

Howard Borress Enterprises, Inc. v CSJ, LLC

2005 NY Slip Op 30365(U)

November 3, 2005

Supreme Court, New York County

Docket Number: 102897/05

Judge: Rolando T. Acosta

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 102897/2005 ACOSTA

PART 61

HOWARD BORRIS ENTERPRISES

vs
CSJ, LLC

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2
3, 4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion was decided in accordance with the attached decision, dated November 3, 2005.

FILED

NOV 28 2005

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/15/05

SO ORDERED

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

**ROLANDO T. ACOSTA
NON-FINAL DISPOSITION**

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61**

Howard Borress Enterprises Inc., d/b/a Star
Electric,

Plaintiff,

– against –

CSJ, LLC, Scott Fletcher, Cathy Muller and
Jed Walentas, individually and in their
capacity as officers of CSJ, LLC,

Defendants.

DECISION/ORDER

Index No. 102897/05

Motion Seq. 1

Present:

Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in Defendant's motion to dismiss pursuant to Section 3211(a)(1) and (a)(7) of the Civil Practice Law and Rules:

Papers	Numbered
Notice of Motion and Affidavit in Support	1 (Exh. A- D)
Memorandum of Law in Opposition	2
Affirmation in Opposition to Motion	3
Reply Memorandum of Law in Support of Motion	4

Plaintiff Howard Borress Enterprises Inc. ("Borress") is the owner of three units in a commercial condominium located at 490-506 Greenwich Street, New York, NY. Borress, as the owner of a unit on the ground floor, and owner of two units in the basement of that building, alleges that defendants Scott Fletcher, Cathy Muller, and Jed Walentas, individually and in their capacities as officers of CSJ, LCC.,

through negligent and fraudulent acts, caused severe damages to its first floor and basement units inside the Greenwich condominium.

Borress claims that defendants sought approval from the condominium's Board at a meeting on November 4, 2004 to amend the building's bylaws allowing a change in its Certificate of Occupancy to allow for commercial as well as residential units. A decision was not made at the meeting, and CSJ, acting through Scott Fletcher, was advised to contact the Board's attorney to discuss the matter. It is uncontradicted that defendants never contacted the Board's attorney. Rather, beginning in January of 2005, defendants began demolition work on its second floor unit to convert the unit for residential purposes, without securing approval by the condominium's Board or the necessary permits to do so from the New York City Department of Buildings.

According to plaintiff, during CSJ's conversion of the unit, CSJ's workers uncovered eight (8) window openings each measuring approximately six feet by eight feet in dimension from the rear wall of the building, as well as removing the existing heating system and all of the ductwork on the second floor, thereby exposing the unit to the elements. Beginning on January 18, 2005, New York City experienced a period of extremely cold weather with temperatures reaching as low as 9 degrees Fahrenheit. At some time during the night of January 19 -20, 2005, water inside the pipes of the condominium's sprinkler system located in defendant's second floor unit froze in three separate locations as a result of the extremely cold temperature in the unit.

Subsequently these pipes burst at the locations where they were frozen, which were located directly above the first floor unit occupied by plaintiff. Over the ensuing hours thousands of gallons of waters gushed out of the burst pipes, and eventually worked its way down plaintiff's ceilings and walls, causing the ceiling to collapse. The water inundated plaintiff's ground floor unit, and its devastating effects continued down into the basement, causing the basement ceiling of plaintiff's unit to collapse as well.

The damages to plaintiff that 'flowed' from this unfortunate incident included destruction of electrical fixtures and wiring, computer systems, alarm systems, computerized and paper record and files, carpeting, plumbing and heating equipment, kitchen and other appliances, interior paint, flooring, desks, chairs, personal possessions, and business records. Laboratory tests performed by an environmental health and safety consultant retained by plaintiff revealed extensive mold contamination, thereby making the space uninhabitable and forcing plaintiff to rent a nearby office space. Borress also claims to have lost income, profits, and business opportunities as a consequence of its inability to operate normally since the flooding of its units.

Defendants replied to plaintiff's claim by a pre-answer motion to dismiss. Defendants move to dismiss plaintiff's first cause of action (negligence) and second cause of action (gross negligence) pursuant to CPLR § 3211(a)(1) and (a)(7) against

Scott Fletcher, Cathy Muller, and Jed Walentas in their individual capacities, and to dismiss plaintiff's third cause of action, viz, fraud, against the individual defendants pursuant to CPLR § 3211(a)(7).

In evaluating a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the Court must accept the allegations of the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within a cognizable legal theory. CBS Corp. v. Dumsday, 268 A.D.2d 350 (1st Dept. 2000); see also Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d 46 (2001)(motion must be denied if "from [the]four corners [of the pleading] factual allegations are discerned which taken together manifest any cause of action cognizable at law"); Weiner v. Lazard Freres & Co., 241 A.D.2d 114 (1st Dept 1998)("so liberal is th[is] . . . standard that the test is simply 'whether the pleading has a cause of action,' not even 'whether he has stated one'").

In a motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1), the Court will construe every fact alleged by plaintiff as true. Fern v. International Business Machines Corp., 204 A.D.2d 907 (3rd Dept. 1994). The motion will be granted only where the documentary evidence unequivocally contradicts plaintiff's factual allegations and conclusively establishes a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314

(2002); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144

(2002); Landenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc., 275

A.D.2d 243 (1st Dept. 2000).

It is in light of these standards that the Court looks at defendant's motion to dismiss plaintiff's first and second causes of action pursuant to CPLR §3211(a)(1) and (a)(7) against the individual defendants. According to defendants, CSJ as a Limited Liability Company, provides its individual members protection from personal liability from plaintiff's negligence and gross negligence causes of action. To support their argument, defendants point to Section 609 of the New York Limited Liability Company Law which provides that a member of a LLC cannot be held liable for any debts, obligations or liabilities of the limited liability company solely by reason of being such a member. However, New York case law has held that a member of a limited liability company may be held personally liable if that member participates in the commission of a tort in furtherance of the company's business. Rothstein v. Equity Ventures, LLC., 299 A.D.2d 472 (2nd Dept. 2002). *See also* Retropolis, Inc. v. 14th Street Development LLC, 17 A.D.3d 209 (1st Dept. 2005) ("[Member] can be held liable... to the extent that the complaint pleads tort claims against him, since a corporate officer who participates in the commission of a tort can be held personally liable even if the participation is for the corporation's benefit."). Moreover, taking plaintiff's pleading that CSJ was

merely a shell corporation for its individual members as true, the Court has the power to impute liability to the individual members should it find that the limited liability company was merely an alter ego for the individual members. Milistar (NY) Inc. v. Natasha Diamond Manufacturers, LLC, 18 A.D.3d 402 (1st Dept. 2005). Resolution of this factual issue precludes dismissal of plaintiff's action.

Defendants further try to buttress their motion to dismiss plaintiff's first and second cause of action against them by providing documentary evidence of the existence of the LLC. This, defendants claim, is dispositive as to whether or not they may be personally liable to plaintiff. However, as noted above the Court holds that in according the benefit of a liberal construction of its pleadings, there is a factual issue as to whether or not defendants as individual members of CSJ participated in the commission of a tort in furtherance of the business of CSJ. The documentary evidence provided by defendants - a Closing Statement of CSJ's purchase of the 2 units in the condominium, an assignment of contract from Eenimon Corporation to CSJ for the 2 units, and a Deed for the two units being held in CSJ's name - do not conclusively establish a defense as a matter of law as to the individual defendants. *See Goshen v. Mutual Life Ins. Co. of New York*, supra, 98 N.Y.2d 314 (2002). There is a factual dispute as to whether or not CSJ was a mere alter ego for its individual members as well as whether those members committed a tort in furtherance of CSJ's business. Thus, a dismissal of plaintiff's

action without resolving this factual dispute would be unwarranted.

Plaintiff's third cause of action alleges that Scott Fletcher, Cathy Muller, and Jed Walentas in their individual capacities fraudulently misrepresented and concealed the demolition of their condominium unit by failing to get approval by the condominium's board or the required permits by the City of New York. Thus, plaintiff argues it was induced to take no precautionary steps in protecting itself while CSJ performed its demolition work and it was this fraudulent conduct that ultimately led to plaintiff's damages.

In order to state a cause of action based on fraud, a plaintiff must show that the defendant made material misrepresentations to the plaintiff that defendant knew to be false, the misrepresentations were made by defendant with the intent to induce plaintiff's reliance upon them, plaintiff relied on such misrepresentations and as a result suffered damages. Pensee Associates, Ltd. v. Quon Industries, Ltd., 241 A.D.2d 354 (1st Dept. 1997). Plaintiff has failed to make out a cause of action of fraud against CSJ's members. No statements were ever made by defendants to plaintiff regarding defendant's intentions with respect to the units. Thus, plaintiff was not induced by any statements made by defendant aimed at plaintiff with the intention that plaintiff would detrimentally rely on it. In fact, it is not even alleged that statements made to the condominium's Board by defendants were false; all that is alleged is that CSJ merely asked the Board for a change in the bylaws to

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permit residential use of the units. See National Union Fire Insurance Co. v. Robert Christopher Assoc., 257 A.D.2d 1, 9 (1st Dept. 1999) (“A mere recitation of the elements of fraud is insufficient to state a cause of action.”). Plaintiff therefore has failed to make out a prima facie case of fraud. Accordingly, it is hereby

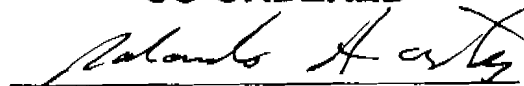
ORDERED defendant’s motion to dismiss plaintiff’s first and second causes of action is denied, and defendant’s motion to dismiss plaintiff’s third cause of action is granted; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

This Constitutes the decision and order of the Court.

Dated: November 3, 2005

ENTER: **SO ORDERED**



ROLANDO T. ACOSTA
Rolando T. Acosta, J.S.C.J.S.C.

