

**Board of Mgrs. of the Philip House Condominium v  
141 E. 88th St., LLC**

2020 NY Slip Op 32814(U)

August 28, 2020

Supreme Court, New York County

Docket Number: 153289/2019

Judge: Kathryn E. Freed

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

*Justice*

-----X

**INDEX NO.** 153289/2019

THE BOARD OF MANAGERS OF THE PHILIP HOUSE  
CONDOMINIUM, ON BEHALF OF ITS INDIVIDUAL UNIT  
OWNERS,

**MOTION SEQ. NO.** 001

Plaintiff,

- v -

141 EAST 88TH STREET, LLC, THE CHESHIRE GROUP,  
L.L.C., SUSAN HEWITT, JENNIFER STEIG, JOHN DOES  
1-10, and JOHN DOE CORPORATIONS 1-10,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

141 EAST 88TH STREET, LLC, THE CHESHIRE GROUP,  
L.L.C., SUSAN HEWITT, and JENNIFER STEIG,

Third-Party  
Index No. 595567/2020

Third-Party Plaintiffs,

-against-

TEKTON BUILDERS, LLC, EDWARDS & ZUCK, P.C., ARCT  
ARCHITECTURE, P.C., STERLING PROJECT  
DEVELOPMENT GROUP, LLC, and METAL AND GLASS  
SOLUTIONS,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21,  
22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39

were read on this motion to/for DISMISS.

In this action by plaintiff The Board of Managers of the Philip House Condominium, on behalf of its Individual Unit Owners, sounding, inter alia, in breach of contract against defendants 141 East 88<sup>th</sup> Street, LLC (“141”), The Cheshire Group, L.L.C. (“Cheshire”), Susan Hewitt, and Jennifer Steig (collectively “defendants”), Hewitt and Steig move, pursuant to 3211(a)(7) and

3212, to dismiss the claims against them. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

This action arises from allegedly defective design and construction during the conversion of an apartment building located at 141 East 88<sup>th</sup> Street a/k/a 1327-1329 and 1311-1337 Lexington Avenue, New York, New York ("the building" or "the condominium") to condominium ownership. Doc. 1 at par. 1. The condominium was to be known as The Philip House.

In its complaint filed May 7, 2019, plaintiff, the governing body of the condominium association, whose members collectively owned the building, alleged that 141, the condominium's sponsor, as well as Cheshire, Hewitt, and Steig, improperly designed and constructed modifications to the building, thereby causing various construction defects. Doc. 1 at pars. 2, 4, 15. Plaintiff claimed that defendants failed to repair the defects and deliver the individual condominium units to the purchasers thereof in the condition required by the condominium's offering plan and the applicable building codes. Doc. 1 at par. 3.

Plaintiff alleged that Cheshire, a real estate investment firm, as well as its principals, Hewitt, and Steig, who shared the same office and personnel, formed 141, of which they were also principals, "as part of a scheme to shield the beneficial owners of the [building] from liability arising from [141's] activities and, in particular, to prevent [141's] creditors - - including [p]laintiff and the [u]nit [o]wners - - from obtaining and/or enforcing a judgment against [141]." Doc. 1 at pars. 23-24, 33, 40. The "Identity of Parties" section of the offering plan allegedly listed the sponsor as 141 "c/o The Cheshire Group, L.L.C.", noted that the principals of 141 were Hewitt

and Steig, and reflected that Hewitt and Steig's business address reflected that it was "c/o The Cheshire Group, L.L.C." Doc. 1 at pars. 25-28. Additionally, Cheshire's website listed Steig and Hewitt as its principals and noted that the condominium was one of its "current investments." Doc. 1 at pars. 28-29. Additionally, Cheshire, Hewitt, and Steig created a website, [www.philiphousenyc.com](http://www.philiphousenyc.com), for the purpose of marketing units in the building, which site identified Cheshire, Hewitt, and Steig as the condominium's developers. Doc. 1 at pars. 27-34.

The offering plan, declared effective May 21, 2013, contained reports regarding the condition of the building prepared by 141's engineer and architect in 2012, both of which were adopted by 141 in the offering plan. Doc. 1 at pars. Docs. 42-44, 50. The offering plan further reflected that 141 had "no knowledge of any material defects or need for major repairs to the property" other than those set forth in the section entitled "Description of Property and Building Condition", which included the architect's report, and obligated 141 to perform significant repairs, alterations and improvements ("the construction") to the building at its own expense, in a "careful and professional manner", and "substantially in accordance with the Plans and Specifications." Doc. 1 at pars. 51-55. In addition, the offering plan contained a certification signed by Hewitt and Steig, representing that they "exercised due diligence" in executing the same on behalf of 141. Doc. 1 at par. 56.

Every purchaser of an individual unit in the building was required to execute a purchase agreement in the form contained in the offering plan, and each purchase agreement specifically incorporated the offering plan by reference. Doc. 1 at par. 61.

After control of plaintiff was transferred from 141 to the unit owners, plaintiff, at its own expense, retained an engineer to conduct a survey of the building, which revealed numerous construction defects and building code violations. Doc. 1 at pars. 64-69. Although defendants

were allegedly aware of the defects, they failed to correct them, thereby causing plaintiff to incur significant expense in rectifying some of the problems. Doc. 1 at pars. 71-72.

As a first cause of action, asserted against all defendants, plaintiff alleged that the latter breached the offering plan and purchase agreement by failing to perform the construction in a careful and professional manner consistent with the offering plan and applicable laws, resulting in damages of \$4 million. Doc. 1 at pars. 76-86. Plaintiff further alleged that “[t]he corporate veil of 141 should be pierced to hold [Cheshire, Hewitt, and Steig] responsible for the breaches of the [p]urchase [a]greements and the [o]ffering [p]lan.” Doc. 1 at par. 85.

As a second cause of action, sounding in fraudulent conveyance and asserted against all defendants except Hewitt and Steig, plaintiff alleged that 141 entered into a loan agreement requiring it to pay its lender 85% of the proceeds from the sale of individual units until the loan was satisfied. Doc. 1 at par. 95. However, instead of repaying the loan, 141 allegedly distributed the proceeds of the sales of the individual units to Cheshire and/or to certain individuals or corporations named herein as “John Doe” defendants (“the equity distributions”). Doc. 1 at pars. 97-102. Thus, alleged plaintiff, it was entitled to a judgment setting aside the equity distributions pursuant to Debtor and Creditor Law (“DCL”) §§ 273 and 278. Doc. 1 at par. 102.

As a third cause of action, sounding in constructive fraudulent conveyance and asserted against all defendants except Hewitt and Steig, plaintiff alleged that “some or all of the [e]quity [d]istributions were made while [141] was engaged in, or [was] about to be engaged in a business or transaction, for which the property remaining in its hands after such [e]quity [d]istributions would leave it with an unreasonably small amount of capital.” Doc. 1 at par. 104. Thus, alleged plaintiff, it was entitled to a judgment setting aside the equity distributions pursuant to DCL §§ 274 and 278. Doc. 1 at par. 105.

In their answer filed July 25, 2019, defendants denied all substantive allegations of wrongdoing and asserted several affirmative defenses. Doc. 10.

Hewitt and Steig now move, pursuant to CPLR 3211(a)(7) and/or 3212, to dismiss the claims against them. Doc. 17. In support of the motion, they argue that the complaint is devoid of any facts substantiating plaintiff's claim that they are subject to alter ego liability based on domination or control over 141 in connection with the condominium or that 141 was used to commit a fraud against plaintiff. Doc. 18. They further assert that any claim against them based on their execution of the certification is barred by the Martin Act, pursuant to which the certification was included in the offering plan, and that they executed the same solely in their capacity as principals of 141. Further, they maintain that, since they were not parties to any purchase agreements and signed the offering plan solely in their capacities as signatories of 141, there is no privity upon which to base any claim against them.

In opposition to the motion, plaintiff argues that it has adequately pleaded a claim for breach of contract on an alter ego theory against Hewitt and Steig. Doc. 37. Plaintiff further argues that Hewitt and Steig's arguments do not warrant dismissal of the claim against them and that, in any event, their motion is premature pursuant to CPLR 3211(d). Additionally, plaintiff argues that Hewitt and Steig are not entitled to summary judgment.

In reply, Hewitt and Steig argue that they cannot be held personally liable for breaching the purchase agreements since they were not parties thereto but, rather, they executed the same as principals of 141.

**LEGAL CONCLUSIONS:**

It is well settled that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [This Court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citation omitted). Whether plaintiff can ultimately prove its allegations is not a consideration in determining such a motion. *See EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19.

Generally, "a corporation exists independently of its owners, who are not personally liable for its obligations, and . . . individuals may incorporate for the express purpose of limiting their liability." *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 (2d Dept 2009), *aff'd as mod* 16 NY3d 775 (2011).

"Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, 'pierce the corporate veil', whenever necessary 'to prevent fraud or to achieve equity' "(*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993] [citation omitted]). The party asserting this equitable doctrine "seek[s] to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation" (*id.* at 141). Properly understood, "an attempt . . . to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*id.*).

"Generally, a plaintiff seeking to pierce the corporate veil must show 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 plaintiff's injury" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015] [internal quotation marks omitted]; *see also TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998] [plaintiff bears "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"]). At the pleading stage, "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in

'bad faith' while representing the corporation" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d at 776). The plaintiff must adequately allege the existence of a corporate obligation and that defendant "exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice' " (*id.*, quoting *Morris* 82 NY2d at 142).

*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 46-48 (2018).

The Court of Appeals further stated in *Cortlandt St. Recovery Corp.* that "a fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss (*see e.g. Holme v Global Mins. & Metals Corp.*, 22 Misc 3d 1123[A], 2009 NY Slip Op 50252[U] [Sup Ct, NY County 2009], *affd* 63 AD3d 417 [1st Dept 2009])" and that it was "acutely aware of the potential to decide the matter prematurely on a motion to dismiss." 31 NY3d at 47. Importantly, however, the Court of Appeals further stated that

"conclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil" (*Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 528 [1st Dept 1986]; *see also Matter of Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007] ["[t]he mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil"]). Instead, the plaintiffs must "allege particularized facts to warrant piercing the corporate veil" (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007]; *see also Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005] [claims seeking to pierce the corporate veil properly dismissed where they were not alleged "with the requisite 'particularized statements detailing fraud or other corporate misconduct'"]).

*Sandler v Ind. Living Aids, LLC*, 2016 NY Slip Op 30861(U), \*10 (Sup Ct, NY County 2016).

Plaintiffs first cause of action, the sole claim asserted against Hewitt and Steig, alleges, in utterly conclusory fashion, that "[t]he corporate veil of 141 should be pierced to hold [Cheshire,

Hewitt, and Steig] responsible for the breaches of the [p]urchase [a]greements and the [o]ffering [p]lan.” Doc. 1 at par. 85. In support of this claim, plaintiff alleges that Cheshire, Hewitt, and Steig shared the same office and personnel and formed 141 “as part of a scheme to shield the beneficial owners of the [building] from liability arising from [141’s] activities and, in particular, to prevent [141’s] creditors - - including [p]laintiff and the [u]nit [o]wners - - from obtaining and/or enforcing a judgment against [141]” (Doc. 1 at pars. 23-24, 33, 40); that the offering plan listed the sponsor as 141 “c/o The Cheshire Group, L.L.C.”, noted that the principals of 141 were Hewitt and Steig, and reflected that Hewitt and Steig’s business address was “c/o The Cheshire Group, L.L.C.” (Doc. 1 at pars. 25-28); that Cheshire’s website listed Steig and Hewitt as its principals and noted that the condominium was one of its “current investments” (Doc. 1 at pars. 28-29); and that the website created for marketing units in the building identified Cheshire, Hewitt, and Steig as the condominium’s developers. Doc. 1 at pars. 27-34.

These allegations of overlapping ownership, common officers and common office space are, as Hewitt and Steig assert, insufficient for the purposes of stating a prima facie case for piercing the corporate veil. *See Sass v. TMT Restoration Consultants Ltd.*, 100 A.D.3d 443 (1st Dep’t 2012). Plaintiff does not allege with any specificity its claim that Hewitt and Zweig acted in their personal capacity “without regard to [corporate] formality and to suit [their] immediate convenience.” *Art Capital Bermuda Ltd. v Bank of N.T. Butterfield & Son Ltd.*, 169 AD3d 426, 427-428 (1st Dept 2019) citing *Walkovszky v Carlton*, 18 NY2d 414, 420 (1966). Additionally, it is ironic that the sole cause of action against Hewitt and Steig is devoid of any allegation of fraud, whereas the other two causes of action allege it against the remaining defendants. *Sheridan Broadcasting Corp. v Small*, 19 AD3d at 332.

In *Art Capital Bermuda*, the Appellate Division, First Department deemed insufficient a claim for piercing the corporate veil where there was no allegation that the entities in question were "created for an improper purpose" or "engaged in illegitimate business." 169 AD3d at 427 (citation omitted). Although plaintiff herein alleges in conclusory fashion that 141 was created by Hewitt and Steig "as part of a scheme" to prevent 141's creditors from enforcing a judgment against said entity, plaintiff fails to allege "facts that, if proved, indicate that [Hewitt and Steig] exercised complete domination and control over [141] and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice.'" *East Hampton Union Free School Dist.*, 16 NY3d at 776 citing *Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d at 141-142.

Plaintiff further maintains that the instant motion is premature given that discovery is in its nascent stage. However, "[t]he fact that [plaintiff did not have] discovery at the time of the [instant] motion does not excuse its failure to plead more than conclusory allegations. *See e.g. East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 128-129 (2d Dept 2009), *affd* 16 NY3d 775 (2011).

Given the foregoing, the claims against Hewitt and Steig are dismissed. However, the dismissal is without prejudice to replead the same, should plaintiff be so advised. *See Art Capital Bermuda*, 169 AD3d at 428.

The parties' remaining contentions are either without merit or need not be addressed given the findings above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants Susan Hewitt and Jennifer Steig to dismiss the claims against them is granted, and the complaint is dismissed in its entirety as against said defendants, without prejudice to replead, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that, if the remaining parties to the action can agree on a discovery schedule, they are directed to enter into a so-ordered discovery stipulation prior to September 29, 2020, leaving the dates for the next compliance conference and the deadline for filing the note of issue blank, and emailing the same to Law Clerk Jonathan Judd at [jjudd@nycourts.gov](mailto:jjudd@nycourts.gov) to be so-ordered by the court; and it is further

ORDERED that, if counsel for the remaining parties cannot stipulate to a discovery schedule, then they are to participate in a telephonic compliance conference with Mr. Judd on September 29, 2020 at 2:30 p.m. (counsel are to provide the court with a dial-in number and access code for the call OR are to have all parties on the line and then patch the court in at (646) 386-5655); and it is further

ORDERED that the compliance conference previously scheduled for December 15, 2020 is hereby cancelled; and it is further

ORDERED that this constitutes the decision and order of the court.

20200828170330KFBCEUA027073C0DA4AFFA04529E544EDFFC9

KATHRYN E. FREED, J.S.C.

8/28/2020  
DATE

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