

Jarns Holding Inc. v Yue Wah Chau

2009 NY Slip Op 30044(U)

January 8, 2009

Supreme Court, New York County

Docket Number: 107658/2006

Judge: Shirley Werner Kornreich

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

PRESENT: ~~ARNE MAYER~~ ~~DAVID M. KORNREICH~~
ARNE MAYER

PART 54

JUDGE SHIRLEY WERNER KORNREICH

Index Number : 107658/2006

JARNS HOLDING

vs.

CHAU, YUE WAH

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE

10/2/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4

5

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 13 2009

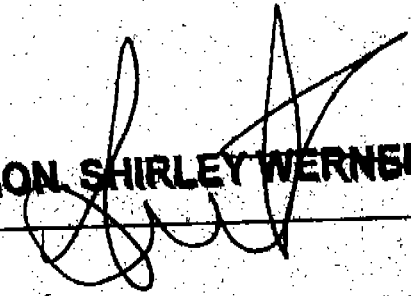
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: _____

1/8/09

HON. SHIRLEY WERNER KORNREICH



J.S.C.

Check one: FINAL DISPOSITION

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 YORK
COUNTY OF NEW YORK

-----X
JARNS HOLDING INC.,

Plaintiff,

-against-

YUE WAH CHAU a/k/a CHAU WAH YUE a/k/a
CHAU YUE WAH a/k/a WINNIE CHAU,

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.

**DECISION
and
ORDER**

Index No.: 107658/2006

Defendant Yue Wah Chao, sued here as Yue Wah Chau (Chau or defendant)¹ moves to dismiss the amended complaint or, alternatively, for a more definite statement. The grounds for the motion are that the amended complaint fails to state a cause of action and is insufficiently pled, the conversion claim is barred by the one year statute of limitations, and that the relief should be sought in a prior pending action.

FILED
JAN 13 2009
COUNTY CLERKS OFFICE
COUNTY NEW YORK

Background

On March 21, 2002, plaintiff, Jarns Holding, Inc. (Jarns) purchased the premises located at 15 Catherine Street, New York, New York (Building). Until 2004, Million Gold Realty Co., Inc. (Million Gold) was the net lessee of the second through fifth floors of the Building. On December 29, 1999, Million Gold was dissolved under the Tax Law by proclamation of the New York State Secretary of State.

The amended complaint contains three causes of action: to hold Chau personally liable on a money judgment against Million Gold, on the ground that Chau executed a stipulation of

¹ Defendant submitted an affidavit under the name Yue Wah Chao.

settlement on behalf of Million Gold after it had been dissolved by proclamation (1st); to pierce Million Gold's corporate veil to hold Chau personally liable for the judgment (2nd); and to recover "rent"² collected by Chau that belongs to plaintiff based on the theories of trespass, fraud, conversion, and tortious interference with contractual relations (3rd).

In her affidavit submitted in support of the motion to dismiss, defendant Chau claims that she was Million Gold's agent, not an owner of the corporation. She avers that the owners were Christina Hsu, L. S. Zee and K. T. Ling. She submits documents that allegedly demonstrate that she had no ownership interest in Million Gold. There is a stock certificate for 30 out of 200 no par value shares issued to Christina Hsu in 1989. In addition, there are pages from a stock ledger, which are largely illegible and which, other than an exhibit marking on one page, do not bear the name Million Gold. The date and last name following "L.S." on the ledger for certificate one are unreadable, as are the date and first name on the ledger entry for certificate 3.

After Jarns purchased the Building, it commenced a holdover proceeding in Civil Court and an ejectment action in Supreme Court to obtain possession. The record contains a decision and order of Hon. Pam Jackman Brown, dated May 28, 2008, in consolidated holdover proceedings in Civil Court, New York County (Holdover Proceeding) to recover possession of Million Gold's leasehold from various occupants claiming to be tenants of Million Gold. The Holdover Proceeding decision recites that Million Gold's lease was terminated by the Supreme Court, but that Chau admitted that she continued to operate the Building and collect rent from occupants after she was aware of the Supreme Court order terminating the lease through as late as

² The money allegedly collected was use and occupancy as it was determined in Civil Court that the occupants from whom Chau allegedly collected "rent" were occupants and not tenants.

April 2008. The decision in the Holdover Proceeding further recites testimony by the respondent occupants. One occupant testified that Chau owned the Building and another testified that she would only pay rent to Jarns if Chau admitted that Jarns was the new landlord.

Also in the record is an order made on the record in a transcript dated September 4, 2008, by Hon. Marcy S. Friedman, Justice, in a case bearing Supreme Court, New York County, Index No. 119116/02 (Ejectment Action). Justice Friedman denied a motion to hold defendant Chau in contempt. The decision states that Chau was a principal of Million Gold and was continuing to collect rent in the Building.

