360 Concepts Group LLC v Astoria Bowl Inc.
2023 NY Slip Op 35175(U)
June 1, 2023
Supreme Court, Queens County
Docket Number: Index No. 721129/2022
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IA Part 4
Justice

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360 CONCEPTS GROUP LLC,

Plaintiff,

-against-

ASTORIA BOWL INC., PERRY POULOS and ELAINE POULOS,

Defendants,

---x

Index Number: 721129/2022

Motion Date: February 21, 2023

Motion Seq. No.: 1

The following numbered papers read on this motion by the defendants for an Order pursuant to CPLR §3211(a)(1) and (a)(7), dismissing the Complaint.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits..........................	EF 7-16
Answering Affidavits - Exhibits.....................................	EF 17-22
Reply Affidavits..	EF 23-24

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action for, among other things, breach of contract, based on the sale of a bowling alley in Astoria. In September 2009, the defendant Astoria Bowl Inc. (the tenant) entered into a ten-year lease agreement (the lease) with non-party The Maric Family Limited Partnership (the landlord) for the bowling alley. As is relevant here, the Rider to the lease states that upon either the expiration or the termination of the lease, "the Tenant shall . . . [r]emove the following trade fixtures: scoring machines, bases, ball returns and personal property and such other installments made by Tenant", and that at such time, "[a]ny improvement to the Premises which becomes a fixture, including but not limited to bowling lanes and pinsetters shall, at Landlord's sole option, be deemed the property of the Landlord." Although the lease was set to expire in August 2019, the tenant and the landlord executed a five-year lease extension in June 2019. The lease extension provided for new annual rent, but did not otherwise alter the terms of the lease.

[*1]

In March 2021, the plaintiff and the tenant entered into a contract of sale whereby the tenant agreed to sell its assets, properties, and business associated with the bowling alley to the plaintiff. The Contract of Sale acknowledges the lease between the tenant and the landlord, and notes that the sale "is contingent upon [the tenant] obtaining [the] Landlord's consent to the assignment of the Lease to the [plaintiff]," that the tenant "shall exert all reasonable efforts in applying for and obtaining said consent," and that the plaintiff "agrees to assume all the terms and conditions of the Lease." The Contract of Sale further states that, "[i]n addition to obtaining an assignment, [the tenant] agrees that [the plaintiff] is hereby authorized to interact directly with the Landlord in order to discuss the possibility of entering into a new lease."

Annexed to the Contract of Sale is a schedule of assets which were included in the sale. Pursuant to this schedule, the assets include "28 Entire Synthetic Lanes, Approaches, & Steltronic Scoring System." A closing for the transaction occurred on June 29, 2021. At the closing, the tenant and the plaintiff executed a bill of sale, which sets forth the same schedule of assets that was annexed to the Contract of Sale.

In October 2022, the plaintiff commenced this action against the tenant and the defendants Perry Paulos and Elaine Paulos, the owners of Astoria Bowl Inc. The Complaint alleges that the sale of the bowling alley and its assets was a fraudulent sale because the "28 Entire Synthetic Lanes, [and] Approaches" (the bowling lanes) were included as part of the sale. According to the plaintiff, however, the landlord was actually the rightful owner of the bowling lanes at the time of the conveyance, thus plaintiff alleges that the tenant had no legal right to include the bowling lanes as part of the sale. The plaintiff further alleges that Perry and Elaine Paulos, as the principals of the tenant corporation, intentionally made false statements to the plaintiff concerning the tenant's ownership of the bowling lanes. The Complaint also alleges that, but for these misrepresentations, the plaintiff would have either not executed the Contract of Sale or paid a substantially lower purchase price for the business and its assets. The Complaint asserts causes of action for breach of contract, unjust enrichment, fraud and intentional misrepresentation, and fraudulent concealment. The Complaint also seeks to pierce the corporate veil and impose liability against Perry and Elaine Paulos individually.

In lieu of an answer, the defendants collectively move to dismiss the Complaint pursuant to CPLR §3211(a)(1) and (a)(7). In support of their motion, the defendants submit the Summons and Complaint, the Contract of Sale, the Lease, and an affidavit from Perry Poulos. Based on these submissions, the defendants assert that the breach of contract claim must be dismissed because it had no duty to disclose any of the information which forms the basis for the plaintiff's claim. The defendants contend that, during the negotiation process, the plaintiff had unfettered access to the lease between the tenant and the landlord. To this end, the defendants point to language in the lease which makes clear that upon its expiration or termination, the landlord has the sole option of deeming the bowling lanes as its own property. Thus, relying on the doctrine of *caveat emptor*, the defendants assert that the plaintiff's claim is predicated entirely on its own failure to do its due diligence.

With respect to the plaintiff's claims sounding in fraud, the defendants argue that these causes of action must be dismissed because they are duplicative of the breach of contract claim. The defendants further argue that these claims lack the requisite specificity required under CPLR §3016(b). The defendants also assert that the sale of the bowling alley was an arms-length transaction, and that absent any allegation that the defendants impeded the plaintiff's ability to conduct its own due diligence, claims sounding in fraud, misrepresentation, and concealment cannot lie.

The defendants further assert that the plaintiff's claim for unjust enrichment fails to state a claim because it is duplicative of the breach of contract claim. The defendants note that unjust enrichment is a quasi-contract claim which cannot be maintained where, as here, a valid contract exists and the facts which form the basis for the claim are identical to those which support the breach of contract claim. Finally, the defendants challenge the plaintiff's cause of action to pierce the corporate veil and impose personal liability upon Perry and Elaine Poulos. The defendants assert that, because this claim is predicated on conclusory allegations that the tenant is the alter ego of Perry and Elaine Poulos, the veil-piercing claim is insufficient to state a cause of action.

In opposition to the defendants' motion, the plaintiff submits, among other things, the Contract of Sale, an affidavit from Linda Zahn, the landlord's principal, an email sent by Perry and Elaine Poulos, and a Surrender and Release Agreement executed by the landlord and the tenant. Based on these submissions, the plaintiff first argues that the defendants' motion is premature. The plaintiff asserts that under the circumstances here, it should be permitted to obtain discovery concerning, *inter alia*, the circumstances surrounding the execution of the surrender agreement and the tenant's status as the alter ego of Perry and Elaine Poulos. The plaintiff further argues that its cause of action for breach of contract against the defendants is sufficiently pleaded because it specifically alleges that the Contract of Sale existed, that the plaintiff performed under the contract, that the defendants expressly claimed ownership of the bowling lanes during the negotiation of the Contract of Sale and through closing, that the defendants breached the contract of sale by conveying an asset that they had no right to sell to the plaintiff, and that this resulted in an improperly inflated purchase price for the business and its assets.

The plaintiff further asserts that its fraud claim complies with pleading requirements of CPLR §3016(b) because the allegations make specific reference to the Contract of Sale and the defendants' representations concerning the tenant's purported ownership interest in the bowling lanes. In addition, the plaintiff argues that this claim is not duplicative of the breach of contract claim because it alleges that the defendants made representations concerning present facts – the tenant's ownership of the bowling lanes – which induced the plaintiff to enter into the contract of sale. Finally, the plaintiff contends that its cause of action to pierce the corporate veil contains sufficient facts to survive a motion to dismiss, and that its unjust enrichment claim is sufficiently pleaded in the alternative to the breach of contract claim.

For the reasons that follow, the defendants' motion is granted in part and denied in part.

"When assessing a motion to dismiss a complaint or counterclaim pursuant to CPLR §3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 722 [2d Dept 2013]; *see* CPLR §3211[a][7]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Alleyne v Rutland Dev. Group, Inc.*, 213 AD3d 887, 888 [2d Dept 2023]; *see Guggenheimer v Ginzburg*, 43 NY2d 268). Similarly, a motion pursuant to CPLR §3211(a)(1) may be granted only where the documentary evidence utterly refutes the factual allegations in a complaint and conclusively establishes a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]).

In opposition to a CPLR §3211 motion, a party may submit affidavits to remedy defects in the pleading and preserve claims which, while inartfully pleaded, are potentially meritorious (*see Cron v Hargro Fabrics*, 91 NY2d 362). Whether the claims will ultimately be proven, or whether the pleading will later survive a motion for summary judgment, plays no part in the determination of a prediscovery CPLR §3211 motion to dismiss (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11; *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Moreover, where it appears that facts essential to justify opposition to a CPLR §3211 motion may exist but cannot be stated, CPLR §3211(d) provides that the court may deny the motion (*see* CPLR §3211[d]; *Karpovich v City of New York*, 162 AD3d 996, 998 [2d Dept 2018]). However, the mere hope that discovery may reveal facts essential to justify opposition does not warrant denial of the motion (*see Karpovich*, 162 AD3d at 998).

Breach of Contract

This branch of the defendants' motion is denied (*see* CPLR §3211[d]). In opposition to the defendants' motion, the plaintiff submits the surrender agreement, which was executed by the tenant and the landlord. The surrender agreement terminates the lease between the landlord and the tenant. Notably, the surrender agreement highlights a sharp factual dispute between the parties, which their motion papers do not resolve.

Although the surrender agreement terminates the lease, this appears to run afoul of the tenant's obligation under the Contract of Sale to "exert all reasonable efforts in applying for and obtaining" the landlord's consent to the assignment of the lease to the plaintiff. In addition, the surrender agreement was executed on the same day as the Bill of Sale, but there is no indication that these documents were actually executed contemporaneously or that the plaintiff had knowledge of the surrender agreement. Moreover, the surrender agreement, by its terms, triggered the provision of the lease which gave the landlord the option to claim ownership of certain improvements to the bowling alley, including the bowling lanes. To this end, although there is no direct indication that this option was exercised by the landlord, Zahn affirms that the landlord owned the bowling lanes at the time of the conveyance between the tenant and the plaintiff.

Under the unique circumstances presented here, discovery may uncover additional facts regarding the surrender agreement and the circumstances surrounding its execution. This, in turn, may provide additional insight into whether the tenant had the legal right to convey the bowling lanes to the plaintiff. Therefore, the Court finds that the plaintiff sufficiently established that facts essential to its opposition to this branch of the defendants' motion may be in the defendants' possession (*see D.S. v Positive Behavior Support Consulting & Psychological Resources, P.C.*, 197 AD3d 518, 521 [2d Dept 2021]; *Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 89 AD3d 799, 800 [2d Dept 2011]).

Fraud and Intentional Misrepresentation

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553; *see Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 677 [2d Dept 2017]). In addition, CPLR §3016 requires that the circumstances which give rise to a cause of action for fraud must be stated in detail (*see* CPLR §3016[b]). This pleading requirement may be met when the facts, as alleged, are sufficient to permit a reasonable inference of the alleged conduct (*see Qureshi v Vital Transp., Inc.*, 173 AD3d 1076, 1077 [2d Dept 2019]). However, the requirement for specificity "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486).

Moreover, "[a] cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of a contract" (*Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012]). "[G]eneral allegations that a defendant entered into a contract while lacking the intent to perform are insufficient to support a fraud cause of action" (*Pugni v Giannini*, 163 AD3d 1018, 1020 [2d Dept 2018]). Nevertheless, a fraud claim is not duplicative of a breach of contract claim where it alleges that "the defendant made misrepresentations of present facts that were collateral to the contract and served as an inducement to enter into the contract" (*Did-it.com, LLC v Halo Group, Inc.*, 174 AD3d 682, 683 [2d Dept 2019]).

Here, contrary to the defendants' contention, the plaintiff's fraud and intentional misrepresentation claim is sufficiently pleaded (*see* CPLR §3016[b]; *Emby Hosiery Corp. v Tawil*, 196 AD3d 462, 465 [2d Dept 2021]). However, the plaintiff's fraud claim is not predicated on representations that are collateral to the Contract of Sale. The Complaint alleges that the defendants made specific representations concerning the tenant's ownership interest in the bowling lanes during the negotiation and closing processes for the sale of the bowling alley. Insofar as the bowling lanes were expressly included in the Contract of Sale and itemized in the Bill of Sale which was generated at the closing, any representation concerning the ownership of the bowling lanes lacks sufficient distinction from the breach of contract claim (*see Toobian v Toobian*, 209 AD3d 907, 909-910 [2d Dept 2022]; *Doukas v Ballard*, 135 AD3d 896, 897 [2d Dept 2016]). The defendants are therefore entitled to dismissal of the fraud and intentional misrepresentation claim as duplicative of the breach of contract claim.

Unjust Enrichment

To prevail on a claim for unjust enrichment, a plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173). Whereas an unjust enrichment claim may be pleaded as an alternative to a cause of action alleging breach of contract where the existence of the contract is in dispute (*see Thompson Bros. Pile Corp. v Rosenblum*, 121 AD3d 672, 674 [2d Dept 2014]), this cause of action is not available "where it simply duplicates, or replaces, a conventional contract or tort claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]; *see Guzman v Ramos*, 191 AD3d 644, 648 [2d Dept 2021]).

Here, the parties' submissions establish that the unjust enrichment claim is duplicative of the breach of contract claim (*see Federico v Brancato*, 144 AD3d 965, 967 [2d Dept 2016]; *Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 752 [2d Dept 2011]). The plaintiff specifically refers to the Contract of Sale in the Complaint, and the defendants do not dispute the existence or the terms of the Contract of Sale. In addition, the plaintiff's unjust enrichment claim is based on the same facts as the breach of contract claim, and asserts identical damages (*see Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 684 [2d Dept 2017]). Thus, the defendants are entitled to dismissal of the unjust enrichment claim.

Fraudulent Concealment

"New York adheres to the doctrine of caveat emptor and imposes no liability on a seller for failing to disclose information regarding the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller which constitutes active concealment" (*Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 520 [2d Dept 2007]). "Mere silence on the part of the seller, without some affirmative act of deception, is not actionable as fraud" (*Perez-Faringer v Heilman*, 95 AD3d 853, 854 [2d Dept 2012]). Thus, "[t]o maintain a cause of action to recover damages for active concealment in the context of a fraudulent nondisclosure, the plaintiffs must show, in effect, that the seller thwarted the plaintiffs' effort to fulfill their responsibilities fixed by the doctrine of caveat emptor" (*Platzman v Morris*, 283 AD2d 561, 562 [2d Dept 2001]; *see Guoba v Sportsman Props., Inc.*, 200 AD3d 658, 661 [2d Dept 2021]). Here, even when affording the Complaint a liberal construction and accepting all facts alleged in the Complaint as true, the Complaint fails to allege that the defendant engaged in any conduct which would constitute active concealment or otherwise prevented the plaintiff from doing its due diligence (*see Ader v Guzman*, 135 AD3d 668, 670 [2d Dept 2016]; *cf. Razdolskaya v Lyubarsky*, 160 AD3d 994, 996-997 [2d Dept 2018]). Thus, the defendants are entitled to dismissal of the fraudulent concealment claim.

Piercing the Corporate Veil

"As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and consequently, will not impose liability upon shareholders for the acts of the corporation" (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152; *see Doe v Bloomberg L.P.*, 36 NY3d 450). Piercing the corporate veil to impose liability on corporate shareholders is an exception to this general rule (*see AZTE, Inc. v Auto Collection, Inc.*, 124 AD3d 811, 812 [2d Dept 2015]). Because the doctrine is equitable in nature, "an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owner" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135).

"In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, [the] plaintiff must allege facts that, if proved, indicate that the shareholder 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'" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, quoting *Matter of Morris*, 82 NY2d at 142). Although a veil-piercing claim is not required to meet any heightened level of particularity in its allegations (*see F&R Goldfish Corp. v Furleiter*, 210 AD3d 643, 645 [2d Dept 2022]; CPLR §3016), "[m]ere conclusory statements that a corporation is dominated or controlled by a shareholder are insufficient to sustain a cause of action against a shareholder in its individual capacity" (*JGK Indus., LLC v Hayes NY Bus., LLC*, 145 AD3d 979, 981 [2d Dept 2016]; *see Sacks v The Knolls at Pinewood, LLC*, 157 AD3d 917, 919 [2018]; *Matter of Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007]).

Here, the Complaint fails to state a claim to pierce the corporate veil and impose individual liability on Perry and Elaine Poulos. The allegations in the Complaint are devoid of facts which could indicate that Perry and Elaine Poulos exercised complete domination and control over the tenant. To the contrary, the Complaint merely alleges, in bald and conclusory terms, that the tenant lacked adequate capitalization, that Perry and Elaine Poulos intermingled the tenant's funds with their own, and that Perry and Elaine Poulos exercised complete dominion and control over the tenant.

Indeed, the failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and the personal use of corporate funds are factors to be considered when determining whether an individual has abused the privilege of doing business in the corporate form (*see DePetris v Traina*, 211 AD3d 939, 941 [2d Dept 2022]). However, the conclusory restatement of these factors is insufficient to adequately plead a veil-piercing claim (see *East Hampton Union Free School Dist.*, 16 NY3d at 776; *Sky-Track Tech. Co. Ltd. v HSS Dev., Inc.*, 167 AD3d 964, 965 [2d Dept 2018]; *Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30 *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]; *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1075 [2d Dept 2012]). To the extent that the plaintiff relies on Perry Poulos's participation in negotiations with the plaintiff and his act of signing the Contract of Sale on behalf of the tenant, these facts, standing alone, cannot support this cause of action (*see Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 683 [2d Dept 2016]). Finally, contrary to the plaintiff's contention, its submissions fail to establish that facts essential to its veil-piercing claim may exist but cannot be stated (*see* 3211[d]; *Karpovich*, 162 AD3d at 998). Thus, the defendants are entitled to dismissal of the claims against Perry and Elaine Poulos individually.

Accordingly, it is

ORDERED that the branches of the defendants' motion to dismiss the plaintiff's causes of action for fraud and intentional misrepresentation, unjust enrichment, and fraudulent concealment insofar as asserted against the defendant Astoria Bowl Inc. are granted; and it is further,

ORDERED that the branch of the defendants' motion to dismiss the Complaint insofar as asserted against the defendants Perry Poulos and Elaine Poulos is granted; and it is further,

ORDERED that all other relief not expressly granted herein is denied.

Dated: June 1, 2023

MARGUERITE A. GRAYS
J.S.C.

FILED
6/2/2023
COUNTY CLERK
QUEENS COUNTY

[*9]