

Tate Law Group, LLC v Stillwater Funding, LLC

2012 NY Slip Op 33505(U)

April 27, 2012

Sup Ct, New York County

Docket Number: 650746/11

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 650746/2011
TATE LAW GROUP, LLC
vs.
STILLWATER FUNDING, LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

Motion to/for
No(s) 4, 5, 6
No(s) 9, 10, 16
No(s) 15, 17

Upon the foregoing papers, it is ordered that this motion and cross-motion are
denied in accordance with the
attached decision/order.

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

Dated: 4/27/12

SHIRLEY WERNER KORNREICH
J.S.C.

- 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
[X] cross-motion

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
TATE LAW GROUP, LLC and MARK TATE,

Plaintiffs,

- against -

Index No. 650746/11
DECISION & ORDER

STILLWATER FUNDING, LLC, THE STILLWATER
ASSET-BACKED FUND, LP, STILLWATER CAPITAL
PARTNERS, INC., GEROVA FINANCIAL GROUP,
LTD, GEROVA ASSET BACKED HOLDINGS, LP,
PARTNERRE U.S. CORPORATION and PARTNERRE
INSURANCE COMPANY OF NEW YORK,

Defendants.

----- X
SHIRLEY WERNER KORNREICH, J.:

Defendants PartnerRe U.S. Corporation (PartnerRe US) and PartnerRe Insurance Company of New York (PartnerRe NY) move, pursuant to CPLR 3211 (a) (1) and (a) (7), for dismissal of the complaint with prejudice as to them (PartnerRe US and PartnerRe NY together, PartnerRe). Plaintiffs, Tate Law Group, LLC and Mark Tate (together, Tate), cross-move, pursuant to CPLR 3025 (b), for leave to amend the complaint to substitute other “PartnerRe” entities – PartnerRe Ltd., PartnerRe Principal Finance Inc. (PPF), and Partner Reinsurance Company Ltd. (Partner Reinsurance) – as defendants in place of PartnerRe US and PartnerRe NY (all five PartnerRe entities collectively, PartnerRe Entities).

Background

On this motion to dismiss, the following facts are taken from the complaint and plaintiffs’ additional submissions.

Mark Tate is the sole owner of Tate Law Group, LLC, a Georgia limited liability company specializing in mass tort, personal injury, wrongful death, and related practice areas.

Defendant Stillwater Funding, LLC (Stillwater) is a Delaware limited liability company and an assignee and successor in interest of The Stillwater Asset-Backed Fund, LP, a Delaware limited partnership. Defendant Stillwater Capital Partners, Inc. is a New York corporation, and an owner, manager, or an entity exercising control over Stillwater. Defendant Gerova Financial Group, Ltd. is a Bermuda corporation that primarily operates out of Stillwater's offices and exercises control over Stillwater. Defendant Gerova Asset Backed Holdings, LP, f/k/a, The Stillwater Asset Backed Fund, LP, d/b/a, The Stillwater Asset-Backed Fund LP, is a New York limited partnership (the Gerova entities together, Gerova).

Stillwater is a New York City-based hedge fund whose investment strategy included seeking extremely high yield returns from loans made to law firms representing plaintiffs in personal injury cases on a contingency fee basis. Tate was introduced to Stillwater by two principals of Oxbridge Financial Group, LLC (Oxbridge), acting as an agent and partner of Stillwater.

In 2007, Tate and Oxbridge discussed the establishment of a credit line to finance Tate's law office operations and litigation costs. Stillwater and Oxbridge highlighted Stillwater's financial strength, and they outlined an aggressive financing strategy, pursuant to which Tate would remit to Stillwater 100% of its receivables (Tate Receivables), and in return, Stillwater would make the full amount of a credit line available to Tate. Stillwater and Oxbridge assured Tate that: (1) the full amount of funds would be available for the duration of the loan term; (2) there would be flexibility for repayment; and (3) the financing strategy would lead to a substantial increase in profitability.

On November 26, 2007, Tate and Stillwater entered into a loan agreement (Credit

Agreement), which, as amended, provided Tate with a \$7.5 million revolving credit line and had a September 30, 2010 maturity date (Credit Line). According to the complaint, Stillwater required that Tate rely exclusively on it for operational funds so as to gain de facto ownership of Tate's law practice. Further, Stillwater required Tate to pay Nationwide Litigation Funding, an Oxbridge/Stillwater affiliate, a fee of \$110,000 and required Mark Tate to maintain life insurance policies covering the full amount of the Credit Line, for which Tate incurred annual premiums exceeding \$35,000. Tate, allegedly a victim of Stillwater's fraudulent scheme, and dependent upon continuous funding to finance the law practice office, allegedly had no choice but to accept all of the conditions that Stillwater imposed.

Notwithstanding Tate's compliance with its obligations under the Credit Agreement, plaintiffs allege, beginning in 2008, Stillwater's funding under the Credit Agreement became increasingly unreliable and Oxbridge imposed onerous and illegal conditions on Tate's ability to access the Credit Line. Plaintiffs also allege that Stillwater and Oxbridge falsely assured Tate that the inability to timely fund draw requests was temporary and that Tate would be able to continue to operate with the funding outlined in the Credit Agreement.

The complaint continues that in 2010, a new servicer, Brevet Asset Solutions, on behalf of Stillwater and PartnerRe, advised Tate that Stillwater and PartnerRe would no longer honor funding requests. Stillwater did not have the funds available to fulfill its obligations under the Credit Agreement. Tate incurred substantial financial losses. On September 15, 2010, Tate sent a formal default letter to Stillwater. After the parties could not reach an equitable resolution, it commenced this action.

The complaint contains 14 causes of action. As is relevant here, only the 12th cause of

action is against PartnerRe, alleging that it exercised dominion and control over Stillwater based on a \$30 million capital infusion, elevating it from lender to owner-in-fact of Stillwater. Tate alleges that PartnerRe is purposely foreclosing on a note that it holds against Stillwater to deprive Stillwater's creditors of their rights and to become a holder in due course, leaving Tate with no recourse.

In support of their motion for dismissal, PartnerRe US and PartnerRe NY submit documents which support their contentions that they and an affiliate, Partner Reinsurance Company Ltd., are subsidiaries of PartnerRe Ltd, that the PartnerRe entities had no interaction or involvement with the credit line issued by Stillwater to plaintiffs or are parties to those loan documents, and that PartnerRe Reinsurance is the holder of "asset-backed promissory notes, pursuant to a Note Purchase Agreement, dated July 27, 2009, which have as the underlying security, among other things, the receivables owed by Plaintiffs" to Stillwater. The third proposed substituted PartnerRe entity, PPF, is an investment advisor to Partner Reinsurance pursuant to an investment management agreement (Affidavit of Thomas L. Forsyth, executive vice president at PartnerRe US and PartnerRe NY, sworn to Jul 11, 2011, ¶¶ 3-6; Affidavit of Michael J. Halford, managing director of PPF, sworn to October 13, 2011, ¶¶ 3-4).

Tate argues that the court should deny the motion to dismiss at this stage so that the parties may engage in discovery regarding the relationship among the various PartnerRe Entities. As for the cross motion, Tate argues that the complaint alleges sufficient facts to establish that the PartnerRe Entities are the alter ego of Stillwater and, therefore, liable because they exercised complete control over Stillwater, which led to Tate's damages.

Discussion

The motion by PartnerRe US and PartnerRe NY for dismissal of the complaint as to them, is granted for the reasons discussed below. The cross motion by Tate for leave to amend the complaint to substitute PartnerRe Ltd., PPF, and Partner Reinsurance as defendants in place of PartnerRe US and PartnerRe NY, is denied. The complaint, even when considered together with the additional submissions, does not state a claim against any of the PartnerRe Entities for breach of contract, or any other cause of action, under an alter ego theory of liability.

In essence, Tate seeks to “pierce the corporate veil” (*see e.g. AI Entertainment LLC v 27th St. Prop. LLC*, 60 AD3d 516 [1st Dept 2009]). “In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff” (*Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 [1st Dept 2009], citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The “attempt of a third party 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” (*Matter of Morris, id.*).

Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity

(*Fantazia Intl. Corp.*, 67 AD3d 512).

Tate is relying on the following allegations in the complaint to support its alter ego claim:

(1) in July 2009, Stillwater and PartnerRe entered into a \$30 million loan agreement, and shortly thereafter, material changes were made to the servicing of Tate's Credit Agreement with Stillwater; (2) in early 2010, after continuously failing to timely honor the terms of the Credit Agreement, PartnerRe fired Oxbridge and replaced the servicing with Brevet Asset Solutions, on behalf of Stillwater and PartnerRe, which advised Tate that Stillwater and PartnerRe would no longer honor funding requests; (3) PartnerRe has exercised and continues to exercise dominion and control over Stillwater since its \$30 million infusion of capital, and elevated itself from a lender to an owner of Stillwater; (4) PartnerRe is now in control of the actions of Stillwater; and (5) PartnerRe, or its agents, contacted Tate and fraudulently represented that funding under the Credit Agreement would be renewed.

None of these allegations pertains to the requisite factors, discussed above, such as the disregard of corporate formalities, inadequate capitalization, the intermingling of funds, the overlapping in ownership, officers, directors and personnel, common office space or telephone numbers, and whether the dealings between the entities are at arm's length. As for domination and control, the proposed amended complaint alleges only legal conclusions with no factual allegations supporting the alter ego claim (*Vitale v Steinberg*, 307 AD2d 107 [1st Dept 2003]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559 [2d Dept 2002]).

To be sure, Tate also contends that, since filing the original complaint, Tate has discovered the following additional facts, including that: (1) PartnerRe's subsidiary, LFR Collections, acquired Stillwater's interest in the Credit Agreement and direct ownership of the Tate Receivables on July 14, 2011, purportedly evidenced by a notice of assignment, dated July 27, 2011, that PartnerRe's attorneys, Mayer Brown LLP, sent to it; (2) PartnerRe's associate

general counsel, Kathleen Servidea, is the sole principal listed on the Connecticut Secretary of State web site for LFR Collections; (3) executives of PPF (president Dave Moran and managing director Michael Halford) met in person with Tate on June 30, 2009, and stated that PartnerRe would control funding decisions under the Credit Agreement; (4) Partner Reinsurance acquired an interest in the Tate Receivables on July 27, 2009; (5) on July 27, 2009, PartnerRe Ltd., through its control of Oxbridge and Brevet relating to the subject matter of this action, assumed control and became substantially involved in the servicing of the Credit Agreement and made unilateral changes to the criteria for determining if Stillwater would resume funding Tate, and these changes were adverse to Tate.

Even if true, these allegations do not show that any of the PartnerRe Entities, none of which has any contractual relations with Tate, used the corporate form to commit a wrong against Tate (*Albstein v Elany Contr. Corp.*, 30 AD3d 210, 210 [1st Dept], *lv denied* 7 NY3d 712 [2006]; *Brainstorms Internet Mktg. v USA Networks*, 6 AD3d 318, 318 [1st Dept 2004]). Those seeking to pierce a corporate veil “bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud” (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). It is inconsequential that Tate alleges that PartnerRe’s subsidiary, LFR Collections, acquired direct ownership of the Tate Receivables and “PartnerRe, through its control of Oxbridge and Brevet relating to the subject matter of this action, assumed control and became substantially involved in the servicing of the Credit Agreement and made unilateral changes to the criteria for determining if Stillwater would resume funding Tate.”

There are no allegations by Tate that contravene the assertion that the involvement of any

of the PartnerRe Entities was other than as the holder of asset-backed promissory notes, which have as the underlying security, among other things, the Tate Receivables. Thus, the allegation that PPF executives told Tate that “PartnerRe would control the Credit Agreement and all funding decisions” does not support an alter ego theory of liability. The complaint does not set forth any other theory upon which to hold any of the PartnerRe Entities liable. Accordingly, it is

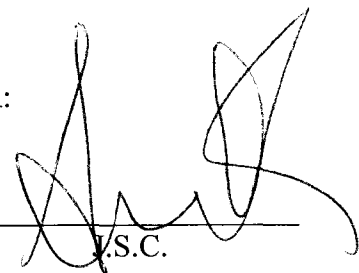
ORDERED that the motion by defendants PartnerRe U.S. Corporation and PartnerRe Insurance Company of New York to dismiss is granted and the complaint is dismissed as against these defendants with costs and disbursements to PartnerRe U.S. Corporation and PartnerRe Insurance Company of New York as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross motion by Tate Law Group, LLC and Mark Tate for leave to amend the complaint to substitute PartnerRe Ltd., PartnerRe Principal Finance Inc., and Partner Reinsurance Company Ltd. as defendants in place of PartnerRe U.S. Corporation and PartnerRe Insurance Company of New York, is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 228, 60 Centre Street, New York, NY, on May 15, 2012, at 10:30 a.m.

Dated: April 27, 2012

ENTER:



U.S.C.