

Borough Constr. Group, LLC v Red Hook 160 LLC
2021 NY Slip Op 31441(U)
April 28, 2021
Supreme Court, Kings County
Docket Number: 500308/19
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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BOROUGH CONSTRUCTION GROUP, LLC.,
Plaintiff, Decision and order

- against - Index No. 500308/19

RED HOOK 160 LLC, PHILADELPHIA INDEMNITY
INSURANCE COMPANY, ACREFI MORTGAGE
LENDING, LLC, TRI STATE LUMBER, AF SUPPLY
CORP, UNITED RENTALS(NORTH AMERICA), INC.,
WORLDWIDE PLUMBING SUPPLY, INC., CASTLE
MASONRY, INC., WOODBURY CONSTRUCTION, INC.,
GO GREENER PLUMBING, INC., PREMIUM BUILDING
MATERIALS, INC., UNIVERSAL MARBLE AND GRANITE
OF QUEENS AND TPG CONTRACTING, CORP.,
Defendants, April 28, 2021

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Red Hook 160 LLC,
Third Party Plaintiff,

- against -

BOROUGH EQUITIES LLC, MICHAEL BAUER &
EMANUEL KANARIS,
Third-Party Defendants,

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UNITED RENTALS (NORTH AMERICA) INC.,
Third Party Plaintiff,

- against -

ATLANTIC SPECIALTY INSURANCE COMPANY,
a/k/a ATLANTIC SPECIALTY INSURANCE INC.,
D/b/a ASIC INSURANCE,
Third-Party Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff/third party defendant Borough Construction Group LLC and Borough Equities LLC has moved seeking to amend the caption to remove Michael Bauer and Emanuel Kanaris pursuant to

CPLR §3025. The defendant/third party plaintiff Red Hook 160 LLC has moved seeking to reargue a portion of an order dated June 1, 2020 which dismissed fraud claims against Mr. Bauer and Mr. Kanaris. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in prior decisions Borough Construction Group LLC entered into a contract with Red Hook 160 LLC concerning the construction and renovation of a project located at 160 Imlay Street in Kings County. Borough Construction sued alleging it is owed over two and a half million dollars. Red Hook 160 LLC asserted various amended counterclaims and on June 1, 2020 the court dismissed some of the counterclaims and allowed others to remain. Essentially, these motions concern Bauer and Kanaris and specifically whether they remain defendants in this lawsuit. Borough Construction asserts the court has already dismissed them and merely seeks the actual removal of them from the caption. Red Hook 160 LLC seeks clarification and reargument they should remain in the lawsuit.

Conclusions of Law

In the prior order the court denied the motion seeking to dismiss the conversion claim. The conversion claim applies to

Bauer and Kanaris as well since the Amended Counterclaim and Third Party Complaint sufficiently alleges that both Bauer and Kanaris engaged in conduct which could be conversion. Thus, paragraph 165 states that "Mr. Bauer and Mr. Kanaris directed that Project materials be removed from the Project site for their personal benefit" (id). Further, Paragraph 168 alleges that "Mr. Bauer and Mr. Kanaris directed individuals under their control to remove the roofing materials from the Project site and deliver such materials to homes in which Mr. Bauer and Mr. Kanaris have an interest" (id). Those allegations sufficiently and properly allege conversion and thus Bauer and Kanaris remain defendants as to that cause of action. Borough Construction argues those allegations do not sufficiently allege conversion because they are conclusory. However, the allegations are specific and detailed. They allege that Bauer and Kanaris told others to take building materials meant for the project to their homes. Further, the fact the court held there was no evidence to pierce the corporate veil does not mean individual wrongs cannot be alleged against them. On the contrary, it is for that very reason individual torts may be asserted against them. Therefore, based upon that cause of action the motion seeking to amend the caption is denied and the motion seeking to clarify the prior order is granted to the extent noted.

Turning to the motion seeking reargument, it is well settled

that a motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS2d 617 [2d Dept., 2019]).

Concerning the fraud issues, the court concluded there could be no fraud claims against Bauer and Kanaris individually since there was no evidence to pierce the corporate veil. Red Hook 160 LLC argues the fraud claims against Bauer and Kanaris are unrelated to any piercing of the corporate veil, rather, the fraud claims are based upon individual acts of fraud which can be alleged even if no such piercing of the corporate veil is possible. Borough counters that the fraud claim regarding falsifying records is really a claim against Borough. Of course a corporation cannot commit fraud without human intervention, thus, the fraud claims are not directed at Bauer and Kanaris, but rather at Borough as an entity.

In Hamlet at Willow Creek Development Company v. Northeast Land Development Corp., 64 AD3d 85, 878 NYS2d 97 [2d Dept., 2009]) the court held that "a corporate officer may be liable for torts committed by or for the benefit of the corporation if the officer participated in their commission" (id). Thus, a "corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the

officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (see, Rajeev Sindhvani, M.D. PLLC v. Coe Business Service Inc., 52 AD3d 674, 861 NYS2d 705 [2d Dept., 2008]). Therefore, it does not matter whether Bauer and Kanaris were acting on behalf of Borough as argued by Borough since in any event the allegations of fraud are present. Thus, paragraphs 55 through 64 surely allege fraud against Kanaris. Further, the Amended Complaint does allege fraud committed by Bauer as well. Red Hook 160 LLC argues that "Bauer was an equally engaged participant in this fraudulent conduct, as the falsified manpower logs were annexed to payment applications to RH 160, all of which were personally signed by Bauer" (see, Red Hook 160, LLC's Memorandum of Law in Opposition to Third Party Defendants' Motion to Amend Caption and in Support of Cross-motion for Leave to Reargue, Footnote 4). Indeed, the Amended Complaint alleges that "the knowingly falsified manpower logs that were annexed to payment requisitions submitted to Red Hook 160 constitute misrepresentations of then-present facts" (see, Amended Counterclaim and Third Party Complaint, ¶60). Further, in Paragraph 103 the Amended Complaint asserts that Michael Bauer executed such applications for payment on behalf of Borough.

Therefore, individual claims for fraud may be asserted against both Bauer and Kanaris even though they were acting on

behalf of Borough at the time. Therefore, the motion seeking reargument is granted and upon reargument the motion seeking to dismiss the fraud claim against Bauer and Kanaris contained in paragraphs 55 through 64 is denied. Further, the motion seeking to amend the caption to remove Bauer and Kanaris is denied as well.

So ordered.

ENTER:

DATED: April 28, 2021
Brooklyn, NY



Hon. Leon Ruchelsman
JSC