

Commissioner of the State Ins. Fund v Grosman

2011 NY Slip Op 31282(U)

May 10, 2011

Sup Ct, NY County

Docket Number: 400287/10

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

THE COMMISSIONER OF THE STATE
INSURANCE FUND,

Plaintiff,

-v-

FAINA GROSMAN a/k/a FAY GROSMAN, et al.,
Defendants.

INDEX No. 400287/10

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL NO. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1+4

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED

MAY 16 2011

Dated: May 11, 2011

NEW YORK
COUNTY CLERK'S OFFICE
Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
THE COMMISSIONERS OF THE STATE
INSURANCE FUND,

Plaintiff,

Index No.: 400287/10
DECISION/ORDER

-against-

FAINA GROSMAN a/k/a FAY GROSMAN, PAUL
GROSMAN and POWERS BRIDGING &
SCAFFOLDING, INC.,

Defendants,

FILED

MAY 16 2011

-and-

BRIDGEWORKS OF GREATER NEW YORK, INC.,
Judgment Debtor.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. DONNA MILLS, J.S.C.:

In this action on a judgment, two of the defendants move to dismiss the amended complaint as against them (motion sequence number 004). For the following reasons, this motion is granted in part and denied in part.

BACKGROUND

On April 24, 2009, the plaintiff Commissioners of the State Insurance Fund (plaintiff) obtained a judgment (the judgment) against the judgment debtor herein, Bridgeworks of Greater New York, Inc. (Bridgeworks), in an action that it had commenced in this court on July 24, 2001 under Index No. 405408/01 (the underlying action). *See* Notice of Motion, Mosscrop Affirmation, ¶¶ 3-5; Exhibit E. Thereafter, plaintiff commenced this current action against co-defendants Faina Grosman a/k/a Fay Grosman (Faina Grosman) and Paul Grosman (Paul Grosman). *Id.*, ¶ 6; Exhibit A. Paul Grosman is the sole owner and sharcholder of Bridgeworks.

Id., ¶ 7; Exhibit C. Faina Grosman, his wife, is the sole owner and shareholder of co-defendant Powers Bridging & Scaffolding, Inc. (Powers). *Id.*, ¶ 8; Exhibit D.

Plaintiff alleges that Paul and Faina Grosman (hereinafter “the Grosman defendants”) incorporated Powers on August 17, 2001, after plaintiff had commenced the underlying action, and that they thereafter transferred all of Bridgeworks’s assets, employees, property and business to Powers. *See* Notice of Motion, Exhibit A, ¶¶ 11-14. Plaintiff further alleges that the Grosman defendants did this in order to render Bridgeworks insolvent and unable to satisfy the judgment that plaintiffs eventually obtained against Bridgeworks. *Id.*, ¶¶ 15-23.

Plaintiff initially commenced this action on February 2, 2010, and the Grosman defendants moved to dismiss. *See* Notice of Motion, Mossdrop Affirmation, ¶ 6. Thereafter, on May 18, 2010, the parties executed a stipulation (the stipulation) permitting plaintiff to amend its complaint, and extending defendants’ time to answer. *Id.*; Exhibit B. Plaintiff’s amended complaint sets forth four causes of action for what appear to be fraud and/or declaratory relief, and one for violation of Debtor & Creditor Law § 273-a. *Id.*; Exhibit A. Powers filed an answer to the amended complaint on June 9, 2010. *Id.*; Exhibit G. The Grosman defendants now move to dismiss that amended complaint as against themselves (motion sequence number 003).

DISCUSSION

In their motion, the Grosman defendants purport to seek dismissal of the entire amended complaint as against them, pursuant to CPLR 3211 (a) (7). *See* Notice of Motion, Mossdrop Affirmation, ¶ 18. However, as plaintiff correctly notes, the Grosman defendants’ moving papers only set forth argument against the first cause of action in the amended complaint. *See* Gellis Affirmation in Opposition, ¶ 4. The Grosman defendants’ reply papers dispute this claim

and reassert their request to dismiss the entire amended complaint. *See* Mossdrop Reply Affirmation, ¶ 2. However, it is clear that those reply papers, like the original moving papers, only raise arguments that are directed against plaintiff's first cause of action. Therefore, the court may only review the Grosman defendants' dismissal request for plaintiff's second through fifth causes of action pursuant to the governing statute, without the benefit of any additional argument.

With respect to plaintiff's first cause of action, the amended complaint makes the following request:

To achieve equity and fairness the Court should issue an order and judgment determining that defendants are the alter egos of Judgment Debtor and hold defendants liable for the Judgment, plus all accrued interest:

See Notice of Motion, Exhibit A, ¶ 30. The Grosman defendants characterize the foregoing as a cause of action "to pierce the corporate veil," and argue that it must fail because it is composed entirely of "conclusory allegations." *See* Notice of Motion, Mossdrop Affirmation, ¶¶ 15-16. Plaintiff replies that its cause of action is "a corollary of the traditional 'veil piercing'" claim that is adequately substantiated by the allegations of the amended complaint. *See* Memorandum of Law in Opposition to Motion, at 3-6. The Grosman defendants reply that plaintiff's argument is composed of "semantics," and is insufficient "to avoid the strict pleading requirements for ... 'veil piercing' claims." *See* Mossdrop Reply Affirmation, ¶ 8. The court finds that all of these arguments miss the mark.

As the Court of Appeals held in *Morris v New York State Dept. of Taxation and Fin.* (82 NY2d 135, 141 [1993]), "an attempt of a third party to pierce the corporate veil does *not* constitute a cause of action independent of that against the corporation; rather it is an assertion of

facts and circumstances which will persuade the court to impose the corporate obligation on its owners [emphasis added].” Rather, the Court described “piercing the corporate veil” as a “doctrine ... typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation.” *Id.*, at 140-141. Thus, the Grosman defendants are incorrect to characterize plaintiff’s first cause of action as one for “piercing the corporate veil,” and plaintiff is incorrect to characterize that cause of action as a “corollary” to the doctrine. New York law simply does not recognize the doctrine of “piercing the corporate veil” as an independent cause of action. Therefore, the court rejects both parties’ arguments as irrelevant. That does not end the inquiry, however.

When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211 (a), the test “is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained.” *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any “cognizable legal theory.” *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 (2001). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. *See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V.*, 258 AD2d 349 (1st Dept 1999); *Caniglia v Chicago Tribune-New York News Syndicate*,

Inc., 204 AD2d 233 (1st Dept 1994).

Here, plaintiff's stated purpose in this action is to enforce a money judgment - a cause of action that is governed by the procedural rules set forth in CPLR Article 52 and the 20-year statute of limitations set forth in CPLR § 211 (b). In *Commissioners of State Ins. Fund v Ramos* (38 AD3d 445, 445 [1st Dept 2007]), the Appellate Division, First Department defined "legally cognizable claims" for the enforcement of a money judgment by the criteria set forth in its earlier decision in *Chase Manhattan Bank (Nat. Assn.) v 264 Water Street Assocs.* (174 AD2d 504, 505 [1st Dept 1991]) which held that:

[The] plaintiff alleged ... that the individual defendant dominated and controlled the corporation and caused the corporation to make fraudulent conveyances [internal citations omitted].

The Court further noted that:

A court may pierce the corporate veil to reach the controlling parent, shareholder or director, upon a showing that said party exercised complete domination in respect to the transaction attacked so that the subsidiary had at the time no separate will of its own.

Id. Here, in its first cause of action, plaintiff alleges that:

Paul [Grosman] used his domination and control over [Bridgeworks] and Paul and [Faina] Grosman used their domination and control over Powers, to cause Powers to receive the Transfers and continue [Bridgeworks's] business, without interruption.

Paul used his domination and control over [Bridgeworks], and Paul and [Faina] Grosman used their domination and control over Powers, to cause [Bridgeworks's] business to continue under Powers, without [Bridgeworks's] debts.

Paul and [Faina] Grosman used their domination and control over Powers to deceive [plaintiff] and other creditors into believing that Paul did not have any control over Powers' business operations by making [Faina] Grosman, Powers' president and sole shareholder.

See Notice of Motion, Exhibit A, ¶ 25-27. Plaintiff appears to have confused its first cause of action (i.e., recovery of a money judgment) with its theory of liability (i.e., piercing the corporate veil/alter ego liability). However, the court finds that the statements set forth in the amended complaint clearly allege the “individual domination and control of a corporation” that was specified by the Appellate Division, First Department as a prerequisite to a plaintiff’s invocation of the “piercing the corporate veil” doctrine. The court further finds that, despite the Grosman defendants’ protestations, the foregoing statements clearly include allegations of individual action by both Paul and Faina Grosman, and do *not* refer only to Bridgeworks. Thus, the court concludes that plaintiff’s allegations make out a cause of action to hold defendants herein liable for the money judgment against Bridgeworks on a theory of alter ego liability. Therefore, the court finds that the Grosman defendants’ motion should be granted, but that plaintiff should be permitted to replead its first cause of action properly.

In its second cause of action, plaintiff alleges that:

There is a continuity of ownership between [Bridgeworks] and Powers.
[Bridgeworks] ceased its ordinary business operations at or about the time that Powers began operations and received the Transfers.
Powers assumed [Bridgeworks’s] liabilities necessary for the uninterrupted continuation of the business formerly conducted by [Bridgeworks] and now conducted by Powers.

Powers had a continuity of ownership, management, personnel, physical location, assets, and general business operation with [Bridgeworks] when it succeeded [Bridgeworks].

See Notice of Motion, Exhibit A, ¶ 35-38. Plaintiff concludes that “the court should issue an order and judgment determining that there was a de facto merger between [Bridgeworks] and Powers, and hold Powers liable for the Judgment.” *Id.*, ¶ 39. As with its first cause of action, plaintiff appears to confuse its second cause of action (also for the recovery of a money

judgment) with its theory of liability (the de facto merger doctrine). In *Holme v Global Minerals and Metals Corp.* (22 Misc 3d 1123(A), *5-6, 2009 NY Slip Op 50252 (u) [Sup Ct, NY County 2009], *affd* 63 AD3d 417 [1st Dept 2009]), this court (Lowe, J.), observed that:

The de facto merger doctrine is an exception to the general rule that an acquiring corporation does not automatically become responsible for the pre-existing liabilities of the acquired corporation. The factors indicating a de facto merger are: (i) continuity of ownership; (ii) cessation of ordinary business and dissolution of the acquired corporation; (iii) assumption by the successor of the liabilities for the continuation of the business of the acquired corporation; and (iv) continuity of management, personnel, physical location, assets and general business operation.

[T]he de facto merger doctrine is rooted in equity, and has the purpose of avoiding “patent injustice which might befall a party simply because a merger has been called something else.”

Thus, New York courts agree that a “corporation that acquires the assets of another ... may be held liable for the torts of its predecessor if ... the transaction is entered into fraudulently to escape such obligations [internal citations omitted].”

Here, plaintiff has clearly recited all of the allegations necessary to invoke the de facto merger doctrine. It may further be reasonably implied from the pleadings that: 1) the Grosman defendants were individually responsible for improperly transferring Bridgeworks’ assets to Powers; and 2) that plaintiff wishes to invoke the de facto merger doctrine to support a claim that said transfers were fraudulent, and should not absolve all of the defendants herein from liability for the judgment against Bridgeworks. Thus, the court concludes that plaintiff has adequately pled a cause of action to hold defendants herein liable for the money judgment against Bridgeworks on the grounds of fraudulent conveyance. Therefore, the court finds that the Grosman defendants’ motion should be granted, but that plaintiff should be permitted to replead its second cause of action properly.

Plaintiff's third cause of action states that:

Powers is merely a new form for [Bridgeworks], without a change in substance.

Powers is a mere continuation of [Bridgeworks].

To achieve equity and fairness the Court should issue an order and judgment determining that Powers is a mere continuation of [Bridgeworks], that Powers is the successor entity to [Bridgeworks] and hold Powers liable for the Judgment..

See Notice of Motion, Exhibit A, ¶¶ 41-43. Plaintiff's fourth cause of action states that:

The Transfers were made to avoid paying [Bridgeworks's] debts to [plaintiff].

The transactions between [Bridgeworks] and Powers were entered into fraudulently to allow Powers to escape [Bridgeworks's] liabilities to [plaintiff].

To achieve equity and fairness the Court should issue an order and judgment determining that Powers is liable for [Bridgeworks's] debts, that Powers is the successor entity to [Bridgeworks] and hold Powers liable for the Judgment..

Id., ¶¶ 45-47. Both of these claims appear to invoke elements of the "piercing the corporate veil" and de facto merger doctrines, which are the rationales underlying plaintiff's first and second causes of action. However, because neither party offers any argument directed at these two claims, it is impossible to determine whether plaintiff merely intended to restate those claims, or whether plaintiff wished to assert other theories of liability to support its claim on the judgment, or whether plaintiff even sought to raise claims for declaratory relief. Under these circumstances, the court believes that the only available course of action is to grant the Grosman defendants' motion to dismiss, but permit plaintiff to replead its third and fourth causes of action with a good deal more clarity.

Plaintiff's fifth cause of action pleads that the Grosman defendants violated Debtor and Creditor Law § 273-a. *See* Notice of Motion, Exhibit A; ¶¶ 48-56. That statute provides that:

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.

Here, the amended complaint specifically alleges that:

The Transfers took place during the pendency of the Underlying Action.
 The Transfers were not made for fair consideration.
 The Transfers were not made in good faith.
 The Judgment is unsatisfied.
 The Transfers allowed Paul and [Faina] Grosman to maintain control and use of [Bridgeworks's] assets.
 Paul and [Faina] Grosman, under the guise of Powers, are the beneficial transferees of the Transfers and [Bridgeworks's] assets.

See Notice of Motion, Exhibit A, ¶¶ 49-55. These allegations clearly satisfy the statute's criteria regarding de facto fraudulent transfers (i.e., those consummated "without regard to the actual intent of the defendant"). With respect to the ancillary issue of "intent to defraud," plaintiff cites the decision of the Appellate Division, Second Department, in *Dempster v Overview Equities, Inc.* (4 AD3d 495, 498 [2 Dept 2004]), wherein the Court held that:

Direct evidence of fraudulent intent is often elusive. Therefore, courts will consider 'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent." Badges of fraud include (1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance [internal citations omitted].

Plaintiff then argues that such "badges of fraud" exist herein because the Grosman defendants are married, and because "courts view with great suspicion intra-family transfers, including those between a husband and wife." See Memorandum of Law in Opposition to Motion, at 8-9. The Grosman defendants did not reply to any of plaintiff's arguments. However, whether plaintiff's claim is based on a theory of de facto fraudulent transfer or upon the theory that the Grosman

defendants had fraudulent intent, the court finds that plaintiff's allegations are sufficient to make out a violation of Debtor and Creditor Law § 273-a. Therefore, the court finds that the Grosman defendants motion should be denied with respect to plaintiff's fifth cause of action.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of defendants Faina Grosman a/k/a Fay Grosman and Paul Grosman is granted solely to the extent that the first, second, third and fourth causes of action in the amended complaint herein are dismissed, but is denied as to the fifth cause of action in said amended complaint; and it is further

ORDERED that plaintiff is granted leave to serve an amended complaint so as to replead the first, second, third and fourth causes of action within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.


Dated: New York, New York
May 10, 2011

ENTER:

FILED

MAY 16 2011

NEW YORK
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Hon. Donna Mills, J.S.C.