

**Rohan 573 W 161 St LLC v Feldman**

2024 NY Slip Op 30172(U)

January 11, 2024

Supreme Court, New York County

Docket Number: Index No. 653381/2020

Judge: Nancy M. Bannon

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

**PRESENT: HON. NANCY M. BANNON PART 42**

*Justice*

-----X

ROHAN 573 W 161 ST LLC,  
Plaintiff,  
  
- v -

**INDEX NO.** 653381/2020  
**MOTION DATE** 7-13-23  
**MOTION SEQ. NO.** 001, 002

YAN FELDMAN, IGOR SPIVAKOV, FAMILY HEALTH  
MANAGEMENT LLC, HISPANIC MEDICAL HEALTH, P.C.,  
and 577W 161 STREET CORPORATION

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 81, 82, 83, 87, 88, 90, 92, 93, 94 were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 74, 75, 76, 77, 78, 79, 80, 84, 85, 86, 89, 91 were read on this motion to/for AMEND CAPTION/PLEADINGS.

**I. INTRODUCTION**

In this breach of contract action to recover unpaid rent and additional rent due under a commercial lease and several guaranties, the plaintiff, Rohan 573 W 161 ST LLC (Rohan), owner of commercial property at 573 West 161 Street in Manhattan, moves (1) pursuant to CPLR 3212 for summary judgment on its complaint against defendant 577W 161 Street Corporation (577W), the tenant on the premises, and defendants Yan Feldman, Igor Spivakov, Family Health Management LLC, and Hispanic Medical Health, P.C., the guarantors of the lease (collectively, Guarantors), and (2) pursuant to CPLR 3211(b) for dismissal of the defendants' affirmative defenses (MOT SEQ 001). The defendants oppose the motion and cross-move pursuant to CPLR 3025(b) for leave to amend their answer. The plaintiff opposes the cross-motion and moves separately for leave to amend its complaint (MOT SEQ 002). The plaintiff's motion for summary judgment and to dismiss the affirmative defenses is denied without prejudice, the defendants' cross-motion to amend the answer granted and the plaintiff's motion to amend the complaint is granted.

## II. BACKGROUND

Plaintiff Rohan leased a medical office within the subject property to defendant 577W by an agreement dated December 10, 2019. Defendants Feldman and Spivakov executed a guaranty of the lease, and defendants Family Health Management LLC (Family) and Hispanic Medical Health, P.C. signed a separate guaranty. The defendants thereafter defaulted in their obligations and accrued \$170,796.24 in rent and additional rent arrears as of January 31, 2022. In the meantime, on August 6, 2021, the defendants sent the plaintiff a six-month notice of their intent to vacate the premises.

The defendants claim that, under Feldman and Spivakov's guaranty, any obligation of those defendants terminated six months after the notice of intent to vacate was served. The plaintiff maintains that the conditions under which the vacatur day would occur under the guaranties have not yet occurred as the defendants left behind furniture, the premises were not broom clean and arrears were not paid, and thus their obligation continues.

On July 27, 2020, the plaintiff commenced this action, asserting two causes of action for (1) breach of the lease as against 577W and (2) breach of the guaranties as against the Guarantors. After the defendants answered on August 17, 2020, the parties engaged in discovery for approximately two years and the plaintiff filed a Note of Issue on August 31, 2022.

On September 26, 2022, the plaintiff filed a motion seeking summary judgment (MOT SEQ 001) on its two causes of action and dismissal of the defendants' ten affirmative defenses. The defendants opposed the motion and filed a cross-motion for leave to file an amended answer on January 6, 2023, seeking to add two additional affirmative defenses alleging that the plaintiff's claims are (1) "barred by defendants' having provided notice of intention to vacate and having surrendered the Premises" and (2) "barred by virtue of defendants' payments of all sums due and owing through the date of surrender of the premises." The plaintiff opposes the cross-motion on the basis that an amendment of the answer at this juncture would be untimely since the defendants' cross-motion was filed over four months after the Note of Issue.

The plaintiff filed a second motion on April 7, 2023 (MOT SEQ 002), seeking leave to amend its complaint, citing evidence obtained during discovery. In the proposed amended complaint, the plaintiff adds a third cause of action seeking to pierce the corporate veil of 577W and hold Feldman, Spivakov, and Family liable for 577W's alleged breach of the lease. See NYSCEF Doc. 79. The defendants oppose this motion as untimely.

### III. DISCUSSION

#### A. Plaintiff's Motion for Summary Judgment and Dismissal of Affirmative Defenses - MOT SEQ 001

Inasmuch as the plaintiff subsequently moved to amend its complaint to add a third cause of action to impose a new theory of liability (MOT SEQ 002), and that motion and the defendant's cross-motion to amend its answer are granted as set forth below, the court deems the plaintiff's motion for summary judgment and to dismiss the defendant's ten affirmative defenses (MOT SEQ 001) to be withdrawn. However, the court will allow that motion to be withdrawn without prejudice for the plaintiff to renew within 30 days after the defendants file an amended answer.

#### B. Defendants' Cross-Motion for Leave to Amend Answer - MOT SEQ 001

Leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JP Morgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1<sup>st</sup> Dept. 2013); Cherebin v Empress Ambulance Serv., Inc., 43 AD3d 364, 365 (1<sup>st</sup> Dept 2007). "Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources." 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552, 553 (1<sup>st</sup> Dept. 2011). "[T]hat a motion to amend is made after a Note of Issue does not of necessity call for its denial." Jacobson v Croman, 107 AD3d 644, 645 (1<sup>st</sup> Dept. 2013).

As stated, the defendants move to amend their answer to add two affirmative defenses alleging that the plaintiff's causes of action are (1) "barred by defendants' having provided notice of intention to vacate and having surrendered the Premises" and (2) "barred by virtue of defendants' payments of all sums due and owing through the date of surrender of the premises." The defendants filed their cross-motion to amend four months after the plaintiff filed the Note of Issue. While this may be considered untimely, these proposed defenses concern events that occurred after the filing of the original answer. Moreover, the plaintiff's subsequent motion to amend is being made even later, and is being granted, such that the defendant would have an opportunity to file an amended answer anyway. Further, the proposed additional affirmative defenses fall within the definition of affirmative defenses, which include payment and release. CPLR 3018(b) defines affirmative defenses as "all matters which if not pleaded would

be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a proper pleading, such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in Article 14A [contribution], discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds or statute of limitations.” Nor does it appear that the additional affirmative defenses require any further discovery in contravention of the rule against post-note discovery. See 22 NYCRR 202.21(d).

In serving an amended answer, the defendants shall also be mindful that affirmative defenses that are improperly asserted in a conclusory manner in the answer without any detail are subject to dismissal. See Commr. of State Ins. Fund v Ramos, 63 AD3d 453 (1<sup>st</sup> Dept. 2009); Mfrs.Hanover Trust Co. v Restivo, 169 AD2d 413 (1<sup>st</sup> Dept. 1991). That is because CPLR 3013 expressly requires that all “statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.”

C. Plaintiff’s Motion for Leave to Amend the Complaint – MOT SEQ 002

“Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.” Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 47 (2018). “Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.” D’Mel & Assoc. v Athco, Inc., 105 AD3d 451, 452 (1<sup>st</sup> Dept. 2013); Etage Real Estate LLC v Stern, 211 AD3d 632, 633 (1<sup>st</sup> Dept. 2022).

Initially, the court notes that “[t]here is no independent cause of action to pierce the corporate veil.” Brandsway Hosp. LLC v Delshah Capital LLC, 216 AD3d at 486 (1<sup>st</sup> Dept. 2023). Thus, the third cause of action entitled “Pierce the Corporate Veil” cannot stand alone as a cause of action. However, the additional proposed allegations contained therein are not palpably insufficient to the extent they supplement the breach of contract and breach of

guaranty causes of action. The plaintiff adds allegations to show that Feldman, Spivakov, and Family “exercised complete domination of” 577W and that “such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.” Cortlandt St. Recovery Corp. v Bonderman, supra at 47. Specifically, the plaintiff alleges that 577W had no directors, officers, or a manager, had no shareholders agreement, issued no stock certificates, and was wholly owned, managed, and controlled by Feldman, Spivakov, and Family. In addition, the plaintiff alleges that 577W failed to adhere to corporate formalities such as maintaining corporate minutes, books, or records, filing tax returns or periodic reports with the Department of State, and comingled its assets with those of Feldman, Spivakov, and Family by funneling any income to their bank accounts without maintaining any bank account of 577W’s own, and that Feldman, Spivakov, and Family used the corporate funds solely for personal use. Furthermore, the plaintiff has alleged that Feldman, Spivakov, and Family entered into the lease through 577W with the intent to evade liability for 577W’s breach of the lease by leaving the entity devoid of funds to satisfy its obligations.

Furthermore, allowing this amendment would not require additional discovery as the additional allegations arose from discovery already conducted and concluded. Indeed, this discovery was in the sole possession of the defendants at all times prior and they were at times recalcitrant in providing it to the plaintiff. For that reason, the defendants fail to show that prejudice or surprise would result from the proposed amendment. The defendants may respond to the additional cause of action in an amended answer.

The proposed amended complaint, filed under NYSCEF Doc. 79, is deemed served upon the defendants as of the date of this order and the defendants may file an amended answer within 30 days of the date of this order.

The parties are encouraged to explore settlement.

#### IV. CONCLUSION

Accordingly, and upon the papers submitted and after oral argument, it is

ORDERED that the plaintiff's motion for summary judgment and to dismiss the defendants' affirmative defenses (MOT SEQ 001) is denied without prejudice to renew within 30 days after the defendants file an amended answer, and it is further

ORDERED that the defendants' cross-motion for leave to amend their answer (MOT SEQ 001) is granted to the extent that they may file an amended answer to the amended complaint within 30 days of the date of this order, and it is further

ORDERED that the plaintiff's motion for leave to amend its complaint (MOT SEQ 002) is granted, and the proposed amended complaint annexed to the moving papers (MOT SEQ 002) filed under NYSCEF Doc. 79, is deemed served upon the defendants as of the date of this order, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

1/11/2024  
DATE

CHECK ONE:

SEQ 001

SEQ 001 x-m

SEQ 002

CASE DISPOSED  
 GRANTED  
 GRANTED  
 GRANTED

DENIED  
 DENIED  
 DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  
 GRANTED IN PART  
 GRANTED IN PART

OTHER  
 OTHER  
 OTHER