The court takes judicial notice of papers in the Ejectment Action, which are not in the record of this motion. By decision and order dated December 7, 2004 and entered on December 13, 2004, Justice Friedman granted summary judgment of ejectment in favor of Jarns and against Million Gold. The decision recites that Million Gold was the assignee of a net lease of the Building from S. E. & K. Corp. made in 1980, which expired in 1991. In addition, the decision held that Million Gold did not become a month-to-month tenant at the expiration of its lease. An order of Justice Friedman, dated January 18, 2005 (entered on January 28, 2005), annexes the stipulation of settlement of the Ejectment Action, dated January 18, 2005, executed by defendant Chau as President of Million Gold (Stipulation). The Stipulation provided that Million Gold would surrender legal possession by August 13, 2005 and that Jarns would waive use and occupancy if possession was surrendered by that date, failing which Jarns could move for a money judgment. Paragraph 13 of the Stipulation provides that "each of the signatores [sic] hereto represents that they are authorized to execute this stipulation their respective party." On March 23, 2006, Justice Friedman granted a motion for a money judgment for use and occupancy

in the amount of \$44,287.00 in favor of Jarns against Million Gold, which was entered by the Clerk of the Court on April 14, 2006, in the amount of \$44,862.00 (inclusive of interest).

Discussion

A. Standard of Review

On a motion to dismiss, the facts alleged in the complaint are accepted as true and the plaintiff is entitled to the benefit of every favorable inference. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wise Metals Group, LLC*, 19 A.D.3d 273, 275 (1st Dep't 2005). However, bare legal conclusions are not entitled to a presumption of veracity. *Caniglia v. Chicago Tribune-New York News Syndicate*, 204 A.D.2d 233 (1st Dept. 1994). Affidavits and other evidence may be freely used to preserve inartfully pleaded claims. *R.H. Sanbar Projects, Inc. v. Gruzen Partnership*, 148 A.D.2d 316 (1st Dep't 1989).

B. Liability for Actions Taken on Behalf of Defunct Corporation

Jarns argues that where a corporation has been dissolved by proclamation for non-payment of taxes, an individual who knowingly makes a contract for the defunct corporation is personally liable. This is a correct statement of the law. *Keystone Mech. Corp. v. Conde*, 309 A.D.2d 627 (1st Dep't 2003); *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666 (2nd Dep't 1989).

Accordingly, the first cause of action states a valid claim against Chau, who executed the Stipulation in the Ejectment Action on behalf of defunct Million Gold. The record contains evidence that Chau entered into the Stipulation after Million Gold had been dissolved for non-payment of taxes. Chau executed the Stipulation as President of Million Gold and represented her authority to sign for that entity. The Stipulation provided that in the event of default,

judgment could be sought for use and occupancy. Hence, by contracting for a defunct entity, Chau could be held personally liable for the ensuing Judgment.

Although Chau defends on the ground that she was winding up Million Gold's affairs, that claim is belied by the record. Actions to wind up corporate affairs cannot include entering into an agreement to pay use and occupancy in the event of a default by a corporation without assets that had been dissolved by proclamation five years earlier. *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666 (2nd Dep't 1989)(entering into new agreement for defunct corporation not winding up).

C. Piercing the Corporate Veil

The corporate veil may be pierced upon a showing that: (1) the corporate owner exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury. *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993); *First Capital Asset Mgmt. v. N.A. Partners, L.P.*, 300 A.D.2d 112, 116 (1st Dep't 2002). Other factors that may be considered are the failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, and common use of office space and equipment. *Alpha Bytes Computer Corp. v. Slaton*, 307 A.D.2d 725, 726 (4th Dep't 2003). The question of domination is usually a question of fact not suited to summary disposition. *Klein v. CAVI Acquisition, Inc.*, 2008 NY Slip Op 10031, 2008 N.Y. App. Div. LEXIS 9796 (1st Dep't 2008)(n.o.r.).

Jarns has sufficiently stated a claim for piercing the corporate veil. The amended complaint alleges that Million Gold failed to maintain separate books and records, was

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inadequate capitalized, failed to maintain formal rent records for apartments in the Building and that Chau was its alter ego and intermingled her assets with Million Gold's. The record contains evidence that Chau acted on the corporation's behalf and received "rent" from apartment dwellers, who believed that Chau was the owner of the Building. There is evidence that plaintiff was injured as a result of Chau's actions in collecting rent on behalf of Million Gold and settling the Ejectment Action as its President. As discovery is ongoing, Jarns should be given a chance to explore whether Chau was an owner of the corporation. Chau's countervailing evidence in the form of one stock certificate and portions of a barely legible stock ledger is insufficient at this juncture to conclusively prove her lack of ownership of Million Gold.

C. Fraud, Trespass, Conversion and Interference with Contractual Relations

1. Fraud

The amended complaint sufficiently states a cause of action for fraud. In a pleading alleging fraud, the "circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). The elements that must be pleaded are a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury. *Monaco v. New York Univ. Medical Ctr.*, 213 A.D.2d 167, 169 (1st Dep't 1995). Here, there are allegations and evidence that Chau collected rent from occupants who believed that she was the landlord.

Plaintiff's allegations are sufficiently particular to comply with CPLR 3016(b). A pleading should not be so strictly interpreted as to dismiss a valid cause of action early on where the details of the circumstances surrounding the fraud are peculiarly in control of the adverse party and might be presented later in the case. *Pludeman v. Northern Leasing Sys., Inc.*, 10

[* 8]
N.Y.3d 486, 491 (2008). In this case, the amended pleading apprises defendant that the fraud consists of collecting rent after plaintiff bought the Building.

2. *Trespass and Conversion*

Plaintiff has stated an action for conversion. Interference with a person's property constitutes a trespass, while a denial of the plaintiff's rights to possession is a conversion. *Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 487 (1983). In order for an action for conversion to lie when the subject of the action is money, there must be specific funds sought. *In re Ideal Reliable Sundries, Inc.*, 49 A.D.2d 852 (1st Dep't 1975)(landlord's commingling of tenant security deposit with checking account monies was conversion). Here, the basis for plaintiff's alleged damages is that Chau collected rent money from occupants of the Building in violation of plaintiff's rights and never returned it. The money collected as rent is a specific fund, and, hence, plaintiff has stated a claim for conversion.

The conversion claim is not barred by the statute of limitations. The three-year statute of limitations contained in CPLR 214 is applicable to a conversion claim. *Sporn v. MCA Records, Inc.*, *supra*, 58 N.Y.2d at 488-489. It is not one-year as alleged by defendant. The statute begins to run when the conversion occurs. *Sporn v. MCA Records, Inc.*, *supra*, 58 N.Y.2d at 488. This action was commenced on June 2, 2006 when, according to the County Clerk's records on line, the summons and complaint were filed. CPLR 304. There is evidence that defendant continued to collect "rent" from occupants of the Building until 2008. Plaintiff has not alleged when defendant first collected it. Hence, the conversion claim is timely as to any rent money allegedly collected by defendant on or after June 2, 2003.

To the extent that the third cause of action alleges a trespass, it is dismissed, as the

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claimed interference with the plaintiff's property is limited to the claim that defendant took rent payments from occupants of the Building. This is not a claim of damages for interference with property, which give rise to a trespass claim, but rather a claim of a permanent taking of money, which is a conversion. *Sporn v. MCA Records, Inc., supra.*

3. *Interference with Contractual Relations*

The portion of the third cause of action relating to interference with contractual relations is dismissed because the record demonstrates that plaintiff did not have or seek to have a contractual relationship with the occupants who paid "rent" to Chau. Interference with contractual relations is a cause of action for malicious, fraudulent or deceitful interference with an executed or prospective contract. *Union Car Advertising Co. v. Collier*, 263 N.Y. 386, 401 (1934); *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 (1993). Here, the evidence demonstrates that plaintiff had no contractual relationship with the occupants and, in fact, evicted them on that ground.

4. *Prior Pending Action in Civil Court*

CPLR 3211(a)(4) provides that a court may dismiss an action on the ground that there is "another action pending between the same parties for the same cause of action." The causes of action must be identical and the decision whether to dismiss is discretionary. *Morgulas v. J. Yudell Realty, Inc.*, 161 A.D.2d 211 (1st Dep't 1990).

In this case, dismissal is not warranted because the prior pending action was for ejectment, which is not a cause of action asserted here. In addition, the court is not inclined to dismiss because plaintiff tried unsuccessfully in Civil Court to hold Chau in contempt for

continuing to collect rent, thus frustrating plaintiff's attempt to obtain damages.

5. More Definite Statement

The motion for a more definite statement is denied. A court may order a party to make a more definite statement where a pleading is so vague or ambiguous that a party is unable to frame a response. CPLR 3024; *Mirage Rest., Inc. v. Majestic Chevrolet, Inc.*, 75 A.D.2d 808 (2d Dep't 1980). Here, the amended pleading is not so vague or unambiguous that it cannot be answered and the underlying facts allegedly needed can be sought through discovery. Accordingly, it is

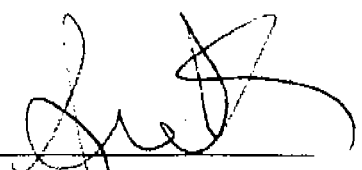
ORDERED that defendant's motion to dismiss the amended complaint or alternatively for a more definite statement is granted solely to the extent that the portions of the third cause of action alleging trespass and interference with contractual relations are dismissed with prejudice and severed from the remainder of the action which shall continue, and in all other respects the motion is denied; and it is further

ORDERED that upon service upon the Clerk of the Court and the Clerk of the Trial Support Office, Room 158M, of a copy of this order with notice of entry, the Clerk of the Court is directed to enter judgment dismissing plaintiff Jarns Holding Inc.,'s causes of action for trespass and interference with contractual relations and to sever the remainder of the action, which shall continue; and said Clerks are directed to note the dismissal and severance in their respective records; and it is further

ORDERED that the parties shall appear for a status conference on February 26, 2009 at 9:30 a.m. in Part 54, Room 1221, of the Courthouse located at 111 Centre Street, New York, NY; and it is further

ORDERED that defendant shall answer the amended complaint within 20 days of service upon the attorneys for Yue Wah Chau of a copy of this order with notice of entry.

Dated: January 8, 2009

ENTER: 

J.S.C.

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK