

Carlyle, LLC v Quik Park 1633 Garage LLC
2016 NY Slip Op 32476(U)
December 15, 2016
Supreme Court, New York County
Docket Number: 653347/15
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

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THE CARLYLE, LLC,

Plaintiff,

Index No. 653347/15

-against-

QUIK PARK 1633 GARAGE LLC and
RAFAEL LLOPIZ, individually and as
managing member of Quik Park 1633
Garage LLC,

Defendants.

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Anil Singh, J.:

This is an action to recover money damages of at least \$2.5 million by plaintiff The Carlyle, LLC (The Carlyle), allegedly suffered as a result of a fraudulent scheme to transfer and dispose of assets and monies for the purpose of thwarting plaintiffs' ability to collect debts owed to it by defendants, including a judgment in a related action titled *The Carlyle, LLC v Beekman Garage LLC et al.*, Index No. 652780/2013 (Sup Ct, NY County). Defendants Quik Park 1633 Garage LLC and Rafael Llopiz, individually and as the managing member of Quik Park 1633 Garage LLC, move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint. For the reasons stated below, the motion is granted in part and denied in part.

Parties

According to the complaint, The Carlyle is a Delaware limited liability company authorized to do business in the State of New York, with its principal business office located at 35 East 76th

Street, New York, New York.

Defendant Quik Park 1633 Garage LLC (Quik Park 1633) is a limited liability company, organized under the laws of the State of New York, with its principal business office located at 247 West 37th Street, New York, New York.

Defendant Rafael Llopiz (Llopiz) resides in the State of New York with a business office located at 247 West 37th Street, 6th Floor, New York, New York 10018, and is the principal and controlling member of Quik Park 1633.

Background

The complaint states that plaintiff operates The Carlyle Hotel (Hotel) pursuant to a commercial lease, under which it leases most of the building comprising the hotel as well as a parking garage (Garage) adjoining the hotel, which has at least 140 parking spaces.

By written sublease (Sublease) dated December 7, 2001, plaintiff subleased the Garage to nonparty Beekman Garage LLC (Beekman Garage), an entity allegedly controlled by Llopiz. Pursuant to a written agreement, and with plaintiff's consent, Beekman Garage assigned its interest in the Sublease to nonparty Quik Park Beekman LLC (Quik Park Beekman), an entity also allegedly controlled by Llopiz.

On May 1, 2009, plaintiff and Quik Park Beekman entered into a sublease modification and extension (Sublease Extension) which extended the term of the Sublease through April 30, 2016. On that same date, with plaintiff's consent, Quik Park Beekman assigned its interest under the Sublease to Quik Park Beekman II LLC (Quik Park Beekman II), another entity allegedly controlled

by Llopiz.

The complaint alleges that, under the Sublease Extension, Quik Park Beekman II was obligated to pay rent to plaintiff of \$109,166.67 per month through April 30, 2016. It further alleges that, for the period November 1, 2012 through August 31, 2013, one or more of the nonparty companies, and/or Quik Park 1633, occupied and operated the Garage.

Plaintiff alleges that, for the entirety of this period, it was never paid any rent, resulting in \$1,091,666.70 in unpaid rent. At the same time, the entities operating the Garage continued to collect revenues from such operation, in excess of \$100,000 for each month the rent went unpaid.

By written Notice of Termination dated July 24, 2013, plaintiff terminated the Sublease as well as any tenancy or occupancy of Quik Park 1633 in the Garage, effective as of August 31, 2013. Despite such termination, plaintiff alleges that the various Quik Park-related entities and/or defendant Quik Park 1633, continued to occupy the Premises without paying any rent or compensation to plaintiff until January 31, 2014, when they vacated the Garage.

On August 7, 2013, plaintiff commenced a related action in this court, titled *The Carlyle, LLC v Beekman Garage LLC et al.*, Index No. 652780/2013, seeking unpaid rent, late fees on unpaid rent, and attorney's fees. On October 14, 2015, this court, per Justice Joan Kenney, entered a judgment in that action against Beekman Garage, Quik Park Beekman and Quik Park Beekman II (the Quik Park Entities) for \$1,503,661.16 for unpaid rent, late fees, and attorney's fees.

On September 3, 2013, plaintiff also commenced a holdover proceeding in the Civil Court, titled *The Carlyle LLC v Quik Park Beekman II LLC et al.* Index No. L&T 79135/13 (Civ Ct NY

County.), seeking damages for post-lease-termination use and occupancy of the Premises in the amount of \$1,143,250.26. The court granted summary judgment in plaintiff's favor on its possessory claims, but did not determine a monetary award.

Plaintiff commenced the instant action in December 2015, against Llopiz and Quik Park 1633 for, among other things, fraud, fraudulent conveyance, unjust enrichment and conversion.

The gravamen of the complaint is that defendants intentionally transferred all, or substantially all, of the funds out of the various Quik Park Entities and into certain shell entities and persons controlled by Llopiz, including Quik Park 1633. The complaint further alleges that these conveyances were made without fair or adequate consideration and rendered the Quik Park Entities insolvent, and thus incapable of paying the debts owed to plaintiff.

Defendants now move to dismiss the complaint for failure to state a cause of action.

Fraud

The first cause of action in the complaint is for fraud. Plaintiff alleges that defendants misrepresented that Quik Park Beekman II was the tenant of the Premises, even though Quik Park 1633 had allegedly taken control of the Premises and had been paying the rent.

“Where a cause of action is based in fraud, the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury.” *MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 290-291 (1st Dept 2016), internal quotation marks and citation omitted. “Circumstances constituting fraud must be set forth in a complaint in detail.” *Id.*, citing CPLR 3016 (b).

Here, the complaint alleges that, although Quik Park Beekman II was the tenant pursuant to the terms of the Sublease, Quik Park 1633 was secretly acting as the tenant and defendants failed to inform plaintiff of this fact and affirmatively led plaintiff to believe that Quik Park Beekman II was still the tenant.

This cause of action is dismissed. First, the complaint fails to allege any fraudulent statements on the part of defendants. The complaint refers to a 2012 email from Llopiz which, according to plaintiff, falsely states that Quik Park Beekman II was the sole tenant of the Premises, while, in fact, it was occupied by Quik Park 1633. However, the email simply states, in the context of a conversation about rent reduction, that Quik Park Beekman II was the sole tenant responsible for the rent. Plaintiff has not demonstrated that his statement was false, given that, under the terms of the Sublease, Quik Park Beekman II was the tenant responsible for paying the rent.

The court notes that plaintiff argues that it had no reason to believe that defendants had transferred control of the Premises to Quik Park 1633. However, it is undisputed that, for a period of at least three years, from November 2009 to November 2012, plaintiff accepted monthly rent checks from Quik Park 1633 rather than from Quik Park Beekman II. Therefore, even assuming that Quik Park 1633 was in fact acting as the tenant, plaintiff was on notice of that possibility. Therefore, the first cause of action is dismissed.

Fraudulent Conveyance

Plaintiff's second, third, fourth, fifth, sixth, seventh and eighth causes of action are for fraudulent conveyance under common law and New York Debtor and Creditor Law §§ 273, 274,

275, 276, 276-A and 278 and 279, respectively. As set forth above, the complaint alleges that defendants intentionally transferred all or substantially all of the funds out of the various Quik Park Entities and over to certain shell entities and persons controlled by Llopiz, including Quik Park 1633. The complaint further alleges that these conveyances were made without fair or adequate consideration and rendered the Quik Park Entities insolvent, and thus incapable of paying the debts owed to plaintiff.

Defendants argue that all of the fraudulent conveyance claims should be dismissed because the complaint fails to plead such causes of action with the specificity required by CPLR 3016 (b). Among other things, defendants contend that the complaint fails to identify any specific transfers or conveyances that were fraudulent or that were not supported by adequate consideration.

In general, a party pleading a cause of action for fraudulent conveyance must allege specific facts, including, among other things, the identity of the specific transactions or conveyances which plaintiff alleges were fraudulent. *Syllman v Calleo Dev. Corp.*, 290 AD2d 209, 210 (1st Dept 2002); see CPLR 3016 (b). A conclusory allegation that the plaintiff has been damaged as the result of certain unspecified transfers is not sufficient. *Id.*

However, “[d]ue to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on badges of fraud to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent.” *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999), internal quotation marks and citations omitted. “Among such circumstances are: a close relationship between the parties to the

alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." *Id.*

Here, the complaint adequately alleges facts to demonstrate a close relationship between Llopiz and Quik Park 1633 on the one hand, and the various nonparty Quik Park Entities on the other. The complaint alleges that Llopiz and/or Quik Park 1633 controlled such entities and made payments to plaintiff on their behalf. It also alleges that Quik Park 1633 may have occupied the premises at some point as well. The complaint further alleges that the various Quik Park Entities do not have sufficient assets to satisfy the judgments.

The complaint does not, on its own, identify specific fraudulent transactions. However, plaintiff submits, in support of the complaint, defendants' responses to information subpoenas (Responses), which, although largely non-responsive, indicate several facts to support plaintiff's claims.

First, the Responses indicate that the various Quik Park Entities had bank accounts into which, and from which, money from the operation of the garage was transferred. According to plaintiff, and not disputed by defendants, the Responses also indicate that the monies in such accounts were periodically transferred to a bank account in Quik Park 1633's name, controlled by Llopiz.

The Responses further indicate that the Quik Park Entities closed their accounts at some point, and the companies are no longer operational. Further, the Responses state that Llopiz is a

member of an unidentified entity which now owns the Quik Park Entities.

In light of the foregoing, the court finds that plaintiff has adequately set forth enough facts, supported by documentary evidence, to sustain the causes of action for fraudulent conveyance. While plaintiff has not yet identified the specific transactions which it alleges were fraudulent, it has set forth enough facts to warrant further discovery as to whether, among other things, defendants wrongfully removed assets from any of the underlying judgment debtors. Therefore, the motion to dismiss the second, third, fourth, fifth, sixth, seventh and eighth causes of action is denied.

Conversion

Plaintiff's ninth cause of action is for conversion. The complaint alleges that plaintiff has a possessory interest in the monies owed to it under the Sublease and pursuant to the judgment entered by this court. It further alleges that defendants transferred such monies to their own dominion and for their own benefit in violation of plaintiff's rights.

"An action for conversion of money may be made out where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." *Thys v Fortis Sec. LLC*, 74 AD3d 546, 547 (1st Dept 2010), internal quotation marks and citation omitted; *see McBride v KPMG Intl.*, 135 AD3d 576, 580 (1st Dept 2016).

Here, the complaint alleges only that defendants transferred funds to themselves which could have been used to pay the underlying judgment. The complaint does not set forth any specific, identifiable funds or other monies which were transferred by defendants, such as would sustain a cause of action for conversion. Therefore, the ninth cause of action is dismissed.

Unjust Enrichment

Plaintiff's tenth cause of action is for unjust enrichment.

The complaint alleges that defendants were unjustly enriched at plaintiff's expense "by their (1) occupying, operating, and reaping pecuniary benefits from the Premises for over fifteen months without compensating Plaintiff; and (2) fraudulently conveying, for the benefit of themselves and the Related Quik Park Entities, monies and assets amounting to at least \$2.5 million that are rightfully owed to Plaintiff." Complaint, ¶ 84.

This cause of action is dismissed. First, the complaint does not allege that Llopiz occupied the premises in his individual capacity, but only that Quik Park 1633 did. Therefore, the complaint fails to state a claim against Llopiz in his individual capacity for unpaid rent. Further, plaintiff concedes that it has already asserted a claim against Quik Park 1633 for unpaid rent in the underlying Unpaid Rent action, which is still pending.

Plaintiff alleges that defendants were unjustly enriched in any event because they fraudulently conveyed assets from the related Quik Park Entities. However, this allegation is duplicative of the causes of action for fraudulent conveyance.

Therefore, the tenth cause of action is dismissed.

Prima Facie Tort

Plaintiff's eleventh cause of action is for prima facie tort. At oral argument, the parties agreed to the dismissal of this cause of action. Therefore, it is dismissed.

Tortious Interference with Contract

Plaintiff's twelfth cause of action is for tortious interference with contract. The complaint alleges that defendants interfered with the performance under the Sublease of the various nonparty Quik Park Entities. Specifically, the complaint alleges that defendants removed funds from such entities, caused them to stop paying rent, and secretly permitted Quik Park 1633 to operate the Premises.

Defendants contend that this cause of action should be dismissed because the complaint fails to allege any facts to demonstrate that either of the defendants caused the underlying Quik Park Entities to stop paying rent.

This argument is unpersuasive. Plaintiff had adequately alleged that Quik Park 1633 and Llopiz, for his own individual benefit, wrongfully transferred funds which caused the underlying Quik Park entities to stop paying rent in breach of the Sublease.

Moreover, while defendants contend that the rent was not paid in response to plaintiff building a scaffold which interfered with the operation of the Premises, this is a factual issue which is not properly resolved on this motion. Therefore, the motion to dismiss this cause of action is denied.

Civil Conspiracy

Plaintiff's thirteenth cause of action is for civil conspiracy to commit fraud, tortious interference with contractual relations, and prima facie tort.

As a threshold matter, civil conspiracy is not recognized as an independent tort in New York.

Mamoon v Dot Net Inc., 135 AD3d 656, 658 (1st Dept 2016), citing *Shared Communications Servs. of ESR, Inc. v Goldman Sachs & Co.*, 23 AD3d 162, 163 (1st Dept 2005). Moreover, the allegations set forth in this cause of action are duplicative of other causes of action in the complaint. Therefore, the thirteenth cause of action is dismissed.

Piercing the Corporate Veil

Plaintiff's fourteenth cause of action seeks to pierce the corporate veil against Llopiz. The complaint alleges that Llopiz has exercised complete dominion and control over Quik Park 1633 and the non party Quik Park Entities, and certain other shell companies established by Llopiz. It alleges that Llopiz is the principal, chief executive officer, and managing member of all of these entities and that he uses them to shift monies and other assets in an effort to defraud plaintiff.

A party seeking to pierce the corporate veil must demonstrate that the owner exercised complete domination of the corporation in respect to the transactions at issue and that such domination was used to commit a fraud or wrong against the plaintiff, resulting in plaintiff's injury. *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, ___ AD3d ___, 2016 NY Slip Op 06903 (1st Dept 2016).

Here, based on the allegations in the complaint, and the Responses to the information subpoenas, the court finds that defendant has not demonstrated that plaintiff's effort to pierce the corporate veil should be dismissed. Plaintiff has adequately pleaded that Llopiz dominated the underlying Quik Park Entities and that he may have used such domination to fraudulently convey assets out of the companies. As above, at a minimum, plaintiff is entitled to further discovery on this

issue.

Permanent Injunction

The fifteenth cause of action in the complaint seeks to permanently enjoin defendants from (1) transferring, or causing to be transferred, from any of the Related Quik Park Entities to any other person or entity, including, but not limited to themselves, assets or monies needed to satisfy existing and/or requested monetary judgments in the Quik Park Actions; or (2) making any other conveyances, undertaking any other obligations, or engaging in any other activities that would result in the removal from the Related Quik Park Entities or themselves of assets or monies needed to satisfy the existing and/or requested monetary judgments in the Quik Park Actions.

Defendants argue that this cause of action should be dismissed because all of plaintiff's underlying causes of action lack merit. However, as set forth above, defendants have not demonstrated that all of the underlying causes of action should be dismissed at this point. Therefore, the motion to dismiss the fifteenth cause of action is denied.

Disqualification

Defendants have also moved to disqualify plaintiff's counsel, Kevin Smith, on the ground that he might be called as a witness in this action. However, this portion of defendants' motion was previously denied by this court at oral argument and is therefore not addressed herein.

Accordingly, it is

ORDERED that the motion by defendants Quik Park 1633 Garage LLC and Rafael Llopiz to dismiss the complaint is granted to the extent that the first, ninth, tenth, eleventh and thirteenth

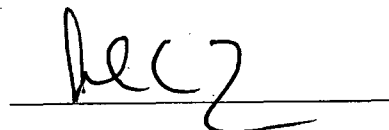
causes of action are dismissed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that defendants shall answer the complaint within 20 days of today; and it is further

ORDERED that the parties are directed to appear for a status conference on January 31, 2017 at 2:30 PM at 60 Centre Street, room 218.

DATED: December 15, 2016

A handwritten signature in black ink, appearing to read 'Anil C. Singh', is written over a horizontal line.

Anil C. Singh