

Zues Home Improvement, Inc. v RBKC, LLC
2014 NY Slip Op 31774(U)
July 8, 2014
Sup Ct, NY County
Docket Number: 653395/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ZUES HOME IMPROVEMENT, INC.,
Plaintiff,

-against-

INDEX NO. 653395/2013
MOTION DATE 06-04-2014
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

RBKC, LLC, THE COMMUNITY PRESERVATION CORPORATION, RAYMOND BONHOMME, and KATHERINE H. COLACECCHI,
Defendants,

The following papers, numbered 1 to 8 were read on this motion to Dismiss the Amended Complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that this motion to dismiss plaintiff's Amended Complaint as against defendants RBKC, LLC, Raymond Bonhomme, and Katherine H. Colavecchi pursuant to CPLR 3211 (a)(1) and (7) is granted, and the Complaint as against the parties herein is dismissed.

Zues Home Improvement, Inc. (herein "Zues") entered into an agreement (herein "Construction Contract") with RBKC, LLC (herein "RBKC") in which Zues would construct a new apartment building at a property owned by RBKC. CPC and RBKC entered into an Acquisition Loan Mortgage, Assignment of Leases and Rents, and Security Agreements (herein "Mortgage") for the new construction in which CPC provided the financing for the construction. The Mortgage required RBKC to post a security in lieu of a bond in the form Letter of Credit (herein "Letter") in the amount of \$160,000.00, which represented ten (10) percent of the Mortgage. Zues provided the Letter to CPC on behalf of RBKC.

A dispute arose between Zues and RBKC after construction began and the parties entered into an assignment of the Construction Contract (herein "Assignment"). The Assignment provided that Zues assigned its rights and obligations under the Construction Contract to Dorian Mechanical Solutions Corporation (herein "Dorian"), and for the remittance of the Letter to an officer of Zues upon the "satisfaction in full of all of RBKC, LLC's payment and performance obligations under the Loan Documents [Mortgage] by and between RBKC, LLC and The Community Preservation Corporation entered into in connection with the construction loan [Mortgage]."

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

The Assignment provided that \$100,000 being held in escrow would be remitted to Zues for work previously performed. The Assignment also provided that RBKC would remit to George Kolitsopoulos as Zues' principal the Letter and pay 0.5% per month for each month that the Letter remained unpaid. CPC was not a party to the Assignment, nor did it execute the Assignment.

Once the construction was completed, the CPC declined to remit the Letter to Zues stating that "per the executed maturity extension agreement, we [CPC] used the cash in lieu reserve funds to apply towards the monthly interest payments until the reserve eventually depleted." During the construction, RBKC failed to timely make payments on the Mortgage and the CPC, pursuant to the Construction Contract, applied the Letter to any outstanding payments until the Letter eventually depleted. On August 16, 2013, the attorneys for Zues made a written demand for the fund to RBKC, and on September 6, 2013, RBKC was dissolved.

Plaintiff commenced the instant action against the CPC, RBKC, and Raymond Banhomme and Katherine H. Colavecchi (herein "Individuals") as principals of RBKC. The Amended Complaint asserts causes of action for Breach of Fiduciary Duty, Breach of Contract, and Constructive Trust as against RBKC and CPC for failing to return the Letter to Zues, failing to release \$100,000 held in escrow for work previously performed, and for allowing the Letter to be used towards the monthly interest payments of the Mortgage. The Fourth cause of action seeks to pierce the corporate veil as against the Individuals for failing to remit the Letter to Zues.

RBKC and the Individuals now move to dismiss the causes of action asserted in the Amended Complaint as against them on the grounds that RBKC and the Individuals have a defense founded upon documentary evidence, and that the Amended Complaint fails to state a cause of action. In support of this motion, the movants annex a copy of the pleadings, the Standard Form of Agreement between RBKC and Zues, a copy of the Mortgage, a copy of the Zues' release as against all defendants for the \$100,000 sought in previous work performed, and a copy of the Assignment.

In order to dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The question is whether the complaint gives rise to a cognizable cause of action. The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (*Union Brokerage, inc., v. Dover Insurance Company*, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st Dept. 1983]).

Plaintiff's Fourth cause of action seeks to pierce RBKC's corporate veil and hold the Individuals liable for the Letter in place of RBKC. "In order to pierce the corporate veil, plaintiffs must show that (1) Parent exercised complete domination and control with respect to the transaction attacked, and (2) such domination was used to commit a fraud or wrong against them (*Teachers Ins. Annuity Ass'n of America v. Cohen's Fashion Optical of 485 Lexington Ave. Inc.*, 45 A.D.3d 317, 318, 847 N.Y.S.2d 2 [1st Dept., 2007] citing to, *Matter of Morris v.*

New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157 [1993]). “In determining the question of control, courts have considered factors such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity ... [n]o one factor is dispositive” (Id., citing to, TNS Holdings v. MKI Sec. Corp., 243 A.D.2d 297, 300, 663 N.Y.S.2d 144 [1st Dept. 1997], revd. on other grounds, 92 N.Y.2d 335, 680 N.Y.S.2d 891, 703 N.E.2d 749 [1998]). Where a plaintiff fails to “allege particularized facts to warrant piercing the corporate veil so as to allow the claims against the principals to continue,” dismissal of a complaint alleging conclusory statements is proper (Pine Street Homeowners Ass'n v. 20 Pine Street LLC, 109 A.D.3d 733, 735, 971 N.Y.S.2d 289, 292 [1st Dept., 2013] citing to, Barneli & Cie SA v. Dutch Book Fund SPC, Ltd., 95 A.D.3d 736, 737, 946 N.Y.S.2d 53 [1st Dept. 2012]).

Here, the Amended Complaint only alleges that (1) the Individuals “were the shareholders of [RBKC]” and that as shareholders, the individuals “exercised complete domination over [RBKC] by residing and doing business from the same location;” (2) as shareholders the Individuals failed to return the Letter; and (3) the Individuals dissolved RBKC “in an attempt to avoid the payment of any liabilities.” The Amended Complaint makes conclusory allegations but fails to allege particularized facts to warrant piercing RBKC's corporate veil.

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff's claim (Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858[2002]; 511 West 232nd Owners Corp., v. Jennifer Realty Co., 98 N.Y.2d 144, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002];Fortis Financial Services v. Fimat Futures USA, 290 A.D.2d 383, 737 N.Y.S.2d 40 [1st. Dept. 2002]).

Plaintiff's Second cause of action alleges that RBKC breached the construction contract with Zues by failing to remit the Letter after Zues had substantially performed under the contract and executed the Assignment. A party may recover for a breach of contract when there exists a contract, the plaintiff's performed under the contract, the defendant's breach of that contract, and there was resulting damage (JP Morgan Chase v. J.H. Elec. of New York, Inc., 69 A.D.3d 802, 893 N.Y.S.2d 237 [2nd Dept., 2010]).

Here, RBKC entered into a Mortgage with CPC. Zues was not a party to the Mortgage nor was it named as an intended beneficiary in the Mortgage. The Mortgage explicitly states that “upon the occurrence of an Event of Default hereunder or under the Note or the Building Loan Agreement, the Mortgagee shall have the right immediately to draw upon the full amount of the Letter of Credit [Letter] and apply same to any portion of the Indebtedness as is determined by the Mortgagee in its sole discretion” (See Section 4.42[b] of the Mortgage).

Zues argues that it provided CPC with the Letter on behalf of RBKC but that Zues never authorized RBKC or CPC to deplete the Letter in order to satisfy the Mortgage. Zues asserts that pursuant to the Assignment, RBKC is obligated to return the Letter. The Assignment states the CPC is authorized to remit the Letter and any interest earned on the Letter "upon satisfaction in full of all of [RBKC's] payment and performance obligations under the [Mortgage] by and between [RBKC] and [CPC]." The Assignment entered into by Zues and RBKC explicitly conditioned RBKC's obligation to return the Letter upon fulfilling the obligations set forth in the Mortgage.

RBKC presents unambiguous documentary evidence of undisputed authenticity that resolves all factual issues as a matter of law as to the breach of contract cause of action (see Fontanetta v. Doe, 73 A.D.3d 78, 898 N.Y.S.2d 569 [2nd Dept., 2010]).

Plaintiff's First cause of action is for breach of fiduciary duty and the Third cause of action seeks to convert CPC and RBKC into trustees of the \$100,000 held in escrow for work previously performed by Zues. Pursuant to a Partial Release dated January 22, 2014 executed by the parties, Zues released the defendants from the \$100,000 breach of contract and constructive trust claims in exchange for \$63,264.52.

Accordingly, it is ORDERED, that the motion to dismiss the Amended Complaint as against defendants RBKC, LLC, Raymond Banhomme, and Katherine H. Colacecchi is granted, and it is further,


ORDERED, that the Amended Complaint is dismissed as to defendants RBKC, LLC, Raymond Banhomme, and Katherine H. Colacecchi, and it is further,

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

MANUEL J. MENDEZ
J.S.C.

ENTER:

Dated: July 8, 2014



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE