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SHORT FORM ORDER

INDEX No. 5297-11

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/13/11
ADJ. DATES 7/29/11
Mot. Seq. # 001 - Mot D
PC Scheduled: 10/28/11
CDISP Y____ N X

CHRISTOPHER ESPOSITO, Plaintiff, -against- JOHN C. TSUNIS, JOHN A. DANZI, HOME RUN HOTELS, LLC and LONG ISLAND HOTELS, LLC, Defendants.	PLUMMER & PLUMMER, LLP Attys. For Plaintiff 77 Arkay Dr. Hauppauge, NY 11788 MELTZER, LIPPE, GOLDSTEIN ET AL Attys. For Defs. Home Run & LI Hotels 190 Willis Ave. Mineola, NY 11501 RIVKIN, RADLER, LLP Attys. For Def. Danzi 926 RXR Plaza Uniondale, NY 11556 PINKS, ARBEIT & NEMETH, ESQS. Attys. For Def. Tsunis 140 Fell Ct. Hauppauge, NY 11788

Upon the following papers numbered 1 to 12 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5; 6-7; 8 ; Replying Affidavits and supporting papers 9-10 ; Other 11-12 (memorandum) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the corporate defendants, Home Run Hotel, LLC and Long Island Hotels, LLC, for an order dismissing the plaintiff's complaint to the extent it contains claims against these moving defendants, is considered under CPLR 3211(a) (1) and (7) and is granted only as to the Sixth Cause of Action which is dismissed, and its is further

ORDERED that a preliminary conference shall be held with respect to all remaining causes of action on **October 28, 2011**, at 9:30 a.m., in Part 45, at the courthouse located at 1 Court Street - Annex, Riverhead, New York.

The plaintiff, as purchaser of a portion of the individual defendants' equity interests in defendant, Home Run Hotels, LLC, and as a member thereof, commenced this action to recover money damages from defendants, John C. Tsunis, John A. Danzi and Home Run Hotels, LLC (hereinafter "Home Run") under theories of contract and tort law. In addition, the plaintiff seeks the equitable remedy of an accounting from the individual defendants and from defendant, Long Island Hotels, LLC (hereinafter "Long Island") as to profits they allegedly derived from competing hospitality group developments and other hospitality investments in which they had ownership interests since February 19, 2003. By the instant motion (#001), the LLC defendants seek an order dismissing the separate causes action asserted against them by the plaintiff.

A review of the record adduced on this motion reveals the existence of the following facts. In 2002, defendants, Tsunis and Danzi, formed Home Run Hotels, LLC, so as to engage in the commercial development of property in Central Islip as a hotel with affiliated services and to otherwise manage, operate, lease, sell or mortgage the property for profit. On February 19, 2003, the plaintiff executed a Subscription Agreement by which he purchased a 4% ownership interest in Home Run. The February 19, 2003 Subscription Agreement reads as follows:

> Chris Esposito, hereby subscribes to purchase four percent (4%) membership interest in Home Run Hotels, LLC, a duly formed New York State limited liability company with offices at c/o Long Island Hotels LLC at 801 Motor Parkway, Hauppauge, New York 11788.
>
> Said interest shall represent a 4% equity in the Home Run Hotels LLC project at Courthouse Drive and Carlton Avenue, Central Islip, New York and shall enjoy a guaranteed return of 6% and a return of principal for five (5) years guaranteed by John C. Tsunis and John A. Danzi.
>
> Subscription for said interest shall be made upon execution of this subscription agreement to be held in escrow by Tsunis, Gasparis & Dragotta, LLC, as attorneys, as escrow agent to be subsequently paid over to Home Run Hotels, LLC at which time certificates representing said equity interest shall be duly issued.

A written guaranty of the type contemplated by the Subscription Agreement had previously been executed by defendants, Tsunis and Danzi, on February 14, 2003. The written guaranty recites that the plaintiff, Christopher Esposito, was the purchaser of the equity interests of Tsunis and Danzi in two hotel development projects, including the one for which Home Run Hotels, LLC had been formed and that the guarantors were required by the contracts with Esposito to execute such guaranty and that they did so in order to induce Esposito to purchase equity interests in the LLCs. Therein, Tsunis and Danzi guaranteed, absolutely, irrevocably and unconditionally "that Esposito shall receive a SIX (6%) percent annualized return on the . . . and [the] FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS invested in Home Run Hotels LLC for the first FIVE (5) YEARS following Esposito's investment". Tsunis and Danzi further guaranteed the return of Esposito's principal investment in the event Esposito wished to terminate his equity interest in Home Run within the 54th and 60th months following his purchase of such interest.

The plaintiff alleges that under the 6% annualized return on principal investment provisions of the February 19, 2003 Subscription Agreement, he was entitled to $150,000.00 from Home Run. The plaintiff further alleges that Home Run paid the plaintiff only the sum of $71,054.79, leaving a balance due in the amount of $78,945.21. The plaintiff further alleges that defendant Long Island owes the plaintiff an accounting of certain of its profits.

The claims asserted against the LLC defendants for which dismissal is sought on this motion, are set forth the FIRST and SIXTH causes of action of the plaintiff's complaint. By such FIRST cause of action, defendant Home Run is charged with breaching the February 19, 2003 Subscription Agreement by reason of its failure to pay, in full, the 6% return on the plaintiff's principal investment of $500,000.00 for the first five years. In the SIXTH cause of action, defendant Long Island is charged with a duty to account to the plaintiff and the other minority owners of Home Run with respect to certain of Long Island's profits due to its purported status as the "alter ego" of defendants, Tsunis and Danzi. The plaintiff alleges that both of the LLC defendants are owned and controlled by defendants, Tsunis and Danzi, and that such defendants operate Long Island as alter egos of themselves.

In support of their joint motion, the LLC defendants contend that the SIXTH cause of action against defendant Long Island for an accounting of certain of its profits is subject to dismissal pursuant to CPLR 3211(a)(7) due to legal insufficiency. For the reasons stated below, the court agrees and thus grants the dismissal of the plaintiff's SIXTH cause of action.

It is well settled law that when a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], quoting ***Sokol v Leader***, 74 AD3d 1180, 1180-1181, 904 NYS2d 153 [2d Dept 2010]). In considering a motion to dismiss for legal insufficiency under CPLR 3211 (a)(7), the court must afford the complaint a liberal construction after accepting the facts alleged therein to be true and determine only whether those facts fit within any cognizable legal theory (*see* ***Peery v United Capital Corp***., 84 AD3d 1201, 924 NYS2d 470 [2d Dept 2011]; ***Reiver v Burkhart, Wexler & Hirschberg, LLP***, 73 AD3d 1149, 901 NYS2d 690 [2d Dept 2010]; ***Goldin v Engineers Country Club***, 54 AD3d 658, 864 NYS2d 43 [2d Dept 2008]). If the court can determine that the plaintiff may be entitled to relief on any view of the facts alleged, its inquiry is complete and the complaint must be declared legally sufficient (*see* ***Symbol Tech. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of a that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Builders, Inc***., 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]).

The sole claim asserted in the complaint against defendant Long Island is that it owes the plaintiff an accounting of certain of its profits because it is merely an alter ego of the individual defendants who are alleged to have breached fiduciary duties and contractual obligations owing to the plaintiff (*see* Complaint ¶ 55). It is well established that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an

interest" (***AHA Sales, Inc. v Creative Bath Prods., Inc***., 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]). A review of the complaint reveals that the same is devoid of any allegations from which the existence of a confidential or fiduciary relationship between the plaintiff and defendant Long Island may be discerned. There are no allegations that the plaintiff is a member or other participant in the defendant, Long Island Hotels, LLC, either as a partner, joint venturer or otherwise. The moving defendants thus established that the plaintiff's claim for an accounting from Long Island is legally insufficient due the absence of allegations of a confidential relationship between them.

However, there are allegations that defendant Long Island is the mere "alter ego" of defendants Tsunis and/or Danzi who are alleged to have confidential or fiduciary relationships with the plaintiff and to have breached same. In discharge of its obligation under CPLR 3211(a)(7) to afford the complaint a liberal construction after accepting the facts alleged therein to be true and to determine whether those facts fit within any cognizable legal theory, the court must analyze whether these allegations of "alter-egoism" sufficiently demonstrate that the plaintiff may be entitled to the remedy of accounting under theories that allow a constructive piercing of the veil of the corporate form by judicial fiat.

Piercing the corporate veil is an equitable concept that allows a claimant or creditor to disregard a corporation and to hold its controlling shareholders personally liable for corporate debts or other liabilities. Reverse-piercing operates, conversely, and when successfully litigated, subjects a corporation to liability for debts and like obligations of its shareholders (*see* ***Sweeney, Cohn, Stahl & Vaccaro v Kane***, 6 AD3d 72, 773 NYS2d 420 [2d Dept 2004]; ***State of New York v Easton***, 169 Misc2d 282, 288-289, 647 NYS2d 904 [Sup. Ct. Albany County 1995]). In both situations, there is a disregard of the corporate form and the controlling shareholders are treated as alter egos of the corporation and vice versa (*see* ***Sweeney, Cohn, Stahl & Vaccaro v Kane***, 6 AD3d 72, *supra*). As with conventional veil-piercing claims, to establish a reverse veil-piercing claim, the plaintiff must allege (1) that the owner exercised complete domination over the corporation with respect to the transaction at issue; and (2) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil (*see* ***Monteleone v The Leverage Group***, 2009 WL 249801 [EDNY 2009]; ***JSC Foreign Economic Assn. Technostroyexport v International Dev. Trade Serv., Inc***., 295 F.Supp2d 366 [SDNY 2003]; ***American Fuel Corp. v Utah Energy Dev. Co.***, 122 F3d 130, 134 [2d Cir.1997]; ***State of New York v Easton***, 169 Misc2d 282, *supra*). The veil-piercing analysis applicable to traditional corporations is likewise applicable to LLC defendants (*see* ***MAG Portfolio Consult, GmbH v Merlin Biomed Group, LLC***, 268 F3d 58, 63-64 [2d Cir.2001]). Thus, an LLC may be held liable for debts and other liabilities of its controlling members or it may be required to provide accountings and other equitable relief to remedy the wrongs of such members.

A review of the plaintiff's complaint reveals that it fails to state a cognizable claim against defendant Long Island, in as much as, said complaint contains no allegations of fact concerning the material elements of claims resting on theories of reverse corporate veil piercing. Instead, the complaint merely contains two conclusory allegations that defendant Long Island is the "alter ego" of defendants, Tsunis and Danzi (*see* Complaint ¶¶ 6; 56). Those portions of the instant motion wherein defendant Long Island Hotels, LLC seeks dismissal of the claim asserted against it in the SIXTH Cause of Action of the complaint are thus granted pursuant to CPLR 3211(a)(7).

The remaining portions of the instant motion wherein defendant, Home Run Hotels, LLC, seeks dismissal of the plaintiff 's FIRST Cause of Action which sounds in breach of the February 19, 2003 Subscription Agreement are also denied. As indicated above, "the standard applicable to determining a motion to dismiss for failure to state a claim is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist Coll. v Chazen Envl. Serv.***, 84 AD3d 1181, *supra*, quoting ***Sokol v. Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). A review of the first cause of action reveals that it states a claim against Home Run, since it contains sufficient factual allegations concerning the material elements of a cause of action against Home Run for breach its apparent breach of its obligation to pay the 6% annualized return on investment set forth in the Subscription Agreement.

The court's inquiry is not, however, ended as Home Run has submitted evidentiary material in support of its motion for dismissal. "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (***Rietschel v Maimonides Med. Ctr.***, 83 AD3d at 810, 921 NYS2d 290 [2d Dept 2011]). The court is thus permitted, but not compelled, to consider evidentiary material submitted by a moving defendant, and where it does so, the criterion becomes whether the plaintiff has a cause of action, not whether he has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***Bodden v Kean***, 86 AD3d 524, 927 NYS2d 137 2d Dept 2011]). However, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action (*see* ***Sokol v Leader***, 74 AD3d 1180, *supra,* quoting, ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]). Absent a showing that a material fact as claimed by the plaintiff is not a fact at all and the absence of any dispute with regard to it, a motion pursuant to CLR 3211(a)(7) to dismiss for legal insufficiency must be denied (*see* ***Rietschel v Maimonides Med. Ctr.***, 83 AD3d at 810, *supra*; ***Sokol v Leader***, 74 AD3d 1180, *supra*).

Here, Home Run relies on the affirmation of its counsel, Thomas J. McGowan, Esq. and the affidavit of Richard C. Erb, an officer of defendant Long Island. They in turn rely upon the terms of the Operating Agreement of Home Run dated March 1, 2004, an Amended and Restated Mortgage dated November 1, 2009 and certain correspondence. By such submissions, Home Run contends that the terms of the Operating Agreement provide a legal defense to the plaintiff's FIRST Cause of Action which demonstrates that the plaintiff has no cause of action for breach of the Subscription Agreement. However, this court declines to consider these affidavits and the submissions attached thereto under the case authorities cited above. Even if the court did so, the affidavits of attorney McGowan and of Mr. Erb failed to demonstrate that the plaintiff has no cause of action against Home Run for the remaining amounts due under the 6% annualized return on principal investment provisions of the Subscription Agreement.

Nor did defendant Home Run establish an entitlement to dismissal of the plaintiff's FIRST Cause of Action pursuant to CPLR 3211(a)(1). It is well established that a motion pursuant to that rule may be appropriately granted only where the documentary evidence submitted utterly refutes plaintiff's factual allegations and conclusively establishes a defense as a matter of law (*see* ***Goshen***

v Mutual Life Ins. Co. of New York, 98 NY2d 314, 746 NYS2d 858 [2002]; ***Mason v First Cent. Nat. Life Ins. Co. of New York***, 86 AD3d 854, 927 NY2d 694 [2d Dept 2011]). To be considered documentary for purposes of CPLR 3211(a)(1), the submissions must be unambiguous and of undisputed authenticity and consist of writings and documents other than letters, affidavits and deposition testimony (*see* ***Granada Condominium III Assn. v Palomino***, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; ***Fontanetta v Doe***, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]).

Here, the Operating Agreement of Home Run and the Amended and Restated mortgage note and other submissions attached to the affidavit of Mr. Erb do not conclusively refute the plaintiff's claim to an entitlement to the annualized returns at 6% on the plaintiff's principal investment of $500,000.00 that remain unpaid. Specifically, such documentation fails to establish that the terms of the Operating Agreement or the Amended Mortgage effectively modified, suspended or nullified Home Run's apparent obligation to pay the plaintiff, in cash, the remaining unpaid portion of the total $150,000.00 6% return of principal that was the subject of the Subscription Agreement. The moving defendants are thus not entitled to a dismissal of the plaintiff's FIRST Cause of Action against Home Run pursuant to CPLR 3211(a)(1).

The moving defendants reply paper demands for other relief, including that the court convert this motion into one for summary judgment or schedule an immediate trial on fact issues purortedly raised in the record are denied (*see* CPLR 3212(c); ***Sokol v Leader***, 74 AD3d 1180, *supra*). Also denied is the request for the imposition of sanctions against the plaintiff (*see* 22 NYCRR Part 130-1).

In view of the foregoing, the instant motion to dismiss by the LLC defendants is granted only to the extent that the SIXTH Cause of Action against Long Island Hotels, LLC is dismissed. Counsel for the parties are directed to appear for the preliminary conference scheduled above with respect to the FIRST Cause of Action against defendant Home Run.

DATED: 9/6/14

THOMAS F. WHELAN, J.S.C.