Linn v Bonet
2018 NY Slip Op 34008(U)
March 8, 2018
Supreme Court, Westchester County
Docket Number: 64106/2017
Judge: Charles D. Wood

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ERICA LINN and NADINE SBEZZI, as co-Executors of the Estate of CARMELO SBEZZI, deceased and as co-Executors of the Estate of HENRIETTA SBEZZI, deceased,

Plaintiff,

DECISION & ORDER
Index No. 64106/2017
Sequence No. 1

-against-

MICHELLE BONET, BEMAN GONZALEZ, MIMI'S BAR AND GRILL LLC, MICHELE BERGERON and BERNARD HAGAN,

Defendants.

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WOOD, J.

The following documents were read in connection with moving defendants Michele Bergeron and Bernard Hagan's ("defendants") motion to dismiss[1]:

Defendants' Notice of Motion, Counsel's Affirmation, Exhibits.
Plaintiff's Counsel's Affirmation in Opposition, Exhibits.
Defendants' Counsel's Reply Affirmation.

This action for wrongful death and Dram Shop Act claim (General Obligations Law §11–101) was commenced on June 16, 2017, by the filing of the summons and complaint. It arises out of a motor vehicle accident that occurred on October 28, 2016, at approximately 2:15 P.M. on West Hartsdale Avenue in Greenburgh. Plaintiffs allege that defendant Michelle Bonet's vehicle struck the vehicle in which plaintiffs were traveling ultimately causing the death of plaintiffs'

[1]Defendants filed a Motion to Change Venue from Bronx to Westchester County along with a motion to dismiss the individual claims against moving defendants. The Supreme Court, Bronx County granted defendants' motion to change venue and this matter was transferred to this court.

decedents. According to the complaint, just prior to said accident, defendant Michelle Bonet had been drinking alcohol at Mimi's Bar and Grill LLC at North Central Avenue in Hartsdale. Defendants are the purported owner and operators of Mimi's. Plaintiffs contend that defendants and their employees were reckless, negligent, and careless unlawfully provided alcoholic beverages to defendant Bonet, while she was in a visibly intoxicated condition.

Now, before this court, defendants seek to dismiss the action as against them on the grounds that individual liability cannot lie, as plaintiffs have not properly plead an action for piercing the corporate veil.

Based upon the foregoing, the motion is decided as follows:

A motion to dismiss pursuant to CPLR 3211 (a)(7), which requires that "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"[2] (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). This does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]).

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[2]Internal citations omitted.

If the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7), a court may "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Affidavits and other evidentiary material may also be considered to "establish conclusively that plaintiff has no cause of action" (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action" (Sokol v Leader, 74 AD3d 1180; Marist College v Chazen Envtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

As a procedural matter, in their motion, defendants demanded that plaintiffs serve their answering papers at least seven days before the time the motion was noticed to be heard since they served their motion at least 12 days prior to that time, pursuant to CPLR 2214(b). Although plaintiff's opposition is untimely, the court exercises its discretion to consider the opposition papers, in light of the minimal delay, the fact that defendants have not established any resulting prejudice, and defendants have submitted a reply (Kavakis v Total Care Systems, 209 AD2d 480 [2d Dept 1994]).

Turning to the merits, a party seeking to pierce the corporate veil must establish 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 or wrong against the plaintiff which resulted in the plaintiff's injury" (Mistrulli v McFinnigan, Inc., 39 AD3d 606, 607 [2d Dept 2007]). "Additionally, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (Olivieri Const. Corp. v WN Weaver St., LLC, 144 AD3d 765, 767 [2d Dept 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds (Olivieri Const. Corp. v. WN Weaver St., LLC, 144 AD3d at 767).

Here, defendants argue that plaintiffs have not alleged any facts necessary to establish that defendants through their domination of the business abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against plaintiffs, such that a court should intervene and pierce the corporate veil. They note that the allegations against them are the same as those against the corporate Mimi's and are insufficient as a matter of law to state a cause of action against defendants.

In opposition, plaintiffs point out that a statutory cause of action would exist separately for any individual who was responsible for the management or operation of Mimis, which includes the procurement of alcohol. Moreover, plaintiffs contend that defendants are both listed on the liquor license for Mimi's. Defendant Bergeron was also present in Mimi's on October 28, 2016, and served

alcohol to Bonet immediately prior to Bonet's involvement in the motor vehicle accident which resulted in the deaths of plaintiff's parents. Bergeron had produced a type written page identifying herself as one of the two employees working when Bonet was at Mimi's, as a cashier. Thus, plaintiffs argue that defendants have failed to establish that they had no hand in procuring the liquor for the bar; serving the liquor to Bonet managing the bar and operating the bar.

Of significance, as plaintiffs contend that this motion is premature, they must "demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (Marrone v Miloscio, 145 AD3d 996, 998, [2d Dept 2016]). Viewing the facts in the light most favorable to plaintiffs as the nonmoving party, and at this early juncture in this action, discovery has not yet been conducted and plaintiffs are entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil (Dromgoole v T-Foots, Inc., 309 AD2d 1186, 1187 [4th Dept 2003]). Thus, this instant application must be denied as premature.

Accordingly, for the stated reasons, it is hereby

ORDERED, that defendants' motion to dismiss is **denied** without prejudice ; and it is further

ORDERED, that plaintiffs shall serve a copy of this order with Notice of Entry upon defendant within 10 days of entry, and file an affidavit of service within 5 days of service in accordance with NYSCEF protocol; and it is further

ORDERED, that the parties are directed to appear at the Compliance Conference Part Room 800 on April 9th, 2018 at 9:30 am at the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: March 8, 2018
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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