

**169 Bowery, LLC v Bowery Dev. Group, LLC**

2013 NY Slip Op 33377(U)

January 29, 2013

Sup Ct, New York County

Docket Number: 651102/10

Judge: Joan A. Madden

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

**HON. JOAN A. MADDEN**

PRESENT: \_\_\_\_\_ **J.S.C.**  
Justice

PART 11

Index Number : 651102/2010

169 BOWERY LLC

vs.

BOWERY DEVELOPMENT GROUP, LLC

SEQUENCE NUMBER : 005

REARGUMENT/RECONSIDERATION

INDEX NO. 651102/10

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. (005)

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed decision and order.*

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

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NYS SUPREME COURT - CIVIL

Dated: January 29, 2013

\_\_\_\_\_  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
169 BOWERY, LLC,

Plaintiff,

-against-

Index No. 651102/10

BOWERY DEVELOPMENT GROUP, LLC,  
COLLECTIVE HARDWARE, LLC, DAN McCLURE  
and RONALD RIVELLINI,

Defendants.

-----X  
**JOAN A. MADDEN, J.:**

Plaintiff 169 Bowery, LLC, moves, pursuant to CPLR 2221, for leave to reargue and renew defendants' motion to dismiss, and upon reargument and or/renewal, vacating the January 17, 2012 decision of this court to the extent that it dismissed the amended complaint in its entirety against defendants Dan McClure (McClure) and Ronald Rivellini (Rivellini), in their individual capacities.

The underlying facts in this action regarding the lease and use of a commercial building located at 169 Bowery, New York, NY, are discussed in detail in the January 17, 2012 decision and will not be repeated here except as necessary to understand this decision.

MOTION TO REARGUE

A motion for leave to reargue must be based upon "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221 (d)

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(2).

1. Dismissal of the Action as to Defendant McClure

169 Bowery seeks leave to reargue two aspects of this court's decision regarding defendant McClure, the dismissal of plaintiff's first cause of action seeking to enforce the personal guaranty signed by McClure and the rejection of plaintiff's request to pierce the corporate veil to obtain individual liability against McClure with respect to the various breach of contract causes of action (second through seventh causes of action), the eleventh cause of action for enforcement of a money judgment and the twelfth cause of action for attorney's fees.

With respect to the first cause of action to enforce the personal guaranty, this court concluded that the express language of the guaranty did not constitute an unconditional guaranty by McClure to pay for all of Bowery Development Group's obligations, as plaintiff contended. Rather, this court concluded that, as a result of negotiations between the parties, the language of the guaranty established a series of preconditions for the guaranty to take effect and, therefore, was far more limited than that which plaintiff seeks to enforce.

On its motion to reargue, plaintiff contends that the court overlooked basic precedents cited by plaintiff in its opposition to McClure's motion to dismiss that a contract must be construed in accordance with the intent and purpose of the parties. See

e.g. *150 Broadway N.Y. Assoc., L.P. v Shandell*, 27 Misc 3d 1234(A), 2010 NY Slip Op 51035(U) (Sup Ct, NY County 2010), *affd* 90 AD3d 498 (1<sup>st</sup> Dept 2011). Plaintiff argues that, by its ruling, the court overlooked the generally accepted purpose of a "Good Guy" guaranty.

In the January 17, 2012 decision, the court was fully aware of plaintiff's position that to interpret the guaranty as having preconditions would render it as "without force and effect." The decision expressly noted, however, that the guaranty provision was the result of extensive negotiations between the parties, both of whom were represented by counsel, and concluded that, even if the resulting language provided little protection for plaintiff, that was understood by Gordon Lau, the managing member of 169 Broadway, when he agreed to the final version of the guaranty.

This court neither overlooked nor misapprehended the law regarding the interpretation of the guaranty. Plaintiff's motion for leave to reargue with respect to the guaranty is, therefore, denied.

With respect to the rejection of plaintiff's request to pierce the corporate veil as to McClure, this court concluded that rather than providing the necessary factual allegations regarding how McClure had exercised domination and control over the LLC, the complaint provided little more than "buzz words"

restating the basic principles of law governing veil-piercing.

Citing two recent decisions by this court in other cases (*Labgold v Soma Hudson Blue, LLC*, 2011 WL 3565823, 2011 NY Misc LEXIS 3956, 2011 NY Slip Op 32179(U) [Sup Ct, NY County 2011] and *Gardner v Yanko*, 2011 WL 3565829, 2011 NY Misc LEXIS 3957, 2011 NY Slip Op 32193(U) [Sup Ct, NY County 2011]) in which the court permitted plaintiffs to amend their complaints to add veil-piercing claims against principals of an LLC, defendants now argue that the court overlooked precedents indicating that veil-piercing "involves a fact intensive inquiry that is not well suited for determination prior to discovery." *Gardner v Yanko*, 2011 NY Misc LEXIS 3957, \*14, 2011 NY Slip Op 32193(U) \*\* 10.

In both *Gardner* and *Labgold*, the plaintiff purchasers of condominium units sued the LLC sponsor of the condominium and individual principals of the sponsor LLC. The plaintiffs alleged, among other things, that there were major defects in and failure to repair the units they had purchased, and that warranties contained in the offering plan filed with the Attorney General of the State of New York were violated. The proposed amended complaints in *Gardner* and *Labgold*, which sought to obtain individual liability against the principals as well as the LLC by piercing the corporate veil, contained detailed allegations against the individual members of the LLC that went far beyond the "buzz word" allegations in this case. For example, in

*Gardner*, it was alleged that the condominium board of managers had filed a complaint with the Attorney General against the sponsor LLC and its principals (the individual defendants in *Gardner v Yanko*) that was settled, and that the settlement treated the principals collectively, jointly and severally as sponsor. It was further alleged that in that settlement, the principals had agreed to accept personal liability for defects in a condominium unit in the building that was the subject of the *Gardner* litigation.

The court does not agree with plaintiff's contention that McClure's payment of several months rent for Bowery Development is the equivalent of Yanko's acceptance of liability for the failure of the LLC to fulfill its obligations under the condominium offering plan in *Gardner v Yanko*. A settlement treating Yanko jointly and severally as sponsor and his acceptance of personal liability for the failures of the condominium is far greater in scope than McClure's payment of several months of rent for the LLC here when it was unable to meet its financial obligations.

"[I]t is well settled that a member of a limited liability company is statutorily exempt from individual liability for acts taken on behalf of the company." *Resheff, Inc. v 970 Kent Ave. Assoc., LLC*, 22 Misc 3d 1114(A), \*8, 2009 NY Slip Op 50116(U) (Sup Ct, Kings County 2009). In order to establish such

individual liability, "plaintiff bears 'a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.'" *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 (1<sup>st</sup> Dept 2005). "A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard. ... '[F]ailure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action.'" *Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 (1<sup>st</sup> Dept 2002) (citation omitted). To avoid dismissal, the pleadings must show that the acts complained of "were done with the motive for personal gain as distinguished from gain to their corporations." *Id.* at 110 (internal quotation marks and citation omitted). For example, personal gain may be shown where "funds are put in and taken out of the corporation for personal rather than corporate purposes." *Wm. Passalacqua Bldrs., Inc. v Resnick Devs. S., Inc.*, 933 F2d 131, 139 (2d Cir 1991) (emphasis supplied); see also *Horizon Inc. v Wolkowicki*, 55 AD3d 337, 338 (1<sup>st</sup> Dept 2008) (plaintiff "ignored the corporate form by transferring monies in and out of [the company] without any documentation or formalities") (emphasis supplied). Here, of

course, there is no allegation that McClure took funds out of Bowery Development, but rather, merely that he paid some of its rent bills when the LLC apparently had insufficient funds to meet its rent obligations. Such action fails to show that McClure acted for personal gain in paying rent for the LLC. Thus, neither the *Labgold*, nor the *Gardner* decision, nor the other cases cited by plaintiff, provide a basis to justify granting reargument with respect to McClure.

## 2. Dismissal of the Action as to Defendant Rivellini

Nor do *Labgold* or *Gardner* alter this court's view of the very limited factual allegations concerning Rivellini in the amended complaint.

Thus, defendants' motion for leave to reargue is denied as to both defendants.

## MOTION TO RENEW

A motion to for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." CPLR 2221 (e) (2).

Plaintiff relies on the January 23, 2012 decision of Justice Debra A. James in a trespass case brought by plaintiff 169 Bowery, LLC against Collective Hardware, Rivellini and numerous other individuals and entities allegedly occupying the building

located at 169 Bowery without plaintiff's permission. See *169 Bowery, LLC v Collective Hardware*, 2012 WL 337785, 2012 NY Misc LEXIS 328, 2012 NY Slip Op 30182(U) (Sup Ct, NY County 2012). Plaintiff argues that the fact that Judge James granted plaintiff partial summary judgment for trespass against not only Collective Hardware, but also against Rivellini as an individual, constitutes a new fact that justifies a grant of renewal.

Renewal is granted to consider the impact of the decision by Justice James.

Although Justice James did find Rivellini individually liable for trespass, she noted Rivellini's admission in a signed release that "he had no landlord-tenant relationship with plaintiff and that he was on the property in his individual capacity without plaintiff's permission." *Id.*, 2012 NY Misc LEXIS 328 \*9, 2012 NY Slip Op 30182(U) \*\*9. Justice James further found that "Collective Hardware is a separate legal entity from Bowery Development and, despite Rivellini's<sup>1</sup> testimony, the evidence establishes that it was not acting as Bowery Development's assumed name in New York until after the present lawsuit was filed." *Id.* at \*10, \*\* 9. Thus, finding Rivellini individually liable for trespass does not constitute a

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<sup>1</sup> The court notes that defendant Rivellini's name is spelled differently in the decision of the trespass case, but the spelling used in this case will be used in this opinion except where his name is contained in a direct quotation from that decision.

sufficient basis for an alter ego liability theory with respect to either Collective Hardware or Bowery Development.

Plaintiff contends that because McClure was the managing member of Collective Hardware, Justice James's ruling that Collective Hardware was liable for trespass justifies piercing the corporate veil. Plaintiff further relies on Justice James's finding that on February 2, 2010 a certificate was filed on behalf of Bowery Development assuming the name of Collective Hardware, but, as noted above, Justice James also concluded that the evidence indicated that Collective Hardware was a separate legal entity from Bowery Development, and that when Collective Hardware signed subleases for the building, it was not yet acting as Bowery Development's assumed name.<sup>2</sup> Furthermore, given that Justice James never mentions McClure in her decision, her ruling that Collective Hardware was liable for trespass does not constitute a new fact indicating alleged abuse of the corporate form by McClure.

Thus, on renewal, the court adheres to its previous decision with respect to both McClure and Rivellini.

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied to the extent that

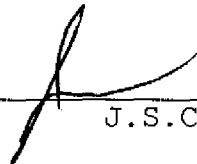
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<sup>2</sup> The assumed name certificate was filed on February 2, 2010, approximately three months after the trespass lawsuit was filed and after the allegedly illegal subleases were entered into by Collective Hardware.

leave for reargument is denied and leave for renewal is granted,  
and on renewal, the court adheres to its previous decision.

Dated: *January 29, 2013*

ENTER:

  
\_\_\_\_\_  
J.S.C.