

Silver Galore, Inc. v New Generation Realty, LLC

2015 NY Slip Op 31668(U)

August 25, 2015

Supreme Court, New York County

Docket Number: 650403/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

-----X
SILVER GALORE, INC. and DEEPAK PARWANI,

Index No.650403/13

Plaintiffs,

-against-

NEW GENERATION REALTY, LLC, ALL-
BORO TANK TESTING and JOHN DOES (1-10)
(fictitious names) and ABC CORPORATIONS
(fictitious entities),

Defendants.

-----X
NEW GENERATION REALTY, LLC.

-against-

CASTLE OIL CORPORATION,

Third-party Defendant

-----X
CASTLE OIL CORPORATION,

Third-party Plaintiff

-against-

S.J. FUEL CO., INC. d/b/a S.J. FUEL TRANSPORTATION,

Third-party Defendant

-----X
JOAN A. MADDEN, J.:

Plaintiffs move to amend their complaint to add third-party defendant/third-party plaintiff
Castle Oil Corporation (Castle Oil), and former second third-party defendant S.J. Fuel Co., Inc.
d/b/a S.J. Fuel Transportation (SJ Fuel)¹ and David Hadad (“Hadad”) as defendants (motion seq

¹Castle Oil has discontinued its second-third party claims against SJ Fuel.

no. 004). Defendant New Generation Realty Inc. (New Generation) opposes the motion. Castle Oil and SJ Fuel separately oppose the motion.

This action arises out of an oil spill that occurred shortly after an oil tank was refilled on November 21, 2012, in the basement of the premises located at 35 West 30th Street, New York, New York (“the Building”). Specifically, it is alleged that on the date of the accident, a 5,000 gallon oil tank was overfilled causing the tank to burst and discharge oil throughout the basement, and to seep into the soil, causing damages to plaintiffs’ jewelry business which leased space in the basement of the Building, and exposing plaintiffs’ employees to toxic fumes. The Building is owned by New Generation, which had retained Castle Oil to refill the oil tank. Castle Oil subcontracted this obligation to SJ Fuel. Hadad is the President of New Generation. Defendant All Boro Tank Testing was hired to remediate the oil spill and allegedly removed merchandise from the basement that was covered in oil. It is alleged, upon information and belief, that on the date of the accident, a representative of New Generation instructed plaintiffs not to report the oil spill, and that New Generation did not immediately notify the Department of Environmental Conservation of the spill

The proposed amended complaint contains fourteen causes of action, including proposed claims against Hadad for negligence, fraud, piercing the corporate veil, “personal injury,” vicarious liability, and strict liability under Article 12 of the Navigation Law, and against Castle Oil and SJ Fuel for negligence, strict liability under Article 12 of the Navigation Law, and “personal injury.”

Leave to amend a pleading should be ‘freely given’ (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise.” Zaid Theatre Corp. v. Sona Realty Co., 18

AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). Leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted).

Here, it cannot be said that any delay in joining the proposed defendants resulted in prejudice or surprise. Accordingly, the only issue is whether the proposed claims are of sufficient merit.

With respect to the proposed claims against Haddad, for the reasons below, the only viable proposed claim against him is for fraud, as there is no basis for piercing the corporate veil to hold Hadad liable for New Generation’s alleged wrong doing and/or omissions. To pierce the corporate veil it must be shown that (1) the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue; and (2) such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff’s injury. TNS Holdings., Inc. v MKI Securities Corp., 92 NY2d 335, 339-40 (1998); Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141-42 (1993). However, “[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance” TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d at 339, citing Morris v New York State Dept. of Taxation and Fin., 82 NY2d at 141-42. Furthermore, “while the courts are empowered to pierce the corporate veil in appropriate circumstances [...] the corporate form is not lightly to be disregarded” Treeline Mineola, LLC v. Berg, 21 AD3d 1028, 1029 (2d Dept. 2005) quoting Bowles v. Errico, 163 AD2d 771 (3d Dept 1990).

Here, the proposed amended complaint seeks to pierce the corporate veil and hold Hadad

personal liable based solely on the allegations that he is a principal/member and/or owner of New Generation and fraudulent induced plaintiffs not to take measures to protect their inventory, business and/or health after the oil spill. In the absence of allegations that Haddad ignored the corporate form or completely dominated New Generation he cannot be held liable for the corporation's conduct or omissions. See generally, TNS Holdings., Inc. v MKI Securities Corp., 92 NY2d at 339-40. Thus, the proposed claims against Hadad for negligence, strict liability, under Article 12 of the Navigation Law, "vicarious liability" and "personal injury," all of which seek to hold him liable based on his status as an officer of New Generation may not be added.

However, the court reaches a different conclusion with respect to the proposed fraud claim against Hadad, since a corporate officer, like Hadad, may be held liable if it can be shown that he participated in a tort committed against plaintiffs, even when there is no basis for piercing the corporate veil. See Fletcher v. Dakota, Inc., 99 AD3d 43, 49 (1st Dept 2012) ("a corporate officer who participates in the commission of a tort may be held individually liable, ... regardless of whether the corporate veil is pierced"). Here, the amended complaint alleges that Hadad fraudulent induced plaintiffs not to take safeguards to protect their business, inventory and health by making misrepresentations that New Generation had notified the proper governmental authorities about the spill. It also alleged that he misrepresented that plaintiffs would not have to pay rent for November and December 2012, while the oil spill was being clean up, and that in December 2012, he commenced eviction proceedings against plaintiffs based on the failure to pay rent. These allegations are sufficient to state a viable fraud claim against him. See generally, Lama Holding Company v. Smith Barney Inc., 88 NY2d 413, 421 (1996).

As for the proposed claims against Castle Oil and SJ Fuel, except for claim for "personal

injury,” which is not a separate claim but a request for a type of damages, the other proposed claims, i.e. for negligence, and strict liability under Navigation Law Article 12, are of sufficient merit to be added. In opposition, Castle Oil and SJ Fuel argue that they do not owe a duty of care to plaintiffs who are non-contracting third-parties. However, “[a] contractor’s duty of care to noncontracting third parties may arise out of a contractual obligation or the performance thereof in three circumstances...including ... where the [contractor], while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk.” Powell v. HIS Contrs. Inc., 75 AD3d 463, 464 (1st Dept 2010)(internal citations and quotations omitted). Here, issues of fact exist as to whether in the performance of their contractual obligation to refill the oil tank, Castle Oil and/or SJ Fuel created an unreasonable risk of harm to plaintiffs or increased that risk.

Likewise, the amended complaint adequately alleges that these proposed defendants discharged petroleum such that they are potentially strictly liable under the Navigation Law. See Berens v. Cook, 263 AD2d 521 (2d Dept 1999); Navigation Law § 181 (providing, inter alia, that “[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained...”). Finally, while it is unclear from the submissions the respective role of Castle Oil and/or SJ Fuel in causing the oil spill, at this juncture, the allegations in the proposed amended complaint are sufficient to permit the plaintiffs to add proposed claims against both of these defendants

In view of the above, it is

ORDERED that the motion to amend is granted to the extent permitting plaintiffs to add

(i) Castle Oil, SJ Fuel and Haddad as direct defendants, (ii) all the proposed claims against Castle Oil and SJ Fuel, except for the “personal injury” claim, and (iii) only the fraud claim against Haddad; and it is further

ORDERED that, within 30 days of e-filing this decision and order, plaintiffs shall serve a summons and amended complaint consistent with this decision and order; and it is further

ORDERED that defendants shall file an answer within 20 days of such service; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, on October 8, 2015, at 9:30 am.

Dated: August 13, 2015


HON. JOAN A. MADDEN
J.S.C.J.S.C.