Commonwealth Land Tit. Ins. v Platinum Abstract of N.Y., Inc.
2017 NY Slip Op 30959(U)
May 11, 2017
Supreme Court, Bronx County
Docket Number: 302752/2013
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

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COMMONWEALTH LAND TITLE INSURANCE COMPANY,

Plaintiff(s),

- against -

INDEX NO: 302752/2013

PLATINUM ABSTRACT OF NEW YORK, INC., HILDA DENARO and THOMAS M. DENARO,

DECISION/ORDER

Defendant(s)

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HON. DOUGLAS E. MCKEON

Defendant Thomas Denaro's motion to dismiss the complaint as against him under CPLR 3211 is granted. Plaintiff's separate motion for a default judgment against defendants Platinum Abstract of New York and Hilda Denaro is granted.

Under an agency agreement, dated February 2002, Platinum was a title-insurance-policy-issuing agent for plaintiff. According to the complaint, Hilda was a 50% owner of Platinum and its president, and Thomas owned the other 50% of Platinum and was its secretary. The agency agreement was signed on behalf of Platinum by Hilda; Thomas did not sign the agreement. Plaintiff terminated Platinum as its policy-issuing agent in February 2009 based, among other things, on Platinum's failure to remit to plaintiff sufficient premium payments (i.e., inadequate remittances).

On April 30, 2013, plaintiff commenced this action against Platinum, Hilda and Thomas, seeking damages, an accounting and injunctive relief. The gist of the

complaint is that Platinum breached the agency agreement by, among other things, transmitting to plaintiff inadequate remittances; thwarting a post-termination audit of Platinum's operations; failing to properly maintain Platinum's records; and failing to record certain documents. As against all of the defendants, plaintiff asserted causes of action for an accounting, breach of contract, common law negligence, and injunction. As against Hilda and Thomas, plaintiff asserted an additional cause of action for common law indemnification. The causes of action for common law indemnification, breach of contract and common law negligence request that Platinum's corporate veil be pierced.

Thomas moves to dismiss the complaint as against him under CPLR 3211(a)(1), (3), (5), (7) and (8). He argues that the court lacks personal jurisdiction over him because plaintiff's process server failed to perform the mailing component of CPLR 308(2), the provision under which Thomas was served. He also argues that plaintiff lacks standing because it was absorbed by another corporation before the action was commenced. That aspect of the motion that seeks relief under CPLR 3211(a)(5) is directed at the common law negligence cause of action; Thomas contends that the cause of action is time-barred under the three-year statute of limitations applicable to negligence actions. Those aspects of the motion that seek relief under CPLR 3211(a)(1) and (7) are premised on Thomas' contention that he is not liable for Platinum's breach of contract or tortious conduct because he did not sign the agency agreement and there is no privity of contract between him and plaintiff. Thomas contends that plaintiff's claim for piercing of the corporate veil must be

dismissed because he neither exercised domination or control over Platinum nor committed a fraud or wrong against plaintiff.

Thomas' motion is supported by his affidavit, the complaint, and tax returns suggesting that from 2003 through 2009 he earned no income from and declared no losses on account of Platinum.

Plaintiff opposes the motion, arguing that the court has personal jurisdiction over Thomas, the affidavit of service demonstrating compliance with CPLR 308(2) and Thomas failing to raise an issue of fact warranting a traverse hearing. As to its standing to maintain this action, plaintiff argues that it is a wholly-owned subsidiary of another corporate entity (Chicago Title Insurance Company) and that a wholly-owned subsidiary has standing to commence legal proceedings. Regarding that aspect of the motion seeking dismissal of the cause of action for common law negligence on the basis it is time-barred, plaintiff asserts that the cause of action did not accrue until the parties' business relationship ceased, which, including the post-termination audit, was within three years of the commencement of the action. With respect to the aspects of the motion seeking dismissal under CPLR 3211(a)(1) and (7), plaintiff argues that it sufficiently pleaded causes of action for common law indemnification, breach of contract, common law negligence, and piercing the corporate against Thomas.

A corporate officer is not personally liable on a contract of his or her corporation, provided he or she did not purport to bind him- or herself personally under the contract (see Lido Beach Towers v Denise A. Miller Insurance Agency, 128 AD3d 1025 [2nd Dept. 2015]). Similarly, an owner (i.e., a shareholder) of a corporation is not

liable for the corporation's breach of a contract because the owner and the corporation are separate legal entities (see Morris v New York State Dept. Of Taxation & Finance, 82 NY2d 135 [1993]). With respect to torts, an officer of a corporation that takes part in the commission of a tort by the corporation is personally liable for any resulting injuries, if the officer engaged in misfeasance or malfeasance (see Peguero v 601 Realty Corp., 58 AD3d 556 [1st Dept. 2009]). The shareholder of a corporation is not individually liable for the torts of the corporation unless he or she exercised complete domination over the corporation alleged to have committed the wrong (see MLM LLC v Karamousiz, 2 AD3d 161 [1st Dept. 2003]).

Giving the complaint a liberal construction, accepting the allegations in it as true, and according plaintiff the benefit of every possible favorable inference (see Chanko v Am. Board. Companies Inc., 27 NY3d 46 [2016]), the complaint fails to state a cause of action against Thomas for breach of contract. Nowhere in the complaint is it alleged that Thomas, a 50% shareholder of Platinum and its one-time secretary, signed the agency agreement or otherwise purported to bind himself personally to it. The complaint also fails to state a cause of action against Thomas for common law indemnification. The complaint does not allege (other than in conclusory fashion) that Thomas, personally, was actively at fault in bringing about plaintiff's injuries (see McCarthy v Turner, 17 NY3d 369 [2011]). Even assuming the common law negligence cause of action is not duplicative of the breach of contract claim (cf. Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382 [1987]), the complaint fails to plead (other than in vauge and conclusory terms) that Thomas took part in the

commission of a tort of the corporation.

The viability of the complaint as against Thomas, therefore, depends on the application of the doctrine of piercing the corporate veil, which presupposes that the corporation has an underlying obligation to plaintiff (see Morris v New York State Dept. of Taxation and Finance, supra). A party seeking to pierce a corporation's veil has the heavy burden of showing that the corporation was dominated in connection with the transaction at issue and that the domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences (TNS Holdings, Inc v MKI Securities Corp., 92 NY2d 335 [1998]). "In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" (E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc., 16 NY3d 775, 776 [2011] [internal quotation marks omitted]). Owing to the principle that the corporate form is not to be lightly disregarded (Cobalt Partners L.P. v GSC Capital Corp., 97 AD3d 35 [1st Dept. 2013]), plaintiff is required to set forth in the complaint "'particularized [factual] statements detailing fraud or other corporate misconduct'" that would warrant piercing the corporate veil (Sheridan Broadcasting Corp., v Small, 19 AD3d 331 [1st Dept. 2005], quoting Sheinberg v 177 E. 77, 248 AD2d 176 [1st Dept. 1998]).

Plaintiff's allegations aimed at piercing Platinum's corporate veil do not

withstand this motion to dismiss. On each of the three causes of action[1] on which plaintiff seeks to pierce the corporate veil, plaintiff alleges, in conclusory terms, that the Denaros, as the owners and principals of Platinum, controlled the corporation and used it as their alter egos. Given the absence of particularized factual statements detailing fraud or other corporate misconduct warranting the piercing of the corporate veil, the complaint fails to state a claim for such relief against Thomas (Sheridan Broadcasting Corp. v Small, supra; see E. Hampton Union Free School Dist. v Sandpebble Builders, Inc., supra). The well-settled rules of decision applicable to a motion to dismiss under CPLR 3211 -- give the challenged pleading a liberal construction, view it in a light most favorable to the party opposing dismissal, and accord the party opposing dismissal the benefit of every reasonable favorable inference -- cannot save a pleading attempting to assert a claim for piercing of the corporate veil that does not satisfy the "enhanced pleading standard" imposed on such claims (see John Hansen & Co. Inc. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103 [1st Dept. 2002]).

Because plaintiff has stated no cognizable cause of action against Thomas to recover damages, its purported cause of action against him for "equitable relief" (which, based on the limited allegations in the sixth causes of action, indicates that plaintiff wants a prejudgment attachment [see CPLR 6201(3)]) must be dismissed (see generally Vision China Media Inc. v Shareholder Representative Services, LLC, 109

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[1]The three causes of action are common law indemnification, breach of contract and common law negligence.

AD3d 49 [1st Dept. 2013] [to obtain prejudgment attachment of defendant's property, plaintiff must show, among other things, viable cause of action against defendant and probability that it will succeed on the merits]).

Regarding the cause of action for an accounting, "'[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (Palazzo v Palazzo, 121 AD2d 261, 265 [1986]; see Weinstein v Natalie Weinstein Design Assoc., Inc., 86 AD3d 641, 643 [2011])"' (Ctr. for Rehab. & Nursing at Birchwood, LLC v S&L Birchwood, LLC, 92 AD3d 711, 713 [2012]).

Here, the complaint fails to state a cause of action against Thomas because no fiduciary relationship exists between him (a shareholder and officer of the corporation) and plaintiff (a party that contracted with the corporation) (see East End Laboratories, Inc., v Sawaya, 79 AD3d 1095 [2nd Dept. 2010]).

At bottom, the complaint must be dismissed as against Thomas under CPLR 3211(a)(7).[2] In light of this conclusion, Thomas' other arguments in favor of dismissal are academic.

Plaintiff's motion for a default judgment against Platinum and Hilda is granted. A plaintiff seeking a default judgment must submit proof of service of the initiatory papers on the defendant, demonstrate that the defendant is in default, and submit

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[2]The dismissal is based on the insufficiency of the pleading, not on the evidence submitted by Thomas in connection with the motion to dismiss.

proof of the facts constituting plaintiff's claims (see CPLR 3215[a], [f]).

Here, plaintiff satisfied those three elements. Plaintiff submitted the facially-valid affidavits of service reflecting service on Platinum and Hilda, and demonstrated that both of those defendants are in default. With respect to the proof of plaintiff's claims against Platinum and Hilda, the court notes that those defendants are deemed to have admitted all factual allegations contained in the complaint (see Woodson v Mendon Leasing Corp., 100 NY2d 62 [2003]). Those admissions, coupled with the affidavit of merit of plaintiff's vice president, demonstrate that plaintiff has viable causes of action against Platinum and Hilda (see id.). Notably, Hilda (unlike Thomas) executed the agency agreement.

Accordingly, it is hereby ordered that Thomas Denaro's motion to dismiss the complaint as against him is granted, and the complaint is dismissed as against him; and it is further,

ORDERED that plaintiff's motion for a default judgment against Platinum Abstract of New York, Inc. and Hilda Denaro is granted, and plaintiff is entitled to a default judgment against those defendants; and it is further,

ORDERED that plaintiff, within 60 days of the date of this decision and order, is directed to settle judgment on notice.

This constitutes the decision and order of the court.

Dated: April 25, 2017

Douglas E. McKeon, J.S.C.