Board of Mgrs. of a Bldg. Condominium v 13th & 14th Street Realty, LLC
2014 NY Slip Op 32509(U)
September 29, 2014
Supreme Court, New York County
Docket Number: 1000061/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF THE A BUILDING CONDOMINIUM,

Index No. 100061/11

Plaintiff,

Motion seq. no. 018

-against-

DECISION & ORDER

13th & 14th STREET REALTY, LLC, *et al.*,

Defendants.

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BARBARA JAFFE, JSC:

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By notice of motion, defendants 13th & 14th Street Realty, LLC (Realty), Ascend Group, LLC, Benjamin Shaoul, Robert Kaliner, and Magnum Management, LLC (collectively, sponsor defendants) move for an order granting them leave to amend their answer, and upon amendment, pursuant to CPLR 3211(a)(7) and 3212 for an order dismissing the causes of actions and allegations set forth in plaintiffs' amended consolidated complaint as against Shaoul and Kaliner. Plaintiffs oppose.

I. BACKGROUND

This action arises from the construction of a condominium, which plaintiffs allege is riddled with water leaks and was not constructed in compliance with the condominium's offering plan, applicable codes and regulations, and industry standards along with as yet undiscovered and latent building defects. Defendants Realty, Ascend, and Magnum allegedly played a role in the

construction and management of the condominium.

It is undisputed that Shaoul and Kaliner, on behalf of Realty, certified the condominium's offering plan and admitted to being principals of Realty in their answer. Plaintiffs accuse the two of improperly spending condominium funds, failing to maintain monies and books and records, and engaging in self-dealing and corrupt practices (NYSCEF 811, 845), and maintain, on information and belief, that the sole purpose of Realty is to shield Shaoul and Kaliner from liability, that Realty is their instrumentality and alter ego, that Shaoul and Kaliner operate Realty to advance their personal and financial interests, and that they control and dominate it as a personal enterprise. Identical allegations are advanced as to Shaoul's and Kaliner's relationships with Magnum and Ascend. (NYSCEF 757).

II. CONTENTIONS

Sponsor defendants seek leave to amend their answer to assert that the sole member of Realty is 13th & 14th Street Holdings LLC (Holdings), which was incorrectly omitted in the original answer, and that no surprise or prejudice to plaintiffs will result from the amendment. They also contend that certain causes of action asserted against Shaoul and Kaliner in the amended complaint do not set forth claims upon which they may be held personally liable for the acts of Magnum, Realty, or Ascend. Sponsor defendants thus seek dismissal of the following claims: (1) breach of contract (first, second, third, tenth, eleventh, and thirty-third causes of action); (2) breach of warranty (sixth cause of action); (3) violations of the General Business Law (seventh and twenty-third causes of action); (4) negligence (twelfth, thirteenth, and sixteenth causes of action); (5) fraud (nineteenth cause of action); (6) negligent misrepresentation (twenty-first cause of action); (7) violation of USC 1703(a)(2) (twenty-fourth cause of action);

(8) conversion (twenty-fifth cause of action); (9) breach of fiduciary duty (twenty-seventh, twenty-eighth, and thirty-second causes of action); (10) self-dealing (twenty-ninth cause of action); (11) equitable relief (thirty-fourth cause of action); (12) declaratory relief (thirty-fifth cause of action); and (13) attorney fees (thirty-sixth cause of action). (NYSCEF 757).

By supporting affidavit, Shaoul acknowledges that he is a manager of Realty and a member of Magnum, but denies being employed by or being a member of Ascend, or that he and Kaliner were ever members of Realty, notwithstanding the certification in the offering plan and initial answer, responsibility for which he assigns to their former attorney. Rather, he contends that the sole member of Realty is Holdings. He also denies being an alter ego of Realty, Magnum, or Ascend, claiming that from 2008 to 2012, Realty had a tax identification number, paid corporate taxes, and had its own bank account, through which it paid costs and expenses related to the condominium's construction. He asserts that Magnum was incorporated in October 1998, with the sole purpose of engaging in real estate management, and that it too maintains its own corporate identity with a tax identification number and website, and was not involved with the condominium's construction. Rather, Shaoul alleges that Magnum managed the building from July 1, 2009 to January 31, 2010, and from 2008 to 2012, employed five to ten people, and paid its own salary expenses, payroll taxes, and operating expenses; it paid him no salary. Shaoul also maintains that Realty and Magnum were created for different purposes, are not subsidiaries of one another, maintain separate bank accounts, and are financially separate and distinct, and that Ascend performed ministerial functions for Realty at the condominium and was also not involved in its construction. According to Shaoul, he signed the offering plan on behalf of Realty and not in his individual capacity, and denies any agreement between Magnum and

plaintiffs or any other party. He denies having failed to act in the best interest of the condominium's Board of Managers while he was a member, and observes that the Board operated at a growing profit from 2008 to 2011. (NYSCEF 747).

In a separate supporting affidavit, Kaliner acknowledges that he is a manager of Realty and a member of Ascend, but denies being employed by or a member of Magnum or having ever been a member of Realty. He states that Realty was incorporated in April 2005 with the sole purpose of constructing the condominium, which he managed and performed for it tasks related to the construction. He asserts that Realty had its own tax identification number and paid corporate taxes between 2008 and 2012, and had its own bank account through which it paid for costs, materials, and services for the construction, and that Realty had no employees, operated out of Ascend's offices, and paid Ascend for its office work, utilities, supplies, expenses, and rent. According to Kaliner, Ascend was incorporated in December 2005, with the sole purpose of performing real estate business, and that he has been a member of Ascend since its formation, and that it has its own website and tax identification number. During construction of the condominium, Kaliner contends, Ascend performed ministerial functions for Realty, and was not involved in or a signatory of any construction contracts. He also alleges that from 2008 to 2012, Ascend employed approximately three to five people, incurred salary expenses and paid payroll taxes and operating expenses, and paid Kaliner a salary in the form of shareholder dividends. Realty and Ascend are separate entities and maintain separate bank accounts and file separate tax returns. (NYSCEF 746).

Plaintiffs oppose the amendment given the nine-year delay in seeking to do so, and argue that the merit of the amendment is speculative given Shaoul's and Kaliner's prior admissions.

They also argue that Shaoul and Kaliner may be held personally liable as: (1) they signed the certification of the offering plan, thereby incorporating the its terms into the purchase agreement; (2) they are listed as principals of Realty in the offering plan, and control various entities involved with the construction and management of the condominium; (3) other documents in addition to Kaliner's and Shaoul's testimony in another action "indicate" that they abused Realty's corporate form for their own benefit; and (4) they engaged in self-dealing and corrupt practices as members of the initial Realty-controlled Board, including failing to deposit insurance proceeds into the condominium's account, failing to maintain books and records, failing to turn over documents to the unit-owner-controlled Board, and hiring Magnum as the managing agent in order to gain complete control of the condominium's operation and funds. (NYSCEF 811).

In reply, sponsor defendants deny plaintiffs' allegations and explain the reasons underlying certain actions allegedly taken by them. (NYSCEF 848-851).

III. ANALYSIS

A. Motion to amend

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of the court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether a party may amend its complaint. (*Murray v City of New York*, 43 NY2d 400, 404-405 [1977]; *Lanpont v Savvas Cab Corp., Inc.*, 244 AD2d 208, 209 [1st Dept 1997]). The factors to be considered in deciding the motion are whether the proposed amendment would "surprise or prejudice" the opposing party (*Murray*, 43 NY2d at 405; *Lanpont*, 244 AD2d at 209, 211; *Norwood v City of New York*, 203 AD2d 147, 148 [1st Dept 1994], *lv dism* 84 NY2d 849), and whether the amendment has merit (*Thomas Crimmins Contracting Co., Inc. v City of New*

York, 74 NY2d 166, 170 [1989]). "Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied." (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]).

Here, while plaintiffs challenge the merit of the proposed amendment and question the veracity of Shaoul's and Kaliner's recent denials of prior statements they made, they have not established that it plainly lacks merit. (*See Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008] [motion should be denied only where proposed pleading is palpably insufficient or patently devoid of merit; to test merits, opposing party may later move for summary judgment]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003] [leave to amend should be denied where proposed amendment is totally devoid of merit and legally insufficient]).

Moreover, plaintiffs have failed to show that they are surprised or prejudiced by the amendment, and as discovery continues, they will have an opportunity to seek further information about Shaoul's and Kaliner's new position. (*Jacobson v McNeil Consumer & Specialty Pharm.*, 68 AD3d 652 [1st Dept 2009] ["need for additional discovery does not constitute prejudice sufficient to justify denial of amendment"]; *Fellner v Morimoto*, 52 AD3d 352 [1st Dept 2008] [motion to amend should have been granted as new claims arose from same facts in original complaint and were not devoid of merit]). Although the delay is lengthy, it does not warrant denial of the amendment. (*Cherebin v Empress Ambulance Svce., Inc.*, 43 AD3d 364 [1st Dept 2007] [in absence of prejudice, mere delay insufficient to defeat amendment]).

B. Motion to dismiss

Pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action

against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Leon*, 84 NY2d at 87-88; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

1. Piercing corporate veil

A member of a limited liability company may not be held liable for the company's obligations solely by virtue of his or her status as a member thereof. Rather, in order to pierce the corporate veil, the moving party bears the heavy burden of showing that the company was dominated by the owners or members as to the transaction at issue and that such domination resulted in a wrong. (*Matias ex rel. Palma v Mondo Props. LLC*, 43 AD3d 367 [1st Dept 2007]). A plaintiff must plead detailed allegations of fraud or corporate misconduct. (*Sheridan Broadcasting Corp. v Small*, 19 AD3d 331 [1st Dept 2005]).

A plaintiff must establish that the defendant "abused the privilege of doing business in the corporate form" (*Morris v State Dept. of Taxation and Fin.*, 82 NY2d 135, 142 [1993]), rendering the corporation an illegitimate entity, formed for illegitimate purposes (*ABN AMRO Bank, N.V. v MBIA Inc.*, 81 AD3d 237, 245 [1st Dept 2011]). Factors to be considered include whether there has been a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use. (*Millennium Constr., LLC v Loupolover*, 44 AD3d 1016 [2d Dept 2007]). Conclusory allegations that the individual defendant intermingled his or her assets with those of the corporation or dominated the

corporation for his or her own personal benefit, without additional facts or detailed allegations of fraud or corporate misconduct, are insufficient to pierce the corporate veil (*Andejo Corp. v S. St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007]), as is the bare allegation that the corporation acted as the individual's alter ego (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 [2d Dept 2006]).

Here, even if plaintiffs prove that Shaoul and Kaliner were principals of Realty, the evidence they offer shows that Realty, Magnum, and Ascend shared office space and email addresses, and received mail, entered into agreements, and paid bills associated with the construction and management of the condominium, none of which demonstrates an abuse of their corporate form in the construction and management of the condominium or how the abuse was used to defraud or commit a wrong against plaintiffs. (*See Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443 [1st Dept 2012] [facts insufficient to pierce corporate veil as plaintiff showed only that two companies had overlapping ownership, common officer, and common office space and facilities]).

Plaintiffs also offer no evidence showing that Kaliner and Shaoul individually abused the privilege of doing business in the corporate form. (*See Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733 [1st Dept 2013] [claims against sponsor's principals properly dismissed; other than conclusory allegations that principals dominated and controlled sponsor, plaintiffs failed to allege particularized facts to warrant piercing corporate veil]; *The Bd. of Mgrs. of the Lore Condominium v Gaetano*, 2012 WL 5287598 [Sup Ct, New York County 2012] [plaintiff's allegations that individual defendant as alter ego of company breached duties including failing to collect common charges and failing to turn over condominium's books and records did not

indicate abuse of corporate form, absent allegations that defendant used company for personal use or that company was undercapitalized, funds were commingled, or corporate formalities were disregarded]; *see also Saiveest Empreendimentos Imobiliarios E. Participacoes, Ltda. v Elman Investors, Inc.*, 117 AD3d 447 [1st Dept 2014] [in non-condominium case, plaintiff did not allege that company owner's actions were made for his personal gain as opposed to company's gain, and conclusory allegations of company's undercapitalization and intermingling of assets and that owner dominated company, without additional facts, insufficient to pierce corporate veil]; *E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2d Dept 2009] [complaint failed to allege or suggest that owner acted in any way other than in capacity as company owner in transaction, failed to respect separate legal existence of company, treated corporate assets as own, undercapitalized company, or did not respect corporate formalities; conclusory allegation that individual exercised domination and control over company insufficient]).

The evidence offered by sponsor defendants establishes that Realty, Magnum, and Ascend maintained separate bank accounts and records, were incorporated at different times and for different legitimate business purposes, and filed separate tax returns, thereby showing that none of the companies dominated or controlled the others and that Kaliner and Shaoul respected corporate formalities in managing them. (*Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511 [1st Dept 2009] [insufficient evidence of one company's control over other as companies kept separate bank accounts, books, and records, were incorporated at different times for legitimate business purposes, filed separate tax returns, complied substantially with corporate formalities, and no evidence that other company was undercapitalized]).

And, as Kaliner and Shaoul deny having been members or principals of Realty, it is irrelevant whether they may be held personally liable by having signed the certification to the offering plan. (*Cf Bd. of Mgrs. of 184 Thompson St. Condominium v 184 Thompson St. Owner LLC*, 106 AD3d 542 [1st Dept 2013] [non-sponsors not held individually liable for claims based solely on alleged violations of offering plan and certification as statements made by defendants in certification and plan mandated by Martin Act]; *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284 [2d Dept 2009], *lv denied* 15 NY3d 742 [2010] [claims against sponsor, its members, and its principals based on alleged unrealistic budget projections included in offering plan dismissed as inclusion of projections was required by Martin Act and could not constitute basis for common-law fraudulent inducement and/or negligent misrepresentation claims]).

Plaintiffs' assertion that emails not yet produced may yield evidence substantiating their claims provides an insufficient basis for denying the motion. (*See Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009] [plaintiff's claim that discovery is necessary so that she may oppose motion to dismiss based solely on "unsubstantiated hope of discovering something relevant to her claims," thus insufficient to warrant denial of motion]; *Desyatnikov v Credit Suisse Group, Inc.*, 2012 WL 1019990 [ED NY 2012] [rejecting plaintiff's contention that dismissal of piercing claims before discovery premature; permitting inquiry into relationship between alleged alter ego and corporation would result in fishing expedition]).

2. Breach of fiduciary duty and conversion as Board members

Absent any allegation of independent tortious conduct by Kaliner and/or Shaoul other than allegations made against them as Board members, they may not be held liable for breach of

fiduciary duty or conversion. (*Berenger v 261 W. LLC*, 93 AD3d 175 [1st Dept 2012]; *Meadow Lane Equities Corp. v Hill*, 63 AD3d 699 [2d Dept 2009]).

Plaintiffs also fail to establish that these claims, based on Shaoul's and Kaliner's actions while they were Board members, are not barred by the business judgment rule, absent allegations or proof of fraud, self-dealing, unconscionability or other misconduct. (*Cave v Riverbend Homeowners Assn., Inc.*, 99 AD3d 748 [2d Dept 2012], *lv denied* 21 NY3d 885 [2013]; *Molander v Pepperidge Lake Homeowners Assn.*, 82 AD3d 1180 [2d Dept 2011] [conclusory and speculative allegations of bad faith, self-dealing, and other wrongdoing insufficient to raise triable issue]; *Hochman v 35 Park West Corp.*, 293 AD2d 650 [2d Dept 2002] [party seeking review of board's actions has burden of demonstrating breach of fiduciary duty through evidence of discrimination, self-dealing, or other misconduct by board members]; *see Skouras v Victoria Hall Condominium*, 73 AD3d 902 [2d Dept 2010], *lv denied* 18 NY3d 808 [2012] [as board's actions were made within their authority and thus protected by business judgment rule, conversion claim dismissed]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' 13th & 14th Street Realty, LLC, Ascend Group, LLC, Benjamin Shaoul, Robert Kaliner, and Magnum Management, LLC's motion for leave to amend is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; it is further

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing the following causes of action as against Benjamin Shaoul and Robert Kaliner: first, second, third,

sixth, seventh, tenth, eleventh, twelfth, thirteenth, sixteenth, nineteenth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth, thirty-second, thirty-third, thirty-fourth, thirty-fifth, and thirty-sixth, and these claims are severed and dismissed, and the clerk shall enter judgment accordingly, and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

DATED: September 29, 2014
New York, New York