169 Bowery, LLC v Bowery Dev. Group, LLC
2012 NY Slip Op 33282(U)
January 17, 2012
Supreme Court, New York County
Docket Number: 651102/2010
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Index Number : 651102/2010

169 BOWERY LLC

VS

BOWERY DEVELOPMENT GROUP, LLC

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is consolidated for determination with motion seq. no. 004 and the consolidated motions are determined in accordance with the annexed decision and order.

RECEIVED
JAN 26 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: January 17, 2012

HON. JOAN A. MADDEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----------X

169 BOWERY, LLC,

Plaintiff,

-against- Index No. 651102/10

BOWERY DEVELOPMENT GROUP, LLC, COLLECTIVE HARDWARE, LLC, DAN McCLURE and RONALD RIVELLINI,

Defendants.

----------X

JOAN A. MADDEN, J.:

In these consolidated motions,[1] defendants Bowery Development Group, LLC ("Bowery Development"), Collective Hardware, LLC ("Collective Hardware"), Dan McClure and Ronald Rivellini move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the 9th and 10th causes of action in the amended complaint, and dismissing the amended complaint in its entirety as to the individual defendants McClure and Rivellini. Defendants Collective Hardware and Rivellini also move for an order pursuant to CPLR 3211(a)(4) dismissing the 3rd, 4th, 5th, 9th and 10th causes of action on grounds of another action pending, or alternatively staying this action pursuant to CPLR 2201 until final resolution of the two related actions. Plaintiff 169 Bowery, LLC ("169 Bowery") opposes the motions, but has neither moved nor cross-moved for affirmative relief.

---

[1]Motion sequence numbers 003 and 004 are consolidated for disposition.

I. Background

This action arises from a dispute regarding a 10-year commercial lease for the building located at 169 Bowery, New York, New York (the "building") entered into between the building owner, plaintiff 169 Bowery, as landlord, and defendant Bowery Development, as tenant. Individual defendants McClure and Rivellini are the sole members of corporate defendant Bowery Development.

Pursuant to paragraph 2.3 of Bowery Development's operating agreement, "[t]he initial business of the Company" was to "engage in business operations at 169 Bowery" and "to establish and operate related businesses under the brand name 'Collective Hardware.'" Pursuant to paragraph 5.1 of the parties' lease, Bowery Development agreed to develop the building "as a mixed use commercial building with residential units on the third, fourth and fifth floors, substantially in accordance with the plans approved by Landlord ... ." In paragraph 5.1, Bowery Development further agreed that "Tenant shall use, occupy and operate the Demised Premises for such purposes and no others. Neither the use nor the occupancy thereof may be modified or changed without Landlord's prior written consent granted or withheld in Landlord's sole discretion."

The amended complaint alleges that, pursuant to Article 9.1 of the lease, Bowery Development could sublease portions of the

building, but was required to obtain the approval of 169 Bowery. Schedule C to the lease listed the names of specific businesses pre-approved as subtenants by 169 Bowery; Schedule D listed 15 categories of businesses and individuals for which approval by 169 Bowery was required, but could not be unreasonably withheld.[2] The amended complaint also alleges that in early July 2007, McClure submitted designs for the development and renovation of the building as a mixed-use building, and that on August 1, 2007, plaintiff entered into the lease for the building with Bowery Development. In August 2008, Bowery Development sought plaintiff's approval to sublet a portion of the first floor of the building to Retro Bagutta LLC, a retailer of one-of-a-kind luxury and estate goods; the term sheet, however, apparently indicated that the space was also intended to be used as an "event space." Plaintiff rejected the sublet request as contrary to the terms of the lease.

According to the amended complaint, except for a partial payment in January 2009, in or about December 2008, Bowery Development stopped making the required monthly payments of Net

---

[2] The fifteen categories are: florist, tanning salon, fast food franchise, hair salon, retail shoes, mobile phone store, chain coffee store, banks and financial services, hardware & house ware store, jewelry store, residential tenant of good character and no criminal record, furniture store, lighting store, high end gourmet grocery store, and professional offices of a business in good standing, not including medical offices or clinic.

Annual Rent. Shortly thereafter, plaintiff commenced a summary non-payment proceeding against Bowery Development in Civil Court, which was subsequently discontinued. On February 19, 2009, the New York City Fire Department notified plaintiff that parties and/or events were being held at the building which were not in compliance with applicable fire codes, and that if the building were used without necessary work being completed and permits obtained, it would be padlocked for no less than 90 days.

