Sanders v 230 FA, LLC
2014 NY Slip Op 33791(U)
March 7, 2014
Supreme Court, Kings County
Docket Number: 1637/13
Judge: Bernadette Bayne

At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 7th day of March 2014.

PRESENT:

HON. BERNADETTE BAYNE

Justice.

JERMAINE SANDERS, NYISHA HAYNES, NIYAH COOK, and JULIA COOK,

Plaintiffs,

- against -

230 FA, LLC, THE ESTATE OF STEVEN A. GREENBERG, MICHAEL SCHARF IN HIS CAPACITY AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG, and CHARLES GREENBERG, AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG,

Defendants.

DECISION AND ORDER

Index No. 1637/13

The following papers numbered 1 to 3 read on this motion:	Papers Numbered
Notice of Motion/ Affidavits (Affirmations) Annexed	1
Affirmations in Opposition	2
Affirmation in Reply	3

In connection with an alleged visit to a bar/lounge located at 230 Fifth Avenue in New York, New York in February of 2010, the plaintiffs in this case brought suit against the within

defendants, collectively alleging negligent supervision; negligent hiring, retention and training; and race discrimination in violation of New York State Executive Law §296 and New York City Administrative Code §8-107(4). The complaint also contains a cause of action, claiming breach of contract, on behalf of plaintiff JERMAINE SANDERS, (hereinafter referred to as plaintiff SANDERS), individually.

Prior to filing an Answer to the second amended complaint, the defendants move this Court for an Order, "[d]ismissing Plaintiff's Second Amended Complaints [*sic*] in its entirety with prejudice against the Estate of Steven A. Greenberg pursuant to New York Civil Practice Laws and Rules §§3211(a)(7) and (8)", as well as an Order "[d]ismissing Plaintiff's Second Amended Complaints [*sic*] in its entirety with prejudice against Michael Scharf in his Capacity as Co-Executor of the Estate of Steven A. Greenberg and Charles Greenberg in his Capacity as Co-Executor of the Estate of Steven A. Greenberg pursuant to CPLR §3211(a)(7)". Finally, the defendants also seek an Order "[d]ismissing Plaintiff's claims with prejudice against 230FA LLC pursuant to CPLR §3211(a)(7) for (i) violation of the New York State Human Rights, Executive Law §296, et seq., (ii) breach of contract; (iii) negligent supervision; and (iv) negligent hiring, retaining and training".

Specifically, the defendants argue that "[i]t is procedurally improper to assert claims against the Estate of Steven A. Greenberg and for the Estate to be a defendant in this action" because "[u]nder well established New York law, an estate is not a legal entity and therefore it cannot sue or be sued". The defendants also argue that the breach of contract claim asserted on behalf of plaintiff SANDERS "[f]ails to allege that a valid contract existed between any of the Defendants and any of the Plaintiffs", and that the second, amended, complaint fails to "[a]llege that any Defendant breached any purported contract that may have existed, or that Plaintiffs

suffered damages as a result of any purported breach".

The defendants contend that the plaintiffs negligence claims are also defective because they "[a]re duplicative of Plaintiffs' HRL *[Human Right Law]* and CHRL *[City Human Right Law]* claims"; they fail to "[a]ssert any facts suggesting that Defendants were on notice that 230FA employees would allegedly act discriminatorily towards Plaintiffs"; and because the "[p]laintiffs do not allege that they suffered any significant physical injury as a result of the purported negligence".

The defendants also argue that the "[p]laintiffs' HRL and CHRL claims are defective", because the second amended complaint "[d]oes not contain any facts to show that any of the Defendants participated in the alleged discrimination" and it also "[d]oes not contain any facts that suggest that the Defendants condoned or ratified the alleged discrimination".

The defendants further contend that the "[p]laintiffs allegations of racial discrimination by a 230FA employee are insufficient to sustain any claim of negligent hiring, retention, or supervision against the defenants" because "[N]ew York Courts do not recognize such negligence claims when the employee's offense involved racial discrimination". The defendants also contend that "[N]ew York's recognition of negligent hiring, retention, training, and supervision of an employee are limited to instances resulting in significant physical injury to the plaintiff". The "[p]laintiffs do not claim any physical injuries and thus their negligence claims must fail".

