

905 5th Assoc., Inc. v 907 Corp.

2011 NY Slip Op 31801(U)

June 24, 2011

Sup Ct, New York County

Docket Number: 100662/2006

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

905 5th Associates, Inc. and
Pamela Lipkin, M.D.,
Plaintiffs,

INDEX NO. 100662/2006

MOTION DATE _____

- against -

MOTION SEQ. NO. 021

907 Corporation, Richard and Liane
Weintraub, Brown Harris Stevens
Residential Management, LLC, My Home
Remodeling, Inc., RDM Renovation
Corp., Rick Kramer and My Home LLC,

FILED

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Defendants.

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The following papers were read on these motions and cross motions for summary judgment, pursuant to CPLR 3212.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits (Memo) _____	_____
Replying Affidavits (Reply Memo) _____	_____

Cross-Motion: Yes No

Motion sequence numbers 021 and 023 are hereby consolidated for purposes of disposition.

My Home Remodeling, Inc. (My Home) moves for summary judgment dismissing Richard Weintraub's (Richard) and Liane Weintraub's (Liane) (together, the Weintraubs) cross claims against it and for an order limiting plaintiffs' damages by granting it an offset for insurance proceeds (the Insurance Proceeds,) in the amount of \$531,665.68, received by Pamela Lipkin (Lipkin) from National Fire Insurance Company of Hartford (National Fire).

Rick Kramer (Kramer) moves for summary judgment dismissing the cross claims

asserted against him by My Home LLC (LLC). RDM Renovation Corp. (RDM) cross-moves for summary judgment limiting plaintiffs' damages by granting it a credit for the Insurance Proceeds. The Weintraubs cross-move for an order that would determine that My Home and LLC are one legal entity.

Background

Lipkin is the sole shareholder of 905 5th Associates, Inc. She is a doctor whose practice is in a building (the Building) located at 905 5th Avenue, New York, Apartment 1-C (the Office). The Weintraubs live in the building, Apartment 2-E (the Upstairs Apartment), located directly above the Office. The Weintraubs hired My Home as the general contractor to perform renovation (the Renovation) in the Upstairs Apartment. They hired Kramer as the architect for the Renovation and hired RDM to perform demolition work as part of the Renovation. Plaintiffs allege that construction debris from the Renovation caused damage to the Office.

March 2010 Order and August 2010 Order

This Court, by order dated March 30, 2010 (the March 2010 Order), dismissed plaintiffs' first cause of action for an injunction against all defendants, dismissed the complaint against Liane, dismissed the second, third, fourth and fifth causes of action against Richard and limited damages against him to property damages and directed that they be setoff by the insurance proceeds that Lipkin had received (March 2010 Order at 10). It also dismissed the complaint and any cross-claims against Kramer (*id.* at 10). The parties' contentions are set forth in detail in the March 2010 Order (*id.* at 3-5) and, consequently, need not be repeated. The Court dismissed the negligence causes of action against Kramer finding that, while he had been present at the Upstairs Apartment, he had no specific authority over My Home (*id.* at 7). It also dismissed the architectural malpractice claims against Kramer, finding that Kramer's duty ran to the Weintraubs and that, in the absence of any significant relationship with Lipkin, malpractice

claims against Kramer did not lie (*id.* at 7-8).

This Court, by order dated August 12, 2010 (the August 2010 Order), granted Kramer's motion for summary judgment dismissing My Home's cross claims against him.

Insurance Proceeds

Lipkin received the Insurance Proceeds from National Fire for damage to the Office (March 2010 Order at 9), and the Court, therefore, granted Richard a credit against plaintiffs' damages in the amount of the Insurance Proceeds, so as to avoid a double recovery. This same reasoning applies to plaintiffs' claims against My Home and RDM. Accordingly, the portion of My Home's motion for an order offsetting any damages awarded to the plaintiffs by the amount paid to plaintiffs by National Fire and RDM's cross motion for the same relief are granted.

Architect's Liability

The Court dismissed plaintiffs' claims against Kramer, finding that Kramer had no authority over My Home and was therefore not liable, either in negligence or architectural malpractice (March 2010 Order at 7-8). The Court dismissed My Home's cross claims against Kramer, finding that My Home could not sustain claims of contribution, contractual indemnity or common-law indemnity (August 2010 Order at 2-3). LLC has raised the same claims of contribution, contractual and common-law indemnity against Kramer, but the lack of contractual privity and active wrongdoing bars LLC's cross claims (*id.* at 2-3). Consequently, Kramer's motion to dismiss LLC's cross claims against him is granted.

Piercing the Corporate Veil

The Weintraubs' cross motion, denominated as a motion for a declaration that My Home and LLC are one entity, is a motion for summary judgment, since it seeks to determine as a matter of law that the separation between My Home and LLC, as well as other entities which are

not parties, should be disregarded (Cuomo affirmation, ¶ 26). They assert that there are overlapping officers, overlapping business offices, communications which do not differentiate between My Home and LLC, all of which purportedly shows that they "are undoubtedly dominated and controlled by the same principals and operated without regard to any separate corporate form" (*id.*, ¶ 21).

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-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]). A party seeking to disregard corporate separateness must show more than mere domination of a corporation. Rather, it must show that "the owners, through their domination, abused the privilege of doing business in the corporate form" (*Morris*, 82 NY2d at 142; *see also*, *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775 [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]).

The Weintraubs' conclusory assertions that My Home and LLC are "undoubtedly dominated and controlled by the same principals" is insufficient to meet the "heavy burden" required to determine that corporate separateness should be disregarded (*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]). The relationship between My Home and LLC is "fact-laden" (*First Capital*, 300 AD2d at 117) and the Weintraubs' cross motion is, therefore, denied. The portion of My Home's motion that seeks dismissal of the Weintraubs' cross claims against it for indemnification is intertwined with the relationship between My Home and LLC and it is also denied.

Moreover, My Home previously sought summary judgment dismissing the Weintraubs' cross claims against it and this court denied this application. Denial of My Home's cross motion for summary judgment dismissing the Weintraubs' cross claims was affirmed by the Appellate Division, First Department, *905 5th Assoc., Inc. v 907 Corp.*, 47 AD3d 401, 402-403 [2008].

Conclusion

Accordingly it is,

ORDERED that the portion of My Home Remodeling, Inc.'s motion that seeks summary judgment dismissing Richard Weintraub's and Liane Weintraub's cross claims against it is denied; and it is further,

ORDERED that the portion of My Home Remodeling, Inc.'s motion that seeks a set-off of any damages awarded to plaintiffs in the amount of \$531,665.68 is granted; and it is further,

ORDERED that Rick Kramer's motion for summary judgment dismissing My Home LLC's cross claims is granted; and it is further,

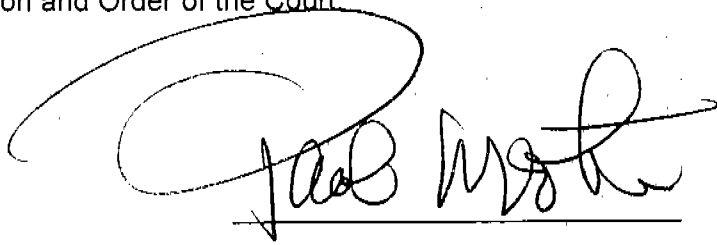
ORDERED that the Clerk is directed to enter judgment accordingly, sever and dismiss

said cross claims; and it is further,

ORDERED that RDM Renovation Corp.'s cross motion for an order seeking a set-off of any damages awarded to plaintiffs in the amount of \$531,665.68 is granted; and it is further,

ORDERED that Richard Weintraub's and Liane Weintraub's cross motion is denied.

This constitutes the Decision and Order of the Court



Dated: June 24, 2011

Paul Wooten J.S.C.

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