

**219 E. 7th St. Hous. Dev. Fund Corp. v 342 E. 8th St.
Hous. Dev. Fund Corp. BFC, Inc.**

2012 NY Slip Op 33376(U)

July 12, 2012

Supreme Court, New York County

Docket Number: 114227/03

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 114227/2003
219 EAST 7TH ST. HOUSING
vs.
342 EAST 8TH ST. HOUSING
SEQUENCE NUMBER : 013
DISMISS ACTION

INDEX NO. _____

MOTION DATE 11.14.20

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 013 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the branch of defendants' motion seeking dismissal of the complaint as against defendants Donald Capoccia, Brandon Baron, and Joseph Ferrara under CPLR 3211 and CPLR 3212 is denied; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the complaint as against defendants BFC, Inc., BFC Associates, Inc., BFC Developer, LLC, BFC Partners, LP, and BFC Construction Management, Inc. is granted with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and said claims are severed and dismissed; and it further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

ORDERED that the Clerk is to enter judgment accordingly.

Dated: 7.12.2012

HON. CAROL EDMEAD J.S.C.

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

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X

219 E. 7th STREET HOUSING
DEVELOPMENT FUND CORPORATION,

Plaintiff,

-against-

342 EAST 8th STREET HOUSING
DEVELOPMENT FUND CORPORATION,
BFC, INC., BFC ASSOCIATION, LLC,
BFC DEVELOPER, LLC, BFC
PARTNERS, LP, DONALD CAPOCCIA,
JOSEPH FERRARA, BRANDON BARON,
BFC CONSTRUCTION CORP., BFC
CONSTRUCTION MANAGEMENT, INC.,
GETHSEMANE GARDNERS, LP,
GETHSEMANE PARTNERS, LLC,
GETHSEMANE GARDEN BAPTIST
CHURCH, SANDHA GENERAL
CONTRACTING CORP., THE
SCHULMAN GROUP, INC., NEB
CONTRACTING, INC., C.E. BOSS CO.,
INC., LESLIE FEDER, WILLIAM ATLAS
ASSOCIATES, LMW ENGINEERING
GROUP, LLC, JIEMANG WANG, P.E.,
A&D MAJA CONSTRUCTION, INC.,
RAJA CONSTRUCTION CO., INC. and
M.A. RAJA CONSTRUCTION CORPORATION,

Defendants.

-----X

GETHSEMANE GARDENS, LP and
GETHSEMANE PARTNERS, LLC,

Third-Party Plaintiffs,

-against-

N.E.B. CONTRACTING, INC., N.E.B.
CONTRACTING, INC. d/b/a AMERICAN
PILE COMPANY and AMERICAN PILE
COMPANY,

Third-Party Defendants.

-----X

CAROL R. EDMEAD, J.S.C.:

Index №.: 114227/03
Motion Seq. No. 013
DECISION AND ORDER

In a case involving allegations that a construction project caused damages to a neighboring property, defendants Donald Capoccia (Capoccia), Brandon Baron (Baron), and Joseph Ferrara (Ferrara) move, pursuant to CPLR 3211, for dismissal of plaintiff's complaint as against them. Additionally, Capoccia, Baron, and Ferrara, as well as defendants BFC, Inc. (BFC), BFC Associates, Inc. (BFC Associates), BFC Developer, LLC (BFC Developer), BFC Partners, LP (BFC Partners), and BFC Construction Management, Inc. (BFC Management) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them.

BACKGROUND

Plaintiff, 219 East 7th Street Housing Development Fund Corporation, alleges that, in August 2000, defendants did excavation and pile driving pursuant to a construction project on a lot located at 223-225 East 7th Street in Manhattan. Plaintiff, the owner of an adjoining lot, claims that vibrations from defendants' work caused damage to the building located on its property, including damage to the building's lateral supports. Gethsemane Gardens, L.P. (Gethsemane Gardens) owned 223-225 East 7th Street at all relevant times, and BFC Construction Corp. (BFC Construction) was the general contractor on the project. Plaintiff's complaint seeks damages under theories of negligence, trespass, nuisance, and strict liability for engaging in hazardous activities.

DISCUSSION

"On a motion to dismiss pursuant to CPLR Section 3211, the pleading is to be afforded a liberal construction," and "[c]ourts must accept the facts as alleged in the complaint as true, accord plaintiffs every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 227 [1st Dept 2011 [internal quotation marks and citations omitted]]).

On the other hand, "[s]ummary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. **Capoccia, Baron, and Ferrara**

Capoccia, the President of BFC Construction, the general contractor, and a limited partner of Gethsemane Partners, the owner, submits an affidavit in which he states that any work he did with regard to the subject project was on behalf of BFC

Construction and Gethsemane Partners, and he "did not engage in any work and/or execute any contract for the Site in [an] individual capacity" (Capoccia Affidavit, ¶ 6). Baron, the treasurer of BFC Construction, and a limited partner of Gethsemane Partners, and Ferrara, a vice president of BFC Construction, and also a partner of Gethsemane Partners, each make similar statements that their involvement on the worksite was not in their individual capacity (Baron Affidavit, ¶ 17; Ferrara Affidavit, ¶ 17).

Thus, defendants argue that Capoccia, Baron, and Ferrara are not personally liable. In order to pierce the corporate veil to reach individual principals of a corporation plaintiffs "must establish that [defendants], through their domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against [plaintiff] such that a court in equity will intervene" (*Sound Communications, Inc. v Rack & Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011] [internal quotation marks and citation omitted]). Here, plaintiff has failed to plead, or provide any evidence, that defendants abused the privilege of doing business in the corporate form. Thus, the court cannot pierce the corporate veil.

However, "[i]f a director or officer commits, or participates in the commission of, a tort, whether or not it is also by or for the corporation, he is liable to third persons

injured thereby" (*Aguirre v Paul*, 54 AD3d 302, 304 [2nd Dept 2008] [internal quotation marks and citation omitted]; (see also *Hamlet at Willow Cr. Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85, 116 [2nd Dept 2009] ["A corporate officer may be liable for torts committed by or for the benefit of the corporation if the officer participated in their commission").

While Capoccia, Baron, and Ferrara show that plaintiff's allegations cannot serve as a basis for the court to pierce the corporate veil, the complaint alleges that they are liable as individuals for negligence, trespass, nuisance, and strict liability. Under plaintiff's generally-worded complaint, the facts alleged could fit within these theories. As to negligence, for example, the complaint alleges that "defendants, their agents, servants and employees dug, conducted, authorized and supervised demolition and/or construction ... performed in a careless and negligent way" (Plaintiff's Complaint, ¶¶ 142, 147). Thus, Capoccia, Baron, and Ferrara's motion to dismiss pursuant to CPLR 3211 must be denied.

Capoccia, Baron, and Ferrara do not make any showing that they did not participate in the alleged negligent acts. Thus, they do not make a prima facie showing of entitlement to summary judgment, as they failed to show that, without regard to their position as corporate officers, they did not participate in the commission of a tort. As such, their motion under CPLR 3212 must

be denied.

II. BFC, BFC Associates, BFC Developer, BFC Partners, and BFC Management

These five entities make a prima facie showing of entitlement to judgment by submitting the affidavits of Capoccia, Baron, and Ferrara, all three of which state that BFC, BFC Associates, BFC Developer, BFC Partners, and BFC Management were not involved with the subject project (Capoccia Affidavit, ¶¶ 7-16; Baron Affidavit, ¶¶ 7-16; Ferrara Affidavit, ¶¶ 7-16). Defendants also submit the construction contract between Gethsemane Gardens and BFC Construction, which refers to BFC Construction as the general contractor and to Gethsemane Gardens as the owner of 2226 First Avenue.

In opposition, plaintiff submits an affidavit from Claude O'Shea (O'Shea), an investigator hired by plaintiff. O'Shea testified that:

On October 24, 2011, I personally went to the Department of Buildings of the City of New York at 280 Broadway, New York, New York, and in particular, the permit department. I was informed by the supervisor in the permit department that the corporate entities, [BFC], [BFC Associates], [BFC Developer], [BFC Partners], and [BFC Construction], and [BFC Management] all utilize the same General Contractor number, GC - 4380 and all permits which are issued through the Department of Buildings on behalf of these entities are all issued to the same general contractor. Although some of these entities have been affiliated with properties other than the ones at issue in this lawsuit, the general contractor number is the same throughout

(O'Shea Affidavit, ¶ 3).

Plaintiff argues that, based on O'Shea's testimony, defendants' motion is premature, and that it is entitled to conduct depositions to learn more about the various entities, and any possible involvement they may have had with the subject construction more than a decade ago.

Here, O'Shea's testimony fails to raise an issue of fact. While the various entities may have a relationship with BFC Construction, the general contractor on the subject project, that does not provide a basis by which these five defendants could be subject to liability for work done by BFC Construction. Moreover, plaintiff may not avoid summary judgment in favor of BFC, BFC Associates, BFC Developer, BFC Partners, and BFC Management by simply suggesting that more discovery is needed. The Appellate Division recently noted:

[W]hile determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent, [a] determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence

(*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192 [1st Dept 2011] [internal quotation marks and citation omitted]).

Here, plaintiff has not provided any basis that would suggest that further discovery will lead to relevant evidence. As such, plaintiff fails to rebut BFC, BFC Associates, BFC Developer, BFC

Partners, and BFC Management's prima facie showing, and the application for summary judgment dismissing the complaint as against these defendants is granted.

CONCLUSION

Based on the foregoing, it is

ORDERED that the branch of defendants' motion seeking dismissal of the complaint as against defendants Donald Capoccia, Brandon Baron, and Joseph Ferrara under CPLR 3211 and CPLR 3212 is denied; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the complaint as against defendants BFC, Inc., BFC Associates, Inc., BFC Developer, LLC, BFC Partners, LP, and BFC Construction Management, Inc. is granted with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and said claims are severed and dismissed; and it further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for plaintiff.

ORDERED that the Clerk is to enter judgment accordingly.

Dated: July 12, 2012

ENTER:



Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD