

1424-1428 Lexington Realty LLLC v Liu

2018 NY Slip Op 30557(U)

March 28, 2018

Supreme Court, New York County

Docket Number: 155635/2017

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

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1424-1428 LEXINGTON REALTY LLLC,
Plaintiff,

INDEX NO. 155635/2017

MOTION DATE 8/10/2017

- v -

MOTION SEQ. NO. 001

STUART 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 2, 3, 4, 5, 6, 15, 16, 17, 18, 19, 20

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Decided that defendant Cecilia Liu's motion to dismiss for failure to state a cause of action is denied. According to the portion of the Complaint that relates to moving defendant, 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. Nicolo Ottomanelli and/or Joseph Ottomanelli Jr. ("Ottomanelli Brothers") are the shareholders of 1424 Corp. 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”). The then landlord was made aware and consented to the Assignment on December 17, 2010.

The Complaint alleges that SL93 is a New York Corporation and that Cecilia Liu (“defendant”) and/or her husband Stuart Liu are the shareholders of SL93. SL93 continued to operate as a restaurant and deli on the Premises. Despite the Assignment, the Complaint alleges 1424 Corp. was not released of its obligations should the assignee fail to pay the rent. 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. did not appear in that action and was in default and 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 SL93 owns assets such as moveable furniture, equipment, bank accounts, etc. (“Assets”). The Complaint also alleges that defendant have conveyed and transferred these Assets from SL93 to defendant without fair consideration. According to plaintiff, defendant and Stuart Liu exercise total dominion control over SL93. Plaintiff alleges the Assets were transferred from SL93 to defendant and Stuart Liu 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 Nicolo Ottomanelli and/or Joseph Ottomanelli, Jr., 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 the plaintiff's enforcement of the lease. This motion only discusses the first and third causes of action against the moving defendant Cecilia Liu.

Defendant moved to dismiss based upon CPLR § 3211(a)(7). In support of the motion, defendant claims she has no connection with SL93 and that her husband Stuart, whom she is seeking a divorce from, has been the one in control of SL93 and the other entities. Defendant argues that she is completely separate from the entities and the Assets.

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]). Defendant moves to dismiss based upon failure to state a claim upon which relief can be granted. Under CPLR § 3211(a)(7), the court "accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory" (*Elmaliach*

v Bank of China Ltd., 110 AD3d 192, 199 (1st Dept 2013) (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001])).

The first 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 NY Debt. 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 to plead a cause of action alleging fraud with such "heightened particularity" as required by CPLR 3016(b) (*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 in the Complaint as true, plaintiff has sufficiently stated that is a creditor of SL93 as it has a judgment against SL93, that SL93 conveyed to moving defendant the Assets without fair consideration in order to render SL93 insolvent and avoid debts owed to plaintiff.

Plaintiff also claims SL93 is an "alter ego" of Defendant and therefore, the corporate veil should be pierced making defendant 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]).


Plaintiff alleges that defendant and/or Stuart Liu are the shareholders of and exercise complete domination over SL93 as well as other related entities. These entities along with defendant and Stuart Liu all share a common address of 295 Continental Drive, New Hyde Park, NY 11040. It is alleged that there was no arms-length dealing between the companies.

Plaintiff's cause of action to pierce the corporate veil includes defendant's alleged domination and control over SL93. It also includes allegation that defendant conveyed SL93's Assets to herself to avoid debt owed to plaintiff, resulting in plaintiff's injury. Plaintiff has properly stated that defendant had exercise and control over SL93 and used that exercise and control to commit fraud or wrong against plaintiff resulting in the plaintiff's injury through particularized statements. Thus, plaintiff has established a piercing the corporate veil cause of action. Accordingly, it is therefore

ORDERED, that defendant's motion to dismiss for failure to state a cause of action is denied.

This constitutes the decision and order of the Court.

3/28/2018
DATE


DAVID BENJAMIN COHEN, J.S.C.

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

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	