

Baltic Fourth LLC v Stern
2020 NY Slip Op 30845(U)
March 24, 2020
Supreme Court, New York County
Docket Number: 654881/2018
Judge: Barry R. Ostrager
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
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER. **PART** **IAS MOTION 61EFM**
Justice
 -----X **INDEX NO.** 654881/2018

BALTIC FOURTH LLC, directly and derivatively on behalf of FOURTH AVENUE JV LLC, FOURTH AVENUE MEZZ LLC, and FOURTH AVENUE PROPERTY OWNER LLC, and TONA CONSTRUCTION & MANAGEMENT LLC,

Plaintiffs,

- v -

MICHAEL STERN, JDS FOURTH AVENUE LLC, and JDS CONSTRUCTION GROUP LLC,

**DECISION and ORDER on
Motion 003**

Defendants.

FOURTH AVENUE JV LLC, FOURTH AVENUE MEZZ LLC, and FOURTH AVENUE PROPERTY OWNER LLC

Nominal Defendants.

-----X
OSTRAGER, J.

This dispute arises out of a joint venture between Baltic Fourth LLC and JDS Fourth Avenue LLC for the development of property in Brooklyn, New York (“the Property”). In December 2013 Baltic Fourth LLC and JDS Fourth Avenue LLC formed a joint venture company called Fourth Avenue JV, LLC (“the Company”), a Delaware LLC. The Company then formed Fourth Avenue Property Owner LLC (“Owner”), a Delaware LLC, to hold title to the Property. In April 2014, Domenick Tonacchio, principal of Baltic Fourth, LLC, and Michael Stern, principal of JDS Fourth Avenue LLC (“Manager”), executed an Amended and Restated

Limited Liability Agreement of Fourth Avenue JV, LLC (“the Agreement”) on behalf of their respective companies. The Agreement governs the parties’ relationship with respect to developing the Property. In April 2016, Owner and JDS Construction Group LLC executed a Construction Management Agreement. This action relates primarily to the alleged breaches of the Agreement and the Construction Management Agreement.

Before the Court is Defendants’ motion (003) to reargue the portion of the prior motion to dismiss which sought to remove Michael Stern as a defendant in his individual capacity. The Court heard oral arguments on the motion to dismiss on October 17, 2019. The Court ruled on some of the fourteen causes of action on the record and issued a written decision regarding the others on October 18, 2019. Defendants request reargument on the grounds that the Court overlooked their arguments about Michael Stern’s purported lack of individual liability, which both parties did cover in their oral arguments. Because Stern is not expressly addressed in either the decision on the record or the written decision, the Court grants reargument. Upon reargument, the Court adheres to its prior implicit ruling, that Michael Stern will remain a defendant in his individual capacity.

Michael Stern is named as an individual defendant in counts two, three, four, five, eight, nine, ten and fourteen. Plaintiffs assert an alter ego theory of liability with respect to counts two, three, four, five and ten. With respect to counts eight, nine and fourteen, Plaintiffs argue that Stern is liable for his own torts.

The party seeking to pierce the corporate veil and hold a principal personally liable must sufficiently allege that the (1) the owner 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 plaintiff’s injury. Moreover, the party seeking to

pierce the corporate veil must establish that the owner, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene. *Franklin v. Daily Holdings, Inc.*, 135 A.D.3d 87 (First Dept. 2015).

Here, Plaintiffs have undoubtedly met their burden with respect to the first prong. The Complaint clearly alleges that Stern dominates and controls both Manager and JDS Construction. The Complaint specifically alleges that Stern “is the sole owner of and/or controls” both Manager and JDS Construction, that Stern is the only individual that Baltic partnered with for the Joint Venture, and that Stern is the only individual directing Manager and JDS Construction with respect to the Joint Venture. Defendants argue that these allegations are legally insufficient but do not offer any evidence to refute that Stern in fact controls Manager and JDS Construction.

With respect to the second prong, Plaintiffs specifically allege that Stern abused the corporate form to avoid corporate obligations and to harm Plaintiffs. The Complaint alleges that:

(1) Manager has no bank accounts; (2) Stern caused JDS Construction to fund Manager's capital contributions; (3) Stern caused Manager to take out loans for the Joint Venture and distribute the proceeds as "distributions" to JDS Construction; (4) Stern deprived Baltic of its contractual rights by failing to make capital calls, disclose budgets, and make distributions to Baltic in accordance with the waterfall; and (5) Stern breached his fiduciary duties by causing Owner to enter into an affiliate transaction with JDS Construction without Baltic's consent, forging Tonacchio's signature to trick the lenders, and submitting requisitions for personal expenses, all of which harmed Plaintiffs.

In opposition, Defendants argue that Plaintiffs’ allegations that Stern caused JDS to take out loans to pay JDS Construction, the Construction Manager, or caused JDS to fail to make capital calls, disclose budgets or make distributions, all reflect legitimate business activity taken by JDS in its role as Manager of the Company. Relying on *Credit Suisse First Boston v. Utrecht*

America Finance, Co., 80 A.D.3d 485 (1st Dep't 2011), Defendants argue that Plaintiffs have failed to show that Stern's actions were not for a legitimate business purpose.

The premise of several of Plaintiffs' causes of action for which Plaintiffs seek to hold Stern individually liable on an alter ego theory of liability, is essentially that Stern – through the entities he controls – has allegedly left Plaintiffs in the dark throughout the course of the development of the Property and completion of the Project. In sum, Plaintiffs claim that Stern – through the entities he controls – has allegedly made decisions related to the Joint Venture without notice to Plaintiffs, has allegedly withheld access to books and records from Plaintiffs, and has allegedly failed to make distributions in accordance with the Joint Venture Agreement.

With respect to count eight sounding in breach of fiduciary duty, counts nine and fourteen sounding in fraud, Plaintiffs seek to hold Stern liable for his own alleged actions. Both counts eight and nine allege specific conduct by Stern, including that Stern allegedly forged the signature of Baltic Fourth's principal, on loan documents, entered transactions without Tonacchio's knowledge or permission, and allegedly misstated expenses to his personal benefit. Defendants' central argument with respect to count fourteen is that Plaintiffs cannot plead reasonable reliance, an essential element of fraud. However, the Court already noted that reasonable reliance is inherently a fact-intensive inquiry and declined to dismiss count fourteen on that basis. *See* NYSCEF Doc. No. 117.

Although this is a 2018 case, the present motion seeks to reargue a motion to dismiss – which was decided using a CPLR 3211 standard, meaning that the pleadings were afforded liberal construction. The First Department recently indicated that pleading should be evaluated in light of the information available to plaintiffs when pled. *See Cohen Bros. Realty Corp. v. Mapes* (First Dept. 2020) (finding plaintiffs sufficiently pleaded fraud causes of action with the

information available to them in a pre-discovery posture). Additionally, neither party submitted any evidence turned over in discovery in connection with this motion. Indeed, Plaintiffs have reiterated that they lack access to information critical to their claims because it has been allegedly withheld by Defendants (*see e.g.* motion 006). Therefore, the Court has the same information to evaluate Stern’s individual liability that it did in October 2019 and does not find a reason to disturb its prior implicit ruling. As such, the Court rejects Defendants’ request to remove Stern as an individual defendant, without prejudice to renewing this application on motion of summary judgment, should new evidence arise.

Dated: March 24, 2020



 BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE