

**Northside Tower Realty, LLC v Scorcia & Diana
Assoc., Inc.**

2008 NY Slip Op 30969(U)

March 3, 2008

Supreme Court, Nassau County

Docket Number: 8356-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

NORTHSIDE TOWER REALTY, LLC,

Plaintiff,

-against-

SCORCIA AND DIANA ASSOCIATES, INC.,
SCORCIA AND DIANA ASSOCIATES, LLC,
MICHAEL SCORCIA, Individually
THEODORE SCORCIA, Individually and
RICHARD NESSIM, Individually,

Defendants.

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 018356/07

MOTION DATE: March 4, 2008
Motion Sequence # 003

The following papers read on this motion:

| | |
|--------------------------------|----|
| Notice of Motion..... | X |
| Affirmation in Opposition..... | X |
| Affidavit in Support..... | XX |
| Reply Affidavit..... | X |
| Memorandum of Law..... | XX |
| Reply Memorandum of Law..... | X |

This motion, by defendants, for an order pursuant to CPLR 3211(a)(1) and (1)(7) to dismiss the fourth and fifth causes of action of the complaint; to dismiss the complaint in its entirety as to Scorcia and Diana Associates, LLC pursuant to CPLR 3211(a)(7); to

NORTHSIDE TOWER REALTY, LLC

Index no. 018356/07

consolidate this action with an action previously commenced in Supreme Court: Kings County entitled **Northside Tower Realty, LLC v Scorcia and Diana Associates, Inc., et al.**, (Index No. 37079/07) pursuant to CPLR 602 and to impose sanctions pursuant to 22 NYCRR § 130-1.1-a is determined as hereinafter provided.

This action arises from defendants' alleged breach of the Superstructure Contract dated November 21, 2006 regarding construction of residential condominium buildings located at 142 North 6th Street, Brooklyn, New York. Defendants seek dismissal of the fourth and fifth causes of action wherein plaintiff alleges a claim of fraudulent inducement against the Scorcia and Diana Associates defendants (Scorcia and Diana Associates, Inc., Scorcia and Diana Associates, LLC) in the fourth cause of action and against the individual defendants in the fifth cause of action. In the fourth cause of action plaintiff alleges that during negotiation of the Superstructure Contract dated November 21, 2006 the Scorcia and Diana Associates defendants:

"by purposeful omission withheld, concealed, did not disclose, and/or did not reveal, material and necessary information * * * including but not limited to: (i) the issuance of SWOs [Stop Work Order] by the NYCDOB, (ii) the existence and/or extent of the damages sustained at the Premises and adjoining properties, (iii) the 'stopped' status of the work at the Premises under the E&F Contract [Excavation and Foundation], and (iv) the resulting impact of the previously issued SWOs on the progress schedule of the Work to be performed under both the E&F Contract and the Superstructure Contract."

Plaintiff maintains that defendants' silence regarding their failures under the Excavation and Foundation Contract, and the damage caused at the work site as a result thereof, caused the plaintiff to unknowingly execute the Superstructure Contract with the defendants, whom plaintiff alleges knew they would be unable to complete the excavation work within the fourteen month time frame contained in the Superstructure Contract.

With respect to the individual defendants, plaintiff alleges in the fifth cause of action, that Messrs. Michael Scorcia, Theodore Scorcia and Richard Nessim:

NORTHSIDE TOWER REALTY, LLC

Index no. 018356/07

“colluded and acted in concert to cause the Defendants S&D to withhold, conceal, not disclose and/or not reveal material and necessary information from [sic] the plaintiff concerning the Premises.”

Plaintiff also alleges that the individual defendants told them that they would be able to lift the stop work order and thereafter timely complete the project which plaintiff now believes was impossible.

In deciding a motion to dismiss directed at the sufficiency of the pleadings (CPLR 3211[a][7]), a court must accept their allegations as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory. (**Gem Services of New York, Inc. v United General Title Ins.**, 28 AD3d 516, 2nd Dept., 2006). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss under this provision. (**EBC I, Inc. v Goldman, Sachs & Co.**, 5 NY3d 11, 19, 2005). If the plaintiff can succeed upon any reasonable view of the allegations, the cause of action may not be dismissed. (**Hayes v Wilson**, 25 AD3d 586, 587, 2nd Dept., 2006).

A motion pursuant to CPLR 3211(a)1) to dismiss the complaint on the ground that the action is barred by documentary evidence may only be granted where the documentary evidence utterly refutes the plaintiff's allegations, thereby conclusively establishing a defense as a matter of law. (**Farber v Breslin**, 47 AD3d 873, 2nd Dept., 2008; **Mendelovitz v Cohen**, 37 AD3d 670, 2nd Dept., 2007). Here, no evidence has been presented to the court which would warrant dismissal of either the fourth or fifth causes of action of the complaint on CPLR 3211(a)(1) grounds.

To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material misrepresentation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment. (**Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC**, 19 AD3d 273, 275, 1st Dept., 2005). It is axiomatic that a cause of action for fraud in the inducement may not be maintained if the fraud relates solely to a breach of contract. (**Tsilogiannis v 53-11 90th Street Associates, Inc.**, 293 AD2d 468, 469, 2nd Dept., 2002). Plaintiff does not, however, allege that the fraud herein occurred in relation to the nonperformance of the Superstructure Contract but rather that plaintiff was fraudulently induced to enter that contract as a result of misrepresentations/deceptions collateral to the

NORTHSIDE TOWER REALTY, LLC**Index no. 018356/07**

Superstructure Contract made by defendants during the negotiation process. A misrepresentation of material fact, which is collateral to the contract, is sufficient to sustain a cause of action alleging fraud. (**Ross v DeLorenzo**, 28 AD3d 631, 636, 2nd Dept., 2006). Unlike a misrepresentation of future intent to perform, a misrepresentation of facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and, therefore, involves a separate breach of duty. (**Deerfield Communications Corp. v Chesebrough-Ponds, Inc.**, 68 NY2d 954, 956, 1986).

Reasonably construed, the allegations of the fourth cause of action state a cognizable cause of action against defendant Scorcia and Diana Associates, Inc. to recover damages for fraud in the inducement.

The concept of piercing the corporate veil, an equitable doctrine, is a limitation on the accepted principle that a corporation exists independently of its owners, as a separate legal entity, and that the owners are normally not liable for the debts of the corporation. (**Morris v Dept. of Taxation**, 82 NY2d 135, 140, 1993). With respect to the fifth cause of action against the individual defendants, the court notes that in order to pierce the corporate veil, to reach individual defendants who are officers/principals of defendant corporation, a third party must show that: 1) the owners exercised complete domination of the corporation in respect to the transaction at issue; and 2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. (**Goldman v Chapman**, 44 AD3d 938, 939, 2nd Dept., 2007; **Pae v Chul Yoon**, 41 AD3d 681, 682, 2nd Dept., 2007). The corporate veil can also be pierced if there is a failure to follow corporate formalities, inadequate capitalization, the use of corporate funds for personal purposes, an overlap in ownership or directorship, or common use of office space and equipment. (**Forum Ins. Co. v Texarkoma Transp. Co.**, 229 AD2d 341, 342, 1st Dept., 1996).

Even viewing the complaint liberally, as the court must on a CPLR 3211 motion to dismiss (**Wohlgemuth v Lang Const., LLC**, 18 AD3d 650, 657, 2nd Dept., 2005), plaintiff has failed to allege facts sufficient to sustain a cause of action for fraudulent inducement against the individual defendants or against Scorcia and Diana Associates, LLC. The complaint fails to allege any manner in which the individual defendants misused the corporate form (**Shisgal v Brown**, 21 AD3d 845, 847, 1st Dept., 2005) or the limited liability company form. The alter ego theory is simply insufficient to support a claim of fraudulent inducement against the individual defendants, or the limited liability company which was not a party to either the Excavation and Foundation Contract or the

NORTHSIDE TOWER REALTY, LLC**Index no. 018356/07**

Superstructure Contract, in the absence of specific factual allegations that the individuals in question conducted business in their personal rather than corporate capacity. There are no factors alleged which would justify disregarding the corporate form to reach either the individual defendants or the LLC.

A limited liability company is validly and legally formed to protect against personal liability. Limited Liability Law § 609(a) provides that a member or manager of a limited liability company is not "liable for any debts, obligations or liabilities of the limited liability company."

Parent and subsidiary or affiliated corporations are generally treated separately and independently so that one will not be held liable for the contractual obligations of the other absent a demonstration that there was an exercise of complete dominion and control. (Shefulsky v Sony Corp. of America, 232 AD2d 397, 2nd Dept., 1996).

The power to order the consolidation of pending actions rests in the sound discretion of the court. (RCN Const. Corp. v Fleet Bank, N.A., 34 AD3d 776, 777, 2nd Dept., 2006). Consolidation is generally favored in the interest of judicial economy and ease of decision making where cases present common questions of law and fact unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right. (Amcam Holdings, Inc. v Torys LLP, 32 AD3d 337, 339, 1st Dept., 2006). Here both actions arise out of the same construction project but involve two separate construction contracts regarding two separate aspects of the construction project. Moreover, the Superstructure Contract at issue herein contains a forum selection clause in § 21.08 which provides, with respect to legal proceedings, that the agreement

"shall be governed by the laws of the State of New York both as to interpretation and performance, and venue shall be exclusively in the Supreme Court of the State of New York, County of Nassau, for any and all disputes arising out of the Work or this Agreement."

Courts have consistently held that a contractual forum selection clause is **prima facie** valid and enforceable unless shown by the resisting party to be unreasonable. Such clauses are favored because they provide predictability and certainty in the resolution of disputes. (Brooke Group Ltd. v JCH Syndicate 488, 87 NY2d 530, 534, 1996). Thus a party challenging a forum selection clause has the heavy burden of establishing that the

NORTHSIDE TOWER REALTY, LLC

Index no. 018356/07

clause is unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court. (*Best Cheese Corp. v All-Ways Forwarding Int'l. Inc.*, 24 AD3d 580, 581, 2nd Dept., 2005).

Under the circumstances extant, a decision on defendants' consolidation request is best left until after the completion of discovery at which time the court will be better able to assess whether enforcement of the Superstructure Contract's valid forum selection clause would in some way contravene public policy and/or whether the claims asserted in this action are so inextricably linked to the claims asserted in the Kings County action that the interest of judicial economy would trump the parties' contractual choice of forum provision.

Accordingly, defendants' motion is **granted** to the limited extent that the complaint is **dismissed** in its entirety as to defendant Scorcia and Diana Associates, LLC and the fifth cause of action is **dismissed** as to the individual defendants. Defendants' request to consolidate this action with the action pending in Kings County between the same parties is **denied** with leave to renew upon completion of discovery in this action. Defendants' request to impose sanctions pursuant to 22 NYCRR § 130-1.1-a against plaintiff's counsel is **denied** as defendants have failed to present evidence to support such a request.

Dated 3, March 2018

Stephen A. Scavia
J.S.C.