

**Ohel Children's Home & Family Servs., Inc. v
Precious Care Mgt., LLC**

2021 NY Slip Op 30500(U)

February 11, 2021

Supreme Court, Kings County

Docket Number: 500080/2020

Judge: Reginald A. Boddie

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This opinion is uncorrected and not selected for official publication.

At an IAS Commercial Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 11th of February 2021.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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OHEL CHILDREN'S HOME AND FAMILY SERVICES, INC., a New York not-for-profit Corporation,

Plaintiff,

Index No. 500080/2020
Cal. No. 10 MS 1

-against-

DECISION AND ORDER

PRECIOUS CARE MANAGEMENT, LLC;
UNION MEDICAL CARE, PLLC; KAMIN HEALTH OHEL, LLC; YITZ KAMINETZKY; and MONTEE KAMINETZKY,

Defendants.
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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion:

Papers Numbered
MS 1 Docs. # 13-23

Upon the foregoing cited papers, defendants' motion to dismiss, pursuant to CPLR 3211, is decided as follows:

Plaintiff Ohel Children's Home and Family Services, Inc. (OHEL), a 501 (c) (3) corporation, commenced this action against defendants Precious Care Management, LLC (PCM) and Union Medical Care, PLLC (UMC) to recover damages for unpaid rent due under two leases, between OHEL and UMC (the UMC lease), and OHEL and PCM (the PCM lease).

Plaintiff alleged that in November 2018, defendant Yitz Kaminetzky (Y. Kaminetzky), CEO of the Kamin Urgent Care Network, entered into two lease agreements with OHEL. The PCM lease took effect on November 1, 2018. Pursuant to that lease, OHEL leased approximately 1,750 square feet on the ground floor plus ten parking spaces on its premises in Flatbush, New York to PCM for a three-year renewable term to enable defendant Y. Kaminetzky and his brother, defendant Montee Kaminetzky (M. Kaminestzky), to operate a “Kamin Urgent Care” walk-in medical clinic. Plaintiff further alleged that the PCM lease was heavily dickered, as a result of which Y. Kaminetzky successfully negotiated for two months deferred rent (November and December 2018). As such, under the PCM lease, PCM was liable to pay OHEL monthly rent at the rate of \$13,000 per month beginning in the third month of the lease, in advance, on the first day of the month and each month thereafter. Pursuant to the lease, OHEL would also provide staffing such as existing OHEL support personnel including medical assistants, a receptionist and an x-ray technician to PCM, to be charged in accordance with a rate schedule annexed to the PCM lease.

Plaintiff also allegedly entered into a lease with Union Medical Center (UMC). Pursuant to that lease, UMC, a professional services company, contracted for the services of a physician assistant already on staff at OHEL, for 17.5 hours per week, at a fee payable by UMC. The UMC lease allegedly called for UMC to pay 1/12th of the annual fee every 30 days, with invoices due within 45 days of transmission. Plaintiff alleged that both the UMC and PCM lease agreements contained material limitations on assignment by and the transfer of control of PCM, and that the PCM lease restricted subletting and forbid PCM from allowing any person or entity, other than UMC, from operating a medical clinic in the leased premises without OHEL’s written permission.

Plaintiff alleged that in June 2019, the individual defendants assigned interests, delegated duties, transferred control, assets and/or the operation of the business being conducted at the OHEL premises from PCM and UMC to defendant Kamin Health Ohel, LLC (KHO), a newly-formed New York limited liability company, in violation of the terms of the leases. Plaintiff alleged that throughout the period from January through August 2019, it made repeated demands for payment of the rents owed under the leases. On August 16, 2019, Y. Kaminetzky advised the executive director of OHEL that they would be closing the facility by the close of business that day. On September 19, 2019, by letter, plaintiff allegedly made a final demand for payment in the amount of \$323,048.42 due under the PCM lease and \$126,140.63 due under the UMC lease.

Plaintiff brought this action to recover for unpaid rent due under the two leases, and alleged fraud and alter ego liability against the individual defendants. Defendants, pursuant to CPLR 3211, moved to dismiss the complaint on the grounds that plaintiff failed to adequately allege veil piercing and the fraud count fails as a matter of law. Plaintiff opposed.

In considering a motion to dismiss pursuant to CPLR 3211, “the court should 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” (*Simos v Vic-Armen Realty, LLC*, 92 AD3d 760, 761 [2d Dept 2012] [internal quotation marks and citation omitted]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Further, the general rule is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*Bartle v Home Owners Co-op.*, 309 NY 103, 106 [1955]; *Seuter v Lieberman*, 229 AD2d 386 [2d Dept 1996]). The concept of piercing the corporate veil is an exception to this general rule which permits, in certain circumstances, the imposition of

personal liability on owners for the obligations of their corporation (*see Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140 [1993]). A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff (*see id.*; *Love v Rebecca Dev., Inc.*, 56 AD3d 733 [2d Dept 2008]; *Millennium Const., LLC v Loupolover*, 44 AD3d 1016, 1016 [2d Dept 2007]). Factors to be considered in determining whether the owner has “abused the privilege of doing business in the corporate form” include whether there was a “failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use” (*see Millennium Const., LLC*, 44 AD3d at 1016-1017; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 146 [2d Dept 2009]). To succeed on a motion to dismiss a cause of action to pierce the corporate veil, the movant must demonstrate that the opposing party has not pled sufficient facts to establish the owners of the corporation exercised complete domination over it in the transaction at issue nor abused the privilege of doing business in the corporate form, which resulted in injury to the plaintiff (*see Allstate ATM Corp. v E.S.A. Holding Corp.*, 98 AD3d 541, 542 [2d Dept 2012]).

Here, defendants argued that plaintiff failed to adequately allege sufficient facts to enable veil piercing or that the individual defendants exercised complete domination and control over PCM and UMC since the Complaint is simply filled with pure conjecture and bare recitation of the main equitable considerations. However, plaintiff alleged in ¶¶ 7, 23, 50 and 54 of the Complaint that the individual defendants exercised complete domination and control over PCM and UMC. Specifically, plaintiff alleged that defendant Y. Kaminetzky founded PCM and UMC

in January 2013, and controlled the finances of both entities in November 2018. While some of the allegations are made in portions of the complaint other than the first cause of action, the complaint is to be construed as a whole (*see Gateway I Group*, 62 AD3d at 147). Therefore, plaintiff pled sufficient facts to establish that the individual defendants exercised complete domination over both PCM and UCM in the transaction at issue (*see Love*, 56 AD3d at 734).

Plaintiff further alleged that the individual defendants abused the privilege of doing business in the corporate form because the subject entities were inadequately capitalized at the time of the transaction. Specifically, in ¶ 53 of the Complaint plaintiff averred based on balance sheets Y. Kaminetzky provided plaintiff for October through November 2019, Y. Kaminetzky caused a transfer of more than \$27,000 from UMC to KHO in order to defraud OHEL, and render UMC unable to pay its debts. With respect to PCM, plaintiff alleged in ¶ 52 of the Complaint that from January through April 2019, PCM incurred expenses totaling \$190,335.13 for “Outside Help,” which defendant Y. Kamenetzky could not adequately explain upon inquiry. Plaintiff suggested that the individual defendants misused those funds for personal gain and thus abused the privilege of doing business in the corporate form. Plaintiff has thus pled facts sufficient to sustain its cause of action for piercing the corporate veil (*see Love*, 56 AD3d at 733).

Defendants also argued that the complaint failed to adequately allege fraud against the individual defendants. Under New York law, the elements of a claim for fraud are: (1) the making of a material representation of historical or existing fact by the defendant (or the omission to disclose one or more material facts which the defendant, under the circumstances, had a duty to disclose); (2) falsity; (3) scienter; (4) justifiable reliance by the plaintiff, and (5) injury (*see Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). A statement of a

party's present intention to perform an act in the future may be deemed a false statement of present fact rather than a prophesy or prediction and may therefore be actionable as fraud if the party did not intend to perform at the time the statement was made, even where the statement relates to an agreement between the parties (*see Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]; *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). CPLR 3016 (b) further requires that the circumstances of the fraud must be "stated in detail" (*see Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 [2d Dept 2010]). A plaintiff cannot maintain a claim of fraud against a party with whom he/she has contracted, unless plaintiff can demonstrate that the fraud arose from a legal duty owed to plaintiff separate from the defendant's duty to perform under the contract or that a misrepresentation resulted in any loss independent of the damages allegedly incurred for breach of contract (*see Doukas v Ballard*, 135 AD3d 896, 897 [2d Dept 2016]; *LIUS Group Intern. Endwell, LLC v HFS Intern., Inc.*, 92 AD3d 918, 920 [2d Dept 2012]).

In ¶¶ 73-83 of the Complaint, plaintiff alleged that when Y. Kamenetzky negotiated the leases with OHEL, and particularly when he assured OHEL's general counsel, just before the leases were signed, that if OHEL gave PCM two months deferred rent, there was "no question, particularly given the resources already available to the Kamin Health Network, that PCM would be able to make the payments due January 2019 and all monthly payments thereafter," that defendant Y. Kaminetzky did so with a specific plan that neither PCM nor UMC would pay any rent under those leases, or with reckless disregard for those entities' obligations to pay the agreed upon rent. To demonstrate scienter, plaintiff alleged that defendants did not even make partial payments of the rent as an act of good faith. Plaintiff also alleged that they justifiably relied on Y. Kaminetzky's averments, which caused injury. Because plaintiff provided details of alleged

misstatements or misrepresentations made specifically by defendant Y. Kaminetzky to plaintiff, as required by CPLR 3016 (b), plaintiff argued that he pled sufficient facts to establish fraud against defendant Y. Kaminetzky. However, here, plaintiff's causes of action against the individual defendants that alleged fraud arose out of identical circumstances and were based upon identical allegations as the causes of action that alleged breach of contract (*see Doukas*, 135 AD3d at 896). Further, plaintiff's causes of action regarding fraud did not allege that a misrepresentation resulted in loss independent of the damages incurred for breach of contract (*see id.*). Therefore, plaintiff failed to adequately state a claim for fraud against the individual defendants (*see id.*).

Accordingly, defendant's motion to dismiss is granted to the extent plaintiff's cause of action for fraud is dismissed. The remainder of the motion is denied.

ENTER:

RB

Hon. Reginald A. Boddie
Justice, Supreme Court

HON. REGINALD A. BODDIE
J.S.C.

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