100 Varick Realty, LLC v NYC E. Mgt. Corp.
2021 NY Slip Op 31519(U)
April 29, 2021
Supreme Court, New York County
Docket Number: 654569/2016
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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100 VARICK REALTY, LLC,

Plaintiff,

- v -

NYC EAST MANAGEMENT CORP., ERIC BROWN, IAN BROWN

Defendant.

INDEX NO. 654569/2016

MOTION DATE 10/07/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94, 95, 96, 97, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

Defendant NYC East Management Corp. (herein "NYC East") moves pursuant to CPLR §3025 for an order permitting the defendants to amend their answer and pursuant to CPLR §3212 for summary judgment for either or both individual defendants. Specifically, Defendants seek to amend their answer to disavow that Defendant Ian Brown had was an officer or exercised any control over Defendant NYC East. In opposition, Plaintiff contends that permitting defendants to amend their answer would not only be prejudicial but that they are collaterally estopped from doing so as Defendant Ian Brown has repeatedly held himself out as Vice President of NYC East in prior actions. Further, Plaintiff argues that summary judgment should be denied as the allegations demonstrate that the corporate veil can be pierced to hold the individual defendants liable for NYC East's debts.

Background

Plaintiff was the owner and landlord of the premises known as and located at 403 East 60th Street a/k/a 403-407 East 60th Street. Defendant NYC East was a commercial tenant occupying the premises as a parking garage pursuant to an oral agreement for a month-to-month tenancy with rent in the amount of $45,000.00 per month and real estate taxes in the amount of $16,834.00 per month for a total of $61,834.00 per month.

Plaintiff commenced a commercial holdover proceeding against NYC East in the Civil Court, New York, County of New York, Index Number L&T 72774/15 when NYC East failed to vacate despite being served with a Thirty (30) day Notice of Termination on June 30, 2015. The Civil Court issued an order dated September 9, 2015, ordering NYC East to pay monthly use and occupancy to Plaintiff. NYC East failed to make the required use and occupancy payments and Plaintiff brought a motion by Order to Show Cause in the Civil Court Proceeding to strike NYC East's answer.

Subsequently, NYC East commenced an action in the Supreme Court, New York County, Index Number 653220/15 seeking a declaratory judgment that, inter alia, NYC East's tenancy was extant. NYC East brought an Order to Show Cause in the Supreme Court Action seeking a temporary restraining order ("TRO") staying the Civil Court Proceeding, which was denied. NYC East appealed the denial of the TRO, and the Appellate Division conditionally issued a TRO provided that NYC East paid 1 month's use and occupancy of $61,834.00. NYC East tendered a check that failed to clear due to insufficient funds.

Thereafter, NYC East and Plaintiff entered into a Stipulation of Settlement in the Civil Court Proceeding wherein NYC East agreed to the issuance of a final judgment in the amount of $325,099.00, representing all use and occupancy and rent and additional rent due and owing

through November 30, 2015. Plaintiff contends that no part of the money judgment was ever paid.

NYC East's eviction from the Premises was scheduled to take place on February 8, 2016. However, NYC East filed for Chapter 11 Bankruptcy protection on or about January 24, 2016 in the United States Bankruptcy Court for the Southern District of New York, entitled *In re NYC East Management Corp.*, 16-10159. On or about March 4, 2016, the Hon. Michael E. Wiles issued an Order vacating any automatic stays, permitting Plaintiff to immediately execute a warrant of eviction obtained against NYC East in the Civil Court proceeding to recover possession.

Plaintiff contends that it is owed $476,435.00, which is comprised of the $325,099.00 money judgment and $151,336.00 for use and occupancy and additional rent due between December 1, 2015 and the March 21, 2016 eviction.

Plaintiff further alleges that the two members/owners of NYC East are Ian and Eric Brown and that the corporate veil should pierced to hold Ian and Eric Brown liable for the monies owed to it.

Plaintiff asserts eleven causes of action: (1) money judgment against NYC East in the amount of $151,336.00, plus applicable interest, (2) piercing the corporate veil to issue a money judgment against Ian and Eric Brown, jointly and severally, in the amount of $476,435.00, plus applicable interest, (3) judgment and order setting aside the conveyances made from NYC East to the individual defendants in violation of New York Business Corporation Law §1005, (4) an order setting aside the conveyances made from NYC East to the individual defendants for lack of consideration, (5) money judgment and order setting aside the conveyances made from NYC East to the individual defendants in violation of New York Debtor and Creditor Law § 273-a, (6)

money judgment and order setting aside the conveyances made from NYC East to the individual defendants in violation of New York Debtor and Creditor Law § 274, (7) money judgment and order setting aside the conveyances made from NYC East to the individual defendants in violation of New York Debtor and Creditor Law § 275, (8) money judgment and order setting aside the conveyances made from NYC East to the individual defendants in violation of New York Debtor and Creditor Law § 276, (9) money judgment and order setting aside the conveyances made from NYC East to the individual defendants in violation of New York Debtor and Creditor Law § 276-1, (10) money judgment for physical property damages which occurred when prior to NYC East's eviction, and (11) judgment against the Defendants, jointly and severally, in the amount of $7,468.95, plus applicable interest, for electricity bills owed to Consolidated Edison that were paid by Plaintiff.

Motion to Amend Defendants' Verified Answer

Defendants move to amend their Verified Answer to reflect that individual defendant Ian Brown incorrectly "admitted" that he was an officer of defendant NYC East and that he exercised control over its management along with his brother, the owner of NYC East, Eric Brown. Defendants contend that this was an error of fact that was only recently realized when counsel for Defendants examined corporate formation documents that do not contain Ian Brown's name. Defendants do not provide a copy of these documents, nor do they provide the date that this issue was discovered.

In opposition, Plaintiff contends that Defendants' motion to amend their answer is frivolous, as it is devoid of merit, has been undertaken to delay and prolong the resolution of the litigation, and asserts material factual statements that are false. Further, Plaintiff argues that the amendment will result in prejudice to Plaintiff, as the parties have been engaged in discovery and

motion practice that was based on the undisputed fact that Ian Brown and Eric Brown were both members and managed NYC East. Additionally, Plaintiff argues that Defendants should be judicially estopped from denying that Ian Brown was an officer or member of NYC East, because Ian Brown previously represented that he was the Vice President of NYC East in numerous filings in connection with NYC East's chapter 11 bankruptcy filing on January 24, 2016 and obtained a benefit therefrom.

In the alternative, if the court does grant Defendants motion to amend, Plaintiff asks that it be awarded attorneys fees and costs incurred in connection with this motion, prior motion practice, discovery, and expenses incurred in attempting to obtain discovery from Ian Brown.

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party (*see* CPLR §3025(b); *see also Solomon Holding Corp. v Golia*, 55 AD3d 507, 507 [1st Dept. 2008] [granting motion to amend absent showing of surprise or prejudice]). A showing of "[p]rejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [*quoting Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

Further, unwarranted delay in moving to amend is inexcusable (*see Chichilnisky v The Trustees of Columbia Univ. in City of N.Y.*, 49 AD3d 388, 389, 852 NYS2d 777 [2008]; *Spence v. Bear Stearns & Co.*, 264 AD2d 601, 694 NYS2d 654 [1999]; *B.B.C.F.D., S.A. v Bank Julius Baer & Co.*, 62 AD3d 425, 425–26, 878 NYS2d 56, 57 [2009]).

Plaintiff has demonstrated that significant prejudice would result from allowing Defendants to amend their answer to effectively remove Defendant Ian Brown from the present action. Defendants allege that their request to amend is based upon corporate foundation

documents that were recently discovered. Defendants do not provide any dates to indicate when these documents were discovered, nor do they provide the documents themselves.

Plaintiff's First Notice for Discovery and Inspection, dated April 27, 2017, sought corporate foundation documents which were not provided in Defendants' First Response. Further, Defendants' First Response, dated July 10, 2017, stated that Ian Brown "is an improper party to this lawsuit and no proper or relevant nexus has been demonstrated to exist between him and NYC East." It is unclear why if Defendants were aware that Ian Brown was an improperly named defendant that took them until February 17, 2020 to move to amend. Defendants' motion for leave to amend the answer is denied as impermissibly delayed and further, because such an amendment would cause undue prejudice to Plaintiff's ability to proceed.

