

Cornwall Mgt. LTD. v Kambolin
2014 NY Slip Op 32164(U)
August 4, 2014
Supreme Court, New York County
Docket Number: 653675/2013
Judge: Melvin L. Schweitzer
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Between 2006 and 2009, Thor Real Estate Master Fund, Ltd. (Thor Real Estate), Thor United's wholly owned subsidiary, loaned money raised by Thor United for the development of the Williamsburg Property to Atlant Capital Holdings, Inc. (Atlant). Atlant acquired the Williamsburg Property in 2008 through its wholly-owned subsidiary, Williamsburg Terrace LLC.

Between 2006 and 2010, defendants made regular interest payments to plaintiffs. However, in 2010, as plaintiffs' loans were coming due, defendants became concerned about defaulting. A default would have jeopardized the defendants' planned sale of the Williamsburg Property. Defendants consulted plaintiffs and asked plaintiffs to refrain from instituting a suit. Plaintiffs agreed, and the terms of this agreement were put down in writing (the 2010 Repayment Agreement).

The 2010 Repayment Agreement assured plaintiffs that Atlant would sell the property and then use the proceeds to repay its debts to Thor United, who would in turn repay plaintiffs. On November 8, 2010, Atlant sold the Williamsburg Property to SL Green for \$20.8 million. The sale of the Williamsburg Property was a short-sale, done with the approval of the secured mortgage creditors. Plaintiffs were told by defendants that because the property was sold for less than the amount owed on the secured mortgage, defendants' debts to plaintiffs would remain unpaid. As part of the short-sale, Mr. Kambolin and Mr. Batrachenko agreed to have no further pecuniary interest in the property or its proceeds post-sale.

After the sale of the Williamsburg Property to SL Green, another entity, North 3rd Development (N3D), an entity owned by Mr. Bennun, reacquired a portion of the property for \$3.1 million. The portion re-sold to N3D consisted of the condominium towers, the townhouses, and one of the three commercial units. After the sale and partial buy-back, the defendants

dissolved Atlant and shifted Atlant's debt to another entity, North 3rd Funding, LLC (N3F). Years later, N3D sold its re-acquired portion of the Williamsburg Property for \$51.3 million. None of the debt was repaid to plaintiffs.

On May 28, 2012, judgment was entered in Moscow against Thor United in favor of Cornwall, and on April 19, 2012, judgment was similarly entered in Moscow against Thor United in favor of Mr. Soloviev. On April 24, 2013 the Cornwall Judgment was domesticated in the United States District Court for the Southern District of New York for \$2,026,289.21. On April 15, 2013, the judgment in favor of Mr. Soloviev was domesticated in the United States District Court for the Southern District of New York for \$1,421,336.78. Both judgments remain wholly unsatisfied.

Defendants Corporate Inter-Connections

Plaintiff alleges several corporate inter-connections between the individual defendants, Mr. Bennun, Mr. Kambolin, and Mr. Batrachenko. Thor United, now known as Consolidated Optimal Corp, N3D, Atlant, Thor Real Estate, Williamsburg Terrace and other Thor entities currently share, or previously shared, the same office space, 551 Fifth Avenue. Plaintiffs' allege that 551 Fifth Avenue is rented to Mr. Bennun.

Plaintiffs further allege that Mr. Kambolin has held himself out as an owner and/or employee of Atlant and Thor United, Mr. Batrachenko has held himself out as an owner and/or employee of Thor Real Estate and Thor United, and Mr. Bennun shared in the ownership of Atlant with Mr. Kambolin. Plaintiff further alleges that Mr. Bennun has held himself out as the developer of the Williamsburg Property through his ownership or employment in various entities including Thor United, Atlant, Williamsburg Terrace, and N3D. Plaintiff contends that Mr. Bennun is intertwined with Mr. Kambolin and Mr. Batrachenko as he served as the

Managing Director of Thor Realty Holdings, LLC and as a Senior Vice President for Thor Capital in Moscow, a corporation for which Mr. Kambolin is allegedly the President.

Discussion

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The motion to dismiss can be granted only if the documents "definitively dispose" of plaintiffs' claims. *See Blonder v Citibank N.A.*, 28 AD3d 180, 182 (1st Dept 2006). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept 2005) (quoting *Guggenheimer v Ginsberg*, 43 NY2d 268, 275 (1997)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Whether plaintiffs are eventually able to establish a meritorious cause of action is excluded from the 3211 (a) (7) inquiry. *See EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Moreover, "[a] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *See Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Nonnon v City of New York*, 9 NY3d 825, 827 (2007); *Rovello v Orofino*, 40 NY2d 663 [1976]).

Veil Piercing Claim

Plaintiffs' suit on judgment pursuant to the alter ego and veil piercing doctrines, seeks to hold Mr. Bennun and N3D liable for the judgments rendered in Russia against Thor United and related entities. A court may choose to pierce the corporate veil where the plaintiff demonstrates "(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 NYS Dept of Taxation & Fin.*, 82 NY2d 135, 141 (1993).

In determining whether a plaintiff has adequately alleged domination and control so as to pierce the corporate veil, courts consider a variety of factors including "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 allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporation's debts by the dominating entity." (*Fantazia Int'l Corp v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]). Courts are reluctant to dispose of veil piercing claims on summary judgment because of their fact intensive nature. *See Ledy v Wilson*, 38 AD3d 214, 215 (1st Dept 2007).

The plaintiffs have provided enough facts, construed in favor of the plaintiff, to show that Mr. Bennun and the other individual defendants may have dominated the corporations at issue, including Thor United, Thor Real Estate, Atlant, N3D, N3F. Plaintiffs also have alleged, with specificity, how they believe defendants used their domination and control to propagate a fraud and benefit themselves at the expense of creditors such as the plaintiffs.

Specifically, plaintiffs allege that they loaned money to Thor United for the purposes of purchasing and developing the Williamsburg Property. Thor United transferred that loan to Atlant, which plaintiffs contend Mr. Bennun is a principal owner and/or employee of. Atlant sold the property to SL Green for less money than the mortgage value, leaving plaintiffs and other unsecured creditors with no way to recover their loans. N3D, a corporate entity owned by Mr. Bennun purchased a large portion of the property from SL Green and subsequently sold it,

after development, for approximately \$51.3 million. Atlant then transferred all of its liabilities to N3F, an entity with no assets. Atlant was subsequently dissolved and plaintiffs were left as a creditor of an asset-less entity, Thor United.

Plaintiffs also claim to have an audio recording where Mr. Batrachenko acknowledges that the individual defendants “were playing favorites”, deciding amongst themselves which investors would be repaid. If the allegations prove true, it is possible Mr. Batrachenko, Mr. Kambolin, and Mr. Bennun conspired to defraud the unsecured investors of Thor United by separating the Williamsburg Property from the unsecured liabilities owed to plaintiffs and other creditors, and thereby enabling themselves to personally profit from the development of the property. The court finds plaintiffs’ allegations of common ownership amongst the companies, common office space, under-capitalization of N3F, and co-mingling of corporate funds are sufficient to “raise factual questions not determinable on a pre-answer motion to dismiss.” *Kralic v Hemsely*, 294 AD2d 234, 236 (1st Dept 2002).

Fraudulent Conveyance Claim

The Amended Complaint claims that the Williamsburg Transaction was a fraudulent conveyance, pursuant to New York Debtor and Creditor Law (DCL) 276. A claim under DCL 276 exists where a transferor makes a transfer “with actual intent ... to hinder, delay, or defraud either present or future creditors.” Claims under this section are subject to the heightened pleading requirement of CPLR 3016 (b). *See IDC (Queens) Corp v Illuminating Experiences, Inc.*, 220 AD2d 337, 337 (1st Dept 1995) (affirming dismissal of a complaint for failing to plead the alleged fraudulent conveyance with enough particularity).

“In order to set aside a fraudulent conveyance claim, one must be a creditor of the transferor; those who are not injured by the transfer lack standing to challenge it.” *Eberhard v*

Marcu, 530 F3d 122, 131 (2d Cir. 2008). “Non-creditors can find no relief in a statute whose object is to enable a creditor to obtain his due despite efforts on the part of a debtor to elude payment.” *Id.* (citation and formatting omitted).

Plaintiffs argue that because they were creditors of Thor United, they are creditors of the Williamsburg Property. Plaintiffs contend that because defendants are alter egos of one another, they own a pool of common assets. *See e.g. Helicon Partners v Kim's Provision*, 2013 Bankr. LEXIS 1844, *25 (Bank Ct SDNY 2013). Plaintiffs argue that since they were creditors of Thor United, and Atlant is an alter ego of Thor United, that plaintiffs are creditors of the Williamsburg Property.

Plaintiffs conflate their two claims. Plaintiffs are correct to assert that when defendants are alter egos of one other, they are considered to share a pool of common assets. The common assets are pooled for the purposes of recovering damages from defendants, not for asserting a second claim. The court in *Helicone Partners* never addressed the fraudulent conveyance claim in tandem with the alter ego claims. The court in *Helicone Partners* first addressed the fraudulent conveyance claim and then separately addressed the alter ego claim. The fact that the defendants may be alter egos of one another, and therefore own a common pool of assets, does not affect plaintiffs' fraudulent conveyance claim.

Plaintiffs were never creditors of the Atlant or the Williamsburg Property. Plaintiffs were creditors of Thor United. Thor United loaned plaintiffs' money to its subsidiary, Thor Real Estate, who in turn loaned the funds to Atlant. Atlant was the owner of the Williamsburg Property and was the only entity who transferred the property. The 2010 Repayment Agreement is illuminative. In the 2010 Repayment Agreement, Atlant never agreed to directly repay plaintiffs. Atlant agreed to repay Thor United because Thor United was a creditor of Atlant.

Thor United agreed to use the money it received from Atlant to repay its creditors, including plaintiffs. If plaintiffs were creditors of the Williamsburg Property or Atlant, they would have been able to recover directly from Atlant. Plaintiffs clearly understood in 2010 that they were not creditors of Atlant. Plaintiffs were creditors of Thor United, which in turn was a creditor of Atlant. Because it was Atlant who transferred the Williamsburg Property, not Thor United, plaintiffs lack standing to assert a fraudulent conveyance claim as they were not creditors of Atlant.

Martes v USLIFE Corp addressed a similar situation. 927 F Supp 146 (SDNY 1996). There, the plaintiff purchased an insurance policy from Title Dallas, a subsidiary of USLIFE. *Id.* at 147. USLIFE subsequently sold all of the stock of Title Dallas to Title-USA, an unrelated purchaser. *Id.* After the transfer of Title Dallas from USLIFE to Title-USA, plaintiff instituted a suit and obtained a judgment against Title Dallas and Title-USA. *Id.* at 148. However, Title-USA entered liquidation and plaintiff was unable to collect. *Id.* Plaintiffs commenced a second suit against USLIFE arguing the sale of Title Dallas's stock to Title-USA was a fraudulent conveyance that "prevented plaintiff from collecting his judgment against Title-USA." *Id.* at 147. The court rejected plaintiff's claim holding that plaintiff lacked standing to assert a fraudulent conveyance claim because plaintiff was not a creditor of USLIFE. Plaintiff was a creditor of Title Dallas and Title Dallas never transferred any property, USLIFE did. *Id.* at 148.

Similarly, Thor United never transferred the Williamsburg Property, Atlant did. Even if Atlant's transfer was a fraudulent conveyance, plaintiffs were not creditors of Atlant, they were creditors of Thor United. The court holds that plaintiffs lack standing to assert a fraudulent

conveyance claim as they were never a creditor of the property or of any corporation with an ownership stake in the property.

CONCLUSION

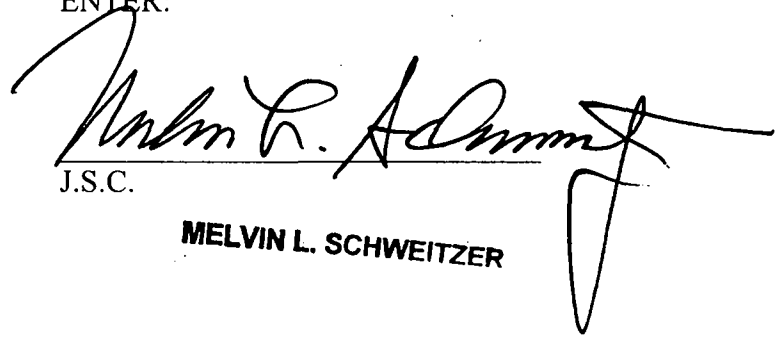
Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the suit on judgment is denied; and it is further

ORDERED that defendants' motion to dismiss the fraudulent conveyance claim is granted.

Dated: August 4, 2014

ENTER:

A handwritten signature in black ink, appearing to read 'Melvin L. Schweitzer', written over a horizontal line. The signature is stylized and cursive.

J.S.C.

MELVIN L. SCHWEITZER