

**Cole, Schotz, Meisel, Forman & Leonard, P.A. v
Stanton Crenshaw Communications, LLC**

2014 NY Slip Op 32351(U)

September 3, 2014

Supreme Court, New York County

Docket Number: 603167/09

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

COLE, SCHOTZ, MEISEL, FORMAN & LEONARD,
P.A.,
Plaintiffs,

Index No.: 603167/09

Motion Date: 11/01/13

Motion Seq. No.: 09

- v -

STANTON CRENSHAW COMMUNICATIONS, LLC,
CRENSHAW COMMUNICATIONS, STANTON PUBLIC
RELATIONS & MARKETING, DOROTHY CRENSHAW,
ALEXANDER H. STANTON,
Defendants.

The following papers, numbered 1 to 10 were read on this motion and cross motions for summary judgment.

Table with 2 columns: Document Name and No(s). Rows include Notice of Motion/Order to Show Cause -Affidavits -Exhibits, Notices of Cross Motion/Answering Affidavits - Exhibits, and Replying Affidavits - Exhibits.

Cross-Motions: [X] Yes [] No

Upon the foregoing papers, it is ordered that this motion and these cross motions are granted in part and denied in part.

Defendants Stanton Crenshaw Communications, LLC (SCC), Stanton Public Relations & Marketing (SPRM), and Alexander H. Stanton (Stanton) (hereinafter, the Stanton Defendants) move for summary judgment dismissing the complaint. Plaintiff cross-moves for summary judgment against all defendants. Defendants Crenshaw Communications (CC) and Dorothy Crenshaw (Crenshaw) (hereinafter, the Crenshaw Defendants) cross-move for summary judgment.

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

- 1. CHECK ONE: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

This action involves a commercial sublease. Plaintiff Cole, Schotz, Meisel Forman & Leonard, P.A. holds a lease on property located at Court Plaza North, 25 Main Street, Hackensack, New Jersey (premises). Plaintiff alleges that defendants owe it money for rental payments and related charges pursuant to a sublease of the premises, dated December 22, 2006, between itself and SCC. Pursuant to paragraph 4 of the sublease, SCC is obligated to pay plaintiff rental payments through January 31, 2011. Plaintiff claims that SCC ceased compliance with the sublease when it stopped making payments in August 2009. Plaintiff originally commenced a nonpayment proceeding in Civil Court, New York County against SCC. On May 14, 2009, plaintiff and SCC entered into a stipulation of settlement (stipulation), and in June 2009, SCC vacated the premises. Plaintiff contends that despite its vacatur, SCC is not discharged from paying plaintiff through the end of the sublease's term.

After plaintiff commenced this present action, the Stanton Defendants moved for summary judgment dismissing the complaint for failure to state a cause of action as against them. This court granted this motion in part, dismissing all but the first through third causes of action. These causes of action consist of variations of breach of contract. After the completion of extensive discovery, the Stanton Defendants move again for summary judgment dismissing the remaining causes of action.

The Stanton Defendants seek summary judgment on three grounds. First, they argue that defendant Stanton should be dismissed from this action because he is not individually liable for breach of contract. According to them, Stanton never executed the sublease or the stipulation in his individual capacity.

Second, the Stanton Defendants state that the merger clause in the stipulation unambiguously bars SCC and SPRM from liability under plaintiff's claims, specifically claims related to the subject sublease. In fact, they argue that the merger clause in the stipulation provides that the sublease, along with its financial obligations, is no longer in effect.

Plaintiff, in pursuing this action against SPRM, claims that SPRM is the successor to SCC, and so, is liable under the sublease. Plaintiff refers to a buy-out agreement by which SCC transferred its business to SPRM, leaving Stanton to operate SCC. Plaintiff contends that most of SCC's assets were transferred to SPRM.

The Stanton Defendants, in their third ground, claim that plaintiff cannot proceed against SPRM because there is no successor liability attached to SPRM; there is no merger or consolidation between SCC and SPRM; there is no dispute that SPRM did not assume the liabilities or obligations of SCC; and SCC has not been dissolved. They also claim that SPRM is not a mere

continuation of SCC, with respect to ownership, management or employees, and no transfer of assets occurred between the two entities. Therefore, the Stanton Defendants aver that SPRM is not a proper defendant in this action and should be dismissed.

Plaintiff opposes the motion and cross-moves for summary judgment. Plaintiff argues that the stipulation does not release SCC from making payments to plaintiff pursuant to the sublease. According to plaintiff, the stipulation was meant to keep SCC from repossessing the premises, giving plaintiff the opportunity to re-let the premises. Plaintiff claims that the stipulation contains no release or termination of SCC's future payment obligations.

Furthermore, plaintiff states that when the Stanton Defendants originally moved for summary judgment here, they included an argument that the stipulation served to extinguish the payment obligations pursuant to the sublease. In its order, this court denied that portion of motion seeking dismissal of the breach of contract claims. When the Stanton Defendants appealed this court's order in the Appellate Division, First Department, the Appellate Division affirmed the decision. The Appellate Division decision (88 AD3d 452 [1st Dept 2011]), held: "The stipulation on which defendants rely does not clearly and unambiguously manifest an intent on plaintiff's part to release defendants from future rent obligations under the lease." Id. at

452. Plaintiff maintains that as a result of the Appellate Division decision, SCC is collaterally estopped from arguing that the stipulation releases it from payment obligations.

Plaintiff also claims Stanton should be held personally liable based on an alter ego theory. According to plaintiff, after the buy-out agreement was executed, Stanton was the 100% owner of SCC. Plaintiff contends that he simply changed the name of SCC and continued to operate the entity as before, as well as transferred SCC's assets to SPRM. Plaintiff accuses Stanton of perpetrating a fraud against plaintiff by draining SCC of its assets in order to prevent plaintiff from recovering the unpaid payments. Plaintiff asserts that such conduct imposes personal liability on Stanton.

Plaintiff cross-moves for summary judgment against all defendants. Plaintiff contends that all defendants are liable based on the terms of the sublease and the stipulation, and are liable either directly, or based on successor liability or the alter ego theory. Plaintiff states that there are no disputed issues of fact which would preclude the granting of this cross motion.

In reply, the Crenshaw Defendants argue that they are not liable pursuant to the sublease and did not execute a personal guarantee to the sublease or stipulation. They deny any successor liability as related to SCC, and claim to maintain a

separate identity from SCC and SPRM. Defendant Crenshaw denies any liability based on an alter ego theory with respect to CC.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." Birnbaum v Hyman, 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of this suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted].'" People v Grasso, 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law."

Flores v City of New York, 29 AD3d 356, 358 (1st Dept 2006).

"Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." Id.

The basic matter here concerns the validity of defendants' liability with respect to the remaining causes of action. The individual defendants in this action, Crenshaw and Stanton, are clearly not personally liable as either signatories of the sublease or guarantors of SCC, which signed the sublease. Nor

are they signatories of the stipulation. Plaintiff essentially claims that Stanton and Crenshaw are personally liable through an alter ego theory, or the piercing the corporate veil theory. Plaintiff contends that their relationship with SCC indicates that they maintain such complete control over this entity that said entity is a mere "shell" used to conceal their actual financial dominance. Thus, plaintiff theorizes that Crenshaw and Stanton are liable for whatever breaches were committed by SCC.

"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).

"Factors to be considered include 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 corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity. No one factor is dispositive

[citation omitted]." Fantazia Intl. Corp. v CPL Furs N. Y., Inc., 67 AD3d 511, 512 (1st Dept 2009).

Plaintiff alleges the following: before executing the buy-out agreement, Stanton owned 57% of SCC, and Crenshaw owed the remainder. After the execution of this agreement, Stanton owned 100% of SCC. Stanton only changed the name of SCC to SPRM and continued to operate SCC under the new name. Stanton transferred the assets from SCC to SPRM in order to undercapitalize SCC and defraud plaintiff. After Crenshaw sold her ownership in SCC to Stanton, she set up CC. Both defendants utilize some of the same officers, such as CFO Anthony Castro.

In reply, the Stanton Defendants state that plaintiff has failed to substantiate any reason to hold Stanton personally liable in this case. They state that plaintiff has failed to prove that Stanton used SCC or SPRM for personal gain. According to the Stanton Defendants, there is no evidence that Stanton intermingled the funds of SCC or SPRM with his personal funds; that SCC or SPRM failed to observe corporate formalities; that Stanton stripped SCC or SPRM of its assets for his personal use; that SCC was undercapitalized at the time of the buy-out agreement; or that Stanton perpetrated a fraud by using SCC or SPRM.

The court finds that plaintiff has not proved by a fair preponderance of credible evidence that Stanton is personally

liable, as they proffer no evidence that he personally benefitted from conduct that was allegedly harmful to plaintiff. There is insufficient proof that Stanton personally defrauded plaintiff or that he used SCC or SPRM for any personal purpose. The evidence to hold Crenshaw personally liable under the alter ego or piercing the corporate veil theory is even scarcer. Thus, plaintiff has not met its burden of showing personal liability on Crenshaw's part.

Therefore, the court concludes that neither Stanton nor Crenshaw are liable for damages to plaintiff, and the action against such defendants shall be dismissed.

On the issue of SCC's liability, the parties take opposite positions, each citing the stipulation as favoring their positions. The Stanton Defendants, in referring to the merger clause in this document, claim that it clearly releases SCC from further payment obligations from plaintiff pursuant the sublease. They cite paragraph 7, which provides, in part, that:

"Respondents (the Stanton Defendants) warrant and represent that: . . . (iii) there is presently no sublease or sublease renewal in existence to which Respondents are subtenant and the petitioner (plaintiff) is overtenant". The Stanton Defendants also cite paragraph 15 of the stipulation, which provides, in part:

"Respondents expressly agree and acknowledge that, effective upon the execution of this Stipulation, . . . (ii) by entering into

this Stipulation, Respondents do not become subtenants of Petitioner under a written sublease or otherwise". The Stanton Defendants argue that the stipulation has clearly extinguished the sublease and with it, all future obligations SCC owed plaintiff.

Plaintiff, however cites paragraph 5, which provides, in part: "It is expressly agreed and understood that Respondents hereby immediately surrender all claims of tenancy rights effective of this Stipulation, and the remaining rights and obligations of the parties with respect to the subject Premises shall be governed by the provisions of this Stipulation."

Paragraph 22 provides that, "Subject to the terms hereof, Respondents hereby waive and release any and all claims against the Petitioner, its successors and assigns, relating to the Respondents' occupancy of the Premises from the beginning of time to the date that respondents actually vacate the Premises." Plaintiff states that the provision releases plaintiffs from claims brought by defendants, but there is no waiver of claims by plaintiff. Plaintiff also asserts the collateral estoppel doctrine as applied to the Appellate Division decision precludes relief to the Stanton Defendants. The Stanton Defendants argue that the doctrine is inapplicable.

Regarding collateral estoppel, the requirements that satisfy this doctrine are that an identical issue must have been decided

in a prior action and be decisive of the present action.

Collateral estoppel will apply to such subsequent actions, where the party to be estopped had a full and fair opportunity to contest the dispositive decision, or was in privity with one who did. See Kaufman v Eli Lilly & Co., 65 NY2d 449, 455 (1985).

The Stanton Defendants state that the Appellate Division appeal did not constitute a subsequent lawsuit as required for collateral estoppel to come into effect. Nor, they aver, has this issue been finally decided in this court.

The court agrees with the Stanton Defendants that they are not collaterally estopped from raising the liability issue under the stipulation. The appeal represented the continuation of this action, not a new one. However, the court must adhere to the determination of the higher court, which held that the stipulation did not "clearly and unambiguously" release SCC from liability under the sublease. "'An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law (citations omitted).'" Board of Mgrs. of the 25 Charles St. Condominium v Seligson, 106 AD3d 130, 135 (1st Dept 2013). In accordance with the appellate court's ruling, because plaintiff has come forward with evidence in the form of statements by the

attorney who represented it in negotiations of the stipulation that the parties did not intend that the Stanton defendants be released from future rent obligations, parol evidence is admissible to clarify the ambiguity in the stipulation. The import of such parol evidence must be considered by a fact finder at trial. Ronbet 366 LLC v Tobias, 19 AD3d 102, 103 (1st Dept 2005).

The remaining issue is the matter of whether successor liability is applicable to CC and SPRM. Evidence considered in determining successor liability in corporations include: a corporation purchased almost all of the predecessor corporation's fixed assets and intangibles; the predecessor corporation apparently ceased to exist after the sale; the corporation assumed a name identical to that of the predecessor corporation; and at least one officer from the predecessor corporation was retained by the corporation. See Burgos v Pulse Combustion, Inc., 227 AD2d 295, 295-296 (1st Dept 1996).

Plaintiff claims that successor liability applies in this case. Plaintiff asserts that all of the assets of SCC were transferred to either CC or SPRM; that SCC's clients, employees, and vendors were distributed to either CC or SPRM; that the successor entities retained some or all of the original name of SCC; and that CC and SPRM have continued the same line of business as SCC. The Stanton Defendants retort that SCC is still

in existence and that there has been no liquidation; that the entities have separate business addresses and telephone numbers; that none of the accounts receivable or records were transferred from SCC to SPRM; and that almost none of the physical assets were transferred from SCC to SPRM. The Stanton Defendants also admit that some former employees and clients of SCC are involved with SPRM, and that there is partial, but not total continuity of ownership and management between SCC and SPRM. They state, however, that this does not rise to an assumption of liability, because they argue that SPRM never assumed the prior liabilities of SCC or engaged in a merger or consolidation with SCC. Finally, the Stanton Defendants argue that plaintiff has failed to demonstrate that the activities of SCC and SPRM constitute fraudulent conduct meant to escape obligations toward plaintiff.

The Crenshaw Defendants argue that no successor liability exists with respect to CC. According to them, CC never assumed the liabilities of SCC, never committed any fraud toward plaintiff, did not engage in a merger or consolidation, and did not set out to continue the business of SCC. They state that Crenshaw, a former owner of SCC, simply agreed to sell her ownership interest in SCC and set up a new entity.

This court finds little evidence of successor liability. There is no proof of a merger or consolidation. SCC has not been liquidated as a result of the buy-out transaction. While SCC and

SPRM do share some, but not all, clients, such sharing does not make them the same entity. Nor does the fact that a similar name exists in the entities means that they are identical. The buy-out agreement does not provide that SPRM would assume the liabilities of SCC. There is also an insufficient showing of an intent to defraud plaintiff. The evidence against CC is weaker with respect to its liability toward plaintiff.

This court finds that neither SPRM nor CC is subject to successor liability, and SCC is the sole entity that can be held liable for the contractual claims of plaintiff in this action. As the Appellate Division decision did not decide that plaintiff released SCC from future payments, but instead held that the stipulation does not "unambiguously manifest an intent" on plaintiff's part to release SCC (Id. at 452), receipt by the fact finder of parol evidence may clarify this issue in plaintiff's favor.

Accordingly, it is

ORDERED that plaintiff Cole, Schotz, Meisel, Forman & Leonard, P.A.'s cross motion for summary judgment is denied; and it is further

ORDERED that defendants Stanton Crenshaw Communications, LLC, Stanton Public Relations & Marketing and Alexander H. Stanton's motion for summary judgment is granted to the extent that defendants Alexander H. Stanton and Stanton Public Relations

& Marketing LLC are dismissed from this action; and it is further

ORDERED that the aforesaid defendants are dismissed with costs and disbursements to them taxed by the Clerk upon a submission of an appropriate bill of costs; and it is further

ORDERED that defendants Crenshaw Communications and Dorothy Crenshaw's cross motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to such defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

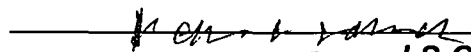
ORDERED that the causes of action against the defendants Stanton Public Relations & Marketing, Alexander H. Stanton, Crenshaw Communications and Dorothy Crenshaw are severed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue as to the causes of action against the remaining defendant Stanton Crenshaw Communications, LLC.

This is the decision and order of the court.

Dated: September 3, 2014

ENTER:


DEBRA A. JAMES J.S.C.