

**Broadway 26 Waterview, L.L.C. v Bainton McCarthy
& Siegel, L.L.C.**

2011 NY Slip Op 31659(U)

June 15, 2011

Supreme Court, New York County

Docket Number: 602318/2009

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 55

Broadway 26 Waterview, LLC

INDEX NO. 602318/09

MOTION DATE _____

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

- v -
Bainton McCarthy & Siegel

The following papers, numbered 1 to _____ were read on this motion to/for Amend Caption & Complaint

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

PAPERS NUMBERED	
1-3	_____
4	_____
5-6	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order.

NB 7/25/11 at 11th
conference part at end

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JUN 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

(Handwritten initials)

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Dated: 6/15/11

(Signature)
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

6/16/11 ee

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
BROADWAY 26 WATERVIEW, L.L.C.,

Index No. 602318/2009

Plaintiff,

DECISION & ORDER

-against-

BAINTON MCCARTHY & SIEGEL, L.L.C.,

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Defendant.

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SOLOMON, J.:

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Plaintiff Broadway 26 Waterview, L.L.C. (Plaintiff) moves by order to show cause for leave to amend its complaint to add new causes of action and additional defendants. Defendant, Bainton McCarthy, LLC s/h/a Bainton McCarthy & Siegel, LLC¹ (Defendant), a law firm appearing pro se by its former partners John McCarthy (McCarthy), J. Joseph Bainton and John Lee (collectively, the Partners), opposes.

Plaintiff is the landlord of 26 Broadway in lower Manhattan. Defendant was its 24th floor tenant pursuant to a lease made on April 12, 2001 and expiring on October 31, 2011 (Lease, attached to Itkowitz Affirmation, Ex. 2). On February 1, 2009, Defendant vacated its premises and ceased paying rent. This action was commenced on July 20, 2009 for rent arrears of \$104,750.88 plus attorneys' fees.

During discovery Plaintiff learned that: Defendant,

¹ Defendant's name was changed when Mr. Siegal left the firm (McCarthy deposition, attached to Itkowitz Affirmation, Ex. 6, p. 5).

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then a ten attorney law firm with offices in New York and Connecticut, had been struggling. The Partners were approached by a headhunter for Smith Gambrell & Russell (Smith Gambrell), a two hundred attorney firm. The Partners joined Smith Gambrell, taking most of their clients with them, and in December 2008, Defendant closed its New York practice.² Moreover, Plaintiff's bill to Defendant for the use of the building's freight elevator during the removal of furniture from the premises was paid by Smith Gambrell--because it had purchased the items from Defendant.

From this, Plaintiff alleges that the Partners became owners or equity partners of Smith Gambrell, so that a continuity of ownership exists, making Smith Gambrell the successor tenant, and seeks to amend the complaint accordingly.

In opposition, Defendant supplies McCarthy's affidavit, stating that the Partners did not receive any ownership interest in Smith Gambrell in 2008 (and only Mr. Bainton received an interest in 2011), and that Defendant still exists; under his supervision, it is winding up its affairs (McCarthy Affidavit, ¶32).

The Proposed Amended Complaint, (attached to Itkowitz Affirmation, Ex. 1) first adds the Partners, individually, and

²Its three attorney Connecticut practice continued until January 2009 (McCarthy Affidavit, p. 3 fn. 1)

[*4]

Smith Gambrell as defendants, and increases the *ad damnum* to the rent due through January 2011; it then adds claims for piercing the corporate veil, successor liability, conspiracy, various violations of the Debtor and Creditor Law (DCL) §§ 271, 272, 275, 276 and 276-a, and punitive damages.

Defendant counters that: the Partners were members of Defendant, did not guarantee the lease to which the firm was the only signatory, and they are not all members of Smith Gambrell; Plaintiff's attempt to pierce the corporate veil is without merit because the new facts do not constitute fraud or malfeasance; the DCL fraudulent conveyance claims lack specificity and are untrue; the claim for successor liability fails because there is no continuity of ownership or management; and punitive damages are inappropriate.

DISCUSSION

Although leave to amend a pleading should be "freely" granted (CPLR 3025[b]), the motion must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment (*American Theatre for Performing Arts, Inc. v. Consolidated Credit Corp.*, 45 AD3d 506 [1st Dept., 2007], citing *Nab-Tern Constructors v. City of New York (Yankee Stadium)*, 123 AD2d 571, 573, [1st Dept., 1986]).

The thrust of the amended complaint is based on allegations that the Partners "merged and transferred

[Defendant's] entire law practice and business, including its assets and liabilities, client lists, etc., with [Smith Gambrell] continuing to operate the same law practice, including servicing [Defendant's] clients, from the same Premises" (Proposed Amended Complaint, ¶ 11). In order to pierce the corporate veil, Plaintiff bears "a heavy burden of showing that the [company] was dominated [by the owners] as to the transaction attacked and that such domination ... resulted in wrongful ... consequences" (*Matias ex rel. Palma v. Mondo Properties LLC*, 43 AD3d 367, [1st Dept., 2007][internal quotation marks omitted]).

Based on McCarthy's deposition testimony, Plaintiff seeks to attach liability to the Partners, who are otherwise exempt from personal responsibility for the obligations of the LLC (Limited Liability Company Law §609[a]; *Collins v. E-Magine, LLC*, 291 AD2d 350, 351 [1st Dept., 2002]), and to Smith Gambrell. Both parties refer to McCarthy's deposition testimony (attached to Itkowitz Affirmation, Ex. 6), that he became a partner in Smith Gambrell's New York office in December 2008 (*Id.*, p. 5); that three Bainton McCarthy partners were hired by Smith Gambrell (*Id.*, p. 9); and, that he was working for Smith Gambrell out of 26 Broadway for approximately six weeks (*Id.*, p. 18). This is a flimsy basis for the new claims. Moreover, McCarthy also testified that he maintains Defendant's business records on a computer, which only the Partners can access, in his new office,

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and that he uses the data to collect Defendant's accounts receivable (*Id.*, p. 11). He issues invoices which are payable at a post office box maintained for that purpose. That Smith Gambrell permits this conduct does not make it liable to Plaintiff.

The proposed amended complaint reflects overreaching. In the aggregate, McCarthy's statements do not support Plaintiff's successor and DCL claims. The evidence that Defendant is winding up, keeps separate books, is collecting its open accounts, and has not transferred receivables or other assets to Smith Gambrell shows that it remains a separate entity trying to satisfy its creditors, and that McCarthy is maintaining its integrity. Finally, New York does not recognize a cause of action for civil conspiracy (*Jebran v. LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [1st Dept., 2006]), and there is no basis for punitive damages under the facts here.

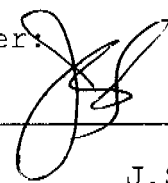
The branch of the motion to increase the damages to the amount due when the motion was made is granted, as set forth below.

Accordingly, it is

ORDERED that the motion to amend the complaint is granted insofar as the first cause of action of the complaint is amended to reflect the amount due as proved at trial, and is otherwise denied; and it further is

ORDERED that counsel for the parties are directed to appear for a compliance conference at Part 55, 60 Centre Street, Room 432, on July 25, 2011 at 11:00 A.M.

Dated: June ¹⁵/₁₅, 2011

Enter: 

J.S.C.

JANE S. SOLOMON

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