

Aryeh Realty Corp. v Joseph

2023 NY Slip Op 33749(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 654723/2021

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

domination and control as the sole shareholder and director of Blow Bar, Joseph caused Blow Bar to breach its lease agreement with respect to its rent obligations. Plaintiff also claims that, upon the expiration of the lease, Joseph transferred most of Blow Bar's employees to other Valery Salons.

In its original complaint, plaintiff seeks the following: a money judgment against Blow Bar in the amount of at least \$391,251.52, plus pre-judgment interest, based on breach of the lease (first cause of action); a money judgment as against Joseph in the amount of at least \$391,251.52, plus pre-judgment interest (second cause of action); and Blow Bar's liability under New York's Business Corporation Law (third cause of action). Plaintiff also asserts the following causes of action: fraudulent conveyance (fourth cause of action); declaratory judgment that the other companies are alter ego of Joseph (fifth cause of action); and damages against successor (sixth cause of action).

Defendants move, pre-answer, to dismiss plaintiff's original complaint pursuant to CPLR 3211(a)(1) and (a)(7). Joseph argues that he became the sole shareholder of each of the Valery Salons (separate and distinct companies that operate independent businesses at different locations in the State of New York) due to and upon his wife's passing, and that these independent corporations were formed, existed, and operated prior to Blow Bar (NYSCEF Doc. No. 9, *affidavit of Joseph Valery*, ¶3-10, 16). Joseph also avers in his affidavit that the parties "agreed to modify the lease so that, beginning in January 2019, Blow Bar's rent payment would be limited to \$14,000.00 per month." Defendants argue that plaintiff's second cause of action as a claim for "[d]amages against Joseph, as [s]ole [p]roprietor," in that he dominates the Valery Salons and their assets, and has used them as an instrumentality, agent, and alter ego of himself is improper because New York does not recognize claims for alter ego (NYSCEF Doc. No. 16, *memo*, pg 10-13). Defendants further contend that plaintiff's allegations are wholly comprised of recitations of the standard elements required to seek piercing of the corporate veil, and that such mere recitation cannot withstand a motion to dismiss.

Plaintiff filed an amended complaint after defendants filed their motion to dismiss. In the amended complaint, plaintiff seeks only the following:² a money judgment against Joseph (alleging alter ego) in the amount of at least \$391,251.52, plus pre-judgment interest (first cause of action) and a money judgment of at least \$391,251.52, plus pre-judgment interest in damages against Blow Bar for the breach of the lease (second cause of action). Lastly, plaintiff sets forth that it is entitled to attorney fees for defendants' breach of lease (third cause of action).³

In opposition, plaintiff argues it is entitled to amend the complaint during the pendency of defendants' motion to dismiss the original complaint pursuant to CPLR 3025(a). Plaintiff articulates that it has sufficiently alleged an alter-ego claim regarding Joseph's alleged dominion over Blow Bar, and, in the alternative, pleads breach of contract as against the corporate-

² In the amended complaint, plaintiff no longer asserts claims against VALERY JOSEPH @ BRIDGEHAMPTON, INC., VALERY JOSEPH @ PARK AVENUE, INC., VALERY JOSEPH SALON 2 LTD., and VALERY JOSEPH SALON LTD. In this regard, Plaintiff discontinues the following causes of actions alleged in the original complaint: "Receivership" (3rd); "Fraudulent Conveyance" (4th); "Declaratory Judgment" (5th); and "Successor Liability" (6th).

³ The amended complaint is the operative complaint, and the court will address the causes of action asserted therein.

defendant Blow Bar in its amended complaint, which supersedes the original complaint (NYSCEF Doc. No. 25, *opposition*, pg 7). To this point, plaintiff sets forth that it has alleged sufficient facts for the claim of piercing the corporate veil to withstand dismissal at the pleading stage such as Joseph's operating his salons as a single business under his sole control, that Blow Bar was a shell for the acts and omissions of a single dominant shareholder and director, and that Blow Bar's existence is purely for the personal benefit of Joseph (*id.*, at pg 10). Plaintiff likewise states that Joseph misused the Blow Bar's corporate form to commit a wrong by deciding not to pay plaintiff the rent owed under the lease and that now Blow Bar is no longer conducting business at the premises. Plaintiff claims it cannot collect on the rent owed because Joseph has intentionally undercapitalized Blow Bar (*id.*, at pg 12-13). Plaintiff maintains that defendants' arguments that the facts alleged cannot sustain an alter ego liability as against Joseph should fail because either their conclusion is wrong or they fail to analyze the facts accurately. Additionally, plaintiff contends that the fact that some of the allegations in the amended complaint were made "upon information and belief" does not render them implausible because the relevant details which are not available to plaintiff at this pleading stage are solely within the possession and control of defendants (*id.*, at pg 15). Lastly, plaintiff argues that defendants do not submit any documentary evidence disputing Joseph's control over the Valery Salons, or proof that all business decisions are conducted for Joseph's personal gain as opposed to the benefit of the individual corporations.

In reply, defendants admit that the amended complaint is the operative complaint and assert that plaintiff does not attach any affidavits or documents—not even the lease—to attempt to support plaintiff's allegations. Defendants argue that the first cause of action should be dismissed because it fails to allege a claim for alter-ego liability or breach of contract against Joseph, since it cannot be stated that plaintiff entered into a contract with Joseph or that plaintiff performed its duties under any alleged contract. Defendants further contend that the cause of action for alter-ego or piercing the corporate veil should be dismissed because it is not an independent cause of action recognized in New York. In furtherance of this point, defendants maintain that plaintiff's allegations are conclusory insofar as they are premised on "information and belief" and lack particularity because it does not allege sufficient facts explaining how Joseph dominated and used Blow Bar's corporate status to funnel Blow Bar's cash-flow out of its creditor's reach (NYSCEF Doc. No. 32, *reply*, pg 12). Concerning plaintiff's commonality allegations — that the businesses have a common business model, salon name and related signage, and social media accounts and website — defendants maintain that they are insufficient to support piercing any corporate veil. Defendants articulate that another reason to dismiss the complaint is that plaintiff relies on its own books and records as the source of its "information and belief" or the basis for the alter-ego and other allegations. Defendants argue that plaintiff's second cause of action should be dismissed because plaintiff does not provide affidavit or proof in admissible form addressing or refuting Joseph's sworn statements that the parties "agreed to modify the Lease so that, beginning in January 2019, Blow Bar's rent payment would be limited to \$14,000.00 per month," and therefore, that fact must be deemed admitted. Plaintiff has thus admitted that the parties, according to defendants, agreed to a lower rent—the very basis of plaintiff's supposed breach of contract claim (*id.* at pg 17). Lastly, defendants assert that the third cause of action for attorneys' fees should be dismissed because in New York, the issue of attorneys' fees is not the proper subject for an independent cause of action.

When considering defendants' motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Normally, a court should not be concerned with the ultimate merits of the case. (See *Anguita v Koch*, 179 AD2d 454, 457 [1st Dept 1992].) A CPLR 3211(a)(1) 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, conclusively establishing a defense as a matter of law (See *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Concerning the breach of contract claim against Joseph for allegedly using Blow Bar as his alter ego (first cause of action), the court finds that this claim survives defendants' motion to dismiss. A party seeking to pierce the corporate veil must establish that "the owners exercised complete domination and control of the corporation with respect to the transaction attacked; and (2) such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury" (*Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, 173 AD3d 568, 568 [1st Dept 2019]). Here, the court notes that while an attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation, plaintiff has alleged corporate debt in the form of Blow Bar's failure to pay rent pursuant to the lease, purportedly caused by Joseph's use of the corporate form to solely dominate and control the activities of Blow Bar (See *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 50 [2018].) The amended complaint adequately alleges lack of corporate formalities and that, as Blow Bar's sole shareholder and director, Joseph solely dominated and controlled the affairs of Blow Bar with respect to the decision to stop paying rent due and owing under the terms of the lease, funneling Blow Bar's cash-flow out of plaintiff's reach, and ceasing operations of Blow Bar at the premises (See *TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 90 [1st Dept 2015]). The amended complaint thus alleges specific factual allegations, i.e., Joseph's ownership and control of Blow Bar such that it shared business signs and social media accounts with the Valery Salons, etc., that taken together, support an alter ego claim. Contrary to defendants' contention, a plaintiff is not required to plead the elements of alter ego liability with the particularity required by CPLR 3016(b), "but only to plead in a non-conclusory manner" (*Kostyatnikov v HFZ Capital Group LLC*, 212 AD3d 477, 478 [1st Dept 2023] quoting *2406-12 Amsterdam Assoc. LLC v Alianza LLC*, 136 AD3d 512, 512 [1st Dept 2016].) At the pleading stage and viewing all inferences in the light most favorable to plaintiff, "it cannot be said that the [amended] complaint 'is totally devoid of solid, nonconclusory allegations'" in regard to seeking to pierce corporate veil (*International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]).

Turning next to the breach of contract claim (second cause of action), this court finds that plaintiff has stated a claim for breach of lease as against Blow Bar. The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (see *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].) Notwithstanding Joseph's claim in his affidavit that landlord agreed to modify the lease so that Blow Bar's rent payment would be limited to \$14,000.00 per month starting January 2019, the lease modification clause states that "this agreement may not be

modified except in writing subscribed by the parties hereto” (NYSCEF Doc. No. 2, *lease ¶ 101*; see *150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004].) Insofar as defendants have not proffered a modified lease or writing reflecting the alleged rent change subscribed to by the parties, the breach of lease claim survives dismissal at this juncture.

The court likewise denies the portion of defendants’ motion seeking to dismiss attorneys’ fees sought insofar as paragraph 132 of the lease provides that tenant shall be responsible for all reasonable fees that the landlord incurs in connection with any default by tenant (see *Sage Sys., Inc. v Liss*, 39 NY3d 27, 30-31 [2022], quoting *Hooper Assoc. v AGS Computers.*, 74 NY2d 487, 491 [1989]). All other arguments have been considered and are either without merit or need not be addressed given the foregoing. Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss plaintiffs’ complaint is denied, except to the extent that the action is discontinued as against VALERY JOSEPH @ BRIDGEHAMPTON, INC., VALERY JOSEPH @ PARK AVENUE, INC., VALERY JOSEPH SALON 2 LTD., and VALERY JOSEPH SALON LTD., 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 shall continue as against the remaining defendants; and it is further

ORDERED that the action shall bear the following caption:

.....X

ARYEH REALTY CORP.,
Plaintiff,

Index No. 654723/2021

-v-

VALERY JOSEPH and VALERY
JOSEPH BLOW BAR EXPRESS, INC.,
Defendants.

.....X

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 counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, 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)]; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order with notice of entry upon defendants, the Clerk of the Court and the General Clerk’s Office; and it is further

ORDERED that defendants shall interpose an answer within twenty (20) days after service of this decision and order with notice of entry; and it is further

ORDERED that parties are to appear for a remote preliminary conference on December 20, 2023, details shall be provided no later than December 18, 2023; and it is further

ORDERED that service upon the Clerk of the Court 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).

This constitutes the decision and order of this court.

October 12, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: