

Normandy Chatham, LLC v Avelino & Assoc., P.C.

2013 NY Slip Op 33114(U)

December 10, 2013

Supreme Court, New York County

Docket Number: 151873/13

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

NORMANDY CHATHAM, LLC,

Plaintiff,

-against-

**AVELINO AND ASSOCIATES, P.C. and
AVELINO NITKEWICZ, LLP,**

Defendants.

INDEX NO. 151873/13
MOTION DATE 11-13-13
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion for Summary Judgment and Cross-Motion Pursuant to CPLR §3211 [a][7] to Dismiss :

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 6, 7 - 10</u>
Replying Affidavits _____	<u>11</u>

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion pursuant to CPLR §3212, for summary judgment, is granted only as to the first cause of action for enforcement of a money judgment against Avelino and Associates, P.C., the remainder of the motion is denied. Defendants' cross-motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211[a] [7], is granted only as to the second and third causes of action asserted against Avelino and Associates, P.C. the remainder of the motion, is denied.

Plaintiff makes this motion pursuant to CPLR §3212, for summary judgment. Defendants oppose the motion and cross-move to dismiss the complaint for failure to state a cause of action pursuant to CPLR §3211[a][7].

On June 30, 2008, Avelino and Associates, P.C. (hereinafter referred to as "Avelino and Associates") entered into a six year and three month lease agreement with the plaintiff, for property located at 26 Main Street, Chatham, New Jersey (Mot. Exh. C). In February of 2012, Avelino and Associates defaulted in payment of their rent. Plaintiff commenced a dispossess action in New Jersey Superior Court, Law Division, Morris County under Docket No. LT-1423-12 and obtained a warrant of removal on June 22, 2012. On May 30, 2012, plaintiff re-let the premises to Silc Management, Inc.. The new lease with Silc Management, Inc., expires on March 31, 2014 and is for a smaller amount of monthly rent. The lease with Avelino and Associates ran through December 31, 2014. On October 10, 2012, the Hon. Robert J. Brennan of New Jersey Superior Court Law Division, Morris County signed a default judgment against Avelino and Associates for \$45, 463.68 with interest, which represents money owed under the lease and attorney fees. No part of the judgment has been paid.

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

The complaint seeks enforcement of a money judgment obtained in New Jersey, and asserts additional causes of action for breach of contract, quantum meruit and for unjust enrichment solely against Avelino and Associates, P.C.. The complaint also asserts causes of action for quantum meruit, unjust enrichment, to pierce the corporate veil, fraud and for successor liability solely against Avelino Nitkewicz, LLP.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]). In determining the motion the Court must construe the evidence in a light most favorable to the non-moving party (*Martin v. Briggs*, 235 A.D. 2d 193, 663 N.Y.S. 2d 184 [N.Y.A.D. 1st Dept., 1997]).

Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

A court is precluded from inquiring into the merits of a judgment rendered in a sister state and is limited to determining whether jurisdiction was obtained for purposes of entering judgment. "A judgment rendered in a sister state is accorded, the same credit, validity, and effect in every other court in the United States, which it had in the state where it was pronounced." (*All Terrain Properties, Inc. v. Hoy*, 265 A.D. 2d 87, 705 N.Y.S. 2d 350 [N.Y.A.D. 1st Dept., 2000]). An out of state judgment's adequacy is not affected by entry on default (*Westland Garden State Plaza, L.P. v. Ezat, Inc.*, 25 A.D. 3d 516, 810 N.Y.S. 2d 131 [N.Y.A.D. 1st Dept., 2006]).

A valid enforceable written contract governing a specific subject matter prevents recovery events arising out of the same subject matter. In the absence of an express agreement, the relief sought is in "quasi contract" which is not actually a contract but an obligation, "imposed to prevent a party's unjust enrichment." (*Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y. 2d 382, 516 N.E. 2d 190, 521 N.Y.S. 2d 653 [1987]). Unjust enrichment and quantum meruit are quasi-contract claims that only apply in the absence of an express written agreement (*Zolotar v. New York Life Ins. Co.*, 172 A.D. 2d 27, 576 A.D. 2d 850 [N.Y.A.D. 1st Dept., 1991]). A party is not precluded from asserting both breach of contract and quasi-contract causes of action when there is a, "bona fide dispute as to the existence of a contract or the contract does not cover the dispute in issue" (*Joseph Sternberg, Inc. v. Walber 36th Street Associates*, 187 A.D. 2d 225, 594 N.Y.S. 2d 144 [N.Y.A.D. 1st Dept., 1993]).

A cause of action to pierce the corporate veil seeks equitable relief based on an abuse of the corporate form for purposes of perpetrating, "...a wrong or injustice against the party asserting the claim.." (*Tap Holdings, LLC v. Orix Finance Corp.*, 109

A.D. 3d 167, 970 N.Y.S. 2d 178 [N.Y.A.D. 1st Dept., 2013]). The Court will permit piercing of the corporate veil to prevent fraud. Generally piercing of the corporate veil requires, "...a showing 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 (Morris v. New York State Dept. of Taxation and Finance, 92 N.Y. 2d 135, 623 N.E. 2d 1157, 603 N.Y.S. 2d 807[1993]). Absent a showing of abuse of the corporate form, the shareholders of a professional service corporation cannot be held personally liable for the ordinary business debt of the corporation (We're Associates Co. v. Cohen, Stracher & Bloom, P.C., 65 N.Y. 2d 18, 480 N.E. 2d 357, 490 N.Y.S. 2d 743 [1985]).

A cause of action asserting fraud requires, "a representation of a material existing fact, falsity, scienter, deception and injury" (Lama Holding v. Smith Barney, Inc., 88 N.Y. 2d 413, 688 N.E. 2d 1370, 646 N.Y.S. 2d 76 [1996]). A party asserting fraud is required to meet the pleading requirements of CPLR §3016[b], requiring particularity and specificity in their claims. General and conclusory allegations of fraud will not sustain the cause of action (Abrahami v. UPC Const. Co. Inc., 176 A.D. 2d 180, 574 N.Y.S. 2d 52 [N.Y.A.D. 1st Dept. 1991] and Polonetsky v. Better Homes Depot, Inc., 97 N.Y. 2d 46, 760 N.E. 2d 1254, 735 N.E. 2d 479 [2001]).

Successor liability is applied when there is a mere continuation of the acquired business, where the acquiring corporation utilizes the business location, employees, management and goodwill of the entity that was acquired. Successor liability is also applied based on the defacto merger doctrine (Tap Holdings, LLC v. Orix Finance Corp., 109 A.D. 3d 167, supra). The de facto merger doctrine permits an exception to the general principles concerning lack of liability for pre-existing debts of the acquired corporation. Elements of de facto merger include, "...continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of business of the acquired corporation; and continuity of management, personnel, physical location, assets and general business operation." (Fitzgerald v. Fahnestock & Cvo., Inc., 286 A.D. 2d 573, 730 N.Y.S. 2d 70 [N.Y.A.D. 1st Dept., 2001]).

Plaintiff contends that it is entitled to summary judgment against Avelino and Associates on the causes of action for enforcement of the money judgment and breach of contract. Plaintiff claims that the judgment although obtained on default in New Jersey, is enforceable in New York based on Avelino and Associates' failure to raise jurisdictional objections. Plaintiff also claims that it is entitled to summary judgment on the second cause of action for breach of contract against Avelino and Associates based on the default under the lease and failure to pay rent, additional rent, real estate taxes, operating expenses, minimum electric energy charges and reconciliation charges that are due. Plaintiff also seeks to recover the remainder of the amount due from Avelino and Associates based on quantum meruit and unjust enrichment.

Plaintiff seeks summary judgment against Avelino Nitkewicz, LLP, (hereinafter referred to as "the partnership") on the causes of action asserted for quantum meruit and unjust enrichment, to pierce the corporate veil, fraud, and for successor liability. Plaintiff contends that the partnership is liable for quantum meruit

and unjust enrichment because it received the benefit of use of the space in New Jersey without paying for it. Plaintiff also contends that the partnership dominated and controlled Avelino and Associates, therefore it is entitled to summary judgment on the causes of action seeking to pierce the corporate veil, fraud and for successor liability. Plaintiff claims that A. Jude Avelino, who signed the lease as President of Avelino and Associates, P.C., is also a partner of Avelino Nitkewicz, LLP, and appears to be an owner of both entities. Plaintiff claims successor liability applies because the entities shared a common office space and address, telephone numbers and website, for a New York office. Plaintiff also claims that the partnership regularly paid the bills and rent for Avelino and Associates under the New Jersey lease. Plaintiff contends that to the extent there was no actual merger, there was a de facto merger.

Defendants oppose the motion for summary judgment contending that plaintiff is attempting to improperly re-litigate a matter that was resolved by a judgment entered in its favor in another jurisdiction. Defendants also contend that public policy requires that the case against Avelino and Associates be tried on the merits and there remain issues of fact concerning constructive eviction.

Defendants cross-move to dismiss this action contending that there is no basis for the causes of action asserted against the partnership based on reliance on untrue material facts and the complete lack of privity of contract. Defendants claim that the partnership is a totally separate entity and did not enter into the lease agreement with the plaintiff therefore it is not liable for any rent. Defendants also claim that the partnership did not occupy the space, so that there is no basis for the claims of unjust enrichment and in quantum meruit. The partnership contends that there is no basis for the remaining causes of action to pierce the corporate veil, for fraud and for successor liability, because they have not been pled with particularity, and fail to allege any facts regarding the partnership's control of Avelino and Associates. The partnership also claims the pleadings do not specifically state that Avelino and Associates committed any wrongs based on directions provided by, or control exercised by, the partnership.

This Court finds that plaintiff has established a prima facie basis to obtain summary judgment on the first cause of action for enforcement of the money judgment obtained in New Jersey. The defendants have failed to raise an issue of fact concerning jurisdiction over Avelino and Associates in New Jersey. The defendants have stated a basis to dismiss the second and third causes of action for breach of contract, quantum meruit and unjust enrichment against Avelino and Associates. Plaintiff obtained a judgment based on breach of the lease agreement in New Jersey, there is no basis to re-litigate those claims which have no independent basis to remain. Plaintiff has not met its burden of proof for purposes of obtaining summary judgment on its remaining causes of action against the partnership. There remain issues of fact concerning the extent of control exercised by the partnership over Avelino and Associates. Defendants have not stated a basis to dismiss the remaining causes of action against the partnership. The plaintiff has stated potentially meritorious causes of action to pierce the corporate veil, for fraud and for successor liability.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3212, for summary judgment, is granted only as to the first cause of action for enforcement of a money judgment obtained in New Jersey, and it is further,

ORDERED that plaintiff is granted a judgment on the first cause of action against Avelino and Associates, P.C., in the amount of \$45, 463.68, together with interest at the statutory rate from October 10, 2012 as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon the submission of an appropriate bill of costs, the first cause of action is severed and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the remainder of the relief sought in plaintiff's motion for summary judgment is denied,

ORDERED that defendant's cross-motion to dismiss the complaint pursuant to CPLR 3211[a,][7], is granted only to the extent that the second and third causes of action asserted against Avelino and Associates, P.C. are severed and dismissed, and it is further,

ORDERED that the action shall continue as to the remaining causes of action asserted against Avelino Nitkewicz, LLP, and it is further,

ORDERED that the remainder of the defendant's cross-motion is denied, and it is further,

ORDERED that the remaining parties shall appear for a Preliminary Conference on February 26, 2014 at 9:30 am in IAS Part 13.

ENTER:



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: December 10, 2013

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE