

One Riv. Run Acquisition, LLC v Milde

2024 NY Slip Op 33346(U)

September 23, 2024

Supreme Court, New York County

Docket Number: Index No. 653389/2022

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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ONE RIVER RUN ACQUISITION, LLC, A COLORADO
COMPANY, SHERVIN RASHIDI, RYAN GELLER, SCOTT
RUSSELL,

Plaintiff,

- v -

SIMON MILDE, STEVE LORENZ, JAMES FLOOD, LARRY
BAUCOM, PETER WITHAM, THE GREENWICH GROUP
INTERNATIONAL, LLC, A NEW YORK COMPANY, ORRA
KEYSTONE INVESTMENTS, LLC, ENHANCED IMPACT
REAL ESTATE, LLC, ENHANCED PACE FINANCE, LLC

Defendant.

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INDEX NO. 653389/2022
MOTION DATE 04/08/2024,
04/26/2024
MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 70, 71, 72, 73, 74, 81, 95, 107

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 9.19.24):

- Enhanced Impact Real Estate, LLC and Enhanced PACE Finance, LLC (collectively, **Enhanced**)’s motion to dismiss (Mtn. Seq. No. 005) is GRANTED, and Greenwich Group International LLC (**GGI**)’s counterclaims against Enhanced are dismissed without prejudice. Simply put, giving GGI every favorable inference as the Court must, GGI does not set forth a basis for either general personal jurisdiction or specific jurisdiction pursuant to the long arm statute (CPLR 301 and 302). The contacts that they rely upon are primarily contacts of the parent company (Enhanced Capital Group, LLC) not Enhanced to allege general jurisdiction.

This is plainly insufficient. Enhanced itself has no assets, no personal, no offices and no

continuous and systematic contacts with New York such that GGI has made a showing that they are “at home” in New York (*see* NYSCEF Doc. No. 97 ¶¶ 4-5; *Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 919 [2011] [quoting *International Shoe Co. v Washington*, 326 US 310, 317 (1945)]).

Nor have they adequately alleged facts to support personal jurisdiction based on transacting business within the state, committing a tortious act in the state, or committing a tortious act without the state causing injury to person or property within the state (CPLR § 302). GGI has also not made a *prima facie* showing that Enhanced’s alleged contacts with New York have an articulable nexus to the claims asserted in a certain Answer with Counterclaims (the **Counterclaims**; NYSCEF Doc. No. 54), dated February 23, 2024—namely Enhanced’s alleged inducement of ORRA to breach a certain Partnership Agreement (the **Agreement**; NYSCEF Doc. No. 14), dated December 7, 2020, by and between ORRA and GGI to warrant jurisdictional discovery. To the extent that GGI argues that Enhanced *might have used* the New York office and employees of its parent company, Enhanced Capital Group, LLC, to perpetuate the alleged tortious interference, this is mere speculation. Indeed, although Enhanced concedes that it has had some contacts in New York and with some deals they have used personnel in New York, they explain that they never did it with this Colorado deal (NYSCEF Doc. No. 97 ¶¶ 9-10). Thus, the claims against Enhanced must be dismissed without prejudice. Whatever claims may exist, on this record, they must be brought elsewhere.

2. The branch of One River Run Acquisition, LLC (**ORRA**), ORRA Keystone Investments LLC (**ORRA Keystone**), and Shervin Rashidi, Ryan Geller, and Scott Russell (collectively, the **ORRA Individuals**, and together with ORRA and ORRA Keystone, collectively, the **ORRA Parties**)’s motion (Mtn. Seq. No. 004) seeking to dismiss the breach of contract claim against ORRA Keystone is GRANTED. Simply put, the documentary evidence utterly refuses that ORRA Keystone expressly assumed any contractual liability under the Agreement. The allegations as to an implied finding of successor liability also fail as a matter of law because there was no consolidation or merger, there are insufficient allegations of continuation of ORRA (which still exists) and there are insufficient independent allegations that a transaction was entered into to fraudulently escape obligations other than those supporting the fraudulent conveyance claim (*see Broadway 26 Waterview, LLC v Bainton, McCarthy & Siegel, LLC*, 94 AD3d 506, 507 [1st Dept 2012]). The Agreement itself contemplates the creation of NewCo and the transfer which took place:

The Project and its development operations will be housed under a yet to-be-formed, new entity ("NewCo"), which will be capitalized by a combination of debt and equity (as detailed in Exhibit E). The active members of ORRA, and GGI, will form a new entity to manage NewCo (the "Developer" or "Developer GP"). The existing passive investors of ORRA (in addition to those additional investor ORRA is currently soliciting in a ~\$8MM equity capital raise anticipated to close on or about January 31, 2021), will remain in the Project and form the "Investor GP". Together the Developer GP and the Investor GP, collectively known as the "General Partner", will constitute most of the Project equity requirement. Any additional equity needed will be sourced by GGI and will be treated as the "Limited Partner" in the Project. It is understood that the Investor GP will be general partner in name only, and that any and all of the control rights, development oversight, design decisions, operational management, financial decisions and legal and tax decisions; as well as 100% of the Promote economics (as defined herein, and further refined in the capital raising process), shall be the sole and exclusive right of the Developer GP only.

(NYSCEF Doc. No. 14 § 1).

Thus, the claim is dismissed. As to the fraudulent conveyance cause of action, affording the allegations every favorable inference, the allegations are sufficient. Thus, the claim sounding in breach of contract as against ORRA Keystone is dismissed.

3. The branch of the ORRA Parties' motion seeking to dismiss the fraud claims against ORRA is DENIED. The elements of a cause of action sounding in fraud are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The Counterclaims allege that ORRA invested less than half the cash that it represented and failed to disclose the existence of outstanding invoices and mechanic's liens that had been recorded on the property. GGI claims that it relied on these misrepresentations in entering into the Agreement and in working to arrange financing for the Project and that, as a result of the misrepresentations, GGI suffered damages from loss of significant financing and Project delays. Thus, GGI has adequately stated a cause of action for fraud against ORRA.

4. The branch of the ORRA Parties' motion seeking to dismiss the fraudulent conveyance claims against ORRA and ORRA Keystone is DENIED. An action for fraudulent conveyance may be brought under Debtor and Creditor Law § 276, which provides:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

At the pleading stage, a plaintiff may rely on “badges of fraud” to state a cause of action due to the difficulty of proving actual intent to hinder, delay, or defraud creditors (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). These include

a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance.

Although a close call because the Agreement itself contemplates the creation of NewCo for the project, giving GGI every favorable inference that ORRA “transferred the Property to insiders making ORRA judgment proof by divesting ORRA of its primary asset, which was the Property on which the Project was to be built and developed” (*see* NYSCEF Doc. No. 54 ¶ 143), dismissal of this claim simply is not appropriate at this stage of the litigation.

5. The branch of the ORRA Parties’ motion seeking to dismiss the unjust enrichment claims against ORRA and ORRA Keystone is GRANTED. The existence of a valid and enforceable written contract governing the particular subject matter at issue in this case precludes recovery under a theory of unjust enrichment (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). ORRA does not dispute that the Agreement is a binding agreement, and GGI’s breach of contract claim and unjust enrichment claim claims thus are duplicative. As such, the unjust enrichment claim is dismissed.

6. The branch of the ORRA Parties’ motion seeking to dismiss GGI’s requests for equitable relief is GRANTED solely to the extent that GGI seeks to have this Court assert jurisdiction

over the property located outside of the Court's jurisdiction (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 538 [2009]).

7. Finally, the Court notes that decision is reserved subject to additional briefing as to the simultaneous transfers that occurred of certain property interests from ORRA to Shervin Rashidi, Ryan Geller, and Scott Russell, and then simultaneously to ORRA Keystone. Although GGI indicates that the Colorado court found this significant, the papers are not clear as to why GGI thinks it matters as this appears to have been done to benefit ORRA Keystone and not any of the individuals personally. Indeed, it may be that this was done for tax reasons or perhaps because ORRA Keystone was newly formed or for some reason under Colorado law, and that these individuals were not acting for their own benefit such that they could be held individually liable. Additional briefing of up to a three-page letter is called for. This is particularly important given the exculpation clause set forth in the Agreement:

Personal Liability - Notwithstanding anything to the contrary contained in this Agreement or elsewhere, no Individual person and no corporation, trust, or other entity affiliated with a party, as a shareholder, member, officer, director, or employee of such party, or otherwise, or who participated in the negotiation of, or preparation of this Agreement, shall have any personal liability, financial or otherwise, in law or equity, for any performance required herein. Without limiting the generality of the foregoing, there shall be no personal liability on the part of the principals and employees of either party.

(NYSCEF Doc. No. 14 § 7).

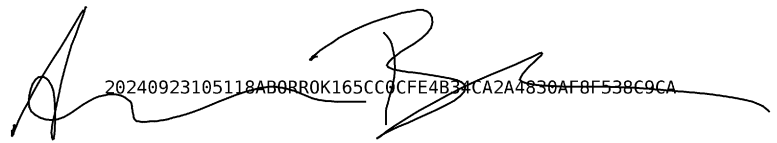
Following review of the letters to be submitted no later than September 24, 2024 at 5:00 pm, the Court will address the remaining cause of action by supplemental order or on the record at the hearing scheduled for September 26, 2024.

Accordingly, it is hereby

ORDERED that the motions to dismiss (Mtn. Seq. Nos. 004 and 005) are decided in accordance with the rulings made on the record (*tr.* 9.19.24), except to the extent set forth herein; and it is further

ORDERED that the parties shall submit supplement briefings by September 24, 2024 at 5:00 pm in accordance with the rulings herein; and it is further

ORDERED that a hearing is scheduled for September 26, 2024 at 11:30 am for oral argument on the supplemental briefings.



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9/23/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE