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| Hament v Fitzgerald |
| 2017 NY Slip Op 31507(U) |
| July 14, 2017 |
| Supreme Court, New York County |
| Docket Number: 155410/16 |
| Judge: Gerald Lebovits |
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

NANCY J. HAMENT and RICHARD J.J. SCAROLA,

Plaintiffs,

-against-

KEVIN P. FITZGERALD,

Defendant.

Index No.: 155410/16
DECISION/ORDER
Mot. Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant’s motion to dismiss under CPLR 3211 (a) (1) and (7), or, in the alternative, to stay the action pending the outcome of arbitration or to transfer venue.

| Papers | Numbered |
|--|-----------------|
| Defendant’s Notice of Motion | 1 |
| Defendant’s Memorandum of Law | 2 |
| Plaintiffs’ Affidavit in Opposition | 3 |
| Plaintiffs’ Memorandum of Law | 4 |
| Defendant’s Reply Affirmation in Further Support | 5 |
| Defendant’s Reply Memorandum of Law in Further Support | 6 |

Scarola Malone & Zubatov, LLP, New York (Richard J.J. Scarola of counsel), for plaintiffs.
Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP, Riverhead (Patrick B. Fife of counsel), for defendant.

Gerald Lebovits, J.

Plaintiffs, Nancy J. Hament and Richard J.J. Scarola, filed a summons and complaint against defendant Kevin P. Fitzgerald, President of Ark Construction, Inc. (ARK), alleging six causes of action, specifically trespass, intentional tortious injury to property, prima facie tort, personal liability for intentional torts, per se and absolute liability for violations of statutory and regulatory law, and declaratory judgment as to personal liability based on piercing the corporate veil. These causes of action all relate to acts allegedly committed by defendant after he, in his capacity as President of ARK, abandoned ARK’s construction contract with plaintiffs.

Plaintiffs allege that defendant entered their home without authorization, moved their belongings from a storage pod to various inappropriate places in their home, and left their home largely unusable. Defendant now moves to dismiss the complaint under CPLR 3211 (a) (1) and (7) or, in the alternative, to stay the action pending the outcome of arbitration under CPLR 2201 and 7503 (a) or to transfer venue under CPLR 510.(3). In a separate arbitration action against ARK, plaintiffs allege four of the same causes of action they allege here, as well as additional claims regarding construction defects. Defendant argues that the case at bar should be stayed

pending the outcome of plaintiffs' arbitration with ARK, as that arbitration may limit the issues the court needs to determine in this action.

I. Defendant's CPLR 3211 (a) (7) Motion

Defendant's motion to dismiss is denied as to plaintiffs' first four causes of action and granted as to the fifth and sixth causes of action. When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "a motion to dismiss made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].)

To pierce the corporate veil and hold a corporate officer personally liable, a plaintiff must show that a defendant exercised complete domination of the corporation "and abused the privilege of doing business in the corporate form so as to perpetrate a wrong or injustice against the plaintiffs such that a court in equity will intervene." (*Kopec v Hempstead Gardens, Inc.*, 264 AD2d 714, 716 [2d Dept 1999].) Additionally, "a separate cause of action to pierce the corporate veil does not exist independent from the claims asserted against the corporation." (*9 E. 38th St. Assoc., L.P. v George Feher Assoc., Inc.*, 226 AD2d 167, 168 [1st Dept 1996].)

As a separate matter, and distinct from piercing the corporate veil, "[c]orporate officers may be held personally liable for torts committed in the performance of their corporate duties." (*Kopec*, 264 AD2d at 716.) In *Kopec*, the court held that the plaintiffs did not establish a case to pierce the corporate veil, yet denied defendants' motion to dismiss plaintiffs' tortious causes of action against the principal officer of a construction company because the officer was personally involved in the construction. (*Id.*)

In their first four causes of action, plaintiffs allege that defendant engaged in tortious activity against plaintiffs after defendant abandoned the construction contract. Defendant does not argue that plaintiffs failed to allege facts necessary to bring their underlying causes of action. Defendant's argument to dismiss these causes of action — that defendant was not a party to the contract and that plaintiffs have not alleged facts necessary to pierce the corporate veil — is unpersuasive. Plaintiffs' causes of action relate to torts defendant allegedly committed while performing his corporate duties. No need exists to consider whether plaintiffs have alleged facts necessary to pierce the corporate veil. (*See Kopec*, 264 AD2d at 716.)

Defendant argues further that plaintiffs' tort claims should be breach-of-contract claims, because "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from

circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract.” (*Wildenstein v SH & Co. Inc.*, 97 AD3d 488, 491–92 [1st Dept 2012], quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987].) But plaintiffs allege that defendant committed torts after abandoning the contract, rather than torts that occurred during the course of construction. Therefore, plaintiffs’ claims are not related to elements of the contract.

Finally, defendant argues that plaintiffs’ causes of action are duplicative of breach-of-contract causes of action they already brought against ARK in arbitration. (Defendant’s Reply Memorandum of Law in Further Support, at 3-8.) In that arbitration action, plaintiffs brought, among other claims, the same first three causes of action asserted in the case at bar. (Defendant’s Reply Affirmation in Further Support, Exhibit A.) Courts will dismiss duplicative causes of action where the claim repeats the same breach of contract allegations and seeks the same damages. (*See e.g. Wildenstein*, 97 AD3d at 492.) Although plaintiffs assert the same allegations and seek the same damages in the case at bar and in the arbitration proceeding, plaintiffs do not allege breach of contract in this action. Therefore, defendant’s motion to dismiss is denied as to the first four causes of action.

In their fifth cause of action, plaintiffs seek to establish per se liability against defendant based on violations of Suffolk County Code § 563 – 10 and Southampton Town Code § 143 – 11 (a), regarding a contractor’s improper abandonment of a contract. (Notice of Motion, Exhibit D.) Because this cause of action relates to a breach of contract, not tortious activity, plaintiffs must show cause to pierce the corporate veil. Plaintiffs allege facts that defendant exercised complete domination of the corporation, but they have not properly alleged that the “corporate form was used to commit a fraud.” (*See Albstein v Elany Contr. Corp.*, 30 AD3d 210, 210 [1st Dept 2006].) Plaintiffs’ fifth cause of action is dismissed.

In their sixth cause of action, plaintiffs seek a declaratory judgment to hold defendant personally liable for ARK’s liability based on piercing the corporate veil. (Notice of Motion, Exhibit D.) Plaintiffs have not sufficiently alleged that defendant used the corporate form to commit a fraud against them. Plaintiffs’ sixth cause of action is dismissed.

II. Defendant’s CPLR 3211 (a) (1) Motion

A CPLR 3211 (a) (1) motion to dismiss based on a defense founded upon documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002].) Defendant proffers evidence only that the construction agreement was solely between plaintiffs and ARK, not with defendant. (Defendant’s Memorandum of Law in Support, at 3-4.) Defendant argues that the construction agreement demonstrates that it is not a party to the agreement. But because defendant acted in his corporate capacity while performing the alleged torts, defendant need not be a party to the agreement. (*See Kopec*, 264 AD2d at 716 [dismissing defendants’ motion to dismiss as to several tort claims against a corporate officer who was not a party to the contract, where the corporate officer personally committed the torts during performance of his corporate duties].) Defendant’s

documentary evidence does not utterly refute plaintiffs' factual allegations, conclusively establishing a defense. Therefore, defendant's CPLR 3211 (a) (1) motion to dismiss is denied.

III. Defendant's motion to stay this action pending arbitration

Defendant's motion to stay this action is granted. According to CPLR 2201, "except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Furthermore, the First Department "has stayed litigation that included nonsignatories to the subject arbitration agreement where the non-signing party was closely related to the signatories and was alleged to have engaged in substantially the same improper conduct . . . [t]he determination of the pending arbitration proceeding may well dispose of or limit the issues to be determined in th[e] action." (*Oxbow Calcining USA Inc. v Am. Indus. Partners*, 96 AD3d 646, 652 [1st Dept 2012].) Here, plaintiffs' first, second, third, and fifth causes of actions are being asserted in arbitration against ARK as well. (Defendant's Affirmation in Further Support, Exhibit A.) Even though defendant was not personally a signatory to the agreement with ARK, he is closely related to ARK — he is an officer of ARK. Because plaintiffs allege identical tort claims against both defendant and ARK, based on the exact same improper conduct, the arbitration proceeding may dispose of or limit the issues in this action. Defendant's motion to stay this action pending the outcome of arbitration is granted.

IV. Defendant's motion to transfer venue

Defendant's motion to change venue under CPLR 510 (3) is denied. Under CPLR 510 (3), "the court, upon motion, may change the place of trial of an action where . . . the convenience of material witnesses and the ends of justice will be promoted by the change." In showing a court that changing venue would be convenient for material witnesses, the moving party must make a showing that, among other things, "the witnesses have been contacted and are available and willing to testify for the movant." (*Cardona v Aggressive Heating Inc.*, 180 AD2d 572, 572 [1st Dept 1992].) Furthermore, "the convenience of the parties or their employees will not be considered in determining a motion for change of venue pursuant to CPLR 510 (3)." (*Coles v LaGuardia Med. Group, P.C.*, 161 AD2d 166, 167 [1st Dept 1990].)

Here, defendant argues that venue should be transferred to Suffolk County because most material witnesses are located there and thus that it would be inconvenient for them to travel to New York City. Defendant seeks to bring two sets of witnesses. The first set of witnesses are identified as ARK's employees; the convenience of these witnesses is not relevant to this motion. (Defendant's Affirmation in Support, ¶ 26.) The second set of witnesses are contractors, and defendant does not state that he contacted them to establish whether they are available and willing to testify; rather, defendant states he believes these witnesses are willing to testify. (Defendant's Affirmation in Support, ¶¶ 28-29.)

Also, plaintiffs are residents of New York County, even though, defendant points out, plaintiffs own a home in Suffolk County as well and spend as much time as possible there. (Defendant's Reply Affirmation in Further Support, ¶ 31.)

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted in part and denied in part: defendant's motion to dismiss is denied as to plaintiffs' causes of action one through four and granted as to the fifth and sixth causes of action; and it is further

ORDERED that defendant's motion to stay this action is granted and this matter is stayed pending resolution of the arbitration; and it is further

ORDERED that defendant's motion to transfer venue is denied; and it is further

ORDERED that defendant serve a copy of this decision and order with notice of entry on plaintiffs and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: July 14, 2017



J.S.C.

HON. GERALD LEBOVITS
J.S.C.