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

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115 W. 27TH STREET ASSOCIATES LLC, as successor in interest to 115 W. 27TH STREET CO.,

Index No.: 654343/2015

**DECISION & ORDER**

Plaintiff,

-against-

JUAN PEREZ,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendant Juan Perez moves, pursuant to CPLR 3211, for partial dismissal of the complaint. Plaintiff, 115 W. 27th Street Associates LLC (Landlord), opposes the motion. For the reasons that follow, defendant's motion is granted in part and denied in part.

*I. Factual Background & Procedural History*

As this is a motion to dismiss, the facts recited are taken from the complaint (Dkt. 1)[1] and the documentary evidence submitted by the parties.

Landlord owns a building located at 115-117 West 27th Street in Manhattan (the Building). On September 6, 2012, Landlord and non-party Roc The Mic LLC (Tenant or RTM) entered in a commercial lease (the Lease) for the fifth floor of the Building for the period October 1, 2012 to September 30, 2017. *See* Dkt. 9. The Lease is governed by New York law. *See id.* at 19. RTM is a Delaware LLC. Its principal, Perez, is the defendant in this action. Perez signed a Good Guy Guaranty (the Guaranty) in which he agreed to personally guaranty RTM's obligations under the Lease until the Surrender Date, which is defined as:

> [T]he date that Tenant shall have performed all of the following: (a) vacated and surrendered the demised premises to Landlord (or its managing agent) free of all

[1] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

> subleases or licensees and **in broom clean condition, reasonable wear and tear, casualty and condemnation excepted**, and Tenant has so notified Landlord or such agent in writing and (b) **delivered the keys** to the doors to the demised premises to Landlord (or its managing agent).

*See id.* at 27 (emphasis added). The Guaranty further provides that "[o]n the Surrender Date, [Perez] shall be released and discharged from all liability with respect to any obligations of Tenant arising or accruing after the Surrender Date." *See id.* The Guaranty also is governed by New York law. *See id.* at 28. The Guaranty provides that Landlord is entitled to recover its reasonable attorneys' fees in this action. *See id.*

In February 2015, Landlord sent Tenant a written rent demand. The following month, by letter dated March 5, 2015, Tenant notified Landlord that it:

> (a) vacated and surrendered the demised premises to Landlord (or its managing agent) free of all subleases or licensees and in broom clean condition, reasonable wear and tear, casualty and condemnation excepted, and (b) delivered the keys to the doors to the demised premises to Landlord (or its managing agent).

*See* Dkt. 10. By separate letter dated March 5, 2015, Perez wrote:

> Guarantor hereby notifies Landlord that the Surrender Date occurred on March 5, 2015. Therefore, from and after such date, Guarantor is released and discharged from all liability with respect to any obligations of Tenant under the Lease arising or occurring after the Surrender Date.

*See* Dkt. 11.

Landlord responded with letters to Tenant and Perez dated March 9, 2015. *See* Dkt. 12 & 13. Landlord wrote to Tenant:

> Please be advised that Tenant's Notice contains numerous inaccuracies, and to the extent that it purports to constitute a legal surrender of the Premises thereby alleviating Tenant of the obligation to pay past due rent and rent (or liquidated damages) not yet due, it is hereby rejected.
>
> As an initial matter, Tenant did not abandon the Premises in March 5, 2015 as set forth in the Notice. Instead. Tenant abandoned the Premises handed over the keys to the Landlord on March 6, 2015. What's more, contrary to the method of service described in the Notice, it was never served by "Hand Delivery. " [sic]

> More significantly, the Premises was not left by Tenant in "broom clean condition." Instead, Tenant left numerous items of its property and garbage behind in the Premises, and the Premises was left in a state of disarray and disrepair. Among other things, the Tenant:
>
> 1) removed electrical wiring from the Premises (in violation of paragraph 117 of the Lease);
> 2) left the ceiling in a of [sic] state of disrepair (including, but not limited to, leaving holes in the ceiling from which wires were left dangling and were otherwise exposed; numerous holes in the ceiling);
> 3) left behind a pool table;
> 4) left behind a table, a long couch and a black sofa;
> 5) left behind metal shelves, wire racks, and a cabinet;
> 6) left electrical outlets dangling from the walls;
> 7) left behind a receptionist desk;
> 8) left behind garbage
>
> While not exhaustive, the foregoing is sufficient to demonstrate that numerous items of Tenant's property were abandoned in the Premises, and that the Premises itself and the electrical wiring were left in a condition that can only be described as being in an extreme state of disrepair. To state that the Premises was not left in a "broom clean in condition" would be an understatement.

*See* Dkt. 12 at 1-2 (underline in original). Landlord took the position that Tenant was, for these reasons, in breach of the Lease and, therefore, Perez was still liable under the Guaranty. *See* Dkt. 13 at 2.

Tenant and Perez responded by letter dated March 11, 2015:

> Please be advised that your letters are hereby rejected as factually inaccurate and legally defective and incorrect. The surrender notices are fully effective. Tenant and Mr. Perez regard your letters as a continuation of the Landlord's pattern of harassment and merely a cover to distract from the Landlord's own breaches of the Lease. Among other things, the demised premises have been returned in better condition than at the inception of the Lease, the Landlord has expressly (through you) accepted the furniture that remained on site, and no wires that connect the building's electrical system, to Tenant's equipment were ever removed. We have documented all these matters and will have no difficulty so demonstrating if need be.

*See* Dkt. 14. Perez's counsel, Stuart Riback, also takes issue with Landlord's complaint about the furniture left behind by Tenant. On February 23, 2015, at 3:36 p.m., Landlord's counsel (and counsel of record in this action), Gil Santamarina, left Mr. Riback the following voicemail:

> Hey Stuart, this is Gil Santamarina:
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> In response to your question. They [i.e. Tenant and Perez] **can leave behind whatever sort of furniture they want,** um and he's [i.e. Landlord] okay with that, um but he also noted that he's gonna be .... We would like to review the Security Agreement, I'm sorry the Surrender Agreement uh preferably tomorrow or Wednesday at the latest because I think Joel won't be in the office on Thursday so he wants to have that sort of hammered out beforehand.
>
> Any questions call me at [phone number omitted]. Thank you, Bye.

*See* Dkt. 8 (emphasis added).

Landlord commenced this action on December 21, 2015 by filing a complaint with three causes of action: (1) breach of the Guaranty; (2) breach of the Lease; and (3) attorneys' fees. The first cause of action turns on whether Tenant fulfilled the conditions in the Guaranty such that March 5 (or 6), 2015 is considered the Surrender Date. The second cause of action seeks to hold Perez personally liable for RTM's obligations under the Lease, regardless of the scope of Perez's liability under the Guaranty.

To explain, RTM is a Delaware LLC that was formed in September 2005. RTM's status as an active LLC was administratively canceled by the State of Delaware in June 2011.[2] It is undisputed that RTM was not an active LLC when the Lease was executed in September 2012 or when this action was commenced in December 2015. Perez caused RTM to be revived on January 26, 2016. The parties dispute whether RTM's revival affects Perez's personal liability under the Lease. The parties also dispute whether New York or Delaware law governs this issue.

[2] This occurred, presumably, for failure to pay taxes or franchise fees.

On February 19, 2016, Perez moved to dismiss the portion of the first cause of action as it relates to the furniture left behind by Tenant and also the entirety of the second cause of action. The court reserved on the motion after oral argument. *See* Dkt. 32 (6/9/16 Tr.)

*II. Legal Standard*

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

*III. Discussion*

Perez's motion to dismiss the furniture related claims is denied. Leaving aside the question of whether the voicemail is admissible or constitutes documentary evidence, there are disputed facts regarding the state in which Tenant was obligated to surrender the premises. The single cited voicemail does not suffice to utterly refute Landlord's claim that an agreement permitting Tenant to leave the furniture was never finalized. The full context of the parties' negotiations should be produced in discovery before determining the parties' agreement with respect to the furniture.[3] Without such a factual record, it is premature to evaluate the merits of Perez's waiver argument, which, it should be noted, is not necessarily precluded by the Lease's requirement that amendments be in writing. *See Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 425 (2013).

Perez's motion, however, is granted with respect to his personal liability under the Lease beyond that which may exist under the Guaranty. Under New York law,[4] it is well settled that one who signs a contract on behalf of a dissolved corporate entity is personally liable under the contract unless the contract was necessary to wind up the company's affairs. *See Penn. Bldg. Co. v Schaub*, 14 AD3d 365, 366 (1st Dept 2005), citing *Brandes Meat Corp. v Cromer*, 146 AD2d 666, 667 (2d Dept 1989) (defendant who "purported to act on behalf of a corporation which had neither a de jure nor a de facto existence ... is therefore personally responsible for the obligations which he incurred"); *see also Keystone Mech. Corp. v Conde*, 309 AD2d 627 (1st

[3] As noted earlier, there are other claims regarding the state of the premises, such as the wiring issue, that are not at issue on this motion.

[4] RTM, as noted, is a Delaware LLC. The applicability of Delaware law is addressed below.

Dept 2003).[5] "As a result, '[a] person who purports to act on behalf of a dissolved corporation is personally responsible for the obligations incurred.'" *Long Oil Heat, Inc. v Polsinelli*, 128 AD3d 1296, 1298 (3d Dept 2015), quoting *80-02 Leasehold, LLC v CM Realty Holdings Corp.*, 123 AD3d 872, 874 (2d Dept 2014).

However, "as a general rule, when a dissolution is annulled, the entity's corporate status is reinstated nunc pro tunc, **and contracts entered into during the period of dissolution are 'retroactively validated.'**" *Lodato v Greyhawk N. Am., LLC*, 39 AD3d 496, 497 (2d Dept 2007) (emphasis added),[6] quoting *Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 113 (2d Dept 1986). Moreover, "an individual who has 'no actual knowledge of the dissolution,' and thus has not 'fraudulently represented the corporate status' of the dissolved entity, **will not be held personally liable for the obligations undertaken by the entity while it was dissolved**."

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[5] While the case law cited herein principally applies to corporations, the parties agree that the same standards should apply to LLCs.

[6] Justice Knipel, the trial court judge in *Lodato*, set forth an extensive discussion of contrary holdings by various lower courts on the issue of personal liability after corporate status is reinstated. *See Lodato v Greyhawk N. Am., L.L.C.*, 10 Misc3d 418, 420-27 (Sup Ct, Kings County 2005). After surveying the case law and considering public policy implications, he concluded:

> [I]ndividual officers or directors of corporations should be shielded from personal liability absent a showing of fraud or misrepresentation and that an officer or director of a corporation that has forfeited its corporate charter for non-payment of taxes and been dissolved by proclamation of the Secretary of State pursuant to the Tax Law is not personally liable for service obligations of the corporation contractually undertaken while the corporation was dissolved, where the officer acted without knowledge of the corporation's dissolution, the dissolution was truly inadvertent and not due to neglect, the corporation quickly rectified the default by seeking reinstatement and there is a subsequent annulment of the dissolution and reinstatement of the corporation.

*See id.* at 426. This holding was affirmed by the Second Department. *See Lodato*, 39 AD3d at 496-97. *Lodato* has been cited approvingly by the First Department. *See Spinnell v JP Morgan Chase Bank, N.A.*, 59 AD3d 361 (1st Dept 2009).

*Lodato*, 39 AD3d at 497 (emphasis added), quoting *Bedford Hills Supply, Inc. v Hubert*, 251 AD2d 438 (2d Dept 1998).

In this case, the complaint fails to state a claim under New York law to hold Perez liable under the Lease. Nowhere in the complaint is it alleged that Perez knew that RTM was dissolved or that Perez failed to disclose that fact to Landlord for the purpose of fraudulently inducing Landlord to enter into the Lease with a defunct company.[7] The cause of action to hold Perez personally liable under the Lease is dismissed because the complaint fails to plead the facts required by *Lodato*.

That being said, the court would be remiss if it did not address the parties' dispute over whether Delaware law applies or would mandate a different result. While Landlord's brief suggests that New York law is different from Delaware law and that such difference is dispositive in its favor, that does not appear to be the case. Delaware law, like New York law as set forth in *Lodato*, provides for nunc pro tunc protection of the corporate veil onto a revived company. 6 *Del C* § 18-1109(c) provides:

> Upon the filing of a certificate of revival, a limited liability company shall be revived with the same force and effect as if its certificate of formation had not been canceled .... Such revival shall validate all contracts, acts, matters and things made, done and performed by the limited liability company, its members, managers, employees and agents during the time when its certificate of formation was canceled ... with the same force and effect and to all intents and purposes as if the certificate of formation had remained in full force and effect. All real and personal property, and all rights and interests, which belonged to the limited liability company at the time its certificate of formation was canceled ... or which were acquired by the limited liability company following the cancellation of its certificate of formation ... and which were not disposed of prior to the time of its revival, shall be vested in the limited liability company after its revival as fully as they were held by the limited liability company at, and after, as the case may be,

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[7] Landlord cannot claim reasonable reliance on RTM's status as canceled since, as its own complaint alleges, the status of a Delaware LLC can be quickly and easily ascertained on the website of Delaware's Division of Corporations. It should be noted that the same information also is available online for New York companies.

> the time its certificate of formation was canceled .... **After its revival, the limited liability company shall be as exclusively liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its members, managers, employees and agents prior to its revival as if its certificate of formation had at all times remained in full force and effect.**

(emphasis added).

Delaware, moreover, also appears to provide for an exception to this rule when, like the situation set forth in *Lodato*, an individual who contracts on behalf of a dissolved entity does so for fraudulent purposes. *In Frederic G. Krapf & Son, Inc. v Gorson*, 243 A2d 713 (Del 1968), the Supreme Court of Delaware held:

> We are of the opinion that failure to pay franchise taxes is an issue solely between the corporation and the State since the franchise tax statutes are for revenue raising purposes alone. This being so, **if the creditor dealt in good faith with the corporation as a corporation, and if no fraud or bad faith on the part of the corporate officers is involved, the creditor's remedy is against the corporation.**
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> ...
>
> We think it clear that **in the absence of fraud or bad faith** a corporate officer may enter into a contract binding on the corporation, even after forfeiture of the charter, particularly when, as at bar, the forfeiture came about by inadvertence. We think it equally clear that the corporate creditor has a remedy against the corporation. It follows, therefore, that summary judgment was properly entered for Gorson who was sued in his individual capacity.

*See id.* at 715 (emphasis added).

In *Spinnell* (where, as noted, the First Department cited approvingly to *Lodato*), the Court relied on *Gorson* in holding that "there is no conflict with Delaware law with respect to ... the liability of an individual shareholder for fraud or acts taken in bad faith while a revived formerly tax-defunct corporation's charter was void." *See Spinnell*, 59 AD3d at 361, citing *Gorson*, 243 A2d at 715. In other words, in the First Department's view, the standard under *Lodato* and *Gorson* are the same. The First Department also has held that where "Delaware law does not

differ significantly from New York law," New York law should be applied. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014), quoting *Excess Ins. Co. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 (1st Dept 2003) ("In a conflicts of law analysis, the first consideration is whether there is any actual conflict between the laws of the competing jurisdictions. If no conflict exists, then the court should apply the law of the forum state in which the action is being heard"), *aff'd* 3 NY3d 577 (2004), accord *Matter of Allstate Ins. Co. (Stolarz-N.J. Mfrs. Ins. Co.)*, 81 NY2d 219, 223 (1993). Consequently, the court relies on *Lodato* to dismiss the claim against Perez under the Lease.[8] Accordingly, it is

ORDERED that the motion by defendant Juan Perez for partial dismissal of the complaint is granted with respect to the second cause of action, which is hereby dismissed, and is otherwise denied; and it is further

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[8] While there is no apparent conflict between New York and Delaware law in this case, the court finds it appropriate to expressly reject Landlord's contention that the Lease's New York choice of law clause would mandate application of New York law even if Delaware law differed. Landlord's position is based on *Ministers & Missionaries Ben. Bd. v Snow*, 26 NY3d 466 (2015). Landlord's reliance on *Snow* is misplaced. *Snow* merely held that the parties' rights under a contract with a New York choice of law clause must be governed exclusively by New York law since such a clause evidences the parties' intent to have New York law govern their contractual relationship. *See id.* at 474. This court does not read *Snow* to apply to the internal affairs doctrine, which mandates that corporate governance issues, such as the respective liabilities of an LLC and its members, must be governed by the law of the state of incorporation. *See Davis v Scottis Re Group, Ltd.*, 138 AD3d 230, 233 (1st Dept 2016), citing *Hart v General Motors Corp.*, 129 AD2d 179, 182 (1st Dept 1987). For instance, had landlord argued that RTM's corporate veil should be pierced to hold Perez personally liable under the Lease, it would be Delaware's veil piercing standard that applies. *See MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 530 (1st Dept 2015), citing *Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 (1st Dept 2008). Indeed, only courts in the state of incorporation may dissolve or revive corporate entities. *See Raharney Capital, LLC v Capital Stack LLC*, 138 AD3d 83, 87 (1st Dept 2016); *Otto v Otto*, 110 AD3d 620 (1st Dept 2013). The internal affairs doctrine also should dictate that LLC member liability after revival is governed by the law of the state of incorporation, especially where, as here, both the Delaware Code and the Delaware courts have rules governing this situation.

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on August 30, 2016, at 11:00 in the forenoon.

Dated: August 19, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C