

Fifth Ave.Partners, L.P. v Doniger

2013 NY Slip Op 30797(U)

April 19, 2013

Supreme Court, New York County

Docket Number: 109774/2011

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Davis Ling - Lohan
Justice

PART 36

Index Number : 109774/2011
FIFTH AVENUE PARTNERS
vs
DONIGER, SCOTT
Sequence Number : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary judgment
Strike defenses + cross-motion for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3

7

8

4, 5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion cross-motion are
decided in accordance with the attached
memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

APR 19 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/19/13

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

STIRMIT ORDER / TIME

SETTLE ORDER / TIME

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
FIFTH AVENUE PARTNERS, L.P.,

Index No. 109774/2011

Plaintiff,

Motion Seq. No. 002

-against-

SCOTT P. DONIGER d/b/a FULL CIRCLE POST and
FULL CIRCLE POST NYC, LLC.

FILED

Defendants.

APR 19 2013

-----X
DORIS LING-COHAN, J. :

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves for partial summary judgment against defendant Full Circle Post NYC, LLC (Full Circle), on its third cause of action for unpaid use and occupancy, in the amount of \$96,566.12, and for an order striking Full Circle's affirmative defenses. Full Circle cross-moves for an order dismissing plaintiff's third, fourth and fifth causes of action, and for leave to amend its answer pursuant to CPLR §3025(b).

Plaintiff is the owner of a building located at 19 West 21st Street, New York, New York, and the landlord of the commercial space known as Suites 1202, 1203 and 1204 (premises). Defendant Scott P. Doniger d/b/a Full Circle Post (Doniger) was the lessee of the premises, who entered into a lease with plaintiff on August 30, 2007. The lease was for a term of 10 years, commencing on September 1, 2007, and ending on August 31, 2017. Doniger also executed a personal guarantee, upon execution of the lease.

In July 2008, Doniger allegedly sublet the premises, by oral agreement, to Full Circle, without plaintiff's prior knowledge or written consent. Full Circle admittedly occupied the premises until it vacated, on January 29, 2011. Plaintiff alleges that Doniger vacated the premises on February 8, 2011, without plaintiff's consent, and owes base rent and additional rent in the amount of

\$1,275,453.96, for the period of October 2010 through August 31, 2017, based upon the terms of the lease.

On or about January 2011, plaintiff commenced a non-payment proceeding against defendant Doniger, to recover possession of the premises, and to obtain a judgment for the outstanding rent. Doniger defaulted and a judgment of possession and a warrant of eviction were issued in plaintiff's favor.¹

On August 25, 2011, plaintiff commenced this action against both Doniger and Full Circle. While Full Circle served and filed an answer, Doniger defaulted in answering or making an appearance. By order of this court dated March 26, 2012, plaintiff's motion for a default judgment against defendant Doniger was granted, with an inquest to be conducted as to damages, at, or about, the time of the trial of this case.

As stated, plaintiff now moves for partial summary judgment against Full Circle on its third cause of action and to dismiss Full Circles' affirmative defenses. Full Circle has cross-moved for summary judgment of dismissal of plaintiff's third (use and occupancy), fourth (declaratory judgment that Full Circle is the alter ego of Doniger) and fifth (holding Full Circle liable under the lease based upon such alter ego theory) causes of action, and for leave to amend its answer pursuant to CPLR §3025(b).

Plaintiff's Motion for Partial Summary Judgment - Third Cause of Action

In seeking partial summary judgment on its third cause of action for unpaid use and occupancy, plaintiff alleges that while there is no contractual privity between plaintiff and Full Circle, with

¹ A money judgment was not awarded at such time.

respect to the subject commercial space, Full Circle is, nevertheless, liable to plaintiff for unpaid use and occupancy, under the theory of *quantum meruit*. According to plaintiff, and it is not disputed by Full Circle, during the period from October 2010 through January 2011, Full Circle occupied the subject premises and no rent or use and occupancy was paid. Thus, plaintiff argues it is entitled to summary judgment on its claim for use and occupancy against Full Circle and seeks the fair market value of such use and occupancy of the subject premises.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dalla-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Applying such principles herein, as further detailed below, plaintiff is entitled to partial summary judgment as to liability on its third cause of action for the fair market value of Full Circle’s use and occupancy, of the subject premises, for the time period from October 2010 through January 2011, based upon the theory of *quantum meruit*, with the issue of damages (the amount of the fair market value), to be determined by a Special Referee, in accordance with CPLR §4317(b), as further detailed below. As stated, significantly, it is not disputed that, Full Circle did in fact occupy the subject premises during the time period alleged by plaintiff and that no lease or other contract existed between plaintiff and Full Circle.

Under New York law, a landlord's entitlement to receive, and an occupant's obligation to pay, a reasonable fee for use and occupancy of a premises is not contingent on an underlying contract; rather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of *quantum meruit*, and is imposed by law for the purpose of bringing about justice, without reference to the intention of the parties. See *Trump CPS LLP v Meyer*, 249 AD2d 22 (1st Dept 1998)(landlord entitled to use and occupancy where undisputed that tenants' family members resided in the subject joined apartments); *Eighteen Assoc., LLC v Nanjim Leasing Corp.*, 25 AD2d 559 (2nd Dept 1999)(the absence of privity of contract is not a bar to a cause of action to recover damages for use and occupancy); *Gateway I Group, Inc., v Park Ave. Physicians, P.C.*, 62 AD3d 141, 148-49 (2nd Dept 2009)(owner can sue corporate defendants in *quantum meruit* based on their use and occupancy of the subject premises).

Here, in response to that portion of plaintiff's motion which seeks summary judgment on its use and occupancy claim based upon *quantum meruit*, Full Circle submits virtually no opposition as to its liability under such theory, agreeing with plaintiff that there was no lease or contract between Full Circle and plaintiff, and admitting that Full Circle was in fact in possession of the subject premises, as Doniger's subtenant, during the time period claimed by plaintiff. Full Circle merely contests the issue of damages, arguing that plaintiff should not be entitled to any use and occupancy from Full Circle, since plaintiff failed to make repairs to the subject premises, which was severely damaged in a fire, on or about January 2010. Full Circle *does not, however, dispute that it occupied the subject premises for the time period claimed by plaintiff and that no rent or use and occupancy was paid during such time.* Thus, as there are no factual issues with respect to the fact that Full Circle, as occupant of the subject premises for the time period alleged by plaintiff, is obligated to plaintiff for use and occupancy based on the theory of *quantum meruit*, plaintiff's motion for summary judgment is granted, as to liability, with the determination of the amount of such use and occupancy, to be referred to and determined by a Special Referee, in accordance with CPLR §4317(b), as detailed below.

Plaintiff's Motion to Strike Affirmative Defenses

Plaintiff also moves to dismiss Full Circle's affirmative defenses pursuant to CPLR §3211(b), arguing that they lack merit and that they fail to comply with the specificity required by CPLR §3013. Full Circle's affirmative defenses include the following: (1) failure to state a cause of action; (2) plaintiff contributed to the damages sustained by plaintiff; (3) third parties' contribution to damages sustained by plaintiff; (4) damages claimed by plaintiff are subject to offset; and (5) the action is barred by waiver, estoppel, laches and unclean hands.²

CPLR §3211(b) states that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." "On a motion to dismiss affirmative defenses...the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law". *534 East 11th Street Housing Development Fund Corp. v Hendrick*, 90 AD3d 541, 541-542 (1st Dept 2011). In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. *Id.* at 541-542 (1st Dept 2011). However, factual allegations that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration. *See Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, 233-34 (1st Dept 1994).

The portion of plaintiff's motion which seeks to dismiss Full Circle's first affirmative defense (failure to state a cause of action) is denied, as such a defense has been deemed to be "surplusage, as it may be asserted at any time even if not pleaded". *Riland v Todman & Co.*, 56 AD2d 350, 352 (1st Dept 1977).

Full Circles second, third and fourth affirmative defenses pertain to plaintiff's claim for damages/use and occupancy, and are therefore preserved for the hearing before the Special

² It is noted that Full Circle has cross-moved for leave to amend its answer, which will be addressed separately below.

Referee. The court notes that while plaintiff argues that such defenses are barred by the terms of the lease, such argument is *contrary* to plaintiff's argument in support of its motion for partial summary judgment that use and occupancy be awarded under the theory of *quantum meruit*, in which it was not disputed that no lease existed between plaintiff and Full Circle.

Full Circle's fifth affirmative defense, based on laches, unclean hands, waiver and estoppel, is dismissed, as such defense is conclusory and not supported by any facts. Moreover, as further described below, Full Circle has moved to serve an amended answer and the proposed amended answer fails to include such defense. Thus, that portion of plaintiff's motion which seeks to dismiss Full Circle's affirmative defenses is granted, only to the extent that Full Circle's fifth affirmative defense is dismissed.

Full Circle's Cross-Motion for Summary Judgment of Dismissal

Full Circle cross-moves for summary judgment of dismissal of plaintiff's third cause of action (use and occupancy), fourth cause of action (declaratory judgment that Full Circle is the alter ego of defendant Doniger) and fifth cause of action (holding Full Circle liable under the lease based upon an alter ego theory). That portion of Full Circle's motion which seeks dismissal of plaintiff's third cause of action for use and occupancy on the theory of *quantum meruit* is denied, since, as indicated above, this court granted partial summary judgment as to liability, with respect to such claim.

In addition to plaintiff's claim based upon *quantum meruit*, plaintiff seeks in its fourth and fifth causes of action, to hold Full Circle jointly liable with Doniger for the unpaid rent owed pursuant to the terms of the lease between plaintiff and Doniger on an "alter ego" theory. Full Circle seeks the dismissal of these causes of action based on its argument that Full Circle is not Doniger's "alter ego". Moreover, Full Circle maintains, and this court agrees, that, plaintiff *may not* seek summary judgment on its cause of action based upon a theory of *quantum meruit*, where, plaintiff has argued and it is undisputed that there is no contract between the parties, and also pursue a

claim to hold Full Circle liable under the terms of Doniger's lease. Such arguments and legal theories are entirely inconsistent, as it is well settled that a plaintiff may *only* recover on a theory of *quantum meruit*, where there is no contract between the parties, as specifically argued by plaintiff in support of the portion of its motion seeking partial summary judgment on its third cause of action, and as consented to by Full Circle. See *Peter Dankin, P.C. v. North Shore Partnership*, 255 AD2d 207 (1st Dept 1998)(were there a contract between the parties, relief under the theory of *quantum meruit* would be barred as a matter of law); *Bellino Schwartz Padob Adv. v. Solaris Mktg. Group*, 222 AD2d 313 (1st Dept 1995)("the existence of an express contract...governing the subject matter of plaintiff's claims...bars any quasi contractual claims against [the] defendant"); *Feigen v Advance Capital Mgt.*, 150 AD2d 281, 283 (1st Dept 1989); *Timur on 5th Ave., Inc. v Record Explosion, Inc.*, 290 AD2d 221 (1st Dept 200)(landlord is precluded from asserting claims for rent based upon a lease and in *quantum meruit*); *Hawghorne Group LLC v RRE Ventures*, 7 AD3d 320 (1st Dept 2004); *Sheiffer v Shenkman Capital Mgt.*, 291 AD2d 295 (1st Dept 2002). In fact, throughout its papers, plaintiff goes to great lengths to continuously refer to Full Circle as "Non-Lessee", to presumably emphasize its position that there was no lease between plaintiff and Full Circle, and, as indicated above, established an entitlement to summary judgment on its claim for use and occupancy on the theory of *quantum meruit*.³ Thus, plaintiff's "alter ego" theory is deemed moot, as it is well settled that plaintiff may not recover on both grounds.

Moreover, even if this court was to consider plaintiff's fourth and fifth causes of action for a determination that Full Circle is an "alter ego" of Doniger, dismissal of such causes of action is warranted, as plaintiff's bald and conclusory allegations fail to state a cause of action.

A party seeking to pierce a corporate veil and hold an entity liable as another's "alter ego", "bears a heavy burden of showing that the corporation was dominated as to the transaction attacked and

³ The court notes that *at no time* did plaintiff seek to withdraw its motion for partial summary judgment on its third cause of action based upon *quantum meruit*, to pursue a different basis for liability.

that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.” *TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998); *see also Hyland Meat Co., Inc. v Tsagarakis*, 202 AD2d 552, 552 (2d Dept 1994). Here, significantly absent are specific allegations that Full Circle was dominated by Doniger *and that such domination was to cause or commit a fraud, or other misconduct, on plaintiff*, sufficient to warrant that this court determine that Full Circle is the “alter ego” of Doniger. Thus, dismissal is warranted on such basis alone. *See Ablstein v Elany Contracting Corp.*, 30 AD3d 210 (1st Dept 2006)(claim to pierce the corporate veil dismissed, since plaintiff alleged nothing more than the corporation was “undercapitalized” and functioned as the individual defendant’s alleged “alter ego”). The court notes that, as stated above, by order dated March 6, 2012, a default judgment was entered against Doniger, and, thus, a determination was made that he is personally liable under the terms of the lease.

Moreover, while plaintiff alleges that Full Circle should have its enterprise “pierced” in order to show that it is not an independent entity, but, rather, a “shell” of Doniger, the legal tenant of the premises, Full Circle has established that such is not the case and that it is entitled to summary judgment of dismissal of plaintiff’s fourth and fifth causes of action, and plaintiff has failed to raise any factual issues. *See Chalk & Vermillion, LLC v Thomas F. McKnight, LLC*, 303 AD2d 225 (1st Dept 2003)(summary judgment dismissing claim to pierce the corporate veil granted since plaintiff failed to raise any triable issues of fact as to whether the corporation was dominated and that such domination was used to commit fraud or other misconduct).

A party can establish its *prima facie* entitlement to dismiss an alter ego claim through an affidavit of a member or shareholder of a corporation, which demonstrates the lack of domination, control and fraud or misconduct. *See John John, LLC v Exit 63 Development, LLC*, 35 AD3d 540, 541-42 (2nd Dept 2006)(affidavit from member of corporate defendants, which stated that companies that shared office space had different owners and engaged in different fields of business, established defendant’s *prima facie* entitlement to dismiss veil piercing claim, which plaintiff failed to rebut).

Here, Full Circle has supplied an affidavit by Robert Burgos, the sole owner of Full Circle, a copy of the Asset Purchase Agreement between Full Circle and Doniger, and Full Circle's corporate tax returns from 2008 through 2010, to show itself to be an entity separate from Doniger. Such proof confirms that Burgos is the only member of Full Circle and that Full Circle purchased Doniger's assets.

In opposition, while plaintiff argues in support of its "alter ego" theory that Doniger and Full Circle shared the same business address, Doniger was observed at the premises as Full Circle's owner, and Full Circle held itself out as Doniger's entity, such alleged facts, are mostly conclusory and even if true, are insufficient to fulfill plaintiff's *heavy* burden required for this court to determine that Full Circle be treated as an "alter ego" of Doniger. See *TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998). Moreover, the strongest argument raised by plaintiff is that defendants shared the same business address, however, this, in itself is not sufficient proof of one defendant dominating another. See *Etex Apparel, Inc. v Tractor International Corp.*, 83 AD3d 587, 587 (1st Dept 2011). In addition, plaintiff's reference to Doniger appearing at the premises after Full Circle's occupation is not supported by sufficient evidence. Further, as stated above, significantly, absent are any specifics allegations that Full Circle was dominated by Doniger, in order to commit a fraud, or other misconduct, upon plaintiff.

Additionally, while there was an assignment of Doniger's assets to Full Circle, pursuant to the Asset Purchase Agreement, such agreement *specifically conditioned* any assignment of the lease on receipt of a sublease or assignment from plaintiff. Full Circle denies ever receiving such an instrument from plaintiff and plaintiff does not dispute that a written sublease was never given to Full Circle and that it never gave its consent to Full Circle's occupancy of the subject premises.

It is noted that while plaintiff asserts that this court should treat Full Circle as the "alter ego" of *individual* Doniger (the signatory of the lease with plaintiff), significantly, no case law has been supplied, which *specifically* provides for a court to hold a corporation liable for an individual's

debt, based upon such theory, which, in essence asks that this court impose a reverse piercing of the corporate veil.

For the reasons stated above, plaintiff's fourth and fifth causes of action are dismissed.

Full Circle's Cross-Motion to Amend its Answer

"It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay", unless "the proposed pleading fails to state a cause of action...or is palably insufficient as a matter of law". *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1st Dept 2001). Here, Full Circle has cross-moved to amend its answer pursuant to CPLR §3025(b), "to assert a more complete and detailed affirmative defense against "[p]laintiff's claim for payment". Notice of Motion, ¶2.

Specifically, Full Circle seeks to include in its answer allegations that: (1) due to the conditions in the subject premises and plaintiff's failure to repair the premises adequately, Full Circle is entitled to a bar, or a setoff, of any recovery for use and occupancy sought by plaintiff; and (2) that Full Circle is not in contractual privity with plaintiff, and, thus, it is not bound to any of the lease terms of the Doniger lease. Full Circle insists that such an amendment is proper because its position is meritorious and there is no prejudice to plaintiff. This court agrees and, thus, Full Circle's motion to amend is granted.⁴

⁴ It is noted that, *to the extent that* Full Circle's amended answer asserts an allegation of constructive eviction, *which Full Circle denies that it is asserting* [see Full Circle's Reply Memo, at 9], the amendment is denied, since plaintiff is not seeking use and occupancy from Full Circle, *for any time period after which Full Circle alleges that it vacated the subject commercial premises*, due to the alleged condition of the premises. There is no dispute between the parties that Full Circle vacated on January 29, 2011, and plaintiff does not seek payment from Full Circle, for use and occupancy after such date. An alleged defense of constructive eviction would not allow for the avoidance of a claim for rent/use and occupancy, prior to any abandonment or alleged constructive eviction.

In essence, Full Circle is not asserting any new defenses, but, merely consolidating and/or elaborating its prior defenses asserted in its initial answer, in response to plaintiff's claim for damages/use and occupancy. Additionally, Full Circle's defense that it is not bound by the terms of the lease between plaintiff and Doniger is consistent with this court's decision to grant partial summary judgment to plaintiff on its third cause of action for use and occupancy on the theory of *quantum meruit*, since there is no lease or other contract between plaintiff and Full Circle, as argued by plaintiff in moving for partial summary judgment. As stated, a plaintiff may only recover in *quantum meruit*, when there is no contract.

Accordingly, based upon the above, it is

ORDERED that the portion of plaintiff's motion for partial summary judgment against defendant Full Circle Post NYC, LLC on the third cause of action for the fair market value of Full Circle's use and occupancy, for the time period from October 2010 through January 2011, based upon the theory of *quantum meruit*, is granted as to liability, with the issue of damages (the amount of the fair market value of Full Circle's use and occupancy of the subject premises), respectfully referred to a Special Referee to hear and determine, in accordance with CPLR §4317(b).

As, by order of this court dated March 26, 2012, a default judgment was granted as to defendant Scott P. Doniger, with the amount of damages to be determined at an inquest, at or around the time of trial of this case, this court's order dated March 26, 2012 is, *sua sponte*, amended to reflect that the inquest as to damages with respect to defendant Scott P. Doninger is respectfully referred to a Special Referee to hear and determine in accordance with the CPLR §4317(b); and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order, with notice of entry, upon all parties and upon the Special Referee Clerk (Room 119M) to arrange a calendar date for the reference to a Special Referee; and it is further

ORDERED that the portion of plaintiff's motion which seeks to dismiss Full Circle's

affirmative defenses in the answer is granted to the extent that Full Circle's fifth affirmative defense, contained in its initial answer, is deemed dismissed; and it is further


ORDERED that the portion of defendant Full Circle Post NYC LLC's cross motion which seeks to dismiss the causes of action in the complaint is granted to the extent that the fourth and fifth causes of action are hereby dismissed; and it is further

ORDERED that the part of defendant Full Circle Post NYC LLC's cross motion for leave to amend the answer is granted and the proposed amended answer is deemed served and filed, upon entry of this order; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

DATED:

4/19/13



Doris Ling-Cohan, J.S.C.

FILED

APR 19 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

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