New Hackensack Realty, LLC v Lawrence Dev. Realty, LLC
2023 NY Slip Op 35253(U)
February 2, 2023
Supreme Court, Orange County
Docket Number: Index No. EF005062-2019
Judge: Sandra B. Sciortino

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
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NEW HACKENSACK REALTY, LLC and QUALAMAR CORPORATION,

Plaintiffs,

-against-

LAWRENCE DEVELOPMENT REALTY, LLC; K&J PARTNERS, LLC; JMK CONSTRUCTION MANAGEMENT, INC.; JOHN R. LAWRENCE; and KIM REDL-LAWRENCE,

Defendants.
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DECISION AND ORDER
MOTION NO.: 2 & 3
MOTION DATE: 9/16/2022
INDEX NO.: EF005062-2019

SCIORTINO, J.

The following papers numbered 1-14 were considered in connection with plaintiffs' motion to amend their complaint pursuant to CPLR § 3025 and CPLR § 321(e) (Seq. 2), and defendants' motion to amend the caption to remove all defendants except Lawrence Development Realty, LLC (Seq. 3):

PAPERS	NUMBERED
Notice of Motion/Affirmation(Feldman)/Exhibits 1-7/ Memorandum/Reply Memorandum	1-11
Notice of Cross-Motion/Affirmation(DuVall)	12-13

PROCEDURAL HISTORY

This action arises from an alleged breach of a commercial real estate contract. Plaintiffs initiated this action by filing the Summons and Verified Complaint (Exhibit 1). Plaintiffs purchased from defendant Lawrence Development Realty, LLC ("Lawrence Development") a multi-tenanted commercial property, located at 1820 Route 376, Wappinger, New York (the "Property") for $3,450,000.00. In their complaint, plaintiffs allege that defendants made certain misrepresentations and omissions of fact. As a result, plaintiff was damaged in the amount in excess of $1,250,000.00.

Plaintiffs allege that defendants grossly inflated the purported rents being collected on the Property; misrepresented and concealed a failing septic system on the Property, and misrepresented the possibility of expanding the structure on the Property by 3,200 square feet. Plaintiffs further allege that, due to these issues, the property has an approximate value of $2,285,000.00, a $1,165,000.00 difference in value compared to the alleged value stated in the contract between plaintiffs and defendants.

Plaintiffs listed five causes of action in their complaint: (1) breach of contract, (2) fraud, (3) fraudulent concealment, (4) unjust enrichment, and (5) piercing the corporate veil as to defendants John R. Lawrence ("Lawrence") and Kim Redl-Lawrence ("Redl-Lawrence").

<u>Sequence #1: Prior Motion to Dismiss</u>

Defendants previously sought the dismissal of the complaint pursuant to CPLR 3211(a)(1) and CPLR 3016(b). In their memorandum, arguing that all causes of action should be dismissed, defendants primarily argued that, with the transfer of title, plaintiffs' claims merged with the deed and are, therefore, extinguished.

This Court granted defendants' motion in part on January 6, 2020. Defendants' motion was denied as to breach of contract, the first cause of action. Defendants' motion was granted as to the second, third, fourth, and fifth causes of action. As a result, the only surviving action of the complaint is a claim for breach of contract.

Sequence #2: Motion to Amend

Plaintiffs now move to amend the complaint, apparently to restore causes of action that were previously dismissed, including the cause of action piercing of the corporate veil. Plaintiffs argue that subsequent discovery, including the deposition of defendant John R. Lawrence ("Lawrence"), has revealed additional facts supporting an *alter ego* theory of liability on the part of defendants. Plaintiffs state the following information is pertinent to their motion:

1. Lawrence is married to defendant Redl-Lawrence (Exhibit 3, p.8). Lawrence and Redl-Lawrence own defendants Lawrence Development Realty ("LDR"), K&J Partners ("K&J"), and JMK Construction Management ("JMK") (Exhibit 3, p.26-27).
2. Lawrence and Redl-Lawrence run the defendant companies in a "casual" manner. They do not hold shareholder meetings. They do not adhere to the "formality" of keeping minutes or records of these meetings, and the sole bank account for LDR was closed after selling the property to plaintiffs (Exhibit 3, p.28).
3. Lawrence made multiple payments that were allegedly personal payments using LDR's bank account:
    - I. A February 28, 2017 payment of $329.93 to American Express indicated it was for Lawrence personally (Exhibit 3, p.195).
    - ii. A September 12, 2017 payment of $338.67 to Citicard had Redl-Lawrence's name and the office's address (Exhibit 3, p.198). Lawrence said he does not know what this transaction related to and that he would speak to his wife.
    - iii. A February 13, 2018 payment of $6,537.06 to Citicard had Redl-Lawrence's name and the office address (Exhibit 3, p.203). Lawrence said he does not

know what this transaction related to, and that he would speak to his wife.

iv. A February 20, 2018 payment of $10,000 was made to Lawrence personally. Lawrence explained he was "probably buying a boat." (Exhibit 3, p.203).

v. A February 20, 2018 payment of $2,400,000.00 was to Charles Schwab. Lawrence explained he wanted "this money to work rather than have it sit in a checking account." (Exhibit 3, p.204).

