

277 Mott St., LLC v Fountainhead Constr., LLC

2009 NY Slip Op 31446(U)

June 30, 2009

Supreme Court, New York County

Docket Number: 603168-2008

Judge: Judith J. Gische

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

PRESENT: HON JUDITH J GISCHE
Justice

PART 10

Index Number : 603168/2008
277 MOTT LLC
vs.
FOUNTAINHEAD CONSTRUCTION LLC
SEQUENCE NUMBER : # 001
DISMISS COMPLAINT

INDEX NO. 603168-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

_____ were read on 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/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and preliminary conference scheduled for August 13, 2009 Part 10 at 9:30 am

FILED

JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

JUN 30 2009

Dated: _____

[Signature]
HON. JUDITH J. GISCHE s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----x
277 Mott Street, LLC,

Plaintiff (s),

-against-

Fountainhead Construction, LLC,
Steven Abrams and "John Does #1-10,"

Defendant (s).
-----x

DECISION/ ORDER
Index No.: 603168-2008
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
JUL 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR § 2219 [a] of the papers considered the review of this (these) motion(s):

Papers	Numbered
Defs FHC, SA n/m [§3211], w/HB affirm, SA affid, exhs	1
Pltf opp w/EJ affirm, DTF affid, exhs	2
Defs FHC, SA reply, w/SA affid	3

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from a letter of intent ("LOI") between plaintiff 277 Mott Street, LLC ("owner") and defendant Fountainhead Construction, LLC ("FHC" sometimes "contractor") to construct a building at 277 Mott Street, New York, New York ("the property"). Defendant Steven Abrams was the managing member of FHC ("Abrams") when the LOI was made.

The court has before it the pre-answer motion of Abrams and FHC (collectively "defendants") to dismiss the 1st, 4th, and 5th through 9th causes of action asserted against them for failure to state a cause of action. CPLR § 3211 [a] [7]. The motion is

opposed by plaintiff who argues that such relief is premature because there has been no discovery.

On a motion to dismiss pursuant to CPLR § 3211 *et al*, the pleading is to be afforded a liberal construction and the facts as alleged in the complaint must be accepted by the court as true, and are to be accorded every favorable inference. Leon v. Martinez, 84 NY2d 83 (1994); Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court will consider whether, accepting all of the plaintiff's facts, they support the causes of action asserted. Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976).

Facts considered and arguments presented

Pursuant to the LOI between the owner and FHC, executed February 22, 2008, it was agreed that FHC would render construction services to the owner for the contract price of \$10,888,292 ("contract price"). The LOI is printed on FHC letterhead and is signed by Joe DiPalermo, FHC's Director of Operations. In relevant part, the LOI provides as follows:

"[n]o other agreement or understanding shall be deemed to exist between Contractor and Owner until a mutually agreeable Construction Agreement has been executed by both parties, except to the limited extent permitting Contractor to mobilize for the Project. If any work is performed by the Contractor under this Letter of Intent after receipt of a written authorization from the Owner to proceed with specific work, the value of such work shall be automatically credited against the Contract Sum agreed upon in the Construction Agreement."

The owner delivered a down payment of \$1,533,839 to FHC on February 25,

2008. This sum included money which would be, in turn, paid by FHC to any of the subcontractors and vendors it hired. The owner contends that despite this sizeable down payment, FHC did no work on the project. Douglas T. Fountain, the owner's representative for the construction project, has provided a sworn affidavit. He states that "less than 5% of this construction [project] was performed" and today the property consists of merely "a concrete slab at street level."

According to plaintiff, the money that the owner paid was misappropriated because it was applied to FHC's debts, having nothing to do with the project at 277 Mott Street. Plaintiff contends that the defendants defrauded the owner by accepting this project (and the down payment), knowing full well FHC could not and would not be performing its construction obligation under the contract. Plaintiff contends this was a fraudulent act (1st cause of action), and that FHC subsequently stopped doing business, in violation of the Business Corporation Law (4th cause of action). The 5th through 9th causes of action each assert fraudulent conveyance involve claims under the Debtor Creditor Law. DCL §§ 273, 274, 275, 276, 276-a.

Plaintiff alleges that Abrams is individually liable for the money the owner lost because Abrams was the managing member at the time of these events and involved in each of these fraudulent acts and transfers.

Defendants argue that plaintiff has failed to state an action against Abrams individually, even if the tort claims against FHC survive, because a managing member of an LLC is not personally liable for the debts of the LLC, whether arising in tort, contract or otherwise. LLC § 609. Abrams denies there is any basis to pierce the corporate veil.

Defendants deny any wrongdoing, or that plaintiff's claims, even if proved, support the claims it has asserted against them.

Discussion

Accepting all of plaintiff's facts, it does not have a cause of action against Abrams, individually, either under a piercing of the corporate veil theory, or based upon fraud.

LLC § 609 shields a member or managing member of a limited liability company from personal liability for debts, obligations, or liabilities of an LLC, whether arising in tort, contract or otherwise. However, a managing member may be held personally liable if s/he participates in the commission of a tort in furtherance of company business. Pepler v. Coyne, 33 A.D.3d 434 (1st Dept 2006). A managing member may also be held personally liable by piercing the corporate veil. Retropolis, Inc. v. 14th Street Development, LLC, 17 AD3d 209 [1st Dept. 2005]. Such "piercing" may be allowed if the defendant has so dominated the company or conducted business in his or her individual capacity, thereby disregarding the corporate form to suit his or her personal needs and immediate convenience. Retropolis, Inc. V. 14th Street Development, LLC, *supra*.

Plaintiff has not pled any facts that support a cause of action against Abrams based upon his disregarding the corporate form. Therefore, any cause of action to impose personal liability on Abrams, based upon the piercing the corporate veil fails, and must be dismissed.

The fraud claims against Abrams also fail and they must be dismissed as well. Although plaintiff alleges that "Abrams always intended to divert 277 Mott funds for

purposes other than the renovations and development of the Mott Street Property," this is a conclusion. It is not based upon any facts set forth in this record. The complaint, supporting affidavit, and Grundvig's email to Mr. Fountain may set forth facts about the financial problems and insolvency of FHC, but no facts that Abrams intended to defraud the plaintiff. Therefore, the claims against Abrams personally must be, and hereby are, severed and dismissed.

The fraud claim against FHC is not pled with particularity. CPLR § 3016 (b). The necessary elements of a fraud cause of action are that there has been a misrepresentation of material facts, falsity, scienter, reliance and injury. Standish-Parkin v. Lorillard Tobacco Co., 12 A.D.3d 301 [1st dept 2004]. Here, plaintiff's fraud claim is based upon its belief that the defendants never intended to comply with the LOI, but agreed to it simply because FHC needed the money. Defendants have not identified the factual misrepresentations that were made that were false.

Even were the court to decide that the fraud claim is sufficiently particularized, the cause of action must be dismissed in any event. It is completely duplicative of the breach of contract claim. The owner has not alleged any fraud that is collateral or extraneous to the contract, or that damages are not recoverable under a contract measure of damages, or that defendant owed the owner a duty separate from FHC's duty under the LOI. Coppola v. Applied Electric Corp., 288 A.D.2d 41, 42 [1st Dept. 2001].

The 4th cause of action is based upon FHC's alleged violation of an unarticulated section of the Business Corporation Law. Presumably, the owner is referring to BCL §

1008 pertaining to corporate dissolution because plaintiff claims FHC engaged in a de facto dissolution of the corporation, without paying its creditors. Although BCL § 1008 provides for an orderly, judicial dissolution of a corporation, the dissolution of a corporation does not affect any remedy against such corporation, for any right, claim or liability existing or incurred before such dissolution. Ford v. Pulmosan Safety Equipment Corp., 52 A.D.3d 710, 711 [2nd Dept 2008]. Thus, plaintiff has failed to allege any facts to support this cause of action, or differentiate it from the owner's breach of contract claim. Consequently, defendant's motion to sever and dismiss this cause of action (4th) is granted as well.

The 5th through 9th cause of action are all based on allegations by plaintiff that FHC conveyed its assets (including the owner's down payment) to Abrams and the various "John Does" named. The underpinnings of these causes of action for fraudulent conveyance are that FHC was insolvent, accepted the down payment of the plaintiff, never intended to perform the contract, and then used the down payment to satisfy the defendant's debts. These allegations are indistinguishable from the fraud (1st) cause of action and the action under the Business Corporation Law (4th cause of action), addressed earlier in this decision and order. Furthermore, the payment of antecedent debt is not a fraudulent conveyance within the meaning of the debtor and creditor law. Ronga v. Chiusano, 97 A.D.2d 753 [2nd Dept 1983]. Plaintiff has provided copies of summons and complaints against FHC in other actions, and even a copy of judgment entered against the defendant. Those cases (and the money judgments) preceded this action.

Even affording the complaint a liberal construction, accepting the plaintiff's facts

as true, and according the owner every favorable inference, plaintiff has failed to a state a cause of action against Abrams, the individually named defendant. The owner has also failed to state any fraud based causes of action against the other defendants. Therefore, defendants' motion, for the dismissal of the 1st, 4th and 5th through 9th causes of action is granted. Those claims are severed and dismissed. The complaint, however, remains as to the 2nd and 3rd causes of action against FHC. FHC's time to answer is hereby extended in accordance with CPLR § 3211 (f).

The preliminary conference will be held on AUGUST 13, 2009 in Part 10 at 9:30 a.m. No further notices will be sent.

Conclusion

Defendants' motion, for the dismissal of the 1st, 4th and 5th through 9th causes of action is granted. Those claims are severed and dismissed. The complaint, however, remains as to the 2nd and 3rd causes of action against FHC. FHC's time to answer is hereby extended in accordance with CPLR § 3211 (f).

The preliminary conference will be held on AUGUST 13, 2009 in Part 10 at 9:30 a.m. No further notices will be sent.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 30, 2009

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK
So Ordered:
Hon. Judith J. Gisch
