

**Charles Condominiums, LLC v Victor RPM First,  
LLC**

2022 NY Slip Op 34067(U)

November 30, 2022

Supreme Court, New York County

Docket Number: Index No. 657040/2019

Judge: Margaret Chan

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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, and RAN  
KOROLIK,

Defendants.

INDEX NO. 657040/2019

MOTION DATE 04/26/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON  
MOTION**

-----X

VICTOR RPM FIRST, LLC,

Counterclaim Plaintiff,

-v-

THE CHARLES CONDOMINIUMS, LLC, 1355 FIRST AVENUE  
FEE HOLDER LLC, LAND OWNER LLC, RAMIN KAMFAR,  
and PHILIP MENDLOW,

Counterclaim Defendants.

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for

DISMISS

In this action involving a dispute arising from a contract for the construction of a luxury condominium, plaintiff owner the Charles Condominiums, LLC (Charles) moves to dismiss the verified amended counterclaims filed by the defendant counterclaim plaintiff Victor RPM First, LLC (Victor), the developer for the project. Victor opposes the motion and cross moves to consolidate, for joint trial and discovery, this action with a related action titled *Victor RPM First, LLC v Charles Condominium, LLC*; Index No. 653265/2018 (Victor Action). Charles opposes the cross-motion.

## Background

In its complaint, Charles alleges that it sustained millions of dollars in damages as the result of the breach by Victor of an Amended and Restated Development Agreement (the Development 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 # 23, Development Agreement, Third Whereas Clause, §§ 2, 5). Charles and Victor are parties to the Development 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).

The complaint asserts a single cause of action for breach of contract based on allegations that defendants breached the Development 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 (NYSCEF # 1, ¶¶ 84-88). Charles seeks damages resulting from these breaches in an amount no less than \$15 million and disgorgement of a \$5.7 million payment to Victor under the Development Agreement (*id.*, Wherefore Clause, [a][b]).

Defendants moved to dismiss the complaint arguing, *inter alia*, that Charles failed to allege that it provided Victor notice of its default as required under the Development Agreement, and that the complaint contained insufficient allegations as to Victor Group and the Individual Defendants to support piercing the corporate veil; Charles opposed the motion (NYSCEF #'s 12-19, 22-30, 32). By Decision and Order dated December 2, 2021, the court denied the motion (NYSCEF # 37).

Defendants thereafter served a Verified Answer with counterclaims naming various counterclaim defendants (Original Counterclaims) (NYSCEF # 42). Charles moved to dismiss the Original Counterclaims (NYSCEF #'s 43-55). Instead of opposing the motion, defendants filed an Amended Verified Answer with Amended Counterclaims (Amended Counterclaims) against Charles and four new parties-- counterclaim defendants 1355 First Avenue Fee Holder LLC (Fee Holder), 1355 First Avenue Land Owner LLC (Land Owner), Ramin Kamfar, and Philip Mendlow (together, the New Counterclaim Defendants)(NYSCEF #'s 63-64).

Regarding Fee Holder and Land Owner, they are alleged to be Charles' affiliates, predecessors and stakeholders, through which, *inter alia*, Charles began the Project and retained Victor and entered into a series agreements regarding the Project including (a) the Amended and Restated Limited Liability Company Agreement of 1355 First Avenue Land Owner, LLC (the LLC Agreement); (b) the Development Agreement; and (c) the Backstop Agreement (the Backstop)(NYSCEF # 62-Amended Counterclaims, ¶¶ 63, 66). As for Kamfar, it is alleged that "he personally oversaw Charles' performance of the Development Agreement to the extent it related to Charles' financial obligations and made all financial decisions on behalf of Charles" (*id.*, ¶ 86). With respect to Mendlow, it is alleged that Mendlow signed the Development Agreement, the LLC Agreement, and Backstop on behalf of Charles, and Fee Holder and Land Owner, and was "personally responsible for Charles' day-to-day operations" and "overseeing aspects of Charles' performance," and that of its affiliates, predecessor and stakeholders, including Fee Holder and Land Owner, under the Development Agreement, LLC Agreement and Backstop with respect to the Project (*id.*, ¶¶ 87-89).

The Amended Counterclaims seek damages for breach of contract (against all the counterclaim defendants), imposition of a constructive trust (against Charles) and an accounting (against Charles). The breach of contract counterclaim seeks damages in the amount of \$4,288,570.80 based on allegations that Charles breached section 10.1 of the Development Agreement by failing to pay Victor a management fee in connection with the sale of at least two condominiums and that under section 10.2, Victor is owed a Back-End Fee (NYSCEF # 62, ¶¶ 70-76, 105-111). Although the New Counterclaim Defendants were not parties to the Development Agreement, the breach of contract counterclaim seeks to hold them liable for breach of the agreement on a veil piercing theory. In support it is alleged, *inter alia*, "upon information and belief" that: (i) "Fee Holder, Land Owner, Kamfar and Mendlow devised a scheme to purchase the Property and construct the Project while minimizing their financial exposure through the creation of Charles"; (ii) "Charles is a single purpose entity with no assets other than ownership in the condominium units"; (iii) "Charles was created by Kamfar and Mendlow to develop the Project and to carry out Fee Holder and Land Owner's financial obligations with respect to the Project"; (iv) the New Counterclaim Defendants "dominate and control Charles, which has no assets and no independent physical existence"; (v) "Charles has no offices, phones, email addresses, websites, or personnel, other than what it shares with Fee Holder and Land Owner"; and (vi) "Fee Holder and Land Owner used Charles as a vehicle to control the Project and to funnel fees to themselves and other comingled accounts under their control and, in so doing, they left Charles undercapitalized and unable to meet its financial obligations, [and] an empty shell that is unable to satisfy any judgment in this action" (*id.*, ¶¶ 81-85, 91).

Charles moves to dismiss the Amended Counterclaims, arguing that (i) the Amended Counterclaims against Charles are duplicative of Victor's pending claims

against Charles in the Victor Action and should be dismissed pursuant to CPLR 3211(a)(4); (ii) the constructive trust counterclaim is barred by res judicata based on Justice Sherwood's dismissal of claims seeking the same relief in the Victor Action, and by existence of the Development Agreement; (iii) the dismissal of the claims against Charles requires the dismissal of the counterclaims against the New Counterclaim Defendants pursuant to CPLR 3019(a).

Charles also argues that the allegations in the Amended Counterclaims are insufficient to pierce the corporate veil under Delaware Law which applies since Charles is a Delaware, LLC. In support of this argument, Charles submits various documentary evidence including a bank statement from its operating account at Key Bank showing that it has \$5,347,001.19, dated March 31, 2022, which is just prior to the filing of the Amended Counterclaims on April 1, 2022 (NYSCEF # 75).<sup>1</sup>

Charles adds that the court should order sanctions requiring Victor to pay the counterclaim defendants' attorneys' fees incurred in responding to the Original Counterclaims and Amended Counterclaims.

In opposition and in support of its cross motion to consolidate, Victor argues that the pendency of the Victor Action does not warrant dismissal of the Amended Counterclaims since the two actions should be consolidated. In addition, Victor contends that res judicata does not bar its constructive trust claim since the dismissal of claims in the Victor Action was not on the merits or with prejudice and that, in any event, the dismissed claims were "materially different" than that of the constructive trust counterclaim. Next, Victor argues that even if the counterclaims against Charles were dismissed, dismissal of the counterclaim against the New Counterclaim Defendants is not required under CPLR 3019(a) and, in any event, consolidation of this action and the Victor Action would eliminate the issue.

As for the constructive trust counterclaim, Victor argues that it is not barred by the Development Agreement since it may proceed on theories of both quasi-contract and breach of contract. Victor also asserts that the allegations in the Amended Counterclaim sufficiently allege a basis for piercing corporate veil under Delaware law and points to various extrinsic evidence including the LLC Agreement, Development Agreement, Backstop and organizational chart that allegedly support these allegations. Lastly, Victor asserts that Charles is not entitled to sanctions since neither the Original Counterclaims nor the Amended Counterclaims can be said to be frivolous.

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<sup>1</sup> Charles argues that Victor's denial of its construction management obligations (NYSCEF # 62, ¶¶ 13, 14), which constitutes an admission that it did not perform its obligations under the Development Agreement, is fatal to the breach of contract counterclaim. The court need not address this argument since by Decision and Order dated September 9, 2022, the court rejected substantially the same argument made by in the Victor Action in support of its summary judgment motion (NYSCEF # 98 at 2).

In reply, Charles argues, *inter alia*, that under binding law of the First Department, the proposed counterclaims must be dismissed under CPLR 3211(a)(4) as duplicative of the claims already raised in the Victor Action.

### Discussion

The threshold issue on this motion is whether the Amended Counterclaims should be dismissed under CPLR 3211(a)(4)<sup>2</sup> on the ground of another action pending based on the earlier filed Victor Action.

The original complaint in the Victor Action asserted eight causes of action based on Charles' failure to pay the full amount of the Back-End Fee that Victor allegedly earned for its construction management services under the Development Agreement, and on Charles' alleged diversion of the net cash derived from the sale of condominium units, which deprived Victor of the Back-End Fee (NYSCEF #'s 67, 72). After oral argument on the record, Justice Sherwood granted Charles' motion to dismiss the second through eighth causes of action (NYSCEF #'s 68, 72). The claims for a declaratory judgment (second), unjust enrichment (third), quantum meruit (fourth), money had and received (sixth), and for injunctive relief (seventh) were dismissed after Victor's counsel conceded at oral argument that they were subject to dismissal (NYSCEF # 78 at 2-3). As for the claims for conversion (fifth) and breach of the implied covenant of good faith and fair dealing (seventh), Justice Sherwood dismissed both claims, "not because [Victor] has failed to plead the elements of each of those causes of action but because both claims are duplicative of the breach of contract claim which is the fundamental claim we have here" (*id.* at 25).

After Justice Sherwood dismissed all but the claims except for the breach of contract claim, Victor filed an Amended Complaint against Charles asserting cause of actions for (i) breach of contract alleging failure to pay the full Back-End Fee, and failure to pay Victor a Development Management Fee, respectively, under section 10.2 and 10.1 of the Development Agreement, (ii) a declaratory judgment that the "Available Cash" for distribution as a Bank-End Fee not be reduced by fee, expenditures and expenses incurred by non-party Bluerock investors (Bluerock), the alleged majority owner of Fee Holder, through Charles, and (iii) an accounting of the books and records of the Project (NYSCEF # 69). By Decision and Order dated November 26, 2019, Justice Sherwood granted Charles' motion to dismiss the claim

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<sup>2</sup> CPLR 3211(a)(4) provides that:

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires....

for a declaratory judgment writing that “this claim is no less duplicative of plaintiff’s breach of contract claim than the earlier claim” (NYSCEF # 70). Accordingly, the remaining causes of action in the Victor Action are against Charles for breach of the Development Agreement and for an accounting.

In determining whether dismissal is warranted based on the earlier commenced Victor Action, the court notes that it “has broad discretion in determining whether an action should be dismissed based on another action pending between the same parties arising out of the same subject matter or series of alleged wrongs and it is inconsequential that different legal theories or claims were set forth in the two actions” (*Shah v RBC Capital Mkts. LLC*, 115 AD3d 444, 445 [1st Dept 2014] citing *Whitney v Whitney*, 57 NY2d 731, 732 [1982]). In this regard, where a party seeks to litigate a claim involving the same wrong that has been raised in a related action, dismissal is appropriate under CPLR 3211(a)(4) (*Friedman v 16 Madison Square Hous. Corp.*, 113 AD3d 557, 557 [1st Dept 2014]).

Here, the Amended Counterclaims against Charles must be dismissed on the grounds of another action pending since the Amended Counterclaims for breach of contract and for an accounting involve the same parties and arise out of the same wrongs as the identical claims in the Victor Action (*id.*; see also, *Pen and Pencil Publs., Inc. v Lembeck*, 2014 WL 840406, \*3 [Sup Ct, NY County Feb. 28, 2014] [dismissing claim based on another action pending where plaintiff “seeks to litigate an identical claim that has already been raised in a related action before the Court...”]). Regarding the remaining counterclaim against Charles seeking the imposition of a constructive trust over the \$4,288,570.80 allegedly owed to Victor under the Development Agreement, Justice Sherwood’s dismissal of essentially duplicate claims for unjust enrichment and money had and received in the Victor Action warrants the dismissal of this claim under CPLR 3211(a)(4) (*Syncora Guar. Inc. v J.P. Morgan Secs. LLC*, 110 AD3d 87, 96 [1st Dept 2013][stating that to warrant a dismissal based on another action pending, “[i]t is not necessary that the precise legal theories presented in the first action also be presented in the second action”][internal citation omitted]). In any event, the counterclaim for a constructive trust must be dismissed since the subject matter of the claim is governed by the Development Agreement (*Hamrick v Schain Leifer Guralnick*, 146 AD3d 606, 607 [1st Dept 2017]).

Moreover, the addition of the New Counterclaim Defendants does not warrant a different result since this action and the Victor Action “seek the same relief for the same alleged injuries” and “there is still a substantial identity of the parties which is sufficient” (*Brook v Zuckerman*, 155 AD3d 415, 415-416 [1st Dept 2017]; see *Syncora Guar. Inc.*, 110 AD3d at 96 [“substantial, not complete, identity of parties is all that is required to invoke CPLR 3211 (a)(4)”][internal citation and omitted]). In the absence of a viable counterclaim against Charles, it appears that the breach of contract counterclaim against the New Counterclaim Defendants is

not properly asserted as a counterclaim (*see* CPLR 3019(a) “[a] counterclaim may be any cause of action in favor of one or more defendants... against one or more plaintiffs... or a plaintiff and other persons alleged to be liable”)[emphasis supplied]; *see also New York Indus. Centre Corp. v Natl. Biscuit Co.*, 14 AD2d 761, 761 [1st Dept 1961] [holding that Civil Practice Act § 271 (the similarly worded predecessor to CPLR 3019) “does not allow additional defendants to be brought into an action upon a claim that does not embrace plaintiff to the action”]; *Linzer v Bal*, 184 Misc. 2d 132 [Civ Court, New York County 2000] [finding respondent’s counterclaim improper when counterclaim is not expressly directed at petitioner]); *but see Stryker Sec. Group Inc. v Elite Investigations Ltd.*, 2013 WL 4035348 [Sup Ct NY County Aug. 7, 2013] [noting that courts have recognized an exception to the rule requiring a counterclaim to be asserted against plaintiff and other parties where the counterclaim is “so closely connected with plaintiffs’ cause of action that it should be litigated in [the] action” (*quoting Gettinger v Glasser*, 204 AD 829 [1st Dept 1923])].

In any event, the court finds that the allegations in the Amended Counterclaim are insufficient to provide a basis for piercing the corporate veil so as to give rise to liability of the New Counterclaim Defendants for breach of the Development Agreement. Under applicable Delaware law,<sup>3</sup> “[p]iercing the corporate veil under alter ego theory requires that the corporate structure cause fraud or similar injustice. Effectively, the corporation must be a sham and exist for no other purpose than as a vehicle for fraud” (*Wallace ex. Rel., Cencom Cable Income Partners II, Inc. v Wood*, 752 A2d 1175, 1183 [Del Ch 1999][internal quotations omitted]); *see also Nieves v Insight Bldg. Co., LLC*, 2020 WL 4463425, at \*8 [Del. Ch. Aug. 4, 2020][“Judicial disregard for the corporate form is not a remedy available to plaintiffs who merely wish to hold another entity liable in addition to the one with whom they contracted”].

Here, Victor has not adequately alleged that Charles is a sham which exists solely to perpetuate a fraud or injustice. In fact, Charles is alleged to have engaged in business in which it developed the condominium, entered into a construction management agreement with the construction manager of the Project, maintained a bank account at Key Bank in furtherance of the Project, and sold condominium units from which proceeds are used to pay fees, expenses and distributions to investors (NYSCEF # 62, ¶¶ 63-66, 77-78, 83) (*see In re Sunstates Corp. Shareholder Litigation*, 788 A2d 530, 534 [Del. Ch. 2001][dismissing veil-piercing claims where “the record shows that each of [the subject] entities was engaged in substantial business operations and was formed or acquired by Sunstates for purposes relating to the pursuit of normal business operations”]). Additionally, Charles has submitted evidence that at the time the Amended Counterclaims were filed, it had an operating account with more than \$5 million, which contradicts

<sup>3</sup>Victor does not deny that its veil piercing claims are governed by Delaware law since Charles is a Delaware LLC.

allegations that Charles “left Charles undercapitalized and unable to meet its financial obligations” (*id.*, ¶ 90).

Finally, although the court finds that the Amended Counterclaims are without merit, it cannot be said that they are frivolous such as to warrant the imposition of sanctions. Likewise, the filing of the Original Counterclaims, which were withdrawn by Victor upon receipt of Charles’ motion to dismiss these counterclaims, do not provide a basis for an award of sanctions.

### Conclusion

In view of the above, it is

ORDERED that the motion by plaintiff the Charles Condominiums, LLC to dismiss the Verified Amended Counterclaims is granted and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the Verified Amended counterclaims in their entirety; and it is further

ORDERED that the caption is amended to read as follows:

THE CHARLES CONDOMINIUMS, LLC,

Plaintiff,

- v -

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

Defendants.

and it is further

ORDERED that plaintiff the Charles Condominiums, LLC shall serve a copy of this decision order with notice of entry on the Clerk of the General Clerk’s Office and the County Clerk who are directed to mark their records to reflect the change in the caption; and it is further

ORDERED that such service upon the General Clerk’s Office and the County Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible

at the "E-Filing" page and on the court's website at the address ([www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the cross motion by defendant Victor RPM First, LLC to consolidate this action with a related action titled *Victor RPM First, LLC v Charles Condominium, LLC*; Index No. 653265/2018 is denied

11/30/2022

DATE



MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE