

Slattery Advisors, Inc. v Sedona Partners, Inc.

2016 NY Slip Op 31339(U)

July 14, 2016

Supreme Court, New York County

Docket Number: 653766/15

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 15

-----X
 SLATTERY ADVISORS, INC.,

Plaintiff,

- v -

SEDONA PARTNERS, INC., and DAVID
 ITZKOWITZ,

Defendants.
 -----X

HON. EILEEN A. RAKOWER, J.S.C.

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**DECISION
 and ORDER**

Mot. Seq. 001

This action arises out of a Joint Venture Agreement between plaintiff, Slattery Advisors, Inc. (“Slattery Advisors” or “Plaintiff”), and non-party Cranwell Advisors, Inc. (“Cranwell Advisors”), with an effective date of July 27, 2010, and a Modification to Joint Adventure Agreement (“Modification Agreement”) entered between Slattery Advisors and Cranwell Advisors on June 27, 2010 to share all brokerage commissions earned from clients during the term of the Joint Venture Agreement and for five years after expiration or termination of the Joint Venture Agreement. Pursuant to the Modification Agreement, Cranwell Advisors assigned, transferred, and delegated to defendant, Sedona Partners, Inc. (“Sedona Partners”) all of its rights under the Joint Venture Agreement, and Slattery Advisors consented to such assignment, transfer and delegation. The Joint Venture Agreement and the Modification Agreement are referred to collectively herein as the “Joint Venture Agreement.” Plaintiff claims that Sedona and David Itzkowitz, a licensed real estate broker and Sedona’s employee and Vice President (“Itzkowitz”), failed to comply with the terms of the Joint Venture Agreement, including failing to share commissions and provide financial reports in accordance with the terms of the Joint Venture Agreement. Plaintiff asserts causes of action for breach of contract and declaratory judgment against Defendants.

Defendants now move for an Order, pursuant to CPLR §§ 3211(a)(7) dismissing Plaintiff’s complaint against Itzkowitz for failure to state a cause of action. Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action; or

(CPLR §§ 3211[a][1], [7]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t 2003] [internal citations omitted]; CPLR § 3211[a][7]).

However, with respect to individual defendant Itzkowitz, it is the general rule that a corporate officer is not liable for contracts entered into on the corporation’s behalf “unless there is clear and explicit evidence” of the individual officer’s intention to be personally bound. (*Mencher v. Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177 [1953]). In order to pierce the corporate veil to impose a corporation’s contractual obligations upon an individual officer, the party seeking to pierce the corporate veil must show: (1) the officer 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. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep’t 2012] quoting *Morris v. State Dep’t of Taxation & Fin.*, 82 N.Y.2d 135, 141 [1993]). Where a party seeks to hold an individual officer liable for the contractual obligations of the corporation, allegations of control, “unaccompanied by allegations of consequent wrongs”, are insufficient to plead a cause of action as against the officer individually. (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 A.D.3d 35, 40 [1st Dep’t 2012]).

Here, Plaintiff’s complaint alleges that Slattery Advisors and Cranwell Advisors entered into the Joint Venture Agreement, and Slattery Advisors and Cranwell Advisors entered into the Modification Agreement wherein Cranwell Advisors assigned, transferred, and delegated to Sedona Partners all of its rights under the Joint Venture Agreement, and Slattery Advisors consented to such assignment, transfer, and delegation. Thus, even accepting Plaintiff’s allegations as true, Plaintiff’s complaint does not plead that Itzkowitz is a party to the Joint Venture

Agreement or Modification Agreement or that he executed the agreements in his individual capacity.

To the extent that Plaintiff's complaint seeks to pierce the corporate veil to impose Sedona's obligations upon Itzkowitz individually, the complaint alleges, "Upon information and belief, Sedona Partners is the corporate alter ego of Itzkowitz." The complaint further alleges, "Itzkowitz exerts domination and control over Sedona Partners, Sedona Partners primarily transacts Itzkowitz's business and not its own, Sedona Partners is used by Itzkowitz to accomplish his own business objectives, and Sedona Partners is a shell company that does not follow corporate formalities." Even accepting Plaintiff's allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiff's complaint fail to plead facts sufficient to suggest that Itzkowitz, through his domination, "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [Plaintiff], such that a court in equity will intervene." (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 140, 142 [1993]).

In opposition to Defendants' motion, John J. Slattery, Jr., a licensed real estate broker and the President of Slattery Advisors, submits an affidavit providing additional facts to support Plaintiff's claim to hold Itzkowitz's liable for Sedona Partners' obligations. Slattery states that Itzkowitz's residence and Sedona Partners' principal office are located at the same address. Slattery further states that Sedona Partners "does not have a dedicated phone line," email address, or letterhead and that Itzkowitz conducted his real estate brokerage activities using his work or personal phone numbers, emails, and letterhead. Slattery further states that Itzkowitz's wife, who is listed as the Chief Executive Officer of Sedona Partners, "is purely ceremonial," and that "based on [his] direct observations of Itzkowitz, as well as conversations with him, Itzkowitz solely directs and dominates the activities of Sedona Partners, and Sedona Partners has no employees other than Itzkowitz." Slattery further states, "Upon information and belief, Sedona Partners is a Subchapter-(S) corporation and all income derived by Sedona Partners is reported for tax purposes as personal income to Itzkowitz." Slattery states that while "it was [his] expectation that Itzkowitz would maintain sufficient funds in the Sedona Partners bank account to pay Slattery Advisors its share of commissions due under the Joint Venture Agreement," "[i]nstead, Itzkowitz has diverted commissions the commissions owed to [him] to his personal use, and has effectively stripped Sedona Partners' bank accounts and any significant assets, rendering Sedona Partners judgment proof in the event Slattery Advisors ever sued to collect what it is owed."

In opposition, Plaintiff further contends that it has not had any opportunity to take discovery in this action; it argues that discovery “will further reveal that Sedona Partners were used for Itzkowitz’ and his wife’s personal use, that Sedona Partners is completely undercapitalized, and that all commissions paid into the account(s) of Sedona Partners (including commissions owed to [him]) were withdrawn by David Itzkowitz and relocated to his personal account or otherwise used to pay his expenses.”

At this stage – prior to any discovery having been taken – and drawing all inferences in favor of the non-moving party, Plaintiff’s Complaint states a claim against Itzkowitz individually based upon a piercing the corporate veil theory of liability.

Wherefore, it is hereby

ORDERED that Defendants’ motion to dismiss Plaintiff’s complaint as against defendant David Itzkowitz is denied and David Itzkowitz shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JULY 14 2016
JUL 14 2016



EILEEN A. RAKOWER, J.S.C.