Shtockhammer v 29th Street Hotel Acquisition, LLC
2014 NY Slip Op 32790(U)
October 24, 2014
Sup Ct, New York County
Docket Number: 190393/13
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JUDITH SHTOCKHAMMER,

Plaintiff,

-against-

29TH STREET HOTEL ACQUISITION, LLC, et al.,

Defendants.

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Index No. 190393/13
Motion Seq. 001

DECISION & ORDER

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendants 29th Street Hotel Acquisition, LLC ("Acquisition"), 29th Street Hotel Mezz, LLC ("Mezz"), 29th Street Hotel Member, LLC ("Hotel"), Chetrit Group, LLC ("Chetrit"), and JCMC 29th Street LLC ("JCMC") (collectively, "Defendants") move pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) to dismiss the complaint as against them for failure to state a cause of action and on the basis of documentary evidence. For the reasons set forth below, the motion is granted in part and denied in part.

From 1993 to 2006 plaintiff Judith Shtockhammer resided at what was then the Martha Washington Hotel located at 30 East 30th Street in New York City (the "Property"). This action arises from asbestos abatement at the Property which took place from approximately 1999 to 2001. Plaintiff alleges that she was exposed to a substantial amount of asbestos-laden dust during the abatement process even though she was assured that the work was completely safe and that it posed no health risks. Ms. Shtockhammer was diagnosed with mesothelioma on August 25, 2013 and has no other known history of asbestos exposure.

In 2012 Acquisition purchased the Property from 30 East 30th St., LLC which had owned the Property throughout the time that Ms. Shtockhammer resided there. The parties memorialized such

transaction in a Purchase and Sale Agreement ("PSA").[1]

Acquisition was and continues to be wholly owned by Mezz, which is in turn wholly owned by Hotel. Both are Delaware entities. As of the PSA closing date, Hotel had two members, JCMC and Lola Acquisition, LLC ("Lola"), each of which held a 50% interest. On or about August 16, 2013 JCMC transferred a 49.9% interest in Hotel to Lola. As of this writing Lola holds a 99.9% interest in Hotel, and JCMC holds a 0.1% interest in Hotel.

The Defendants argue that there are no allegations in the complaint which tie Ms. Shtockhammer's alleged asbestos exposure to Acquisition. They further argue that there are no grounds on which to maintain this action against Mezz, Hotel, Chetrit, or JCMC because they have never had any direct ownership interest in the Property.

On a CPLR 3211 motion to dismiss the court must afford the pleadings a liberal construction, accepting the facts as alleged in the complaint as true, and accord plaintiffs the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *Leon v Martinez*, 84 NY2d 83, 88 (1994). A motion to dismiss will fail if "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Weksler v Weksler*, 81 AD3d 401 (1st Dept 2011). In assessing a motion under CPLR 3211(a)(7) a court may "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon, supra*, at 87-88. Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.*

In light of these liberal principles the court finds that plaintiff's complaint states a cognizable

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[1] A copy of the PSA is submitted as defendant's exhibit 4.

cause of action against Acquisition sounding in common law negligence and premises liability. And, even assuming the complaint as written was insufficient to state a cause of action, plaintiff's counsel's affidavit remedies any such defect by setting out Ms. Schtockhammer's allegations in detail, including her claimed asbestos exposure at the Property during renovations and her claim that Acquisition purchased the Property and its liabilities in 2012.

The Defendants' documentary defense is belied by the PSA, the plain language of which suggests that all liabilities associated with the Property transferred from the Seller to Acquisition. In this regard, PSA ¶ 7.4 enumerates certain specific liabilities that were assigned to Acquisition as part of the purchase (*id.* at 33):

> (a) Seller Releases From Liability. Seller is hereby releases from all responsibility and liability to Buyer regarding the condition (including the presence in the soil, air, structures and surface and subsurface waters, of Hazardous Materials or substances that have been or may in the future be determined to be toxic . . . .

Significantly, the term "Hazardous Materials" is expressly defined to include asbestos-containing materials (*id.* at 5, emphasis added):

> "Hazardous Materials" means any pollutants, contaminants, hazardous or toxic substances, materials or wastes (including, without limitation, petroleum, petroleum by-products, radon, *asbestos and asbestos containing materials*. . . .

Also of note is PSA ¶ 7.3, referred to by plaintiff as a catch-all provision that conclusively establish's Acquisition's liability (*id.* at 32):

> Buyer acknowledges that the Purchase Price reflects the "as is, where is" nature of this sale and any faults, liabilities, defects or other adverse matters that may be associated with the Property."

Reading these provisions in the light most favorable to the non-moving party, plaintiff's claims against Acquisition must survive.

The remaining defendants assert that they have never had a direct interest in the Property and that plaintiff has failed to allege any facts which would permit her to pierce the corporate veil and recover from them for Acquisition's torts. While the court is well aware that piercing the corporate veil is a serious remedy which requires particularized pleadings,[2] the plaintiff cannot even begin to assess the relationship between the Defendants without the benefit of some discovery.

The court will however grant the motion by Chetrit. Defendants have alleged, and plaintiff does not dispute, that Chetrit has never held any interest whatsoever in the Property, Acquisition, Mezz, Hotel, or JCMC.

Accordingly, it is hereby

ORDERED that the branch of Defendants' motion which seeks dismissal on behalf of 29th Street Hotel Acquisition, LLC is denied; and it is further

ORDERED that the branch of Defendants' motion which seeks dismissal on behalf of defendants 29th Street Hotel Mezz, LLC, 29th Street Hotel Member, LLC, and JCMC 29th Street LLC is denied without prejudice to renew pending discovery as set forth herein; and it is further

ORDERED that the branch of Defendants' motion which seeks dismissal on behalf of Chetrit Group, LLC is granted; and it is further

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[2] *See, i.e., Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 140-41 (1993) ("The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners. . . . Generally . . .piercing the corporate veil 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."); *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 (1st Dept 2013) ("To make out a cause of action for liability on the theory of piercing the corporate veil because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene . . .").

ORDERED that this action and any cross-claims against Chetrit Group, LLC are hereby severed and dismissed; and it is further

ORDERED that this action shall continue as against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: Oct 24, 2014

SHERRY KLEIN HEITLER, J.S.C.