SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice

PART 9

Index Number : 150017/2013
ACCESS.1 COMMUNICATIONS
vs
SHELOWITZ, MITCHELL C.
Sequence Number : 001
DISMISS

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

motion ~~and cross-motion~~ is decided in accordance with accompanying memorandum decision.

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

Dated: 10/3/13

SALIANN SCARPULLA, 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: CIVIL TERM: PART 19

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ACCESS.1 COMMUNICATIONS CORP.-NY,

Plaintiff,

Index No: 150017/2013
Submission Date:5/8/13

DECISION & ORDER

-against-

MITCHELL C. SHELOWITZ,

Defendant.

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For Plaintiff:	For Defendant:
Moritt, Hock & Hamroff, LLP	Robert S. Broder, PLLC
450 Seventh Avenue, Suite 1504	2903 Preston Lane
New York, New York 10123	Merrick, NY 11566

Papers considered in review of the motion to dismiss:

Notice of Motion	1
Memo of Law in Support	2
Aff in Support	3
Memo of Law in Opp	4
Aff in Opp	5
Reply Memo of Law	6
Reply Aff	7

HON SALIANN SCARPULLA, J.:

In this action to recover rent due on a commercial sublease ("the sublease") entered into between plaintiff Access.1 Communications Corp.-NY ("Access.1" or "plaintiff") as a sublandlord and non-party Shelowitz & Associates PLLC ("Shelowitz & Associates") as a subtenant for the period from May 2008 until the termination date of August 31, 2011, defendant Mitchell C. Shelowitz ("Shelowitz") moves to dismiss the complaint and for sanctions against Access.1 and plaintiff's counsel.

In an earlier action before me, *Access.1 Communications Corp.-NY v. Mitchell C. Shelowitz and Shelowitz & Associates PLLC*, Index No. 107939/2010 (the "prior action"), Shelowitz moved to dismiss the action as against him, and Access.1 cross-moved for summary judgment. At oral argument on November 17, 2010, I entered an order granting Shelowitz's motion to dismiss, dismissing the cause of action to pierce the corporate veil against Shelowitz. By decision and order dated April 11, 2011, I granted Access.1's cross-motion for summary judgement as against Shelowitz & Associates for unpaid rent from June 2010 through August 2011 in the amount of $312,308.74. Plaintiff was also awarded attorney's fees in the amount of $39,100.00.

Access.1 then moved pursuant to CPLR 2221 to reargue the motion to dismiss as against Shelowitz, arguing that there were sufficient facts alleged to maintain the action, and that it was improper to dismiss the action prior to plaintiff taking any discovery. I denied the motion to reargue, finding that there were no factual assertions in the complaint, nor were any provided at oral argument on the motion, sufficient to state a cause of action against Shelowitz individually. I further found and that plaintiff failed to introduce anything new or different on the motion to reargue, and that I neither misunderstood the facts or the law of the case.

Plaintiff then commenced this action against Shelowitz individually, alleging two causes of action. The first seeks to pierce the corporate veil of Shelowitz & Associates, and to impose personal liability against Shelowitz for Shelowitz & Associates's breach of

contract, and seeks to recover the amount of the judgment in the prior action,. The second cause of action alleges that Shelowitz is personally liable for any reasonable attorneys' fees incurred by plaintiff in enforcing its rights as against Shelowitz & Associates, and in prosecuting this action, and seeks an addition $25,000 in attorneys fees.

In response to the complaint, Shelowitz moved to dismiss the action on grounds that it is barred by *res judicata*, and that the complaint fails to state a cause of action because (1) piercing the corporate veil is not an independent cause of action; (2) plaintiff's claims lack particularized facts sufficient to support a claim for piercing the corporate veil; and (3) plaintiff does not and cannot allege that there was any tortious action against it, therefore failing to make a prima facie case to support recovery on a veil-piercing claim.

In opposition, Access.1 argues that because the prior action against Shelowitz was dismissed without reference to any specific evidence, and because it was not stated that the complaint was dismissed on the merits, res judicata does not bar the complaint. Access.1 also asserts that the complaint can not be dismissed for failure to state a cause of action because, as opposed to the complaint in the prior action, the complaint here pleads "specific, different and additional facts," and the facts were learned from Shelowitz during his deposition in the prior action, and from documents produced in response to an information subpoena.

Discussion

"On a motion addressed to the sufficiency of the complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference. However, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Franklin v. Winard*, 199 A.D.2d 220, 221 (1st Dep't 1993); *see also Leder v. Spiegel*, 31 A.D.3d 266 (1st Dep't 2006) *affd* 9.N.Y.3d 836 (2007). On a motion to dismiss pursuant to CPLR § 3211(a), the test is not whether the opposing party "has artfully drafted the [pleading], but whether, deeming the [pleading] to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wooton USA v. LeBoeuf, Lamb, Greene & Macrae*, 243 A.D.2d 168, 176 (1st Dep't 1998).

It is well established that there is no separate cause of action to pierce the corporate veil. *9 E. 38th St. Assocs. L. P. v. George Feher Assocs.*, 226 A.D.2d 167, 168 (1st Dep't 1996) ("[A] separate cause of action to pierce the corporate veil does not exist independent from the claims asserted against the corporation"). "In order to pierce the corporate veil, plaintiffs must show that (1) [defendant] exercised complete domination and control with respect to the transaction attacked, and (2) such domination was used to commit a fraud or wrong against them." *Teachers Ins. Annuity Assn. of Am. v. Cohen's*

Fashion Opt. of 485 Lexington Ave. Inc., 45 A.D.3d 317, 318 (1st Dep't 2007) (citation omitted).

Here, Access.1 alleges that Shelowitz exercised dominion and control over Shelowitz & Associates, that there was commingling of funds, and that the corporation was undercapitalized.

However, the complaint fails to allege how Shelowitz's domination over the corporate entity was used to commit a fraud or other tortious act against Access.1. This action, as with the prior action, seeks only to recover for breach of a commercial lease. As such, the allegations of the complaint are insufficient to warrant piercing the corporate veil. "[A] simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil." *Bonacasa Realty Co., LLC v Salvatore*, 2013 N.Y. App. Div. LEXIS 5941, 2013 NY Slip Op 5979 (2d Dep't Sept. 25, 2013). "Indeed precedent is clear that courts will pierce the corporate veil only to prevent fraud, illegality or to achieve equity. This is true even in situations such as this where the corporation is controlled or dominated by a single shareholder. *Treeline Mineola, LLC v. Berg*, 21 A.D.3d 1028, 1029 (2d Dep't 2005) (internal citations and quotations omitted).

Access.1 also fails to adequately state a basis for Shelowitz to be personally liable to Access.1 for attorney's fees. Accordingly, the complaint will be dismissed for failure to state a cause of action.[1]

Lastly, that part of Shelowitz's motion which seeks sanctions is denied. Pursuant to 22 NYCRR §130-1.1, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. *See also Llantin v. Doe*, 30 A.D.3d 292 (1st Dept. 2006). Sanctions are within the sound discretion of the trial court and are reserved for serious transgressions. There is no showing here that Access.1 pursed this action in bad faith. As such, no sanctions are appropriate.

In accordance with the foregoing, it is

ORDERED that defendant Mitchell C. Shelowitz's motion to dismiss is granted, and the complaint is dismissed; and it is further

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[1] As I am dismissing the complaint pursuant to CPLR 3211(a)(7), I need not reach Shelowitz's *res judicata* argument.

ORDERED defendant Mitchell C. Shelowitz's motion for sanctions against Access.1 Communications Corp.-NY and its counsel is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 3, 2013

ENTER:

Saliann Scarpulla, J.S.C.