

17 W. 127th St. Partners LLC v Baruch Realty, LLC

2014 NY Slip Op 31718(U)

July 1, 2014

Supreme Court, New York County

Docket Number: 158807/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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17 WEST 127th STREET PARTNERS LLC,

Plaintiff,

Index No. 158807/2012

-against-

DECISION/ORDER

BARUCH REALTY, LLC, MOSHE NIR,
17 W 127th STREET, LLC, ADAM DRESSLER, ESQ.,
DRESSLER LAW, LLP, DUSTIN BOWMAN, ESQ.,
A.M. TITLE INC. and SANDRA M. SALMON PINK,

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Affidavits in Reply.....	<u>3</u>
Exhibits.....	<u>4</u>

This action arises from defendant Baruch Realty, LLC's alleged breach of a contract to sell real property to plaintiff and instead sell the property to defendant 17 W. 127th Street, LLC. Plaintiff has brought the present motion to amend the complaint and to disqualify Adam Dressler, Esq. from acting as counsel for defendants Baruch Realty, LLC and Moshe Nir.

The relevant facts are as follows. On or about August 3, 2012, plaintiff entered into a written contract with defendant Baruch Realty, LLC ("Baruch") for the purchase of the property located at 17 West 127th Street, New York, New York (the "Premises"), which called for title closing on October 2, 2012 (the "Contract"). However, the closing did not occur on October 2,

2012 and by letter dated November 28, 2012, Baruch's attorney, Adam Dressler, notified plaintiff that Baruch was cancelling the Contract. On November 29, 2012, Baruch allegedly sold and transferred the property to defendant 17 W 127th Street, LLC. On that same day, plaintiff wrote to Baruch to notify it that it was rejecting its cancellation and scheduling the closing date for December 10, 2012. Baruch did not appear on December 10, 2012.

On or about December 12, 2012, plaintiff commenced the instant action. Initially, plaintiff only named Baruch as a defendant and sought specific performance of the Contract. Once plaintiff discovered that the Premises had been sold to another purchaser at a higher price, plaintiff moved to amend its complaint to assert additional claims against Baruch and to add Moshe Nir, 17 W 127th Street, LLC, Adam Dressler, Esq., Dressler Law, LLP, Dustin Bowman, Esq., A.M. Title Inc. and Sandra M. Salmon Pink as additional defendants. By Decision/Order dated July 25, 2013, this court granted plaintiff's motion without opposition. Thereafter, plaintiff served defendants with an amended complaint.

Plaintiff now seeks leave to file a second amended complaint based on information it has obtained during the discovery process. The proposed second amended complaint asserts claims against the seller Baruch and its principal, Moshe Nir, for declaratory relief and specific performance, breach of contract, fraudulent conveyance and to pierce Baruch's corporate veil. It is asserting these claims based on its allegation that recently produced documents demonstrate that Nir, the principal of Baruch, diverted the funds that the purchaser paid for the Premises to himself and then caused Baruch to be dissolved. Plaintiff also seeks to withdraw the fraud claim asserted against Baruch and Nir and withdraw claims asserted against some of the other defendants. It also asserts a new cause of action against the purchaser of the Premises for

tortious interference with contract. It is asserting this claim based on its allegation that the recently produced documents establish that the seller's counsel, Adam Dressler, Esq., specifically informed the purchaser of plaintiff's pre-existing agreement to purchase the Premises and that the purchaser induced Baruch to breach the pre-existing agreement by selling the Premises to the purchaser instead.

Pursuant to CPLR § 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *Id.*

In the present case, plaintiff's motion to amend the complaint is granted as it has sufficiently established that defendants will not be prejudiced or surprised by the amendments and that the amended complaint is not palpably insufficient or clearly devoid of merit. Plaintiff's proposed second amended complaint adequately pleads claims for intentional and constructive fraudulent conveyance pursuant to the New York Creditor and Debtor Law §§273-276. To establish an intentional fraudulent conveyance, plaintiff must allege that Baruch made a conveyance with the actual intent to hinder, delay or defraud plaintiff. *See* NY Debtor & Creditor Law §276. To state a claim for constructive fraudulent conveyance, plaintiff must allege that Baruch made a conveyance, that it was insolvent prior to the conveyance or was rendered insolvent as a result of the conveyance and that the conveyance was made without fair

consideration. See NY Debtor & Creditor law § 273-275. Plaintiff has sufficiently alleged the elements of a claim for actual and constructive fraudulent conveyance based on the allegations that Baruch made a conveyance of the proceeds of the sale of the property to Nir, that it did not receive any consideration for the transfer, that the transfer was made while plaintiff was a creditor of Baruch, that the transfer left Baruch insolvent and that the transfer was designed with the actual intent to hinder, delay and defraud plaintiff.

Plaintiff's claim to pierce the corporate veil is also not clearly devoid of merit. In order to pierce the corporate veil, a party must show 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." *Morris v. Dept. of Taxation*, 82 N.Y.2d 135 (1993). To determine dominion and control, courts examine various criteria. Those criteria include but are not limited to:

(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e. issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 139 (2d Cir. 1991). Plaintiff's claim to pierce the corporate veil is based on its allegations that Nir was the sole member of Baruch and exercised complete control over Baruch's actions; that Nir used that control to commit a wrong when he caused Baruch to unilaterally cancel the contact with

plaintiff without any legitimate basis so that the Premises could be sold to another purchaser at a higher price; that Baruch did not receive any consideration for the sale of the Premises; that instead the consideration paid for the Premises was paid directly to Nir even though Nir did not personally own the property; that in so doing, Nir commingled his personal funds with the corporate funds of Baruch and treated the corporate assets of Baruch as his own; that less than three weeks after Baruch sold the property to the purchaser, Baruch filed a certificate of dissolution with the New York department of State, Division of Corporations; and that Baruch was inadequately capitalized and upon its dissolution, had failed to reserve sufficient funds for any contingent liabilities that could have arisen after its dissolution. These allegations with respect to the piercing the corporate veil claim are not devoid of merit.

Finally, plaintiff's proposed claim against the purchaser of the Premises for tortious interference with contractual relations is also not devoid of merit. In its second amended complaint, plaintiff adequately pleads a cause of action for tortious interference with contractual relations by alleging that plaintiff and Baruch had a valid contract for the purchase and sale of real property; the purchaser of the Premises knew or should have known about this contract; the purchaser induced Baruch to breach this contract; and, as a result, plaintiff was damaged. These allegations sufficiently state a viable claim for tortious interference with contractual relations.

The argument by the purchaser of the Premises that any contract by plaintiff to purchase the Premises is void as against the purchaser pursuant to Real Property Law § 294(3) is without merit. Real Property Law § 294(3) provides that an executory contract for the sale of real property which is not recorded shall be void against any person who subsequently purchases the real property if the subsequent purchase is made in good faith. In the present case, plaintiff has

sufficiently alleged that the contract by the purchase to purchase the Premises was not made in good faith as the purchaser had actual knowledge of the contract between Baruch and plaintiff. It alleges that the purchaser had knowledge based on the existence of the rider to the draft contract between Baruch and the purchaser, which was not included in the actual contract, which specifically notified the purchaser of the existence of another contract. Therefore, plaintiff is granted leave to amend the complaint to assert the claim for tortious interference against the purchaser.

The court now turns to plaintiff's motion pursuant to Rule 3.7 of the Rules of Professional Conduct seeking an order disqualifying Dressler from representing Baruch and Nir. Rule 3.7 of the Rules of Professional Conduct provides that a "lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." Moreover, disqualification "may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary." *S&S Hotel Ventures, Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 445-46 (1987). A "finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and the availability of other evidence". *See also Davin v. Jmam, LLC.*, 27 A.D.3d 371 (1st Dept 2006) ("Disqualification of plaintiff's law firm..was properly denied in the absence of a showing that the testimony of plaintiff's attorney would be necessary"). The courts have found, however, that an attorney may be a necessary witness where the attorney is the only one who will have knowledge of some of the central issues in dispute regarding the negotiation and terms of the contracts in question. *See Falk v. Gallo*, 73 A.D.3d 685 (2d Dept 2010) (in action for breach of contract, "since the plaintiff's attorney was the only

person, other than the parties, who had knowledge of any discussions regarding the terms of the oral agreement, he is 'likely to be a witness on a significant issue of fact' and was properly disqualified); *Brunette v. Gianfelice*, 171 A.D. 2d 719 (2d Dept 1991) ("considering that the plaintiff's attorney has admitted his participation in the negotiation of the agreement, as well as having personal knowledge of the parties' intent, we believe that he 'ought to be called' as a witness for the plaintiff and that he should, therefore be disqualified from acting as the plaintiff's attorney").

In the present case, the courts finds that the attorney for Baruch and Nir should be disqualified from acting as attorney for these defendants on the ground that he is a necessary witness. One of the key issues in this case is the extent of the purchaser's knowledge of the contract between plaintiff and Baruch. Mr. Dressler's testimony as to what the purchaser of the Premises knew about this contract is essential to a determination of whether or not the purchaser was a good faith purchaser of the Premises. Moreover, it is Mr. Dressler who was the person responsible for adjourning the closing of the plaintiff's purchase of the Premises at the same time that he was negotiating a contract for the sale of the Premises to another purchaser for a higher price, as a result of which he has knowledge as to whether there has been a breach of the Contract by either plaintiff or Baruch. The court finds that under the circumstances of this case, Mr. Dressler should be disqualified from acting as counsel for Baruch and Nir because he is a necessary witness who has information about the contract negotiations and sequence of events which is unavailable to any other witness in this matter.

Based on the foregoing, the motion to amend the complaint is granted and the amended complaint shall be deemed served upon the e-filing of this decision and the motion to disqualify

Mr. Dressler is granted. This constitutes the decision and order of the court.

Dated: 7/1/14

Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.