Charles Condominiums, LLC v Victor RPM First, LLC
2021 NY Slip Op 32563(U)
December 2, 2021
Supreme Court, New York County
Docket Number: Index No. 657040/2019
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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THE CHARLES CONDOMINIUMS, LLC,

Plaintiff,

- v -

VICTOR RPM FIRST, LLC, VRE DEVELOPMENTS INC. D/B/A VICTOR GROUP, MOSHE SHUSTER, RAN KOROLIK

Defendants.

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INDEX NO. 657040/2019

MOTION DATE 07/19/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISSAL.

In this action involving a dispute arising from a contract for the construction of a luxury condominium, defendants move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint. Plaintiff the Charles Condominiums, LLC (Charles) opposes the motion.

Background

In its complaint,[1] Charles alleges that it sustained millions of dollars in damages as the result of the breach by defendant Victor RPM First (Victor) of an Amended and Restated Development Agreement (the Agreement) dated January 17, 2013, related to the development and the construction of a 32-story luxury condominium (the Condominium) on Manhattan's Upper East Side (the Project) (NYSCEF # 1, Complaint, ¶¶ 1-3; NYSCEF # 16, Agreement, Third Whereas Clause, §§ 2, 5).

Charles and Victor are parties to the Agreement under which affiliates of Charles provided substantially all the equity capital for the Project, while Victor agreed to be "solely responsible" for managing the development and the construction of the Project (NYSCEF # 1, ¶ 2) Defendants Moshe Shuster and Ran Korolik (together, the Individual Defendants) are executives of Victor's parent, defendant VRE Developments Inc. d/b/a Victor Group (Victor Group), and

[1] Unless otherwise noted, the facts are based on the allegations in the complaint which for the purposes of this motion must be accepted as true.

"personally were responsible for Victor's performance and oversight of the construction, and the financing for the development" (*id.*).

Under Victor's management, the Project was "plagued with construction defects" (*id.*, ¶ 3). Specifically, "Victor' s deficient construction and management (i) resulted in a burst water pipe in July 2016 and subsequent glycol leak that flooded several floors, displaced owners from their homes and caused extensive damage; (ii) necessitated a costly repair and replacement of a significant portion of the Condominium's pipe system, including for the floors above the floor on which the leak occurred; and (iii) exposed Charles to numerous other construction-related claims by the Condominium's unit owners, asserted on their behalf by its independent Board of Managers" (*id.*).

As a result of these construction defects, Charles was required "to suspend all Condominium unit sales for an approximately seventeen-months period of time (July 2016 through November 2017) so that the defects could be repaired, cash and other repair-related settlements could be reached with the Board … and appropriate disclosures could be filed with the New York Attorney General…" (*id.* ¶ 4). Because of the delays caused by the defects and Victor's failure to properly and timely construct the Condominium, "Charles missed opportunities to sell the Condominium units during favorable market periods" resulting in "substantially reduced sales prices" (*id.,* ¶¶ 4,6) Additionally, "many of the remaining units were incomplete or were beset by poor workmanship, causing the Condominium and its stakeholders to incur additional out of pocket costs that were Victor's responsibility under the Development Agreement, but which Victor refused to pay" (*id.*, ¶ 6). Victor also breached the Agreement by failing to advance funds to cover shortfalls resulting from Victor providing Charles with a projection in late 2015 and early 2016, which "vastly understated" additional costs needed to complete the Project and caused "significant cash flow shortfalls" (*id.*, ¶ 5).

"Throughout the relevant time period, and to this day, Victor was and is dominated and controlled by Shuster and Korolik" (*id.*, ¶ 7). In this connection Shuster and Korolik created Victor, a limited liability company, to "carry out the Victor Group's financial and construction obligations with respect to the [Project]" (*id.*, ¶73). The Victor Group's management team "carefully oversee[s] every aspect of the development process from land acquisition, through design, marketing, construction for the projects for which they participate (*id.*, ¶¶ 45, 72). "Shuster and Korolik used Victor as a vehicle to control the construction project and funnel fees to themselves and other commingled accounts under their control" (*id.*, ¶ 8). In so doing, they left Victor undercapitalized and unable to meet its obligations. They have also left Victor an empty shell that is unable to satisfy any judgment in this action" (*id.*, ¶¶ 8, 46-49; 80).[2]

[2] Certain of these allegations are made "upon information and belief" (NYSCEF # 1, ¶¶ 8, 80).

The complaint asserts a single cause of action for breach of contract based on allegations that defendants breached the Agreement by (i) failing to undertake and complete all tasks necessary to construct the Condominium in a timely manner, (ii) failing to cause the commencement and the diligent continuance of the construction of the Condominium in accordance with the work schedule, (iii) exceeding the budget for the construction of the Condominium, (iv) failing to advance the funds to cover the budget overruns, and (v) constructing, and causing the construction of the Condominium to be carried out, in a deficient manner, resulting in substantial construction defects (*id.*, ¶¶84-88). Charles seeks damages resulting from these breaches in amount no less than $15 million and disgorgement of a $5.7 million paid to Victor under the Agreement[3] (*id.*, Wherefore Clause, [a][b]).

Defendants move to dismiss the complaint on the grounds that Charles did not comply with a condition precedent to commence this action by providing written notice of any "Material Default" under the Agreement as required under §§ 9 and 11 (a). In support of their position that Charles failed to provide notice, defendants submit the affidavit of Korolik, who avers that he has been a principal owner of Victor since its inception in 2011 and an authorized signatory for VRE, and that "Charles never provided Victor with written notice of an alleged failure to comply with any provision of the Agreement" (NYSCEF # 15, ¶¶ 1 8).

Defendants also argue that based on the allegations in the complaint that (1) the construction work has been completed; (2) the burst water pipe and any defects repaired; (3) the Offering Plan has been accepted; and (4) the units are sold, any potential defaults by Victor have been cured.

Additionally, defendants argue that the Victor Group cannot be held liable because it did not provide services under the Agreement, was not a signatory to the Agreement, and is not mentioned in the Agreement. As for the Individual Defendants, defendants maintain that they cannot be held liable for any breach of the Agreement as they are not parties to the Agreement and were not required to provide services under the Agreement in their individual capacities, and that the allegations in the complaint are insufficient to pierce the corporate veil.

In opposition, Charles argues that the contractually mandated notice does not provide a basis for dismissal for failure to state a claim since "the performance or occurrence of a condition precedent need not be pleaded" to state a cause of action for breach contract (citing 3015[a]). Moreover, Charles argues that the alleged lack of notice is not a ground for dismissal based on documentary evidence because the only document relied on by defendants is the Agreement which contains the notice

[3] In *Victor RPM First, LLC v The Charles Condominium*; Index No. 653265/2018, which is also pending before this court, the remaining breach of contract claim alleges, *inter alia*, that Charles owes Victor a Back-End Fee under the Agreement.

requirement but does not address whether the requirement was met. Additionally, Charles maintains that the Korolik affidavit, the only evidence proffered on the alleged lack of notice, does not constitute documentary evidence for the purpose of 3211(a)(1).

In contrast, Charles proffers the affidavit of an authorized officer and printouts of dozens of emails to show that defendants received notice regarding the construction defects. Charles adds that defendants also had notice based on Victor's and Korolik's participation in numerous meetings, inspections and settlement discussions with Charles, the Board, and various subcontractors with the goal of remedying the defects (NYSCEF # 22, Aff. Michael Konig ¶¶ 20-22; NYSCEF # 24-28). Charles further argues that even if the notice was not in the precise form required under the Agreement, since actual notice was received and no prejudice shown, Victor cannot be relieved of liability based on the alleged lack of notice. Alternatively, Charles argues that notice would have been futile under the circumstances. As for Victor Group and the Individual Defendants, Charles argues that the complaint contains sufficient allegations to pierce the corporate veil.

In reply, defendants argue, *inter alia*, that dismissal of this action is appropriate as defendants have submitted evidence negating Charles' position that the required notice under the Agreement was provided and that the emails submitted by Charles do not constitute written notice as Charles failed to comply with the requirements of § 11(a) of the Agreement.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a)(7), the court must "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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]). Significantly, "whether a plaintiff…can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss" (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). Additionally, "to withstand dismissal, a plaintiff may submit opposing affidavits which can be considered to amplify the pleadings" (*M& E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 (1st Dept 2020], *lv dismissed* 38 NY2d 1086 [2021]). When extrinsic evidence is considered on a motion to dismiss, "the inquiry is whether the pleader has a cause of action and not whether [the pleader] has properly stated one" (*Blackgold Realty Corp v Milne,* 119 AD2d 512, 513 [1st Dept 1986], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Additionally, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not

presumed to be true or accorded every favorable inference'" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). However, dismissal based on documentary evidence under CPLR 3211(a)(1) may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v New York Life Ins. Co.,* 285 AD2d 73, 76 [1st Dept 2001][internal citation and quotation omitted]).

The first issues to be addressed are related to the Agreement's notice provisions contained in sections 9 and 11.

Section 9 (a) provides, in relevant part, that:

> (a) Development Manager (i.e. Victor) shall be in default of this Agreement if Development Manager engages in a Material Default. "**Material Default**" shall mean...(iii) if Development Manager ceases to actively perform the Project Work in compliance with the Loan Documents; (iv) failure by Development Manager to comply with any non-monetary provision of this Agreement within fifteen (15) days after notice thereof has been given to Development Manager (except that if same cannot be cured within such within fifteen (15) day period, then same shall not constitute a Material Default hereunder so long as Development Manager or its agents have commenced to cure same within such fifteen (15) day period and in good faith diligently and continuously prosecute same to completion; provided in all cases such cure shall be effectuated in not more than 90 days). Except as otherwise specifically provided above or elsewhere in this Agreement, if any monetary Material Default shall continue for a period of ten (10) business days after notice thereof by Owner specifying the items of Material Default, such Material Default shall thereafter constitute an "**Event of Default**" hereunder and then, in addition to Owner's right to terminate this Agreement, Owner shall have the right (but not any obligation) to take any and all steps Owner deems necessary to remedy or cure such Material Default or otherwise perform such obligations on Development Manager's behalf. If Owner remedies or cures such Event of Default, Development Manager shall, immediately upon demand therefor, reimburse Owner for all costs and expenses relating to or concerning such remedies, cure or performance of Development Manager's obligations, together with interest at the rate of 12% per annum form the date of outlay of such expense until reimbursement therefor is received by Owner.

(NYSCEF # 23, § 9[a] (emphasis in original]).

Section 11(a) provides, in part, that:

> All notices, demands, requests or other communications of any type give, or required to be given pursuant to this Agreement ("Notices") shall be in writing (it being agreed that email messages and faxes shall be deemed a writing for purposes of this Agreement) and shall be delivered to the person to whom the notice is directed, either in person with a receipt requested therefor, or sent by a recognized overnight service (e.g., FedEx), by United States certified mail, return receipt requested, postage prepaid, or by legible facsimile transmission, or via email, to the addresses (or fax numbers or email addresses) …[listed below]….

While the complaint does not allege that Charles provided notice of the default in compliance with the above notice provisions, dismissal for failure to state a cause of action is not warranted on this ground since "[t]he performance or occurrence of a condition precedent in a contract need not be pleaded" (CPLR 3015(a); *Warner Licensing Co., Inc. v Kitty Fan Koo & Fashion Franchises, Ltd.*, 281 AD2d 190, 191 [1st Dept 2001][rejecting defendant's argument that plaintiff failed to adequately plead performance of the agreement which "overlooks that CPLR 3015(a) …provides that performance of a condition precedent in a contract need not be pleaded"]; *Allis-Chalmers Mtg Co. v Malan Constr. Corp.*, 30 NY2d 225, 232 [1972][noting that in enacting CPLR 3015(a), the Legislature "eliminated any requirement that performance or occurrence of conditions precedent be pleaded"]).

Moreover, although defendants submit an affidavit from Korolik who states that Charles failed to provide notice in accordance with the Agreement, his statements are insufficient to conclusively establish a defense based on the lack of notice (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]["affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint … and do not otherwise conclusively establish a defense to the asserted claims as a matter of law"]; *compare ASKL Enterprises, Inc. v NYNEX Long Distance Inc.*, 7 AD3d 424, 425 [1st Dept 2004][affirming dismissal of complaint for breach of contract where "unrefuted evidence, including plaintiffs' own admissions, established [plaintiffs'] breach of their agreements with defendants" thus negating allegations of performance alleged in their complaints]).

Next, Korolik's affidavit does not constitute documentary evidence from which lack of notice can be established (*Amsterdam Hospitality Group, LLC v*

Marshall-Alan Associates, 120 AD3d 431, 432 [1st Dept 2014]). In this connection, the affidavit fails to qualify as documentary evidence as it cannot be said that the subject statement as to notice is "essentially undeniable" (*id.,* at 433 [internal quotation and citation omitted]). In fact, as indicated above, Charles has submitted an affidavit from one of its officers, together with emails, to refute Korolik's denial of receipt of notice (NYSCEF #22, ¶¶ 20-22; NYSCEF # 24-28). As for defendants' argument in reply that the notice was insufficient as it did not strictly comply with the specified methods for providing such notice under § 11(a) of the Agreement, such argument is not basis for granting a pre-answer motion to dismiss, particularly in view of plaintiff's submission of evidence suggesting that defendants received written notice via email (*see e.g., Gucci America, Inc. v Sample Sale Wholesalers List*, 39 AD3d 271, 272-273 [1st Dept 2007][petitioner was not barred from exercising default rights under settlement agreement based on failure to comply with methods specified for giving notice where respondents had notice of their default and an opportunity to cure]). Furthermore, contrary to defendants' apparent argument, the eventual resolution of the issues arising from defendants' alleged defaults does not eliminate their potential liability for damages resulting from such defaults.

Accordingly, the motion to dismiss based on Charles' purported failure to comply with the notice provisions of the Agreement is denied.

The remaining issues concern whether the action can be maintained against Victor Group and the Individual Defendants on a theory of piercing the corporate veil. To establish that piercing the corporate veil is warranted such as to impose liability on a corporation's owners or related entities, it must be shown that (1) the defendants exercised complete domination of the corporation, and (2) the defendants' domination of the corporation was used to commit a fraud or wrong against plaintiff that injured plaintiff (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). Factors to be considered in determining whether defendants have abused the privilege of doing business in the corporate form include (1) a failure to adhere to corporate formalities, (2) inadequate capitalization, (3) a commingling of assets, and (4) application of corporate funds for personal use. *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122 [2d Dept 2009], *aff'd* 16 NY3d 775 [2011]).

"[A] fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d at 46-47 [internal citations omitted]). At the same time, however, to survive a pre-answer dismissal motion, a 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 perpetuate a wrong or injustice" *(id.*, at 47-48 [internal citations and quotations omitted]).

Under this standard, the court finds that the complaint contains sufficient allegations to impose potential liability on the Victor Group and the Individual Defendants based on a theory of piercing the corporate veil. Specifically, the complaint alleges that these defendants dominated and controlled Victor, used Victor, which was undercapitalized, as a vehicle to control the Project and funnel fees to themselves and left Victor unable to meet its obligations under the Agreement (*Cobalt Partners, LP v GSC Capital Corp.*, 97 AD3d 35, 42 [1st Dept 2012]).

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss the complaint is denied; and it is further

ORDERED that defendants shall answer the complaint within 20 days of service of this order with notice of entry; and it further

ORDERED that a preliminary conference will be held by telephone on January 25, 2022 at noon, with the call-in number to be provide by the court.

12/2/2021
DATE

MARGARET A. CHAN, J.S.C.
MARGARET CHAN, 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