

D.N. v 1841 LLC, Chestnut Holdings of N.Y., Inc.
2018 NY Slip Op 32110(U)
July 20, 2018
Supreme Court, Bronx County
Docket Number: 302938/2015
Judge: Donald A. Miles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8**

Index No. **302938/2015**
Motion Calendar No. 10
Motion Date: 3/5/18

D.N., Infant by her m/n/g DALENY ADRIAN DIAZ,
Plaintiff,

-against-

DECISION/ ORDER
Present:
Hon. Donald Miles
Justice Supreme Court



1841 LLC, CHESTNUT HOLDINGS OF NEW YORK,
INC., JONATHAN WEINER and BEN RIEDER,
Defendants,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion for Summary Judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits in Support.....	1
Affidavit in Partial Opposition.....	2
Reply Affirmation	3

Upon the foregoing papers, and following oral argument, the Decision/Order on this Motion is as follows:

This is an action for personal injury. The defendants BEN RIEDER and JOHNATHAN WIENER i/s/h/a JOHNATHAN WEINER (“Individual Defendants”), now move pursuant to CPLR § 3212 to dismiss the plaintiff’s complaint.

Factual Background

Plaintiff (who is an infant) alleges that on May 13, 2014, the defendants were negligent in permitting her to sustain injuries due to a dangerous and/or defective condition at the front entrance door to the premises located at 1841 Mohegan Avenue, Bronx, New York (“subject premises”). 1841 LLC and CHESTNUT HOLDINGS OF NEW YORK, INC., (“CHESTNUT HOLDINGS”) own and manage the subject premises, respectively. RIEDER and WIENER were employed as Chief Operating Officer and President, respectively of CHESTNUT HOLDINGS on the date of Plaintiff’s injury. According to the Amended Verified Complaint, Plaintiff’s injury was caused by, inter alia, the negligent manner in the ownership, operation, management, maintenance and control of the subject premises by the defendants.

The Individual Defendants first argue that their affidavits demonstrate that they do not

now, and never have had any ownership interest in either 1841 LLC or CHESTNUT HOLDINGS and plaintiff cannot “pierce the corporate veil” as they have never exercised complete domination over CHESTNUT HOLDINGS in an individual or personal capacity. Additionally, they claim that plaintiff has not asserted any claims of fraud or fraudulent transactions against defendants. The individual Defendants further argue that Plaintiff has failed to plead facts sufficient to pierce the corporate veil, since Plaintiff pleads identical boilerplate allegations against all defendants and fails to allege that the Individual Defendants, through their domination of the entity, abused the corporate form to harm Plaintiff. Defendants argue that plaintiff’s refusal to voluntarily withdraw these claims after it was made explicitly clear to plaintiff that such claims were improper, can only be interpreted as plaintiff behaving willfully, frivolously and in bad faith and as such plaintiff should be directed to reimburse the individual defendants for costs and expenses.

Plaintiff’s Opposition

Plaintiff represents that the affirmation in opposition is submitted in partial opposition to the defendants’ motion. It appears that plaintiff only opposes the portion of defendants’ motion which seeks sanctions and costs as no substantive arguments have been put forward in opposition to the branch of the motion seeking dismissal. Instead plaintiff raises the issue of insurance documentation and seeks to have defendants “compelled” to provide a copy of their insurance policy before the action be discontinued against RIEDER and WIENER. Plaintiff also raises the status of discovery as if to suggest that having the opportunity to question them in deposition would reveal necessary information as to their roles within the corporation and whether they possess personal knowledge of plaintiff’s claim. Moreover, Plaintiff argues that the purported affidavits of the Individual Defendants are unsworn and thus lack any probative value.

Individual Defendants’ Reply

In reply, the Individual Defendants argue that Plaintiff’s opposition fails to raise an issue of fact since it fails to specify what material issues of fact exist. The Individual Defendants further argue that Plaintiff has failed to plead any facts to pierce the corporate veil. Additionally, the Individual Defendants argue that Plaintiff failed to show that additional discovery will lead to relevant evidence against them. Moreover, the Individual Defendants assert that Plaintiff fails to

show that facts essential to oppose the motion for summary dismissal are exclusively within the knowledge and control of the Individual Defendants. Finally, the Individual Defendants contend that Plaintiff fails to offer any proof that the affidavits submitted in support of their motion are incredible.

Discussion

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (see *Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 [1st Dept 2001]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” (Id).

In order to pierce corporate veil, plaintiff must allege facts to show that: “(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud of wrong against the plaintiff which resulted in plaintiff’s injury” (*Shisgal v. Brown*, 21 A.D.3d 845, 848 [1st Dept 2005] [internal quotation marks omitted]; see *Berenger v. 261 West LLC*, 93 A.D.3d 175 [1st Dept 2012]). Further, a plaintiff must allege, with the requisite “particularized statements detailing fraud or other corporate misconduct,” facts that would warrant piercing the corporate veil (*Sheridan Broadcasting Corp v. Small*, 19 A.D.3d 331, 332 [2005]; *Sheinberg v. 177 E. 77*, 248 A.D.2d 176, 177 [1998], lv denied 92 N.Y.2d 844 [1998] [holding that the dismissal of the complaint was warranted as plaintiff “failed to allege particularized facts to warrant piercing the corporate veil”]).

Here, the Amended Verified Complaint is completely void of facts that would persuade this Court to pierce the corporate veil, as it only contains generalized allegations and fails to allege that the Individual Defendants exercised complete domination of the corporation and abused the corporate form to perpetuate a wrong against Plaintiff. Accordingly, the Individual Defendants’ motion to dismiss the Complaint is granted. Even if the Complaint did allege facts

sufficient to pierce the corporate veil, the Individual Defendants met their *prima facie* burden entitling them to summary dismissal by submitting the sworn affidavits of the Individual Defendants stating, among other things, that neither of them operated, managed, maintained or controlled the subject premises, in their respective individual capacity. Nothing in the Complaint or Plaintiff's opposition establishes a factual basis for finding that the corporate form should be pierced in order to hold the individual defendants liable. In fact, Plaintiff's opposition fails to address this allegation. Accordingly, the defendants' motion for summary dismissal is granted and all claims and cross claims against them are dismissed. (see *Perez v. Folio House, Inc.*, 123 A.D.3d 519, 520 [1st Dept 2014] (failure to address claims indicates an intention to abandon them as a basis of liability); *Kronick v. L.P. Thebaull Co.*, 70 A.D.3d 648, 649 [2d Dept 2010] (plaintiff abandoned her claim "by failing to oppose the branch of the defendant's motion which was to dismiss it").

As to the branch of defendants' motion seeking costs and sanctions, this Court declines to grant such relief.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendants BEN RIEDER and JOHNATHAN WIENER i/s/h/a JOHNATHAN WEINER, for summary dismissal of the Complaint as against them is granted and the complaint is hereby dismissed as against the aforesaid individual defendants only and it is further

ORDERED that the Clerk enter judgment accordingly and it is further

ORDERED that the action is severed and continues against the remaining defendants.

This is the decision and Order of the Court.

JUL 20 2018

DATE



HON. DONALD MILES, J.S.C.