26/32, LLC v Vallat, Inc.
2015 NY Slip Op 31600(U)
August 20, 2015
Supreme Court, New York County
Docket Number: 158825/2014
Judge: Cynthia S. Kern

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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26/32, LLC,

Plaintiff,

Index No. 158825/2014

-against-

DECISION/ORDER

VALLAT, INC. d/b/a CAFÉ NOIR, GEORGE FORGEOIS and 35 LISPENARD CAFÉ, INC.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	
Replying Affidavits	
Exhibits	2

Plaintiff commenced the instant action seeking, among other things, unpaid rent in connection with a commercial lease for the premises located at 32 Grand Street, Store #4 and #5, New York, NY. Defendants now move for an Order pursuant to CPLR § 3211(a)(1) and § 3212 dismissing the third, fourth, fifth, seventh and eighth causes of action and dismissing the entire complaint as against defendants George Forgeois ("Forgeois") and 35 Lispenard Café, Inc. ("35 Lispenard"). For the reasons set forth below, defendants' motion is granted in part and denied in part.

The relevant facts are as follows. Defendant Vallat, Inc., d/b/a Café Noir's ("Vallat") is a former tenant of the premises located at 32 Grand Street, Store #4 and #5, New York, NY (the

"Premises"). Vallat occupied the Premises pursuant to a commercial lease (the "Lease") with plaintiff and used the premises to operate a bar and restaurant under the name "Café Noir." Defendant Forgeois is the Chief Executive Officer of Vallat. Sometime in 2013, Vallat fell behind in its rent and plaintiff commenced a summary proceeding against it. The summary proceeding was settled pursuant to a stipulation between the parties. Pursuant to the stipulation, plaintiff was awarded a judgment for $151,937.04, representing rent arrears through September 30, 2013, with a warrant of eviction to issue forthwith. However, execution of the warrant was stayed for Vallat to pay off the judgment. Vallat failed to pay off the judgment and vacated the Premises on or about November 7, 2013. On that date, the parties entered into another stipulation wherein they agreed that Vallat would have supervised access to the Premises for two hours to remove certain items including, but not limited to, shelving and personal property not affixed to the premises.

Sometime between signing the first stipulation and vacating the premises, Forgeois formed a new corporation, which eventually became defendant 35 Lispenard, and began searching for a new location for the restaurant. On August 27, 2013, Forgeois entered into a lease to rent out the property located at 35 Lispenard Street, New York, New York. 35 Lispenard now owns and operates a bar and restaurant under the name Café Noir, the same name as the restaurant ran out of the Premises, at this location.

On September 9, 2014, plaintiff commenced the instant action asserting eight causes of action against defendants: (1) breach of contract against Vallat for unpaid rent and additional rent; (2) breach of contract against Vallat for property damage; (3) negligence for property damage against Vallat and Forgeois; (4) prima facie against Vallat and Forgeois; (5) conversion against Vallat and Forgeois; (6) legal fees against Vallat; (7) piercing the corporate veil against

Forgeois; and (8) alter ego liability against 35 Lispenard. Defendants now move to dismiss the third, fourth and fifth causes of action on the ground that they are duplicative. Additionally, defendants move to dismiss plaintiff's seventh and eighth causes of action on the ground that the complaint fails to allege, or in the alternative, there remains no issues of fact, that defendants Forgeois and 35 Lispenard can be held liable for Vallat's alleged damages under a piercing the corporate veil or alter ego theory of liability. Although plaintiff's label their motion as one pursuant to CPLR § 3211(a)(1), based on documentary evidence, it is clear from their moving papers that it intended to move pursuant to CPLR § 3211(a)(7) for failure to state a cause of action. Thus, the court shall treat the motion as such.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in

admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the present case, as an initial matter, defendants' motion for an order dismissing plaintiff's third and fourth causes of action for negligence and prima facie tort as against Vallat is granted on the ground that both claims are duplicative of plaintiff's breach of contract claims. It is well settled that in order to maintain a separate negligence claim, plaintiff must allege a duty independent of the contract. *See Von Sengbusch v. Les Bateaux De New York, Inc.*, 128 A.D.3d 409 (1st Dept 2015). Furthermore, in order to maintain a prima facie tort claim separate and apart from a breach of contract claim, plaintiff must allege that defendants engaged in tortious conduct separate and apart from their alleged failure to fulfill their contractual obligations. *Susman v. Commerzbank Capital Mkts. Corp.*, 95 A.D.3d 589, 590 (1st Dept 2012). Here, plaintiff fails to allege any duty independent of Vallat's duties under the Lease or that Vallat engaged in tortious conduct apart from its alleged failure to adhere to the terms of the Lease to maintain a negligence or prima facie tort claim. Thus, the claims are wholly duplicative of the breach of contract claim and must be dismissed.

Similarly, defendants' motion for an order dismissing plaintiff's fifth cause of action for conversion as against defendant Vallat is granted as it is also duplicative of plaintiff's breach of contract claim. It is well settled that a claim to recover damages for conversion cannot be predicated on a mere breach of contract. *See Rosetti v. Ambulatory Surgery Ctr. of Brooklyn, LLC*, 125 A.D.3d 548, 549 (1st Dept 2015). Here, plaintiff's claim of conversion is based on the allegation that Vallat "wrongfully converted the fixtures and possessions in violation of the Lease." As this allegation is based on a mere breach of the Lease, under either a motion to dismiss or summary judgment standard it cannot stand as a matter of law.

Additionally, defendants' motion for an order dismissing plaintiff's fourth cause of action for prima facie tort against Forgeois is granted on the ground that is fails to state a cause of action. The elements of prima facie tort are (1) the intentional infliction of harm; (2) which results in special damages; (3) without any excuse or justification; (4) by an act or series of acts which would otherwise be lawful. *Curiano v. Suozzi*, 63 N.Y.2d 113, 117 (1984). "[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act." *Burns Jackson Miller Summit & Spritzer v. Lidner*, 59 N.Y.2d 314, 333 (1983).

In the present case, the complaint fails to state a claim for prima facie tort against Forgeois as plaintiff fails to allege malevolence or special damages. Plaintiff's sole allegations in support of its claim for prima facie tort are that: (1) Forgeois removed the fixtures and possessions with the intention of damaging the Premises; (2) Forgeois was aware of his contractual obligations to keep the Premises in good repair; (3) Forgeois was aware that he fixtures and property belonged to the plaintiff; and (4) Forgeois directed that the fixtures and property be forcibly removed from the Premises. These allegations are clearly insufficient to allege the elements necessary to state a claim for prima facie tort.

However, defendants' motion for an order dismissing plaintiff's third cause of action for negligence against Forgeois is denied as the complaint sufficiently states a claim against Forgeois for negligence based on the commission of a tort doctrine. It is well settled that "a corporate officer is not normally liable in his or her personal capacity on contracts executed on behalf of the corporation unless the officer expresses some intention to be personally bound, for the officer is in effect an agent of the corporate principle." *W. Joseph McPhillips, Inc. v. Ellis*, 278 A.D.2d 682, 683 (1st Dept 2000). "Personal liability will be imposed, however, upon

corporate officers who commit or participate in the commission of a tort, even if the commission or participation is for the corporation's benefit." *Id.* The "'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act." *Peguero v. 601 Realty Corp.*, 58 A.D.3d 556 (1st Dept 2009) (internal citation omitted).

In the present case, the complaint states a cause of action against Forgeois for negligence as it alleges that Forgeois personally participated in the alleged negligent taking of the fixtures in the Premises causing property damage. Indeed, the complaint alleges that "Foregois personally oversaw and directed the removal of the fixtures and property form the Premises." Thus, as the complaint alleges that Forgeois personally committed a tort in removing the fixtures, he may be held personally liable and plaintiff's third cause of action should not be dismissed.

Similarly, to the extent defendants seek to dismiss plaintiff's fifth cause of action for conversion as against Forgeois, such relief is denied as the complaint alleges that Foregois personally participated in the alleged conversion. The complaint alleges that Foregois "wrongly converted the fixtures." Thus, as the complaint alleges that Foregois personally committed the tort he can be held personally liable for such act.

However, defendants' motion for an order dismissing plaintiff's seventh and eighth causes of action against Forgeois and 35 Lispenard for piercing the corporate veil and alter ego liability is granted as New York does not recognize these theories of liability as a separate cause of action. "[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners."

Morris v. New York State Dep't. of Taxation & Fin., 82 N.Y.2d 135 (1993); *see also Fiber Consultants, Inc. v. Fiber Optek Interconnect Corp.*, 15 A.D.3d 528 (2d Dept 2005) ("New York does not recognize a separate cause of action to pierce the corporate veil."). Thus, as plaintiff pleads these theories of liability against Forgeois and 35 Lispenard as separate causes of action, such causes of action must be dismissed.

Additionally, to the extent plaintiff seeks to pierce the corporate veil and hold Foregois individually liable for any damages it may recover against Vallat for breach of the Lease, the court finds that plaintiff's complaint fails to allege sufficient facts to constitute piercing the corporate veil. "A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard." *Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D.2d 103, 109 (1st Dept 2002). "Failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action." *Id.* at 110. The general rule "is that an 'officer or director is liable when he acts for his personal, rather than the corporate interests.'" *Id.* (quoting *Hoag v. Chancellor, Inc.*, 246 A.D.2d 224, 230 (1st Dept 1998)). Thus, "a pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant." *Id.*

Here, plaintiff cannot maintain a claim against Foregois individually for breach of the Lease as the complaint fails to allege in all but the most conclusory fashion that Forgeois acted maliciously for his personal gain in inducing Vallat to breach the Lease with plaintiff. In fact, the complaint is devoid of any nonconclusory allegations that Forgeois caused Vallat to breach

the Lease with plaintiff for Foregois's personal benefit.

Additionally, defendants' motion to dismiss this action as against 35 Lispenard is granted as plaintiff fails to sufficiently allege facts demonstrating that the corporate veil should be pierced to hold 35 Lispenard liable as Vallat's alter ego. "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 (1998). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." *Id.* Moreover, the complaint must allege particularized facts to warrant piercing the corporate veil. *See Siegel Consultants, Ltd. v. Nokia, Inc.*, 85 A.D.3d 854 (1st Dept 2011). Conclusory allegations of under capitalization and intermingling of assets, without additional facts are insufficient to pierce the corporate veil and impose alter ego liability. *See Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda v. Elman Invs., Inc.*, 117 A.D.3d 447 (1st Dept 2014); *Board of Mgrs. of the Gansevoort Condominium v. 325 W. 13th, LLC*, 121 A.D.3d 554 (1st Dept 2014).

Here, plaintiff has failed to allege that 35 Lispenard dominated Vallat in connection to the alleged breach of the Lease and conversion of the fixtures. As an initial matter, 35 Lispenard did not exist at the time Vallat breached the Lease by failing to pay rent. Thus, it is impossible that 35 Lispenard dominated Vallat in relation to that transaction. Further, plaintiff's allegations, based on information and belief, that 35 Lispenard was used to undercapitalize Vallat and that Vallat's assets were transferred to 35 Lispenard are conclusory and devoid of facts. Thus, this action must be dismissed as to 35 Lispenard.

Based on the foregoing, defendants' motion is granted and denied as follows: (1)

defendants' motion to dismiss plaintiff's third, fourth and fifth causes of action as against Vallat is granted; (2) defendants' motion to dismiss plaintiff's fourth cause of action as against Forgeois is granted; (3) defendants' motion to dismiss plaintiff's seventh and eighth causes of action in their entirety is granted; (4) defendants' motion to dismiss this action as against 35 Lispenard is granted; and (5) defendants' motion to dismiss plaintiff's third and fifth causes of action against Forgeois is denied. Thus, it is hereby

ORDERED that this action is dismissed in its entirety as to defendant 35 Lispenard, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the General Clerk's Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: 8/20/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.