

1424-1428 Lexington Realty LLC v Liu
2018 NY Slip Op 30556(U)
March 29, 2018
Supreme Court, New York County
Docket Number: 155635/2017
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. DAVID BENJAMIN COHENPART 58*Justice*

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1424-1428 LEXINGTON REALTY LLLC,

INDEX NO. 155635/2017

Plaintiff,

MOTION DATE 9/6/2017

- v -

MOTION SEQ. NO. 002STUART LIU, CECILIA LIU, S.L. 86 CORP, JUNCTION 88
CORP, NICOLO OTTOMANELLI, JOSEPH OTTOMANELLI,
OTTOMANELLI'S CAFE FRANCHISING CORP, OTTOMANELLI
BROTHERS LTD

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45

were read on this application to/for DISMISSAL.

Upon the foregoing documents, it is

Decided that defendants Nicolo Ottomanelli and Joseph Ottomanelli, Jr.'s motion to dismiss (1) based upon documentary evidence; and (2) for failure to timely complete service of process is denied. According to the portion of the Complaint that relates to defendants, 1424-1428 Lexington Realty ("plaintiff") leased 1424 Lexington Avenue, Ground Floor Store and Whole Basement, New York, NY 10128 ("Premises") to 1424 Lexington Avenue Corp. ("1424 Corp.") for a term commencing October 1, 2003 and ending on September 30, 2018 ("Lease"). The Premises was used as a restaurant by 1424 Corp. 1424 Corp. is a New York corporation whose shareholders are Nicolo Ottomanelli and Joseph Ottomanelli Jr. ("defendants"). In connection with the sale of the restaurant business, the Lease was assigned to and assumed by S. L. 93 Corp.

("SL93") on November 30, 2010 ("Assignment"). Cecilia Liu and Stuart Liu are alleged to be the shareholders of SL93. The then landlord was made aware and consented to the Assignment on December 17, 2010.

The Complaint alleges that despite the Assignment, 1424 Corp. was not released of its obligations should the assignee fail to pay rent. SL93 continued to operate as a restaurant and deli on the Premises. After SL93 allegedly failed to pay rent, plaintiff commenced a summary non-payment proceeding entitled *1424-Lexington Realty LLC v. 1424 Corp. and S. L. 93 Corp.*, Index No. 84299/2016 (Civ. Ct. New York). 1424 Corp. failed to appear or answer the petition for the proceeding. On May 1, 2017, a stipulation was entered settling that matter where SL93 consented to entry of a money judgment in the amount of \$175,820.87 in favor of plaintiff and agreed to vacate the Premises on or before May 31, 2017.

SL93 failed to vacate and surrender the Premises by May 31, 2017 and was eventually evicted on June 8, 2017. Since then, neither SL93 nor 1424 Corp. has paid any part of the money judgment. Plaintiff claims 1424 Corp. and SL93 remain liable for \$416,037.35 which totals the missing rent and any additional rent due under the Lease through September 30, 2018.

The Complaint states upon information and belief, that 1424 Corp. owns assets such as moveable furniture, equipment, bank accounts, etc. ("Assets"). Plaintiff also alleges defendants have conveyed and transferred these Assets from 1424 Corp. to defendants without fair consideration. The Assets were transferred by defendants from 1424 Corp. to themselves allegedly to avoid liability for debts owed to plaintiff.

The Complaint alleges five causes of action; (1) SL93 secreted and dissipated its assets to frustrate plaintiff's attempts to satisfy a money judgment against SL93; (2) 1424 Corp. secreted and dissipated its assets to frustrate plaintiff's attempt to satisfy a money judgment against 1424

Corp.; (3) SL93's corporate status should be disregarded, and the corporate veil should be pierced making Stuart Liu and/or Cecilia Liu jointly and severally liable for the acts, omissions, liabilities, and debts of SL93; (4) 1424 Corp.'s corporate status should be disregarded, and the corporate veil should be pierced making defendant's and/or the Ottomanelli Corporations jointly and severally liable for the acts, omissions, liabilities, and debts of 1424 Corp.; and (5) SL93 and 1424 Corp. are liable for the legal fees that resulted from their breach of the lease and plaintiff's enforcement of the lease. This decision only discusses the second and fourth causes of action as they relate to defendants Nicolo Ottomanelli and Joseph Ottomanelli, Jr.

Defendants moved to dismiss based upon CPLR § 3211(a)(1) and § 308(2). In support of the motion, defendants claim the Assignment of the Premises' Lease released defendants from their obligations and transferred them to SL93.

When deciding a motion to dismiss pursuant to CPLR § 3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *see Faison v Lewis*, 25 NY3d 220 [2015]). A motion to dismiss pursuant to CPLR § 3211(a)(1), should not be granted unless the documentary evidence submitted is such that it resolves all factual issues as a matter of law and conclusively disposes of the claims set forth in the pleading (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept. 2014]).

The second cause of action is for fraudulent conveyances under New York Debtor and Creditor Law. To state a cause of action for a fraudulent conveyance, the Complaint must allege (1) that plaintiff is a creditor; (2) that debtor's property was conveyed to defendant without fair consideration; and (3) that debtor had "actual intent" to defraud the creditor (*Plaza v. Estate of*

Wisser, 211 AD2d 111, 120 [1st Dept. 1995]) *see* New York Debtor and Creditor Law §273, §275). When pleading causes of action for fraudulent conveyance for New York Debtor and Creditor Law §273, §273-a, §274, §275, and §276, plaintiff does not need a cause of action alleging fraud with such “heightened particularity” as required by CPLR 3016(b) (*see Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149-50 [2d Dept. 2009]; *see Menaker v Alstaedter*, 134 AD2d 412, 413 [2d Dept. 1987]). Taking the facts of the Complaint as true, plaintiff has sufficiently stated that it is a creditor of 1424 Corp. as it has a judgment against 1424 Corp., that 1424 Corp. conveyed to moving defendants the Assets without fair consideration in order to render 1424 Corp. insolvent and avoid debts owed to plaintiff.

Plaintiff has sufficiently stated that it is a creditor by being the owner of the Premises, that was leased to 1424 Corp. Although, the Lease was assigned, plaintiff alleges that 1424 was not released from its obligations thereunder and that conveyances were made from 1424 Corp. to moving defendants to render 1424 Corp. insolvent to avoid debts owed to plaintiff. The allegations set forth by plaintiff in the Complaint sufficiently set forth a cause of action that defendants have fraudulently transferred 1424 Corp.’s Assets to themselves to avoid paying plaintiff (*see Shisgal v. Brown*, 21 AD3d 845, 846 [1st Dept. 2005]).

Plaintiff also claims 1424 Corp. is an “alter ego” of defendants and therefore, the corporate veil should be pierced making defendants personally liable. To survive a motion to dismiss, the party seeking to pierce the corporate veil needs more than just conclusory statements. (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept. 2007]). Plaintiff must allege particularized facts that warrant a piercing of the corporate veil. (*Andejo Corp.* 40 AD3d at 407). “In order to state a claim for alter-ego liability plaintiff is generally required to allege ‘complete domination of the corporation in respect to the transaction attacked’ and ‘that such

domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept. 2014] quoting *Matter of Morris v NY Dept. of Taxation & Fin.*, 82 NY2d 135, 141, 623 NE2d 1157 [1993]).

Defendants are the sole shareholders of and exercise complete domination over 1424 Corp. as well as the other related entities. Paragraph 4.8 of the license agreement shows the Ottomaneli corporations are all intertwined. These entities along with defendants all share a common address of 1549 York Avenue, New York, NY 10028. It is alleged there was no arms-length dealing between the companies.

Plaintiff's cause of action to pierce the corporate veil includes defendants' domination and control over 1424 Corp. It alleges defendants conveyed 1424 Corp.'s Assets to themselves to avoid debt owed to plaintiff, resulting in plaintiff's injury. Plaintiff has properly stated that defendants have exercise and control over 1424 Corp. and used that exercise and control to commit fraud or wrong against plaintiff resulting in plaintiff's injury through particularized statements. Thus, plaintiff has established a piercing the corporate veil cause of action.

Defendants claim that the predecessor landlord's approval and of the Assignment released them from all obligations under the original Lease. However, the Assignment did not specifically release 1424 Corp. who would still be held liable for the continuance of payment of rent through the expiration of the Lease (*185 Madison Assocs. v. Ryan*, 174 AD2d 461 [1st Dept. 1991]). Further paragraph 11 of the Lease: entitled Assignment states "no such assignment, underletting, occupancy or collection shall be deemed a waiver of the covenant, or the acceptance of the assignee, under tenant or occupant as tenant, or a release of Tenant from the further performance by Tenant of covenants on the part of Tenant herein contained.").

Defendants also argues that the matter should be dismissed under CPLR § 213 that plaintiff's cause of action for defendants' alleged fraudulent conveyances has lapsed and is barred by the six (6) year statute of limitations. For an action based upon fraud, "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it" (CPLR §213(8)).

Specifically, defendants argue that plaintiff's cause of action for fraudulent conveyance occurred on the Assignment date, November 30, 2010. However, plaintiff does not state in the Complaint that is when 1424 Corp.'s Assets were conveyed by defendants. Further, plaintiff states the fraud was discovered on November 1, 2015 when 1424 Corp. had stopped paying rent. Plaintiff sought to collect rent from 1424 Corp. in November 2015 and discovered all 1424 Corp.'s Assets were gone. The earliest plaintiff could have discovered the fraud was November 1, 2015, which is within two years of plaintiff's commencement of this action on June 21, 2017. However, to the extent that plaintiff is seeking damages relating to transfer that occurred prior to June 21, 2011, said transactions would be beyond the statute of limitations

Finally, defendants also moved to dismiss under CPLR §308(2) for plaintiffs alleged failure to provide proof of service filed with the clerk of the court designated in the summons within twenty (20) days of either such delivery or mailing. Defendants allege that proof of service of process on Nicolo Ottomanelli was twenty-two (22) days late, proof of service of process on Joseph Ottomanelli, Jr. was three (3) days late, proof of service of Ottomanelli's Café Franchise was twenty-nine (29) days late, and proof of service of process on Ottomanelli Brothers Ltd. was twenty-nine (29) days late. Defendants move to dismiss the action against each of the above stated

parties. Plaintiff cross-moved pursuant to CPLR 2001 and 2004, seeking the Court's permission to extend the time to file the affidavits of service.

Public policy favors "the resolution of cases on the merits." (*Crimmins v. Sagona Landscaping, Ltd.*, 33 A.D.3d 580, 581 [2d Dept. 2006]). CPLR § 2004 grants the court permission to extend the time fixed by a statute for just or good cause either before or after the expiration of time fixed. Extension of time may be granted if there is no showing of prejudice (*Paracha v County of Nassau*, 282 AD2d 422, 423 [2d Dept. 1996]) (*see* CPLR §2004). Defendants have not produced any evidence to show plaintiff's delay in service have prejudiced them in any way. Accordingly, it is therefore

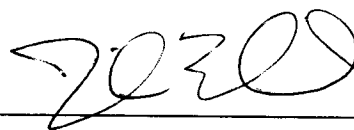
ORDERED, that defendants' motion to dismiss based upon documentary evidence for failure to timely complete service of process is denied; and it is further

ORDERED, that the cross-motion to extend time is granted.

This constitutes the decision and order of the Court.

3/29/2018

DATE



DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

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DENIED

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NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

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OTHER

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REFERENCE