

Weiss v Markel
2012 NY Slip Op 31515(U)
May 29, 2012
Sup Ct, Nassau County
Docket Number: 12279/11
Judge: Anthony L. Parga
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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

-----X **PART 6**
 ILAN WEISS, a/a/o AQUA-TROL CORPORATION,

Plaintiff,

INDEX NO. 12279/11

-against-

MOTION DATE: 04/06/12
 SEQUENCE NO. 002

ADAM DAVID MARKEL and ADAM DAVID
 MARKEL, P.C.,

Defendants.

-----X	
Notice of Motion, Affs. & Exs.	<u>1</u>
Memorandum of Law in Support	<u>2</u>
Affirmation in Opposition	<u>3</u>
Reply Memorandum of Law	<u>4</u>

Upon the foregoing papers, defendants' motion to dismiss plaintiff's amended complaint, pursuant to CPLR §§3211(a)(1) and (a)(7), is denied.

Plaintiff brought the within action against the defendants alleging, *inter alia*, that the defendants committed fraud, legal malpractice, and breach of fiduciary duty relating to a loan transaction dated March 20, 2007. On March 20, 2007, Colatrella Builders, Inc. (hereinafter "Colatrella") obtained a loan from Aqua-Trol Corporation (hereinafter "Aqua-Trol") in the amount of \$400,000.00, which was evidenced by a note and mortgage secured by real property in New Jersey. In addition to the \$400,000.00 loan by Aqua-Trol, a company named Land Settlement, LLC (whose managing member was defendant Adam David Markel) loaned \$500,000 to Colatrella, and another individual, Danny Capozello, loaned \$100,000 to Colatrella. On March 26, 2007, in connection with the loans, Aqua-Trol, Land Settlement, LLC, and Capozello executed a Loan Participation Agreement in which Aqua-Trol, Land Settlement, LLC,

and Capozello were collectively designated as the “Mortgagee” with respect to the subject property. Plaintiff’s amended complaint alleges that the note, which was prepared by the defendants, specifically stated that the mortgage of March 20, 2007 “is and will be maintained as a valid FIRST mortgage lien” on the subject property. Plaintiff alleges, however, that said representation was known to be false by defendant Adam David Markel, as, on March 2, 2007, Colatrella issued a first mortgage on the same property to another entity, Triplets, LLC, to secure a loan in the amount of \$525,000.00. It is further alleged that defendant Adam David Markel was the notary public on the face of the document executed on March 2, 2007. As such, plaintiff alleges that Adam David Markel was aware that another entity had a first lien on the property prior to Colatrella’s execution of the note and mortgage on March 20, 2007 and prior to Aqua-Trol’s execution of the Loan Participation Agreement on March 26, 2007. Plaintiff further alleges that the first lienholder, Triplets, LLC, commenced foreclosure proceedings on the property and, in the course of such proceeding, extinguished the plaintiff’s lien. No part of plaintiff’s loan has been satisfied.

Plaintiff alleges that Aqua-Trol assigned all rights relating to the transactions at issue to Ilan Weiss. It is further alleged in plaintiff’s amended complaint that Ilan Weiss personally advanced the loan monies to Colatrella in the March 20, 2007 transaction, that he was “doing business as” Aqua-Trol at said time, and that he was the owner of Aqua-Trol. The Court notes that Ilan Weiss is not named on the mortgage or note.

Defendants move to dismiss plaintiff’s complaint, contending that Ilan Weiss lacks legal capacity to sue as assignee of Aqua-Trol and that Weiss should be estopped from arguing contrary factual allegations and theories of recovery to those which were advanced in a New Jersey action entitled, *Land Settlement, LLC v. Colatrella Builders, Inc.*, wherein the Aqua-Trol, in its corporate capacity, averred that it provided the loan to Colatrella and subsequently sought and obtained judicial relief arising from Colatrella’s failure to pay back the loan. Defendants further contend that plaintiff’s amended complaint fails to state a valid cause of action against them herein.

Defendants first argue that the subject loan was issued by Aqua-Trol on March 20, 2007, but that Aqua-Trol did not have a valid corporate existence at the time the loan was made.

Defendants contend that Aqua-Trol had been “inactive,” according to the New York Secretary of State’s records, since June 30, 2004, and as such, any rights that Aqua-Trol had in connection with the Colatrella loan are barred because Aqua-Trol lacked the legal capacity to enter into the subject loans or to assign its rights to sue in connection with those loans. As such, the defendants contend that Aqua-Trol, as well as Ilan Weiss, lacks capacity to sue herein. In addition, the defendants contend that Ilan Weiss also lacks capacity to sue as the plaintiff has failed to allege that the assignment of rights from Aqua-Trol to Ilan Weiss was in writing, as required by the Loan Participation Agreement.

Defendants further contend that while Ilan Weiss alleges in his amended complaint herein that he personally advanced the funds to Colatrella and that he was doing business as Aqua-Trol, in the New Jersey action entitled, *Land Settlement, LLC v. Colatrella Builders, Inc.* (wherein plaintiffs Land Settlement, LLC and Aqua-Trol obtained a default judgment against Colatrella in the amount of \$1,490,000.00 plus interest), it was alleged that Aqua-Trol provided the loan to Colatrella. As such, defendants contend that Ilan Weiss should be judicially estopped from taking an inconsistent position here.

In opposition, plaintiff submits evidence that the proceeds for the loan came from Ilan Weiss’s personal funds and that Ilan Weiss advised defendants that the loan documents should have been drafted to reflect a loan from Ilan Weiss and not from Aqua-Trol. Plaintiff further argues that as the defendants were Ilan Weiss’s and Aqua-Trol’s legal counsel for the transaction at issue, it is not impossible that the defendants knew that the loan was made with the personal funds of Ilan Weiss, but drafted the loan documents in the name of an inactive corporation in order to frustrate any future action commenced by plaintiff against the defendants for their “misdeeds.” Further, plaintiff contends that defendant, Adam David Markel, and not the plaintiff or Aqua-Trol, verified the complaint in the New Jersey action as the “managing member of Land Settlement, LLC.”

The general rule is that where a corporate term of existence has expired but the corporation carries on its affairs and exercises corporate powers as before, it is a de facto corporation. (*Ludlum Corp. Pension Plan Trust v. Matty’s Superservice, Inc.*, 156 A.D.2d 339, 548 N.Y.S.2d 292 (2d Dept. 1989); *Bruce Supply Corp. v. New Wave Mechanical, Inc.*, 4 A.D.3d

444, 773 N.Y.S.2d 408 (2d Dept. 2004)). The dissolution of a corporation does not entirely terminate corporate existence. (*Camacho v. New York City Transit Authority*, 115 A.D.2d 691, 496 N.Y.S.2d 516 (2d Dept. 1985)). It is well settled that a dissolved corporation “may sue or be sued...in its corporate name.” (*Bruce Supply Corp. v. New Wave Mechanical, Inc.*, 4 A.D.3d 444, 773 N.Y.S.2d 408 (2d Dept. 2004), *quoting*, Business Corporation Law §1006(a)). More importantly, parties who knowingly treat a dissolved entity as a corporation are estopped from asserting its nonexistence to avoid obligations made with and under the dissolved corporation. (*Miot v. Miot*, 24 Misc.3d 1224(A), 897 N.Y.S.2d 670 (N.Y. Sup. Ct. N.Y. Cty. 2009), *aff’d*, 78 A.D.3d 464, 910 N.Y.S.2d 436 (1st Dept. 2010); *Metered Appliances, Inc. v. 75 Owners Corp.*, 225 A.D.2d 338, 638 N.Y.S.2d 631 (1st Dept. 1996); *National Bank of North America v. Paskow*, 75 A.D.2d 568, 427 N.Y.S.2d 262 (1st Dept. 1980)). Conversely, “[i]f neither of the parties [to a suit] is aware that corporate status has not been achieved, then corporation by estoppel may apply.” (*Boslow Family Ltd. Partnership v. Glickenhau & Co.*, 7 N.Y.3d 664, 860 N.E.2d 711 (2006))(holding that where defendant does not dispute that it derived a benefit from the agreement and that the investment services provided were not dependent in any way on the nature of the plaintiff as a limited partnership, defendant is estopped from denying the partnership’s validity), *quoting*, 8 Fletcher, Cyclopedia of Corporations 3890 (2006)). The doctrine of corporation by estoppel has been applied in cases where a defendant seeks to avoid liability on a contract from which the defendant benefitted. (*Id.*).

In the instant matter, at this early stage in the litigation, there is insufficient evidence before this Court to determine whether Aqua-Trol was a de facto corporation at the time that the loan at issue was made to Colatrella. There is also insufficient evidence before this court to determine whether corporation by estoppel applies herein. The defendants fail to submit any evidence to demonstrate whether either party hereto knew that Aqua-Trol was not a valid corporation at the time the loan was made by Aqua-Trol to Colatrella. Further, the movants have failed to demonstrate that Ilan Weiss does not have standing to sue herein, as there is insufficient evidence to demonstrate that Aqua-Trol did not assign its rights under the Partnership Agreement to Ilan Weiss or that Ilan Weiss did not loan the money to Colatrella “doing business as” Aqua-Trol. In addition, the defendants fail to submit any retainer agreement entered into between Ilan

Weiss and/or Aqua-Trol and the defendants herein relating to the transaction with Colatrella. As such, defendants have failed to make a prima facie showing that the plaintiff's amended complaint should be dismissed pursuant to CPLR §3211(a)(1).

Additionally, the Court has reviewed the plaintiff's amended complaint and the complaint in the New Jersey action. While defendant contends that Aqua-Trol averred that it provided the loan to Colatrella in the New Jersey action and that Ilan Weiss avers herein that he provided the funds for the loan to Colatrella in this action "doing business as Aqua-Trol," the Court notes that Ilan Weiss is suing herein only as assignee of Aqua-Trol. The allegations against the defendants herein are not inconsistent with those of the New Jersey action and are not duplicative of those of the New Jersey action. Further neither Ilan Weiss, nor Aqua-Trol, verified the complaint in the New Jersey action.

Finally, with respect to defendants' contention that the plaintiff failed to state a cause of action, in considering a motion to dismiss for failure to state a cause of action, the court must "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." (*Brooks v. Key Trust Co. Nat'l. Ass'n*, 26 A.D.3d 628 (3d Dept. 2006), *quoting*, *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005)). In doing so, the Court determines only whether the facts as alleged fit within any cognizable legal theory. (*Id.*, *quoting*, *Leon v. Martinez*, 84 N.Y.2d 83, 683 N.E.2d 511 (1994); *see also*, *Khoury v. Khoury*, 78 A.D.3d 903, 912 N.Y.S.2d 235 (2d Dept. 2010), *citing*, *Gougenheim v. Ginzberg*, 43 N.Y.2d 268, 372 N.E.2d 17 (1977)). Whether the plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11 (2005); *see also*, *Sokol v. Leder*, 74 A.D.3d 1180, 904 N.Y.S.2d 153 (2d Dept. 2010)). Construing the plaintiff's allegations as true, plaintiff's complaint sufficiently states the cause of action alleged against defendants herein.

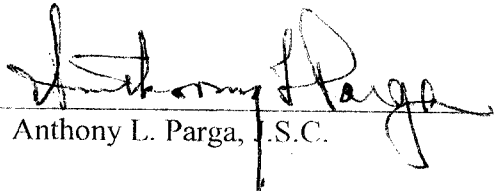
Accordingly, defendants' motion to dismiss the plaintiff's amended complaint is denied. Defendants may serve an answer to the plaintiff's amended complaint within thirty (30) days of the date of this Order, to the extent an answer has not previously been provided.

Plaintiff is hereby directed to serve a copy of this order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court within thirty

(30) days of the date of this Order. The parties shall appear for a **Preliminary Conference on August 22, 2012 at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

This constitutes the decision and order of this court.

Dated: May 29, 2012



Anthony L. Parga, J.S.C.

ENTERED

JUN 01 2012

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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