

Puma Sidewalk Corp. v GDY Props., Inc.

2011 NY Slip Op 30771(U)

March 21, 2011

Supreme Court, Nassau County

Docket Number: 010107/2009

Judge: Ira B. Warshawsky

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SCAN

AMENDED AND CORRECTED SHORT FORM ORDER

**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

PUMA SIDEWALK CORPORATION,

Plaintiff,

INDEX NO.: 010107/2009
MOTION DATE: 1/7/11
SEQUENCE NO .: 02, 03

- against -

GDY PROPERTIES, INC., CITYSIDE EQUITIES, LLC,
UNITED HOMES OF NEW YORK, INC., RON HERSCHO
a/k/a YOURAN HERSCH a/k/a YARON HERSCHO,

Defendants.

The following documents were read on this motion:

Motion to Dismiss Complaint against Defendants other than GDY.....	1
Defendants' Rule 19-a Statement	2
Plaintiff's Rule 19-a Statement	3
Plaintiff's Motion to Dismiss Defendants' Counterclaim and for Summary Judgment against GDY Properties, Inc.	4
Plaintiff's Reply Affirmation in Response to Opposition to Cross-Motion	5
Defendants' Reply Affirmation in Response to Plaintiff's Reply	6

PRELIMINARY STATEMENT

The Court sua sponte vacates and sets aside its prior Decision and Order dated March 7, 2011, which was based upon a misperception of the continued status of defendants other than GDY Properties, Inc. in the proceedings.

Defendants Cityside Equities, LLC ("Cityside"), United Homes of New York, Inc.

("United") and Ron Hershco ("Herschco") move to dismiss the complaint against them on the grounds that there is no privity of contract between them and plaintiff.

Plaintiff cross-moves for an order dismissing the counterclaim against plaintiff on the ground that it is without merit; and for summary judgment in favor of plaintiff against defendant GDY Properties ("GDY") because there is no defense to their claim.

BACKGROUND

Plaintiff is a concrete contractor. The defendant corporations and company have been engaged in the business of developing and selling real estate. Hershco is the principal shareholder and officer of each of them. The complaint alleges that Hershco created each of the entities for the purpose of evading payment for services provided by contractors and sub-contractors on properties in which he had an interest. It asserts that the defendants conspired to induce plaintiff to enter into a contract with GDY; and that between June 14, 2007 and April 25, 2008, plaintiff provided services with a reasonable value of \$270,400.68, none of which has been paid, although demanded. The essence of the claim is that, by means of the formation of more than 30 LLCs, many of which were single-entity companies, having no asset other than the property to be developed, defendants perpetrated a fraud in the form of a preconceived notion to insulate the company with whom service providers contracted, from having assets to pay for the services provided. The answer, in addition to claiming twelve affirmative defenses, asserts a counterclaim for defective workmanship, for which they claim damages of \$250,000.

DISCUSSION

Plaintiff's motion for summary judgment against GDY Properties, Inc. is granted.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact."¹

To grant summary judgment, it must clearly appear that no material and triable issue of

¹ *Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 (1st Dept. 1992); See also, *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, (1974).

fact is presented.² It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue.³

The evidence will be considered in a light most favorable to the opposing party.⁴ The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party.⁵ On a motion to dismiss, the court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”⁶ But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact.⁷

Defendant, although alleging defective workmanship in its counterclaim, has produced no evidence to substantiate this claim. To the contrary, defendant claims to have lost all records of work done by the plaintiffs as a result of losing all documentation in conjunction with a foreclosure in September 2008. The work for which documents were relevant took place between June 2007 and April 2008. The Master Sub-Contractor Agreement was signed by GDY on January 30, 2008, and Puma submitted bills for work performed as early as August 16, 2007. Defendant was obligated to use reasonable care to preserve documents when they knew, or

² *Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 (1957).

³ *Moskowitz v. Garlock*, 23 A.D.2d 94 (3d Dept.1965); *Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 (3d Dept. 1965).

⁴ *Weill v. Garfield*, 21 A.D.2d 156 (3d Dept.1964).

⁵ *Tortorello v. Carlin*, 260 A.D.2d 201, 206 (1st Dept. 2003).

⁶ *Braddock v. Braddock*, 2009 WL 23307, citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 (1994).

⁷ *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

should have known, that they would be relevant in a claim by sub-contractors.⁸ Defendant did not use reasonable care to preserve such records. (Dep. of Hirshco, Exh. “E” to Lipshie Reply Affirmation, at p. 36). Defendants’ claim that the summary judgment is defective for failure to annex copies of pleadings is without merit. Pleadings were annexed to defendants’ motion to dismiss, and form a part of the record.⁹

Defendants’ motion to dismiss the complaint against all defendants other than GDY is denied. Plaintiff’s complaint, and documents submitted in opposition to the motion create substantial factual questions as to whether the conduct of Hershco, and the utilization of other closely held companies or corporations by him, constituted a fraudulent conspiracy designed solely to prevent plaintiffs from having a source of recovery.

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.”¹⁰ A motion pursuant to CPLR 3211 (a)(7) will fail if, taking all facts alleged as true, and according them every favorable inference, the complaint states in some recognizable form a cause of action known to our law.¹¹

With respect to a claim under the doctrine of piercing the corporate veil, allegations to hold a principal of a corporation liable, a simple allegation that an individual dominates a corporation is inadequate, since this could be said about virtually any single-person corporation. The party seeking to pierce the corporate veil must also establish “that the owners, through their

⁸ *Sloane v. Costco Wholesale Corporation*, 49 A.D.3d 552 (2d Dept.2008).

⁹ *Welch v. Hauck*, 18 A.D.3d 1098 (3d Dept.2005).

¹⁰ *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703—704 (2d Dept. 2008).

¹¹ *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 (2d Dept. 2006).

domination, abused the privilege of doing business in the Corporate form.”¹² Factors to be considered in determining whether or not there has been such abuse include whether there was a “failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.”¹³

In circumstances in which the complaint alleged that the principal of the corporation exercised “bad faith” in negotiating a replacement contract for the supervision of construction work, and that he was the only point of contact with whom the school district negotiated, this was insufficient to state a cause of action to justify piercing of the corporate veil.¹⁴

In this case, however, the failure to produce any corporate records for the party defendants, the inability to differentiate in any meaningful way that the entities were operated separate and apart from one another, and the rather clear import of the testimony of defendant Hershco to the effect that funds from multiple entities were intermingled, without any distinction between or among corporate or limited liability company entities. Whether or not the conduct was such as to constitute a conspiracy to defraud plaintiff, or to warrant the breach of the corporate veil, are factual questions which preclude the grant of summary judgment in favor of the moving defendants.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: March 21, 2011

ENTERED *J. Barshaw*
J.S.C.

MAR 23 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

¹² *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993).

¹³ *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016—1017 (2d Dept. 2007).

¹⁴ *East Hampton Union Free School District v. Sandpebble Builders, Inc.*, 2009 WL 2245755 (2d Dept. 2009).