

JAMC Corp. v Liberty Blue Group LLC
2017 NY Slip Op 32702(U)
December 21, 2017
Supreme Court, New York County
Docket Number: 150679/17
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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JAMC CORPORATION and CELTIC BUILDING
SUPPLIES, INC.,

Plaintiffs,

Index No. 150679/17

-against-

DECISION & ORDER

THE LIBERTY BLUE GROUP LLC, et al.

Defendants.

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3211, defendants The Liberty Blue Group LLC (LBG) and Florim Lajqi (Lajqi) move to dismiss certain causes of action contained in the amended complaint.

Background

Property owner 200 East 62nd Owner LLC entered into a construction contract with LBG, which served as the general contractor on the project. Lajqi is the owner of LBG (Affirmation in Support, Ex A [Complaint] at ¶ 45). LBG retained plaintiffs JAMC Corporation (JAMC) and Celtic Business Supplies, Inc. (Celtic) as a subcontractor and supplier. Plaintiffs commenced this action against defendants alleging that plaintiffs performed work and provided materials but were not fully paid. Plaintiffs allege that defendants owe JAMC \$117,808.12 and Celtic \$38,107.63 (Complaint at ¶ 16). Plaintiffs both filed liens.

Analysis

In analyzing a CPLR 3211(a)(7) motion to dismiss, "the pleadings are necessarily afforded a liberal construction [and plaintiff is accorded] the benefit of every possible favorable inference" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d

314, 326 [2002]; *Access Nursing Servs. v Street Consulting Group*, 137 AD3d 678, 679 [1st Dept 2016]; *Greystone Funding Corp. v Kutner*, 121 AD3d 581, 583 [1st Dept 2014])). "The motion must be denied where the complaint adequately alleges, for pleading survival purposes, viable causes of action. The sole criterion on a motion to dismiss is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law, a motion for dismissal will fail" (*Harris v IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010])).

Second Cause of Action: Lien Law Article 3-A

Movants failed to establish entitlement to dismissal of the second cause of action, which seeks to enforce rights conferred by Lien Law article 3-A. The allegations in the complaint are sufficient to state a cause of action against LBG and Lajqi (*Holt Constr. Corp. v Grand Palais, LLC*, 108 AD3d 593, 597 [2d Dept 2014], *lv denied* 22 NY3d 853 [2013] [individual officers can be personally liable for knowingly diverting trust assets])).

Third Cause of Action: Conversion

"The mere right to payment cannot be the basis of a cause of action alleging conversion since the essence of a conversion cause of action is the 'unauthorized dominion over the thing in question' (*Daub v Future Tech. Enterprise, Inc.*, 65 AD3d 1004 [2d Dept 2009]). Here, the complaint fails to state a cause of action for conversion because movants never had actual ownership, possession or control of funds that were in plaintiffs' possession (see *Orchid Constr. Corp. v Gonzalez*, 89 AD3d 705, 707 [2d Dept 2011]). Therefore, the third cause of action is dismissed.

Fourth Cause of Action: Alter Ego Liability

Plaintiffs' fourth cause of action denominated "pierce the corporate veil/alter ego liability" must be dismissed for failure to state a cause of action. "The allegations of corporate domination are wholly conclusory and consist of no more than a recitation of the elements of the claim, 'upon information and belief'" (*501 Fifth Ave. Co., LLC v Alvona LLC* 110 AD3d 494 [1st Dept 2013]; *Albstein v Elany Contr. Corp.*, 30 AD3d 210, 210 [1st Dept 2006] [dismissal warranted as plaintiff failed to plead facts to substantiate conclusory claims and did "not sufficiently allege that corporate form

was used to commit a fraud against her"], *lv denied* 7 NY3d 712 [2006]; *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]). For example, plaintiffs did not allege facts demonstrating how Lajqi used the corporate form to shield himself and wrong them. Nor did they allege specifically what Lajqi did in disregard of corporate formalities.

Eighth Cause of Action: Violation of the Prompt Payment Act

The motion to dismiss the eighth cause of action seeking relief for violation of the Prompt Payment Act [PPA] (General Business Law § 756 et seq.) is denied. There can be a cause of action based on noncompliance with the PPA (see, e.g., *Precast Restoration Servs., LLC v Global Precast, Inc.*, 131 AD3d 873 [1st Dept 2015], *lv dismissed* 27 NY3d 1031 [2016]). Although the pleaded remedies are incorrect (for example, plaintiffs allege that based on the PPA "LBG has, as a matter of law, waived the right and ability to contest the work performed" [see *Precast Restoration Servs., Inc.*, 131 AD3d at 873; *Donninger Constr., Inc. v C.W. Brown, Inc.*, 113 AD3d 724, 725 (2d Dept 2014) (nothing in the PPA provides that a failure to timely pay or disapprove an invoice "acts as a waiver of a contractor's ability to contest")]), it is undisputed that if

LBG is ultimately adjudged to have been in breach, it may be responsible for "prejudgment interest of 1% per month" (Reply Mem at 4). Therefore, the cause of action itself will remain. Plaintiffs, of course, will not necessarily be awarded the amount sought simply because the PPA may have been violated and LBG will be permitted to proceed with any applicable defenses.

Ninth Cause of Action: Breach of Fiduciary Duty

Plaintiffs allege that Lajqi is personally liable for the outstanding \$155,915.75 along with attorneys' fees because as "the controlling shareholder, officer and/or director" of LBG he owed a fiduciary duty to its creditors (Complaint at ¶¶ 87-88). Because in response to defendants' motion, plaintiffs have not shown any authority supporting the existence of a recognized fiduciary duty running to the plaintiffs that would support liability under the circumstances pleaded, the cause of action is dismissed.*

*None of the allegations in the ninth cause of action assert that LBG had a fiduciary duty to plaintiffs (see Complaint at ¶¶ 86-90). To the extent that the ninth cause of action could somehow be construed as applying to LBG (see Complaint, Wherefore at D; Memorandum of Law in Opposition [Opp] at 9), there is no basis for finding that LBG had any fiduciary duty to the plaintiffs.

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Tenth Cause of Action: Limited Liability Company (LLC) Law § 409

Plaintiffs' tenth cause of action is dismissed as LLC Law § 409 does not give rise to liability to non-members of a limited liability company.

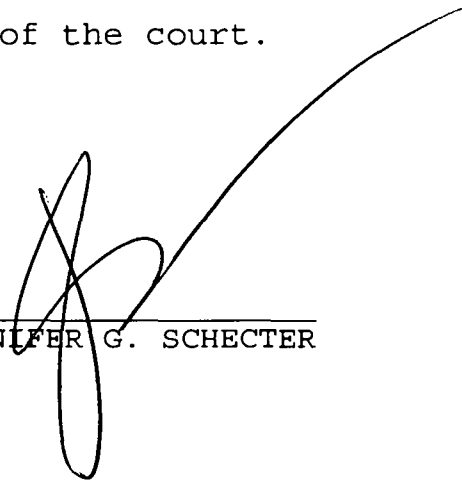
Accordingly, it is

ORDERED that the motion to dismiss by defendants The Liberty Blue Group LLC and Florim Lajqi is granted to the extent that the third, fourth, ninth and tenth causes of action are dismissed as against them; it is further

ORDERED that the moving defendants are to answer within 20 days of the e-filing of this decision and order.

This is the decision and order of the court.

Dated: December 21, 2017



HON. JENNIFER G. SCHECTER