Ultimate Precision Metal Prods., Inc. v GSM LI LLC
2011 NY Slip Op 32281(U)
August 3, 2011
Sup Ct, Suffolk County
Docket Number: 13529/2010
Judge: Peter Fox Cohalan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX # 13529-10
RETURN DATE: **8-24-10**
MOT. SEQ. # **001**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

----------x
ULTIMATE PRECISION METAL PRODUCTS, INC.,

Plaintiff,

-against-

GSM LI LLC, ICA LI LLC, SAF LI LLC, FED LI LLC, and, Long Island Industrial Management LLC,

Defendants.

----------x

CALENDAR DATE: January 19, 2011
MNEMONIC: Mot D.

PLTF'S/PET'S ATTORNEY:
Hill Rivkins, LLP
45 Broadway, Suite 1500
New York, NY 10103

DEFT'S/RESP ATTORNEY:
Phillips Nizer, LLP
600 Old Country Road
Garden City, NY 11530

Upon the following papers numbered 1 to 36 read on this motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1-10; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 11-28; Replying Affidavits and supporting papers 29-35; Other 36; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendants to dismiss the plaintiff's complaint alleging environmental pollution pursuant to CPLR §3211(a)(1) based on a defense founded upon documentary evidence; pursuant to CPLR §3211 (a)(5) because of judicial or equitable estoppel and pursuant to CPLR §3211(a)(7) for failure to state a cause of action upon which relief can be granted is denied as to the first (1st) cause of action asserting breach of contract indemnification and the second (2nd) cause of action asserting negligent representation but granted as to the third (3rd) cause of action asserting alter ego liability or piercing of the corporate veil.

The plaintiff, Ultimate Precision Metal Products, Inc. (hereinafter Ultimate), instituted this action against the defendants for breach of contract, negligent misrepresentation and alter ego liability among the various defendants arising from an alleged claim of pre-existing environmental pollution at the plaintiff's leased premises at 200 Finn Court in Farmingdale, Suffolk County on Long Island, New York. Ultimate is in the business of sheet metal manufacturing and entered into a lease for the aforementioned commercial premises on February 1, 1996 for its business which covers approximately 68,300 square feet. Ultimate took the premises "as is." It is undisputed that there was the possibility of pre-existing contamination by a prior tenant, Lincoln Graphic Arts (hereinafter Lincoln), and the parties as part of the negotiated lease agreed to an alleged time sensitive process (as claimed by defendants) to investigate the contamination at the premises and to establish a baseline for the presence of hazardous materials. Thus, certain provisions were added to the lease in dealing with pre-lease contamination and the rights accruing to each side.

The defendants are the owners and/or landlords having a possessory interest in the premises in this lawsuit which was originally leased by Ultimate from the then owner, Jerry

Lazarus Management Co., on February 1, 1996. Since that time the property has undergone a number of transfers through certain real estate investment trusts to the present owners/landlord presently represented as the named defendants. In June 2005, the Suffolk County Department of Health Services and the Suffolk County District Attorney's Office conducted a joint investigation after a routine inspection of the premises indicated hazardous materials were present. A subsequent criminal action was instituted against Ultimate under Indictment # I-2634-07A alleging hazardous materials were discharged into the environment which resulted in a plea of guilty from Ultimate to disorderly conduct and a civil forfeiture order of $100,000.00, dated June 1, 2007. Ultimate claims that its consent to the plea agreement and forfeiture order was a business decision because the scientific evidence exonerated it as the source of the contamination but its business model was suffering from the continued criminal investigations and therefore a plea agreement was entered into but without an admission of guilt. However, the defendants claim the guilty plea should effect a judicial estoppel to this lawsuit as Ultimate's lawsuit seeks to assert the defendants' liability for the contamination contrary to Ultimate's plea of guilty. Ultimate claims it never admitted as part of its plea that it discharged hazardous waste on the premises and an environmental review, prior historical documents and testing of the hazardous materials undertaken by Ultimate show the contamination contained chemicals clearly resulting from discharges by the prior tenant, Lincoln. Ultimate has submitted documented evidence which record releases into the groundwater by Lincoln as well as chemicals inconsistent with Ultimate's business operation and, more likely, attributable to petroleum products from the asphalt parking lot or automotive related sources.

As a result of these investigations and findings, Ultimate was called upon to conduct, inter alia, remedial measures as a result of the ground contamination and it proceeded to institute this lawsuit seeking damages amounting to $531,634.82 and indemnification of the costs associated with the contamination, negligent representation by the defendants of the true state of the premises, i.e. defendants knew or should have known the true condition of the premises, and seeking to pierce the defendants' corporate structure and impose liability for Ultimate's damages on the principals behind said corporate structure. Thereafter, Ultimate served its summons and verified complaint, dated April 6, 2010, and the defendants pursuant to CPLR §3211 filed a pre-answer motion to dismiss Ultimate's cause of action.

For the following reasons, the defendants' motion pursuant to CPLR §3211 (a) (1) and CPLR §3211 (a) (5) and CPLR §3211 (a) (7) to dismiss Ultimate's complaint is denied as to the first (1st) and second (2nd) causes of action and is granted as to the third (3rd) cause of action.

As Professor David Siegel in New York Practice §258 has noted:

> "CPLR 3211 merely supplies the procedural expedient for bringing to the court's attention a ground that supports an early dismissal of a cause of action or defense. The merits of the particular ground, and whether it supports the dismissal sought, may involve a vast realm of law, substantive or procedural or both."

Thus, the Court when considering a pre-answer motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 must afford the complaint a liberal construction, accept the facts contained therein as true, accord to the plaintiff the benefit of every possible favorable inference and merely determine whether the facts alleged raise a cognizable legal theory

upon which a recovery may occur. ***Goldfarb v. Schwartz***, 26 AD3d 462, 811 NYS2d 414 (2nd Dept. 2006). A dismissal is warranted only if the documentary evidence submitted in support of the motion by the defendants conclusively establishes a defense to the asserted claims as a matter of law. ***511 W. 232nd Owners Corp. v. Junnifer Realty Co.***, 98 NY2d 144, 746 NYS2d 131 (2002). The documentary evidence must be so compelling and conclusive that it resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim. ***Mazur Bros. Realty LLC v. State of New York***, 59 AD3d 401, 873 NYS2d 326 (2nd Dept. 2009); ***Weston v. Cornell University***, 56 AD3d 1074, 868 NYS2d 364 (3rd Dept. 2008); ***Berger v. Temple Beth-EL of Great Neck***, 303 AD2d 346, 756 NYS2d 94 (2nd Dept. 2003).

Here, in the case at bar, the defendants argue that the lease established a baseline time frame for contamination occurring prior to the lease to Ultimate and contamination occurring after the lease to Ultimate wherein Ultimate bore the responsibility for all contaminations, raising the issue that failure to abide by or request from the landlord an environmental study after 75 days as provided in the lease under paragraph 51 (d) (iv) resulted in a waiver and Ultimate assuming liability for all contamination thereafter, both pre-lease and post-lease. The Court disagrees. Ultimate argues that there was acknowledgment by both the tenant (Ultimate) and the landlord that a prior tenant, Lincoln, might be the source of groundwater contamination due to unauthorized discharge of hazardous material and therefore certain provisions were included in the lease in recognition of that fact. In the lease paragraph 79 (a) between the parties, it provided, inter alia,

> "As an additional inducement to the tenant to enter into this lease, the landlord agrees to contract and pay for at the landlord's sole expense, a phase I environmental assessment of the entire premises of which the demised premises forms a part. The assessment will be conducted by a licensed environmental engineering firm. The tenant will be supplied with a complete copy of the phase I assessment no later than 75 days from the date of the execution of the lease. In the event, that the tenant is not supplied with a complete copy of the Phase I assessment within 75 days of the date of the lease, the tenant *may cause* to be conducted a Phase I assessment by a licensed environmental engineering firm of the tenant's own choosing, but at the expense of the landlord." (emphasis added)

Nowhere within the lease itself or in this particular provision is there the establishment of a baseline, as argued by the defendants, or an agreement that a prior environmental contamination by the prior tenant, Lincoln, is waived if neither party sought an environmental review. The defendants claim that the lease contains reference to a post-lease commencement process in performance of an environmental study and the defendants' failure to perform such environmental study operates as a waiver of the general provisions in the lease protecting Ultimate from pre-lease contamination by a prior tenant is misplaced as the lease provisions refer to general indemnification to Ultimate in the event of discovery of a pre-lease contamination.

The defendants also contend that the intent of the parties was to establish a "finite" point after the lease for which Ultimate would then be responsible for an environmental spill, a fact disputed by Ultimate. This question of a baseline is not addressed anywhere in the lease nor does the lease's language suggest a baseline, finite time frame or starting point at which the defendants' liability for a pre-contamination spill would end or thereafter be unenforceable. The question of the intent of the parties herein, especially when raised in the context where the terms of a contract or lease are susceptible of more than one meaning, requires denial of a motion to dismiss under CPLR §3211 as the evidence presented does not conclusively establish and resolve all factual claims as a matter of law. ***Fontanetta v. John Doe 1***, 73 AD3 78, 898 NYS2 569 (2nd Dept. 2010). It requires resolution by the trier of fact. ***Galvan v. 9519 Third Avenue Restaurant Corp.***, 74 AD3d 743, 901 NYS2d 529 (2nd Dept. 2010).

Further, Ultimate points out that two provisions within the lease refer to a contrary conclusion and it points to §51(d)(iv), a general indemnification clause, which states:

> "Landlord shall indemnify, defend and hold harmless tenant from any and all claims, judgments, damage, penalty, fines, costs, liabilities, or losses which arise due to contamination or discharge on the property or demised premises which occurred prior to the date hereof."

and §79(d) recognizes the possibility of a contamination discharge by a prior tenant, Lincoln. It states in pertinent part:

> "Landlord hereby agrees to indemnify and hold harmless the tenant... directly or indirectly arising out of the use, generation, storage or disposal of Hazardous Materials by the landlord *or any prior owner or operator of the premises (including Lincoln Graphic Arts)* ; and (ii) including, without limitation, the cost of any required or necessary repair, cleanup, or detoxification... of Hazardous Materials by any person on the premises at the present time or at any time in the past." (emphasis added)

Ultimate contends its complaint states a cause of action in both breach of the lease and indemnification and negligent representation of the condition of the premises. It argues that an analysis of the contaminating materials found by the Suffolk County Department of Health and its own environmental study points to contaminants consistent with materials and products used by Lincoln and not by Ultimate and it also shows Lincoln's past disposal practices with regularly documented discharges of industrial effluent into various floor drains in the demised premises. Thus Ultimate's lawsuit seeks indemnification for pre-lease contamination by Lincoln from the defendants/landlord.

On a motion to dismiss a complaint for legal insufficiency, the issue is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action known to our law can be discerned from its averments. ***Frank v. DaimlerChrysler Corp.***, 292

AD2d 118, 741 NYS2d 9 (1st Dept. 2002); ***Gruen v. County of Suffolk***, 187 AD2d 560, 590 NYS2d 217 (2nd Dept. 1992); ***Moore v. Johnson***, 147 AD2d 621, 538 NYS2d 28 (2nd Dept. 1989); ***Conroy v. Cadillac Fairview Shopping Center Properties***, 143 AD2d 726, 533 NYS2d 446 (2nd Dept. 1988). Further, the complaint should be liberally construed in plaintiff's favor and the facts alleged in the complaint should be assumed to be true. ***P.T. Bank Central Asai v. ABN Amro Bank N.V.***, 301 AD2d 373, 754 NYS2d 245 (1st Dept. 2003); ***Palazzolo v. Herrick, Feinstein, LLP***, 298 AD2d 372, 751 NYS2d 401 (2nd Dept. 2002); ***Holly v. Pennysaver Corp.***, 98 AD2d 570, 471 NYS2d 611 (2nd Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. ***McGill v. Parker***, 179 AD2d 98, 582 NYS2d 91 (1st Dept. 1992); ***Marini v. D'Atolito***, 162 AD2d 391, 557 NYS2d 45 (1st Dept. 1990). The plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint; however, if the plaintiff does so, the Court may use them to preserve poorly pleaded, but possibly valid claims, ***Rovello v. Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314, (1976).

The Court finds that the complaint sufficiently states the first two (2) causes of action for a breach of the lease between the parties, dated February 1, 1996, and a violation of the indemnification clauses contained within the lease as well as negligent misrepresentation of the pre-lease contamination of the premises so as to withstand a pre-answer motion to dismiss pursuant to CPLR §3211.

The defendants further contend that Ultimate's plea of guilty on June 1, 2007 to a reduced charge of disorderly conduct resulting from the indictment as well as the civil forfeiture order acted as a "judicial estoppel" to this lawsuit in which Ultimate seeks to assert the defendants' liability for the hazardous waste contamination [which defendants contend Ultimate pleaded guilty to] and the subsequent cleanup costs and forfeiture. The defendants argue that CPLR §3211(a) (5) precludes this action by Ultimate. CPLR §3211(a) (5) provides:

> "The cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;"

Ultimate argues there is no "judicial estoppel" provision within the CPLR §3211(a)(5) and while "judicial estoppel" is a viable concept it is recognized not only as separate and distinct from collateral estoppel but requires litigation and is not amenable to a motion to dismiss. Ultimate also claims that the defendants have misread and are applying a "strained interpretation" to the plea agreement as a defense to avoid liability for the hazardous contamination of a prior tenant, Lincoln, which was specifically addressed within the lease provisions and which places the costs on the defendants/landlord for pre-lease contamination.

As to the issue of judicial or equitable estoppel, the Court in ***Kimco of NY v. Devon***, 163 AD2d 573, 558 NYS2d 630 (2nd Dept. 1990) stated:

> "The doctrine of estoppel against inconsistent positions applies to this case. This doctrine precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior

judicial proceeding *(see,* ***Neumann v. Metropolitan Med Group,***, 153 AD2d 888; ***Environmental Concern v. Larchwood Constr. Corp.***, 101 AD2d 591; see also, ***Kasmarski v. Terranova***, 115 AD2d 640).It is to be distinguished from collateral estoppel which assumes a full and fair opportunity to litigate the issue in the prior action (***Kaufman v. Lilly & Co.***, 65 NY2d 449, 455). 'The doctrine rests upon the principle that a litigant "should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise"' ... The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings" (***Environmental Concern v. Larchwood Constr. Corp.***,.....593, supra). Furthermore, this court has held that the doctrine: "will be applied where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his interests have changed" ***Anonymous v. Anonymous***, 137 AD2d 739, 741; see also ***Davis v. Wakelee***, 156 U.S. 680, 689; ***Neumann v. Metropolitan Med Group,***, supra at 889; ***Knight v. Knight***, 31 AD2d 267, 271). The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system' cannot tolerate this "playing fast and loose with the courts"' ***Environmental Concern v. Larchwood Constr. Corp.*** supra, at 594 quoting from ***Scarano v. Central R.R. Co.***, 203 F2d 510, 513."

In ***Kimco of NY v. Devon***, supra, the Court had before it a motion for summary judgment with the presentation of a full and complete record for Court review whereas in the instant case the defendants assert this judicial or equitable estoppel defense in a pre-answer motion to dismiss on an incomplete record. This Court is required to afford Ultimate's complaint a liberal construction, accept the facts contained therein as true and accord the benefit of every favorable inference to it. The Court does not find that the criminal proceeding, the plea of guilty to disorderly conduct or the civil forfeiture penalty imposed in the criminal proceeding rise to the level of the adoption by Ultimate of a contrary position in its pleadings in this case. See, ***Douglas v. Dashevsky***, 62 AD3d 937, 880 NYS2d 667 (2nd Dept. 2009); ***Bono v. Cucinella***, 298 AD2d 483, 748 NYS2d 610 (2nd Dept. 2002).

Here, in the case at bar, Ultimate's pleadings provide over 800 pages of government documented records concerning the history of Lincoln's hazardous material contaminations, sanitary overflows and unpermitted discharges of industrial waste that required remedial remedies and Ultimate alleges that the source of the hazardous waste contamination found

by the Suffolk County Department of Health and the Suffolk County District Attorney's Office resulted from Lincoln's activities, and not its own, thereby requiring pursuant to the lease indemnification by the defendants/landlord. In entering a plea to a fourteen (14) count indictment alleging felony and misdemeanor charges resulting from a discharge of "hazardous waste" contamination, it pleaded guilty to a violation of disorderly conduct on one (1) count in the indictment only and forfeited $100,000.00 of which $50,000.00 allegedly reimbursed the investigation. Ultimate argues this was simply a business decision to resolve this investigation which was affecting its business interests and that there was no confession or admission of guilt or responsibility for the contamination. A review of the plea proceeding indicates no reference to an admission of guilt by Ultimate to contamination or an admission inconsistent with the pleadings presently before this Court, nor does the Court find within the provisions of the civil forfeiture order provided with the settlement agreement an inconsistent position taken by Ultimate in its present pleadings. The settlement at most uses general words of "the forfeiture sum represents the proceeds *and/or substituted proceeds* derived from the activity" [emphasis added] in paragraph nine (9) contained within the indictment. Yet, the language is so drafted as to leave open the initial source of the contamination and nowhere else in the document is there an admission involving ground water contamination. The order does not affirmatively and conclusively apportion or allocate total responsibility on Ultimate for the groundwater contamination. Thus the Court does not at this time find that Ultimate is "playing fast and loose" with the facts within the judicial forum to warrant dismissal of its action on estoppel grounds. ***Environmental Concern v. Larchwood Constr. Corp.***, supra, at 594 quoting from ***Scarano v. Central R.R. Co.***, supra. For those reasons, the defendants' motion to dismiss Ultimate's complaint pursuant to CPLR §3211(a)(5) because of judicial or equitable estoppel is denied.

Ultimate's third (3rd) cause of action sounding in alter ego liability or piercing the corporate veil is dismissed. New York does not recognize an independent cause of action for imposing corporate liability upon the principals behind the corporate structure. ***Hart v. Jassem***, 43 AD3d 997, 843 NYS2d 121 (2nd Dept. 2007). The concept of piercing the corporate veil is an equitable remedy and relies on the assertion and proof of a fact based analysis which persuades the Court that the corporate obligation should be imposed upon its owners. Thus, Ultimate to be successful must show the defendants/landlord exercised "complete domination of the corporation in respect to the transaction attacked; and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" As stated by the Court of Appeals in ***Matter of Morris v. New York State Dept. Of Tax & Fin.***, 82 NY2d 135, 603 NYS2d 807 (1993);

> "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business..., such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required" See also, ***Old Republic Nat'l Title Ins. Co. v. Moskowitz***, 297 AD2d 724, 747 NYS2d 556 (2nd Dept. 2002).

The Court further stated

> "The party seeking to pierce the corporate veil must establish that the owners, through their domination,

> abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." Id at 141-142.

"In reality, piercing of the corporate veil is not an independent action but a procedural device to secure separately existing substantive rights owing to the plaintiff" by the corporation and securing those rights against the landlord/owners behind the corporation [***State v. Easton***, 169 Misc2d 282, 647 NYS2d 904 (1995)]. Therefore, Ultimate's third (3rd) cause of action asserting an independent cause of action seeking alter ego liability or piercing the corporate veil is dismissed. However, the Court grants Ultimate leave to serve an amended complaint asserting factual allegations within the two (2) remaining causes of action to support a claim that corporate liability should be imposed upon the principals behind the corporate structure.

The defendants' motion to dismiss Ultimate's action pursuant to CPLR §3211 (a) is denied as to the first (1st) cause of action and the second (2nd) cause of action alleged in the complaint and granted as to the third (3rd) cause of action.

The foregoing constitutes the decision of the Court.

Dated: August 3, 2011

J.S.C.