37 Crosby Realty LLC v Burgundy Color Bar Inc.
2022 NY Slip Op 33504(U)
October 14, 2022
Supreme Court, New York County
Docket Number: Index No. 652077/2022
Judge: Lyle Frank
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK, ***Justice*** — **PART** **11M**

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37 CROSBY REALTY LLC,

Plaintiff,

- v -

BURGUNDY COLOR BAR INC.,BURGUNDY SALON, INC.,ANA PASTORINO, SANJEEV CHAAND, RAJNEESH ABHOL, KAMALJIT KAUR, CARLOS PASTORINO, XYZ COMPANIES, JOHN OR JANE DOES

Defendant.

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INDEX NO. 652077/2022

MOTION DATE 05/27/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, this motion to dismiss is granted in part.

Plaintiff 37 CROSBY REALTY LLC ("Crosby") commenced this action for breach of contract, breach of guaranty, fraud, insider transfer avoidance pursuant to UVTA §§ 274(b) and 276 and related laws, fraudulent conveyance pursuant to DCL §§ 273, 274, 275, 276, 276-a, and 278, and successor liability, against defendants BURGUNDY COLOR BAR INC.,BURGUNDY SALON, INC.,ANA PASTORINO, SANJEEV CHAAND, RAJNEESH ABHOL, KAMALJIT KAUR, CARLOS PASTORINO, XYZ COMPANIES, JOHN OR JANE DOES (Collectively "The Defendants"). In this decision and order, the parties will be referred to as "Tenant Company" for Burgundy Color Bar Inc.; "Successor Company" for Burgundy Salon, Inc., and, collectively, as the "Defendant Companies"; "Defendant owners" for Ana Pastorino and Sanjeev Chaand collectively; "Defendant Guarantors" for Rajneesh Abhol, Kamaljit Kaur, and Carlos Alberto

Pastorino collectively, and, together with Defendant Owners, referred to as the "Defendant Principals".

Facts

Defendant Owners entered into a 10-year lease agreement with Plaintiff in 2015 for a retail space in the building where it established a salon. In 2020, Defendant Owners negotiated more favorable terms for their lease with plaintiff. Defendant Owners then, around that time, moved their business, under a new company but the same business name and marketing, to a nearby location, without informing the plaintiff. Plaintiff alleges that this operation constitutes a fraudulent-conveyance scheme accompanied by other related deception and wrongdoing by Defendants against it in connection with the leasing relationship between the parties.

Discussion

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994). With respect to CPLR§3211(a)(1), a motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff's factual allegations, and conclusively establishes a defense as a matter of law. *See Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 327 (2002). Furthermore, judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," would qualify as "documentary evidence" in the proper case. *Fontanetta v. Doe*, 73 A.D.3d 78 (2d Dep't 2010).

Cause of action #1: Breach of contract

Against Defendant Principals

Defendants move to dismiss Plaintiff's First Cause of Action against defendants Ana Pastorino, Sanjeev Chaand, Rajneesh Abhol, Kamaljit Kaur, and Carlos Alberto pursuant to CPLR §3211(a)(1)(7) alleging that those defendants are not personally liable as agents of defendant Tenant Company, and that plaintiff has failed to factually plead piercing the corporate veil.

The concept of "piercing the corporate veil" is a limitation on accepted principles that corporation exists independently of its owners as a separate legal entity, that owners are normally not liable for debts of corporation, and that it is perfectly legal to incorporate for the express purpose of limiting liability of corporate owners. *Morris v. New York State Dep't of Tax'n & Fin.*, 82 N.Y.2d 135, 623 N.E.2d 1157 (1993). Although there are no definitive rules governing circumstances when corporate veil may be pierced, there is generally required showing that: (1) owners exercised complete domination of corporation in respect to transaction attacked; and (2) such domination was used to commit fraud or wrong against plaintiff which resulted in plaintiff's injury. *Id.* Further, it has been held by the Court of Appeals that, at the pleading stage, a plaintiff seeking to pierce the corporate veil must adequately allege the existence of a corporate obligation and that the defendant exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice. *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 96 N.E.3d 191 (2018).

In *Ventresca Realty Corp. v. Houlihan*, 41 A.D.3d 707, 838 N.Y.S.2d 609 (2007), the Second Department held that piercing corporate veil of shell entity created solely for purpose of signing commercial lease was warranted, so as to permit imposition of personal liability against corporation's principals for corporation's debt under commercial lease, where principals completely dominated and controlled corporation, and abused the corporate form to advance their

own personal interests, by exercising that control to commit a wrong against landlord in vacating the premises and causing breach of lease.

Plaintiff alleges in the complaint that Defendant Principals stripped Tenant Company of its assets to the profit of Successor Company, in an attempt to render Tenant Company judgment proof and defraud the plaintiff. Plaintiff also alleges that Defendant Owners own and control both of Tenant Company and Successor Company, and that Tenant Company was stripped of its assets in order to defraud plaintiff. If these allegations were found to be true, it is this court's opinion that piercing the corporate veil could be warranted. Accordingly, this motion to dismiss is denied as to the first cause of action with regards to the Defendant Principals.

Against Successor Company

Defendants move to dismiss plaintiff's first cause of action against defendant Burgundy Salon, Inc., alleging lack of contractual privity between the Successor company and the plaintiff. Plaintiff alleges that the Successor Company is the alter ego of the Tenant Company and that, as such, the application of the alter ego doctrine is warranted.

Contractual relationship exists if the plaintiff is in privity of contract with the defendant or is a third-party beneficiary of the contract. *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat. Ass'n*, 747 F.3d 44 (2d Cir. 2014). Absent a contractual relationship there can be no contractual remedy. *Id*. However, the purpose of the alter ego doctrine in the context of a contract is to prevent a company from evading its obligations under the contract through a sham transaction or technical change in operations. The test of alter ego status is flexible, allowing courts to weigh the circumstances of the individual case, while recognizing that the following factors are important: whether the two enterprises have substantially identical management, business purpose,

operation, equipment, customers, supervision, and ownership. *Ferrara v. Smithtown Trucking Co.*, 29 F. Supp. 3d 274 (E.D.N.Y. 2014).

Plaintiff alleges in the Complaint that the Successor Company is the alter ego of the Tenant Company, by presenting multiple facts such as the marketing of the Successor Company as the continuation of the Tenant company, notably through its website where it indicates "Since 2016". If these allegations were found to be true, it is this court's opinion that applying the alter ego doctrine could be warranted. Accordingly, this motion to dismiss is denied as to the first cause of action with regards to the Successor Company.

<u>Cause of action #2: Breach of guaranty</u>

Defendants move to dismiss plaintiff's second cause of action against defendants Rajneesh Abhol and Kamaljit Kaur alleging that it is improperly duplicative of plaintiff's first cause of action for breach of contract, and for allegedly failing to state a cause of action because the guaranty was allegedly not breached. Plaintiff counterargues that defendant's arguments are frivolous, and that the documents presented are not documentary evidence for the purposes of CPLR 3211(a)(1).

To be considered "documentary," for purposes of motion to dismiss based on documentary evidence, evidence must be unambiguous and of undisputed authenticity. *Fontanetta v. Doe,* 73 A.D.3d 78, 898 N.Y.S.2d 569 (2010). Here, the guaranty agreements produced by the defendants, although unsigned, appear to be unambiguous, and plaintiff has not disputed their authenticity.

Pursuant to the guaranty agreement in order to be released from any potential personal liability, the following four factors were to be satisfied: "(1) Defendant vacated the Subject Premises, (2) Defendant left the Subject Premises in broom clean condition, (3) Defendant delivered the keys to the Subject Property, and (4) Defendant gave at least 180 days' notice prior to surrendering possession of the Subject Property". (*See* NYSCEF Doc 15. Paragraph C.1.) The

guaranty limits liability with respect to money "up to the date that is the last to occur" of the four factors, and is completely silent as to any alleged rental arrears or ongoing use and occupancy.

Plaintiff does not, in its complaint or in opposition to this motion, allege that any of the four factors did not occur, neither does plaintiff allege any breach by Defendant Guarantors before the date that the last of the four factors to occurred. Accordingly, this motion to dismiss is granted as to the second cause of action.

Cause of action #3: Fraud

Defendants move to dismiss plaintiff's third cause of action against defendants, alleging that it is improperly duplicative of plaintiff's first cause of action for breach of contract, and for allegedly failing to satisfy CPLR § 3016(b). Plaintiff alleges in this third cause of action that defendants engaged in concerted actions to defraud it in connection with their leasing relationship by misrepresenting and/or omitting material facts to the plaintiff with the intent and effect of inducing Landlord to take actions against its interests.

Simple breach of contract is not to be considered tort unless a legal duty independent of contract itself has been violated; legal duty must spring from circumstances extraneous to and not constituting elements of contract, although it may be connected with and dependent upon contract. *Clark-Fitzpatrick, Inc. v. Long Island R. Co.,* 70 N.Y.2d 382, 516 N.E.2d 190 (1987).

Here, plaintiff did not plead facts or circumstances showing that the Defendants breached a duty independent of the duty imposed upon them by the parties' contract, and therefore, the claim lies in breach of contract rather than fraud. Accordingly, this motion to dismiss is granted as to the third cause of action.

Causes of action #4 and 5: Insider transfer avoidance and Fraudulent conveyance

Defendants move to dismiss plaintiff's fourth and fifth causes of action against defendants, alleging failure to state a cause of action. Plaintiff contends that the Tenant Company was insolvent within the meaning of section 271(a) of the UVTA at the time it transacted with the defendants, and that, as such, transfers made from insolvent debtors like defendant to insiders are voidable as fraudulent conveyances. Plaintiff further contends that the Defendant Owners caused Tenant Company to incur obligations for their benefit without fair consideration, and enumerates a number of alleged transactions allegedly made to defraud the plaintiff.

Under New York law, insolvency is a question of fact that must be determined under circumstances of each particular case. *In re BICOM NY, LLC,* 633 B.R. 25 (Bankr. S.D.N.Y. 2021). A party pleading a cause of action for fraudulent conveyance must allege specific facts, including, among other things, the identity of the specific transactions or conveyances that the plaintiff alleges were fraudulent. *Syllman v. Calleo Dev. Corp.*, 290 A.D.2d 209, 210 (1st Dept. 2002).

Plaintiff provides, upon information and belief, a specified list of alleged transfers made within that timeframe between Successor Company and other defendants, stressing that the full extent of the transfers away from Tenant Company remains unknown and unknowable by plaintiff outside of discovery. It is this court's opinion that plaintiff has met the specificity requirement and that, if these allegations were found to be true, the defendants would be liable under section 271(a) of the UVTA and fraudulent conveyance laws. Accordingly, this motion to dismiss is denied as to the fourth and fifth causes of action.

Cause of action #6: Successor liability

Defendants move to dismiss plaintiff's sixth cause of action against defendants, alleging failure to state a cause of action. Plaintiff contends, in this sixth cause of action, that the defendants and other operative entities of defendants through which they operate the Successor Location,

including Defendant Successor, are liable for the obligations of Defendant under several theories of successor liability including successor liability by fraudulent transaction, *de facto* merger, and mere continuation.

The First Department held in 2013 that elements of *de facto* merger include "continuity of ownership" and "cessation of business" and re-opening using "same location with the same people, clients, management and operations" *ePlus Grp. Inc. v. SNR Denton LLP,* 111 A.D.3d 494, 495 (1st Dept. 2013).

Here, the facts indicates that the Successor Company present elements of continuity with the Tenant Company, as explained in the court's analysis of the prior causes of actions. For the reasons above, it is the Court's opinion that, if these allegations were found to be true, successor liability would be applicable in this case. This motion to dismiss is therefore denied as to the sixth cause of action. Accordingly, it is hereby

ORDERED that the motion to dismissed is granted to the extent that the second and third causes of action are dismissed, and the motion is otherwise denied.

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10/14/2022		LYLE FRANK, J.S.C.
DATE		

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