Stamulis v Mordred Realty Corp.
2009 NY Slip Op 31342(U)
June 9, 2009
Supreme Court, Nassau County
Docket Number: 07-11333
Judge: Joseph P. Spinola
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER
SUPREME COURT, STATE OF NEW YORK
COUNTY OF NASSAU

Trial/IAS Part 17
Index No. 07-11333
Sequence No. 02, 03
Submit Date 4/2/09

JAMES STAMULIS,
Plaintiff

against

MORDRED REALTY CORP., *ET al.*,
Defendants

The following papers read on this motion:

Notice of Motion/Order to Show Cause...................... X
Cross-Motions.. X
Answering Affidavits... X
Replying Affidavits.. X

PRESENT: HON. JOSEPH P. SPINOLA

Application by plaintiff pursuant to CPLR 6311 for a preliminary injunction enjoining defendants from removing or transferring funds received from plaintiff as and for a security deposit and the imposition of a constructive trust for the benefit of plaintiff is denied.

Cross motion by defendants to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted to the extent that the first, second, third, fifth, sixth and ninth causes of action of the complaint are hereby dismissed. The fourth, seventh and eighth causes of action continue.

That branch of defendants' cross motion which seeks to disqualify George M. Gavalas, P.C., as counsel for plaintiff based on the advocate witness rule is denied as moot. Plaintiff is now represented by Richard L. Farley of the law firm of Farley & Kessler, P.C.

BACKGROUND

In this action plaintiff seeks to recover a security deposit in the amount of $135,000 given to defendants in connection with the execution of a lease[1] agreement for

[1]Although referenced in the parties' papers, neither party has included a copy of the lease with his/their submissions in connection with their motion and cross motion.

rental of ground floor space and basement premises located in a condominium building known as 715 9th Avenue, New York, New York, owned by defendant Mordred Realty Corp.

The complaint asserts nine causes of action alleging fraudulent inducement (first cause of action), conversion (second cause of action), unjust enrichment (seventh and eighth causes of action), and negligent misrepresentation (ninth cause of action) on the basis of which plaintiff seeks to pierce the corporate veil (third cause of action) and a permanent injunction (fourth cause of action). The fifth and sixth causes of action allege malicious/wanton conduct for which plaintiff seeks punitive damages.

After purportedly learning, subsequent to the lease signing, that the premises was not suitable for use as a Hollywood Tanning Salon (first floor/main level) with a café to service the salon on the lower basement level, plaintiff repudiated the lease[2] on January 23, 2007 and advised defendants that he would not assume occupancy of the premises and attempted, albeit unsuccessfully, to stop payment on a personal check in the sum of $135,000 which he had tendered to Mordred Realty Corp. as security deposit. Despite due demand, defendants have allegedly improperly retained/misappropriated/misused said funds and refused to return same to plaintiff.

According to the affidavit of defendant Sandri Garakani i/s/h as "Sadre" Garakani, the president and 100% owner of defendant Mordred Realty Corp., the owner of the subject premises, the defendants mitigated damages by re-letting the premises to a new tenant. Contending that Mordred Realty Corp. was entitled to retain the security deposit pursuant to paragraph 31 of the Lease[3], defendants seek dismissal of the complaint and

---

[2]The lease agreement was executed on January 22, 2007. After allegedly learning on the afternoon of January 23, 2007 that the lower level could not be used in any capacity other than storage, and that a tanning salon could not be operated at the premises, plaintiff advised defendants that he would not take occupancy of the premises.

[3]According to defendants, paragraph 31 of the Lease provides as follows:
"Security
Tenant has deposited with Owner the sum of $135,000.00 as security for the faithful performance and observance by Tenant of the terms, provisions and conditions of this lease; it is agreed that in the event Tenant defaults in respect to any of the terms, provisions and conditions of this lease, including, but not limited to, the payment of rent and additional rent, Owner may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default or for any sum which Owner may expend or may be required to expend by reason of defendant's default in respect of any of the terms, covenants and conditions of this lease, including, but not

denial of plaintiff's motion for preliminary injunction.

PRELIMINARY INJUNCTION

Turning first to the application for a preliminary injunction, the court is guided by the well settled principles that: 1) the determination to grant or deny such relief rests in the sound discretion of the court (*Ying Fung Moy v Hohi Umeki*, 10 AD3d 604 [2nd Dept. 2004]); 2) it is a drastic remedy which should be granted only in those instances where the movant has demonstrated a clear right to such relief; 3) the burden of making such a showing rests upon the moving party. *Icy Splash Food and Beverage, Inc. v Henckel*, 14 AD3d 595, 596 [2nd Dept. 2005]. It is incumbent on a party seeking a preliminary injunction to demonstrate 1) a probability of success on the merits 2) the danger of irreparable injury in the absence of an injunction and 3) a balancing of the equities in the movant's favor. *Volunteer Fire Ass'n of Tappan, Inc. v County of Rockland*, 60 AD3d 666, 667 [2nd Dept. 2009]. The threat of irreparable injury is a *sine qua non*. *DeLury v City of New York*, 48 AD2d 405 [1st Dept. 1975]. If there is no irreparable injury, there can be no preliminary injunction. The threatened irreparable injury must be actual and imminent–not remote or speculative. *Golden v Steam Heat*, 216 AD2d 440,. 442 [2nd Dept. 1995].

In the instant matter, plaintiff has failed to adduce sufficient evidence of any of the foregoing elements to warrant such drastic relief. Damages compensable in money and capable of calculation, even with some difficulty, are not irreparable. *SportsChannel America Associates v National Hockey League*, 186 AD2d 417, 418 [1st Dept. 1992].

CROSS MOTION TO DISMISS THE COMPLAINT

In determining a motion to dismiss for failure to state a cause of action, courts consistently apply a liberal approach to the construction of a pleading (CPLR 3026; *Riback v Margulis*, 43 AD3d 1023 [2nd Dept. 2007]), i.e., the facts pleaded are presumed to be true and are given the benefit of every favorable inference. *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 1021 [2nd Dept. 2007]. The sole criterion is whether, from the complaints' four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]. Bare legal conclusions, as well as factual claims flatly contradicted by the record, however, are not entitled to such consideration. *Gershon v Goldberg*, 30 AD3d 372, 373 [2nd Dept. 2006]. The test, therefore, is not whether a cause

---

limited to, any damages or deficiency in the re-letting of the premises, whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Owner."

of action is artfully drafted but whether, accepting the allegations of the complaint as true, and according them the benefit of every favorable inference, a legally cognizable cause of action is made out. *Banc of America Securities LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 242 [1st Dept. 2007]. On a motion to dismiss, the plaintiff is under no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint. *Stuart Realty Co. v Rye Country Store, Inc.*, 296 AD2d 455, 456 [2nd Dept. 2002].

Here, the allegations of the complaint may be read to adequately state causes of action for return of security deposit, conversion; unjust enrichment and injunctive relief. The causes of action for fraudulent inducement, negligent misrepresentation, imposition of a constructive trust to pierce the corporate veil, for attorneys fees and punitive damages, based on defendants' alleged reckless/wanton disregard of plaintiff's rights, however, are insufficiently pled and must, therefore, be dismissed.

In order to state a cause of action for fraudulent inducement[4], the claim must allege a material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequently sustaining a detriment. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept. 2005]. A party cannot claim to have been misled where the alleged misrepresentation could and should have been discovered through the exercise of due diligence. *Dannan Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]. Reasonably construed, a claim for fraudulent inducement or negligent misrepresentation cannot be sustained in the face of paragraph 20 of the Lease which provides, in pertinent part, that

> "Tenant acknowledges familiarity with the premises and all equipment maintained herein and, that Landlord has made no representations as to the condition of the premises or of any equipment or facilities located within or appurtenant thereto, or as to its fitness or sufficiency for Tenant's requirements, or as to any defect, latent, patent or otherwise."

In order to state a cause of action for the imposition of a constructive trust, plaintiff must plead and prove from essential elements: 1) a confidential or fiduciary relationship; 2) a promise; 3) a transfer in reliance thereon, and 4) unjust enrichment. *Doxey v Glen Cove Community Development Agency*, 28 AD3d 511, 512 [2nd Dept.

---

[4]An essential element of any fraud or negligent misrepresentation claim is that there must be reasonable reliance, to a party's detriment, upon the representations made. *Waterstreet Leasehold LLC v Deloitte & Touche LLP*, 19 AD3d 183, 185 [1st Dept. 2005].

[* 5]

2006]. The facts at bar afford no basis to conclude that a confidential or fiduciary relationship existed between the parties. An arms length business relationship does not give rise to a fiduciary obligation. A fiduciary relationship exists when one party reposes confidence in another and relies on the other's superior expertise or knowledge. *WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2nd Dept. 2001].

The attempt of a third party to pierce the corporate veil does not constitute a cause of action independent from that against the corporation. Rather, it is an assertion of fact and circumstances which will persuade the court to impose corporate obligations on its owners. *Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]. The party seeking to pierce the corporate veil must establish that the owner, through her domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene. *Heim v Tri-Lakes Ford Mercury, Inc.*, 25 AD3d 901, 902 [3rd Dept. 2006].

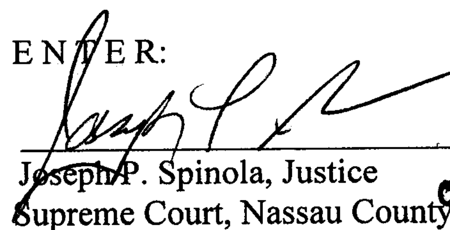
In the absence of any factual basis to support the theory that the individual defendants herein exercised complete dominion and control over the corporate entity, which was a mere alter ego of said defendants, a cause of action for piercing the corporate veil has not been sufficiently stated.

A party must pay its own attorneys' fees and disbursements unless an award is authorized by agreement between the parties, by statute or by court rule. *Paroff v Muss*, 171 AD2d 782, 783 [2nd Dept. 1991]. Plaintiff has failed to indicate any basis to sustain a cause of action for such an award.

Punitive damages may not be sought as a separate cause of action. *Aronis v TLC Vision Centers, Inc.*, 49 AD3d 576, 577 [2nd Dept. 2008]. Rather, they constitute an element of the single total claim for damages. They are available to vindicate a public right only where the actions of the alleged tortfeasor constitute either gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or were activated by evil or reprehensible motives. *Boykin v Mora*, 274 AD2d 441, 442 [2nd Dept. 2000]. Defendants' conduct as alleged in the complaint does not rise to the level of moral culpability necessary to support a claim for punitive damages i.e., so reckless or wanton as to be the equivalent of a conscious disregard of the rights of others. The sixth cause of action is, therefore, legally insufficient.

This constitutes the decision and order of the Court.

ENTER:



Joseph P. Spinola, Justice
Supreme Court, Nassau County

ENTERED
JUN 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: June 9, 2009