

**East Hampton Union Free School Dist. v
Sandpebble Bldrs., Inc.**

2007 NY Slip Op 34427(U)

July 18, 2007

Supreme Court, Suffolk County

Docket Number: 01113/2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

 EAST HAMPTON UNION FREE SCHOOL
 DISTRICT.

Plaintiff(s),

-against-

SANDPEBBLE BUILDERS, INC., and
 VICTOR CANSECO

Defendant(s).

ORIG. RETURN DATE: June 22, 2007

FINAL RETURN DATE: July 2, 2007

MTN. SEQ. #: 001 - MD

PLTF'S ATTORNEY:

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DEFT'S ATTORNEY:

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 RIVERHEAD, NY 11901

Upon the following papers numbered 1 to 34 read on this motion: Notice of Motion and supporting papers 1 - 10; Affirmation in Opposition and supporting papers 11 - 28; Reply Affidavit 29 - 34; it is,

ORDERED that the motion (001) by the defendant Victor Canseco for dismissal pursuant to CPLR 3211(a)(1) and/or 3211(a)(7) is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on July 30, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This action is brought by the East Hampton Union Free School District (hereinafter the school district) against Sandpebble Builders Inc. (hereinafter Sandpebble) and, individually, against Victor Canseco (hereinafter Canseco), Sandpebble's chief officer and sole shareholder. The action seeks a declaratory judgment that a certain agreement between the school district and Sandpebble is void and seeks damages against both defendants for breach of duty of good faith and fair dealing, and breach of an estimating services contract.

This motion to dismiss is brought solely by the individual defendant, Canseco, based upon his claim that his liability is predicated upon piercing the corporate veil and that the complaint is insufficient on its face in this regard and must be dismissed as to him. In support of this motion, Canseco cites certain decisions from the Appellate Division for the First Judicial Department in which such causes of action, based upon piercing the corporate veil, were dismissed where, for example; the complaints contained only conclusory allegations, essentially alleging nothing more than that the corporation was the individual's alter

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ego and failed to substantiate such conclusory claims (*see Albstein v Elany Constr. Corp.*, 30 AD3d 210, 818 NYS2d 8 [1st Dept], *lv denied* 7 NY3d 712, 824 NYS2d 604 [2006]) and, contained conclusory allegations without alleging particularized facts in support thereof (*see Andejo Corp. v South St. Seaport Ltd. Pshp.*, 40 AD3d 407, 836 NYS2d 571 [1st Dept 2007]).

In opposition, the school district, contends that the complaint is sufficient on its face and that, in any event, any defects are cured by the submitted affidavit of the school district's superintendent. In the alternative, the school district asks the court to deny this application as premature under CPLR 3211(d) or to hold this decision in abeyance pending further discovery. In further opposition, the school district claims that its complaint does adequately support the allegations regarding piercing the corporate veil and, moreover, cites an Appellate Division case from the Second Judicial Department which holds that in such circumstances a plaintiff need only plead that the individual exercised dominion and control over the corporation in a manner which forced the corporation to commit a wrong resulting in injury to the plaintiff (*see Bd. of Mgrs. of Regal Walk Condo I v Community Mgt. Servs.*, 226 AD2d 414, 640 NYS2d 784 [2d Dept 1996]) and that, alone, is sufficient to deny dismissal of such causes of action against an individual defendant.

A review of the various appellate division cases in this area reveals an apparent dichotomy between the First and Second Judicial Departments in which the Second Department, wherein Suffolk County is located, takes a more relaxed view than the First Department as to what suffices in a complaint to support a cause of action based upon piercing the corporate veil.

In any event, it is well settled that in considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12). Also, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

In the instant case, in looking within the four corners of the complaint and considering the affidavit submitted in opposition by the school district's superintendent, the court finds that the plaintiff adequately pleaded causes of action against the individual Canseco for the alleged wrongs committed by Sandpebble on the basis of piercing the corporate veil (*see Ventresca Realty Corp. v Houlihan*, 28 AD3d 537, 813 NYS2d 196 [2d Dept 2006]¹). More specifically, the complaint and the superintendent's affidavit contain

¹ A subsequent motion for summary judgment on the issue of liability by the plaintiff in *Ventresca* was denied at the trial level but reversed on appeal with a judgment on liability being granted to the plaintiff on the basis of piercing the corporate veil [2007 NY Slip Op 5498 (2d Dept, June 19, 2007)].

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the following allegations: Canseco exercised complete dominion and control over Sandpebble forcing Sandpebble to engage in certain wrongful acts and omissions which resulted in injury, harm and damages to the school district including acting in bad faith and unfair negotiating tactics, negotiating certain contracts and agreements with the intent to never perform as well as engaging in tactics to stall and/or delay certain projects - all to the detriment of the school district and to the personal financial benefit of Canseco.

Accordingly, in viewing the complaint in this light, the court finds that "the plaintiff adequately pleaded a cause of action against the individual [defendant] for the alleged wrongs committed by the corporate defendant pursuant to a 'piercing of the corporate veil' theory [citation omitted]" (*Ventresca Realty Corp. v Houlihan*, 28 AD3d at 538, 813 NYS2d at 197).

Whether or not the plaintiff can ultimately support these claims at trial or even in a possible future motion for summary judgment is another question but at this time, in the framework of a motion to dismiss pursuant to CPLR 3211(a)(7), the allegations as to piercing the corporate veil are sufficient to defeat this motion to dismiss (*see Goldberg v Lee Express Cab Corp.*, 166 Misc 2d 668, 671, 634 NYS2d 337, 339 [Sup Ct, New York County 1995]).

The other argument for dismissal, based upon documentary evidence (CPLR 3211[a][1]), is without merit. The documents referred to are not, in and of themselves, conclusively dispositive of the issues (*see Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 756 NYS2d 94 [2d Dept 2003]).

This decision constitutes the order of the court.

Dated:

July 18, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.