

GDF Suez Energy Resources NA., Inc. v Esplanade Hilltop, LLC

2016 NY Slip Op 31668(U)

September 1, 2016

Supreme Court, New York County

Docket Number: 451521/2015

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

GDF SUEZ ENERGY RESOURCES NA., INC.,
Plaintiff,
-against-

INDEX NO. 451521/2015
MOTION DATE 08/24/2016
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

ESPLANADE HILLTOP, LLC, and
ESPLANADE CAPITAL, LLC,
Defendants.

The following papers, numbered 1 to 7, were read on this motion for Summary Judgment.
PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits _____	4 - 5
Replying Affidavits _____	6 - 7

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Esplanade Capital, LLC's motion for summary judgment is granted.

GDF Suez Energy Resources NA., Inc. (herein "GDF") commenced this action against Defendants Esplanade Hilltop, LLC (herein "Hilltop") and Esplanade Capital, LLC (herein "Capital") alleging breach of contract, services rendered, account stated, unjust enrichment and attorney's fees. GDF seeks \$58,757.05 in damages for Defendants' failure to pay for electric power services.

GDF previously moved for summary judgment against the Defendants, and Capital cross-moved for summary judgment dismissing the action as against it. This Court denied both motions in an Order dated February 3, 2016. It was determined that Plaintiff's motion was premature as discovery had not yet begun, and Defendant's cross-motion was unsupported by any evidence other than a self-serving affidavit. (Mot. Exh. C). After denial of the motions, the parties proceeded with discovery.

Capital now moves for summary judgment dismissing the action against it, pursuant to CPLR 3211(a)(1) and (7). Plaintiff opposes the motion.

Capital argues that it is not affiliated with Hilltop, that the two entities are distinct, and that Capital did not enter into an agreement with GDF for electric power services. Capital also contends that the Complaint fails to sufficiently state any causes of action against it. The Complaint only identifies Capital as a subsidiary of Hilltop (Mot. Exh. A), and it is only within Plaintiff's responses to Capital's discovery demands (specifically the interrogatories) that it appears Plaintiff's allegations against Capital are based on a theory of alter ego liability (Mot. Exh. G). Capital annexes the Jay Eisenstadt Affidavit that was attached to its previous cross-motion. The Eisenstadt Affidavit states that the Defendants are separate entities that do not share management, employees, bank accounts or places of business. Also attached are (1) the Master Electric Energy Sales Agreement with the Sales Confirmation, by and between GDF and Hilltop (Mot. Exh. E), and (2) copies of the bills for services from Plaintiff to Hilltop where Capital is not named or identified (Mot. Exh. F).

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

GDF attempts to support its allegation of alter ego liability on “[c]ommonality in location, e-mail and principals...” (See Interrogatories- Mot. Exh. G). To rebut this claim, Capital attaches the Affidavit of Joseph Kaufman, the comptroller for Hilltop at the time the Agreement between GDF and Hilltop was signed. Kaufman also worked for Capital at this time, and in an effort to streamline his emails, he would use his Capital email account to correspond with GDF. Kaufman states that this is where the “overlap” between Capital and Hilltop ends. The two entities do not commingle assets, nor does either entity assert control or dominate the other. (Kaufman Aff. attached to Mot.)

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

On a motion for summary judgment pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts alleged in the pleading to be true, afford the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Leon v. Martinez 84 N.Y.S.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511). The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st Dept. 1983]). The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd Dept. 2012]).

The Complaint fails to state a cause of action against Capital. The Complaint simply states that Hilltop was a subsidiary of Capitol, and that the Defendants entered into an agreement with GDF for electricity services. (Mot. Exh. A). It is only within the interrogatories that a theory of alter ego liability is alleged based upon a commonality in location, e-mail and principals. (Mot. Exh. G). Stating in a complaint that one entity is the alter ego of another is conclusory and insufficient to allege alter ego liability where the complaint fails to allege complete domination, or that the purpose of any such domination was to commit a wrong against a plaintiff. (Franklin v. Daily Holdings, Inc., 135 A.D.3d 87, 21 N.Y.S.3d 6 [1st Dept. 2015]). A common use of office space, the same telephone number, and the same email account is relatively insignificant in alleging alter ego liability. (Bd. Of Managers of the Gansevoort Condominium v. 325 W. 13th, LLC, 121 A.D.3d 554, 993 N.Y.S.2d 901 [1st Dept. 2014]).

In order to dismiss an action on documentary evidence, the documentary evidence must unequivocally contradict plaintiff’s factual allegations and conclusively establish a defense as a matter of law, resolve all factual issues and conclusively dispose of plaintiff’s claim (Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]). “In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable (Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668 [2nd Dept., 2010] citing to, Fontanetta v. John Doe 1, 73 AD3d 78, 84 [2010]). To qualify as documentary evidence, printed materials “must be unambiguous and of undisputed authenticity” (Fontanetta v. John Doe 1, 73 AD3d 78, 86, 98 N.Y.S.2d 569, 575 [2nd Dept.,

2010], see *Flushing Sav. Bank, FSB v. Siunykalmi*, 94 AD3d 807, 808, 941 N.Y.S.2d 719, 721 [2d Dept., 2012]).

“When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one,” and if it is “...shown that a material fact as claimed by the pleader to be one is not a fact at all”... and no significant dispute exists regarding it, dismissal is warranted. (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 372 N.E.2d 17 [1977]).

Capital makes a prima facie showing that it was not a party to, or was to receive services covered by the agreement between Hilltop and GDF. The bills for the services provided by GDF also do not name Capital. Upon the documentary evidence provided, GDF does not have a cause of action against Capital.

GDF fails to raise any issues of fact, and fails to provide any contrary evidence to rebut Capital’s arguments. GDF’s argument that this summary judgment motion contains the same arguments as in Capital’s prior cross-motion does nothing to raise issues of fact barring summary judgment. At the time the prior motions were dismissed discovery had not commenced yet. Since then discovery has been exchanged. Even giving merit to GDF’s argument that depositions have not been completed, this does nothing to prevent dismissal on the basis that the Complaint fails to state a cause of action. Therefore, summary judgment dismissing the Complaint as against Capital is proper.

Accordingly, it is ORDERED that Defendant Esplanade Capital, LLC’s motion for summary judgment dismissing the Complaint as against it is granted, and it is further,

ORDERED, that the causes of action in the Complaint asserted against Esplanade Capital, LLC, are hereby severed and dismissed, and it is further,

ORDERED, that the causes of action in the Complaint asserted against Esplanade Hilltop, LLC, remain in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

GDF SUEZ ENERGY RESOURCES NA, INC.,
Plaintiff,

-against-

ESPLANADE HILLTOP, LLC.
Defendant.

and it is further,

ORDERED, that within 20 days from the date of entry of this Order the moving party shall serve a copy of this Order with Notice of Entry on all parties appearing, and it is further,

ORDERED, that within 20 days from the date of entry of this Order a copy of this Order with Notice of Entry shall be served on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry shall be served pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at, genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly, and it is further,

ORDERED, that the remaining parties appear for a Status Conference in IAS Part 13, located at 71 Thomas St., Room 104, N.Y., N.Y. on November 16, 2016, at 9:30 A.M.

ENTER:

Dated: September 1, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE