

Wagner-Ziv Plumbing & Heating Corp. v Atarien

2011 NY Slip Op 33806(U)

July 11, 2011

Sup Ct, Queens County

Docket Number: 1789/11

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

WAGNER-ZIV PLUMBING & HEATING CORP.,

Plaintiff,

-against-

JOSEPH ATARIEN, BRK PROPERTIES, INC.,
MICHELE COHEN, INC., OXFORD HOLDINGS,
CORP., AND NAT HOLDINGS CORP.,

Defendants.

Index No: 1789/11

Motion Date: 5/18/11

Motion Cal. No.: 21, 22

Motion Seq. No.: 1, 2

Motions having calendar numbers 21 & 22 are combined for
determination.

The following papers numbered 1 to 14 read on this pre-answer motion (Cal #21) by defendants to dismiss the complaint pursuant to CPLR 3211(a)(7) and CPLR 3016(b) for failure to state a cause of action and cross-motion by plaintiff for leave to serve an amended complaint; and the papers numbered 15 to 22 read on the motion (Cal #22) by plaintiff pursuant to CPLR 2308 compelling defense counsel and defendants' accountant, Kweit Mantell to comply with two subpoenas Deuces Tecum

	<u>PAPERS NUMBERED</u>
Cal #21 Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits ..	5 - 8
Answering Affidavits-Exhibits.....	9 - 11
Replying Affidavits.....	12 - 14
Cal #22 Notice of Motion-Affidavits-Exhibits	15 - 18
Answering Affidavits-Exhibits.....	19 - 20
Replying Affidavits.....	21 - 22

Upon the foregoing papers it is ordered that these motions are determined as follows.

This is an action for, inter alia, a judgment declaring and setting aside as fraudulent conveyances several parcels of real property owned by the corporate defendants pursuant to Debtor Creditor Law §§ 273, 273a, 274, 275 and 276 and to recover

damages from the corporate defendants' and the individual defendant personally on the theory of piercing the corporate veil.

In this pre-answer motion, the defendants move to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(7) and 3016(b) for failure to plead fraud with sufficient specificity pursuant to CPLR 3016(b).

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Peery v. United Capital Corp., 84 A.D.3d 1201 [2011] quoting Breytman v. Olinville Realty, LLC, 54 AD3d 703 [2008]; see Leon v. Martinez, 84 NY2d 83, 87 [1994]; Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]).

The plaintiff's complaint alleges that the defendants were the owners of certain real properties; that the defendant, Atarien, was the sole shareholder, officer, director of each of the defendant corporations; that in 2003 the defendants requested that plaintiff, who is in the plumbing & heating business, to perform certain work, labor and services at the defendants' real properties; that the plaintiff performed the services for which the defendants failed to pay; that plaintiff obtained a judgment, dated June 29, 2010, against the defendants, its principals and/or related companies for the sums due; that between 2004-2009 the defendants sold, inter alia, seven specific properties; that the funds received from the sales were then transferred to the individual defendant; that the sale of the real properties and the transfer of the proceeds of the sales to the individual defendant was made after plaintiff performed the work, without consideration and thereby rendering the corporate defendants insolvent for the purpose of defeating the plaintiff's claims, and with the intent to hinder, delay and defraud the claims of the defendants' creditors, including plaintiff, in violation of Debtor Creditor Law §§ 273, 273a, 274, 275 and 276.

Contrary to defendants' claim, the plaintiff was not required to plead violations of Debtor and Creditor Law §§ 273, 273-a, 274, and 275, with the heightened particularity required for pleading an action for common-law fraud pursuant to CPLR 3016(b) (see Gateway I Group, Inc. v. Park Ave. Physicians, P.C., 62 AD3d 141, 149-150 [2009]; Zanani v. Meisels, 78 AD3d 823, 824-825 [2010]) inasmuch as fraud under these provisions is presumed

and no intent to defraud need exist or be proven. Here, the plaintiff sufficiently pleaded adequate facts to withstand a motion to dismiss the cause of action based upon violations of these provisions of the Debtor and Creditor Law.

In contrast, however, to adequately plead a cause of action based upon Debtor Creditor Law §276, which involves an intent to defraud, plaintiff is required to comply with the pleading requirements of CPLR 3016(b) (see Wall St. Assoc. v. Brodsky, 257 AD2d 526, 529 [1999]). Generally, facts underlying an alleged fraudulent conduct is in the exclusive knowledge of the persons or entities against whom such claim is asserted (see CPC Intl. v. McKesson Corp., 70 NY2d 268, 285 [1987], citing Jered Constr. Corp. v. New York City Tr. Auth., 22 NY2d 187, 194 [1968]). Thus, to satisfy the pleading requirements of CPLR 3016(b), the allegations in the complaint must be specific enough to apprise the defendants of the incidents and acts complained of and need not set forth such specific facts as would be necessary to prove the cause of action at trial (see Lanzi v. Brooks, 43 NY2d 778, 780 [1977]; Shisgal v. Brown, 21 AD3d 845 847 [2005] . The allegations in the complaint in this case sufficiently plead the overall fraudulent conduct, i.e. conveyance of specific real property and the intent to hinder, delay, or defraud defendants' creditors, to support the plaintiff's claim under Debtor Creditor Law § 276 (see Marine Midland Bank v. Zurich Ins. Co., 263 AD2d 382, 383 [1999]).

The plaintiff's cross-motion for leave to serve a verified amended complaint in the form annexed in the moving papers is granted. Plaintiff shall file a copy of the amended verified complaint within 20 days of entry of this Order. The amended verified complaint is deemed served.

Defendants shall serve an answer to the amended complaint within 20 days of service of this Order with notice of entry.

The plaintiff's motion to compel the defense counsel and defendants' accountant, Kweit Mantell to comply with two subpoenas Deuces Tecum is denied at this time.

Pursuant to CPLR 3120 discovery from a non-party may be sought by serving a subpoena, which gives a notice stating the circumstances or reasons why such disclosure is sought or required (CPLR 3101[a][4]). A subpoena served on a non-party is "facially defective" and unenforceable in the absence of such notice (see Kooper v. Kooper, 74 AD3d 6, 13 [2010], quoting Matter of American Express Prop. Cas. Co. v. Vinci, 63 AD3d 1055, 1056 [2009]; Rickicki v. Borden Chemical, Div. of Borden, Inc.,

195 AD2d 986 [1993]). A party demanding discovery from a non-party, in addition to relevance and materiality, must also make a sufficient showing of such circumstances and reasons which would warrant seeking discovery from a non-party such as the inability to obtain the information or evidence from another source (see Kooper v. Kooper, supra at 15-17; Morganti v. Morganti, 72 AD3d 662 [2010]; Tenore v. Tenore, 45 AD3d 571, 571-572 [2007]).

The subpoenas served in this case do not contain notice of the circumstances or reasons why discovery is sought from the non-parties, thus, they are facially defective and a nullity. The subpoenas merely state that the non-party is to appear to produce documents listed on the annexed schedule. Such general language is insufficient to satisfy the statutorily required notice.

Nor have defendants demonstrated, prima facie, the existence of such circumstances as would warrant disclosure from non-parties, particularly defendants' attorney, or that such evidence cannot be obtained in the normal course of discovery from the defendants.

Dated: July 11, 2011
D# 44

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J.S.C.