4. One tenant of the property prepaid its rent in the amount of $15,000. Lawrence kept the rent "in my wine cellar in my basement" as opposed to depositing it in LDR's bank account (Exhibit 3, p.141).

5. Lawrence personally paid a company he hired to remove oil tanks from the property from his personal account, as opposed to using LDR's bank account (Exhibit 3, p.172).

6. Lawrence paid the oil tank removal company using JMK's checks. Lawrence explained he "had those checks in [his] vehicle." It was noted that the checks were typed out rather than handwritten (Exhibit 3, p.172).

7. Lawrence explained that he used JMK's checks to "cover Workman's Comp in the event there's a claim, ... LDR wouldn't have the coverage this company has, so we'll payout [sic] of that company for that reason and then we'll make an adjustment in the books" (Exhibit 3, p.173).

8. When asked about corporate resolutions authorizing payments to a separate legal entity, Lawrence responded by stating "well, in as much as my wife and I own all these companies, I don't think it matters a hoot about a document" (Exhibit 3, p.173).

9. An oil tank removal company invoiced LDR for $16,840.47, but K&J instead paid the invoice (Exhibit 4, HB000431, 432).

10. Lawrence testified the credit card for LDR "was a universal card to some degree because I don't like having too many cards" (Exhibit 3, p.179).

Based upon this information, plaintiffs now seek leave to replead or, in the alternative, amend the complaint to incorporate the above facts. Plaintiffs argues that leave should be freely granted to amend the complaint under CPLR § 3025. Plaintiffs further argue that the proposed amendments are meritorious. Lastly, plaintiffs argue that they should be entitled to limited discovery on the issue of *alter ego* liability.

<u>Sequence #3: Opposition to Motion and Cross-Motion</u>

In opposition, defendants argue that plaintiffs have yet to establish liability on the remaining breach of contract claim. The current motion is, therefore, premature. Defendants further argue that New York law does not support an independent cause of action for piercing the corporate veil; plaintiffs would first have to establish a claim and reduce the same to judgment.

On the issue of piercing the corporate veil, defendants argue that complete domination of a corporation is the key to piercing the corporate veil. However, such domination, standing alone, is not sufficient. A showing of a wrongful act or unjust act toward plaintiffs is required. Here, plaintiffs have not shown any instances of wrongful or unjust acts or acts which harmed plaintiffs in any way; the alleged instances of co-mingling between the defendant companies are of no consequence .

Defendants, in light of the above and the previous motion, request that the plaintiffs' motion be denied and the caption in the action be amended to list LDR as the sole defendant remaining after dismissal of all causes of action other than breach of contract . Defendants reason that LDR is the only defendant which contracted with plaintiffs.

Reply Memorandum of Law in Support of Plaintiff's Motion

Plaintiffs oppose defendant's cross motion seeking to amend the caption. Plaintiffs argue that, while the immediate motion is made in response to this Court's prior order, plaintiffs seek to foster judicial economy and amend the complaint to incorporate the above facts and remedies for consideration at trial.

Plaintiffs argue that defendants did not address whether these proposed amendments would prejudice them. Distinguishing case law relied upon by defendants, plaintiffs point out that they are not seeking summary judgment in the instant application nor piercing of the corporate veil based upon a single repayment of a predecessor's debt. Plaintiffs simply want the information found during discovery to be included in the complaint. This would allow plaintiffs to later assert these claims and seek remedies at trial.

Plaintiffs further argue that defendants have engaged in improper activities. Prior to closing, plaintiffs requested tenant estoppel letters to confirm all tenants were current on their rents and paying the amounts listed in their leases. However, plaintiffs assert Lawrence denied this request. Lawrence allegedly, instead, proposed adding a representation to the contract of sale, which would survive closing, providing that all tenants were current on their rental obligations.

During deposition, Lawrence testified that the monthly rent to be collected from the property's tenants was $28,136.72. Instead, the bank statements for September 2017, a few months prior to the sale of the property, listed the monthly income as $19,144.92. The income for November 2017, the month prior to the sale of the property to plaintiffs, lists the monthly income as $15,444.92. Lawrence additionally testified that "Elevate Yoga Studio was not paying full rent ... same thing with

Simplicity and a lot of tenants." Plaintiffs note that Elevate is owned by Redl-Lawrence's family, and Simplicity is owned by Redl-Lawrence herself. Lawrence testified that Simplicity did not pay rent because "if you picture a big funnel, we get done with our income taxes, it all comes down to my wife and myself."

Plaintiffs note that defendants also did not deny or explain the lack of corporate formalities, co-mingled assets, or use of LDR's corporate funds for personal benefit. Defendants likewise did not provide authority as to why plaintiffs cannot seek to recoup their funds by piercing the corporate veil at trial or employ the Trust Fund Doctrine at the same time.

Plaintiffs argue defendants' cross motion to amend the caption must be denied, as such an amendment would prevent plaintiff from pursuing the remedy of piercing the corporate veil against the individual defendants.

DISCUSSION

The Court infers that the plaintiff, for all intents and purposes, seeks to set aside the Court's decision of January 6, 2020 by reinstating the four dismissed causes of action. A proposed amended complaint is attached, both a "redline" and a "clean" copy. New allegations describe the use of funds from one company to pay an apparent debt of another company and occupancy of units in the mall by relatives or members of the corporate defendants themselves. Otherwise, the proposed causes of action do not change from the original complaint.

Allegations of alter ego have been alleged from the date of commencement. The proposed complaint inserts the fact that the individual defendants are husband and wife and co-owners of the defendant corporations. As the only owners, they make all decisions relating to the companies. They appear to have no employees and run all of the entities from the same office space.

First, it must be recognized that New York does not recognize a separate cause of action to pierce the corporate veil. (see *DiMauro v United, LLC,* 122 AD3d 568, 569 [2d Dept 2014]; *Hart v Jassem*, 43 AD3d 997, 998 [2d Dept 2007]) It is recognized, however, that allegations as to alter ego and intent to pierce the corporate veil are properly included in a complaint as "factual assertions." Plaintiff seeks to make factual assertions in the amended complaint. However, plaintiff also seeks to reinsert four causes of action previously dismissed, including a cause of action to pierce the corporate veil.

The causes of action for fraud, fraudulent concealment, and unjust enrichment in the proposed amended complaint are exactly the same as in the original pleading. They remain deficient.

It is, for the most part, without question that the individual defendants have complete dominion and control over the defendant corporations. That fact alone, however, does establish their liability. " 'Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance' (*citations omitted*)" (*Ruland v Leibowitz*, 209 AD3d 1051, 1052 [2d Dept 2022])

"[I]t is well settled that '[t]hose seeking to pierce a corporate veil . . . bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences' (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998])." (*Sheridan Broadcasting Corp. v Small,* 19 AD3d 331, 332 [1st Dept 2005]) (see also *Americore Drilling & Cutting, Inc. v EMB Contr. Corp.*, 198 AD3d 941 [2d Dept 2021])

In *Sheridan Broadcasting*, the First Department upheld the lower court's dismissal of several causes of action, including an action to pierce the corporate veil. In affirming the lower court's dismissal of the causes of action, the Appellate Court found that the plaintiffs did not assert facts which show that defendants "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [plaintiff] such that a court of equity would intervene." (19 AD3d 332 -333, quoting *Matter of Morris,* 82 NY2d 135)

The factual assertions in the amended complaint fail to show a connection to a fraud or injustice against the plaintiff. The analysis set forth in this Court's decision of January 6, 2020 remains applicable. The fraud causes of action was dismissed because "the alleged falsit[ies were] a provision of the contract of sale. (*Ka Foon Lo*, 29 AD2d at 526)" (See page 7 of the 1/6/20 decision) The unjust enrichment claim was found to be duplicative of the breach of contract claim. (See page 9 of the 1/6/20 decision) The piercing of the corporate veil was dismissed for lack of specificity. (See page 10 of the 1/6/20 decision) The Court adds to the analysis the understanding that New York does not recognize a separate cause of action for piercing of the corporate veil.

CPLR 3025 (b) reads:

> [a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court .... Leave shall be freely given ...upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Leave to amend a pleading should be freely given, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*5000, Inc. v. Hudson One, Inc.*, 130 A.D.3d 676, 677 [2nd Dept 2015]).

In this case, reassertion of the dismissed causes of action is without merit as the new assertions are insufficient to support the causes of action.

The application to amend the complaint is denied. It is noted that CPLR 3025 (c) allowing a court to amend pleadings "before or after judgment to conform them to the evidence."

The defendants cross-motion is denied. The application seeks amendment of the caption eliminating all defendants but Lawrence Development Realty, LLC. John R. Lawrence signed the contract with the notation "member." The complaint does not specify that the breach of contract cause of action is limited to Lawrence Development Realty, LLC alone. The Court declines to eliminate the other defendants at this time.

Therefore, it is ordered that

The plaintiff's application to file and serve an amended complaint is denied.

The defendants' application to amend the caption eliminating all defendants but Lawrence Development Realty, LLC is denied.

A conference shall be held on March 16, 2023 at 10:00 a.m. in Courtroom 2.

This shall constitute the decision and order of the Court.

Dated: February 2, 2023
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Attorneys of record via NYSCEF*