| **Peak v East Harlem Pilot Block Bldg. 2 Hous. Dev. Fund Co., Inc.** |
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| 2019 NY Slip Op 32299(U) |
| July 30, 2019 |
| Supreme Court, New York County |
| Docket Number: 155664/2017 |
| Judge: Alexander M. Tisch |
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At an I.A.S. Part 18 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 111 Centre Street, Borough of New York, City and State of New York, on the 30 day of July 2019

**PRESENT:**

**HON. ALEXANDER M. TISCH, J.S.C.**

JOYCE PEAK,

Plaintiff,

-against-

EAST HARLEM PILOT BLOCK BUILDING 2 HOUSING DEVELOPMENT FUND COMPANY, INC., ADVANCED CONSTRUCTION EQUIPMENT CORPORATION, VILLAGE CARE OF NEW YORK, INC., and JANE DOE ("being fictitious and intended to represent the home health aide who assisted the Plaintiff on the date of the accident"),

Defendants.

VILLAGE CARE OF NEW YORK, INC.,

Defendant/Third-Party Plaintiff,

-against-

SUMMIT HOME HEALTH CARE, INC. and JANE DOE ("being fictitious and intended to represent the home health aide, whose first name is believed to be "TAMARA", who assisted the Plaintiff on the date of accident"),

Third-Party Defendants.

MOTION SEQ. NO. 002

INDEX NO.: 155664/2017

| The following papers numbered 45 to 56 read on this motion | NYSCEF Doc. Nos. |
|---|---|
| Notice of Motion, Affirmation(s) | 45-51 |
| Answering Affirmation(s) Affidavit(s) | 52 |
| Reply Affirmation(s) & Affidavit(s) | 53-56 |

ALEXANDER M. TISCH J.:

Upon the foregoing papers, third party defendants move this Court for an order dismissing the third-party complaint, removing them as parties to this lawsuit, and directing entry of judgment in favor of third-party defendants pursuant to CPLR 3211 (a) (1) and (7), due to the arbitration

agreement between third party plaintiff and third-party defendants. For the reasons set forth below, the motion is denied.

The third-party defendants, SUMMIT HOME HEALTH CARE, INC. (hereinafter "SUMMIT") and MASSETOU KAMARA s/h/a JANE DOE, contend that third party plaintiff's complaint should be dismissed because there exists a "Provider Agreement" between them, "requiring that any and all disputes arising therefrom be determined exclusively by binding arbitration" (NYSCEF Doc. No. 46).

In opposition, the third-party plaintiff, VILLAGE CARE OF NEW YORK, INC. (hereinafter "VCNY"), argues against dismissing their complaint because the Provider Agreement is "between non-party Village Senior Services Corporation, d/b/a VillageCare MAX [hereinafter "VCM"] and SUMMIT" (NYSCEF Doc. No. 52). Additionally, there is no showing of abuse of the corporate form by VCNY. Third-party defendants did not demonstrate with evidence that "VCNY abused its corporate form for the purpose of exerting dominion and control over VCM and its affairs" and "'to perpetrate a fraud or injustice' that resulted in harm to plaintiff" (NYSCEF Doc. No. 52). Thus, as a non-signatory corporation to the arbitration agreement, third-party plaintiff cannot be compelled to arbitrate. Further, VCNY and VCM's parent-subsidiary relationship is insufficient to bind VCNY by the Provider Agreement between SUMMIT and VCM.

In reply, third-party defendants contend that VCM is "unquestionably dominated by, and an alias of third-party plaintiff, [VCNY]" (NYSCEF Doc. No. 53). Specifically, the President and CEO of VCNY "is the ***literal signatory*** to the Provider Agreement on behalf of [VCM], an entity whose ***only corporate board member is [VCNY]***" (NYSCEF Doc. No. 53 [emphasis in original]). Further, VCNY "has perpetrated an inequitable abuse of the corporate form in an attempt to circumvent their contractual obligations" (NYSCEF Doc. No. 53). Moreover, there is no case law requiring that harm result to the plaintiff in order to constitute abuse of corporate form.

Third-party plaintiff filed a Sur-Reply Affirmation without leave of the Court to further substantiate their arguments, opposing third party defendants' motion to dismiss. It contends that this Court should reject the Reply Affirmation on grounds that it "impermissibly raises new arguments and purports to introduce new exhibits for the first time" (NYSCEF Doc. No. 57). Further, VCNY reiterates that third party defendants provided insufficient evidence to establish its abandonment of corporate form according to New York case law.

A. Third-party plaintiff's "Sur-Reply"

Pursuant to CPLR 2214 (b), "[o]nly papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct." The practice of filing a "Sur-Reply" has long been repudiated repeatedly by the First Department (see Garced v Clinton Arms Assoc., 58 AD3d 506, 509 [1st Dept 2009]; Pinkow v Herfield, 264 AD2d 356, 358 [1st Dept 1999]; Lumbermens Mut. Cas. Co. v Morse Shoe Co., 218 AD2d 624, 626 [1st Dept 1995]). It also requires express leave of the Court in accordance with the undersigned's Part Rules.

Here, the Sur-Reply Affirmation filed by third-party plaintiff will not be considered by the Court. Unlike the defendant in Pinkow (264 AD2d at 357), at no time did third party plaintiff's counsel request permission from this Court to submit supplemental papers in opposition to this motion. Further, this Court shall follow the long-held precedents of the First Department and not consider a "Sur-Reply" filed without leave of this Court, pursuant to CPLR 2214 [b].

B. Third party defendants' motion to dismiss pursuant to CPLR 3211 (a)(1)

To succeed on a motion to dismiss pursuant to CPLR 3211 (a)(1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the movant's claims (see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]; McCully v Jersey Partners, Inc., 60 AD3d 562, 562 [1st Dept 2009]; Blonder & Co. v Citibank, N.A., 28 AD3d 180, 182 [1st Dept 2006]).

Parties to a contract "may freely select a forum which will resolve any disputes over the interpretation or performance of a contract. Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (Brooke Group v. JCH Syndicate 488, 87 NY2d 530, 534 [1996]). However, "absent a showing of abuse of the corporate form, [a] non-signatory corporation cannot be compelled to arbitrate" pursuant to a related corporation's contract (TNS Holdings, Inc. v. MKI Securities Corp., 92 NY2d 335, 337 [1998]). Akin to "[t]hose seeking to pierce a corporate veil," a party who seeks to bind a non-signatory party to an agreement to arbitrate "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (id. at 339). Additionally, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (id.; see also Sheridan Broad. Corp. v Small, 19 AD3d 331, 332 [1st Dept 2005]; Morris v New York State Dep't of Taxation & Fin., 82 NY2d 135, 141–42 [1993]). Further, a party's liability for another "can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary" (Billy v Consol. Mach. Tool Corp., 51 NY2d 152, 163 [1980]; see also Oxbow Calcining USA Inc. v Am. Indus. Partners, 96 AD3d 646, 649 [1st Dept 2012]). Similarly, evidence that two separate entities share common officers and/or directors is not by itself sufficient proof of dominion and control by one entity of the other (see Matter of Franklin St. Realty Corp. v NYC Envtl. Control Bd., 164 AD3d 19, 24–25 [1st Dept 2018]).

Here, third-party defendants failed to meet their heavy burden to show that third-party plaintiff, VCNY, has abused its corporate form as a non-signatory to the arbitration agreement. The "Provider Agreement" was entered into between non-party VCM and SUMMIT. According to the "Provider Manual" (see NYSCEF Doc. No. 55), the sole corporate member of VCM is third-party plaintiff, VCNY. Further, the "Provider Agreement" was executed by the President/CEO of VCM, Emma DeVito, who also serves as the President/CEO of VCNY (see NYSCEF Doc. No. 54, 56). However,

the ownership of VCM by VCNY and their shared common officers are not by themselves sufficient evidence of VCNY's domination and control over VCM, the signatory to the arbitration agreement. Therefore, third party defendants have not met their burden to show that VCM was dominated by VCNY in the case of this arbitration agreement between SUMMIT and VCM.

Even if sole corporate membership and a common officer are sufficient evidence of third-party plaintiff's total dominion and control over VCM, third-party defendants still failed to prove that, through its domination, VCNY "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [third-party defendants] such that a court in equity will intervene" (Morris, 82 NY2d at 142). Third-party defendants argue that "it is manifestly inequitable and unjust to permit an abuse of the corporate form such that [VCNY] may enter into agreements under an apparent alias, '[VCM],' while subsequently attempting to circumvent those agreements through the false assertion that the two entities are separate and distinct" (NYSCEF Doc. No. 53). According to third-party defendants, the "wrong or injustice" perpetrated by VCNY's abuse of corporate form is the incurrence of "costs and expenses [against SUMMIT] associated with [litigation] that the Provider Agreement contemplated and sought to obviate" (NYSCEF Doc. No. 53).

However, third-party defendants offer no evidence of VCNY's intent to incur such litigation cost upon SUMMIT when VCM entered into the Provider Agreement with SUMMIT, which is required to show third- party plaintiff's abuse of corporate form (see Morris, 82 NY2d at 143–44). According to the Provider Agreement, VCM entered into the agreement with SUMMIT for SUMMIT to provide VCM's enrollees with home/personal care aide assistance (see NYSCEF Doc. No. 48). Section 6 of the agreement sets forth that "all disputes between [SUMMIT] and [VCM] arising from this Agreement shall be determined exclusively by binding arbitration," and that "[t]he costs and expenses of such arbitration shall be shared equally by the parties" (NYSCEF Doc. No. 48). Therefore, SUMMIT has always anticipated that it would bear costs if disputes arise with VCM and

the third-party defendants have not provided any evidence that the costs associated with arbitration would be significantly lower than the current litigation. Consequently, third-party defendants failed to prove that VCNY had the intent to incur costs against SUMMIT that the arbitration agreement sought to avoid and abused its corporate form to perpetrate a wrong or injustice against it.

Since third-party defendants made this motion to dismiss pursuant to CPLR 3211 (a)(1), the documentary evidence they submitted that forms the basis of this motion must resolve all factual issues and definitively dispose of their claims. Because the Provider Agreement and all the other exhibits submitted by third-party defendants failed to show definitively that VCNY has abused its corporate form as a non-signatory to the arbitration agreement, third-party plaintiff is not bound by the forum selection clause in the Provider Agreement. Hence, it is not proper to grant third-party defendants' motion to dismiss pursuant to CPLR 3211 (a)(1).

C. Third-party defendants' motion to dismiss pursuant to CPLR 3211 (a)(7)

A motion to dismiss may be granted on the ground that the opposition's "pleading fails to state a cause of action" (CPLR 3211[a][7]). Since third-party plaintiff is not bound by the forum selection clause in the Provider Agreement, the instant dispute shall proceed in this Court. As this branch of third-party defendants' motion was premised upon the foregoing and the Provider Agreement, and no other arguments, this branch of the motion is similarly denied.

Accordingly, it is hereby ORDERED that the motion is denied. This shall constitute the decision and order of the Court.

7/30/2019
DATE

ALEXANDER M. TISCH, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | [X] | NON-FINAL DISPOSITION | | |
| | | GRANTED | [X] DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |