

Royal Host Realty, LLC v 753 Ninth Ave. Realty, LLC
2020 NY Slip Op 30275(U)
January 14, 2020
Supreme Court, New York County
Docket Number: 653826/2014
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

ROYAL HOST REALTY, LLC.

Plaintiff

- v -

753 NINTH AVENUE REALTY, LLC, and
EAST 72ND STREET, LLC,

Defendants

INDEX NO. 653826/2014
MOTION DATE _____
MOTION SEQ. NO. 008
MOTION CAL. NO. _____

753 NINTH AVENUE REALTY, LLC, and
212 EAST 72ND STREET, LLC

Cross-Claim Plaintiffs

- v -

SUZUKI CAPITAL, LLC, SAM SUZUKI, and
DORAL BANK

Cross-Claim Defendants

MELISSA A. CRANE, J.S.C.:

On December 24, 2018, the court granted defendants/cross-claim plaintiffs', 753 Ninth Avenue Realty, LLC and 212 East 72nd Street, LLC (hereinafter "cross-claim plaintiffs") motion to strike plaintiff, Royal Host Realty (hereinafter "plaintiff"), and cross-claim defendants, Suzuki Capital, LLC, Sam Suzuki, and Doral Bank's (hereinafter "cross-claim defendants") pleadings because of prior counsel's failure to comply with four separate court discovery orders (*see* NYSCEF doc no 131). However, the court denied, without prejudice, cross-claim plaintiffs' motion for default judgment because cross-claim plaintiffs never explained how its cross-claims amounted to a prima facie case, or explained how it calculated damages. Defendants/cross-claim plaintiffs now move again for default judgment on its counterclaims and seek to pierce the corporate veil, and to recover under a theory of, *inter alia*, breach of contract, fraud, accounting, and unjust enrichment. Plaintiff, Royal Host Realty, and cross-claim defendants, Suzuki Capital, LLC, Sam Suzuki, and Doral Bank oppose the motion.

In November 2013, cross-claim plaintiffs retained Suzuki Capital, LLC (“Suzuki Capital”) and Sam Suzuki (“Suzuki”) as its mortgage broker and to procure a loan against 753 Ninth Ave (“commercial property”) and 212 East 72nd Street (“residential property”) (collectively, as the “Properties”), so that cross-claim plaintiffs could pay the balance it owed to its previous lender, RCG Dept IV REIT, LP (Compl ¶ 38). Suzuki Capital and Suzuki used Doral Bank for the loan (Compl ¶ 39).

Late on February 26, 2014, cross-claim plaintiffs received, for the first time, a commitment letter from Doral Bank. The letter stated that, as a prerequisite to receiving the loan, Royal Host had to manage the Properties (Compl ¶ 42, 44). Sam Suzuki and Suzuki Capital owned Royal Host, but cross-claim plaintiffs did not know that. Cross-claim plaintiffs had self-managed the Properties prior to this loan. Because cross-claim plaintiffs only learned of the Management Agreement on the eve of closing, they had no time to find another lender.

Thus, on February 27, 2014 at the closing, Royal Host and cross-claim plaintiffs entered into a Management Agreement (“Agreement”) where Royal Host would manage the Properties (Compl ¶ 49, 50). Cross-claim defendants told cross-claim plaintiffs that it was a “standard” agreement.” At no point did cross-claim defendants reveal that Suzuki controlled Royal Host, and that Suzuki would take over the management of the Properties pursuant to the Agreement. Cross-claim plaintiffs entered into the Agreement because they needed the loans to avoid foreclosure (Compl ¶ 51).

Cross-claim plaintiffs believed that the income from the Commercial Property would cover the debt service of the loans, as they were told at the closing (Compl ¶ 57). Instead, cross-claim defendants underwrote the loans to allow renters to rent out the Residential Property. The Property’s sole member, Evanthia Koustis, had resided there for 22 years (Compl ¶ 54).

Under the agreement, Royal Host also collected a management fee equal to 6% of the gross rent of the Properties (Compl ¶ 58). The fee made it impossible for the Commercial Property alone to carry the debt service. Subsequent to the closing, Royal Host paid itself the management fee before paying the obligations to run the Properties (Compl ¶ 59). Royal Host also failed to make monthly mortgage payments to Doral Bank and pay insurance, despite receiving rental payments that could cover these costs. Royal Host did not market the vacant units in the Commercial Property. Nor did it ever send cross-claims plaintiffs a management report or turn over an accounting for the Properties (Compl ¶ 59).

In August 2014, cross-claim plaintiffs had Royal Host removed as manager of the Properties. However, the damage was done and cross-claim plaintiffs were behind on its debt obligations to Doral Bank.

Discussion

CPLR 3215 requires that the movant submit proof of the facts constituting the claim. The rule necessitates only some prima facie demonstration of a viable cause of action, not factual certainty (*State v Williams*, 26 Misc3d 743, 753 [Sup Ct, Albany County 2009]). To make the determination whether a cause of action is viable, the court may consider the pleadings in the action, affidavits, or affirmations submitted by the plaintiff (*Promenade Nursing Home, Inc v Lacey*, 10 Misc3d 1066[A] [NY Sup Ct, Queens County 2005]). While an attorney can verify a complaint to commence an action, on a default motion, the papers must include either an affidavit from someone with first-hand knowledge of the basis for liability, or a complaint the plaintiff who has first-hand knowledge verifies. Further, when the court strikes an answer, all allegations in the pleadings are deemed true, and liability cannot be contested (*Rokina Optical Co., Inc v Camera King, Inc*, 63 NY2d 728, 730 [1984]).

In this case, Sofia Koustis, a managing member of the Properties, verified cross-claim plaintiffs answer with counterclaims and cross-claims. Cross-claim plaintiffs' motion also includes an affidavit from Sofia Koustis. After oral argument on August 13, 2019, the court reserved its decision as to whether cross-claim plaintiffs established, prima facie, its (1) fraud claim; (2) its piercing the corporate veil theory, as related to its breach of contract claim; an (3) whether law of case precludes cross-claim plaintiffs claims against Doral Bank. The court addresses each of those issues now.

Piercing the Corporate Veil

New York Courts disfavor disregard of the corporate form. Piercing the corporate veil requires a showing that: (1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong (*Cobalt Partners, LP v GSC Capital Corp*, 97 AD3d 35, 40 [1st Dept 2012]). Evidence of domination alone does not suffice without also demonstrating that the control led to inequity, fraud, or malfeasance. The pleadings must also allege that the individual misused the corporate form to commit a wrong.

It is undisputed that Royal Host, Suzuki Capital, and Sam Suzuki share an office space, a telephone number, and an email-address. Suzuki and Suzuki Capital are the sole members of Royal Host. Royal Host and Suzuki Capital do not keep proper books, records, and minutes. Suzuki commingles his personal funds with Royal Host and Suzuki Capital's corporate funds. In this way, Suzuki exercises ownership and control over Suzuki Capital.

The issue then, becomes, how did Suzuki Capital and Royal Host misuse the corporate form to commit a wrong on cross-claim plaintiffs. After closing, Royal Host mismanaged the Properties. Under the Management Agreement, Royal Host should have provided a management

report and accounting. It did not. Royal Host also failed to make monthly mortgage payments, to pay the insurance for the Properties, and to actively market vacant units in the Commercial Property pursuant to the Agreement. The loans, therefore, were purposefully set-up to fail. After the loans failed, Suzuki would ultimately have control over the Properties. Further, despite obligations under the loan, Royal Host and Suzuki only paid themselves the management fee. “To use domination and control to cause another entity to breach a contractual obligation for personal gain is certainly misuse of the corporate form to commit a wrong” (*Cobalt Partners, L.P. v GSC Capital Corp*, 97 Ad3d 35,41 [2012]). Thus, cross-claim plaintiffs pled both prongs required to pierce the corporate veil. Therefore, cross-claim plaintiffs demonstrate, prima face, its breach of contract claim against Suzuki Capital and Royal Host.

Fraud

To plead fraud, movant must show (1) a material false representation; (2) made with knowledge of its falsity; (3) with an intent to defraud; and (4) reasonable reliance on the part of movant (*Swersky v Dreyer & Traub*, 219 AD2d 321, 326). A fraud claim must consist of “a material misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 [1996]). Further, “allegations of fraud based on information and belief are insufficient unless they include a statement of facts on which the belief is founded” (*Royal Host Realty, LLC v 793 Ninth Avenue Realty, LLC*, 192 FSupp3d 348, 355 [US Dist Ct SDNY, 2016]).

The issue here is whether cross-claim plaintiffs plead fraud with the requisite particularity. Here, cross-claim plaintiffs’ answer lacked specificity. It was made only “upon

information and belief.” However, the Koustis affidavit, attached to the default motion, remedies the defect (*see Lynn v Maida*, 170 Ad3d 573, 574 [1st Dept 2019]). Koustis states that Suzuki, on behalf of Suzuki Capital and Royal Host, did not tell cross-claim plaintiffs about the Management Agreement until the night before the closing. Suzuki also owned Royal Host, but did not disclose that to cross-claim plaintiffs. Subsequently, Suzuki made the affirmative misrepresentation to cross-claim plaintiffs that the agreement was “standard,” and that the rental income from the Commercial Property would cover the debt service of the loans. Rather, the management fee rendered it impossible for the Commercial Property to carry the debt service. Suzuki set up the loans to fail. He would collect mortgage broker fees and management fees, regardless of whether the loans failed. Accordingly, cross-claim plaintiffs state a fraud claim.

Law of the Case

On June 17, 2015, Federal Deposit Insurance Corporation (“FDIC”), as Receiver for Doral Bank, filed a Notice of Removal to the Southern District of New York. In Federal Court, FDIC, in its capacity as a receiver for Doral Bank, moved to dismiss the claims against Doral Bank. On June 28, 2016, Judge Marrero dismissed the claims against Doral Bank, and remanded the case back to this court (*see Royal Host Realty, LLC v 793 Ninth Avenue Realty, LLC*, 192 FSupp3d 348 [US Dist Ct SDNY, 2016]).

It is undisputed that a federal court decision following removal from state court can be law of the case, after remand back to state court. However, the parties dispute whether Judge Marrero’s decision requires that this court dismiss cross-claim plaintiffs’ claims against Doral Bank as law of the case. It does. Judge Morreo’s decision relates to the same cross-claims against Doral Bank in the same litigation. In that decision, the FDIC represented Doral Bank’s interests. Judge Morreo granted FDIC’s motion to dismiss cross-claims III, IV, V, VI, and VII

as it related to Doral Bank. Accordingly, the court denies cross-claim plaintiffs default motion against Doral Bank, only.

Accordingly, it is

ORDERED that the court grants defendant/cross-claim plaintiffs motion for a default judgment on its counterclaims/cross-claims against Royal Host Realty, LLC, Suzuki Capital, LLC and Sam Suzuki on its breach of contract claim and fraud claim; and it is further

ORDERED that the court denies defendants/cross-claim plaintiffs motion for default on its counterclaims/cross-claims for its third, fourth, sixth, and seventh causes of action against Doral Bank; and it is further

ORDERED that the parties are directed to appear for an assessment on damages on March 4, 2020 at 2:15 p.m., in Courtroom 304, at 71 Thomas Street, New York, NY 10013.

Dated: 1-14-2020

ENTER:



HON. MELISSA A. CRANE, J.S.C.

HON. MELISSA A. CRANE
J.S.C.