

Block 3701 Richmond LLC v Paramount Beauty Distrib. Assoc., Inc.
2013 NY Slip Op 33164(U)
December 12, 2013
Sup Ct, Richmond County
Docket Number: 100852/13
Judge: Philip G. Minardo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X
BLOCK 3701 RICHMOND LLC a/k/a
BLOCK 3701 RICHMOND CORP.,

Plaintiffs,

-against-

PARAMOUNT BEAUTY DISTRIBUTING ASSOCIATES,
INC., HYLAN-SEAVER MALL INC., ROYAL BEAUTY
1919 STATEN ISLAND CORP., ROYAL BEAUTY
ISLAND CORP., JEFFREY HAGLER, INDIVIDUALLY
and ALAN HAGLER, INDIVIDUALLY, BOTSARIS
MORRIS REALTY GROUP, LLC and NICHOLAS
KALOMERIS, Individually,

Defendants,

DCM Part 6
Present:
Hon. Philip G. Minardo

DECISION AND ORDER

Index No. 100852/13
Motion Nos. 2249-002
2663-003

-----X
The following papers numbered 1 to 6 were fully submitted on the 10th day of October, 2013:

Pages
Numbered

Notice of Motion to Dismiss by Defendants Paramount Beauty Distributing Associates, Inc., Royal Beauty 1919 Staten Island Corp., Royal Beauty Island Corp., Jeff Hagler and Alan Hagler with Supporting Affirmation, Exhibits and Memorandum of Law (dated July 2, 2013).....	1
Notice of Cross Motion to Dismiss by Defendants Botsaris Morris Realty Group and Nicholas C. Kalomeris* with Supporting Affirmation and Exhibits (dated August 8, 2013).....	2
Joint Memorandum of Law in Opposition of Defendants' Motions to Dismiss by Plaintiffs, with Supporting Affirmation and Exhibits (dated September 26, 2013).....	3,4
Reply Affidavit of Defendant Nicholas C. Kalomeris (dated October 3, 2013).....	5
Reply Affirmation of Jeffrey Klarsfeld, Esq. on behalf of Defendants Paramount Beauty Distributing Associates, Inc., Royal Beauty 1919 Staten Island Corp., Royal Beauty Island Corp., Jeff Hagler and Alan Hagler (dated October 8, 2013).....	6

*An Amended Verified Complaint adding these defendants was filed on or about July 2, 2013.

Upon the foregoing papers, the motion and cross motion to dismiss are decided as follows.

This is an action for monetary and equitable relief arising from an alleged breach of lease and tortious interference with contract. Plaintiff is the owner of the real property known as 2300 Hylan Boulevard, Staten Island, New York (hereinafter “2300 Hylan”). It is undisputed that on November 10, 2005, plaintiff and defendant Royal Beauty Island Corp (hereinafter “RBI”) entered into a 10-year commercial lease for Units 3 and 4 at the aforementioned premises commencing on August 1, 2006 and extending through July 31, 2016 (*see* Exhibit “5” annexed to Verified Complaint).¹ It is also undisputed that this defendant had been paying rent monthly until February of 2013, when the payments ceased, and that it subsequently notified the plaintiff-landlord in a letter dated March 14, 2013, that it had vacated the premises. Enclosed with the letter were the keys to the rental units (*see* Exhibit “6” annexed to Verified Complaint).

According to the complaint, handwritten signs were posted in the window at the 2300 Hylan by RBI indicating that the shop had relocated to “1919 Hylan Blvd” (*see* Verified Complaint, para 10; Exhibit “7” annexed to Verified Complaint). Moreover, plaintiff has submitted a printout taken, allegedly from a “Royal Beauty” webpage (*see* www.paramountbeauty.powweb.com), which reads as follows: “Hey Staten Island we’ve moved now at 1919 Hyland Blvd Same Phone [number]” (*see* Exhibit “8” annexed to Verified Complaint). It is further alleged that the above website is owned by defendant Paramount Beauty Distributing Associates Inc (hereinafter “Paramount”), which appears to be a related entity to RBI and Royal Beauty 1919 Staten Island Corp (hereinafter “Royal Beauty 1919”) (*see* Exhibits “1”, “2”, “4” annexed to the Verified Complaint).²

¹ Gary Geresi, secretary of the corporate plaintiff, executed the lease on its behalf while defendant Jeff Hagler, the secretary of Royal Beauty Island, signed on the latter’s behalf.

² Defendant Alan Hagler is the chief executive officer of both RBI and Paramount. In addition, Paramount is the registered agent for the service of process on Royal Beauty 1919 (*see*

The premises at 1919 Hylan Boulevard is owned by defendant Hylan-Seaver Mall Inc³ (hereinafter “Hylan-Seaver”) (*see* Verified Complaint, para 79). According to plaintiff, defendant Royal Beauty 1919 “was formed on or about September 6, 2012 with the express purpose of leasing [the] premises known as 1919 Hylan Boulevard” (*id.* at 18). Moreover, it is further alleged that defendants Royal Beauty 1919, RBI, Paramount, Jeffrey Hagler and Alan Hagler “are all one in the same entity”, and that said defendants conspired with (former) co-defendant Hylan-Seaver to breach the lease agreement with plaintiff. In support, plaintiff asserts that negotiations among the above defendants concerning the premises at 1919 Hylan premises began “sometime in the late spring or early summer of 2012” (*see* Verified Complaint, paras 50-51, 62-64, 80). As a result, the complaint asserts that Hylan-Seaver facilitated the breach “by leasing premises to [RBI] under a new name [Royal Beauty 1919]” (*id.* at 65).

Based on the foregoing allegations, plaintiff commenced this action asserting nine causes of action against the defendants, sounding, inter alia, in breach of contract and tortious interference with contract.⁴ Also alleged are violations of the Debtor and Creditor Law §§ 273 through 276-a based, e.g., upon defendants’ alleged fraudulent transfer of the assets of RBI to the other defendants with the intent to defraud plaintiff (*see* Verified Complaint, para 129-138). In addition, plaintiff seeks to pierce the corporate veil and hold the individual defendants Jeffrey and Alan Hagler personally liable for RBI’s debts arising out of the breach of the lease agreement.

Exhibits “1”, “2”, “4” annexed to Verified Complaint).

³In an Order entered on June 25, 2013, the complaint against defendant Hylan Seaver was dismissed with prejudice.

⁴Subsequent to the filing of the motion-in-chief, plaintiff filed and served an Amended Verified Complaint adding Botsaris Morris Realty Group and Nicholas C. Kalomeris as defendants. In asserting a claim of tortious interference with contract against them, plaintiff alleges, inter alia, that these newly added defendants were the real estate brokers who “introduced on or about August until September 2012 the premises known as 1919 Hylan Boulevard... to defendants [Paramount and Royal 1919] for rent” (*see Amended Verified Complaint*, para 144).

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the operative standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Vermont Mut Ins Co v. McCabe & Mack, LLP*, 105 AD3d 837, 839 [2nd Dept 2013]). In considering such a motion, the court must accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the allegations fit within any cognizable legal theory (*id.*). Whether or not a plaintiff can ultimately prevail upon the merits is not part of the analysis (*id.*).

To state a cause of action for tortious interference with contract, a plaintiff must allege (1) the existence of a valid contract between it and a third party; (2) defendant's knowledge thereof; (3) defendant's intentional procurement of the third party's breach of that contract without justification; and (4) damages (*see Ferrandino & Sons, Inc. v. Wheaton Bldrs, Inc., LLC*, 82 AD3d 1035, 1036 [2nd Dept 2011]). Moreover, it must be specifically alleged that the contract would not have been breached but for defendant's conduct (*id.*). Although on a motion to dismiss, the allegations in a complaint are to be construed liberally, it is well settled that in order to avoid dismissal of a claim for tortious interference with contract, a plaintiff must support his claim with allegations of fact rather than mere speculation (*id.*). Here, plaintiff has failed to support its claim of tortious interference with relevant factual allegations, choosing instead to assert in conclusory fashion that the co-defendants' actions *caused* defendant RBI to breach the lease agreement. Additionally, plaintiff has failed to allege that, *but for* the actions of said defendants, RBI would have continued to honor the lease agreement (*see Burrowes v. Combs*, 25 AD3d 370, 373 [1st Dept 2006]). Thus, the complaint is legally insufficient to state a cause of action for tortious interference with contract, and said cause of action must be dismissed in its entirety.

In addition, the cause of action alleging conspiracy to commit tortious interference with contract must also be dismissed. New York does not recognize civil conspiracy to commit a tort as

an independent cause of action (*see Ferrandino & Sons, Inc. v. Wheaton Bldrs, Inc., LLC*, 82 AD3d at 1036-1037).

As for plaintiff's allegations in support of its attempt to pierce the corporate veil and hold the individual defendants personally liable, the Court must note that one of the primary purposes of incorporation is to limit or eliminate the personal liability of corporate principals (*see Bonacasa Realty Co, LLC v. Salvatore*, 109 AD3d 946, 947 [2nd Dept 2013]). Nevertheless, equity will intervene to disregard the corporate form and pierce the corporate veil when necessary to prevent fraud or injustice by the individuals who control the corporation (*id.*). In order to justify such relief, a plaintiff must show that the individuals in question exercised complete dominion and control over the corporation, and used such dominion and control to commit a fraud or other wrong against plaintiff which resulted in injury (*id.*). Here, the complaint includes allegations that the individual defendants failed "to adhere to the formalities that are part and parcel of corporate business, [including the] issuance of stock, election of directors, keeping corporate books, [and] having separate facilities" (*see Verified Complaint*, para 102). In addition, it is alleged that they exercised "complete dominion" over Royal Beauty 1919, RBI and Paramount "to commit a fraud or wrong against the plaintiff" which resulted in breach of the lease (*see Verified Complaint*, paras 98-101). However, other than conclusory statements to the effect that the individual defendants dominated and controlled the corporate defendants, plaintiff has failed to plead particularized facts sufficient to warrant piercing of the corporate veil and allow it to proceed against the Haglers individually (*see 20 Pine St Homeowners Assn v. 20 Pine St LLC*, 109 AD3d 733, 735 [1st Dept 2013]). In any event, it has been held that a single breach of contract, without more, does not constitute a fraud or other wrong which warrants piercing the corporate veil (*see Treeline Mineola, LLC v. Berg*, 21 AD3d 1028, 1029 [2nd Dept 2005]). Accordingly, so much of the complaint as seeks to pierce the corporate veil and hold individual defendants Jeffrey and Alan Hagler personally liable must be dismissed.

Turning to the claims alleging violations of Debtor and Creditor Law §§276⁵ and 276-a⁶, it is the opinion of this Court that these causes of action have not been pleaded with sufficient particularity to satisfy CPLR 3016(b) (*see and compare Gateway I Group, Inc v. Park Ave Physicians, PC*, 62 AD3d 141, 149-150 [2nd Dept 2009]). Accordingly, they must be dismissed. Conversely, the causes of action alleging violations of §§273⁷, 274⁸ and 275⁹ of the Debtor and Creditor Law do not have to be plead with such heightened particularity under CPLR 3016(b), and are therefore sufficient to withstand dismissal (*id.*).

⁵Debtor and Creditor Law §276 provides that every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

⁶In an action or special proceeding brought by a creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors in such action or special proceeding, and the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment. The fee so fixed shall be without prejudice to any agreement, express or implied, between the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors and his attorney with respect to the compensation of such attorney.

⁷Debtor and Creditor Law §273 provides that every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

⁸Debtor and Creditor Law §274 provides that every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent

⁹Debtor and Creditor Law §275 provides that every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

With regard to the remaining cause of action for breach of contract, the Court finds that plaintiff has sufficiently pleaded said cause of action against defendant RBI insofar as it seeks to recover the balance of rent owed from March of 2013 through the expiration of the lease in 2016, the sum of approximately \$260,000 (*see* Verified Complaint, para 77).

Turning to so much of the cross motion to dismiss by defendants Botsaris Morris Realty Group and Nicholas C. Kalomeris as is addressed to the ninth cause of action, the Court opines that, in view of plaintiff's failure to allege that "but for" said defendants' actions, RBI would have continued to honor the 2300 Hylan lease agreement (*see Burrowes v. Combs*, 25 AD3d at 373), the cross motion should be granted.

Accordingly, it is

ORDERED that the motion to dismiss the complaint by Defendants Paramount Beauty Distributing Associates, Inc., Royal Beauty 1919 Staten Island Corp., Royal Beauty Island Corp., Jeff Hagler and Alan Hagler is granted with respect to the cause of action for tortious interference with contract, conspiracy to commit tortious interference with contract, the causes of action pleaded under §§276 and 276-a of the Debtor and Creditor Law, and all of the remaining causes of action against the Haglers personally; and it is further

ORDERED that the designated causes of action against each of said defendants are hereby severed and dismissed; and it is further

ORDERED that the balance of their motion is denied; and it is further

ORDERED that the cross motion to dismiss so much of the Amended Verified Complaint as is against Defendants Botsaris Morris Realty Group and Nicholas C. Kalomeris is granted; and it is further

ORDERED that the causes of action against said cross-moving defendants are hereby severed

and dismissed; and it is further

ORDERED that the balance of the cross motion is denied; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

ENTER,

Philip G. Minardo

J.S.C.

DATED: December 12, 2013