

334-340 Hotel Mgt. LLC v PCCM Supply, Inc.

2021 NY Slip Op 32801(U)

December 22, 2021

Supreme Court, New York County

Docket Number: Index No. 654206/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

BACKGROUND

Hotel Management is the owner of a construction project to renovate and convert certain floors of an existing hotel at the Premises (the “Project”). On or about June 22, 2020, Hotel Management, as Project owner, entered into an agreement with PCCM, as contractor (the “Contract”). Pursuant to the Contract, PCCM was to furnish materials and perform certain construction and related services for the Project. On or about May 7, 2021, PCCM is alleged to have wrongfully abandoned the Project. On or about June 11, 2021, because of PCCM’s alleged material breaches and wrongful abandonment of the Contract, Hotel Management terminated PCCM from the Project for cause.

On or about June 10, 2021, PCCM filed a mechanic’s lien against the Premises (the “Lien”). The Lien named 340 West and 340 West Two, as owners of the Premises. 340 West and 340 West Two are the only owners of the Premises. 340 Realty, Mehta Family and Mehta are not the owners of the Premises. There is no privity of contract between 340 Realty, Mehta Family or Mehta and PCCM. Hotel Management commenced this action by filing and serving a Summons and Complaint (the “Complaint”) on or about July 6, 2021. On or about August 6, 2021, PCCM filed the Counterclaims/Third-Party Complaint. On or about September 7, 2021, 340 West obtained a bond in the amount of \$399,650.97 (the “Bond”). On or about October 20, 2021, the Bond was filed with the New York County Clerk.

STANDARD OF REVIEW

It is the court’s function on a motion to dismiss to take the factual allegations alleged by the plaintiff and construe such allegations liberally, accepting as true for purposes of the motion the allegations contained in the complaint and determining if they fit into any cognizable cause of action. *See, Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 (2017). However,

“allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference.

David v Hack, 97 AD3d 437, 438 (1st Dept 2012); *Biondi v. Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

**PCCM’S QUASI-CONTRACT CLAIM IS BARRED
BY THE EXISTENCE OF A VALID WRITTEN CONTRACT**

The Second Counterclaim alleged against Hotel Management is based on the theory of unjust enrichment. This claim is precluded by the existence of the Contract, a valid written agreement. It is well-settled that the existence of an express agreement covering the issues in dispute precludes recovery under a theory of unjust enrichment or quasi contract. *See, e.g., Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 (1987). PCCM’s claims for unjust enrichment are identical to those allegations pleaded in its breach of contract claim against Hotel Management (the first counterclaim) and seeks to recover the exact same monetary damages. Thus, the Second Counterclaim for unjust enrichment does not provide a separate cause of action from the breach of contract claim. Accordingly, the Second Counterclaim is

**THE THIRD-PARTY DEFENDANTS ARE NOT APPROPRIATE PARTIES TO PCCM’S
LIEN FORECLOSURE ACTION**

None of the Third-Party Defendants are necessary or proper parties to the Lien Foreclosure Action. Thus, the Lien Foreclosure Action should be dismissed as to 340 West, 340 West Two, 340 Realty, Mehta Family and Mehta.

Following the Discharge of the Lien by Bond, 340 West and 340 West Two Are No Longer Necessary or Proper Parties to the Lien Foreclosure Action:

Third-Party Defendants 340 West and 340 West Two appear to be included in the Lien Foreclosure Action solely as owners of the Premises against which PCCM filed the Lien.

However, as there is no other basis alleged for naming 340 West and 340 West Two, there

should be dismissal of the Lien Foreclosure Action as against them because such entities are no longer necessary or proper parties to the action following the filing of the Bond discharging the Lien. Lien Law § 19(4) provides, that a mechanic's lien for a private improvement may be discharged “[e]ither before or after the beginning of an action by the owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property or the enforcement of the lien.” Lien Law § 19. “Where a bond has been filed discharging the lien, the bond ‘has replaced the real property as the security to be attached and attacked.’” *Bryant Equipt. Corp. v A-1 Moore Contracting Corp.*, 51 AD2d 792, 793 (2d Dept 1976). Discharging the bond triggers Lien Law § 37 (7), which requires only that “the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim prior to the date of the filing of such summons and complaint” be necessary parties to the action against the bond. Lien Law § 37 (7). Thus, once a private improvement lien has been discharged by the issuance of a bond, the private owner is neither a necessary nor a proper party to the action to enforce that lien because the bond replaces the property as the subject of the lien. Here, 340 West obtained the Bond in September 2021 and it was filed on or about October 21, 2021. Thus, the Lien has been discharged, and the Bond replaces the property as the subject of Lien Foreclosure Action, and 340 West and 340 West Two are will no longer be necessary or proper parties. Thus, the Lien Foreclosure Action should be, and is, dismissed as against these parties.

