Kessler v ME Architect, P.C.
2024 NY Slip Op 35471(U)
March 15, 2024
Supreme Court, Nassau County
Docket Number: Index No. 607167/2020
Judge: Catherine Rizzo

SUPREME COURT - STATE OF NEW YORK

Present:

Hon. Catherine Rizzo
Acting Justice of the Supreme Court

X

ILANA H. KESSLER, ASSIGNEE OF IAN KESSLER AND REAL SURF HOLDINGS, LLC,
Plaintiff,

- against -

ME ARCHITECT, P.C. AND MICHAEL EVEN,

Defendants.

X

TRIAL/IAS PART 44
NASSAU COUNTY

INDEX NO.: 607167/2020

MOTION SUBMISSION DATE : 12/4/23

MOTION SEQUENCE NOS: 003, 004

The following e-filed documents for Motion Sequence 003 and 004 listed by NYSCEF and attachments and exhibits thereto have been read on this motion:

Motion Sequence 003

Notice of Motion and Affidavits/Affirmations........ X
Affidavits/Affirmations in Opposition.................. X
Reply Affidavit/Affirmation.................................... X

Motion Sequence 004

Notice of Cross-Motion and Affidavits/Affirmations.. X
Memorandum of Law in Support............................. X
Reply Affidavits/Affirmations.................................. X

The plaintiff moves this Court by way of Notice of Motion (Motion Sequence 003) for an order granting the plaintiff leave to amend the complaint to conform to the proof and awarding the plaintiff summary judgment on her proposed cause of action for conversion and her existing cause of action for breach of contract as and against defendant Michael Even ("Even"). The defendants oppose the motion. The plaintiff submits a reply.

The defendants move this Court by way of Notice of Cross-Motion (Motion Sequence 004) for an order denying the plaintiff's motion, granting the defendants summary judgment and dismissing the plaintiff's Verified Complaint. The plaintiff opposes the motion. The defendants submit a reply.

The plaintiff alleges that it purchased a townhouse located at The Printing House, 37 Clarkson Street a/k/a 421 Hudson Street, New York, New York ("Premises") and entered into a renovation/architectural agreement ("Renovation Agreement") and interior design agreement ("Design Agreement"), pursuant to which the defendants agreed to provide architectural services necessary to complete the design and construction for the Premises' renovation as well as interior design services. The defendants also allegedly agreed to supervise and control all sub-contractors and vendors that performed work on the Premises. The plaintiff claims that funding to perform the services was transferred into a segregated account ("Segregated Account") upon requisitions by the defendants, subcontractors and vendors, which were approved by the plaintiff and based upon a progress payment schedule. A total of $868,000.00 was allegedly transferred into the Segregated Account by the plaintiff. The subject agreements allegedly required that the defendants complete the renovations/interior design services within eight weeks from receiving the keys to the Premises.

The plaintiff claims that upon commencement of the renovations, the defendants opened the ceiling of the master bedroom before receiving structural plans and CAD drawings for the Premises and before submitting applications and plains to the Printing House Condominium Board or the New York City Department of Buildings for approval. The plaintiff alleges that the defendants breached the Renovation Agreement and Design Agreement by failing to complete the renovation and design of the Premises within eight weeks, missed at least eight other deadlines, represented to the plaintiff that certain payments were made but were not, failed to supervise and control the subcontractors and vendors, failed to comply with the Plaintiff's specifications, failed to complete the renovation and interior design and left the Premises in worse condition than when the renovation began. The plaintiff also asserts that the defendants were negligent by, among other things, performing unauthorized work and delaying the relating information to the plaintiff's insurer. As a result, the plaintiff terminated the defendants and sustained monetary damages in repairs and alternate housing costs.

With respect to the plaintiff's motion, the plaintiff argues that leave should be granted to conform the Verified Complaint to the proof to include a cause of action sounding in conversion. The plaintiff claims that the record establishes that Even used the Segregated Account for personal gain and converted money that rightfully belonged to the plaintiff, which is supported by the exhibits annexed to the motion including the Renovation Agreement, the Design Agreement, , emails, bank records, and copies of checks.

"Under CPLR [§]3025, a party may amend a pleading at any time by leave of court. Applications to amend pleadings are within the sound discretion of the court, and that of the Appellate Division. Although leave to amend the pleadings should be freely given absent prejudice or surprise resulting directly from the delay, leave to amend should not be granted where a new or alternate theory is plainly lacking in merit." (*Obstfeld v. Thermo Niton Analyzers, LLC*, 168 A.D.3d 1080, 1084). The defendants' argument in opposition that the funds alleged to have been converted were due and owing to defendant ME Architect, P.C. ("ME Architect") does not establish that the plaintiff's claim for conversion lacks merit but, rather, is a defense of the claim that is more aptly addressed with regard to the plaintiff's application for summary judgment set forth below. (*Id.*). As such, the plaintiff should be granted leave to conform the Verified Complaint to the proof to include the proposed cause of action sounding in conversion.

