

400 E. 85th Realty Corp. v MIS Intl., Inc.

2011 NY Slip Op 30404(U)

February 18, 2011

Supreme Court, New York County

Docket Number: 603499/09

Judge: Debra A. James

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.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

400 EAST 85TH REALTY CORP.,
Plaintiff,

Index No.: 603499/09

Motion Date: 7/15/10

- v -

Motion Seq. No.: 01

MIS INTERNATIONAL, INC., MIS KIDS OF FIRST
AVENUE, INC. and STEPHANE IFRAH, ,
Defendants.

Motion Cal. No.: 127

The following papers, numbered 1 to 6 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1 - 3

4

5, 6

FILED

Cross-Motion: Yes No

FEB 22 2011

Upon the foregoing papers,

**NEW YORK
COUNTY CLERK'S OFFICE**

MIS International Inc. (International) and Stephane Ifrah (Ifrah) (together, the Moving Defendants) move, pursuant to CPLR 3211, to dismiss the plaintiff's complaint as against them.

Plaintiff is the owner of the building (the Building) located at 400 East 85th Street, New York, New York. On May 1, 1995, it entered into a lease (the Lease) with MIS Kids of First Avenue, Inc. (Kids) for commercial store premises (the Premises) in the Building. MIS Kids, Inc. (Futurekids) allegedly occupied a portion of the Premises and operated a computer learning center

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):

for children and adults. Kids allegedly subleased a portion of the Premises to Futurekids and a portion to Queens Gallery, Inc. (Queens Gallery).

Ifrah is the president and sole shareholder of International and Kids. He is also the president and one of two shareholders of Futurekids.

Plaintiff contends that the Lease had a 15-year term and required Kids to pay \$7,696.33 per month in base rent plus additional rent charges and that, as of December 1, 2008, Kids owed \$108,693.73 in unpaid rent. It further contends that it commenced a non-payment proceeding in Civil Court, New York County, and that, on May 11, 2009, it obtained a judgment (the Judgment) against Kids in the amount of \$157,185.36, which remains unpaid.

Plaintiff alleges that, in May 2009, prior to the entry of the Judgment, Kids was observed "removing all of its furniture, fixtures and equipment from the Premises" to a property located at 330 East 85th Street, New York, New York (the New Premises). It also states that International is operating its business at the New Premises with the same or substantially the same, ownership, management, personnel and assets as Kids.

Plaintiff further contends that Kids conveyed or transferred its assets, including furniture, computers, inventory, receivables and other assets to International, rendering itself

insolvent, and that International assumed Kids' existing contracts and continued Kids' operations. It also states that Ifrah personally took some of Kids' assets for his personal use and did so with the intent of rendering Kids insolvent.

Plaintiff also alleges that Ifrah exercised complete domination and control over Kids and that he removed Kids' assets as part of a fraudulent design to disregard Kids' corporate form and to render it insolvent and make the Judgment ineffectual.

Plaintiff's complaint asserts causes of action for breach of contract against Kids, successor liability for breach of contract against International, fraudulent conveyance against defendants pursuant to Debtor and Creditor Law (DCL) §§ 273 and 273-a, attorneys' fees against defendants pursuant to DCL § 276-a, and liability against Ifrah based upon piercing the corporate veil.

Kids has interposed an answer and is not seeking dismissal.

The Moving Defendants allege that Kids did not have an operating business at the Premises, but merely rented space to Queens Gallery and Futurekids. They further state that Futurekids was an operating business, that it paid rent to Kids and that it removed its own assets to the New Premises. The Moving Defendants also assert that Kids' only asset was its lease with plaintiff.

The Moving Defendants contend that International, Kids and Futurekids are all separate entities, that Kids has ceased

operating and that none of the purportedly wrongful activity was done by Ifrah personally.

The Moving Defendants have presented copies of Kids', International's and Futurekids' incorporation papers, the Lease for the Premises, the lease for the New Premises, Kids' tax returns for 2006-2008, Futurekids' tax returns for 2006-2008, Futurekids' invoice and bill from the moving company that moved the assets from the Premises to the New Premises and its check paying this bill, a check for the security deposit for the New Premises and portions of Kids' checking account from November, 2006 to July, 2008 that show five separate deposits alleged to be rent payments from Futurekids to Kids.

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory. Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 570-571 (2005). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 NY2d 83, 88 (1994). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences

[* 5]
and need not be accepted as true Biondi v Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), affd 94 NY2d 659 (2000).

DCL § 273 provides:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

DCL § 273-a provides:

Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

DCL § 276-a provides for attorneys' fees in an action brought by a creditor where the conveyance is found to be fraudulent with actual intent.

A party claiming fraudulent conveyance under DCL §§ 273 or 273-a must allege insolvency and lack of fair consideration for the transfer. Wall St. Assoc. v Brodsky, 257 AD2d 526, 528 (1st Dept 1999). Whether the conveyance renders a debtor insolvent and whether fair consideration was paid are "generally questions of fact which must be determined under the circumstances of the particular case." Joslin v Lopez, 309 AD2d 837, 838 (2d Dept 2003).

The doctrine of piercing the corporate veil is an equitable concept which seeks to go behind the corporation to hold its

owners liable for its actions despite the limitation of individual liability that the corporation generally provides. Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 140 (1993). A party seeking to pierce the corporate veil must show complete domination by the owners with respect to the transaction at issue and that this domination was used to commit a fraud or wrong against the plaintiff that caused damage to the plaintiff. Id. at 140-141.

Since a corporation has a legitimate separate existence, more than mere control or ownership by a single individual is necessary to establish such a claim. Id. at 140; Harris v Stony Clove Lake Acres, 202 AD2d 745, 747 (3d Dept 1994). Plaintiff must show "that the individual defendant's control of the corporate defendant was used to perpetrate a wrongful or unjust act toward plaintiff." Lederer v King, 214 AD2d 354, 354 (1st Dept 1995). Generally, piercing the corporate veil "is a fact-laden claim that is not well suited for summary judgment resolution.'" First Capital Asset Mgt. v N.A. Partners, 300 AD2d 112, 117 (1st Dept 2002) (citation omitted).

The Moving Defendants assert that the tax returns for Kids and Futurekids show that these corporations observed appropriate corporate separateness. They also state that Kids' Lease for the Premises and Futurekids' Lease for the New Premises demonstrate this corporate separateness and that Kids' bank account reflects

[* 7]

that Futurekids paid rent as a legitimate subtenant. They further claim the mover's bill to Futurekids shows that the items removed did not belong to Kids. Finally, they contend that the fact that Ifrah was the president and sole shareholder of Kids and International and the president and one of two shareholders of Futurekids does not warrant piercing the corporate veil.

The documents supplied by the Moving Defendants do not conclusively establish a defense to plaintiff's complaint. The mover's bill shows that Futurekids paid to move the inventory from the Premises to the New Premises, but it does not establish which entity owned the inventory.

Kids' bank statements show payments from Futurekids allegedly for rent, but they are not routine monthly payments in the normal manner of an independent subtenant.

If, as the Moving Defendants assert, Kids' sole asset was the Lease with plaintiff, it may not have been adequately capitalized and, therefore, it may have been designed to be a mere shell entity that could perpetrate a wrong on creditors.

Plaintiff alleges that the separate corporations were not, in fact, operated separately and that International is operating as Kids' successor, that Ifrah took corporate assets for his personal use, that Kids transferred its inventory to International without fair consideration to render itself insolvent and that Ifrah arranged this to render the Judgment

ineffectual. These allegations set forth claims for fraudulent conveyance under DCL §§ 273 and 273-a, since they contend that transfers were made without any consideration and that the transfers rendered Kids insolvent. The court notes that while Ifrah has stated that he is one of two shareholders of Futurekids, he has not set forth his percentage ownership or a shareholders agreement to elucidate his degree of control.

Plaintiff's allegations are more than cursory legal conclusions and are not inherently incredible. Rather, they set forth a pattern of alleged facts, that if proven, could establish wrongful conduct that left a shell corporation with debts while allowing a successor entity to obtain its assets improperly. These assertions adequately set forth cognizable claims of successor liability, fraudulent conveyance pursuant to DCL §§ 273 and 273-a and piercing the corporate veil. Leon at 87-88).

Plaintiff's allegations are sufficient in the context of a motion directed at the face of the pleadings pursuant to CPLR 3211, since, if accepted as true and given the appropriate favorable inferences, they set forth the elements of plaintiff's claims for successor liability, DCL §§ 273 and 273-a fraudulent conveyance and piercing the corporate veil. The Moving Defendants' motion to dismiss the complaint as against them shall therefore be denied.

It is, therefore,

ORDERED that the motion of MIS Kids International Inc. and
Stephane Ifrah to dismiss the complaint against them is DENIED;
and it is further

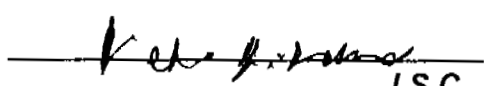
ORDERED that said defendants are directed to serve answers
to the complaint within 20 days after service of a copy of this
order with notice of entry; and it is further

ORDERED that the parties are directed to attend a
preliminary conference on April 5, 2011 in IAS Part 59, Room 103,
71 Thomas Street, New York, NY 10013 at 9:30 A.M.

This is the decision and order of the court.

Dated: FEB 18 2011

ENTER:


J.S.C.

FILED

FEB 22 2011

**NEW YORK
COUNTY CLERK'S OFFICE**