

Vivir of Li, Inc v Ehrenkranz

2014 NY Slip Op 30785(U)

March 26, 2014

Supreme Court, Bronx County

Docket Number: 043523-2009

Judge: Emily Pines

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Motion Date: 02/09/2012
Submit Date: 01/14/2014
Motion No.: 010 MG

X

VIVIR OF LI, Inc, f/k/a OPUS VIVIR, INC,

Index No.
043523-2009

Plaintiff,

- against -

JOHN EHRENKRANZ and
ANDRA EHRENKRANZ,

Defendants.

X

JOHN EHRENKRANZ and ANDREA EHRENKRANZ, ON
BEHALF OF THEMSELVES AND ALL OTHER PERSONS
SIMILARLY SITUATED AS BENEFICIARIES WITH CLAIMS
FOR WORK AND MATERIALS SUPPLIED FOR THE
PROJECT,

Counterclaim
Index No.
30-0079

Counterclaim Plaintiffs,

- against -

JULIAN BOYLAN,

Counterclaim Defendant.

X

Defendants/Counterclaimants, John Ehrenkranz and Andra Ehrenkranz (“counterclaimants” or “Ehrenkranzs”) move, by Notice of Motion, seeking an order of this Court, permitting the Ehrenkranzs to file and serve an amended counterclaim naming Dmitri Boylan as a

Counterclaim/Defendant, on the Ehrenkrantz's breach of contract claim in which the Counterclaimants seek to pierce the corporate veil of Counterclaim Defendant, Opus Vivir. At this stage, following a jury trial, the corporate counterclaim Defendant has been found to have breached the parties' home construction contract and been found liable for contract damages in excess of \$2.2 million. The Court is in the middle of the second stage of this action, in which the Ehrenkrantz are seeking to pierce the corporate veil of Opus Vivir, in order to hold Julian Boylan individually liable for the breach of contract.

In support of its motion, which was originally made in early 2012 and eventually transferred along with the action to this Court, Counterclaim Defendants' prior attorney and current counsel make similar arguments as to why this amendment should be permitted by the Court. Essentially, the Ehrenkrantz counsel take the position that Dmitri Boylan was an inextricable part of the operation of Opus Vivir during the period of the construction of the Ehrenkrantz residence. They use bank records to demonstrate that Opus Vivir used corporate funds supplied by the Counterclaimants to build out properties owned by Dmitri Boylan as well as a limited liability company owned by Dmitri Boylan. Thus, they assert that the corporate entity was utilized by Dmitri Boylan to develop his own real properties.

The Counterclaimants set forth their claim that Opus Vivir was utilized as a vehicle whereby Ehrenkrantz funds were utilized to pay for Dmitri Boylan's and 58 MHR LLC's (owned by Dmitri Boylan) rather than for the Ehrenkrantz construction project. Counterclaimants cite from deposition testimony of Opus Vivir's bookkeeper, Cynthia Robinson, in which she set forth her awareness that

during the Ehrenkranz project the corporate entity used Ehrenkranz funds for other construction projects occurring simultaneously in Suffolk County. They assert that the only such projects occurring at the time were for Dmitri Boylan or his limited liability company.

Counsel for Counterclaim Defendants Opus Vivir and Julian Boylan opposes the motion, stating that it was brought over two years after commencement of this 2009 action and that no new facts had been revealed not already known at the time the action was commenced. Counsel sets forth that what was learned in discovery was that Dmitri Boylan had no involvement with the construction of the Ehrenkranz residence after he received payment for the property which was in his name. He argues that there was no evidence presented during extensive discovery that demonstrates any intent to deceive or false representation of any material fact that caused the Ehrenkranz Counterclaimants injury as a result thereof. Without any basis in merit or excuse for delay, counsel for counterclaim Defendants asserts that the Court should deny the delayed motion to amend.

In a supplemental memorandum of law, submitted by current counsel for Counterclaimants, he argues that financial documents, not revealed until January 2014, over four years after commencement of these actions, show that Dmitri Boylan was a controlling “shadow” owner of Opus Vivir. He sets forth that this evidence reveals that : 1) Dmitri Boylan controlled how the corporation accounted for revenue and income; 2) that Dmitri Boylan controlled the corporate accounting firm; 3) that Dmitri Boylan was the corporation’s only customer other than the Ehrenkranzs for the period in question; 4) that Dmitri Boylan caused the corporation to supply materials and services in connection with work performed on his properties below their actual cost; 5) that Dmitri Boylan made

payments to the corporation that did not correlate with job costs for work on Dmitri Boylan's properties using inflated bills to the Ehrenkrantz to subsidize work on his own properties; and 6) that Dmitri Boylan caused the corporate entity to pay tens of thousands of dollars in personal business expenses unrelated to the corporate business. It is the argument of Counterclaimants' counsel that the delay in production of these documents, which had been assertedly transferred to Dmitri Boylan at the end of the

Ehrenkrantz project, adds further basis to permit the amendment of the complaint at this juncture.

Counterclaim Defendants' counsel submitted a reply to the supplemental memorandum stating that: 1) there is no new evidence gleaned from the QuickBooks files demonstrating Dmitri Boylan dictating that manner in which Opus Vivir's files were categorized; 2) there is no support as testified to by Julian Boylan's expert that the records are disingenuous; 3) the evidence shows that Julian Boylan himself aided in Opus Vivir meeting its cash needs both in loaning funds and in securing lines of credit; 4) that all monies were attributed to specific projects; 4) that the Ehrenkrantz counsel have been in possession of corporate tax returns for years and there is no evidence of tax code violations set forth; and 5) that the final payments by MHR to Opus Vivir has been and will continue to demonstrate that the corporation was simply arranging to make its final payments before going out of business. Counsel for counterclaim Defendants also asserts that at this point, to add Dmitri Boylan as a party will require service, motions to dismiss, and possibly, if denied, more years of discovery.

As set forth in the motion papers by Counterclaimants' counsel, motions for leave to amend pleadings, by adding parties against whom a right may be asserted either jointly or in the alternative,

basis. See, CPLR § 1002(b); **Stewart Tenants Corp v Square Industries, Inc**, 26j AD 2d 246, 703 NYS 2d 453 (1st Dep't 2000); **Hempstead General Hospital v Liberty Mutual Insurance Co**, 134 AD 2d 569, 521 NYS 2d 469 (2d Dep't 1987).

While at this juncture it is quite late to permit the amendment adding Dmitri Boylan as a party to a 2009 action, the motion itself was made years ago, long before the actual trial of the action. While the veil piercing portion of the trial is continuing at this time, it has not been completed. This Court is not in any way stating that the claim actually has merit; however, counsel for Counterclaimants has raised issues, which if could be proved at trial, could possibly lead the Court to permit a piercing of the Opus Vivir corporate veil, to obtain a judgment against Dmitri Boylan. As the attorneys for all parties know, this Court believes that veil piercing is quite difficult to prove. The Court also notes that the veil piercing theory asserted against individual Defendant Julian Boylan is hotly contested and that many of the arguments raised therein, will be reiterated in any such claim against Dmitri Boylan, who counterclaim Defendants' attorney has argued, was really completely uninvolved, except for his financial aid, in the operation of the subject corporate entity. However, in view of the liberal stance afforded parties to amend their pleadings to allege a claim which can be asserted by the Counterclaimants either jointly or in the alternative, the Court grants the subject motion to amend the counterclaim in the 2009 action to add Dmitri Boylan as a Counterclaim Defendant.

While this Court recognizes that Dmitri Boylan, who resides in Argentina, must both be served and that his counsel has the right to move to dismiss the amended complaint pursuant to CPLR § 3211, the Court's reluctance to expand an already heavily delayed proceeding, cannot be the sole basis for

denying the motion.

Accordingly for the reasons set forth above, the motion is granted. This constitutes the *DECISION* and *ORDER* of the Court.

Dated: March 26, 2014
Riverhead, New York



EMILY PINES
J. S. C.

Final
 Non Final

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