There is No Legal Basis for Naming 340 Realty, Mehta Family or Mehta in the Lien Foreclosure Action:

For the foregoing reasons, the Lien Foreclosure Action should also be dismissed as against 340 Realty, Mehta Family, and Mehta because once the Lien is discharged by Bond, the only proper and necessary parties in the Lien Foreclosure Action are the principal and surety on

the bond, the contractor, and claimants who have filed notices of claim prior to the date of the filing of the Complaint. *See*, Lien Law § 37. However, even if the Lien were not discharged by the Bond, the Lien Foreclosure Action must still be dismissed as against 340 Realty, Mehta Family, and Mehta because these entities are not ever a proper or necessary parties in an action to enforce the Lien. Lien Law section 44 sets forth the necessary parties in an action to enforce a mechanic's lien against real property or a public improvement. The necessary parties include: all prior and subsequent lienors and persons appearing by the records in the office of the county clerk or register to be owners of such real property. Lien Law § 44. Here, neither 340 Realty, Mehta Family, nor Mehta have liens filed against the Premises, nor are they owners of the Premises. Accordingly, they are not properly named in the Lien Foreclosure Action. Thus, the Lien Foreclosure Action should be, and is, dismissed as to these parties.

PCCM FAILS TO STATE A CAUSE OF ACTION FOR FRAUD

The Fraud Cause of Action should be dismissed pursuant to CPLR Rule 3016 (b), which states, in pertinent part, that “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” CPLR 3016. Conclusory allegations as to a defendant's actions are insufficient to satisfy the heightened pleading requirement set forth in CPLR Rule 3016 (b). *See, Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 (2009) (finding conclusory allegations, even when coupled with surrounding circumstances, did not give rise to reasonable inference of fraud); *Pontos Renovation Inc. v Kitano Arms Corp.*, 226 AD2d 191 (1st Dept 1996) (finding conclusory allegations of fraud and deception with respect to the subcontract did not meet the specificity requirements of CPLR Rule 3016 [b]). Moreover, a party “cannot sustain a cause of action for fraud where the only fraud

alleged consists of the breach of contract between the parties, and such allegations ‘do not concern representations which are collateral or extraneous to the terms of the parties’ agreement....’” Thus, “to state a claim for fraud separate from a breach of contract, [a party] must allege the breach of a legal duty which exists independent of the contract.’ Where the fraudulent conduct alleged amounts only to [a party’s] false representation that it was adhering to the terms of the contract, the claim for fraud must be dismissed as redundant of the breach of contract claim.” *Helprin v Harcourt, Inc.*, 277 F Supp 2d 327, 336 (SD NY 2003) (internal citations omitted) (applying New York law). Thus, to satisfy the pleading requirements of CPLR 3016 (b), a party alleging fraud must plead sufficient details concerning the purportedly fraudulent actions, and where, as here, the alleged fraud (insufficient funds to support payment for a Project) is the same as the breach of contract claim (nonpayment), the party alleging fraud must allege the breach of an independent legal duty. PCCM has failed to meet either of these requirements.

The Third-Party Complaint merely states bare legal conclusions that reiterate the legal standard for fraud and doctrine of corporate veil without alleging a single specific or relevant fact. Because the Third-Party Complaint simply states the legal conclusion PCCM’s hopes to prove – fraud – without sufficiently explaining the basis for that claim, the Fraud Cause of Action fails to satisfy the requisite legal standards and must be dismissed.

Moreover, the Third-Party Complaint should be dismissed as against Mehta because PCCM fails to allege a level of wrongdoing or fraud required to pierce the corporate veil under New York law. Thus, the Third-Party Complaint fails to state a cause of action for fraud, and the Fraud Cause of Action is dismissed.

The Allegations in the Third-Party Complaint Are Deficient:

The supporting factual allegations in the Fraud Cause of Action, if assumed to be true, are insufficient to support a claim for fraud. PCCM contends that Mehta represented “during conversations” that the Third-Party Defendants had sufficient monies to fund the Project, that in “fact,” Third-Party Defendants did not actually have sufficient monies to fund the Project, and that Mehta knew that Third-Party Defendants did not actually have sufficient monies to fund the Project. *See*, Third-Party Complaint [NYSCEF Doc. No. 9] ¶¶ 73, 75-76, 125, 127-28. Even if assumed to be true, this assertion, without additional factual allegations, does not support a claim for fraud. PCCM provides no details regarding where, when, or what Mehta represented with respect to the financial position of the Third-Party Defendants, provides absolutely no details about the Third-Party Defendants’ purported lack of actual funds, and nothing whatsoever to support that Mehta had actual knowledge of this purported financial deficiency. The only other allegations with respect to PCCM’s reliance on misrepresentations in the Fraud Cause of Action are: (i) that the Third-Party Defendants (not Hotel Management) purportedly “misappropriated” monies allocated to the Project to other “unrelated projects” (neither of which alleged projects are owned by Third-Party Defendants or Hotel Management); and (ii) that after Hotel Management and PCCM entered into the Contract, the Third-Party Defendants (not Hotel Management) attempted to procure loans from various entities, with absolutely no allegations that these purported loans were meant to fund the Project or were in any way related to the Contract or the Project. *See*, Third-Party Complaint ¶¶ 74, 77-78, 126.

First and foremost, Hotel Management is the owner of the Project and the party with whom PCCM contracted. Second, even if the Third-Party Defendants (who are not contracting parties) sought out loans during the pendency of the Project, those purported facts, as alleged,

were after the Contract was entered into and thus could not be part of PCCM's reliance in entering into the Contract.

PCCM's remaining supporting factual allegations alleged in the Third-Party Complaint are simply repetitive and conclusory. They include that PCCM relied on Mehta's purported misrepresentations in entering into the Contract (Third-Party Complaint, ¶ 129); PCCM's reliance was reasonable (*id.*, ¶ 130); and that the Third-Party Defendants' purported misrepresentations proximately caused PCCM's purported damages (*id.*, ¶¶ 131-32). Again, assuming the truth of these allegations without more does not satisfy the heightened pleading standard for fraud. PCCM does not allege any facts that suggest that the Third-Party Defendants were, in fact, undercapitalized.

Moreover, PCCM does not allege any facts regarding the amount of funds Mehta claimed the Third-Party Defendants had, allegations of how the Third-Party Defendants intended to fund the Project, amounts that it supposedly misappropriated, or when said funds were misappropriated. There is simply no basis for any inference that Mehta knew of or participated in any misappropriation of funds. PCCM is apparently relying on the mere logical possibility that Mehta could have misappropriate funds, simply because it is a decision maker for the Third-Party Defendants. This is insufficient to meet the heightened pleading standard set out in CPLR 3016 (b).

PCCM Fails to Allege Sufficient Grounds to Pierce the Corporate Veil:

The viability of PCCM's claim against Mehta depends entirely on the doctrine of piercing the corporate veil. The critical question is whether the managing member of a limited liability entity, through his or her domination, abused the privilege of doing business to perpetrate a wrong or injustice against that party such that a court will intervene. *Morris v N.Y.*

State Dept. of Taxation & Fin., 82 NY2d 135 (1993). Moreover, in order to state a viable claim against a member in his individual capacity for actions taken on behalf of the corporate entity, a party must allege facts that, if proved, indicate that the member exercised complete domination and control over the corporate entity and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice. *Id.* Factors to consider when assessing disregard of the corporate form include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use. *E.g., Millennium Constr. LLC v. Loupolover*, 44 AD3d 1016 (2nd Dept 2007). Thus, a party seeking to pierce the corporate veil must sufficiently allege two elements: (1) facts showing an abuse of the corporate form, and (2) wrong or fraud resulting from such abuse. Despite the requirement to do so, PCCM fails to set forth facts in a particularized fashion detailing fraud or other corporate misconduct that would warrant veil. *See, Sheridan Broadcasting v Small*, 19 AD3d 331 (1st Dept 2005) (affirming dismissal of claims and holding that plaintiffs did not allege with particularity statements that would warrant piercing the corporate veil).

The Complaint Must Allege More Than Dominion and Control:

PCCM's claims against Mehta fail to set forth substantive allegations that allege more than dominion and control of the Third-Party Defendant corporate entities. New York law recognizes that domination and control of a corporation is inadequate to support veil piercing because, otherwise, the principle of limited liability company would be rendered wholly illusory, and the shareholders and officers of any corporation could be hauled into court with great frequency. Indeed, it has consistently been held that domination and control of a corporation must be paired with conduct demonstrating a perversion of the privilege of doing business in the corporate form to be actionable. Mere conclusory allegations of same are insufficient. *TNS*

Holdings Inc. v MKJ Securities Corp., 92 NY2d 335 (1998). In this instance, PCCM's allegations do not allege more than dominion and control. In fact, PCCM's allegations are so conclusory, vague, and generalized, it is questionable whether the pleadings are sufficient to allege domination and control in anything more than a cursory manner. For example, at paragraphs 134 through 138 of the Third-Party Complaint, PCCM makes the following allegations with respect to Mehta:

As it pertains to Mehta, individually, he exercised complete dominion over each of the Owner Defendants.

Such dominion and control was used to perpetrate the fraud detailed above.

The Owner Defendants used each other's finances and resources at will, all under Mehta's control.

Profits were shifted between the Owner Defendants, all under Mehta's control.

There was overlap of management and control of the Owner Defendants, all under Mehta's control.

As a result of the foregoing, the corporate veil should be pierced and Mehta be personally liable for any damages sustained by Defendant.

These sparse, conclusory statements, which are patently lacking in specificity or supporting detail, do not satisfy the standards for veil piercing. *See, Itamari v Gordon Dev. Corp.*, 298 AD2d 559 (2d Dept 2002) (finding that mere conclusory statements could not sustain an action against shareholder in his individual capacity); *Kats v East 13th Street Tifereth Place LLC*, 73 AD3d 706 (2d Dept 2010).

PCCM Fails to Allege a Required Nexus Between the Alleged Abuse and the Alleged Wrong

Giving PCCM all the favorable inferences arising from its allegations, the Third-Party Complaint still fails to adequately state a claim against Mehta due to PCCM's inability to allege

facts that, if proved, indicate that Mehta “abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice.” *Morris, supra*, 82 NY2d at 142. “Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer ... personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in ‘bad faith’ while representing the corporation.” *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 (2011). To hold Mehta personally liable, PCCM must demonstrate that Mehta exercised its purported domination over the Third-Party Defendants for the purpose of harming PCCM. The claimed injustice must consist of more than merely the tort or breach of contract that is the basis of PCCM’s lawsuit. *See, e.g., Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946 (2d Dept 2013) (a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil). However, PCCM’s recitation of alleged veil piercing does not change the fact that there is no fraud or other wrong alleged against Mehta or the other Third-Party Defendants, other than the underlying breach of contract claim for nonpayment.

In actions where the cause of an alleged injury is not the use of domination over a corporation *per se*, the result should be dismissal of claims against individuals premised on the theory of corporate veil piercing. *See, JTS Trading v Trinity White City Ventures Ltd.*, 139 AD3d 630 (1st Dept 2007) (failure to show how entity was used to commit a fraud or a wrong); *Goldman v Chapman*, 44 AD3d 938 (2d Dept 2007) (dismissing complaint at pleading stage where domination and control were shown, but did not support a finding of wrongdoing for equitable relief to pierce), *lv denied* 10 NY3d 702 (2008).

PCCM failed to plead that the damages it purportedly suffered as a result of Mehta’s conduct arose out of Mehta’s alleged failure to observe certain corporate formalities. Such a

nexus between alleged conduct and damages is necessary to make a showing that would support piercing the corporate veil. The Third-Party Complaint also fails to allege that Mehta used his purported dominion and control to commit a wrong against PCCM. Insofar as PCCM has alleged no wrong other than Mehta's purported dominion and control of the Third-Party Defendants, there is no appropriate basis for personal liability against Mehta. Accordingly, the veil piercing allegations in this particular case cannot suffice to sustain the Fraud Cause of Action against Mehta.

The Breach of a Contract is Not a Harm Warranting Veil Piercing

Even if the Fraud Cause of Action would have been pled with the requisite particularity, it cannot be sustained because it is merely duplicative of the breach of contract claim asserted against Hotel Management. PCCM's allegations make clear that the primary wrongful act complained of is nonpayment under the Contract (first counterclaim) and that it relied on Mehta's purported misrepresentations concerning adequate capitalization in entering into the Contract, which, in turn, lead to its nonpayment. Aside from the fact that the allegations related to the Fraud Cause of Action are wholly conclusory, they are also related solely to the nonpayment cause of action itself. An alleged breach of contract alone does not warrant piercing the corporate veil. *See, Skanska v Atlantic Yards B2 Owner LLC*, 146 AD3d 1, 12 (1st Dept 2016), *affd* 31 NY3d 1002, *rearg denied* 31 NY3d 1141 (2018).

PCCM failed to allege any fraud or injustice to justify piercing the corporate veil to impose liability on Mehta. The alleged misrepresentations to induce PCCM to enter into the Contract, and the resulting claim for non-payment under the Contract, are damages that all flow from the contractual relationship. Insofar as PCCM does not have a wrong independent from the alleged contractual breach, the first cause of action is dismissed as against Mehta.

Accordingly, it is

ORDERED that the motion to dismiss the Second Counterclaim is granted in its entirety, and said counterclaim is dismissed; and it is further

ORDERED that the motion to dismiss the Lien Foreclosure Action as against the Third-Party Defendants is granted in its entirety, and said action is dismissed; and it is further

ORDERED that the motion to dismiss the Fraud Action as against the Third-Party Defendants is granted in its entirety, and said action is dismissed.

This will constitute the decision and order of the court.

ENTER:



<u>12/22/2021</u> DATE					<u>LOUIS NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	