

Ryon v Dell'Orto Realty, LLC

2014 NY Slip Op 30917(U)

April 10, 2014

Supreme Court, New York County

Docket Number: 107209/2011

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT:

PART 5

Justice

Index Number : 107209/2011
RYON, KIM
vs
DELL'ORTO REALTY
Sequence Number : 002
SUMMARY JUDGMENT

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

CAL # 66

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

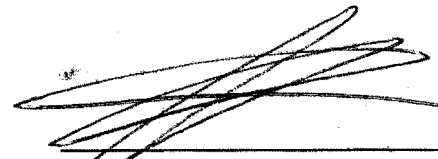
**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

FILED

APR 10 2014

COUNTY CLERK'S OFFICE
NEW YORK


_____, J.S.C.

Dated: 4-7-14
APR 07 2014

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 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: PART 5

-----X
KIM RYON and SAMUEL RYON,

Plaintiffs,

-against-

DELL'ORTO REALTY, LLC, JAMES
DELL'ORTO, GAETANINA'S KITCHEN, INC.,
d/b/a MANGANARO'S HERO BOY, NASHA
COMMUNICATIONS, INC. d/b/a
AROUND THE CLOCK, INC. and
CITY OF NEW YORK,

Defendants.

DECISION/ORDER
Index No.: 107209/2011
Seq. No.: 002

PRESENT:
Hon. Kathryn E. Freed
J.S.C

FILED

APR 10 2014

-----X
HON. KATHRYN E. FREED:

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219[a], of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....3-4.....
EXHIBITS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

Defendants Dell'Orto Realty, LLC, (hereinafter "Dell'Orto LLC"), James Dell'Orto ("Dell'Orto"), and Gaetanina's Kitchen, Inc., all move for summary judgment pursuant to CPLR 3212, on the grounds that plaintiffs will not be able to establish a prima facie case of negligence against them. Additionally the City of New York ("the City") cross-moves for summary judgment pursuant to CPLR 3212, and opposes the Dell'Orto defendants' motions for summary

judgment. The plaintiff opposes the motions by the Dell'Orto defendants' and the City.

Factual and Procedural Background:

At oral argument, on February 4, 2014, this Court granted the City's cross motion for summary judgment and dismissed all claims and cross claims against it. Additionally, this Court granted defendant Gaetanina's Kitchen, Inc.'s motion for summary judgment and dismissed all claims and cross claims against it. This Court denied Dell'Orto Realty LLC's motion for summary judgment, finding that issues of fact exist as to the location of the fall. Finally, this Court reserved decision at that time regarding the summary judgment motion by defendant James Dell'Orto.

The underlying matter was commenced by plaintiff Kim Ryon, who alleged that, on August 4, 2010, she twisted her right ankle due to a defect in the public sidewalk abutting the premises known as 484 Ninth Avenue. She commenced this action by filing a summons and complaint on or about September 1, 2011. Plaintiff's husband, Samuel Ryon, asserts a claim for loss of consortium. Issue was joined by the service of an answer by the Dell'Orto defendants on November 11, 2011 and by the City on or about July 26, 2011.

Positions of the Parties:

James Dell'Orto, contends that, as president and sole member of Dell'Orto Realty, he can not be held personally liable for the negligence, if any, of the limited liability company, Dell'Orto Realty LLC. He further argues that for him to be held personally liable, **he had to have participated in the allegedly** wrongful conduct (*see Clark v. Pine Hill Holmes, Inc.*, 112

* 4]
A.D.2d 755 [4th Dept 1985]), and that **his acts were not merely those of a corporate agent acting on behalf of his principal**. See *Michaels v. Lispenard Corp.*, 11 A.D.2d 12 (1st Dept 1960).

In response, plaintiffs argue that the subject premises were under the “sole and exclusive control, management and maintenance of the defendant James Dell’Orto, [his] agents, servants, workmen or employees then and there engaged in defendant’s business and acting within the course and scope of their employment or authority.” See Complaint, Paragraph 28.

Plaintiffs assert that an officer who participates in the commission of a tort by a corporation has been held personally liable. See *Clark, supra*. Plaintiff **further maintains that**, as the sole officer of the corporation, Dell’Orto was a managing agent in exclusive control of the premises and, therefore, knowingly permitted a dangerous condition to exist for which he is personally liable. Plaintiff cites *Michaels, supra*, at 14, for the proposition that officers of a corporation are personally liable for torts that they commit or inspire or participate in, even if performed through an artificial body.

Conclusions of Law:

Perhaps the seminal discussion on “piercing the corporate veil” was set forth by the Court of Appeals in *Matter of Morris v. New York State Department of Taxation and Fin.*, 82 N.Y.2d 135 (1993). The Court held that generally, piercing the corporate veil “requires a showing that: (1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury...some showing of a wrongful or unjust act toward plaintiff is required...[T]he party

seeking to pierce the corporate veil must establish that the owners, through their domination abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.” *Id.*, at 141-142.

Additionally, the Court of Appeals has consistently held that “those seeking to pierce a corporate veil...bear a heavy burden...” *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). See also *Extel Apparel, Inc.*, 83 A.D.3d 587 (1st Dept 2011). This standard has been also been held to apply to members of a limited liability company. “A party may seek to hold a member of an LLC individually liable...by application of the doctrine of piercing the corporate veil.” *Grammas v. Lockwood Assoc., LLC*, 95 A.D.3d 1073, 1074-1075, (2nd Dept 2012). However, the court in *Grammas* noted that a member of an LLC could not be held liable by virtue of that status alone and went on to apply the same requirements for members of an LLC as those for corporations. *Id.*, at 1074.

Here, it is clear that **plaintiffs have failed to meet their “heavy burden” of piercing the corporate veil since they did not identify** any acts by which Dell’Orto abused or perverted the corporate form or committed a fraud or injustice against the plaintiffs. Plaintiffs, in a very conclusory fashion, **merely** state that Dell’Orto was a managing agent in exclusive control of the premises and, thereby, knowingly permitted a dangerous condition to exist. They fail to cite any evidence supporting this allegation but, even if it were true, **still fail** to meet the requirements necessary for piercing the corporate veil. They do not set forth any alleged fraudulent or willful acts resulting in injury to plaintiff. The most that is alleged is negligence by failing to repair a sidewalk.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendant James Dell'Orto's motion for summary judgment granted; and it is further

ORDERED that the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Defendant Dell'Orto, shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: April 7, 2014

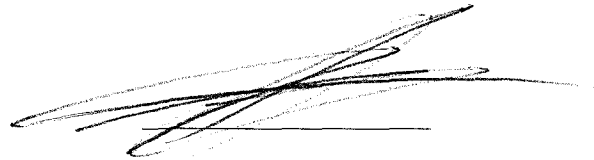
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FILED

APR 10 2014

COUNTY CLERK'S OFFICE
NEW YORK



Hon. Kathryn E. Freed
JUSTICE OF THE SUPREME COURT