For the reasons above, this Court need not rule on the Plaintiff's judicial estoppel argument. However, it is worth noting that, "The doctrine of judicial estoppel or the doctrine of inconsistent positions 'precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed' " (*Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 177, 674 NYS2d 280 [1998], *lv. dismissed* 92 NY2d 962, 683 NYS2d 172, 705 N.E.2d 1213 [1998], *quoting Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 AD2d 435, 436, 626 N.Y.S.2d 527 [1995]; *Baje Realty Corp. v Cutler*, 32 AD3d 307, 310, 820 NYS2d 57, 59 [2006]). This doctrine "protect[s] judicial integrity by avoiding the risk of inconsistent results in two proceedings" (*Bates v Long Is. R.R. Co.*, 997 F.2d 1028, 1038 [2d Cir. 1993]).

"The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts" (*Ford Motor*

Credit Co., 215 A.D.2d at 436, 626 N.Y.S.2d 527 [internal quotation marks omitted]; *Re/Max of New York, Inc. v Weber*, 177 AD3d 910, 914–15, 112 NYS3d 769, 774 [2019]).

In support of its opposition, Plaintiff submits NYC East's chapter 11 bankruptcy petition in *In re NYC East Management Corp.*, 16-10159 (NYSCEF Doc. No. 107). The petition requires a declaration, which states:

> The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition. I have been authorized to file this petition on behalf of the debtor. I have examined the information in this petition and have a reasonable belief that the information is trued and correct. I declare under penalty of perjury that the foregoing is true and correct.

The declaration was executed on January 24, 2016 listing Ian Brown as authorized representative of debtor and titled, Vice President (NYSCEF Doc. No. 107).

Summary Judgment

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], *quoting Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). The evidence presented in a summary judgment motion must be examined in the "light most favorable to the party opposing the motion" (*Udoh v Inwood Gardens, Inc.*, 70 AD3d 563 1st Dept 2010]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos,* 46 NY2d 223, 231 [1978]).

Further, issues of credibility are not to be resolved on summary judgment (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226, 744 NYS2d 25 [1st Dept 2002]).

The doctrine of piercing the corporate veil is typically employed by a party seeking 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 (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 183 AD2d 5, 588 NYS2d 927 [Court of Appeals 1993]; *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879 [1980]; *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 389 NYS2d 327 [1976]). The doctrine is equitable in nature and the piercing of the corporate veil does not constitute an independent cause of action, but is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners (*see Matter of Morris*, 183 AD2d 5).

Piercing of the corporate veil is dependent on the specific facts and equities, but generally requires a showing 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 (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 997 NYS2d 67 [2014]; *Matter of Morris*, 183 AD2d 5). The theory of piercing the corporate veil involves a fact intensive inquiry that is not well suited for determination prior to discovery (*see Gardner v Yanko*, No. 600606/09, 2011 WL 3565829 [2011]; *Ledy v Wilson*, 38 AD3d 214, 214 [1st Dept 2007]; *Kralic v Helmsley*, 294 AD2d 234, 235-36 [1st Dept 2002]; *International Credit Brokerage Co. Inc. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]).

Defendants contend that Plaintiff has failed to meet the heavy burden required to pierce the corporate veil, as Plaintiff cannot show ownership and control by Ian Brown and cannot do more than parrot vague generalizations in the case of Eric Brown.

As discovery has not yet been completed, Defendants' contentions are not persuasive and there remain several material issues of fact that preclude summary judgment. The complaint sets forth sufficient allegations to establish the *prima facie* piercing of the corporate veil. Specifically, the complaint alleges that Ian and Eric Brown did not maintain corporate formalities as to NYC East, exercised complete dominion and control over NYC East, used NYC East corporate funds for personal use, and acted as NYC East's alter egos to perpetuate fraud on Plaintiff. The factual allegations sufficiently support Plaintiff's assertion that the corporate veil should be pierced. Accordingly, Defendants' motion for summary judgment is denied.

It is hereby,

ORDERED that Defendants' motion to amend the Answer and motion for summary judgment are denied; and it is further

ORDERED that counsel are directed to appear for a status conference to be conducted remotely on June 20, 2021 at 11:30 AM.

4/29/2021
DATE

SHAWN TIMOTHY KELLY, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE