

140 W. 57th St. Bldg. LLC v Berrie

2016 NY Slip Op 30377(U)

March 2, 2016

Supreme Court, New York County

Docket Number: 652757/2015

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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140 W. 57TH STREET BUILDING LLC,

Index Number: 652757/2015

Plaintiff,

Decision and Order

- against -

Motion Seq. Nos.: 001, 002, 003

ANGELICA BERRIE, RUSS TEDDY BEAR
INVESTMENTS INC., CHARLES LAHTI,
CHARLES LAHTI STUDIO INC., 188
LAFAYETTE LLC, CHARLES LAHTI POPUP,
CHARLES LAHTI POPUP @ 188 LAFAYETTE,
CHARLES LAHTI POPUP AT 188 GALERIE,
KATE'S PAPERIE LLC, KATE'S PAPERIE LTD
and K.P. LLC,

Defendants.

-----X
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 7, were used on: (A) the separate motions by (i) defendants Kate's Paperie, Ltd. and Kate's Paperie, LLC, and (ii) defendants Anglica Berrie, Russ Teddy Bear Investments Inc., and 188 Lafayette LLC, each pursuant to CPLR 3211(a)(1), (4) and (7), to dismiss the complaint; (B) plaintiff's cross-motions, in response to each of defendants' motions, to consolidate this action with related special proceedings and for a default judgment herein against defendants Charles Lahti, Charles Lahti Studio Inc., Charles Lahti Popup, Charles Lahti Popup @ 188 Lafayette and Charles Lahti Popup at 188 Galerie; and the Lahti Defendants' motion for an extension of time to answer the instant complaint:

Papers Numbered:

Motion to Dismiss by KP Defendants and Cross-Motion by Plaintiff

Notice of Motion - Affirmation - Exhibits (memo of law)	1
Notice of Cross-Motion - Affirmation - Exhibits (memo of law)	2
Reply Affirmation in Further Support of Motion and in Opposition to Cross-Motion	3

Motion to Dismiss by Berrie Defendants and Cross-Motion by Plaintiff

Notice of Motion - Affirmation - Exhibits (memo of law)	4
Notice of Cross-Motion - Affirmation - Exhibits (memo of law)	5
Memorandum of Law in Further Support of Motion and in Opposition to Cross-Motion	6

Motion for Extension of Time to Answer by Lahti Defendants

Notice of Motion - Affirmation - Affidavit - Exhibits	7
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Upon the foregoing papers, defendants' motions are granted in part and denied in part; plaintiff's cross-motions are granted in part and denied in part; and the motion for an extension of time to answer the complaint is granted.

Background

This action is the most recent litigation arising out of plaintiff's attempt to enforce a \$2.1 million Judgment entered in its favor and against certain defendants herein. A brief recitation of the history of the litigation is necessary and is as follows. Plaintiff 140 W. 57th Street Building LLC ("Plaintiff") successfully sued defendants Kate's Paperie, LLC, Kate's Paperie Ltd. and K.P. LLC (collectively, "Kate's") for obligations due under the parties' commercial lease. On October 14, 2015, the court entered Judgment in favor of 140 and against the Kate's in the sum of \$2,156,165.17 (the "Judgment"). Thereafter, plaintiff sought to enforce its Judgment by way of a Marshal's sale of Kate's assets.

Defendant Russ, Teddy Bear Investments, LLC (incorrectly s/h/a Russ Teddy Bear Investments Inc. ["Russ"]), claiming a superior interest in Kate's assets, commenced a special proceeding to vacate the Marshal's levy and declare that Russ has priority in and to all of Kate's collateral (the "Russ special proceeding"). The narrow issue in the Russ special proceeding is the validity of a security interest granted to Russ by Kate's in April 2012, and a UCC-1 Financing Statement that Russ filed against Kate's on May 23, 2012 (the "UCC-1"), to secure loans Russ allegedly made to Kate's in the total sum of \$3,400,000. By Decision and Order dated December 15, 2014, issued in the Russ special proceeding, this Court found, *inter alia*, that there is a "sharp question of fact" on the issue of Russ's alleged priority. The Russ special proceeding is still pending before this Court.

In addition to seeking a Marshal's sale of Kate's assets, plaintiff also commenced a turnover proceeding for an order directing TD Bank to deliver to plaintiff the \$40,147.22 the bank held in an account under Kate's name. Russ, claiming to have an interest in the bank account by virtue of its purported security interest and UCC-1, intervened therein. By Decision and Order dated January 13, 2016, this Court granted plaintiff's petition for a turnover order, directed TD Bank to deliver to plaintiff the funds in the Kate's bank account, and thereby disposed of the turnover proceeding in plaintiff's favor.

In the meantime, defendants Charles Lahti and Charles Lahti Studio, Inc. (some but not all of the Lahti defendants herein) moved to intervene in the underlying action between plaintiff and Kate's that resulted in the Judgment, in order to prevent the Marshal's sale of said defendants' artwork and property that was being offered for sale at Kate's store at 188 Lafayette Street in downtown Manhattan. By agreement of all parties, the Marshal has not levied upon or sold any of Kate's or the Lahti defendants' collateral, artwork, or property (by separate order, issued simultaneously herewith, the Court disposes of the Lahti defendants' motion to intervene in the underlying action between plaintiff and Kate's).

Thus, at present, there are only two (not three or four) litigations pending before this Court.

The Instant Complaint

During the pendency of the special proceedings, and as a result of alleged facts revealed therein and discovered by plaintiff's independent investigation, plaintiff commenced the instant action

against defendants, all of the persons and entities who have thus far appeared in these litigations, plus a few more, to wit: Charles Lahti Popup, Charles Lahti Popup @ 188 Lafayette and Charles Lahti Popup at 188 Galerie (collectively, together with Charles Lahti and Charles Lahti Studio Inc., the “Lahti defendants”). The gravamen of the complaint is plaintiff’s allegation that defendant Angelica Berrie (“Berrie”) – the principal of Kate’s, who is alleged also to have a “majority interest” in Russ and all of the other corporate defendants – is the alter-ego of all of the corporate defendants, and engaged in a fraudulent “scheme” to avoid paying the Judgment by transferring Kate’s assets, without fair consideration, to the other defendants (who are allegedly in cahoots with Berrie) in order to continue Kate’s business and avoid paying the Judgment. The factual allegations of the complaint are contained in the first 60 paragraphs, and allege, in pertinent part, that:

“In furtherance of this scheme, Berrie caused [Kate’s] to create and convey a security interest in [Russ] an entity that she created, and, created at least two other new entities, including 188 Lafayette and Popup, changed bank accounts, opened new stores in different locations, entered into agreements with other defendants to transfer assets, and moved inventory out of state, all with the intent of staying in business as “Kate’s Paperie” and to avoid paying [plaintiff]” ¶16;

“In or about December 2011, Berrie caused 188 Lafayette to be formed for the sole purpose of continuing [Kate’s] business,” “leased space at 188 Lafayette” Street, and “moved [Kate’s] into the space” ¶17; and Kate’s continued business at 188 Lafayette Street, “under the name of Kate’s Paperie, under the same corporate umbrella, using the same phone number and selling the same product at the new address” ¶18;

“Upon information and belief,” since entry of the Judgment in 2014, Berrie “changed the name outside the store at 188 Lafayette to Charles Lahti Popup” ¶20; “has been depositing receipts for sales [of Kate’s products] into a bank account in the name of 188 Lafayette or another entity under her control” ¶19; but otherwise continues Kate’s business “in the same space, selling the same product, using the same employees, same website, same furniture and fixtures, and the same telephone number” ¶21; and “[a]ll the furniture, fixtures, equipment used and existing at 188 Lafayette Street, remain the property of [Kate’s]” ¶43;

After plaintiff commenced enforcement proceedings on its Judgment, “Berrie and Lahti joined together and created Popup” and Kate’s “then continued the business as Popup” ¶41;

The transfer of Kate’s assets to Charles Lahti Popup and/or 188 Lafayette “were a fraud on creditors and specifically [plaintiff]” ¶¶22, 53, 54;

“Berrie continued operating under the name of Kate’s Paperie at two other locations, in Hudson, New York and in Englewood, New Jersey. [Kate’s] also continued its website and sales on its website” ¶43;

After plaintiff commenced the underlying lawsuit in 2011, in 2012 Kate’s “created and conveyed a security interest” in assets to Russ, upon which the UCC-1 was filed, based upon a 2009 loan made by Russ to Kate’s in the sum of \$2,300,000, in order “[t]o insulate its business” from a \$400,000 rent obligation to plaintiff ¶¶26, 27, 28, 29; Berrie was the principal and sole shareholder of Russ and Kate’s and “had complete control over both entities” ¶30; and the “only purpose in creating and conveying the security interest was to defraud [plaintiff] and fraudulently protect the assets of [Kate’s] from [plaintiff]” ¶34; and

“Upon information and belief, [Kate’s] has ‘liquidated’, and has sold or has transferred a substantial portion of its inventory, not in the ordinary course of business, without accounting for the proceeds. Debtor has purchased additional inventory for sale, has sold that inventory, has paid its employees and other creditors and continues to sell its inventory from the store at 188 Lafayette and other locations” ¶57.

Upon the foregoing allegations, the complaint seeks to enforce the Judgment against all defendants, jointly and severally, under the following legal theories, as plaintiff would have it: common law fraud (first cause of action); conspiracy to commit civil fraud (second cause of action); fraud (third cause of action); conspiracy to commit fraudulent conveyances (fourth cause of action); fraudulent conveyance under Debtor and Creditor Law (“DCL”) § 273, § 273-a, § 274, § 275, § 276 (fifth through ninth causes of action, respectively); Business Corporation Law §§ 1005 and 1006 (tenth cause of action); alter-ego (eleventh cause of action); vacate finance statement (twelfth cause of action); accounting (thirteenth cause of action); legal fees under DCL § 276-a (fourteenth cause of action); and punitive damages (fifteenth cause of action).

Kate’s (appearing herein as K.P. Creative, Ltd., s/h/a Kate’s Paperie, Ltd., and Kate’s Paperie, LLC), and defendants Berrie, Russ, and 188 Lafayette, collectively (the “Berrie defendants”), now separately move, each pursuant to CPLR 3211(a)(1), (4) and (7), to dismiss the complaint. The moving defendants assert essentially identical arguments in support of their respective motions, to wit: once this Court determines that Russ’s security interest is valid, and that Russ has priority in and to all of Kate’s assets, all of plaintiff’s claims herein fail as a matter of law. Specifically, defendants argue that: (1) the issue at the “heart” of, and “key” to, the instant action is the validity of Russ’s “prior, perfected security interest” in and to Kate’s collateral, which issue is also at the heart of, and will be determined in, Russ’ special proceeding, and therefore this action should be dismissed under CPLR 3211(a)(4) for prior action pending; (2) plaintiff’s claims of fraud, in its various common law and statutory iterations, are barred by the “Fifth Amendment” to the loan agreement between Russ and Kate’s, the UCC-1, and certain affidavits

submitted in the special proceedings, all of which establish the validity of Russ's security interest, and therefore this action should be dismissed under CPLR 3211(a)(1) as barred by documentary evidence; (3) the complaint fails to allege the elements of fraud with sufficient particularity, and otherwise fails to allege the elements necessary to establish fraudulent conveyances under DCL §§ 273 - 276; (4) the complaint fails to allege causes of action for conspiracy to commit fraud because there is no such cause of action; (5) the complaint fails to allege a cause of action under BCL §§ 1005 and 1006 because Kate's is not dissolved; (6) there is no independent cause of action for "alter-ego" liability; (7) plaintiff lacks standing to assert a cause of action for an accounting; and (8) there is no independent cause of action for punitive damages.

In opposition to each motion, plaintiff reiterates, by way of its attorney's affirmation, the same factual allegations contained in the complaint, urging that Berrie has played a "shell game" with the other defendants in order to continue Kate's business and avoid paying the Judgment. Plaintiff argues that the complaint, as "reinforce[d] and elucidate[d]" by the attorney affirmation, adequately states, with "requisite particularity and detail," all of the causes of action therein. Plaintiff cross-moves to consolidate this action with Russ's special proceeding and the turnover proceeding, upon the grounds that they involve common questions of law or fact, do not prejudice a substantial right of any defendant, and will avoid unnecessary duplication of trials. Plaintiff also cross-moves for a default judgment against the Lahti defendants.

The Lahti defendants move, pursuant to CPLR 3021, for an extension of time to answer the instant complaint.

Discussion

I. Dismissal of the Complaint and Consolidation

The law on the dismissal of a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal pursuant to CPLR 3211(a)(4) is warranted where there is "another action pending between the same parties for the same cause of action"; however the court may decline to dismiss and instead "make such order as justice requires." See Murphy v 317 319 Second Realty LLC, 95 AD3d 443, 445 (1st Dep't 2012) (motion to dismiss for prior action pending denied, consolidation granted). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, *supra*, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013; see Rogers v Earl, 249 AD2d 990 (4th Dept 1998).

Viewed under the foregoing legal standards, this Court finds that the complaint fails to state certain causes of action and adequately states other causes of action, and that consolidation with the Russ special proceeding is warranted.

At the outset, defendants' argument that the complaint, in toto, is barred by documentary evidence, fails. This Court has already considered, on Russ' motion for a preliminary injunction in its special proceeding: (a) the Fifth Amendment to the Russ/Kate loan agreement, the UCC-1, and affidavits attesting to Russ's loans to Kate's, and (b) Russ's arguments that such documents establish its alleged priority in and to Kate's assets as a matter of law, and found that there are sharp questions of fact about Russ's alleged priority. Indeed, had those documents been dispositive in favor of Russ, the Court would have granted Russ's petition in its special proceeding, fully disposing of plaintiff's claims against Russ in this (or any other) action. Thus, dismissal under 3211(a)(1) based upon the security interest documents is not warranted. See Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 (2002) (contract documents submitted by defendants "do not, however, bar plaintiffs' claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law."). The Court also notes, in passing, that the security interest documents have no bearing upon plaintiff's claims of fraudulent transfer as between Berrie and 188 Lafayette, and Berrie and the Lahti defendants.

Similarly, this action is not subject to dismissal under CPLR 3211(a)(4) because Russ's special proceeding is not a "another action pending between the same parties for the same cause of action." The Russ special proceeding involves Russ and plaintiff only, addresses the narrow issue of whether Russ' security interest is valid and enforceable, and the relief sought is a declaration that Russ has priority in and to all of Kate's collateral. Here, several parties in addition to plaintiff and Russ are involved, various factual and legal issues are raised, including, inter alia, the alleged fraudulent transfers between Berrie, 188 Lafayette and the Lahti defendants (which are acts separate and distinct from the alleged fraud underlying Russ' security interest), and money damages and equitable relief are sought. See Kent Dev. Co. v Liccione, 37 NY2d 899, 901 (1975) ("Although the causes of action in both suits arise out of the same subject matter or series of alleged wrongs, there is good reason for the separate existence of the earlier cause of action asserted by Gnerre apart from those asserted against him in the instant action, since the nature of the relief sought is not the same or substantially the same."). However, because this action and the Russ special proceeding do involve common questions of law and fact, and both are apparently in the same procedural posture (i.e., little or no discovery proceedings have taken place), the Court, in its broad discretion, consolidates this action with Russ' special proceeding, rendering moot defendants' motions to dismiss for prior action pending. See Murphy v 317 319 Second Realty LLC, supra, 95 AD3d at 445 ("Since a decision to consolidate is addressed to the sound discretion of the trial court, where, as here, there are common questions of law and fact, Supreme Court did not improvidently exercise that discretion"; consolidation "renders moot the motion to dismiss that claim pursuant to CPLR 3211(a)(4)."); Fay Estates v Toys "R" Us, Inc., 22 AD3d 712, 714 (2d Dep't 2005) ("Therefore, the Supreme Court properly declined to dismiss the instant action pursuant to CPLR 3211(a)(4). However, since the two actions involve common questions of law or fact the actions should have been consolidated.").

As to the individual causes of action, the Court finds as follows. Viewed independently, each of plaintiff's two fraud claims – common law fraud and fraud (which, in this Court's considered view, are the same cause of action) – fail to state a cause of action. “The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009). Neither plaintiff's common law fraud claim (first cause of action) nor fraud claim (third cause of action) allege, with sufficient particularity, any allegedly fraudulent misrepresentation made by any defendant to plaintiff that were allegedly known to be false when made, made with the intention of inducing plaintiff to rely thereupon, and upon which plaintiff allegedly justifiably relied, causing it to be damaged. Rather, plaintiff's fraud claims sound like its fraudulent conveyance claims under DCL §§ 273 - 276: the common law fraud claim alleges that the “conveyances set forth herein were made with the actual and specific intent to hinder, delay, and defraud” plaintiffs, and the fraud claim alleges that the “conduct outlined herein committed by” defendants constituted a “fraud,” the “purpose and intent” of which “was to protect... [and] shield” Kate's assets from plaintiff and to “avoid paying debt and to continue” Kate's business. These allegations, even assuming their truth, do not state valid causes of action for common law fraud or fraud and, therefore, the first and third causes of action are subject to dismissal.

Plaintiff's second cause of action, for conspiracy to commit civil fraud, fails to state a cause of action as “New York does not recognize a substantive tort of conspiracy.” See MBF Clearing Corp. v Shine, 212 AD2d 478, 478-479 (1st Dep't 1995) (under New York law “mere conspiracy to commit a fraud is never of itself a cause of action.”). Even where, as plaintiff contends, “civil conspiracy” may constitute a viable cause of action (see Faulkner v City of Yonkers, 105 AD3d 899 (2nd Dep't 2013) (“a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme”), plaintiff failed to plead a “cognizable tort” – fraud – upon which to base the alleged conspiracy. Accordingly, the second cause of action is subject to dismissal.

However, plaintiff's complaint adequately states causes of action for fraudulent conveyance under DCL § 273, § 273-a, § 274, § 275, and § 276 (fifth through ninth causes of action, respectively). The extensive factual allegations of the complaint plead, with sufficient particularity, that the security interest granted to Russ, and the alleged transfers of Kate's assets by Berrie to 188 Lafayette and the Lahti defendants, (a) rendered Kate's insolvent; (b) were made without fair consideration; (c) were made when Kate's was a defendant in plaintiff's underlying action on the parties' commercial lease; (d) left Kate's with “unreasonably small capital”; (e) were made at a time when Berrie intended or believed that Kate's “will incur debts beyond [its] ability to pay as they mature”; (f) were made with an actual intent “to hinder, delay, or defraud” plaintiff; and (g) the Judgment remains unpaid by Kate's.

For virtually the same reasons, the fourteenth cause of action, for legal fees under DCL § 276-a, states a valid claim, in that it alleges the subject transfers were made with “actual intent” to avoid paying the Judgment. Additionally, because plaintiff has adequately plead valid causes of action for fraudulent conveyance, its fourth cause of action, for conspiracy to commit a fraudulent conveyance, states a valid cause of action. See Faulkner v City of Yonkers, supra.

Plaintiff's tenth cause of action, for a judgment against Berrie under Business Corporation Law §§ 1005 and 1006, fails for two reasons. First, these statutes govern the procedure for non-judicial dissolution of a corporation and do not provide any independent or additional rights or remedies to creditors of a dissolved corporation. BCL § 1005 sets forth the duties of a corporation in winding up its affairs after dissolution and BCL § 1006 states only that dissolution of a corporation does not affect a creditor's rights or claims existing before such dissolution (in other words, plaintiff may proceed on its claims against Kate's and Berrie even if Kate's is in the process of dissolution). Second, Kate's is not dissolved and is still "active" according to the New York State Division of Corporations. Indeed, plaintiff's attorney admits, in his opposing affirmation, that Kate's "was and remains[] in business as a retail purveyor of paper goods and arts and crafts supplies" (Affirmation in Opposition, ¶ 6). Accordingly, the tenth cause of action is subject to dismissal.

The complaint fails to state an independent cause of action for "alter-ego," as no such independent cause of action exists. See Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp., 127 AD3d 479, 480 (1st Dep't 2015) ("alter-ego liability is not an independent cause of action."). And, contrary to plaintiff's argument, the complaint does not "specifically seek to pierce the corporate veil." Rather, the alter-ego cause of action merely alleges, in conclusory fashion, that "Berrie is the alter-ego of Debtor, 188 Lafayette, Popup, RTBI and Lahti Inc. As such Berrie is responsible to creditor for the amount of the judgment, \$2,156,165.17." Of course, even though the complaint fails to state a separate cause of action for alter-ego, and the eleventh cause of action is subject to dismissal, plaintiff may rely upon the alter-ego legal theory in seeking to obtain judgment against Berrie. See Morris v New York State Dep't of Taxation & Fin., 82 NY2d 135, 141 (1993) ("Thus, an 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").

Plaintiff's twelfth cause of action, to vacate Russ's financing statement, seeks declaratory relief (plaintiff admits as much in its opposing papers). However, because plaintiff states valid causes of action for damages its request for declaratory relief is "inappropriate" and "unnecessary." Bartley v Walentas, 78 AD2d 310, 312 (1st Dep't 1980) ("A declaratory judgment action is generally appropriate only where a conventional form of remedy is not available. Where alternative conventional forms of remedy are available, resort to a formal action for declaratory relief is generally unnecessary and should not be encouraged."). Accordingly, the twelfth cause of action is subject to dismissal.

The complaint fails to state a cause of action for an accounting, as plaintiff has failed to allege any special relationship or circumstances which might give rise to a fiduciary relationship between it and defendants. See generally SNS Bank, N.V. v Citibank, N.A., 7 AD3d 352, 355 (1st Dep't 2004) (fiduciary duty claims properly dismissed "because the parties merely had an arm's length business relationship"); Kensington Pub. Corp. v Kable News Co., 100 AD2d 802, 803 (1st Dep't 1984) (in view of contract provision which provided that relationship between parties "is that of creditor and debtor ... there is no such fiduciary relationship between the parties with respect to the moneys owed as to entitle plaintiff to an accounting as distinct from its

ordinary remedies in an action at law.”). Accordingly, the thirteenth cause of action is subject to dismissal.

Finally, the fifteenth cause of action, for punitive damages, fails to state a cause of action, in that plaintiff does not allege that defendants’ fraud is “aimed at the public generally, is gross and involves a high moral culpability.” Ross v Louise Wise Servs., Inc., 28 AD3d 272, 280 (1st Dep’t 2007) (“In a fraud cause of action, punitive damages may only be recovered when the conduct in question is aimed at the public generally, involves a high degree of moral culpability, and rises to a level of “such wanton dishonesty as to imply a criminal indifference to civil obligations.”); Walker v Sheldon, 10 NY2d 401, 405 (1961) (“there may be a recovery of exemplary damages in fraud and deceit actions where the fraud, aimed at the public generally, is gross and involves high moral culpability.”). In any event, “punitive damages” are a form of relief that may be obtained as an adjunct to other damages in various causes of action; they are not a stand-alone cause of action in and of themselves. Accordingly, the fifteenth cause of action is subject to dismissal.

II. Default Judgment and Extension of Time to Answer

Plaintiff’s request for a default judgment against the Lahti defendants is denied, and said defendants motion for an extension of time to answer the complaint is granted. The Lahti defendants established a reasonable excuse for their default in moving to dismiss or answering the complaint, pursuant to the parties’ September 11, 2015 stipulation, and a meritorious defense to this action. See generally Diversified Dev. Corp. v Stavitsky, 41 AD2d 521 (1st Dep’t 1973).

Conclusion

The motions and cross-motions (Motion Seq. Nos. 001 and 002) are granted in part and denied in part, and the motion for an extension of time to answer (Motion Seq. No. 003) is granted. The Clerk is directed to enter judgment dismissing the first, second, third, tenth, eleventh, twelfth, thirteenth and fifteenth causes of action. The Clerk is also directed to consolidate this action with the pending special proceeding entitled Russ v 140 W. 57th Building, LLC, Index No. 160841/2014, for all purposes. All defendants are directed to serve an answer to the complaint, as modified herein, within 30 days of the date of this Decision and Order.

Dated: March 2, 2016



Arthur F. Engoron, J.S.C.