Tri-Rail Designers & Bldrs. Inc. v Darnov Assoc. Inc.
2025 NY Slip Op 35556(U)
January 2, 2025
Supreme Court, Nassau County
Docket Number: Index No. 610193/24
Judge: Erica L. Prager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: ERICA L. PRAGER, J.S.C.

--x

TRI-RAIL DESIGNERS & BUILDERS INC.

Plaintiff,

-against-

DARNOV ASSOCIATES INC. and DARIUS NOWAKOWSI,

Defendants.

--x

IAS/TRIAL PART 17

Motion Seq.: 001
Submission Date: 10/22/24

Index No.: 610193/24

<u>DECISION AND ORDER</u>

<u>Papers Considered</u>:	**<u>NYSCEF Doc. No.</u>**
Supporting Papers..	5-13
Opposition Papers...	16
Reply Papers...	17

<u>Relief Sought</u>

Defendants move for an Order: (1) dismissing this action as against defendant DARIUSZ NOWAKOWSKI pursuant to CPLR §3211(a)(7), as Plaintiff fails to state a cause of action against defendant DARIUSZ NOWAKOWSKI; and (2) dismissing Plaintiff's SECOND Cause of Action pursuant to CPLR §3211(a)(7), as Plaintiff fails to state a cause of action for "piercing the corporate veil".

<u>Background</u>

This is an action sounding in breach of contract brought by TRI-RAIL DESIGNERS & BUILDERS INC. ("Plaintiff") against its subcontractor, defendant DARNOV ASSOCIATES INC. (the "Corporation") and the Corporation's sole shareholder and officer DARIUSZ NOWAKOWSKI, s/h/a DARIUS NOWAKOWSI (the "Individual") (collectively, "Defendants"). Plaintiff alleges that it entered into a written contract with the Corporation wherein the Corporation agreed to perform certain masonry work as a subcontractor to Plaintiff. Plaintiff alleges further that the Corporation lacked the funds to pay its workers and suppliers, that the Corporation failed to perform the work required under the subcontract, and that, as a result, Plaintiff incurred damages, including additional expenses to complete the work. In addition to holding the Corporation liable for breach of contract, Plaintiff seeks to hold the Individual personally liable, based upon its contention that the Individual exercised complete domination and control over the Corporation in order to commit a wrong against Plaintiff.

The action was commenced by the filing of the Summons and Complaint on June 11, 2024. Based upon the foregoing allegations, the Complaint states two causes of action: the FIRST entitled "Breach of Contract against Darnov", and the SECOND entitled "Pierce the Corporate Veil against Nowakowski". Issue was joined as to the Corporation only on July 2, 2024, with the filing of the Corporation's Answer with Counterclaims. Plaintiff filed a reply to the counterclaims on July 22, 2024. The Individual now moves pursuant to CPLR §3211(a)(7) to dismiss the claims against him.

Discussion

The SECOND Cause of Action, asserted against the Individual, alleges, *inter alia*, the following:

- that the Individual is the sole shareholder and officer of the Corporation [¶ 26].

- that the Individual abused the privilege of doing business in the corporate form through his complete domination and control of the Corporation [¶ 27].

- that the Individual represented to Plaintiff that the Corporation was an ongoing, viable entity that possessed the resources needed to perform the subcontracting work, and that Plaintiff relied on those representations when it awarded the Subcontract [¶ 28].

- that the Individual intentionally and wrongfully kept assets out of the Corporation, thereby preventing the Corporation from meeting its obligations with respect to the subcontract work [¶ 29].

- that the Individual failed to adhere to corporate formalities and commingled the Corporation's assets with his own personal assets [¶ 32].

- that the Corporation is an empty shell of an entity, without sufficient assets to meet its existing obligations.

The Individual, by counsel, seeks to dismiss all claims against him on two grounds: (1) that New York law does not recognize a separate cause of action to "pierce the corporate veil"; and (2) that the allegations of the Complaint state bare legal conclusions, and do not afford a factual basis for piercing the corporate veil. Moreover, counsel argues, the allegations are contradicted by the

Individual in his Affidavit, sworn to on July 2, 2024, in which the Individual denies commingling assets, denies conducting any business with Plaintiff or making any representations, except in his capacity as an officer of the Corporation, and asserts that all corporate formalities were maintained.

In opposition, Plaintiff asserts that the motion is premature, insofar as the claim for piercing the corporate veil is fact-intensive and discovery has not yet been exchanged. In addition, Plaintiff argues that the allegations of the Complaint are sufficient to withstand a motion to dismiss pursuant to CPLR §3211(a)(7). Alternatively, in the event that the Court cannot uphold the SECOND Cause of Action to pierce the corporate veil as an independent cause of action, Plaintiff seeks leave to replead its claims against the Individual based upon the facts alleged therein.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. ... Whether plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss. ... Furthermore, a fact-laden claim to pierce the corporate veil is unsuited for resolution on a pre-answer, pre-discovery motion to dismiss. ... We are therefore acutely aware of the potential to decide the matter prematurely on a motion to dismiss." *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 46–47 (2018). See also *Magee-Boyle v Reliastar Life Ins. Co. of New York*, 173 AD3d 1157, 1158–59 (2d Dept 2019).

"While the law permits the incorporation of a business for the very purpose of escaping personal liability, equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice." *Ventresca Realty Corp. v Houlihan*, 28 AD3d 537, 538 (2d Dept 2006). "Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, 'pierce the corporate veil', whenever necessary 'to prevent fraud or to achieve equity' ... . The party asserting this equitable doctrine, seeks to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation. ... Properly understood, an attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." *Cortlandt St. Recovery*, 31 N.Y.3d at 47, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993] (internal citations and quotation marks omitted).

"At the pleading stage, a plaintiff must do more than merely allege that defendant engaged in improper acts or acted in bad faith while representing the corporation ... " The plaintiff must adequately allege the existence of a corporate obligation and that defendant exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice."*Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d at 47-48 (2018) (internal citations and quotation marks omitted).

"To survive a motion to dismiss the complaint, a party seeking to pierce the corporate veil must allege facts that, if proved, establish that the party against whom the doctrine is asserted (1) exercised complete domination over the corporation with respect to the transaction at issue, and (2) through such domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the plaintiff such that a court in equity will intervene. ... Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to corporate or LLC formalities, inadequate capitalization, commingling of assets, and the personal use of corporate or LLC funds. ... Additionally, the corporate veil will be pierced to achieve equity, even absent fraud, 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." *Rosenshein v Kushner*, 212 AD3d 744, 744–45 (2d Dept 2023) (internal citations and quotations omitted).

In the case at bar, defense counsel correctly notes that "New York does not recognize a separate cause of action to pierce the corporate veil." *Fiber Consultants, Inc. v. Fiber Optek Interconnect Corp.*, 15 A.D.3d 528, 529 (2d Dept.2005). See also *Chiomenti Studio Legale, L.L.C. v. Prodos Cap. Mgmt. LLC*, 140 A.D.3d 635, 636 (1st Dept. 2016); *Hart v. Jassem*, 43 Ad3d 997 (2d Dept. 2007). Accordingly, to the extent that the SECOND Cause of Action seeks only to pierce the corporate veil in order to impose personal liability on the Individual, it cannot stand independently, separate and apart from the breach of contract cause of action. See *Hart v. Jassem*, 43 Ad3d at 998; *Fiber Consultants*, 15 A.D.3d at 529.

Nonetheless, contrary to the assertions of defense counsel, the Court finds that Plaintiff has stated factual allegations that support a legally cognizable basis for imposing liability upon the Individual, pursuant to the doctrine of piercing the corporate veil. In particular, Plaintiff has alleged, among other things, the existence of a corporate obligation, undercapitalization of the Corporation, commingling of funds, as well as the sole ownership and complete dominion and control of the Corporation by the Individual. This is sufficient to give "notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned." *Treeline 990 Stewart Partners, LLC v RAIT*

Atria, LLC, 107 AD3d 788, 791 (2d Dept. 2013). Plaintiff was not required to make any evidentiary showing at this stage of the proceedings, and the Individual's affidavit does not establish that "a material fact as claimed by the pleader to be one is not a fact at all" or that "no significant dispute exists regarding it." *Sokol v. Leader*, 74 AD3d 1180, 1181-1182 (2d Dept. 2010).

Accordingly, although the Court is obliged to dismiss the SECOND Cause of Action, the Court grants leave to file and serve an amended complaint asserting the allegations contained therein if Plaintiff be so advised. See *Hart v. Jassem*, 43 Ad3d at 998; *Fiber Consultants*, 15 A.D.3d at 529.

Conclusion

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein.

Based upon the foregoing, it is

ORDERED, that Defendants motion is ***granted in part,*** to the extent that the SECOND Cause of Action is ***dismissed without prejudice,*** and with leave to file and serve an Amended Complaint within sixty (60) days of the date hereof.

Any requests for relief not specifically addressed herein are ***denied.***

This constitutes the Decision and Order of this Court.

Dated: January 2, 2025
Mineola, NY, 11501

E N T E R:

HON. ERICA L. PRAGER, J.S.C.

ENTERED
Jan 03 2025
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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