

**Churong Liu v Gabbay**

2020 NY Slip Op 35491(U)

October 7, 2020

Supreme Court, Queens County

Docket Number: Index No 719123/19

Judge: Robert I. Caloras

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NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS PART 36

Justice

FILED

10/7/2020  
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CHURONG LIU,

Plaintiff,

Index No.: 719123/19  
Seq. No. 1

COUNTY CLERK  
QUEENS COUNTY

-against-

ABRAHAM GABBAY a/k/a EBRIHIM AIDA GABBAY  
d/b/a DANSHA CORP., and RAHIM ZAR a/k/a  
RAHIM YAGHOUBZAR,

Defendants.

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The following papers numbered E4-E13, E15-E25 read on this motion by Defendant Abraham Gabbay a/k/a Ebrihim Aida Gabbay d/b/a Dansha Corp. (hereinafter "Defendant") for an order dismissing the Complaint as against him pursuant to CPLR 3211(a)(1) based on documentary evidence and CPLR 3211(a)(7) for failure to state a cause of action; and the cross-motion by Plaintiff for an order pursuant to CPLR 3025(b) granting leave to amend the Complaint and upon leave amending the Complaint to modify and add allegations in the cause of action against Defendant.

PAPERS  
NUMBERED

Notice of Motion-Affirmation-Affidavit-Exhibits-	
Memorandum of Law-RJI.....	E4-E13
Stipulation.....	E15
Affirmation in Opposition-Memorandum of Law.....	E16-E17
Notice of Cross-Motion-Affirmation-Exhibits.....	E18-E23
Affirmation in Opposition to Cross-Motion and in further support of the Motion.....	E24
Reply Affirmation.....	E25

Upon the foregoing papers, it is ordered that Defendant's motion and Plaintiff's cross-motion are determined as follows:

In the Complaint, Plaintiff alleges on or about January 29, 2018, she entered into an agreement with Dansha Corp., whereby Dansha Corp. agreed to perform the obligations of a general contractor for renovation and additions to her property. Liu also alleged Defendant signed the agreement as President of Dansha Corp. In the Complaint, Plaintiff asserted a cause of action against Defendant for breach of contract, and for money had and received.

Defendant now moves for an order dismissing the Complaint as against him pursuant to CPLR 3211(a)(1) and (a)(7). Defendant has submitted, *inter alia*, the following: the subject contract; New York State Department of State website printout for Dansha Realty Corp.; Dansha Realty Corp's lease; invoices for the subject construction project; and his affidavit.

In his affidavit, Defendant states he is the President of Dansha Realty Corp., a domestic business corporation, with a business address at 45 North Station Plaza, Suite #315, Great Neck, NY 11021. Defendant claims Dansha Realty Corp. is an active corporation, and is the party to the contract referenced at paragraph 5 in the Complaint. Although the contract Plaintiff entered into on January 29, 2018 was with Dansha Corp., Defendant asserts Dansha Corp. is a d/b/a for Dansha Realty Corp., and is not a d/b/a for him. Defendant claims the contract is based on Dansha Realty Corp.'s form proposal. The letterhead states: Dansha Corp., 45 North Station Plaza, Suite #315, Great Neck, N.Y. 11021, 516-946-3588. The signature line on the contract states: GC: Dansha Corp. The address in the letterhead of the contract is the business address for Dansha Realty Corp (Exhibit "D"). Defendant claims he signed the subject contract in his capacity as President of Dansha

Dansha Realty Corp., and made no representations he was conducting business as an individual, nor is there any language in the contract indicating he was conducting business as an individual. Defendant also states all invoices sent for work completed under the contract were sent on his company's form invoice template.

Defendant has also submitted a printout from the New York State Department of State which shows Dansha Realty Corp is an active corporation. In addition, Defendant submitted invoices for this project, which show the entity demanding payment is Dansha Corp., and all checks were to be made payable to "Dansha Corp." at the company's address in Great Neck.

Defendant argues the Complaint should be dismissed as against him pursuant to CPLR 3211(a)(1), because the documentary evidence he submitted shows "Dansha Corp." and Dansha Realty Corp. are the same entity. As such, Defendant argues Dansha Realty Corp. is the party to the contract. As a corporate officer of Dansha Realty Corp., Defendant argues he is not subject to individual liability for the contract he executed on behalf of Dansha Realty Corp. In the alternative, Defendant argues the Complaint should be dismissed pursuant to CPLR 3211(a)(7), because Plaintiff did not allege a claim to pierce the corporate veil or any other theory to hold him personally liable for Dansha Realty Corp.'s debts.

In opposition, Plaintiff argues Defendant has failed to submit evidence establishing he is entitled to dismissal of the Complaint as against him pursuant to CPLR 3211(a)(1 or (7), Plaintiff argues the documents Defendant submitted do not refute he is personally liable as the agent of a nonexistent corporate entity. Plaintiff claims Defendant has not asserted, and has not submitted evidence, she was aware of Dansha Realty Corp. when the contract was entered into and/or was shown the information contained in any of documents submitted in support of the instant motion. As such, Plaintiff argues the entity Dansha Realty Corp. cannot be ascertained from the contract itself, and Defendant has not submitted any evidence she was aware of the existence of Dansha Realty Corp. at the time the contract was entered into. Plaintiff also argues Defendant's request to dismiss the claims regarding piercing the corporate veil is without merit, because she is seeking to hold Defendant personally liable for the obligations incurred in the name of the nonexistent corporation "Dansha Corp.", not based upon a theory of piercing the corporate veil.

"To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Gould v Decolator, 121 AD3d 845, 847 [2d Dept. 2014]). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable" (Granada Condominium III Assn. v Palomino, 78 AD3d 996, 996-997 [2d Dept. 2010]; see Fontanetta v John Doe 1, 73 AD3d 78, 84-86 [2d Dept. 2010]). "[I]t is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case" (J & JT Holding Corp. v Deutsche Bank Natl. Trust Co., 173 AD3d 704, 705-706 [2d Dept. 2019]).

When determining a motion to dismiss a complaint or counterclaim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuworth, LLC v Comprehensive Mental Assessment & Med. Care, P.C., 110 AD3d 1022 [2d Dept. 2013]).

It is well settled "a corporation may be known by several names in the transaction of its business, and it may enforce and be bound by contracts entered into in an adopted name other than the regular name under which it was incorporated" (Harmon v Ivy Walk Inc., 48 AD3d 344, 347 [2d Dept. 2008], lv denied 11 NY3d 702 [2008]). "This is particularly true where there is no confusion as to the parties involved in the contract" (id.). "When individuals purporting to act on behalf a nonexistent principal enter into a contract with a third party, ... the contract generally remains valid and enforceable as between the third party and the individuals who executed the contract on behalf of the nonexistent principal" (Metro Kitchenworks Sales, LLC v Continental Cabinets, LLC, 31 AD3d 722, 723 [2d Dept. 2006]; accord Grutman v Katz, 202 AD2d 293 [1st

Dep't 199411). However, "[t]he use of a trade name, similar to [a business entity's] legal name, will not replace corporate liability with personal liability on behalf of officers and directors" (Walker v Smith, 257 F.Supp2d 691, 698 [S.D.N.Y. 2003]). ‘ ‘Rather, the general rule is that ‘ "[w]here there is a misnomer of the corporation in the contract or obligation sued on, the corporation may sue or be sued, and recovery may be had by or against it, in its true and proper corporate name" ‘ [Quebecor World [USA], Inc. v Harsha Assocs., 455 F.Supp2d 236 [W.D.N.Y. 2006]; see also Spanierman Gallery, P.S.P. v. Love, 320 F.Supp.2d 108, 111 (S.D.N.Y. 2004) ["Under New York law, a contract entered into by a corporation under a 'colloquial title' is enforceable by either party, and 'the misnomer is held unimportant'") (quoting Mail & Express Co. v. Parker Axles, Inc., 204 AD 327 [1st Dep't 1923]; Humble Oil Refining Co. v Jaybert Esso Service Station, Inc., 30 AD2d 952, 952 [1st Dept. 1968] ["The misnomer of the principal obligor in the contract does not affect the validity of the obligation"]]. Consequently, absent an allegation that, at the time of the contract, a plaintiff was under an actual misapprehension that there was some other, unincorporated group with virtually the same name as that of the actual business entity, "the Court will not permit the Plaintiff[] to capitalize on [a] technical naming error in contravention of the parties' evident intentions” (Quebecor World (USA), Inc. v Harsha Assocs., supra). The rationale behind the rule imposing personal liability on one who signs on behalf of a nonexistent corporation or other business entity, is designed to protect a party who enters into a contract where the other signatory represents that he is signing on behalf of a business entity that in fact does not exist, under *any* name (id.). On the other hand, where a corporation or other business entity does exist, it would be inequitable to allow *that* entity to avoid contractual liability merely because of a slight variance between the name on the contract and the entity's "actual" name (id.). Rather, "as long as the identity of the corporation can be reasonably established from the evidence[,] ... [e]rror in the use of the corporate name will not be permitted to frustrate the intent which the name was meant to convey" (id.).

Here, the Court finds Defendant has demonstrated his entitlement to dismissal of the Complaint as against him pursuant to CPLR 3211(a)(1) and (a)(7). The Court finds Defendant established he is a corporate officer of an existing corporation. Defendant showed Dansha Corp. is not a nonexistent corporation, but rather a tradename for Dansha Realty Corp, which is an active corporation that existed at the time the contract was executed. Significantly, the name on the contract “Dansha Corp. differs only slightly from “Dansha Realty Corp. In the Complaint, Plaintiff did not allege there was some other entity separate from Dansha Realty Corp. that could reasonably be misapprehended at the time the contract was executed, nor did she allege she was misled about the identity of the party with whom she was dealing with. Here, Plaintiff did not assert a cause of action against Defendant seeking to pierce the corporate veil and/or for fraud. Consequently, Plaintiff failed to establish any legal basis for imposing personal liability upon Defendant pursuant to the contract. Accordingly, the motion is granted and the Complaint is dismissed as against Defendant.

Based upon the foregoing, Plaintiff’s cross-motion to amend the Complaint pursuant to CPLR 3025 is denied as academic. Even if the Court did not grant dismissal as against Defendant, Plaintiff’s cross-motion would still have been denied. The allegations Plaintiff sought leave to add to the Complaint did not sufficiently allege allegations that would impose personal liability upon Defendant.

Based upon the foregoing, the motion is granted and the cross-motion is denied.

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COUNTY CLERK  
QUEENS COUNTY

DATED: October 7, 2020



ROBERT I. CALORAS, J.S.C.