Port Auth. of N.Y. & N.J. v Bus Term. Brewing, Co. Inc.
2024 NY Slip Op 32127(U)
June 20, 2024
Supreme Court, New York County
Docket Number: Index No. 451909/2019
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Plaintiff,

- v -

BUS TERMINAL BREWING, CO, INC.,

Defendant.

INDEX NO. 451909/2019

MOTION DATE 12/10/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. ROBERT R. REED:

The following e-filed documents, listed by NYSCEF document number (Motion 001) were read on this motion for LEAVE TO AMEND.

This is a breach of contract action commenced by plaintiff Port Authority of New York and New Jersey (Port Authority) against defendant Bus Terminal Brewing Co. Inc. In motion sequence 001, Port Authority moves for an order, pursuant to CPLR 3025(b) and CPLR 1003, granting leave to the Port Authority to amend its complaint and add new parties to the action (NYSCEF doc. no. 17). For the foregoing reasons, Port Authority's motion is denied.

BACKGROUND

The following facts are taken from the summons and complaint (NYSCEF doc. no. 23).

By written agreement of lease made on October 22, 2004, designated as Lease No. LBT-702 (Lease), the Port Authority leased space to Culinary Gateway LLC (Culinary) on the main concourse, mezzanine, and the second floor of the south wing of the Port Authority Bus Terminal (Space). Pursuant to the Lease, the Space was to be used for the operation of a restaurant and liquor bar. Rental payments were to commence on October 1, 2006, pursuant to a supplemental agreement also dated October 22, 2004, and the lease ended on September 30,

2021. On August 31, 2009, Culinary, defendant, and the Port Authority entered into a written agreement titled "Assignment of Lease with Assumption and Consent" (Assignment), whereby Culinary assigned the Lease to defendant (NYSCEF doc. no. 23, paras. 6-12).

Pursuant to item 1(b)(5) of exhibit B of the Lease, defendant agreed to make rental payments to Port Authority for the restaurant area at the rate of $559,680.00 per annum, in monthly installments of $46,640.00, payable in advance on the first day of each month for the period commencing on October 1, 2018 through end of the Lease term on September 30, 2021 (NYSCEF doc. no. 23, para. 17).

Pursuant to item 1(c)(5) of exhibit B of the Lease, defendant agreed to make rental payments to Port Authority for the storage area at the rate of $23,425.68 per annum, in monthly installments of $1,952.14, payable in advance on the first day of each month for the period commencing on October 1, 2018 through end of the Lease term on September 30, 2021 (NYSCEF doc. no. 23, para. 18).

In December of 2018, prior to the termination of the lease, defendant purportedly informed plaintiff that it contemplated closing its location at the Port Authority. Plaintiff ultimately discovered the premises vacant on February 17, 2019. Plaintiff terminated the lease and commenced the instant action, seeking $1,358,732.08 in rent, late charges, and utilities.

DISCUSSION

Pursuant to CPLR 3025, a party may amend a pleading "at any time by leave of court" (CPLR 3025 [b]). "While it is true that on a motion for leave to amend [a pleading] the movants need not establish the merit of [their] proposed new allegations, they must show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Sahmanovic v Kingsbridge Realty Assoc., LLC*, 197 AD3d 1077, 1077 [1st Dept 2021]). Claims that contain

only bare legal conclusions without supporting facts are subject to dismissal (*see Comm'rs of the State Ins. Fund v Ramos*, 63 AD3d 453 [1st Dept 2009]). Otherwise, leave to amend "should be freely granted, absent prejudice or surprise resulting therefrom" (*MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]).

A defendant will only be prejudiced if there is "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (*Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 [1983], quoting Siegel, New York Practice § 237 at 289). Prejudice requires a demonstration that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position (*Loomis v Civetta Corinno Constr. Corp.,* 54 NY2d 18, 23 [1981]).

The Appellate Division has observed, however, that "[w]hile it is true that motions for leave to amend pleadings are to be liberally granted in the absence of prejudice or surprise ... it is equally true that the court should examine the sufficiency of the merits of the proposed amendment when considering such motions" (*Heller v. Louis Provenzano, Inc.*, 303 AD2d 20 [1st Dept 2003]); *Davis & Davis v. Morson*, 286 AD2d 584 [1st Dept. 2001]). Moreover, efforts "… to reinstate previously-dismissed claims" are "… not a proper use of a motion to amend." (*Sutton Apts. Corp. v. Bradhurst Dev. LLC*, 160 A.D.3d 508 [1st Dept 2018]; *Kassover v. PVP–GCC Holdingco II, LLC*, 73 A.D.3d 626, [1st Dept. 2010]).

Here, plaintiff seeks to amend its complaint by adding Heartland Brewery Holdings, Inc., Heartland Brewery, Inc, and Heartland Brewery 2, Inc. as defendants. Plaintiff asserts that the latter entities are alter egos of defendant in the instant action. Plaintiff maintains that the above entities share the same principal and executive officers, a common telephone number, and a

common address. Plaintiff avers that while counsel for Bus Terminal Brewing has warned that it is judgment proof and insolvent, the alternative entities are solvent and have sufficient assets to cover the liabilities owed by Bus Terminal to the Port Authority.

Defendant opposes, arguing that plaintiff's motion is untimely. Defendant maintains that plaintiff knew of the existence of the other Heartland entities prior to the instant action, and thus should be barred from adding these parties as defendants on timeliness grounds. Defendant further argues that the corporate entities plaintiff seeks to add to the instant action have no relationship to the lease at the heart of the underlying dispute, and plaintiff has fallen short of its burden of establishing that piercing the corporate veil is appropriate under these circumstances.

"Generally ... piercing the corporate veil requires a 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" (*Gold v 22 St. Felix, LLC*, 219 AD3d 588, 590 [2d Dept 2023] citing, *DePetris v Traina*, 211 AD3d 939 (2d Dept 2022). Veil-piercing is generally a fact-laden inquiry (*Matter of Morris v N.Y. State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

Complete domination of the corporation is the key to piercing the corporate veil, but, such domination, standing alone, is not enough (*id.*). The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (*id.* at 142).

Here, plaintiff has not established a sufficient basis for piercing the corporate veil. To support its amendment, plaintiff alleges only that Heartland Brewery Holdings, Inc., Heartland

Brewery, Inc, and Heartland Brewery 2, Inc. share the same principal and executive officers, have a common telephone number, and a common address with the named defendant. Conclusory allegations such as these, however, are not enough to hold these Heartland entities responsible as alter egos of defendant in the instant action. Particular support reflecting a comingling of funds, an abuse of the corporate form and common owner domination, all used for an illegal or improper purpose, are required (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209 [1st Dept 2005]; *E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 127 [2d Dept 2009]).

Plaintiff bears "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" (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 (2005); citing, *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). No such showing has been made here.

Although leave to amend a complaint should be freely given (see CPLR 3025 [b]), a court should deny a motion for leave to amend a complaint if the proposed amendment is palpably insufficient, would prejudice or surprise the defendant, or is patently devoid of merit *Martin v Rizzatti*, 142 AD3d 591, 593 (2d Dept 2016); *St. Nicholas W. 126 L.P. v Republic Inv. Co., LLC*, 193 AD3d 488 (1st Dept 2021).

Accordingly, it is hereby

ORDERED that plaintiff's motion sequence no. 001 is denied.

06/20/2024
DATE

ROBERT R. REED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE