

DSW Lenox LLC v Rosetree on Lenox, LLC
2009 NY Slip Op 30096(U)
January 16, 2009
Supreme Court, New York County
Docket Number: 604124/07
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: _____

PART 39

Index Number : 604124/2007
DSW LENOX LLC,
vs.
ROSETREE ON LENOX, LLC,
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 604124/07
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

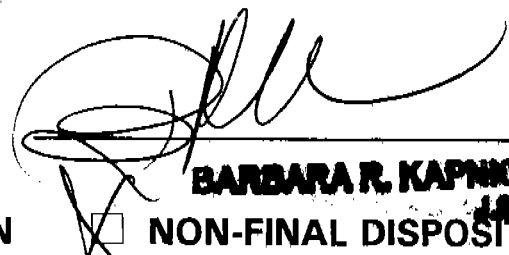
**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

JAN 20 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/16/09



BARBARA R. KAPNICK J.S.C.
JAG

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 NEW YORK
COUNTY OF NEW YORK: PART 39

-----X

DSW LENOX LLC,

Plaintiff,

-against-

ROSETREE ON LENOX, LLC, PETER ROSENBAUM
and ROY ROSENBAUM,

Defendant.

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 604124/07
Motions Seq. Nos.
002 and 003

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Motions sequence numbers 002 and 003 are consolidated for disposition.

This action arises out of a contract entered into on or about May 31, 2006 between Stanley Wolfson, the Managing Member of plaintiff DSW Lenox LLC ("DSW"), as Purchaser, and defendant Rosetree on Lenox, LLC ("Rosetree"), as Seller, for the purchase of Units Comm-1 and Comm-2 at the Lenox Grand Condominium located at 381-387 Lenox Avenue in Manhattan. Wolfson subsequently assigned the contract to DSW.

According to the Complaint, the Contract was made pursuant to the Condominium Offering Plan in which Rosetree represented and warranted that it had enough money to complete the Condominium project and that it would apply for the City of New York's ICIP program for partial real estate tax exemption. The Plan also required Rosetree to deliver code-compliant space, provided various

other representations as to the features of the finished Condominium project, and required Rosetree to complete work set forth on a Punch List.

In November 2006, plaintiff entered into a lease with the Harlem Children's Zone ("HCZ") for the rental of the 2nd floor Unit. HCZ was to take occupancy on March 1, 2007.

Plaintiff contends that Rosetree incurred numerous delays in payment to contractors, resulting in a halt to construction of the Condominium project and an order by the New York Attorney General's Office on or about July 1, 2007 requiring Rosetree to refrain from selling residential units in the Condominium until certain conditions were met.

Plaintiff alleges that around the same time, Peter Rosenbaum, the primary shareholder and principal of Rosetree, and his son, Roy Rosenbaum, who is alleged in the Complaint to also be a shareholder and principal of Rosetree, admitted that they did not have the money to complete the project, and that Rosetree's representations to the contrary had been false.

After numerous delays in the closing date due to Rosetree's alleged refusal and inability to complete the project, plaintiff and Rosetree finally scheduled a closing for early October, 2007.

On October 9, 2007, Plaintiff and Rosetree entered into an Amendment to the Contract, in which plaintiff and Rosetree acknowledged that they had a remaining dispute concerning their respective liabilities and/or responsibilities in connection with the Punch List.

Under the terms of the Amended Contract, Rosetree agreed to allow plaintiff to have a restaurant as a tenant in the commercial space on the first floor of the building, in accordance with the third amendment to the Offering Plan.

Plaintiff and Rosetree closed on the Amended Contract on October 11, 2007.

Plaintiff claims that Rosetree has still failed and/or refused to complete the work set forth on the Punch List, which includes the installation of a boiler for the first and second floors,¹ to obtain a Certificate of Occupancy for the plaintiff's units

¹ Plaintiff claims that it, along with its tenant, HCZ, have thus been required to undertake all of the remaining work required to bring the units into compliance with the Plan.

reflecting that a restaurant will be occupying the commercial space on the first floor of the building, and to repair the ramp leading into the Condominium's parking garage which plaintiff contends is defective and has not been completed in accordance with the Offering Plan.²

Plaintiff further claims that in or about February of 2008, Roy Rosenbaum and Peter Rosenbaum informed DSW that it would no longer be permitted access to the basement or the lobby of the building, since DSW was a Commercial Unit Owner and not a Residential Unit Owner. Rosetree has since installed an electronic card swipe access system to enter the interior of the basement and the elevators, and plaintiff has not been able to obtain a swipe card.

Plaintiff claims that DSW and its tenants require access to certain common areas of the Condominium which Rosetree has designated as "Residential" areas, and require access to the interior of the building via the building parking garage, where plaintiff owns three parking spaces.

² According to plaintiff, the ramp is improperly sloped and causes cars to "bottom out" as they enter, rendering the parking spaces in the garage unuseable.

Plaintiff's Verified First Amended Complaint seeks:

(i) to recover damages against the defendants for breach of contract (first cause of action) and fraud (second cause of action);

(ii) to pierce the corporate veil of Rosetree in order to hold defendants Peter Rosenbaum and Roy Rosenbaum individually liable (third cause of action);

(iii) an injunction restraining *ultra vires* actions by defendants Peter Rosenbaum and Roy Rosenbaum (fourth cause of action);

(iv) a judgment declaring that (a) plaintiff has the right to access all common areas of the Condominium, as an owner of units in the Condominium (fifth cause of action), and (b) plaintiff, as the owner of the commercial units of the Condominium may designate one member of the Board of Managers for the Condominium as provided for in the Plan and the Bylaws for the Condominium (sixth cause of action);

(v) an injunction requiring the Board of Managers for the Condominium to be convened (seventh cause of action); and

(vi) an accounting (eighth cause of action).

Defendant Roy Rosenbaum now moves, under motion sequence number 002, for an order pursuant to CPLR § 3211(a)(7) dismissing the Verified First Amended Complaint as against him.

Defendants Peter Rosenbaum and Rosetree move, under motion sequence number 003, for summary judgment dismissing the Verified First Amended Complaint as against defendant Peter Rosenbaum, individually.

Based on the papers submitted and the oral argument held on the record on November 20, 2008, those portions of the motion seeking to dismiss the first cause of action for breach of contract against defendants Roy Rosenbaum and Peter Rosenbaum on the ground that neither individual was a party to the contract and is not in privity with plaintiff, are granted.

Defendants next argue that the second cause of action for fraud should be dismissed against the individual defendants on the grounds, inter alia, that: (i) plaintiff has failed to plead the claim with the requisite particularity (see, CPLR § 3016[b]); i.e., the Complaint does not set forth the specific dates and times the misrepresentations were allegedly made, nor does the Complaint clearly delineate the actions attributed to each of the defendants; and (ii) plaintiff cannot show that it justifiably relied on any purported misrepresentation since plaintiff concedes that it learned prior to the Closing that Rosetree's statement concerning its financial ability to complete the construction was purportedly false.

In addition, defendant Roy Rosenbaum argues that there is no basis to impose liability against him based on his representation that he is "not presently, nor [has he] ever been, a member" of Rosetree, has "never had any ownership interest in Rosetree", and is "not an employee of Rosetree."

Defendant Peter Rosenbaum has also submitted a sworn Affidavit in which he represents that "Roy Rosenbaum is not presently, nor has he ever been, a member of Rosetree", has "never had any ownership interest in Rosetree whatsoever", and "is not an employee of Rosetree."

In a separate Affidavit, defendant Peter Rosenbaum further claims "[t]hat in no manner, shape or form do I have any individual involvement or claim by the plaintiff." Defendant's counsel argues that Peter Rosenbaum was no more than a stockholder in Rosetree and never executed any document that would make him personally responsible for the actions of the LLC.

However, plaintiff has annexed the Certificate of Formation of the LLC dated April 19, 2005 from the State of Delaware, which is signed by Roy Rosenbaum as an "Authorized Person", and has submitted a sworn Affidavit from Wolfson in which he claims that "[f]rom the time of the initial negotiations in May of 2006 to the

present, Peter Rosenbaum and Roy Rosenbaum have held themselves out to be the principals of Rosetree through their actions, negotiations, and communications to myself and Eric Ramme and to third parties involved with the Condominium project."

Wolfson further contends that

as principals of Rosetree, Peter Rosenbaum and Roy Rosenbaum have: (i) fraudulently negotiated the original and amended contracts by intentionally misrepresenting the financial capacity of Rosetree and Rosetree's willingness to comply with the terms of the contracts; (ii) continued to fraudulently misrepresent Rosetree's finances after the signing of the contracts, and (iii) induced Rosetree to breach both the contract and the amended contract by refusing to comply with Rosetree's obligations under the contracts and Condominium Plan.

Plaintiff contends that it justifiably relied on the individual defendants' misrepresentations in entering into the initial contract, as well as the lease with HCZ.

It is well settled that "'corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally' (citation omitted)." *Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 491 (2008).

However, this Court finds that the Complaint itself fails to set forth plaintiff's fraud claim against the individual defendants with sufficient detail and particularity. Accordingly, the second cause of action is dismissed as against defendants Peter Rosenbaum and Roy Rosenbaum with leave to replead within 30 days.

That portion of the motion seeking to dismiss the third cause of action for alleged alter ego liability is granted since "New York 'does not recognize a separate cause of action to pierce the corporate veil'" (See, *Hart v Jassem*, 43 AD3d 997 [2nd Dep't 2007]).

Defendants next argue that the fourth cause of action which seeks a "judgment restraining Roy and Peter from engaging in further *ultra vires* activities not properly authorized by the complete Board of Managers of the Condominium", should be dismissed as against defendant Roy Rosenbaum on the ground that he is not a member, owner or employee of Rosetree.

Plaintiff, however, has alleged and submitted affidavits from Wolfson, as well as Eric Ramme, a one-third owner of plaintiff, claiming that Roy Rosenbaum held himself out to be a principal of Rosetree, handled the day to day operations for Rosetree and had decision making authority for both Peter Rosenbaum and Rosetree.

Accordingly, this branch of the motion is denied as premature.

Defendants alternatively argue that the fourth cause of action against both defendants Peter Rosenbaum and Roy Rosenbaum, as well as the fifth cause of action should be dismissed on the grounds that the issues were resolved pursuant to a Stipulation between the parties dated March 27, 2008, which resolved plaintiff's prior motion (motion sequence number 001) for a preliminary injunction. However, it is not clear whether all of the outstanding issues raised in these claims were resolved with finality by that Stipulation. Accordingly, these branches of the motions are denied.

The sixth and seventh causes of action which relate to the designation of the members of the Board of Managers for the Condominium and the convening of a meeting of the Board are dismissed without prejudice since these claims appear to have been asserted prior to the date required by the Condominium's By-Laws for the holding of such a meeting, i.e., November 8, 2008.

However, since that date has now passed, plaintiff is granted leave to serve an Amended Complaint within 30 days of service of a copy of this order with notice of entry, in order to reallege the

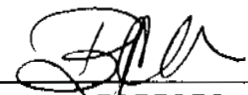
sixth and seventh cause of action (as well as to re-plead the second cause of action).

That portion of the motions seeking to dismiss the eighth cause of action against the individual defendants for an accounting is granted since any accounting would be the obligation of the defendant Rosetree to provide and not the individuals.

The defendants shall serve an Answer or otherwise move with respect to the Amended Complaint within 20 days of service of the amended pleading.

This constitutes the decision and order of this Court.

Dated: January 16, 2009



BARBARA R. KAPNICK
J.S.C.

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J.S.C.

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