

McMullan v HRH Constr., LLC

2008 NY Slip Op 30820(U)

March 13, 2008

Supreme Court, New York County

Docket Number: 0106432/2006

Judge: Michael D. Stallman

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

PRESENT: HON. MICHAEL D. STALLMAN

PART 7

Index Number : 106432/2006

MCMULLAN, ALASDAIR

vs

HRH CONSTRUCTION

Sequence Number : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 07

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

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are decided as per the annexed Memorandum Opinion.*

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

FILED
MAR 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN

J.J.C.



J.S.C.

Dated: 3/13/08

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 7

-----X
 ALASDAIR MCMULLAN and KATRINA CARDEN,

Index No.: 106432/06

Plaintiffs,

Decision and Order

- against -

HRH CONSTRUCTION, LLC, 371 FIRST AVENUE
 CORP., 155 WEST 21ST STREET HOLDINGS, LLC,
 ABRAHAM DANIELS REAL ESTATE INVESTORS,
 INC., LALEZARIAN DEVELOPERS, INC., AURASH
 CONSTRUCTION CORP., FMC ASSOCIATES
 CONSULTING ENGINEERS a/K/a FMC ASSOCIATES,
 INC., FMC CONSTRUCTION, LLC, EAS MECHANICAL,
 INC., ADAM DANIELS, ABRAHAM DANIELS,
 KEVIN LALEZARIAN, ALEX PAPADOPOULOS,
 ANTHONY RAFANIELLO, AMERICAN INTERNATIONAL
 GROUP, INC., ILLINOIS NATIONAL INSURANCE
 COMPANY, A.I.G. CLAIMS SERVICES, INC.,
 A.I.G. DOMESTIC CLAIMS, INC., JOHN DOE
 #1-5 and JD COMPANY #1-5,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

Plaintiffs Alasdair McMullan and Katrina Carden were tenants of an apartment building located at 153 West 21st Street, New York City. In this action involving claims of property loss and personal injury, among others, arising out of construction work performed by certain of the above-captioned defendants, plaintiffs seek to recover against the Corporate Defendants (as defined below) that are owners, developers and/or construction contractors with respect to the parcel of real property located immediately adjacent to plaintiffs' apartment building. In their second amended complaint (the Amended Complaint), plaintiffs also seek recovery against certain Individual Defendants (as defined below) who are

principals, members, officers and/or employees of the Corporate Defendants.

The defendants filed a motion, pursuant to CPLR 3211, seeking dismissal of all claims asserted against the Individual Defendants in the Amended Complaint. In response, plaintiffs filed a cross motion, pursuant to NYCRR §130-1.1, seeking cost and sanctions against the Individual Defendants.¹

Background

Since 2002, plaintiffs were tenants of the apartment building located at 153 West 21st Street, New York City (the 153 Property).² Pursuant to their lease with the then landlord-owner of the 153 Property, EBW LLC (EBW), plaintiffs' leased premises consisted of the entire ground floor apartment, the unfinished basement below the apartment, and the private backyard with a fenced-in garden (the Leased Premises). In or about January 2006, the apartment building was sold by EBW to Extell 21st Street LLC (Extell).

The property located immediately next to plaintiffs' apartment building is 155 West 21st Street (the 155 Property), which is owned

¹ The cross motion also sought a default judgment against E.A.S. Mechanical, Inc. (EAS), a subcontractor defendant. On or about February 27, 2008, this court was advised by plaintiffs' counsel that the cross motion for a default judgment against EAS would be withdrawn.

² The record reflects that subsequent to the commencement of this action, plaintiffs vacated their apartment due to expiration of the lease term.

by 371 First Avenue Corporation (371 FAC). Kevin Lalezarian Developers, Inc. (LDI) and Abraham Daniels Real Estate Investment, Inc. (ADR) are the developers for the 155 Property. Kevin Lalezarian (Lalezarian) is the principal of LDI, and a member of 155 West 21st Street Holdings, LLC (155 Holdings), an entity responsible for the operation and management of the 155 Property. Adam Daniels and Abraham Daniels are principals of both 371 FAC and ADR. HRH Construction, LLC (HRH) is the general contractor-construction manager of the construction project for the 155 Property. Alexander Papadopoulos (Papadopoulos) and Anthony Rafaniello (Rafaniello) are HRH employees, and served as the project manager and the site superintendant, respectively, for the construction project. Adam Daniels, Abraham Daniels, Lalezarian, Papadopoulos and Rafaniello are referred to herein collectively as the "Individual Defendants," and their respective corporations or companies are referred to herein collectively as the "Corporate Defendants."

Construction work on the 155 Property began in mid-April 2005. Plaintiffs allege that, soon after the commencement of construction, defendants' workers tore down the fence of their apartment's backyard, trespassed into their garden, and removed the irrigation system and a shading tree. When confronted, the workers said they were directed to do by their supervisors (i.e. HRH's managers for the construction project). Plaintiffs then confronted

managers Rafaniello and Papadopoulos, who allegedly indicated that they had the legal right to do so. Thereafter, in May 2005, the owner of the 155 Property and EBW entered into a License Agreement (effective from May 24, 2005 to September 24, 2005 only), pursuant to which agents and contractors of the former were permitted to enter certain areas of the 153 Property, including the garden and courtyard areas, in order to perform construction work on the 155 Property. Apart from the License Agreement, on May 31, 2005, plaintiff McMullan entered into an agreement (the Access Agreement) with Lalezarian, as a member of 155 Holdings, pursuant to which 155 Holdings agreed (on behalf of the 155 Property owner), among other things, to pay plaintiffs' rents to their landlord until completion of whatever work was required to be performed in plaintiffs' backyard; restore the backyard and the fence substantially to their original condition; and undertake the construction work in a safe manner.

Soon after execution of the License Agreement and the Access Agreement, the basement of the 153 Property was flooded (in June 2005) allegedly by the construction workers, and a side wall of the 153 Property was broken (in July 2005), allegedly by a backhoe operated by a subcontractor. Both incidents caused damage to plaintiffs, including property loss and personal injury. Claims were filed with the appropriate insurers, which are named as co-defendants in this action. In February 2006, plaintiffs' received

a notice from their new landlord, Extell, stating that their rents were not paid from August 2005 to February 2006. Plaintiffs claim that the rent nonpayment, and the failure to restore the backyard and fence by defendants, were a breach of the Access Agreement.

Apart from the expiration of the License Agreement and breach of the Access Agreement, plaintiffs allege that defendants continued to engage in repeated interferences with their use and enjoyment of the Leased Premises. For example, plaintiffs allege that defendants repeatedly engaged in tortious acts by, among other things, refusing to cease entry or activity in plaintiffs' backyard; leaving construction materials and debris; obstructing a fire exit by bolting closed the exit door to the backyard from plaintiffs' apartment (for which a violation was issued in April 2006 by the Department of Buildings); and threatening plaintiffs and refusing to leave the property until the police were called.

In May 2006, plaintiffs commenced an action to enjoin defendants from entering and using their property. By order dated June 9, 2006, this court (Soto, J.) granted plaintiffs' motion for a preliminary injunction. The injunction was upheld by the Appellate Division, First Department, on March 1, 2007. See *McMullan v HRH Construction, LLC*, 38 AD3d 206 (2007). Thereafter, pursuant to a stipulation of the parties, plaintiffs filed and served the Amended Complaint, dated May 9, 2007.

Discussion

Defendants seek dismissal of all claims asserted against the Individual Defendants in the Amended Complaint, including, among others, negligence, trespass, intentional infliction of emotional distress, nuisance, negligent supervision and prima facie tort. Plaintiffs oppose the motion, and cross move for sanctions against defendants.

In considering a CPLR 3211 (a) (7) motion to dismiss, the court is required to determine whether a plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]." *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 (1st Dept 2003), quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 (2002). The pleadings are to be afforded a "liberal construction," and the court is to "accord plaintiffs the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). However, while factual allegations in a complaint are accorded "favorable inference," bare legal conclusions and inherently incredible assertions are not entitled to favorable inference. *Sud v Sud*, 211 AD2d 423, 424 (1st Dept 1995). Furthermore, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine

whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one". *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 (2nd Dept 2005) (citations omitted).

Respondeat Superior

In support of the motion to dismiss, defendants argue that the doctrine of respondeat superior relieves all Individual Defendants (particularly as to HRH's employees Papadopoulos and Rafaniello) of personal liability, in that an employer is liable for the tortious acts of its employees committed in furtherance of the employer's business and within the scope of employment. The above proposition of law is correct with respect to employers, who become secondarily liable only if their employees committed tortious acts within the scope of employment. *Bowman v State of New York*, 910 AD2d 315, 316 [1st Dept 2004]) ("[a]n employer may be vicariously liable for its employees' tortious acts on the theory of respondeat superior only if they were committed in furtherance of the employer's business and within the scope of employment"). The doctrine of respondeat superior, however, does not shield the employees from personal liability for their tortious acts. In *Morell v Balasubramanian* (70 NY2d 297, 301 [1987]), the Court of Appeals ruled that, although the State of New York could be held "secondarily liable for the tortious acts under respondeat superior," the individual defendants who were state-employed physicians could be held personally liable for their breach of the

duty of care owed to the decedent and her estate. Thus, respondent superior does not absolve individual employees of liability for their own tortious acts. In the instant case, the Amended Complaint alleges that the Individual Defendants, including Papadopoulos and Rafaniello, personally directed the tortious acts perpetrated by the construction workers, despite knowledge that their conduct violated court orders, including the temporary restraining order. Amended Complaint, ¶¶ 145-158, 160-211 and 241-266.

Neither does the corporate form necessarily protect the corporation's officers and principals from direct liability for their tortious actions. Indeed, it has been repeatedly held that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." *Espinosa v Rand*, 24 AD3d 102, 102 (1st Dept 2005), quoting *American Express Travel Related Servs. Co. v North Atlantic Resources, Inc.*, 261 AD2d 310, 311 (1st Dept 1999).

In this case, it is undisputed that Abraham Daniels, Adam Daniels and Lalezarian are principals and/or officers of certain of the Corporate Defendants. Also, it has been alleged that these individuals, as well as Papadopoulos, were informed by plaintiffs that the construction workers must "vacate and cease entering on to [plaintiffs'] property as of the date of March 1, 2006," and that

such information was "corroborated" by e-mails sent to them on March 1, 2006. Affidavit of Plaintiff Katrina Carden (the Carden Affidavit), ¶ 25, a copy of which is annexed as Exhibit "C" to the Affirmation of Attorney In Opposition to Defendants' Motion to Dismiss (the Opposition Affirmation). Furthermore, it has been alleged that "[d]espite the rescission of permission on March 1, 2006 for defendants and their construction workers to enter onto our property for any reason, [such] workers repeatedly entered onto our property [thereafter,]" and that the repeated trespassing by such workers was "confirmed by emails sent by [plaintiffs] to defendants." Carden Affidavit, ¶ 26.

These and other allegations were found by this court (Soto, J.) and the Appellate Division to justify the granting of a temporary restraining order and a preliminary injunction in favor of plaintiffs, because "defendants utterly failed to justify their entry onto the backyard of the subject premises in connection with their construction work." *McMullan*, 38 AD3d at 206. Lalezarin's affidavit opposing plaintiffs' request for a preliminary injunction (a copy of which is annexed as Exhibit "E" to the Opposition Affirmation) indicated that the construction workers continued to enter and use plaintiffs' backyard to perform work, even though the License Agreement had lapsed and plaintiffs had denied their entry. Lalezarian Affidavit, ¶ 6; see also Papadopoulos Affidavit, ¶ 6, a copy of which is annexed as Exhibit "D" to the Opposition

Affirmation. The Individual Defendants may not hide behind the corporate form to avoid liability for their alleged tortious acts.

In the context of a motion to dismiss, and viewing the allegations of the Amended Complaint liberally, particularly in light of the fact that the Individual Defendants have not proffered any evidence that they did not engage in any of the alleged tortious conduct, this case raises an issue of fact as to whether these individuals, as purported tortfeasors, personally committed a tortious act for which they may be held individually liable. For this reason, the motion to dismiss is denied.

Piercing The Corporate Veil

In the alternative, defendants argue that the Amended Complaint should be dismissed as to all Individual Defendants (particularly with respect to Adam Daniels, Abraham Daniels and Lalezarian who are principals or members of certain Corporate Defendants), because there is insufficient evidence to pierce the corporate veil to hold these individuals personally liable.