The amended complaint alleges that a series of correspondence ensued between plaintiff and Bowery Development, and that in or about July 2009, plaintiff commenced a summary holdover proceeding against Bowery Development in Civil Court (*169 Bowery LLC, v. Bowery Development Group, LLC,* Civ Ct, NY Co, Index No. L&T 76241/09). The amended complaint further alleges that, on October 7, 2009, a fire occurred on the fourth floor of the building as a result of an overloaded electrical outlet and that when plaintiff was notified, Gordon Lau (Lau), plaintiff's managing member, went to the building and gained access for the first time since the building was leased to Bowery Development. According to the amended complaint, Lau observed an art gallery operating on the first floor. He also observed that alterations had been made to the building without plaintiff's consent, and that other persons were occupying areas of the building without plaintiff's knowledge or consent.

[* 6]

On February 3, 2010, plaintiff obtained an order in the summary holdover proceeding directing Bowery Development to pay into the court the sum of $219,564.80 for past base rent due, and to continue to pay into the court, the monthly base rent of $31,366.40, as it became due from month to month, pursuant to the lease. On March 15, 2009, the Civil Court issued a decision and order striking Bowery Development's answer based "on its undisputed failure to pay use and occupancy pursuant to this court's order dated February 3rd," and directed the entry of a judgment of possession and money judgment in the amount of $219,564.80" against Bowery Development. On April 5, 2010, the Civil Court issued a final judgment of possession and warrant of eviction against Bowery Development, as well as a $219,564.80 money judgment.

On July 27, 2010, plaintiff commenced the instant action. The amended complaint asserts 12 causes of action: 1) on the personal guaranty in the amount of $3,520,025.00 against McClure; 2) breach of contract for unpaid rent in the amount of $627,015.34, against Bowery Development, Collective Hardware, McClure and Rivellini; 3) breach of contract in the amount of $750,000.00 for failure to surrender the property in the agreed upon condition, against Bowery Development, Collective Hardware, McClure and Rivellini; 4) breach of contract for damages in the amount of $3,334,975.70 based on the condition of the building,

against Bowery Development, Collective Hardware, McClure and Rivellini; 5) attorneys' fees in connection with the summary holdover proceeding and the Insurance Litigation, against Bowery Development, Collective Hardware, McClure and Rivellini; 6) late charges and interest in the amount of $32,856.29, against Bowery Development, Collective Hardware, McClure and Rivellini; 7) use and occupancy in the amount of $700,194.00, against Bowery Development, Collective Hardware, McClure and Rivellini; 8) breach of contract for recapture of rent concession in the amount of $87,000.00, against Bowery Development, Collective Hardware, McClure and Rivellini; 9) fraud in the inducement for defendants' misrepresentations that they would develop a mixed-use commercial and residential building in the amount of $1,000,000.00, against Bowery Development, McClure and Rivellini; 10) fraud for defendants' representations that they were using the building in accordance with the lease and concealing that they were violating the lease, against Bowery Development, Collective Hardware, McClure and Rivellini; 11) enforcement of the Civil Court money judgment in the amount of $219,564.80, against Collective Hardware, McClure and Rivellini; and 12) attorney's fees in the amount of $250,000.00 against Bowery Development, Collective Hardware, McClure and Rivellini.

At or around the same time, plaintiff commenced two related actions in this court. On November 16, 2009, plaintiff commenced

an action which is still pending, against Collective Hardware, Rivellini and more than 25 alleged subtenants of Bowery Development, seeking to enjoin the subtenants from entering and using the building, and prohibiting any repairs, alterations or renovations of the building without valid work permits, and also seeking substantial damages (*169 Bowery, LLC v Collective Hardware, LLC, Ronald Rivellini, Monster Studio, et al.*, Sup Ct, NY Co, Index No. 116120/09) ("Subtenants Litigation"). The other action, commenced on March 5, 2010, is disposed, and sought declaratory relief with respect to the payment of the insurance proceeds from the October 2009 fire at the building (*169 Bowery, LLC v Bowery Development Group, LLC, Collective Hardware, LLC and Greenwich Insurance Company*, Sup Ct, NY County, Index No. 600573/10) ("Insurance Litigation").[3]

---

[3]The Insurance Litigation also sought an award of attorney's fees under paragraph 41 of the lease (4th cause of action). The attorney's fees issue was referred to a Special Referee. By a Decision & Judgment dated August 3, 2011, Special Referee Louis Crespo issued a judgment in favor of 169 Bowery, LLC and against Bowery Development, LLC, in the amount of $21,982.00, as the "reasonable legal fees and costs in this action as the prevailing party."

Previously, on September 2, 2010, the Hon. Richard Braun issued a judgment in favor of 169 Bowery, LLC on its third cause of action declaring that Greenwich Insurance Company "is directed to deliver the insurance proceeds [in the amount of $319,035.64] due under the policy with Defendant Bowery Development Group, LLC and Collective Hardware, LLC to Plaintiff 169 Bowery, LLC's designated Depository, Marc S. Friedlander, pursuant to Article 17(a)(i) of the Lease" and upon such payment, "Plaintiff 169 Bowery, LLC, shall, after making payments to all necessary parties entitled to payment arising from the fire loss that occurred on October 7, 2009, retain the balance of the insurance

In lieu of answering, defendants Bowery Development, Collective Hardware, McClure and Rivellini are now moving to dismiss the 9th and 10th causes of action for fraud, and to dismiss the amended complaint in its entirety as against individual defendants McClure and Rivellini. Defendants Collective Hardware and Rivellini are also moving to dismiss the 3rd, 4th, 5th, 9th and 10th causes of action on the grounds of another action pending, or alternatively to stay this action pending the resolution of the Subtenants Litigation and the Insurance Litigation.

II. Ninth Cause of Action for Fraud in the Inducement

To maintain a claim for fraudulent inducement, "it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged." *Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 (1st Dept 2011). Both parties agree that where a fraud claim merely restates a breach of contract claim, it should be dismissed as redundant. *See e.g. First Bank of Ams. v. Motor Car Funding, Inc.*, 257 AD2d 287, 291 (1st Dept 1999). However, "a cause of action for fraud may be maintained where a

---

proceeds for the restoration of the Premises or payment of other obligations owed by Defendants Bowery Development Group, LLC and Collective Hardware, LLC to Plaintiff 169 Bowery, LLC under the Lease or as a matter of law."

plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract." *Id.* at 291. On the other hand, if the misrepresentation relates to future intention rather than a present fact, it is not sustainable as a cause of action separate from breach of contract. *See Financial Structures Ltd. v. UBS AG*, 77 AD3d 417, 419 (1st Dept 2010); *see also MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 (1st Dept 2011) *(quoting First Bank of Ams. v Motor Car Funding, Inc., supra* at 292) ("'Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract . . . and therefore involves a separate breach of duty.'")

Here, the 9th cause of action alleges that defendants Bowery Development, McClure and Rivellini falsely represented that if they were able to lease the building, they would develop it into a mixed-use commercial and residential building with apartments on the 3rd, 4th and 5th floors, and they would consent to plaintiff's continued oversight of the proposed subtenants, in compliance with the lease. The 9th cause of action further alleges that defendants, in fact, planned to install Collective Hardware as an "artists collective" and not to comply with the lease, and that plaintiff reasonably relied on those representations and suffered damages as a result.

Plaintiff contends that these allegations relate to present fact and, therefore, can sustain a cause of action for fraudulent inducement. This court cannot agree. Rather, the court concludes that the allegations constitute little more than representations regarding the purported future intent of defendants to not comply with the lease. The 9th cause of action for fraudulent inducement is, therefore, dismissed in its entirety.

III. 10th Cause of Action for Fraud

"To make out a prima facie case of fraud, plaintiff must allege 'representation of material fact, falsity, scienter, reliance and injury.'" *US Express Leasing, Inc. v. Elite Technology (N.Y.), Inc.*, 87 AD3d 494, 497 (1st Dept 2011)(quoting *Small v. Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]). As noted above, "[a] cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract." *Tiffany at Westbury Condominium v. Marelli Dev. Corp.*, 40 AD3d 1073, 1076 (2nd Dept 2007).

Here, the 10th cause of action alleges that defendants Bowery Development, Rivellini and McClure permitted Collective Hardware to use the building for an "artists collective," and permitted the alteration of the building for that purpose without obtaining plaintiff's consent in violation of the lease. The amended complaint also alleges that defendants concealed from

plaintiff alterations and activities that were not in compliance with the lease. The 10th causes of action fundamentally alleges that defendants breached the lease, detailing the manner in which the lease was breached, and thus, fails to state an independent claim for fraud. *See Baker v Norman*, 226 AD2d 301, 304 (1st Dept 1996)("The acts alleged in the complaint to constitute fraud do not arise from 'circumstances extraneous to, and not constituting elements of, the contract' and therefore do not represent the breach of 'a legal duty independent of the contract itself.'"[internal citations omitted]).

Furthermore, even if plaintiff's allegations were independent of the requirements of the lease, at least from February 2009, when plaintiff was notified by the Fire Department that parties and/or events were being held in the building in violation of the fire codes, any reliance on defendants' purported assurances that they were in compliance with the lease would have been unreasonable. *See Stuart Silver Assoc. v. Baco Dev. Corp.*, 245 AD2d 96, 98 (1st Dept 1997)(to establish a cause of action for fraud, plaintiff must show that the reliance was reasonable). The 10th cause of action is, therefore, dismissed in its entirety.

IV. Dismissal of the Action as to McClure Individually

A. McClure's Personal Guaranty

The 1st cause of action seeks to impose individual liability

on defendant McClure, based on his personal "good guy" guarantee of the "Net Annual Rent" under the lease between 169 Bowery and Bowery Development. The personal guaranty is contained in Article 48 of the lease, which states as follows:

> By executing below, Dan McClure ("Guarantor") residing at 84 E 10th St #3, New York, NY 10003 hereby unconditionally personally guarantees the payment of all of Tenant's Net Annual Rent obligations hereunder until such time as Tenant vacates the Demised Premises. The term "vacate" for the purposes of this Lease shall mean such date, whether prior to the expiration of the Lease Term or otherwise upon which Tenant surrenders possession together with the key to the Demised Premises to Landlord totally vacant (i.e. free of all tenants, subtenants, occupants and licensees, etc.) in broom clean condition and further provided that, on the surrender date, Tenant shall have otherwise fulfilled all other requirements for delivery of possession at the scheduled lease expiration date. *In addition to the foregoing, in order for this provision to be effective, Tenant must*: (a) tender at least sixty (60) days in advance notice in writing to Landlord of its intention to vacate; (b) have paid to Landlord under the terms of this Lease at least One Million Forty Four Thousand Dollars and No Cents ($1,044,000.00) in Rent or Additional Rent (which condition may be satisfied by making the payments required under paragraphs 3 and 50, and allowable under Schedule G hereof, provided, however, if Landlord has denied its consent to a proposed sublet based upon the exercise of its sole discretion and Tenant is otherwise unable to lease the proposed sublet space at substantially market rates, Guarantor shall not be required to comply with this Section (b)); (c) not otherwise be in default hereunder beyond any applicable notice and cure period; and (d) have completed Tenant's Work (excluding the installation of trade fixtures and other non-structural improvements); and (e) provides reasonable assurance to Landlord that there are no claims or liability to any subtenants, creditors or other third parties resulting directly or indirectly by the acts or omissions of Tenant or subtenants accruing prior to the surrender [emphasis added].

Arguing that "[a] guaranty of a tenant's obligations under a lease must be strictly interpreted in order to assure its consistency with the lease terms to which the guarantor actually consented" (*404 Partners, L.P. v. Lerner,* 75 AD3d 481, 482 [1st Dept 2010]) and that a "guarantor should not be bound beyond the express terms of his guarantee" (*665-75 Eleventh Ave. Realty Corp. v. Schlanger,* 265 AD2d 270, 271 [1st Dept 1999])(citation and internal quotation marks omitted), McClure contends that for the personal guaranty to take effect, the tenant must satisfy five conditions precedent: 1) tender at least 60 days advance notice of its intention to vacate; 2) have paid the landlord at least $1,044,000.00 under the lease; 3) not otherwise have been in default; 4) completed the tenant's work on the building; and 5) provide the landlord with reasonable assurance that there are no claims or liabilities resulting from the acts or omissions of the tenant. McClure asserts that since those preconditions have not been satisfied, the personal guaranty not effective.

In opposition, plaintiff submits the affidavit of Gordon Lau, managing member of 169 Bowery, who states that Bowery Development plainly defaulted under the lease when it was evicted pursuant to the order of the Civil Court, and that McClure's interpretation of the personal guaranty would effectively nullify the guaranty by requiring that the lease be fully complied with in order for the guaranty to take effect. Citing *Ruttenberg v*

Davidge Data Sys. Corp. (215 AD2d 191, 196 [1st Dept 1995]), plaintiff argues that the court should not interpret the lease in a manner that "will operate to leave a 'provision of a contract ... without force and effect'" (internal citation omitted). Plaintiff also relies on Article 54.4 of the lease to effectuate the guaranty, which states as follows: "If any provision of this Lease is unenforceable in whole or in part, it shall be deemed modified to the extent necessary to make it or the applicable provision enforceable, or, if such provision is not deemed modified, the remaining provisions shall continue to be in effect."

According to plaintiff, the personal guaranty unambiguously obligated McClure to guaranty all "Net Annual Rent obligations" until the tenant vacates, as defined in the guaranty. In response to McClure's position that portions of the guaranty constitute "preconditions," plaintiff asserts that in the first draft of the Lease Agreement, drafted by plaintiff's counsel, McClure was to personally guarantee "the payment and performance of all of Tenant's obligations" under the lease, but if the tenant vacated and surrendered possession prior to the expiration of the lease term, then McClure would *not* be liable for "rents due or to become due beyond that date," if the tenant had completed the "Tenant's Work," tendered at least 60 days notice, paid at least $1.044 million in rent, and was "not otherwise in

default hereunder beyond any applicable notice and cure period" (*see* Affirmation of Mark S. Friedlander in Opposition to Defendants' Bowery Development & Dan McClure Pre-Answer Motion To Dismiss, ¶41 & Exh. T). Plaintiff's counsel asserts that in the second draft, plaintiff's counsel changed the guaranty language to "limit" McClure's liability "to the payment of all of the tenant's 'Net Annual Rent obligations under the lease until such time as Tenant vacates the Demised Premises,'" and "released" McClure from *all* obligations under the lease if the tenant was in "compliance" with the foregoing: tendered at least 60 days notice, completed the "Tenant's Work," paid at least $1.044 million in rent, and was not otherwise in default beyond applicable notice and cure periods (*see id* ¶*41* & Exh. U).

According to plaintiff's counsel, the third and final version of the personal guaranty, was drafted as a result of "a conversation between Defendant McClure and Mr. Lau," in which McClure "insisted upon the qualifying language" that was "typed by Mr. Lau at the direction of defendant McClure and inserted in the final lease documents" by plaintiff's "transactional attorney" (*see id* at ¶41[c]). Plaintiff argues that, pursuant to Article 53.1 of the Lease, any ambiguity in the final and "controversial" language of the personal guaranty must be construed against McClure, as the "author" of that language. Plaintiff's argument is directly contrary to the express terms of

Article 53.1, which provide that since both parties were represented by counsel, ambiguous or conflicting provisions are *not* to be construed against the drafting party.[4]

Defendant McClure asserts that the final version of the personal guaranty is not ambiguous, and the pre-condition section does not conflict with, or render the guaranty "meaningless," as it just substantially limits the guaranty. According to McClure, the meaning and intent of the final version of the personal guaranty was to ensure that he would not be liable for *all* of Bowery Development's rent obligations if the company failed, and in the event Bowery Development succeeded to the extent of paying rent obligations for three years and met the other preconditions, then McClure would be willing to pay for the last 60 days that Bowery Development occupied the building.

The court concludes that McClure's position is consistent with the express and unambiguous terms of the guaranty. Although the personal guaranty as ultimately finalized provides very little protection for plaintiff, it is clear from plaintiff's own arguments, that the situation was one that Lau understood and agreed to, after negotiations involving different versions of the

---

[4] Article 53.1 of the Lease Agreement states: "This Lease has been negotiated by Tenant and Landlord, each of which has engaged its own counsel for that purpose. Accordingly, no provision hereof which is or may be considered to be ambiguous, inconsistent, conflicting or otherwise difficult to interpret shall be interpreted or construed against the drafting party."

guaranty. Thus, since it cannot be disputed that the conditions necessary to trigger the effectiveness of the guaranty have not been satisfied, the 1st cause of action to enforce McClure's guaranty must be dismissed as without merit.

B. Piercing the Corporate Veil

The 2nd, 3rd, 4th, 5th, 6th 8th, 11th and 12th causes of action seek to impose individual liability on defendant McClure by piercing the corporate veil, based on the following information and belief allegations:

> 99. Upon information and belief, Defendant BOWERY DEVELOPMENT dominates and controls Defendant COLLECTIVE HARDWARE and Defendants BOWERY DEVELOPMENT and COLLECTIVE HARDWARE are the corporate "alter egos" of Defendants McCLURE and RIVELLINI as they are controlled by Defendants McCLURE and RIVELLINI solely to further the personal interests of Defendants McCLURE and RIVELLINI being that the activities of Defendant BOWERY DEVELOPMENT and Defendant COLLECTIVE HARDWARE are directed by Defendants McCLURE and RIVELLINI and Defendants BOWERY DEVELOPMENT and COLLECTIVE HARDWARE do not display business discretion separate from Defendants McCLURE and RIVELLINI.
>
> 100. Upon information and belief Defendants McCLURE and RIVELLINI have used Defendants BOWERY DEVELOPMENT and COLLECTIVE HARDWARE as corporate "alter egos" to exert control over the Premises for their own personal benefit and to harm Plaintiff 169 BOWERY by using the Premises in a fashion contrary to the terms of the LEASE, but in a way clearly intended to generate income for the personal benefit of Defendants McCLURE and RIVELLINI.
>
> 101. Under these circumstances, adherence to the fiction of the separate existence of Defendants BOWERY DEVELOPMENT and COLLECTIVE HARDWARE, the corporate "alter egos" of Defendants McCLURE and RIVELLINI, would promote injustice and permit an abuse of the limited liability company form.

Amended Complaint, Second Cause of Action, ¶¶ 99-101.[5]

Ordinarily, owners or managers of a corporation are not liable for the debts of the corporation and it is perfectly legal to incorporate in order to limit the liability of the owners. Piercing the corporate veil to establish individual liability is only permitted where it can be shown 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." *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 (1993). However, "the plaintiff cannot rely upon mere 'buzz words' or vague or conclusory allegations, but must instead set forth facts that truly address the underlying transactions and occurrences and the material elements of the claim." *East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, 66 AD3d 122, 131 (2nd Dept 2009), *affd* 16 NY3d 775 (2011); *see also Albstein v. Elany Contr. Corp.*, 30 AD3d 210, 210 (1st Dept 2006)(efforts to pierce the corporate veil properly rejected, where plaintiff alleged "nothing more than that the corporation was 'undercapitalized' and functioned as Krieger's 'alter ego'" and no facts were pleaded "to substantiate such conclusory claims"); *Abelman v.*

---

[5] Identical allegations appear in support of the 3rd, 4th, 5th, 6th, 7th, 8th, 11th and 12th causes of action.

Shoratlantic Dev. Co., 153 AD2d 821, 823 (2nd Dept 1989) ("conclusory statements that an entity is an 'alter ego' of a corporation are insufficient to sustain a cause of action against it"); *Trofien Steel & Constr. Inc. v Rybak*, 26 Misc 3d 1223(A) (Sup Ct, Kings Co 2010)(rejecting as conclusory, allegations in the complaint that the individual defendant "exercised complete domination and control" over the corporation, "abused the privilege of doing business in the corporate form by deliberately undercapitalizing [the corporation] and otherwise intermingling the assets of [the corporation] in which he has an interest").

Here, the amended complaint contains no detailed facts as to how McClure allegedly exercised domination and control over the corporations, abused the corporate form, or undertook any specific actions which would justify piercing the corporate veil. Nor has plaintiff made any additional evidentiary submissions that would provide a basis for piercing the corporate veil. *See Board of Mgrs. of the Arches at Cobble Hill Condominium v Hicks & Warren, LLC*, 18 Misc 3d 1103(A) (Sup Ct, Kings Co 2007). Among the few specific factual allegations asserted against McClure are allegations relating to the fact that he personally paid the large majority of rent payments owed by Bowery Development pursuant to the lease. That allegation alone is insufficient to show or even suggest that McClure is abusing the corporate form for his own interests.

Thus, since plaintiff's conclusory allegations are insufficient to sustain its claims against McClure for piercing the corporate veil, the portions of the 2nd, 3rd, 4th, 5th, 6th 8th, 11th and 12th causes of action asserted against McClure in his individual capacity, must be dismissed.

V. Dismissal of the Action as to Rivellini Individually

Plaintiff likewise seeks to impose individual liability on defendant Rivellini, by piercing the corporate veil based upon the identical conclusory allegations asserted against McClure. The amended complaint contains few factual allegations about Rivellini and his actions, beyond alleging that he acted as a real estate broker who negotiated the lease for the building for Bowery Development, he was a member and day-to-day manager of Bowery Development and Collective Hardware, and he maintained an office in the building. As determined herein above with respect to the allegations against McClure, the allegations against Rivellini do not provide a sufficient basis to support a claim for piercing the corporate veil. Thus, the complaint in its entirety is dismissed as against defendant Rivellini.

VI. 3rd, 4th and 5th Causes of Action for Breach of Contract

Defendant Collective Hardware moves to dismiss the 3rd, 4th and 5th causes of action, pursuant to CPLR 3211(a)(4), on the

grounds of another action pending.[6] Citing *Matter of Topps Co., Inc. Shareholder Litigation*, 19 Misc 3d 1103(A) (Sup Ct, NY County 2007), defendant argues that where another action is pending between the same parties for the same cause of action, the court should dismiss or stay the duplicative causes of action "to avoid vexatious litigation and duplication of effort, with the attendant risk of divergent rulings on similar issues." *See also Nype v Las Vegas Land Partners LLC*, 74 AD3d 497 (1st Dept 2010). Specifically, defendant asserts that the 3rd and 4th causes of action duplicate the 3rd cause of action in the Subtenants Litigation, which seeks damages for waste; and to the extent the 5th cause of action seeks attorney's fees in connection with the Insurance Litigation, it duplicates the 4th cause of action for attorney's fees in that action.

Defendant's arguments are not persuasive. While the 5th cause of action in this case seeks attorney's fees in connection with the Insurance Litigation, as noted above, the Insurance Litigation is no longer pending and is finally disposed, including the attorney's fees issue. The court makes no

---

[6]While defendant Rivellini also joined in this portion of the motion, the court has already determined herein above that the complaint should be dismissed in its entirety as against Rivellini.

To the extent the identical arguments are also made with respect to the dismissal of the 9th and 10th causes of action for fraud, those arguments are moot in view of the dismissal herein above of those claims.

determination as to the preclusive effect, if any, of the judgment in that action.

As to the Subtenants Litigation, that action does not encompass all the same parties, or even the same dispute between the parties. With the exception of Collective Hardware and Rivellini, the complaint in the Subtenants Litigation names more than 25 individuals or entities as defendants, who are not named as defendants in the instant action. Moreover, in the instant action, the 3rd and 4th causes of action are for breach of the lease between the owner and the tenant, alleging that the tenant failed to develop the building as required by the lease, and failed to return the building to the owner in the condition required by the lease. In contrast, the 3rd cause of action in the Subtenants Litigation is a claim for waste, alleging that as a result of the subtenants' alterations and use of the building, the building has been physically damaged and its structural integrity compromised. Based on the foregoing, no basis exists for dismissing the 3rd, 4th or 5th causes of action, on the grounds of another action pending.

Finally, the court notes that even though plaintiff has not filed a formal motion or cross-motion, it has requested permission to amend its pleadings should the court find them to be insufficient in any way. Although leave to amend may be freely granted where the amended pleading is not patently without

merit, *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011), where, as here, no proposed pleading is submitted to the court to determine its merits, amendment is properly denied (*see Fernandez v HICO Corp*, 24 AD3d 110, 111 (1st Dept 2005). Thus, in the absence of a proposed amended complaint, plaintiff's request is denied, without prejudice to moving for such relief upon proper papers.

Accordingly, it is

ORDERED that Motion Sequence Numbers 003 and 004 are granted only to the extent of dismissing the 9th and 10th causes of action in the amended complaint in their entirety as to all defendants, and dismissing the amended complaint in its entirety as against individual defendants Dan McClure and Ronald Rivellini, and such claims are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of Motion Sequence No. 004 to dismiss the 3rd, 4th and 5th causes of action is denied; and it is further

ORDERED that the action shall continue with respect to the remaining parties and the remaining causes of action; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of defendants Dan McClure and Ronald Rivellini, and all future papers filed with the court shall bear the amended

caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the remaining defendants shall serve and file answers within 20 days of the date of this order; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference on February 16, 2012 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

Dated: January 17, 2012

ENTER:

J.S.C.