

Maheras v Awan

2014 NY Slip Op 32057(U)

July 31, 2014

Supreme Court, New York County

Docket Number: 114296/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

MARK MAHERAS, DANA WHITTLE, CHRISTINA
KELSEY and ADRIAN SOLOMON,
Plaintiffs,

-v-

AYAZ AWAN, et al.,
Defendants.

INDEX NO. 114296/11

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-3

Answering Affidavits- Exhibits _____ 4, 5

Replying Affidavits _____

CROSS-MOTION: YES NO

FILED

Upon the foregoing papers, it is ordered that this motion is:

AUG 06 2014

RESOLVED IN ACCORDANCE WITH THE ATTACHED ORDER

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/31/14

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED

AUG 06 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

COUNTY CLERK'S OFFICE
NEW YORK

-----X
MARK MAHERAS, DANA WHITTLE,
CHRISTINA KELSEY and ADRIAN SOLOMON,

Plaintiffs,

-against-

Index No.
114296/11

AYAZ AWAN, NEW YORK BEST DEVELOPMENT,
INC., HIGH RISE DEVELOPMENT ENTERPRISES,
SUMMIT BUILDERS INC., MALIK ALI, SABBA
SALEEMI, K.T. SEUNG, OSCAR JACKSON,
CLEMENT CHAMBERS and KNC ELECTRIC,

Defendants.
-----X

DONNA MILLS, J. :

Plaintiffs seek an order, pursuant to CPLR 306-b, permitting late service of process on defendant Malik Ali (Ali). Ali cross-moves for dismissal of the second amended complaint.

This action was commenced on December 20, 2011. At that time, Ali was not named as a defendant. The first amended complaint alleged that plaintiffs contracted with defendant Ayaz Awan's (Awan) company, defendant New York Best Development, Inc. (New York Best) in order to have renovations performed on their residential property. The reconstruction included a total demolition and gut renovation of the electrical and HVAC systems. Through Awan, plaintiffs hired defendant K.T. Seung (Seung) as architect. Plaintiffs alleged that these defendants engaged in fraudulent acts, and that Awan made specific misrepresentations to them.

Awan moved for summary judgment to dismiss the complaint against him. In a decision and order by the court, dated May 14, 2013, Awan's motion was denied and plaintiffs' cross motion for leave to amend the complaint was granted. Plaintiffs sought an additional cause of

action to pierce the corporate veil of Awan's entities, New York Best, as well as defendants High Rise Development Enterprises (High Rise), and Summit Builders Inc. (Summit); and to add as co-defendants Ali and Summit.

One issue in plaintiffs' motion is whether their failure to serve Ali within the 120-day period prescribed in CPLR 306-b should be excused pursuant to that statute. CPLR 306-b requires that service of a summons and complaint shall be made within 120 days after an action commences. However, the statute permits a court to extend the 120-day period for service of process upon a defendant "in the interest of justice" or "for good cause shown."

Plaintiffs claim that initial attempts to serve Ali within the 120-day period were unsuccessful. They state that these were all good-faith attempts to serve him at his residence in Virginia prior to September 9, 2013, the date that would have marked the expiration of the 120-day period, which started on May 14, 2013, the day that Ali was joined as a defendant in this case. On September 6, 2013, Awan and New York Best brought a motion to dismiss the suit due to plaintiffs' alleged lack of standing. The court, by order dated January 23, 2014, denied this motion. On January 28, 2014, through the nail-and-mail method, Ali was served the summons and the second amended complaint.

Plaintiffs move to validate their personal service on Ali, claiming that good cause is evident and that validation of service of process would further the interests of justice.

Ali cross-moves for dismissal under CPLR 306-b, claiming that he was improperly served. He also cross-moves for dismissal under CPLR 3211 (a) (7) and (a) (8), contending that the second amended complaint fails to properly plead or allege any facts that warrant the piercing of the corporate veil, holding Ali individually liable for the acts of New York Best or High Rise,

and that the second amended complaint fails to properly plead or allege any facts that Ali acted for his own personal profit or committed tortious acts to warrant holding him individually liable for the acts of New York Best or High Rise.

Plaintiffs contend that an exercise of reasonable diligence in an effort to serve a defendant constitutes good cause. As their evidence indicates, they attempted to serve Ali personally at his Virginia residence on at least five occasions within the 120-day period. Their server allegedly failed to serve Ali pursuant to "nail and mail." Such a method is available under both New York and Virginia law. Plaintiffs also allude to the interests of justice, averring that they have meritorious claims against Ali, based on allegations of fraud in the inducement, conspiracy to commit fraud and conversion, which allegedly implicate him with other defendants. Plaintiffs note the repeated efforts of Awan to have this case dismissed on a number of grounds, which resulted in their entanglement in extended litigation. According to plaintiffs, any delay in this action was not due to neglect or inactivity. Plaintiffs argue that there would be no prejudice to Ali if this motion were granted. They state that the claims alleged against Ali are similar or intertwined with those brought against Awan, who they identify as Ali's business associate and co-conspirator. They claim that they would suffer prejudice if the motion were denied, since they would allegedly be deprived of a recovery based on the merits of their case. Specifically, plaintiffs argue that, upon denial of the motion, they would have to commence a new action against Ali, which claims could be dismissed as untimely.

Ali argues that service on him was untimely, was not compliant with the means specified by statute, and that the action, if allowed to go forward, must be dismissed. Due to plaintiffs' alleged failure of proper service, Ali claims to have been prejudiced and deprived of the right to

defend himself through the initial course of this litigation. Ali asserts that he is a mere employee of New York Best and that plaintiffs have failed to plead a cause of action against him with the requisite specificity. Overall, Ali contends that plaintiffs have failed to demonstrate good cause or show how the interests of justice would warrant the granting of their motion.

In reply, plaintiffs state that Ali has failed to address or refute the arguments raised in their motion papers, and has provided only a general denial.

In their motion papers, plaintiffs cite *Leader v Maroney, Ponzini & Spencer* (97 NY2d 95 [2001]). There, the Court of Appeals made a thorough analysis of CPLR 306-b. There was an assessment of the standards mentioned in this statute, that of good cause and interest of justice. Accordingly, the Legislature has given the courts two alternative standards by which to measure an application for an extension of time to serve a defendant. “They cannot be defined by use of the same criteria; otherwise, one would have been sufficient.” *Id.* at 104. “The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties.” *Id.* at 105. On the other hand, an exercise of reasonable diligence in attempting service is relevant in ascertaining whether there is good cause. *See Id.* at 104.

In applying the interest of justice standard, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant.” *Id.* at 105-106.

Based on the evidence, plaintiffs have made out a case for good cause based on reasonable diligence in attempting to serve Ali. There had been several attempts to serve Ali

personally. The litigation with Awan had resulted in delays. Furthermore, there is no indication that Ali would be prejudiced by an extension of the period of service of process. Therefore, the court will grant an extension of time to allow service pursuant to the statute. The court notes that the last attempt to serve Ali was proper under New York law.

The cross motion is also seeking dismissal by challenging the meritorious nature of the claims brought against Ali, specifically, raising the assertion that Ali is not a proper defendant. In the second amended complaint, plaintiffs allege that Ali is Awan's colleague at New York Best and that both defendants made misrepresentations to induce plaintiffs to enter into a contract with New York Best and to hire Seung in order to renovate plaintiffs' residential property. The alleged misrepresentations led to poor renovations that failed to meet industry standards. Ali is being sued for fraud and deceit (first cause of action), conspiracy to commit fraud (second cause of action), deceit (third cause of action), constructive fraud in contract (fifth cause of action), negligence (sixth cause of action), and conversion (seventh cause of action). In the eighth cause of action, plaintiffs seek to pierce the corporate veil of three corporate defendants in order to hold Ali personally liable for damages.

Ali submits an affidavit stating that he was not personally involved in the renovation project, aside from being employed by New York Best. According to him, there is no reason to pierce New York Best's veil to implicate him for the alleged negligence and contractual violations of that entity. Ali claims that there is no evidence that specifically shows that he acted for his own personal profit or acted tortiously. He claims that there is no evidence that New York Best is his alter ego. He avers that the complaint fails to state a valid cause of action against him, and that the complaint should be dismissed against him.

In reply, plaintiffs argue that Ali's affidavit, without further proof, is insufficient to warrant the granting of this cross motion. Plaintiffs also argue that the cross motion is premature and must be denied due to defendants' delay in responding to their discovery demands.

Plaintiffs' other arguments against the cross motion are: there are issues of fact as to whether Ali's allegedly fraudulent and tortious acts justify piercing of the corporate veil; the fraud and conversion claims are not addressed in the cross motion papers; and, after New York Best was dissolved in 2008, as alleged in the complaint, Ali and Awan continued to work on the renovation project and can be held personally liable for acts incurred by the continuation of business originally conducted by New York Best.

When presented with a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint must be construed liberally, the facts alleged therein accepted as true, and plaintiff accorded the benefit of every possible favorable inference. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Regarding the piercing the corporate veil theory, it is settled that courts will disregard the corporate form whenever necessary to prevent fraud or to achieve equity. "Piercing the corporate veil generally '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' [citation omitted]." *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 (1st Dept 2005). "The concept is equitable in nature, and the decision whether to pierce the corporate veil in a given

instance will depend on the facts and circumstances [internal quotation marks and citations omitted].” *Millennium Constr. LLC v Loupolover*, 44 AD3d 1016, 1016 (2d Dept 2007). In their eighth cause of action, plaintiffs allege that Awan had complete domination of New York Best and two other business entities, and that he committed acts of fraud and other tortious actions. However, they fail to allege facts showing that Ali had a dominant position in New York Best. Thus, he cannot be subject to this cause of action.

However, as an officer or owner of New York Best, Ali could be subject to liability if he is alleged to have committed a tort that is independent of a tort committed by the entity. Moreover, in fraud, Ali could be held individually liable if he participated or had knowledge of the fraud committed by the corporation, even if he did not stand to gain personally. *See Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 (1st Dept 2012). Courts have applied this rule to torts in general. *Id.*

In the fraud claims, plaintiffs have alleged that Ali made misrepresentations concerning defendants’ performance of the renovation, and conspired with other defendants to commit fraud. According to plaintiffs, the fraud started prior to the execution of the reconstruction agreement and continued throughout the renovation. Plaintiffs allegedly relied on a number of these misrepresentations to their ultimate detriment, and suffered damages. The complaint clearly alleges that Ali knowingly participated in various fraudulent acts, individually and in concert with other defendants. The court finds all the fraud claims adequately pled, except for the constructive fraud claim. “The elements of constructive fraud are the same as those for actual fraud, except the elements of scienter are replaced by a fiduciary or confidential relationship between the parties.” *Klembczyk v DiNardo*, 265 AD2d 934, 935 (4th Dept 1999). “A

conventional business relationship between parties dealing at arm's length does not give rise to fiduciary duties unless the plaintiff shows that the defendant 'had superior expertise or knowledge about some subject and *misled [the] plaintiff by false representations concerning that subject* [citations omitted].'" *Roni LLC v Arfa*, 74 AD3d 442, 444 (1st Dept 2010), *aff'd* 18 NY3d 846 (2011).

Here, plaintiffs have not made out a relationship that went beyond a conventional contractual one. There is no indication of any fiduciary or confidential relationship between Ali and plaintiffs. Therefore, the court shall dismiss the constructive fraud cause of action.

Plaintiffs contend that the conversion claim is meritorious and the cross motion dismissing it should be denied. Plaintiffs also contend that, due to Ali's failure to contest the conversion claim in his papers, the claim must be upheld. The court has examined Ali's papers, noting a failure to comment on the merits of this claim, and shall not dismiss this claim. The court shall not dismiss plaintiffs' negligence claim on the same ground.

Accordingly, it is

ORDERED that plaintiff's motion to extend the time to serve defendant Malik Ali pursuant to CPLR 306-b is granted and the summons and second amended complaint are deemed served; and it is further

ORDERED that defendant Ali's cross motion for dismissal of the complaint is granted only to the extent that the fifth and eighth causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

DATED: 7/31/14

ENTER:

[Handwritten signature]

J.S.C.

FILED

AUG 06 2014

COUNTY CLERK'S OFFICE
NEW YORK