

Miller v Cohen

2011 NY Slip Op 30751(U)

March 25, 2011

Supreme Court, New York County

Docket Number: 111380/2009

Judge: Milton A. Tingling

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

PRESENT: ~~MILTON A. TINGI, INC.~~
Mitler

PART 49

Mitler
- v -
Cohen

INDEX NO. 111380/09
MOTION DATE 1/10/11
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with annexed decision.*

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

FILED

MAR 31 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/2/11 *Mat* J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 44

-----X

Harvey S. Shipley Miller, as
Trustee of the Trust known as
Judith Rothschild Foundation,
Plaintiff,

Index
Number
111380/2009

-against-

Todd Cohen, Terence Lowenberg,
Martin Cohen, CJR Associates LP,
Mark Lowenberg, Lowenberg Family
Limited Partnership, Lowenberg II
Family Limited Partnership,
Lowenberg III Family Limited
Partnership, Icon Development
and Construction LLC and Icon
Realty Management LLC

Defendants.

-----X

Milton A. Tingling, J.:

FILED

MAR 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

Martin Cohen, CJR Associates LP (CJR), Mark Lowenberg,
Lowenberg Family Limited Partnership, Lowenberg II Family Limited
Partnership and Lowenberg III Family Limited Partnership (the
Lowenberg Family Partnerships) (collectively, the Moving
Defendants) move for summary judgment dismissing plaintiff's
third cause of action. Plaintiff cross-moves for leave to amend
the complaint to add a fifth cause of action against the Moving
Defendants. The motion and cross motion are consolidated for
disposition and decided as noted below.

Parties and Procedural Background

Plaintiff is the owner of a building (the Building) located

at 1110 Park Avenue, New York, N.Y. (complaint, ¶ 2). He entered into a contract to sell the Building to the Icon Group LLC (Icon LLC) for \$17 million, with a down payment (the Down Payment) of \$1.7 million, but Icon LLC stopped payment on the check for the Down Payment (*id.*). Plaintiff commenced an action against Icon LLC in Supreme Court, New York County under index number 603855/2007 (the Underlying Action) and, on June 4, 2009, obtained a judgment (the Judgment) against Icon LLC in the amount of \$2,004,814.93, consisting of \$1.7 million plus interest, costs and disbursements. The Judgment in the Underlying Action was affirmed by the Appellate Division, First Department, 77 AD3d 586 [2010]).

Todd Cohen (Todd) is a member of Icon LLC (complaint, ¶ 4). Terence Lowenberg (Terence) is a member of Icon LLC (*id.*, ¶ 5). Mark Cohen is Todd's father and a principal of CJR (*id.*, ¶¶ 6-7). Mark Lowenberg is Terence's father and a principal in the Lowenberg Family Partnerships (*id.*, ¶¶ 8-9). Icon Development and Construction LLC (Icon Development) is a limited liability company which has its offices in premises located at 43 West 14th Street, New York, N.Y. (the West 14th Street Premises) which were previously Icon LLC's offices (*id.*, ¶ 10). Icon Realty Management LLC (Icon Realty) is a limited liability company which has its offices at the West 14th Street Premises (*id.*, ¶ 11).

Plaintiff's complaint has four causes of action: 1) fraudulent conveyance against Todd; 2) fraudulent conveyance against Terence; 3) alter ego liability against the Moving Defendants; and 4) alter ego liability against Icon Development and Icon Realty. Plaintiff's proposed amended complaint seeks to add a fifth cause of action for fraudulent conveyance against the Moving Defendants.

Parties' Allegations

In this action, plaintiff seeks to enforce the Judgment in the Underlying Action that he obtained against Icon LLC. He alleges that Icon LLC was formed for the purpose of purchasing and managing properties for the Moving Defendants and that investment decisions were made by, and funds provided from, Martin Cohen and Mark Lowenberg (*id.*, ¶ 13). More specifically, plaintiff contends that, in June 2007, when Icon LLC entered into the contract to buy the Building, it tendered the check for the Down Payment without adequate funds, which would be supplied after the weekend by Martin Cohen and Mark Lowenberg (*id.*, ¶ 14). He further states that payment of the check was stopped on their instructions (*id.*, ¶ 15).

Plaintiff states that Icon LLC had no independent capital, management, operations or existence (*id.*, ¶ 17), that it was the alter ego of the Moving Defendants and that, during the

Underlying Action, it transferred its business and operations to Icon Development and Icon Realty (*id.*, ¶ 18). Plaintiff also states that financing for purchasing the Building "was discussed" with Martin Cohen and Mark Lowenberg (Terence EBT, at 32). Plaintiff therefore claims that Icon LLC has rendered itself insolvent and that he has fraudulent conveyance claims against Todd, Terence, Icon Development and Icon Realty and alter ego claims against the Moving Defendants.

The Moving Defendants contend that Icon LLC operated as a real estate development company, which managed property and put together deals, realizing profits through fees resulting from these deals, and that its two owners were Todd and Terence (Terence affidavit, ¶ 2; Terence EBT, at 4, 17-19). They further state that Icon LLC operated with proper corporate formalities (Terence affidavit, ¶¶ 3-4) and that the Moving Defendants had no ownership interest in it (*id.*, ¶ 5).

The Moving Defendants further assert that Todd and Terence made the decisions with regard to the purchase of the Building (*id.*, ¶ 9) and that Icon LLC gave the Moving Defendants information solely as potential investors, but that the Moving Defendants determined not to invest (*id.*, ¶¶ 19, 24). They also state that Icon LLC sought to purchase the adjacent building, 1108 Park Avenue, as part of a total development project (Terence

EBT, at 26-27, 31) and that when the owner of that building would not sell that the arrangement was unfeasible (*id.* at 50-51, 53).

The Moving Defendants also assert that money received from Icon LLC by them was a return of money deposited by them preparatory to real estate deals being made (Todd EBT, at 17, 22-23; Terence supplemental procedure EBT, at 37). The Moving Defendants claim that plaintiff has failed to make the necessary showing to sustain a claim of alter ego liability and failed to present evidence warranting adding a claim of fraudulent conveyance against them.

Alter Ego Liability

Alter ego responsibility is "[a]kin to piercing the corporate veil to 'prevent fraud or to achieve equity' [and it] ... applies ... in determining whether a nonsignatory to an ... agreement should be bound by it" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998] [internal citations omitted]). Piercing the corporate veil is an equitable doctrine which "requires a showing that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and 2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Generally, piercing the corporate veil "is a fact-

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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] [internal quotation marks and citations omitted]). However, plaintiff must show more than mere domination of a corporation. Rather, a plaintiff must show that "the owners, through their domination, abused the privilege of doing business in the corporate form" (*Morris*, 82 NY2d at 142; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, - NY3d-, 2011 WL 588482 [2011]).

In this regard, "conclusory allegations ... that the corporation was 'undercapitalized' and functioned as [defendants'] 'alter ego'" are insufficient (*Albstein v Elany Contr. Corp.*, 30 AD3d 210, 210 [1st Dept 2006]). Rather, piercing the corporate veil "is governed by an enhanced pleading standard ... that the acts complained of ... were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 [1st Dept 2002]).

Plaintiff has failed to meet this "heavy burden" (*Matias v Mondo Props. LLC*, 43 AD3d 367, 368 [1st Dept 2007]; *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]). Plaintiff has not rebutted the Moving Defendants' showing that

they had no ownership interest in Icon LLC and has not proffered evidence that the Moving Defendants abused the privilege of doing business in the corporate form in the transaction at issue, the failed purchase of the Building (*Morris*, 82 NY2d at 141-142). Accordingly, the Moving Defendants' motion for summary judgment dismissing the third cause of action as against them is granted.

Amendment

Leave to amend a pleading pursuant to CPLR 3025 is generally freely granted in the absence of prejudice (*Fahey v County of Ontario*, 44 NY2d 934 [1978]). However, there must be "some evidentiary showing that the proposed amendment has arguable merit" (*Helene-Harrisson Corp. v Moneyline Networks*, 6 AD3d 151, 151 [1st Dept 2004]). A party claiming fraudulent conveyance must allege insolvency and lack of fair consideration for the transfer. Whether a conveyance renders a party 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]). Plaintiff has proffered only conclusory allegations without any specific assertions as to alleged transfer of assets to the Moving Defendants and has not presented any evidence that the moneys given to the Moving Defendants were anything other than a return of their own deposited funds (Terence supplemental

procedure EBT, at 37). This showing is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Therefore, plaintiff's cross motion for leave to amend to add a fifth cause of action is denied.

Order

It is, therefore,

ORDERED that the motion of Mark Cohen, CJR Associates LP, Mark Lowenberg, Lowenberg Family Limited Partnership, Lowenberg II Family Limited Partnership and Lowenberg III Family Limited Partnership for summary judgment dismissing the third cause of action as against them is granted and the complaint is dismissed as to said defendants, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that plaintiff's cross motion for leave to amend the complaint is denied.

Dated: March 25, 2011

FILED

MAR 31 2011

NEW YORK
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mart

J.S.C.

MILTON A. TRING