

Sundaresan v Cat's Paw
2014 NY Slip Op 31285(U)
May 13, 2014
Sup Ct, New York County
Docket Number: 650679/2011
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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PATIENCE SUNDARESAN,

Plaintiff,

-against-

**DECISION AND ORDER
Motion Seq. No.: 002**

Index No.: 650679/2011

**CAT'S PAW, ORVILLE J. VANDERPOOL AND
KILLEAVY BUILDERS CORP.,**

Defendants.

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KILLEAVY BUILDERS CORP.,

Third-Party Plaintiff,

-against-

CORIOLIS EFFECT, INC,

Third-Party Defendant.

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O. PETER SHERWOOD, J.:

Defendant Orville J. Vanderpool moves pursuant to CPLR 3212 for summary judgment.

Background

Plaintiff, Patience Sundaresan, an attorney, sought to hire a general contractor to renovate her 100 year-old brownstone located at 125 West 75th Street, New York, NY (the "Project"). Sundaresan was introduced to Vanderpool, President of defendant Cat's Paw Builders, Inc. ("Cat's Paw"). Cat's Paw is a duly formed New York State S Corporation in good standing, and was formed on February 15, 1999 by filing of a certificate of incorporation with the New York State Secretary of State. Cat's Paw maintains a corporate checking account, and has included its federal and state taxation income in its moving papers (Seymour affirmation, Exs. I-K). Cat's Paw employed and retained an accountant to prepare and file all necessary returns (*see Otello aff*).

Sundaresan advised Vanderpool that she would only consider retaining a general contractor to perform work on the Project that held the requisite experience in brownstone renovation work. Vanderpool informed Sundaresan that Cat's Paw was the general contractor on a similar brownstone

and that Cat's Paw was experienced in that type of work. In reliance on Vanderpool's statements, Sundaresan agreed to retain Cat's Paw for the Project.

On March 22, 2007, Sundaresan and Cat's Paw entered into an agreement for the Project using the AIA Abbreviated Standard Form of Agreement Between Owner and Contractor for Construction Projects of Limited Scope (the "Agreement") (Seymour affirmation Ex. G; Sundaresan aff Ex. 2). The price was \$1,080,208.97 and the completion date was scheduled for November 1, 2007.

Cat's Paw worked on the Project and charged Sundaresan for the work of itself and its subcontractors. Sundaresan submitted numerous change orders to the work, which increased the cost of the Project and extended the deadline for substantial completion (Sundaresan aff ¶¶ 59-61). Pursuant to the terms of the contract, all payments made by Sundaresan were made payable to Cat's Paw (Def's Rule 19-a Statement ¶ 11). According to Sundaresan, Vanderpool failed to provide the documentation called for by the Agreement when he requested payments (Sundaresan aff ¶ 22). In June 2008, Vanderpool submitted a subcontractor balance report in connection with his monthly payment request (Sundaresan aff ¶ 25). The statement included an entry in the amount of \$55,000 references as "Loan OJV" (Sundaresan aff ¶ 27). At his deposition, Vanderpool denied knowledge of the circumstances surrounding that loan (Sundaresan aff ¶ 27; Tr of Vanderpool deposition 209:25-210:22). Sundaresan also alleges that many change orders were billed at a rate higher than what was paid to Vanderpool's workers (*e.g.* Sundaresan aff ¶¶ 40-42). Sundaresan's affidavit contains numerous other examples of allegedly fraudulent billing practices.

According to Sundaresan, in June of 2009, Cat's Paw abandoned the project after receiving payment for contract and change order work in excess of \$1,800,000 (Sundaresan aff ¶ 22). Sundaresan spent \$450,000 remedying incomplete and defective work (Sundaresan aff ¶ 63).

Procedural History

Sundaresan commenced this action by filing the Summons and Complaint on March 15, 2011. Relevant to the instant motion, the Complaint alleges that "Vanderpool in his position as Cat's Paw's officer," fraudulently induced Sundaresan to hire Cat's Paw (First Cause of Action) and to remit funds to Cat's Paw (Fourth Cause of Action), and committed fraud against Sundaresan (Fifth Cause of Action). The Sixth Cause of Action seeks to pierce the corporate veil and hold Vanderpool personally liable for the alleged breaches of Cat's Paw.

Cat's Paw asserted counterclaims against Sundaresan. Defendant Killeavy, a following subcontractor has filed a third party complaint against Coriolis Effect, Inc., a plumbing subcontractor. Neither are implicated in the present motion. The Note of Issue was filed on October 18, 2013. Vanderpool in his individual capacity now moves for Summary Judgment seeking to dismiss the Complaint against him.

Discussion

A. Summary Judgment Standard

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see*, CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see*, *Alvarez v Prospect Hosp.*, *supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see*, *Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see*, *Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see*, *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see*, *Zuckerman v City of New York*, *supra*; *Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

B. Piercing the Corporate Veil

“[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” (*James v Loran Realty V Corp.*, 85 AD3d 619 [1st Dept 2011] *affd*, 20 NY3d 918, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Factors to be considered in determining whether a company has abused the privilege of doing business in the corporate form include “a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purposes, overlap in ownership and directorship, or common use of office space and equipment” (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996]).

Vanderpool has submitted uncontroverted evidence that Cat’s Paw observes corporate formalities. Cat’s Paw maintained a separate office space for its work. There is no evidence that Vanderpool improperly co-mingled corporate and personal funds or that Cat’s Paw was undercapitalized.

Sundaresan argues that Vanderpool has failed to shift the burden based on the lack of an affidavit from someone with personal knowledge of the facts. However, Sundaresan concedes that the affidavit of Joseph Otello, Vanderpool’s accountant, “may be of probative value as to the filing of tax returns” (PI’s Mem of Law at 2). Otello was “responsible for compiling [Cat’s Paw’s] financial records, reviewing bank statements and filing all necessary federal and state income tax returns” (Otello aff ¶5). When read as a whole, the Rule 19-a Statement, the Otello affidavit and the other evidence tendered by Vanderpool make out a prima facie case of entitlement to summary judgment on the Sixth Cause of Action.

None of Sundaresan’s evidence raises a triable issue of fact regarding Vanderpool’s abuse of the corporate form. Sundaresan relies on admissions by Vanderpool that he charged Sundaresan double what he paid his workers. Sundaresan also points to a “mysterious loan” included in the June billing statement. Sundaresan speculates that this loan was “used as a ploy to elicit a large sum of money from the corporation for his own personal gain. Furthermore, Sunderesan asserts that Cat’s Paw was undercapitalized, allegedly evidenced by the fraudulent billings.

Even accepting Sundaresan's speculative allegations as true, they are not probative of an abuse of the corporate form. These "facts," which are supported only by citation to Sundaresan's affidavit, do not evidence an abuse of the corporate form as is necessary to maintain a cause of action to pierce the corporate veil. The payment requests were made by Cat's Paw, not Vanderpool. At most, the show overcharging by Cat's Paw and may be indicative of a breach of contract claim against Cat's Paw. Vanderpool's motion for summary judgment dismissing the Sixth Cause of Action must be granted.

C. Fraud Causes of Action

Vanderpool's initial moving papers focuses exclusively on the Sixth Cause of Action. His Rule 19-a Statement deals only with issues related to the veil piercing claim. In his reply, Vanderpool, for the first time, points to his own deposition testimony to show that he indeed had the requisite knowledge and experience to perform the Project. Nevertheless, the fraud-based causes of action against Vanderpool must be dismissed independently of Vanderpool's factual assertions.

To state a claim for fraud, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). The plaintiff must set forth the circumstances of the fraud with particularity (CPLR 3016 [b]). To plead scienter, a plaintiff must offer more than conclusory allegations of intent. (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495-496 [1st Dept 2006]). Further, a plaintiff may not claim justifiable reliance if he could have discovered the truth "by ordinary intelligence or with reasonable investigation" (*id.* at 496). Furthermore, the fraudulent statement must be more than a concealed lack of intent to perform the contract. "To say that a contracting party intends when he enters into an agreement not to be bound by it is not to state 'fraud' in an actionable area, but to state a willingness to risk paying damages for breach of contract" (*Briefstein v P.J. Rotondo Constr. Co.*, 8 AD2d 349, 351 [1st Dept 1959]).

"A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract" (*Krantz v Chateau Stores of Can. Ltd.*, 256 AD2d 186, 187 [1st Dept 1998]). The "fraud" must therefore "allege fraud extraneous and collateral to the contract" (*International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 527 [1st Dept 2009]).

Here, Sundaresan alleges specific material misrepresentations made by Vanderpool, falsity, reliance, and damages. The specific misrepresentations include Vanderpool's allegedly false assertion regarding Cat's Paw's knowledge and qualifications as well as an allegedly false entry on a June 2008 billing statement. Although the issue of reliance is not raised in Vanderpool's moving papers, it must be noted that Section 6.2 of the Agreement specifically recited that it superseded prior representations. Vanderpool made the representations, signed the contract, and issued billing invoices all in his official capacity as President of Cat's Paw, not as an individual. With the regard to the false billing statements, Vanderpool asserts that he had no knowledge of the entries at issue.

All three fraud causes of action are duplicative of the breach of contract action. If it is true that Cat's Paw failed to perform under the contract, Sundaresan can be made whole by damages for breach of contract. To the extent that the June 2008 bill is found to be inflated, Sundaresan may be entitled to the amount she paid in excess of the contract amounts. Sundaresan's attempt to recast the breach of contract cause of action as fraud causes of action is merely an attempt at an end-run around her inability to pierce the corporate veil.

Sundaresan cites *Logan-Baldwin v L.S.M. General Contractors Inc.* (48 AD3d 1220 [4th Dept 2008]) as "a case directly on point" (Pl's Mem of Law at 3) and it is. In that case, the court noted that "[p]laintiffs failed to raise an issue of fact whether defendant . . . abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" *Logan-Baldwin*, 48 AD3d at 1220-1221. Furthermore, although the complaint alleges that defendants had misrepresented themselves as having the necessary knowledge and skill, the Fourth Department found that "the court properly granted those parts of [defendant's] motion seeking summary judgment dismissing the remaining causes of action for fraud," noting that "[i]t is well established that a separate cause of action for fraud is not stated where, as here, the alleged fraud relates to the breach of contract" *id.* at 1221. In a subsequent appeal, the Fourth Department reiterated that "in a prior appeal we affirmed an order granting the cross motion of [the individual defendant] for summary judgment dismissing the complaint against him in his individual capacity and for summary judgment dismissing the fraud causes of action against [the general contractor]" 94 AD3d 1466 (4th Dept 2012). Thus, the case stands only for the proposition that the claims against Vanderpool must fail.

Sundaresan also cites *Basilico v ADB LLC* (2008 NY Slip Op 30046[U] [Sup Ct NY County]) which denied a contractor's principal's CPLR 3211 motion to dismiss in similar circumstances. That case is distinguishable on at least two grounds. First, unlike here, *Basilico* contained a viable cause of action for piercing the corporate veil. Second, the court made no finding that the fraud claims were duplicative of the breach of contract claim. Where, as here, an examination of the record establishes that the alleged fraudulent contract is indistinguishable from the alleged breach of contract, summary judgment is appropriate on the fraud causes of action. Accordingly, the First, Fourth and Fifth Causes of Action must be dismissed as to Vanderpool.

It is hereby

ORDERED that defendant, Orville Vanderpool's motion for summary judgment is **GRANTED** and the complaint is **DISMISSED** as to him.

This constitutes the decision and order of the court.

DATED: May 13, 2014

ENTER,



O. PETER SHERWOOD

J.S.C.