

<b>F&amp;R Goldfish Corp. v Furleiter</b>
2019 NY Slip Op 32641(U)
August 16, 2019
Supreme Court, Kings County
Docket Number: 521162/18
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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F&R GOLDFISH CORP., AND NEW YORK CITY  
FISH, INC.,

Plaintiffs,

Decision and order

- against -

Index No. 521162/18

VLADIMIR FURLEITER, Individually and on  
behalf of ROYAL BALTIC, LTD., N.Y. FISH,  
INC., AND ROYAL DEVELOPMENT, INC.,  
ALEXANDER KAGANOVSKY, Individually and  
on behalf of ROYAL BALTIC, LTD.,  
N.Y. FISH, INC., AND ROYAL DEVELOPMENT, INC.,

Defendants,

August 16, 2019

MS # 5

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ROYAL DEVELOPMENT, INC.,

Third-Party Plaintiff,

-against-

MYM SMOKED FISH, INC., MAXIM KUTSYK,  
YEFIM KUTSYK AND PAVEL ROYTKOV,

Third-Party Defendants,

-----x  
PRESENT: HON. LEON RUCHELSMAN

The defendants have moved seeking to dismiss the first, fifth, sixth and seventh causes of action pursuant to CPLR §3211. In addition, the third party plaintiff has moved seeking summary judgement on the second counterclaim and the first cause of action of the third party complaint. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the parties this court now makes the following determination.

On November 1, 2012 an entity called Royal Baltic Ltd.,

ceased operations at a fish smoking facility located at 738 Chester Street in Kings County. The property was owned by an entity called Royal Development Inc., that was owned by Vladimir Furleiter and Alexander Kaganovsky. Royal Development Inc., entered into a lease agreement with New York City Fish Inc., wherein New York City Fish would pay rent and operate the fish smoking facility. It is alleged that New York City Fish owes over \$400,000 in rent. Indeed, on May 17, 2019 Royal Development Inc., served a Notice to Quit upon New York City Fish.

New York City Fish instituted the within lawsuit against Furleiter and Kaganovsky and has alleged various causes of action including an account stated, fraud, breach of contract, tortious interference with a contract, breach of a fiduciary duty, breach of implied covenant of good faith and fair dealing, unjust enrichment and a declaratory judgement. The defendants asserted various counterclaims including breach of contract, ejectment, unjust enrichment, a constructive trust, conversion and an injunction. Further Royal Development Inc., filed a third party action against the third party defendants and has alleged ejectment, unjust enrichment, a constructive trust, conversion, an injunction and breach of contract. The defendants/third party plaintiff have now moved seeking to dismiss various causes of action and for a summary determination on some of their claims.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, e.g. AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005], Leon v. Martinez, 84 NY2d 83, 614 NYS2d 972, [1994], Hayes v. Wilson, 25 AD3d 586, 807 NYS2d 567 [2d Dept., 2006], Marchionni v. Drexler, 22 AD3d 814, 803 NYS2d 196 [2d Dept., 2005]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that a party seeking to pierce the corporate veil must establish that "the owners exercised complete domination of the corporation in respect to the transaction attached, and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (see, Matter of Morris v. New York State, 82 NY2d 135, 603 NYS2d 807 [1993]). Conclusory claims of domination or assertions the corporation acted as an "alter ego" without more

will not support the piercing of the corporate veil (Goldman v. Chapman, 44 AD3d 938, 844 NYS2d 126 [2d Dept., 2007]). The Verified Complaint alleges that "at all relevant times, there was no clear separation between Royal Baltic and NY Fish. The same individuals conducted business with F&R Goldfish on behalf of both Royal Baltic and NY Fish" (see, Verified Complaint, ¶ 53). However, that allegation fails to provide any basis to establish the defendants abused the privilege of operating in corporate form by dominating or controlling the corporation (Sacks v. Knolls at Pinewood LLC, 157 AD3d 917, 69 NYS3d 677 [2d Dept., 2018]). As the court noted "under New York law, the corporate veil will be pierced to achieve equity, even absent fraud, '[w]hen 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'" (see, Island Seafood Co., Inc., v. Golub Corp., 303 AD2d 892, 759 NYS2d 768 [3<sup>rd</sup> Dept., 2003]). However, the plaintiff has failed to present any evidence substantiating the allegation. Consequently, the plaintiff cannot pierce the corporate veil and the motion seeking to dismiss the first cause of action is granted.

Concerning the motion seeking to dismiss the breach of fiduciary claims, it is well settled that when breach of

fiduciary duty claims are based on fraud then a six year statute of limitations applies (Cusimano v. Schnurr, 137 AD3d 527, 27 NYS3d 135 [1<sup>st</sup> Dept., 2016]). At this stage of the pleadings the cause of action for breach of a fiduciary duty adequately alleges fraud. Consequently, the motion seeking to dismiss the fifth cause of action as time barred is denied.

Turning to the cause of action for a breach of implied covenant of good faith and fair dealing, it is well settled that cause of action is premised upon parties to a contract exercising good faith while performing the terms of an agreement (Van Valkenburgh Nooger & Neville v. Hayden Publishing Co., 30 NY2d 34, 330 NYS2d 329 [1972]). Further, it is well settled that New York does not recognize a separate cause of action based upon such implied covenant of good faith and fair dealing when it is merely duplicative of breach of contract claims (see, Impax Laboratories, Inc., v. Turing Pharmaceuticals AG, 2017 WL 4357893 [S.D.N.Y. 2017]). Likewise, a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). Therefore, the motions seeking to dismiss those two causes of action are granted.

Turning to Royal Development's motion seeking summary judgement on the ejectment counterclaim and third party claim, it is well settled that to establish an ejectment it must be proved that the movant is the owner, with a present or immediate right to possession and the other party is in present possession of the property (RPAI Pelham Manor, LLC v. Two Twenty Four Enters., LLC, 144 AD3d 1125, 42 NYS3d 267 [2d Dept., 2016]). It is further well settled that generally a notice of termination should be served prior to seeking an ejectment (see, Prana Growth Fund I, L.P. v. Lazala, 8 Misc3d 667, 798 NYS2d 895 [Supreme Court, New York County 2005], see, also, Kosa v. Legg, 12 Misc3d 369, 816 NYS2d 840 [Supreme Court, Kings County 2006]). To the extent still applicable the motion seeking summary judgement for ejectment against New York City Fish is granted. Even if there are questions concerning the validity of the lease, there are no questions of fact New York City Fish has no right to the premises and that Royal Development's rights are superior. However, concerning MYM, RPAPL §713(7) provides that upon the service of a notice to quit a special proceeding may be brought concerning a licensee who's right to possession has been revoked. A trespasser is included within those requiring the ten day notice to quit (Saoidoh v. Saoidoh, 49 Misc3d 1216(A), 26 NYS3d 727 [Civil Court of the City of New York, Bronx County 2015]).

The defendant/third party plaintiff does not dispute a notice to quit was not served upon MYM, the successor of New York City Fish. There are questions of fact whether MYM paid rent, the amount of rent that has been paid and whether MYM was a month to month tenant. Thus, there are questions whether MYM was entitled to a notice to quit. Consequently, the motion seeking summary judgement concerning MYM is denied.

So ordered.

ENTER:



DATED: August 16, 2019  
Brooklyn N.Y.

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Hon. Leon Ruchelsman  
JSC

KINGS COUNTY CLERK  
FILED  
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