SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ Justice PART 35

Index Number : 153425/2012
274 MADISON COMPANY LLC
vs.
RAMSUNDAR, SILVION
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of defendant Silvion Ramsundar's motion pursuant to CPLR 3212 for summary judgment to dismiss the complaint of Madison Company LLC is denied; and it is further

ORDERED that the branch of defendant Silvion Ramsundar's motion to dismiss the second and third causes of action pursuant to CPLR 3211 (a)(7) is granted solely as to the *third* cause of action for attorneys' fees, and the third cause of action is severed and dismissed; and it is further

ORDERED that plaintiff 274 Madison Company LLC's cross-motion pursuant to CPLR 3025 (b) to amend the complaint to add Manhattan Egoscue, LLC ("Egoscue") as a defendant in this action and to add causes of action against defendant Silvion Ramsundar for violations of the New York Limited Liability Company Law §704 (a) and the New York Debtor and Creditor Law §§273, 274, 275 and 276 is granted and the plaintiff shall amend the pleadings accordingly; and it is further

ORDERED that plaintiff shall serve a Second Amended Complaint in the form attached to the cross-motion excluding the proposed fourth cause of action for attorneys' fees against Silvion Ramsundar; and it is further

ORDERED that Manhattan Egoscue, LLC and Silvion Ramsundar shall serve their Answer within 20 days of service of the Second Amended Complaint; and it is further

ORDERED that all parties shall appear for a Preliminary Conference on February 18, 2014, 2:15 p.m.; and it is further

ORDERED that the plaintiff shall serve a copy of this order with Notice of Entry upon all parties, including the newly-named defendant, within 20 days of entry.

This constitutes the decision and order of the court.

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

Dated: 12/2/13

_____, 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

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

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274 MADISON COMPANY LLC,

Plaintiff,

-against-

SILVION RAMSUNDAR,

Defendant.

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Index No.: 153425/2012

DECISION AND ORDER

Motion #001

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

MEMORANDUM DECISION

In this breach of a guaranty action arising from the obligor's breach of a lease, defendant Silvion Ramsundar ("Ramsundar") moves pursuant to CPLR 3212 for summary judgment to dismiss the complaint of the plaintiff 274 Madison Company LLC's ("274 Madison"); or in the alternative, to extend his time to serve discovery demands and dismiss the second and third causes of action for failure to state a cause of action pursuant to CPLR 3211 (a) (7).

274 Madison opposes the motion and cross-moves pursuant to CPLR 3025 (b) to amend the complaint to add Manhattan Egoscue, LLC ("Egoscue") as a defendant in this action and to add causes of action under the New York Limited Liability Company Law ("LLC Law") and the New York Debtor and Creditor Law ("DCL") against Ramsundar, and to deem service of the Amended Complaint complete upon service of the Court's decision herein.

Background Facts

On December 23, 2005, Egoscue as tenant, entered into a five-year lease (the "Lease") with Madison 274, as landlord, for certain premises located at 274 Madison Avenue, New York, New York (the "Premises") with a monthly rent of $5,103, which was to expire on December 31,

2010. Ramsundar, the owner and the sole member of Egoscue, executed the Lease as "president" on behalf of Egoscue. At the same time, Ramsundar assumed responsibility for Egoscue's Lease payment obligations by executing a Limited Guaranty (the "Guaranty") (exhibit B).

Approximately two and a half years prior to the expiration of the Lease, on May 29, 2008, Egoscue vacated the premises, on notice to Billie Jean Hamil (Madison 274's managing agent), and returned the keys (May 29, 2008 letter, exhibit C). At that time, Egoscue owed May 2008 rent payment to Madison 274. Thereafter, on June 10, 2008, Madison 274's counsel sent a letter to Ramsundar, stating that upon Egoscue's vacatur of the premises, Ramsundar's liability as Guarantor through the date of Egoscue's "surrender" was $5,288.15 (June 10, 2008 letter, exhibit D). Next, on November 3, 2008, Madison 274's counsel sent a letter to Ramsundar advising that if he pays Madison 274 $5,288.15 in full, all of his personal obligations under the Guaranty would be satisfied and "[Madison 274] will have no more claims against [Ramsundar] pursuant to the terms of [the] Guaranty" (November 3, 2008 letter, exhibit E).

Madison 274 re-rented the premises to another tenant in July 2009. On or about December 10, 2010, still owing rent payment to the landlord, Egoscue was voluntarily dissolved, pursuant to LLC Law § 705 (*see* Articles of Dissolution filed with the New York Department of State, exhibit F).

Defendant did not pay any of the owed amount to Madison 274, and in June of 2012, Madison 274 commenced this action, seeking, *inter alia*, to enforce the Guaranty against Ramsundar and to recover the alleged outstanding rent payments, from the date of the vacatur through the end of the Lease term, in the amount of $85,728.64 plus attorneys' fees. Thereafter, in or about August 2012, Madison 274 amended its Complaint, seeking to hold Ramsundar

personally liable under the Lease upon dissolution of Egoscue; and attorneys' fees.

In support of his motion, Ramsundar argues that Madison 274's claim against him for breach of the Guaranty should be dismissed because his liability under the Guaranty ended on May 31, 2008, when Egoscue vacated and surrended the Premises. In any event, defendant failed to return the two-month security deposit of $10,206.00, that Egoscue paid to Madison 274 at the time of the Lease (exhibit A). At most, Ramsundar's liability is limited to May 2008 rent payment of $5,288.15, as stated in Madison 274's counsel's June 10, 2008 letter (exhibit D).

Further, Ramsundar argues that the *second* and *third* cause of action alleging Ramsundar's personal liability for Egoscue's debts under the theory of piercing the corporate veil fail to state a cause of action. There is no allegation that Ramsundar exercised domination and control to commit fraud to support the theory of piercing of the corporate veil. The mere claim that Escogue was dissolved while it owed money to 274 Madison is insufficient. And, in the absence of any claim or judgment against the corporation Egoscue, no independent cause of action exists against Ramsundar for piercing the corporate veil.

In the event dismissal is denied, Ramsundar seeks an extension of time to serve discovery demands.

Madison 274 opposes the motion, arguing that the condition precedent for relieving Ramsundar from liability under the Guaranty was not fulfilled because the tenant (Egoscue) did not properly "surrender" the premises as required by the Lease. Egoscue delivered the keys to the superintendent who is not the owner of Madison 274 or its managing agent pursuant to the Lease, and Egoscue failed to "deliver the premises in broom clean condition," as certain pieces of furniture were left in the premises. Further, Egoscue's security deposit is irrelevant to

Ramsundar's liability under the Guaranty, and in any event, only offsets the aggregate damages of $84,993.06, not to the particular months rent as suggested.

Furthermore, Madison 274 never accepted the alleged "surrender," as required by the Lease. As stated in the Affidavit of Madison 274's principal Adam Abramson, neither the June 10, 2008 nor November 3, 2008 letters constitutes an acceptance of the "surrender," and instead, they "were in hopes of reaching a settlement" (Adam Abramson Affidavit). Finally, while Madison 274's complaint does not allege a cause of action for piercing corporate veil against Ramsundar, Madison 274 reserves its right to assert such claim in the future.

In its cross-motion, Madison 274 seeks to amend the Complaint by adding Egoscue as the defendant,[1] on the ground that Egoscue is the named tenant on the Lease, for which Ramsundar guaranteed performance and therefore, Madison 274's claims against Ramsundar are directly related to the claims against Egoscue for the breach of the Lease.

Further, Madison 274 argues it should also be permitted to add causes of action against Ramsundar for violations of the LLC Law and DCL in connection with the dissolution of Egoscue. Ramsundar dissolved his company and transferred all the company's assets to himself, "while the company was insolvent," or thereby rendering the company insolvent. Such transfer violates the LLC Law §704 (a) and constitutes fraudulent conveyance under DCL §§273, 274, 275 and 278 (*see* the proposed Second Amended Complaint, exhibit E). At that time, Ramsundar still owed payment to Madison 274 under the Guaranty and did not give notice of the dissolution to Madison 274. And in any event, it is not necessary to prove the merits of the

[1] In its proposed Second Amended Complaint, Madison 274's alleges causes of action against Egoscue for breach of the Lease in the amount of $84,448.06 and for $25,000 in attorneys' fees.

proposed causes of actions and Ramsundar will not be prejudiced by the amendment.

In reply, Ramsundar argues that the condition releasing him from liability under the Guaranty was fulfilled, as Egoscue returned the key in accordance with the Lease to the building's superintendent, who is an agent of the owner/landlord, and there is no evidence that Egoscue left any personalty or furniture items in the premises.

Further, Madison 274's cross-motion should be denied as it is a mere attempt to delay the disposition of Ramsundar's motion. First, Madison 274 does not allege that Egoscue is a necessary party, as required by CPLR §1001. Second, Madison 274's allegations of Ramsundar's fraudulent transfers, stated "upon information and belief," are conclusory and unsupported by any "evidentiary proof that can be considered upon a motion for summary judgment," as required for a motion to amend pleadings. In this regard, Adam Abramson's affidavit is devoid of any specific factual allegations of wrongdoing on either Egoscue's or Ramsundar's part.

Ramsundar next argues that he did not withdraw assets of Egoscue as it had no other assets at the time of the dissolution and was dissolved as a result of termination of its franchise operating license. No presumption of a fraudulent conveyance is created when an LLC is dissolved and a creditor claiming a fraudulent conveyance has the burden of establishing actual fraud by clear and convincing evidence.

In response, Madison 274 reiterates that it never accepted the tenant's alleged surrender; the tenant did not leave the premises in broom clean condition; the delivery of the keys to the superintendent does not constitute "surrender," as the superintendent is not "the Owner or its Managing Agent"; and the November 3, 2008 letter is merely an offer to settle and cannot be

construed as an accord or satisfaction. An Affidavit of "Alan" Abramson, a member of Madison 274 and president of its management company Abramson Brothers, Inc. indicates that Madison 274 was not given notice of Egoscue's dissolution; and, Egoscue had assets at the time of dissolution, *i.e.*, equipment, fixtures, bank accounts (Alan Abramson Affidavit). Madison 274 also argues that Ramsundar did not provide any evidence of how the company's assets were disposed.

Finally, Madison 274 argues that further discovery is necessary pursuant to CPLR 3212 (f) "on the matters that are in dispute."

Discussion

Ramsundar's Motion

CPLR 3212 (b)

Defendant moving for summary judgment must establish its cause of action or defense sufficiently to warrant the court directing judgment in its favor as a matter of law in (CPLR §3212 [b]; *VisionChina Media Inc. v Shareholder Representative Services, LLC,* 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]; *Ryan v Trustees of Columbia University in City of New York, Inc.*, 96 AD3d 551, 947 NYS2d 85 [1st Dept 2012]). The movant's failure to make such showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Corprew v City of New York*, 106 AD3d 524, 965 NYS2d 108 [1st Dept 2013]; *TrizecHahn, Inc. v Timbil Chiller Maintenance Corp.*, 92 AD3d 409, 937 NYS2d 586 [1st Dept 2012]).

However, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]) and set forth evidentiary proof in admissible form in

support of his or her claim that material triable issues of fact exist (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *IDX Capital, LLC v Phoenix Partners Group*, 83 AD3d 569, 922 NYS2d 304 [1st Dept 2011]).

Further, in determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]).

Breach of the Guaranty (first cause of action)

The court finds that Ramsundar is not entitled to summary judgment dismissing the *first* cause of action for breach of the Guaranty, as he failed to establish that his liability under the Guaranty ended when Egoscue vacated the premises in May 2008.

"It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [2004]). "A guaranty is a contract, and in interpreting it we look first to the words the parties used" (*Wider Consol., Inc. v Tony Melillo, LLC*, 107 AD3d 883, 968 NYS2d 521 [2d Dept 2013], *citing Louis Dreyfus Energy Corp. v MG Ref. & Mktg., Inc.*, 2 NY3d 495, 500, 780 NYS2d 110, 812 NE2d 936 [2004]).

Here, the Guaranty provides in pertinent part:

> "[u]pon Tenant's (a) having *vacated and surrendered* the demised premises to Owner free of all subleases or licenses and in broom clean condition *and as otherwise required by this Lease* and (b) having notified Owner or Managing Agent in writing and (c) delivered the keys to the demised premises to the Owner or its Managing Agent, Guarantor shall not be liable under the guarantee to pay rent, additional rent or other charges or payments accruing under the lease after the date of said *surrender*."
> (See exhibit B)(emphasis added).

Under the Guaranty, Ramsundar's liability ceases upon the vacatur and surrender of the premises as required by Lease.[2] Here, the Lease does not expressly define "surrender."

However, paragraph 25 of the Lease mentions such term as follows:

> "No act or thing done by Owner or Owner's agents during the term hereby demised shall be deemed an acceptance of a surrender of the demised premises, and no agreement to accept such surrender shall be valid unless in writing signed by Owner. *No employee of Owner or Owner's agent shall have any power to accept the keys of said premises prior to the termination of the lease, and the delivery of keys to any such agent or employee shall not operate as a termination of the lease or a surrender of the demised premises.*
> (The Lease, §25).

It is undisputed that the tenant vacated the premises in May 2010 and notified Madison 274's managing agent Hamil of the vacatur by the letter dated May 29, 2008 (exhibit C). Further, Madison 274's (former) counsel's June 10, 2008 letter to Ramsundar supports Ramsundar's claim that Egoscue surrendered the premises. Such letter states as follows:

> "We have been advised by our client that [Egoscue] has vacated the demised premises as of May 31, 2008. However, pursuant to the terms of your personal guaranty, you are responsible to pay [Madison 274] the sum of $5,288.15. Said sum represents the corporate obligations of the tenant of record *through the date of surrender*. Your personal obligations under the terms of the guaranty require you to make payment to the landlord of said sum."
> (exhibit D)(emphasis added).

Also, the November 3, 2008 letter by Madison 274's (former) counsel, indicates that all of Ramsundar's personal obligations under the Guaranty would be satisfied and that Madison 274

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[2] Notably, the Guaranty does not expressly require that a surrender by Egoscue be "accepted."

will have no more claims against Ramsundar under the Guaranty if Ramsundar pays $5,288.15 (the May 2008 rent) in full.

However, it cannot be said, as a matter of law at this juncture, that the tenant (Egoscue) "surrendered" the premises "as otherwise required by the Lease," such that Ramsundar no longer remains personally liable for Egoscue's alleged unpaid rent for May 2010, or for the remainder of the Lease.

When interpreting language in a commercial lease, courts apply the well-established precedent concerning the construction of commercial contracts, that "when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277–278, 793 NYS2d 835 [2005][internal quotation marks and citations omitted]). "This principle is particularly important in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length (*id., citing Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475, 775 NYS2d 765 [2004]).

Furthermore, courts must construe a contract in a manner that reasonably harmonizes its terms and avoids inconsistency (*James v Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002]). Thus, "specific clauses are to be read consistently with the over-all manifest purpose of the parties' agreement" (*Barrow v Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3d Dept 1989]).

Based on the clear and unambiguous language of the Lease, delivery of the keys prior to the termination of the Lease to any agent or employee of the Owner, *i.e.*, the superintendent, does

not operate as a surrender. As Madison 274 points out, Egoscue's notice to Hamil dated May 29, 2008 expressly states that Ramsundar "will return the keys to John the super of the building. . . ." and Madison 274 contends that "John the super" is neither the Owner, nor the Managing Agent. Thus, it cannot be said that the keys were delivered to the "Owner" or "Managing Agent" as required in the Guaranty to effectuate a surrender.

And, Adam Abramson's Affidavit states that its former counsel lacked first-hand knowledge of the factual circumstances regarding Egoscue's vacatur, and that Egoscue did not leave the premises in broom clean condition.

Further, Ramsundar's argument with respect to Madison 274's failure to return the two-month security deposit of $10,206.00 is insufficient to establish the absence of liability for the breach of the Guaranty and only is relevant to the amount of damages.

Consequently, summary dismissal of the *first* cause of action for breach of the Guaranty is denied at this juncture, and the parties shall resume the process of discovery on the issues of Ramsundar's liability under the Guaranty.

Ramsundar's Personal Liability under the Lease (second cause of action)

The second cause of action alleges that Ramsundar is liable for the debts owed to 274 Madison "Due to Tenant's dissolution while still maintaining monetary obligations to 274." (¶35). Inasmuch as Ramsundar seeks dismissal of this claim on the ground that it fails to state facts sufficient to pierce the corporate veil, dismissal is denied, as 274 Madison expressly denies any attempt to state such a claim. 274 Madison concedes that it has not asserted a piercing claim, but reserves its right to do so in the event circumstances indicate its necessity (Affirmation in Support of Cross-Motion, ¶38). Instead, 274 Madison clarifies that the second cause of action

seeks to hold Ramsundar liable under LLC Law and the DCL for transferring or otherwise dissipating Egoscue's assets and/or fraudulently conveying such assets to the detriment of 274 Madison (*see infra*, p. 14).

Further, Ramsundar's argument that the plaintiff failed to establish the necessary elements to pierce the corporate veil is insufficient to meet his burden as the movant for summary judgment.

Therefore, dismissal of the second cause of action on the premise that 274 Madison fails to state or establish a theory of piercing the corporate veil is denied.[3]

Attorneys' Fees (third cause of action)

Under the general rule, attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by an agreement between the parties, statute or court rule" (*Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 906 NYS2d 205 [1st Dept 2010]; *Braithwaite v 409 Edgecombe Ave. HDFC*, 294 AD2d 233, 234 [1st Dept 2002]).

Here, the third cause of action for attorneys' fees cites "paragraph '19' of the Lease," which provides that "in connection with any default by Tenant in the covenant to pay rent hereunder, [the Owner is entitled to] reasonable attorneys' fees incurred in "instituting and prosecuting or defending any action or proceeding and prevails in any such action or proceeding" (the Lease, ¶19, exhibit A).[4] However, Ramsundar signed the Lease in his corporate capacity on

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[3] Similarly, Ramsundar's argument in support of summary dismissal of the third cause of action also premised on plaintiff's purported failure to establish the necessary elements to pierce the corporate veil (Affirmation in Support, ¶14), fails.

[4] The proposed fourth cause of action in the Second Amended Complaint for attorneys' fees against Ramsundar is also based on paragraph 19 of the Lease.

behalf of Egoscue and there is no claim to pierce the corporate veil. Thus, to the extent that 274 Madison's *third* cause of action for attorneys' fees is predicated solely on Ramsundar's personal liability under the Lease, this cause of action is dismissed.

Madison 274's Cross-Motion

Leave to Amend

It is well-established that leave to amend a pleading should be freely granted provided there is no prejudice or surprise to the nonmoving party (CPLR §3025(b); *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). However, in order to conserve judicial resources, an examination of underlying merits of the proposed causes of action is warranted (*Non-Linear Trading Co., Inc. v Braddis Associates, Inc.*, 243 AD2d 107, 675 NYS2d 5 [1st Dept 1998]). It has been held that a motion to amend must "be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment" (*id., citing Nab-Tern Constructors v City of New York (Yankee Stadium)*, 123 AD2d 571, 507 NYS2d 146 [1986]; *see Nichols v Curtis*, 104 AD3d 526, 962 NYS2d 98 [1st Dept 2013][motion to amend denied where plaintiff failed to support her request for leave to amend with an affidavit of merits and such other evidence as is appropriate on a motion for summary judgment]).

A leave to amend will be granted as long as the proponent submits sufficient support to show that the proposed amendment is not "palpably insufficient or clearly devoid of merit" (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]; *Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 836 NYS2d 68 [1st Dept 2007]).

At the outset, the branch of plaintiff's cross-motion seeking leave to amend its complaint to add Egoscue as defendant is granted. Notwithstanding the fact that Egoscue was dissolved

during the pendency of this suit,[5] 274 Madison has demonstrated that this proposed amendment is not palpably insufficient or devoid of merit.

"A proper party is one against whom plaintiff asserts any right to relief jointly, severally or in the alternative, arising out of the same set of transactions or occurrences" (*Stewart Tenants Corp. v Square Indus.*, 269 AD2d 246, 703 NYS2d 453 [1st Dept 2000][reversing the trial court's finding that Square Plus, Square Corp. and Stewart Garage were not proper parties, as plaintiff's essential argument was that those defendants were instrumentalities of the dominant corporation, Square Industries]; CPLR 1002 [b][6]).

Here, the record indicates that Egoscue was the named tenant on the Lease, the performance of which was personally guaranteed by Ramsundar, already a party to this action. Furthermore, the claims that 274 Madison alleges against Egoscue in the *proposed first cause of action* (for breach of lease) and *second* causes of action (for attorneys' fees) arise from the same transaction, *i.e.*, the Lease, as the pending claims against Ramsundar (CPLR §§ 1002(b), 3025(b)). Therefore, in the absence of the demonstrated prejudice on the part of Ramsundar, the

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[5] It has been held that failure of a corporation to provide notice of dissolution to its existing creditors, permits a creditor with an unlitigated claim that preexisted dissolution to sue the dissolved corporation even after dissolution (*see Town of Amherst v Hilger*, 106 AD3d 120, 962 NYS2d 837,§ 1006[a][4]; [b]; *see also Matter of Ford v Pulmosan Safety Equip. Corp.*, 52 AD3d 710, 711, 862 NYS2d 56 [2d Dept 2008]; *see also Otto v Otto*, 110 AD3d 620, --- NYS2d ----, 2013 WL 5787988 [1st Dept 2013][affirming the order declining to dismiss the claims asserted against three dissolved Delaware corporations, as for the purpose of prosecuting suits, dissolved corporations exist for the term of three years from the expiration or dissolution (*see also* Del.Code Ann. tit. 8, § 278; *Smith–Johnson S.S. Corp. v United States*, 231 FSupp 184, 186 [D Del 1964]). Here, the record shows that Egoscue did not notify, *inter alia*, its creditor Madison 274 of the dissolution.

[6] CPLR 1002 ("Permissive joinder of parties") allows the combination of parties as Madison 274s or defendants subject to the conditions that (1) the claims must arise from "the same transaction, occurrence, or series of transactions or occurrences," and (2) a common question of law or fact is presented (*see, Stewart Tenants Corp. v Square Industries, Inc.*, 269 AD2d 246, 703 NYS2d 453 [1st Dept 2000]). The claims that Madison 274 alleges against Egoscue in the proposed *first* and *second* causes of action arise from the same transactions and occurrences as the claims already alleged against Ramsundar (CPLR §§ 1002(b), 3025(b)).

branch of Madison 274's cross-motion to add Egoscue as defendant is granted.

Further, the court finds that Madison 274 sufficiently alleged new causes of action against Ramsundar for violations of the LLC Law §704 (a) and DCL §§273, 274 and 275.

On a motion for leave to amend, plaintiff need not prove the merits of its proposed new allegations (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, *supra*). Madison 274 made the requisite showing of the viability of its proposed amendments *(JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 969 NYS2d 19 [1st Dept 2013]; *see also CodeFab, LLC v Plus 44 Holdings, Inc.*, 2012 WL 5305211 [Sup Ct New York County 2012][Trial Order][plaintiff has sufficiently shown the *prima facie* merit of the proposed causes of action for fraudulent conveyance and conversion based on evidence that defendant entity, while insolvent, may have transferred its assets, including the [software programming] code, for less than fair consideration to the proposed defendants]).

Proposed Claim for Violation of LLC Law §704 (a)

LLC Law §704 (a) provides as follows:

> "Upon the winding up of a limited liability company, the assets shall be distributed as follows:
> (a) to creditors, including members who are creditors, to the extent permitted by law, in satisfaction of liabilities of the limited liability company, whether by payment or by establishment of adequate reserves, other than liabilities for distributions to members and former members under section five hundred seven or section five hundred nine of this chapter."

Here, Madison 274's proposed amended complaint alleges in the *fifth* cause of action that Ramsundar failed to wind-up the affairs of Egoscue in accordance with LLC Law §704, since "[u]pon information and belief, Ramsundar paid and transferred to himself assets of Egoscue without satisfying the debt owed to Madison 274 [. . .] as a creditor of Egoscue" (proposed

Second Amended Complaint, ¶¶45-50). Thus, Madison 274 claims that Ramsundar improperly transferred Egoscue's assets to himself, without satisfying the debt owed to 274 Madison, its creditor. These allegations are supported by the copy of the Articles of Dissolution of Egoscue, dated December 9, 2010, and, the Affidavit of Alan Abramson, Madison 274's principal, stating that "Tenant had assets at the time of dissolution, [*i.e.*,] office equipment, fixtures, [. . .] certain equipment [and] bank account(s)" (Alan Abramson Affidavit, ¶¶4-5). As such, Madison 274 sufficiently showed the viability of its proposed amendment to assert a claim for violation of LLC Law §704 (*JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 969 NYS2d 19, *supra*).

Proposed Claims for Violations of DCL §§273, 274, 275 and 276

The allegations in the proposed amended complaint are likewise sufficient to sustain the claims pursuant to DCL §§273, 274, 275 and 276.

The relevant sections of Debtor and Creditor Law provide as follows:

§273. Conveyances by insolvent

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

§274. Conveyances by persons in business

> Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

§ 275. Conveyances by a person about to incur debts

> Every conveyance made and every obligation incurred without fair consideration when

> the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.
>
> § 276. Conveyance made with intent to defraud
>
> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

The courts interpreting these sections of DCL, have held that "[a] conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration" (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd.*, 25 AD3d 301, 808 NYS2d 187 [1st Dept 2006], *citing* DCL §273). Also fraudulent are conveyances made without fair consideration when the conveyor "intends or believes that he will incur debts beyond his ability to pay as they mature" (*id., citing* DCL §275; *see Liggio v Liggio*, 53 AD2d 543, 385 NYS2d 33 [1st Dept 1976][reversing and remanding dismissal of wife's complaint to set aside fraudulent conveyance, where husband conveyed the house having substantial value to his mother, without consideration, even though husband was earning less than $3,000 per year and had extensive financial obligations to wife and children pursuant to separation and child support agreement]). Moreover, "[t]ransfers to a controlling shareholder, officer or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent" (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd.*, 25 AD3d 301, 808 NYS2d 187 [1st Dept 2006], *citing A.F.L. Falck, S.p.A. v E.A. Karay Co., Inc.*, 722 FSupp 12, 17 [SDNY 1989]).

Here, the allegations that Egoscue conveyed all or substantially all of its assets to Ramsundar without fair consideration, rendering Egoscue insolvent, with intent to hinder

Madison 274's right to enforce its claims against Egoscue under the Lease, adequately state claims for violations of the fraud and constructive fraud provisions of DCL *(see Parsons & Whittemore, Inc. v Abady Luttati Kaiser Saurborn & Mair*, P.C., 309 AD2d 665, 765 NYS2d 861 [1st Dept 2003][sublessor's allegations that individual members of sublessee law firm held over in leased premises while utilizing corporate shield of law firm to escape liability to sublessor, that assets of law firm were insufficient to satisfy any present or future judgment, and that law firm's prior assets were transferred without sufficient consideration and with actual intent to hinder, delay, or defraud sublessor, were sufficient to state claim for violations of fraud and constructive fraud provisions of Debtor and Creditor Law]).

And while generally, conclusory allegations of fraud will not be sufficient,[7] it is nevertheless sufficient to plead facts that would allow a reasonable inference of the alleged fraud, where concrete facts are within the knowledge of the party charged with fraud, and "it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings" (*see Paolucci v Mauro*, 74 AD3d 1517 [3d Dept 2010]). Thus, in a case such as this, the specificity requirement is not to be so strictly interpreted "as to prevent an otherwise valid cause of action" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491, 860 NYS2d 422 [2008]).

Additionally, Madison 274 showed, through the Articles of Dissolution, the Lease, and the Affidavit of its principals Adam Abramson and Alan Abramson, sufficient support that the proposed amendment is not "palpably insufficient or clearly devoid of merit" (*see MBIA Ins.*

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[7] See CPLR §3016 [b], which requires that "the circumstances constituting the wrong shall be stated in detail."

Corp. v Greystone & Co., Inc., 74 AD3d 499, *supra*). Therefore, Madison 274 is permitted to amend its pleadings to add causes of action based on violations of LLC Law §704 (a) and DCL §§ 273, 274, 275 and 276.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendant Silvion Ramsundar's motion pursuant to CPLR 3212 for summary judgment to dismiss the complaint of Madison Company LLC is denied; and it is further

ORDERED that the branch of defendant Silvion Ramsundar's motion to dismiss the second and third causes of action pursuant to CPLR 3211 (a)(7) is granted solely as to the *third* cause of action for attorneys' fees, and the third cause of action is severed and dismissed; and it is further

ORDERED that plaintiff 274 Madison Company LLC's cross-motion pursuant to CPLR 3025 (b) to amend the complaint to add Manhattan Egoscue, LLC ("Egoscue") as a defendant in this action and to add causes of action against defendant Silvion Ramsundar for violations of the New York Limited Liability Company Law §704 (a) and the New York Debtor and Creditor Law §§273, 274, 275 and 276 is granted and the plaintiff shall amend the pleadings accordingly; and it is further

ORDERED that plaintiff shall serve a Second Amended Complaint in the form attached to the cross-motion excluding the proposed fourth cause of action for attorneys' fees against Silvion Ramsundar; and it is further

ORDERED that Manhattan Egoscue, LLC and Silvion Ramsundar shall serve their

Answer within 20 days of service of the Second Amended Complaint; and it is further

ORDERED that all parties shall appear for a Preliminary Conference on February 18, 2014, 2:15 p.m.; and it is further

ORDERED that the plaintiff shall serve a copy of this order with Notice of Entry upon all parties, including the newly-named defendant, within 20 days of entry.

This constitutes the decision and order of the court.

Dated: December 2, 2013

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD