

Replace Retail, LLC v Universal Renovation USA

2009 NY Slip Op 32085(U)

September 10, 2009

Supreme Court, New York County

Docket Number: 602318/2008

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 3

Index Number : 602318/2008
REPLACE RETAIL, LLC
VS.
UNIVERSAL RENOVATION USA
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion for _____

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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(3) (lack of capacity), is granted without prejudice; and it is further

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(7) (failure to state a cause of action) is granted; and it is further

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(1) (documentary evidence) and CPLR 3211(a)(8) (for lack of jurisdiction), is denied; and it is further

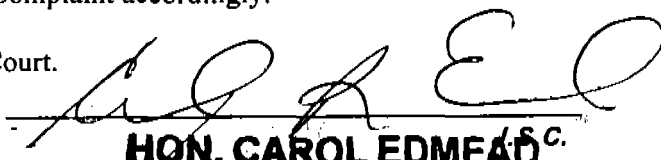
ORDERED that defendant's motion seeking sanctions against plaintiff, pursuant to 22 NYCRR §130-1.1(a), is denied; and it is further

ORDERED defendant serves a copy of this order with notice of entry upon all parties within 20 days of entry.

The Clerk may enter judgment dismissing the Complaint accordingly.

This constitutes the decision and order of the Court.

Dated: 9/10/09


HON. CAROL EDMEAD^{C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
SEP 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

PAPERS NUMBERED _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
REPLACE RETAIL, LLC,

Plaintiff,

-against-

UNIVERSAL RENOVATION USA CORP.
and GUY PAPICH,

Defendants.
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 602318/08

DECISION AND ORDER

FILED
SEP 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

In this action for conversion, breach of contract and negligence, plaintiff Replace Retail, LLC ("plaintiff") moves to reargue the prior motion to dismiss the complaint by defendants Universal Renovation USA Corp. ("Universal") and Guy Papich ("defendant") (collectively "defendants").

Factual Background

This action arises out of an agreement and supplemental agreements pursuant to which defendants performed renovation work for plaintiff at 11 East 22nd Street, Apartment 2, New York, New York (the "Premises"), which work was completed in December 2007. Plaintiff allegedly made numerous payments to Universal from July 2007 through December 2007, for the work performed. It is alleged that plaintiff later discovered certain defective and unfinished work by defendants, requiring plaintiff to retain a handyman to correct and complete defendant's work, at additional costs; plaintiff also allegedly discovered that it made certain overpayments to defendants. Consequently, this action ensued.

As relevant herein, defendants moved to dismiss the Complaint for, *inter alia*, failure to

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state a cause of action against the individual defendant. By Decision and Order dated April 1, 2009, the Court, *inter alia*, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) on the ground that plaintiff failed to state a claim against defendant in his personal capacity. The Court held, in pertinent part, that in order to state a claim against defendant in his personal capacity so as to recover the monies it seeks, plaintiff must "pierce the corporate veil." The Court concluded that unlike plaintiff herein, the plaintiffs in the cases cited by plaintiff submitted sufficient evidence to justify piercing the corporate veil.

Plaintiff's Motion

Plaintiff maintains that the court incorrectly held that in order to state a claim against defendant in his personal capacity, the plaintiff must "pierce the corporate veil." Plaintiff argues that controlling case law holds that a corporate officer, such as defendant, who participates in the commission of a tort can be held individually liable regardless of whether the officer was acting in his corporate capacity and regardless of whether the corporate veil was pierced. Plaintiff further argues that controlling case law holds that a corporate officer can be held personally liable for acts which constitute conversion of another's property. Plaintiff alleges that defendant knowingly misappropriated \$35,417.86 and refused to return these funds in defiance of plaintiff's rights. Such action constitutes a tortious conversion of funds for which the defendant is personally liable.

Defendants' Opposition

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Defendant argues that plaintiff's application is procedurally defective because the proper procedure for vacature of an order is CPLR 5015(a) by an order to show cause.

Further, defendant argues, plaintiff once again fails to state a cause of action against

defendant. Defendant argues that the caselaw cited by plaintiff is distinguishable in that this matter does not involve a landlord-tenant issue where the officer intentionally misled the tenant in an attempt to induce detrimental reliance. Additionally, defendant argues that plaintiff relies on a theory of "commission of tort" to permit personal liability on an officer but fails to make an allegation of such a tort about the defendant. It is undisputed that plaintiff made all payments to Universal only and no payments to defendant. Plaintiff also fails to allege that defendant had any knowledge of the alleged overpayment at time of receipt of any payment. Defendant argues that the instant matter is simply a contractual dispute between plaintiff and Universal only. Defendant reiterates that plaintiff should not be allowed to pierce the corporate veil and attach personal liability to defendant.

Reply

Plaintiff argues that defendant incorrectly asserts that the only proper procedural vehicle to reargue a previous motion is CPLR 5015(a) and asserts that invoking CPLR 2221(d)(2) to reargue the motion is a procedurally sound. CPLR 5015(a) applies to decisions made on the grounds of excusable default, newly discovered evidence, misrepresentation or fraud, lack of jurisdiction, or when a previous order has already been reversed, modified or vacated, and that none of these bases apply in this particular instance.

Plaintiff also argues that defendant improperly characterizes the case law that holds corporate officers personally liable for their commission of torts as applicable only to landlord/tenant cases and detrimental reliance. Plaintiff insists that such caselaw applies to all plaintiffs and all torts including conversion. Plaintiff further argues that courts have held that a corporate officer is personally liable for acts which constitute conversion of another's property.

Plaintiff alleges that defendant was the party who accepted and handled plaintiff's funds and was the party who acknowledged the overpayment and refused to return the funds in defiance of plaintiff's rights.

Analysis

Contrary to plaintiff's contention, the instant motion is properly brought pursuant to CPLR 2221. CPLR 5015(a) empowers a court to vacate its judgment or order for several reasons, including excusable default; newly-discovered evidence; fraud, misrepresentation or other misconduct by an adverse party; lack of jurisdiction; or where there is a reversal, modification or vacatur of an order upon which the judgment is based. However, none of these reasons apply to the instant case (*see Reyes v Sequeira*, 64 AD3d 500, 883 NYS2d 494 [1st Dept 2009] [stating that "While Supreme Court identified defendants' postargument application as a motion to vacate, none of the grounds enumerated in CPLR 5015(a) are applicable. The obvious procedural basis for revisiting an order issued by the same court is CPLR 2221, denominated 'Motion affecting prior order,' which requires either a motion to reargue or a motion to renew"]). Therefore, plaintiff's motion for leave to reargue under CPLR 2221 is procedurally proper.

Turning to the merits of reargument, a motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d

971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" (*William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Given that plaintiff raises an issue as to whether the Court properly analyzed the case law to which it cited in its Decision and Order, the Court grants reargument. Upon reconsideration of the case law, the Court determines that dismissal of the complaint was unwarranted.

A "corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (*Espinosa v Rand*, 24 AD3d 102, 102 [1st Dept 2005] quoting *American Express Travel Related Servs. Co. v North Atl. Resources*, 261 AD2d 310 [1999]). In *Espinosa* the plaintiff's mother alleged that the landlord misled her to believe that lead paint had not been used in the building for over ten years. The court held that if such a misrepresentation had occurred and had led to a detrimental reliance on the part of the plaintiff, the defendant could be held personally liable even though he allegedly spoke on behalf of the corporation (*Espinosa*, at 103).

Fleck v Perla (40 AD2d 1069 [4th Dept 1972]), cited by plaintiff, is also instructive. In *Fleck*, the plaintiff had brought an action to recover trust assets and hold the transferee personally liable for the conversion of trust assets. In reversing the order dismissing the complaint, the First Department stated that "an officer or agent of a corporation is personally liable for his acts which constitute a conversion of the property of a third person" and that "it is no answer to such liability

that the act was done while the officer or agent was acting for the corporation" (*Fleck*, at 1069). The court noted that in the event a jury found that defendant knowingly participated in the diversion of trust funds, or he should have inquired into the origin of the funds he received, defendant would be personally liable to the plaintiff for converting the trust funds.

In *Merrill Lynch, Pierce, Fenner & Smith Inc. v Arcturus Builders, Inc.* (159 AD2d 283 [1st Dept 1990]), Merrill Lynch sued defendant for conversion and fraud to recover an erroneous credit of \$106,785.91 received by defendants. Merrill Lynch had credited defendant's account through an inversion of two digits of another customer's account. The Court stated that a corporate officer could be held personally liable for conversion committed in the scope of his employment and that thus, defendant was "personally responsible for the full amount taken" on the ground that.

Likewise, in the case at bar, plaintiff herein sues to recover an alleged erroneous payment of \$35,417.86 that plaintiff made to the account of the defendant. Since a corporate officer may be held personally liable for conversion of a third party's property in the scope of his employment, plaintiff herein sufficiently states a claim for conversion. Therefore, although plaintiff failed to state a claim against defendant under the theory of piercing of the corporate veil, such failure is not fatal to plaintiff's complaint against defendant; plaintiff sufficiently stated a claim against defendant in his personal capacity to recover the monies it allegedly overpaid to Universal under the theory that defendant committed the tort of conversion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff Replace Retail, LLC for leave to reargue the

prior motion to dismiss by defendants Universal and Guy Papich is granted; and it is further

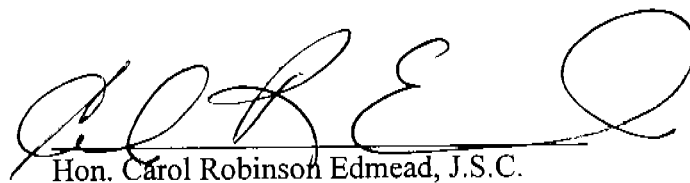
ORDERED that this action shall be reinstated and plaintiff shall serve its Amended Complaint pursuant to the CPLR; and it is further

ORDERED that the parties shall appear for a Preliminary Conference in Part 35 on November 10, 2009, 2:15 p. m.; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 10, 2009



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
SEP 14 2009
COUNTY CLERK'S OFFICE
NEW YORK