As such, the Court turns its attention to the plaintiff's motion for summary judgment. It is well established that summary judgment may only be granted when it is clear that no triable issue of fact exists. (see *Alvarez v. Prospect Hosp.*, 68 NY2d 320). A party seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form. (see *Zuckerman v. City of New York*, 49 NY2d 557). If the movant fails to meet its burden to establish a *prima facie* case, tendering sufficient evidence to eliminate material issues of fact, the motion must be denied "regardless of the sufficiency of the opposing papers." (*Alvarez*, supra).

Regarding the plaintiff's claim sounding in conversion, it has been widely held that a "conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Westbury Recycling, Inc. v. Westbury Transfer & Recycling, LLC*, 209 AD3d 929, 932). The two key elements a plaintiff must establish to prevail on a cause of action for conversion are "(1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." (*Id.*). "[C]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose. Tangible personal property or specific money must be involved." (*Alpha/Omega Concrete Corp. v. Ovation Risk Planners, Inc.*, 197 AD3d 1274, 1278-1279).

The plaintiff has established *prima facie* entitlement to summary judgment as a matter of law through the bank statements for the Segregated Account and Even's testimony. The plaintiff demonstrated that it had an interest in the funds deposited into the Segregated Account as the bank statements reflect that the plaintiff transferred the sum of $862,500.00 into the Segregated Account. Pursuant to the email correspondence between the parties, defendants received notification directing that all work stop, distributions from the Segregated Account cease, and the remaining funds be returned to the plaintiff. In addition, the plaintiff submits that Even's testimony confirms that there was a balance of $154,773.00 as of the date that the parties' relationship was terminated and that the funds were not turned over to the plaintiff. The plaintiff demonstrated the defendants' dominion over the remaining funds in the account by way of the bank account statements, which indicate that the defendants continued to withdraw the funds from the Segregated Account after the plaintiff directed that all work and payments cease. (*Westbury Recycling, Inc*, 209 AD3d at 932). Therefore, the plaintiff established that the defendants used the funds in the Segregated Account for an unauthorized purpose. (*Alpha/Omega Concrete Corp.*, 197 AD3d at 1278-1279).

In opposition, the defendants raise a material issue of fact requiring trial and argue that the plaintiff did not have a possessory right or interest in the remaining funds in the Segregated Account because, pursuant to the terms of the Renovation Agreement and Design Agreement, the defendants were entitled to compensation for their services and, as so, the subject remaining funds were used for the purpose it was designated for. (*Id.*). In addition, the defendants maintain that they did not have dominion over the subject remaining funds because, although the Segregated Account was opened by and in ME Architects' name, the plaintiff had full access to the Segregated Account, including the username, password, and the ability to verify all expenditures. (*Westbury Recycling, Inc.*, supra).

With respect to the plaintiff's claim sounding in breach of contract, the plaintiff asserts that the corporate veil should be pierced against Even. The traditional 'veil-piercing' process holds the corporate shareholders, or other corporations, responsible for corporate obligations. (*Winchester Global Trust Company Limited v. Donovan*, 22 Misc3d 1119(A)). That corollary is that "all defendants, individuals and corporations should be treated as a single personality by reason of domination and control by the individual over the corporations to transfer assets from the debtor corporations to other corporations so as to inhibit or prevent the honoring of the obligation." (*Id.*, citing *Solow v. Domestic Stone Erectors, Inc.*, 269 AD2d 199). "Whether or not the court will elect to pierce the corporate veil is fact-dependent and there is no hard and fast rule." (*Id.*)

Generally, factors considered in determining whether a corporation is dominated by others include whether the corporation is a mere instrumentality, agent or alter-ego of others, whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or the absence of separate paraphernalia that are part of the corporate form. (*Island Seafood Company Inc. v. Golub Corporation*, 303 AD2d 892; and *John John LLC v. Exit 63 Development, LLC*, 35 AD3d 540). "When a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego, the corporate form may be disregarded to achieve an equitable result." (*Austin Powder Co. v. McCullough*, 216 AD2d 825). Generally, in order to pierce the corporate veil, the plaintiff 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. (*Id*). Complete domination, alone, is insufficient, as some showing of a wrongful or unjust act toward plaintiff is required. (*Id*).

Here, the plaintiff asserts that, based on Even's testimony, Even is the sole member of ME Architect, fails to maintain a general ledger nor any other document to track accounts payable and/or receivable, requests payments via informal emails rather than through an invoice, and tracks ME Architect's spending through a checkbook. In addition, Even stated that ME Architect no longer has an office and operates out of Even's residence. In addition, Even testified that he withdrew payment from the Segregated Account after the work on the Premises stopped but was unable to produce a corporate record demonstrating how much of the withdrawal was paid directly to Even other than a one-page spreadsheet that fails to provide the names and dates on which payments were made using the funds in the Segregated Account. Therefore, the plaintiff has established *prima facie*, that there Even dominated ME Architect, abandoned corporate form, and withdrew the remaining funds in the Segregated Account after work ceased. (*Id.*).

The defendants' opposition raises a material issue of fact requiring trial in that, as discussed above, Even gave the plaintiff access to the Segregated Account. Moreover, with respect to the corporate form, the Even's affidavit in opposition establishes that ME Architect employed nine additional employees, some of whom work at or in connection with the Premises. In addition, the defendants submit that the spreadsheet, which is on ME Architects' letterhead, sets forth the expenditures from the Segregated Account, the defendants maintain company records that were used to create the spreadsheet, and ME Architect files separate tax returns. Even also attest that ME Architect was forced to give up the lease on its office space due to the COVID-19 pandemic. Moreover, as discussed above, the defendants maintain that they were entitled to the remaining funds in the Segregated Account pursuant to the terms of the Renovation Agreement and Design Agreement. Based on Even's testimony, the defendants raise a question of fact as to whether Even exercised complete dominion of ME Architect and whether withdrawing the funds from the Segregated Account was a wrongful ac. (*Id.*).

As to the plaintiff's cause of action sounding in breach of contract, "[t]he essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages." (*Liberty Equity Restoration Corp. v. Maeng-Soon Yun*, 160 AD3d 623, 626). Here, the plaintiff as made a *prima facie* showing of entitlement to summary judgment as it is undisputed that the parties entered into the Renovation Agreement and Design Agreement and that the plaintiff deposited the funds in the Segregated Account. In addition, based on the testimony of Ian Kessler ("Kessler"), who appeared on behalf of the plaintiff, the plaintiff established that the defendants did not completed the renovations and design within eight weeks, made unnecessary openings in the walls and ceilings of the Premises, failed to file the necessary permits and approvals from the Printing House Condominium Board or the New York City Department of Buildings, and failed to pay the contractors and subcontractors, which resulted in a mechanic's lien against the Premises. As a result, the plaintiff was forced to pay an additional $685,000.00 to repair the damage to the Premises, resolve the mechanic's lien, and pay for alternate housing. (*Id.*).

The defendants in opposition raise a material issue of fact requiring a trial in that according to Even's testimony, the delays in completing the renovation and design work were due to Kessler's actions. Specifically, Even states that the defendants decision to install a pergola and hot tub on the roof cause unanticipated delays as permits and structural engineers needed to be retained for proper installation. Even also states that the floors of the Premises were only ripped open in the master bedroom so that the two new walk-in closets that the plaintiff requested could be installed, and Kessler specifically directed the defendants not to submit any plans to the New York City Department of buildings and to hold all further payments and work, including payment to subcontractors.

Considering questions of fact are present regarding the plaintiff's causes of action, a finding of summary judgment in favor of the plaintiff or the defendants is not warranted under these circumstances.

In light of the foregoing, it is hereby

ORDERED, that the branch of the plaintiff's motion (Motion Sequence 003) for an order granting the plaintiff leave to conform the Verified Complaint to the proof to include a cause of action sounding in conversion is granted, and it is further

ORDERED, that the branch of the plaintiff's motion (Motion Sequence 003) for an order granting the plaintiff summary judgment is denied, and it is further

ORDERED, that the defendants' motion (Motion Sequence 004) for an order granting the defendants summary judgment and dismissing the plaintiff's Verified Complaint is denied, and it is further

ORDERED, that the plaintiff shall serve the Amended Verified Complaint upon the defendants within twenty (20) days from the date of this order.

This hereby constitutes the decision and order of this Court.

E N T E R :

HON. CATHERINE RIZZO, A.J.S.C.

Dated: March 15, 2024

ENTERED
Mar 20 2024
NASSAU COUNTY
COUNTY CLERK'S OFFICE