Finally, the defendants argue that the "[p]laintiffs do not allege any facts to support their claim that the Greenberg defendants were negligent or that they should be personally liable for the alleged tortious acts of 230FA's employees" and that the second amended complaint "[d]oes not allege a valid claim under the CHRL against the Greenberg defendants. The only allegation against the Greenberg defendants is that Steven Greenberg owned 230FA. There are no

allegations that any of the Greenberg defendants participated in the alleged discrimination or aided and abetted the discrimination, which is required for an individual to incur personal liability under the CHRL". As such, "[t]he Court should dismiss the negligence claims against the Greenberg defendants", and the "[p]laintiffs' CHRL claim against the Greenberg defendants".

In opposition to the motion, the plaintiffs argue that they should be "[p]ermitted to go forward with their racial discrimination suit", contending that they "[h]ave properly pled claims under City and State Human Rights Law", and that the defendants "[d]o not contest that the facts set out such a claim, only that there is insufficient evidence that defendants had knowledge of the discriminatory conduct of the doorstaff or that they acquiesced, condoned or ratified the misconduct".

Specifically, the plaintiffs contend that "[l]ongstanding and consistent complaints about race discrimination by 230 Fifth's doorstaff allow the reasonable inference at the pleading stage that owners and mangagement not only knew, but set the door policy or at least acquiesced, condoned and ratified the conduct to which plaintiffs and, apparently, so many other people of color, have been subjected. There is ample evidence of notice of racial discrimination by doorstaff". In support of this contention, the plaintiffs point to "[r]eviews of and comments regarding 230 Fifth" from various websites, copies of which are annexed to their opposition papers.

The plaintiffs further argue that they "[h]ave stated claims for negligent supervision", and that they "[a]re not impermissibly pleading duplicative claims", despite the defendants arguments to the contrary, and that "[t]hey have pled, as is their right, alternative theories of liability". The plaintiffs contend that "[t]here is ample evidence of notice" of the "racist propensity of 230 Fifth's doorstaff", and, once again, points to the internet "reviews and comments" that are

annexed to their papers as proof of said notice.

In response to the defendants contention that "[N]ew York courts do not recognize negligent hiring/retention/supervision claims where discrimination is involved or that such claims must have a 'significant physical injury'", the plaintiffs argue that the cases cited by the defendants "[d]o not set such an absolute bar on pleading alternative theories", and that they fail to "[g]ive this Court, policy or substantive guidance as to why race discrimination claims should be exempted from the ambit of negligence law", and suggests that "[t]his court should not foreclose these meritorious claims".

The plaintiffs also argue that "[d]ismissing the negligence claims against the representative defendants is premature; it is too early in this litigation to confirm or reject that Steven A. Greenberg, the individual behind 230 Fifth, exercised sufficient control over corporate affairs and hiring, training, and supervision as to attach individual instead of corporate liability to his actions".

Finally, the plaintiffs contend that pursuant to "[t]he elements of a breach of contract are adequately set out, particularly given the simple pleading standards of the C.P.L.R.", and that "[t]his argument is barred by Law of the Case Doctrine" because the "[d]efendants raised the same argument in opposition to plaintiff's motion to correct the caption".

In reply to the plaintiffs' opposition to their motion, the defendants, initially, reiterate the arguments set forth in their motion papers, and then go on to argue that the plaintiffs have failed to offer any opposition to the portion of the motion seeking to dismiss the contract cause of action, contending that the plaintiffs' reliance on the law of the case doctrine is misplaced, and the doctrine does not apply in this case "[b]ecause the Court has never ruled on whether the SAC adequately pleads a breach of contract claim".

Regarding the plaintiffs' negligence claims, the defendants argue that the "[p]laintiffs' opposition provides no substance to defeat defendants arguments" and "[r]elies on utter speculation to contend that the negligence claims against the Greenberg defendants should not be dismissed". According to the defendants, the plaintiffs "[a]ssert that the negligence claims are not duplicative, but provides [*sic*] no explanation about how they are not duplicative". The defendants also attack the plaintiffs claim that the defendants were on notice, arguing that the plaintiffs provide "[c]omments posted on obscure websites, but presents no documentary evidence that defendants were aware of such comments". The defendants further argue that the plaintiffs have failed to offer any argument as to why this Court shouldn't follow the courts that have previously found "[t]hat discrimination cannot form the basis of the negligence claims that plaintiffs assert at bar".

The defendants also argue that the "[p]laintiffs opposition provides no explanation" as to why the discrimination claims against the Greenberg defendants should go forward, and requests that the Court not "[s]anction a fishing expedition as plainitffs do not present a scintilla of evidence that the Greenberg defendants are liable under the HRL or the CHRL".

Finally, the defendants argue that the "[p]laintiffs' opposition does not provide any documentary evidence demonstrating that 230FA condoned or ratified any conduct that is purported to be discriminatory", and that the "[H]RL claim against 230FA should be dismissed".

Discussion

Initially, it should be noted that the plaintiffs, in their opposition papers, concede that THE ESTATE OF STEVEN A. GREENBERG was not a proper party and that they are withdrawing their claims as against THE ESTATE OF STEVEN A. GREENBERG, only. As such, the Court need not address the portion of the defendants' motion, which sought dismissal of the complaint

as against THE ESTATE OF STEVEN A. GREENBERG pursuant to CPLR §3211(a)(8).

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action, the Court must determine whether, accepting as true the factual averments of the complaint, the plaintiff can succeed on any reasonable view of the facts stated, and the Court is required to accord the plaintiff the benefit of all favorable inferences which may be drawn from the pleading, without expressing an opinion as to whether the plaintiff can ultimately establish the truth of the allegations before the trier of fact. *See* Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 631 N.Y.S.2d 565, 655 N.E.2d 661, (1995). When a cause of action may be discerned, no matter how poorly stated, the complaint should not be dismissed for failure to state a cause of action. L. Magarian & Co., Inc. v. Timberland Co., 245 A.D.2d 69, 665 N.Y.S.2d 413, (1st Dept., 1997). However, vague and conclusory allegations are insufficient to maintain a cause of action. Fowler v. American Lawyer Media, Inc., 306 A.D.2d 113, 761 N.Y.S.2d 176, (1st Dept., 2003).

Addressing the portion of the defendants' motion which seeks dismissal of plaintiff SANDERS breach of contract cause of action, it is well settled that in an action for breach of contract, the complaint should set forth, inter alia, the parties who entered into the contract, that consideration was given, that the plaintiff has duly performed all the conditions of the contract on its part, the essential terms of the contract, including the specific terms upon which liability is predicated, that the defendant breached the contract, and that the plaintiff has sustained damages as a consequence. Failure to do so may result in dismissal of the complaint. *See, e.g.*, Kosson v. Algaze, 84 N.Y.2d 1019, 646 N.E.2d 1101, 622 N.Y.S.2d 674, (Ct. Of Appeals, 1995); Hart v. Scott, 8 A.D.3d 532, 778 N.Y.S.2d 718, (2nd Dept., 2004); Valley Cadillac Corp. v. Dick, 238 A.D.2d 894, 661 N.Y.S.2d 105 (4th Dept., 1997); Fowler v. American Lawyer Media, Inc., 306

A.D.2d 113, 761 N.Y.S.2d 176 (1st Dept., 2003); Sud v. Sud, 211 A.D.2d 423, 621 N.Y.S.2d 37, (1st Dept., 1995); Chrysler Capital Corp. v. Hilltop Egg Farms, Inc., 129 A.D.2d 927, 928, 514 N.Y.S.2d 1002, 1003 (3rd Dept., 1987).

If an oral contract is in issue, the complaint should specifically state that the plaintiff is relying upon an oral agreement and set forth all the relevant terms of the oral agreement. Bomser v. Moyle, 89 A.D.2d 202, 205, 455 N.Y.S.2d 12, 14 (1st Dep't 1982). An oral contract must satisfy all the elements of a contract claim and not be barred by the statute of frauds. Sheehy v. Clifford Chance Rogers & Wells LLP, 3 N.Y.3d 554, 822 N.E.2d 763, 789 N.Y.S.2d 456 (Ct. Of Appeals, 2004); D & N Boening, Inc. v. Kirsch Beverages, Inc., 63 N.Y.2d 449, 472 N.E.2d 992, 483 N.Y.S.2d 164 (Ct. Of Appeals, 1984).

Upon review of the plaintiffs' second, amended complaint, this Court is of the opinion that plaintiff SANDERS has failed to plead his claim for breach of contract with the required specificity. As previously set forth herein, the plaintiff must identify the parties to the contract; state the consideration that was given; state that the plaintiff duly performed all of the conditions on his part; state the essential terms of the contract, including the specific terms upon which liability is predicated; state that the defendant breached the contract and identify the defendant that committed said breach; and state the damages that the plaintiff has sustained as a result of the breach. As plaintiff SANDERS has failed to satisfy these elements, the Court is constrained to grant the portion of the defendants' motion seeking dismissal of the breach of contract claim. However, in this instance the Court is of the opinion that the plaintiff has alluded to enough for this Court to permit him to amend his complaint again, so as to properly plead a claim for breach of contract.

The second amended complaint also names MICHAEL SCHARF IN HIS CAPACITY AS

CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG, and CHARLES GREENBERG, AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG as party defendants, despite the fact that they are, essentially, standing in the shoes of Steven A. Greenberg, who is deceased and was allegedly the owner and an officer of defendant 230FA, which owned the premises where the events that are the subject of this lawsuit allegedly occurred.

In New York State, there are two basic requirements which must be proved in order to convince the court to pierce the corporate veil. The first requirement is that the parties sought to be held liable must have dominion and control over the corporate entity and must have treated or operated the corporation as their "instrumentality" or "alter ego", rather than as a separate legal entity. See Union Carbide Corp. v. Montell N.V., 944 F. Supp. 1119, (U.S. District Court, S.D., New York., 1996). See also, Morris v. New York State Dept. of Taxation and Finance, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157, (Ct. Of Appeals, 1993). The second requirement is proof that the corporation was used by said parties to commit a fraud, or there was wrongful conduct which resulted in injury to the plaintiff. Lowendahl v. Baltimore & O.R. Co., 247 A.D. 144, 287 N.Y.S. 62, (1st Dept., 1936), aff'd, 272 N.Y. 360, 6 N.E.2d 56, (Ct. Of Appeals, 1936); Guptill Holding Corp. v. State, 33 A.D.2d 362, 307 N.Y.S.2d 970, (3rd Dept., 1970), order aff'd, 31 N.Y.2d 897, 340 N.Y.S.2d 638, 292 N.E.2d 782 (Ct. Of Appeals, 1972); Megaris Furs, Inc. v. Gimbel Bros., Inc., 172 A.D.2d 209, 568 N.Y.S.2d 581 (1st Dept., 1991).

Judicial action to disregard the corporate form is extraordinary. Harrogate House Ltd. v. Jovine, 2 A.D.3d 108, 767 N.Y.S.2d 613 (1st Dept., 2003). Courts are reluctant to disregard the separate existence of related corporations by piercing the corporate veil and have consistently given substantial weight to the "presumption of separateness." MCI Telecommunications Corp. v. John Mezzalingua Associates, Inc., 921 F. Supp. 936, (U.S. District Court, N.D. New York,

1996); Kashfi v. Phibro-Salomon, Inc., 628 F. Supp. 727, (U.S. District Court, S.D. New York, 1986). Parent, subsidiary, and affiliated corporations are generally treated separately and independently such that one will not be held liable for the contractual obligations of the other unless there is a showing of complete domination and control with respect to the transaction at issue. Alexander & Alexander of New York Inc. v. Fritzen, 114 A.D.2d 814, 495 N.Y.S.2d 386, (1st Dept., 1985), order aff'd, 68 N.Y.2d 968, 510 N.Y.S.2d 546, 503 N.E.2d 102 (Ct. Of Appeals, 1986). In the absence of a clear indication of such domination and control, related corporations are treated separately and independently for purposes of assigning legal responsibility. Meshel v. Resorts Intern. of New York, Inc., 160 A.D.2d 211, 553 N.Y.S.2d 342, (1st Dept., 1990).

In this case, the Court is of the opinion that it was premature and inappropriate for defendants MICHAEL SCHARF IN HIS CAPACITY AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG, and CHARLES GREENBERG, AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG to be named as parties to this lawsuit at this early stage, particularly in light of the fact that no discovery has been conducted. The appropriate time to address the possibility or necessity of piercing the corporate veil will only arise after discovery has been conducted and depositions of the corporate defendant and its representatives have been taken. At that point, if the proof warrants it, the plaintiff may then make a motion before the Court to pierce the corporate veil and add additional parties.

As such, and based upon the foregoing, the branch of the defendants' motion seeking to dismiss the causes of action as against defendants MICHAEL SCHARF IN HIS CAPACITY AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG, and CHARLES GREENBERG, AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG, is granted.

The plaintiffs in this case also make allegations of negligent hiring, retaining and training, as well as negligent supervision. However, the plaintiffs offer nothing more than argument, and cite no cases to counter the moving defendants contention that "[N]ew York courts do not recognize such negligence claims when the employee's offense involved racial discrimination", citing Monte v. Ernst & Young LLP, 330 F.Supp.2d 350 (U.S. District Ct., SDNY, 2004); Brown v. Bronx Cross County Medical Group, 834 F.Supp. 105 (U.S. District Ct., SDNY, 1993); Rosario v. Copacabana Night Club, Inc., 1998 WL 273110 (U.S. District Ct., SDNY, 1998). The plaintiffs also fail to refute the defendants' contention that "[N]ew York's recognition of negligent hiring, retention, training and supervision of an employee is limited to instances resulting in significant physical injury to the plaintiff", citing Monte v. Ernst & Young LLP, supra; Utility Metal Research, Inc. v. Coleman, 2008 WL 850456 (U.S. District Ct., EDNY, 2008).

As the plaintiffs offer no legal argument as to why the causes of action sounding in negligent supervision, negligent hiring, negligent retention, and negligent training should not be dismissed, the portion of the defendants' motions seeking to dismiss those causes of action, is granted.

Finally, the Court turns to the plaintiffs' discrimination claims made pursuant to the New York State Executive Law §296 and New York City Human Rights Law §8-107(4). Upon review of the factual allegations in the plaintiff's second amended complaint, this Court is of the opinion that the plaintiffs' allegation do not possess the requisite specificity to maintain these causes of action. The plaintiffs' discrimination claims are not only vague, but they group all of the plaintiffs together and fail to specify or identify what the claim or claims of discrimination are for each plaintiff, individually. Based upon the factual aversions as alleged in the complaint, the

Court finds no basis for a discrimination claim on behalf of plaintiff SANDERS at all, and that only vague factual claims accompany the discrimination allegations for plaintiffs NYISHA HAYNES, NIYAH COOK, and JULIA COOK. As such, and based upon the foregoing, the portion of the defendants' motion seeking dismissal of the plaintiffs' State and City discrimination claims, is granted.

The Court also notes that the documentary proof that the plaintiffs offer and annex to their motion papers, which they refer to as "[r]eviews and comments", are actually nothing more than pages printed from unknown websites with comments written by unknown individuals, which are not persuasive. Comments, such as the ones contained within the pages offered by the plaintiffs, are not only pure hearsay, but could have been written by anyone, including the within plaintiffs, makes them highly unreliable, as well as inadmissible.

Although the Court has, ultimately, granted the defendants' motion in its entirety, in the interests of justice, the Court grants the plaintiffs leave to draft and file a third amended complaint, in an effort to correctly plead plaintiff SANDERS breach of contract claim, as well as the discrimination claims on behalf of the plaintiffs. The plaintiffs' causes of action sounding in negligent supervision, negligent hiring, negligent retention and negligent training are dismissed in their entirety, and the causes of action as against the defendants MICHAEL SCHARF IN HIS CAPACITY AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG, and CHARLES GREENBERG, AS CO-EXECUTOR OF THE ESTATE OF STEVEN A. GREENBERG are dismissed until such a time arises that the plaintiffs can prove and justify that piercing the corporate veil in this case is warranted.

Conclusion

Accordingly, it is

ORDERED, that the defendants motion to dismiss the plaintiff's complaint is granted to the extent that the plaintiff's fourth and fifth causes of action are dismissed; and it is further,

ORDERED, that defendant THE ESTATE OF STEVEN A. GREENBERG is dismissed from this action; and it is further,

ORDERED, that the first, second and third causes of action in the plaintiffs' second amended complaint are dismissed for lack of requisite specificity, but the plaintiffs are granted leave to file and serve a third, amended, summons and complaint, in an effort to address and correct these deficiencies. The plaintiffs are directed to file the third, amended, summons and complaint within thirty (30) days of entry of this Order.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

BERNADETTE BAYNE
Supreme Court Justice

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