

CFS Enters., Inc. v Rise Concrete LLC

2024 NY Slip Op 32466(U)

July 5, 2024

Supreme Court, Kings County

Docket Number: Index No. 505614/2023

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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CFS ENTERPRISES, INC. d/b/a CFS STEEL COMPANY,

Mot. Seq. # 2

Plaintiff,

Index # 505614/2023

-against-

DECISION AND ORDER

RISE CONCRETE LLC, BREND RESTORATION LLC,
MARRIA LLC, BARRY CALDWELL, TONY VAYSBURD,
KRYSTSINA IVANOVA, ECA DEVELOPERS LLC, AND
"JOHN DOE 1" through "JOHN DOE 10," said
parties being lienors who have yet to perfect their
liens and being fictitious and unknown to Plaintiff,

Defendants.

-----X
HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion to dismiss complaint submitted on February 29, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1&2 [Exh. A-C]
Affirmation/Affidavit in Opposition.....	4[Exh. A-G]; 5[Exh. A]
Memorandum of Law.....	3
Reply Affirmation.....	6

Defendants, Barry Caldwell, Tony Vaysburd, Krystsina Ivanova, and ECA (hereinafter "moving defendants") move to dismiss the complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action and pursuant to CPLR § 3016(b) for failure to state specificity for fraud claims. Plaintiff, CFS Enterprises, Inc., d/b/a CFS Steel Company (hereinafter "CFS") opposes the motion on the grounds that the essential elements of piercing the corporate veil have been met; the motion is premature as there has been no discovery; and in the alternative, plaintiff should be granted leave to amend the pleadings pursuant to CPLR 3025(b).

Plaintiff commenced this action against defendants for breach of contract, unjust enrichment, mechanic's lien foreclosure, and lien law trust diversion. Plaintiff is seeking to pierce the corporate veil of Rise Concrete LLC (hereinafter "Rise") and/or ECA Developers LLC (hereinafter "ECA") to hold the moving defendants personally liable. It is alleged that the plaintiff and Rise agreed for plaintiff to provide construction materials and services to Rise in the total sum of \$149,018.72 and Rise failed to pay. It is further alleged that the moving defendants are personally liable as they exercised dominion and control over Rise and/or ECA in respect to the

subject transaction and that such dominion was used to perpetuate or commit a fraud or wrong against plaintiff. ECA conspired with Rise, Caldwell, Vaysburd, and/or Ivanova in a fraudulent scheme to divert and secret assets and monies of Rise to a successor company (ECA) to the detriment of Rise's creditors.

Discussion

In support of their motion, moving defendants argue that plaintiff has only offered conclusory and vague allegations that Rise and/or ECA is dominated or controlled by the moving defendants. It is further argued that the verified complaint lacks the minimum level of specificity as to fraud allegations. For example, the verified complaint alleges that the moving defendants utilized such dominion and control over the activities of Rise to perpetuate and/or commit a fraud, commingled corporate monies, disregarded corporate formalities, abused the privilege of separation, and utilized the corporate entities to engage in wrongful conduct as an "alter ego" of the moving defendants. The complaint then states that the specific acts of fraud are set forth with specificity below but said specific acts of fraud are not subsequently set forth in the remainder of the complaint. The complaint pleads no specific dates, no specific transactions, no specific amounts, and no specific acts done or consented to by specific people. Instead, it alleged that moving defendants received monies to be held in trust and conspired in diversions of lien law trust funds.

In opposition, plaintiff has submitted the affidavit of its operations manager, Gopaul Edward, unpaid invoices, corporate records, and court records. Plaintiff argues that the moving defendants, Caldwell, Ivanova, and Vaysburd were and/or still are members, shareholders, officers, and/or directors of Rise and ECA. Caldwell is a managing member of Rise and owner, officer, and/or director of ECA. Ivanova is the registered agent for both Rise and ECA. Caldwell and Ivanova are married and reside together in New Jersey. Vaysburd is a member, shareholder, officer, and/or director of Rise and owner, officer, and/or director of ECA. Plaintiff further alleges that numerous actions were brought against Caldwell and Rise and at least three actions are pending in the State of New York that involve similar claims to the present matter. Plaintiff argues that the subject motion is premature since the plaintiff has not completed any discovery, and as such is not in possession of documents necessary to pierce the corporate veil and hold the moving defendants personally liable. Nonetheless, plaintiff argues that there is every reason to believe that ECA conspired with the other moving defendants in a fraudulent scheme to divert and secret assets and monies of Rise to ECA as a successor company, to the detriment of Rise's creditors. Lastly, plaintiff requests leave to amend the complaint to the extent that it does not explicitly allege its fraud claim.

In reply, moving defendants argue that Plaintiff does not contest a failure to allege all the elements of piercing the corporate veil in the complaint. Instead, plaintiff argues why the corporations and moving defendants in question are related to each other through the overlap of ownership between Rise and ECA, and marriage between Caldwell and Ivanova. However, these connections are not enough to pierce the corporate veil without specific allegations of fraud, and plaintiff has admitted they are not in possession of any documents to pierce the

corporate veil. As to granting plaintiff leave to amend the complaint, moving defendants argue that an amended pleading would require a specific allegation of fraud, which plaintiff admits it does not have documents to support at the current time. Therefore, moving defendants argue that the appropriate time to allege fraud against the moving defendants through an amended pleading is upon the discovery of such fraud during the discovery process.

When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff the benefit of every possible favorable inference. See, Cortland Street Recovery Corp v. Bonderman, 31 N.Y.3d 30, 73 N.Y.S.3d 95 (2018). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. Furthermore, "unlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties' evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings." *Id.*, supra, citing, EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 799 N.Y.S.2d 170 (2005).

CPLR 3016(b) provides that where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail. See, CPLR 3016(b). A cause of action to recover damages for fraud must allege: (1) a false representation of fact, (2) knowledge of the falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages. See, Eurycleia Partners, LP v Seward & Kissel, LLP, 12 N.Y.3d 553, 910 N.E.2d 976, 883 N.Y.S.2d 147 (2009).

Applying these principles to the case at bar, the complaint sets forth allegations that the moving defendants utilized such dominion and control over the activities of Rise and/or ECA to perpetuate and/or commit a fraud, comingled corporate monies, disregarded corporate formalities, abused the privilege of separation, and utilized the corporate entities to engage in wrongful conduct as an "alter ego" of the moving defendants. See, Sky-Track Tech. Co. Ltd. v HSS Dev., Inc., 167 A.D.3d 964, 91 N.Y.S.3d 119 (2nd Dept., 2018). Therefore, dismissal of the complaint is not warranted. Furthermore, a fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss. See, F&R Goldfish Corp. v. Furleiter, 210 A.D.3d 643, 178 N.Y.S.3d 87 (2nd Dept., 2022).

In addition, the plaintiff moves to amend its pleading pursuant to CPLR 3025[b]. A party may amend its pleadings at any time by permission of the court, and leave should be freely given (see CPLR 3025 [b]), "provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit." See, Douglas Elliman, LLC v Berqere, 98 AD3d 642, 643 (2nd Dept., 2012). Here, the court finds that granting plaintiff leave to amend the complaint is not palpably insufficient, does not prejudice or surprise the defendant, nor is it patently devoid of merit.

Accordingly, moving defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and pursuant to CPLR 3016(b) for failure to state specificity for fraud claims is hereby denied.

The plaintiff's motion for leave to file an amended complaint is hereby granted in the entirety, and it is, hereby,

ORDERED, that the plaintiff serve a copy of the Amended Complaint, within twenty (20) days from the date of entry of this court's order, and file via NYSCEF the Amended Complaint along with the affidavit of service.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
July 5, 2024



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

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KINGS COUNTY CLERK
FILED