

567 Realty Co., LLC v Accessible Realty LLC

2023 NY Slip Op 33380(U)

October 2, 2023

Supreme Court, New York County

Docket Number: Index No. 154518/2021

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

-----X

567 REALTY CO., LLC,

Plaintiff,

- v -

ACCESSIBLE REALTY LLC, JULIO TEJADA AGENCY
LLC, JULIO TEJADA, STATE FARM INSURANCE AGENCY

Defendant.

-----X

INDEX NO. 154518/2021

MOTION DATE 07/24/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for DISMISS.

In this commercial landlord-tenant action for breach of contract, unjust enrichment, and use and occupancy, defendant-tenant Accessible Realty LLC (Accessible) and defendants Julio Tejada Agency LLC (the Tejada Agency), and Julio Tejada move to dismiss plaintiff 567 Realty Co., LLC's (567 Realty) amended complaint pursuant to CPLR § 3211 (a) (7) for failure to state a claim and pursuant to CPLR § 3211 (a) (1) and (7) for failure to state a claim based on documentary evidence. In the alternative, defendants seek additional time to serve and file an answer to the amended complaint pursuant to CPLR § 3211 (f).

BACKGROUND

The dispute in this action arises over a lease dated December 24, 2008, between plaintiff as landlord and Accessible as tenant for commercial space located at 567 West 170th Street, New York, New York (the premises) (Amended Verified Complaint, ¶ 7, NYSCEF Doc No 64). Plaintiff claims the lease was executed by Tejada as the sole member of Accessible and that Accessible is an alter ego of the Tejada Agency and/or Tejada (*id.* at ¶¶ 8, 39). Pursuant to

Article 1.6 of the lease the fixed monthly rent payable the last year of the lease was \$5,871.48 (Lease, ¶ 1.16, NYSCEF Doc No 65). Pursuant to Article 6 of the lease, Accessible was required to pay twenty percent of the real estate taxes of the premises (*id.* at ¶ 6). Pursuant to Article 1.12 of the lease the permitted use of the premises was the operation of a State Farm Insurance Agency (State Farm) office (*id.* at ¶ 1.12). During the term of the lease, the Tejada Agency and Tejada made most of the rent and additional rent payments on behalf of Accessible (NYSCEF Doc No 64 at ¶ 14).

After the expiration of the lease on December 31, 2018, defendants claim that plaintiff and the Tejada Agency orally agreed that the Tejada Agency would be the sole tenant of the premises going forward for use as a State Farm office (Tejada Affirm, ¶ 5, NYSCEF Doc No 62). In February 2019, plaintiff tendered to defendants a lease renewal for an additional ten years; however, defendants did not sign it (Lease Renewal, NYSCEF Doc No 47). Instead, plaintiff accepted payment from defendants as delineated in the renewal lease in the amount of \$6,125.00 per month from January 2019 to March 2020 and \$6,308.75 per month from April 2020 to December 2020 (NYSCEF Doc No 64 at ¶ 20; NYSCEF Doc No 62 at ¶¶ 6-7). Defendants did not pay real estate taxes after the expiration of the lease (NYSCEF Doc No 64 at ¶ 21). Plaintiff never objected to Tejada Agency occupying the premises after the expiration of the lease and did not send any notice claiming any of the tenants were holding over (NYSCEF Doc No 62 at ¶ 5).

Plaintiff now seeks to enforce paragraph 23.2, the holdover provision, of the expired lease requiring Accessible to pay 200% of the rent payable under the lease for the last year of the term.

DISCUSSION

When determining if a complaint may be dismissed for failing to state a cause of action pursuant to CPLR § 3211 (a) (7), “the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff’s favor” (*Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 [1st Dept 2006]). The motion “must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*id.* [internal quotations omitted]). However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

Additionally, a “CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, . . . may be appropriately granted [] where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The Tejada Agency & Tejada

Defendants argue plaintiff’s first and second causes of action for breach of contract, third cause of action for agency, and sixth cause of action for attorneys’ fees against the Tejada Agency and Tejada should be dismissed because they are not parties to the lease, lack privity with Accessible, and do not have an alter ego relationship with Accessible.

Plaintiff responds that the grant of plaintiff’s previous cross-motion to file an amended complaint implicitly conveys that the amended complaint sufficiently states claims for piercing

the corporate veil; regardless, the amended complaint sets forth sufficient facts to support plaintiff's causes of action; and the documentary evidence submitted by defendants of corporate entity information from the Department of State, copies of rent statements, and copies of canceled rent checks paid by the Tejada Agency do not refute plaintiff's claims for piercing the corporate veil.

Defendants reply that the earlier decision permitting amending the complaint does not bar a pre-answer motion to dismiss because the finding that the amended complaint "is not palpably insufficient or clearly devoid of merit" does not equate to a finding that the amended complaint states proper causes of action or that the documentary evidence does not refute plaintiff's claims.

Privity

It is well established that a plaintiff may not maintain a cause of action for breach of contract where it had no contractual relationship with the defendant and was not in privity with it (*Vogel v Lyman*, 246 AD2d 422 [1st Dept 1998]). Furthermore, there is no privity of contract between a subtenant and prime landlord, and as such a subtenant is not liable to the prime landlord under the terms of the lease (*La Vack v Natl. Shoes, Inc.*, 124 AD2d 352, 353 [3d Dept 1986]; *see also Ivan Mogull Music Corp. v Madison-59th St. Corp.*, 162 AD2d 336, 337 [1st Dept 1990]). Additionally, individuals who sign a lease on behalf of a corporate tenant but are not individual parties to the lease agreement are entitled to dismissal of breach of contract claims asserted against them (*see Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965-66 [2d Dept 2019]).

Here, the lease plaintiff seeks to enforce is only signed by Accessible and there is no evidence of plaintiff's privity with any other defendants (*see* NYSCEF Doc No 65). Even if

Tejada signed the lease for Accessible, he is not bound to it personally (*see Victory State Bank*, 169 AD3d 963).

Alter Ego

“Generally, a member of a limited liability company cannot personally be held liable for any debts, obligations or liabilities of the limited liability company, whether arising in tort, contract or otherwise. The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on members for the obligations of the limited liability company” (*Gold v 22 St. Felix, LLC*, 2023 NY Slip Op 04194, *3 [2d Dept 2023] [internal citations and quotations omitted]). “[P]iercing the corporate veil requires showing that: (1) the owners exercised complete domination of the corporation [or LLC] in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [party seeking to pierce the corporate veil] which resulted in [the party’s] injury” (*id.* at *3-4). “While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward the plaintiff is required” (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140-42 [1993] [internal citations omitted]).

Here, plaintiff does not plead sufficient facts that permit piercing the corporate veil because although plaintiff pleads sufficient facts detailing the element of complete domination, *i.e.*, (1) Tejada entered into the lease; (2) Accessible was organized solely to execute the lease; (3) the sole member of Accessible is Tejada; (4) Accessible maintained no books of account or records; (5) Accessible has no assets; (6) Accessible was not adequately capitalized; (7) Accessible’s sole asset was the lease; (8) Accessible received no income during the lease or

holdover terms; (9) Tejada completely dominated Accessible; (10) Tejada disregarded the corporate formalities; and (11) Tejada and the Tejada Agency co-mingled funds with Accessible; plaintiff fails to plead any facts alleging that defendants used Accessible to commit a fraud or wrong against plaintiff (NYSCEF Doc No 64, ¶¶ 23-29) (*see Matter of Morris*, 82 NY2d at 141-42 [“The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their ‘alter ego,’ without more, will not suffice to support the equitable relief of piercing the corporate veil.”]).

Accordingly, defendants’ motion to dismiss plaintiff’s first and second causes of action for breach of contract, and sixth cause of action for attorneys’ fees against the Tejada Agency and Tejada will be granted and the claims will be dismissed.

Agency

“[A]n individual who signs a contract as an agent for an entity will be held personally liable on the contract if the agency relationship is not disclosed” (*Winer v Valentino*, 121 AD3d 1264, 1265 [3d Dept 2014]). “Whether or not a principal is disclosed depends on whether, at the time of the underlying transaction, the other party to the contract had notice that the agent was acting for a principal and knew of the principal’s identity” (*id.*). Here, since the lease contains Accessible’s name as the tenant, Accessible is not an undisclosed principle and therefore, the Tejada Agency and Tejada cannot be held liable under it (*see* NYSCEF Doc No 65).

Accordingly, defendants’ motion to dismiss plaintiff’s third cause of action that the Tejada Agency and Tejada were agents of an undisclosed principal will be granted and the claims will be dismissed.

Unjust Enrichment and Use and Occupancy

Defendants argue that plaintiff's fourth cause of action for unjust enrichment and fifth cause of action for use and occupancy should be dismissed because plaintiff is not entitled to additional use and occupancy when rent has been paid in full.

To state a claim for unjust enrichment, a plaintiff must allege that: (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Further, a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party. Although contractual privity is not required, there must be a relationship between the parties that is not too attenuated, and that could have caused reliance or inducement

(*Schroeder v Pinterest Inc.*, 133 AD3d 12, 26 [1st Dept 2015] [internal quotations omitted]).

Here, plaintiff invoiced State Farm Insurance and accepted checks from the Tejada Agency in the amount of the invoices (NYSCEF Doc Nos 68 & 69) "without any reservation of rights [which] operates as an accord and satisfaction discharging the claim. The theory underlying this common-law rule is that the parties have entered into a new contract discharging . . . their obligations under the original contract . . ." (*Nationwide Registry & Sec., Ltd. v B&R Consultants, Inc.*, 4 AD3d 298, 299 [1st Dept 2004]). Plaintiff does not allege in the complaint that there was not "a clear manifestation of [its] intent" to accept these payments in full satisfaction of its claim for use and occupancy (*cf. id.*). Therefore, defendants documentary evidence refutes plaintiff's causes of action for unjust enrichment and use and occupancy.

Accordingly, defendants' motion to dismiss plaintiff's fourth cause of action for unjust enrichment and fifth cause of action for use and occupancy against the Tejada Agency and Tejada will be granted.

Accessible

Defendants argue that all claims should be dismissed against Accessible because a subsequent month-to-month lease was created after the initial lease expired, which supersedes the holdover terms in paragraph 23.2 of the expired lease plaintiff now seeks to enforce. Plaintiff responds that even though plaintiff invoiced and accepted rent in a lesser amount after the lease expired, the “No Waiver of Default” provision in paragraph 18.5 of the expired lease applies such that Accessible remained obligated to pay the holdover rent.

The documents submitted by defendants do not unmistakably demonstrate plaintiff’s intention to surrender its rights to holdover payments from Accessible (*Elite Gold, Inc. v TT Jewelry Outlet Corp.*, 31 Add3d 338, 340 [1st Dept 2006]). Therefore, plaintiff’s amended complaint sets forth breach of contract and attorneys’ fees claims as against Accessible that are not utterly refuted by defendants’ documentary evidence (*accord Goshen*, 98 NY2d at 326).

Accordingly, defendants’ motion to dismiss plaintiff’s first and second causes of action for breach of contract and sixth cause of action for attorneys’ fees as against Accessible will be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendants’ motion to dismiss is granted to the extent that the first and second causes of action for breach of contract, the third cause of action for agency, fourth cause of action for unjust enrichment, fifth cause of action for use and occupancy and the sixth cause of action for attorneys’ fees as against defendants the Tejada Agency and Tejada are dismissed and the motion is otherwise denied; and it is further

ORDERED that the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the action shall bear the following caption:

567 REALTY CO. LLC,

Plaintiff,

-against-

ACCESSIBLE REALTY LLC, STATE FARM INSURANCE AGENCY,

Defendants.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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 on the court’s website at the address www.nycourts.gov/supctmanh].


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10/2/2023
DATE

PAUL A. GOETZ, 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