

Fordham Chera Acquisitions LLC v Cohen

2023 NY Slip Op 32018(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 453711/2021

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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FORDHAM CHERA ACQUISITIONS LLC,

Index No. 453711/2021

Plaintiff

- against -

DECISION AND ORDER

DORON COHEN and LEGACY HOME FASHION,
INC.,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks a judgment against defendant Cohen for approximately \$795,000 plus interest, attorneys' fees, and expenses based on a judgment plaintiff obtained in 2018 in a prior action against defendant Legacy Home Fashion, Inc., for its breach of a lease in failing to pay plaintiff rent, taxes, violation fines, and permit fees. Plaintiff alleges that Cohen is Legacy Home Fashion's sole shareholder and officer, which he does not dispute. Plaintiff seeks the judgment in this action against Cohen either as a guarantor of Legacy Home Fashion's lease or as the corporation's alter ego, by piercing the corporate veil. At oral argument October 20, 2022, the parties agreed to convert Cohen's motion to dismiss the amended complaint into a motion for summary judgment dismissing the amended

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complaint against Cohen and to submit additional affidavits, exhibits, and memoranda supporting and opposing summary judgment dismissing the amended complaint against him. C.P.L.R. § 3211(c).

II. SUMMARY JUDGMENT

To obtain summary judgment, Cohen must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence eliminating all material factual issues. C.P.L.R. § 3212(b); Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d 173, 179 (2020); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014). If he fails to make this evidentiary showing, the court must deny his motion. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Dorador v. Trump Palace Condo., 190 A.D.3d 479, 481 (1st Dep't 2021). If he meets this initial burden, the burden shifts to plaintiff to rebut that prima facie showing by producing admissible evidence sufficient to require a trial of material factual issues. Bill Birds, Inc. v. Stein Law Firm, P.C., 35 N.Y.3d at 179; De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader

Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008). In evaluating the evidence for purposes of Cohen's summary judgment motion, the court construes the evidence in the light most favorable to plaintiff. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d at 475; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

III. LIABILITY BASED ON THE GUARANTY

Cohen establishes a prima facie defense supporting summary judgment dismissing plaintiff's claim against him as a guarantor by denying he signed a guaranty for Legacy Home Fashion's lease. Reply Aff. of Doron Cohen, NYSCEF Doc. 103, ¶ 6. By presenting admissible evidence that he did not sign a guarantee, Cohen shifts the burden to plaintiff to raise a factual issue that he did sign a guarantee. Herman v. Judlau Contracting, Inc., 204 A.D.3d 496, 496 (1st Dep't 2022).

Plaintiff, however, fails to produce either an original or an admissible copy of a guaranty executed by Cohen. The affidavit by Charles Chera, plaintiff's managing member, in the prior action against Legacy Home Fashion refers only to an unsigned guaranty. Aff. of Charles Chera, NYSCEF Doc. 89, ¶ 7(A). In this action plaintiff attempts to rectify this omission by presenting a copy of a signed guaranty that Charles Chera

attests plaintiff found in 2017. Supp. Aff. of Charles Chera Ex. A, NYSCEF Doc. 105.

"In order for a piece of evidence to be of probative value, there must be proof that it is what its proponent says it is. The requirement of authentication is thus a condition precedent to admitting evidence." People v. Price, 29 N.Y.3d 472, 476 (2017) (quoting United States v. Sliker, 751 F.2d 477, 497 (2d Cir. 1984)). A person familiar with the evidence may identify it for the court. Id. Charles Chera, however, never attests that he observed an original signed guarantee when plaintiff claims Cohen agreed to it or at any time afterward, nor that the copy of a guaranty he now presents is identical to that original. Plaintiff admits that Charles Chera was not present and instead his son, Raymond Chera, was present when the lease was executed and any guaranty also would have been executed, but Raymond Chera nowhere attests to Cohen's execution of a guarantee. In fact Raymond Chera testified in the prior litigation between the parties that he did not recall Cohen executing a guarantee. Since Charles Chera's affidavits do not authenticate an original or a complete and accurate copy of a guaranty, C.P.L.R. § 4539, plaintiff fails to present admissible evidence raising a factual issue to rebut Cohen's prima facie defense.

As a last resort, plaintiff suggests Cohen signed the lease in his personal capacity. Not only does the lease itself

demonstrate that Cohen signed it for the tenant Legacy Home Fashion, and no evidence indicates otherwise, but plaintiff obtained its judgment against Legacy Home Fashion on the grounds that it was the tenant bound by the lease. Therefore the court grants Cohen's motion for summary judgment dismissing plaintiff's claim that Cohen is liable for the judgment against Legacy Home Fashions based on a guaranty.

IV. LIABILITY BASED ON PIERCING THE CORPORATE VEIL

The amended complaint also seeks to hold Cohen liable for the judgment against Legacy Home Fashion by piercing the corporate veil. To pierce the corporate veil between Legacy Home Fashion and Cohen, plaintiff must show that Cohen dominated Legacy Home Fashion and used that domination to commit a fraud or other wrong against plaintiff. Cortlandt St. Recovery Corp. v. Bonderman, 31 N.Y.3d 30, 47-48 (2018); Walsam 316, LLC v. 316 Bowery Realty Corp., 190 A.D.3d 626, 626 (1st Dep't 2021); Springut Law PC v. Rates Tech. Inc., 157 A.D.3d 645, 646 (1st Dep't 2018). To obtain summary judgment dismissing the claim, defendant must present admissible evidence that Cohen did not dominate Legacy Home Fashion or, even if he did, that he did not use that domination to injure or inflict an injustice on plaintiff. Han v. Chen, 213 A.D.3d 453, 455 (1st Dep't 2023). Speculation alone does not avoid summary judgment. Maternity Warehouse Inc. v. Starr Indem. & Liab. Co., 209 A.D.3d 563, 564

(1st Dep't 2022).

Cohen's affidavit that Legacy Home Fashion followed the formal requirements of an incorporated entity, with a federal employer identification number, and kept its own separate bank account and books and records establishes a prima facie defense supporting summary judgment dismissing plaintiff's alter ego claim. Plaintiff presents neither documents nor testimony based on personal knowledge to rebut Cohen's affidavit. Plaintiff merely asks the court to deny Cohen's motion for summary judgment dismissing plaintiff's veil piercing claim (1) based on Charles Chera's affidavit repeating the unverified amended complaint's conclusory allegations that Cohen underfunded and commingled funds with Legacy Home Fashion and (2) because plaintiff has not yet obtained disclosure from defendants. C.P.L.R. § 3212(f).

A motion for summary judgment may be defeated if the court determines "from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." Id. No affidavit supports plaintiff's claim that such "facts . . . may exist." To defeat a summary judgment motion, plaintiff may not simply rest on its unverified amended complaint and suggest examples of facts plaintiff hopes to support, but must identify testimony exclusively within defendant's knowledge or documents in defendant's possession that likely will raise a material factual issue. 800 Third Ave.

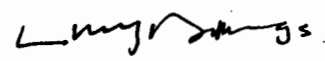
Assocs., LLC v. Roadrunner Cap. Partners LLC, 214 A.D.3d 429, 430 (1st Dep't 2023). "The mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion." Singh v. New York City Hous. Auth., 177 A.D.3d 475, 476 (1st Dep't 2019). To the contrary, plaintiff must show that such "facts . . . may exist." C.P.L.R. § 3212(f). See Board of Managers of Apthorp Condo. v. Apthorp Garage LLC, 187 A.D.3d 632, 633 (1st Dep't 2020).

Here, plaintiff only speculates. It suggests no potential testimony or documents regarding undercapitalization of Legacy Home Fashion or intermingling of funds between Legacy Home Fashion and Cohen. To the extent plaintiff suggests disclosure may reveal Cohen's transfer of Legacy Home Fashion's funds or inventory to other entities, such facts might support a fraudulent conveyance, but not an alter ego claim. To the extent plaintiff suggests disclosure may reveal Cohen's transfer of assets from the store where Legacy Home Fashion was plaintiff's tenant to other stores owned by Legacy Home Fashion, such facts support neither a fraudulent conveyance, nor an alter ego claim, nor any other irregularity in corporate operations. Therefore the court also grants Cohen's motion for summary judgment dismissing plaintiff's claim that Cohen is liable for the judgment against Legacy Home Fashion based on piercing the corporate veil.

V. CONCLUSION

For the reasons explained above, the court grants defendant Cohen's motion for summary judgment dismissing the amended complaint against Cohen. C.P.L.R. § 3212(b).

DATED: May 31, 2023



LUCY BILLINGS, J.S.C.

**LUCY BILLINGS
J.S.C.**