As a generally accepted principle, "a corporation exists independently of its owners, as a separate legal entity, [and] the owners are normally not liable" for the debts or other obligations of the corporation. *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 140 (1993). To disregard the corporate form (i.e. pierce the corporate veil) so as to hold its owners individually liable requires a showing that: "(1) the owners

exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Id.* at 141 (citations omitted); *First Capital Asset Management, Inc. v N.A. Partners, L.P.*, 300 AD2d 112, 116 (1st Dept 2002) (same). Moreover, to hold corporate owners or officers personally liable for the corporation's obligations requires an "enhanced pleading standard." *Joan Jansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109 (1st Dept 2002).

In the instant case, it is alleged that the Individual Defendants "had complete authority and domination over the affairs of the [Corporate Defendants,] and said defendants used their complete authority and domination to commit wrongful acts ... against Plaintiffs which resulted in damages and injury to the Plaintiffs." Amended Complaint, ¶ 159. However, the Amended Complaint makes no allegation that Papadopoulos and/or Rafaniello are owners or corporate officers of HRH. Hence, piercing the corporate veil of HRH so as to reach Papadopoulos and Rafaniello personally is wholly unwarranted and inapplicable.

With respect to Adam Daniels, Abraham Daniels and Lalezarian, the Amended Complaint fails to set forth facts to support the conclusory allegation that they exercised "complete authority or domination" over the Corporate Defendants, such as disregarding

corporate formalities, using the corporations as alter egos, or the commingling of corporate and personal assets. *Albstein v Elany Contracting Corp.*, 30 AD3d 210, 210 (1st Dept 2006) (conclusory allegations of piercing the corporate veil were rejected because plaintiff failed to plead facts to substantiate her claim that the corporate form was used to commit a fraud or wrong against her). More importantly, in their opposition to the motion to dismiss, plaintiffs do not cite to any facts or case law in support of their theory for piercing the corporate veil at this time. Instead, they solely rely on cases that stand for the proposition that corporate officers who committed a tortious act may be held personally liable irrespective of whether the corporate veil is pierced. See e.g., *Espinosa, supra*. As discussed, giving the Amended Complaint every favorable inference in the context of the motion to dismiss, plaintiffs may have stated one or more claims against Adam Daniels, Abraham Daniels and Lalezarian, and the Corporate Defendants may be held secondarily liable for the actions of their officers and employees under the theory of respondeat superior. Accordingly, piercing the corporate veil is not a theory at issue in this case.

Cross Motion For Costs And Sanctions

In their cross motion, plaintiffs seek to impose attorneys' fees, costs and sanctions upon the Individual Defendants pursuant to NYCRR §130-1.1. Plaintiffs argue that defendants' motion to dismiss is "clearly frivolous" in form and substance, and that it

allegedly fails to provide admissible evidence and relevant law. Cross Motion, ¶ 11.

The motion seeking dismissal of the claims against the Individual Defendants is based on the applicability of respondeat superior and piercing the corporate veil. Although certain of defendants' arguments in support of their motion are unavailing, as explained above, they are "not so utterly meritless as to be 'frivolous' within the meaning of [Rule 130]." *Vinci v Northside Partnership*, 250 AD2d 965, 966 (3d Dept. 1998); see also *Adelaide Productions, Inc. v BKN International AG*, 38 AD3d 221, 227 (1st Dept. 2007) (in reversing the trial court's order that granted plaintiff's cross motion for costs and sanctions, the appellate court noted that defendant's affirmative defense "was not so utterly lacking in merit as to qualify as frivolous conduct"). Thus, plaintiffs' cross motion seeking to impose costs and sanctions against the Individual Defendants is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion seeking dismissal of the Amended Complaint as against Adam Daniels, Abraham Daniels, Kevin Lalezarian, Alexander Papadopoulos and Anthony Rafaniello (the Individual Defendants) is denied; and it is further

ORDERED that plaintiffs' cross motion for (1) costs and sanctions against the Individual Defendants is denied, and (2) a

default judgment against E.A.S. Mechanical, Inc. is moot, because plaintiffs' counsel has submitted a letter stating the request for a default judgment has been withdrawn

Dated: March 13, 2008
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.

FILED
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