Lam Platt St. Hotel LLC v Golden Pearl Constr. LLC
2018 NY Slip Op 33018(U)
November 29, 2018
Supreme Court, New York County
Docket Number: 650981/2017
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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LAM PLATT STREET HOTEL LLC,

Lam Platt,

- v -

GOLDEN PEARL CONSTRUCTION LLC, CNY GROUP LLC, KENNETH COLAO, STEVEN COLAO, HARRY GROSS, NOBUTAKA ASHIHARA ARCHITECT P.C.,

Defendants.

INDEX NO. 650981/2017

MOTION DATE 08/31/2018, 08/31/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 48, 51, 52, 53, 54, 55, 70, 71, 72, 83
were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 49, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 73, 74, 75, 76, 77
were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

Motion seq. nos. 001 and 002 are consolidated for disposition and are disposed of in accordance with the following decision and order.

This is an action involving the construction of a hotel located in lower Manhattan, in which the owner, Lam Platt Lam Platt Street Hotel LLC ("Lam Platt"), is suing for breach of both the construction contract and a later settlement agreement, and for injury to property. Lam Platt asserts these claims against the general contractor, defendant Golden Pearl Construction LLC ("GPC") and the architect, defendant Nobutaka Ashihara Architect P.C. ("Architect"). Lam Platt also seeks to pierce the corporate veil of GPC to

pursue its claims against three individuals, Kenneth Colao ("K. Colao"), Steven Colao ("S. Colao"), and Harry Gross ("Gross"), and a limited liability corporation, CNY Group LLC ("CNY Group").

GPC now moves to dismiss the first and fourth causes of action (motion seq. no. 001), arguing, among other things, that the breach of contract claim fails to allege that Lam Platt met a condition precedent to a termination for cause; and there is no claim for injury to property because New York Lien Law § 39 is the exclusive remedy for willful exaggeration of a lien. K. Colao, S. Colao, Gross and CNY Group move to dismiss the complaint as against them (motion seq. no. 2) on that ground that Lam Platt has failed to plead a basis to pierce the corporate veil.

Background

Lam Platt is the owner and developer of a hotel project located at 6 Platt St, New York, New York (the "Project"). On November 22, 2011, Lam Platt entered into a pre-construction consulting agreement with non-party CNY Consulting Services, pursuant to which Lam Platt retained GPC as the general contractor for the Project.

On December 14, 2011, Lam Platt and GPC entered into a $38,417,500.00 lump sum construction contract for the Project, which contract included an AIA A101-2007 construction agreement, an AIA A201-1997 general conditions of the contract for construction, and a rider (the Rider) (together, the Contract).

During construction certain disputes arose between GPC and Lam Platt over extra work and payments. Lam Platt wanted to finish the Project in time for the February 2014 Super Bowl, and so included in the Rider a "time is of the essence" clause. Lam Platt

alleges that GPC failed properly to staff the Project, causing delays, and there were change orders which unnecessarily increased the contract price.

On December 18, 2014, Lam Platt and GPC entered into a settlement agreement regarding these disputes, in which GPC agreed to complete the work according to a project schedule with a new completion date, the contract price was increased to $44,641,151, and Lam Platt agreed to make payments according to a payment schedule.

Further disputes arose between the parties after the Settlement Agreement. Lam Platt asserts that it performed its obligations, but GPC again failed sufficiently to staff the Project, failed to pay subcontractors, performed its work deficiently, and failed to meet the completion deadline of April 30, 2015. By letter dated June 3, 2015, Lam Platt terminated the Contract, revoking GPC's access to the Project site.

The Contract provides different conditions and remedies for Lam Platt's termination "for cause" and "without cause." Section 14.2 provides that where certain specified reasons exist, Lam Platt could terminate for cause "upon certification by the Architect that sufficient cause exists to justify such action," and then Lam Platt could exercise certain rights, including the right to take control over the project site (id.).

In addition, upon termination for cause, Lam Platt's obligations to make payments to GPC under the Contract are suspended until the work is finished, or it becomes clear that the cost of completing the Project would be less than the unpaid balance remaining on the Contract (id.). Where the cost to complete the work is less than the Contract balance due, GPC is entitled to receive the difference from Lam Platt. Where, however, the cost to Lam Platt to have the work completed is greater than the Contract balance due,

then GPC is liable to pay the difference in damages. These costs and amounts due must be certified by the Architect.

Section 14.4 of the Contract and Section 8.1 of the Rider, with identical language, provide Lam Platt's right to terminate "for convenience and without cause" (id.). Where Lam Platt terminates without cause, GPC must cease operations, preserve the work, and cancel further subcontracts and purchase orders. GPC then is entitled to payment for all work completed in accordance with the Contract through the termination date, the costs of termination (such as reasonable demobilization costs), costs for work required by the Department of Buildings or any government agency, and damages, including profit for work not performed or executed (id.). Lam Platt's cost to complete the Project is not relevant to a termination without cause.

The Contract further provides, in Rider Section 8.0A, entitled "Waiver of Claims," that GPC and Lam Platt "waive Claims against each other for consequential damages arising out of or relating to this Contract (excluding claims for gross negligence or willful misconduct)" (id., Rider § 8.0A). The waiver expressly includes damages for "rental expenses, loss of use, income, profit, revenue, financing, business and reputation" (id.). It applies without limitation "to all consequential damages due to either Party's termination for cause in accordance with Article 14" (id.).

By letter dated June 5, 2015, GPC rejected Lam Platt's notice of termination as one for cause, because it was not supported by the Architect's certification as provided in section 14.2.2 of the Contract. On June 10, 2015, Lam Platt sent a letter to the Architect, requesting that it certify the termination of GPC. Architect responded that it needed

evidence that GPC abandoned the Project, and Lam Platt sent some documentation. By letter dated July 13, 2015, Architect refused to certify Lam Platt's termination for cause, stating that such a certification was outside its contractual obligation.

Subsequently, on October 7, 2015, GPC filed a Notice of Mechanic's Lien in the office of the Clerk of New York County in the amount of $3,196,449.44 against the premises. Lam Platt claims that GPC willfully exaggerated the amount claimed in the Notice of Mechanic's Lien.

Lam Platt commenced this action asserting four causes of action, only two of which are at issue on these motions: breach of the contract (first cause of action) against GPC, K. Colao and S. Colao; and injury to property (fourth cause of action) against GPC, K. Colao and S. Colao for willful exaggeration of a lien in the amount of $3,196,449.44.

GPC moves to dismiss the breach of contract claims on several grounds. First, it asserts that Lam Platt failed to obtain a certification from the Architect, which was required to terminate the contract for cause. Second, it contends that the damages Lam Platt seeks, including consequential and lost profit damages, are barred by the Contract. In addition, it asserts that the request for quasi-contractual relief is barred because there is a valid contract. GPC moves to dismiss the fourth cause of action claiming Lien Law § 39 is the exclusive remedy available for willful exaggeration of a lien.

The individual defendants, the Colaos and Gross and CNY Group move to dismiss the claims against them because they are not in privity with Lam Platt on the Project. In addition, they argue that Lam Platt fails to plead any basis for piercing the corporate veil and/or alter ego liability and asserts only conclusory allegations. With respect to the lien

cause of action, they note that they did not file the lien at issue, and, thus, could not be liable, and there is no alter ego liability with respect to that lien either.

Discussion

The Breach of Contract Cause of Action

The Contract contains a mutual waiver provision, in Rider 8.0A, which clearly limits the damages Lam Platt may seek for breach. Specifically, that provision prohibits recovery of "consequential damages arising out of or related to the Contract," except for gross negligence or willful misconduct, which Lam Platt has not alleged. Moreover, the parties explicitly waived recovery of damages for "profit." Similarly, Lam Platt's claim for "financing" damages has also been waived. This clear agreement between the parties on the allocation of the risk of loss in the event of a breach must be honored (*see Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 436 [1994]; *Daily News v Rockwell Intl. Corp.*, 256 AD2d 13, 13 [1st Dept 1998]; *see also J.C. MacElroy Co. v Arben Corp.*, 276 AD2d 434, 435 [1st Dept 2000]). Accordingly, the first cause of action for breach of contract is dismissed to the extent that it asserts damages for lost profits and consequential damages.

The first cause of action is also dismissed to the extent that it asserts a claim for unjust enrichment. Lam Platt alleges a valid contract between it and GPC, and the existence or validity of that binding contract is not being challenged. Therefore, there is no basis for any quasi-contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Lam Platt's request for restitution, plead as a disgorgement

claim, is dismissed for the same reason (see *Lin Shi v Alexandratos,* 137 AD3d 451, 452 [1st Dept 2016]).

Further, to the extent that Lam Platt alleges both the first and fourth causes of action against the individual defendants and CNY Group on the theory of piercing the corporate veil, the claims are dismissed in their entirety against these defendants. "The corporate veil of a business entity may be pierced where a plaintiff sufficiently states that '(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the Lam Platt which resulted in Lam Platt's injury'" (*JTS Trading Ltd. v Trinity White City Ventures Ltd.*, 139 AD3d 630, 630–31 [1st Dept 2016], quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *see also TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 90 [1st Dept 2015]).

The plaintiff bears a heavy burden to make such a showing with particularized facts (*Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.,* 127 AD3d 479, 480 [1st Dept 2015]; *see also Barneli & Cie SA v Dutch Book Fund SPC, Ltd.,* 95 AD3d 736, 737 [1st Dept 2012] [conclusory allegations are insufficient to state a veil-piercing claim]). The complaint must set forth facts that clearly address the underlying transactions and occurrences and the material elements of the claim, and cannot simply rely upon "buzz words" or vague or conclusory allegations (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 130-131 [2d Dept 2009], affd 16 NY3d 775 [2011]; *see also Albstein v Elany Contr. Corp.,* 30 AD3d 210, 210 [1st Dept 2006] [court denied alter ego liability, where plaintiff alleged "nothing more than that the

corporation was "undercapitalized and functioned as Krieger's 'alter ego'" and no facts were pleaded "to substantiate such conclusory claims"]).

Some of the factors to show domination include the failure to adhere to corporate formalities, inadequate capitalization, personal use of corporate funds, and the commingling of assets (*Olivieri Constr. Corp. v WN Weaver St., LLC,* 144 AD3d 765, 767 [2d Dept 2016]). Complaint allegations that simply parrot those factors, pointing only to common ownership, employees, operations and addresses, are not sufficient where the plaintiff fails to show that this control resulted in some fraud or wrong against the plaintiff (*see Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.,* 161 AD3d 1263, 1270 [3d Dept 2018]; *Franklin v Daily Holdings, Inc.,* 135 AD3d 87, 95-96 [1st Dept 2015] [must show domination and that purpose of domination was to commit wrong against plaintiff].

Here, the complaint contains no detailed facts as to how the moving defendants allegedly exercised domination and control over GPC, abused the corporate form, or undertook any specific actions which would justify piercing the corporate veil. None of these defendants were signatories or parties to the Contract. The complaint simply uses the veil-piercing buzz words with entirely conclusory statements, and then fails to connect the alleged domination to the actual transaction, and to a fraud or wrong against Lam Platt (*see Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d at 512).

For example, the complaint alleges that "the Colaos and/or CNY exercised complete domination over GPC, and that such domination was used to commit a wrong that resulted in injury to Lam Platt." It alleges that GPC shares office space and

employees with "other affiliated entities of CNY," all in conclusory terms, which does not show complete domination, and then fails to make any connection to a fraud or wrong against Lam Platt (*see Sass v TMT Restoration Consultants Ltd.,* 100 AD3d at 443). The allegations that "the Colaos and/or CNY used GPC to avoid paying numerous subcontractors," again, are purely conclusory, and do not indicate how that was a fraud against Lam Platt *(see JTS Trading v Trinity White City Ventures Ltd.,* 139 AD3d at 631 [failure to show how entity was used to commit fraud or wrong]).

The alleged wrongful acts are GPC's breach of the construction contract, and the filing of the mechanic's lien, neither of which are sufficient as a wrong to warrant piercing the corporate veil (*see Skanska v Atlantic Yards B2 Owner LLC*, 146 AD3d 1, 12-13 [1st Dept 2016], affd 31 NY3d 1002 [2018] [breach of contract, without more, is not sufficient fraud or wrong to pierce corporate veil]).

Further, contrary to Lam Platt's assertion, veil piercing claims may be dismissed on a CPLR 3211 motion (*see e.g., Cornwall Mgt. Ltd. v Kambolin*, 140 AD3d 507, 507 [1st Dept 2016] [complaint allegations asserted based on information and belief with no specific facts dismissed]; *Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d at 480 [CPLR 3211 dismissal where alter ego allegations too conclusory, no particularized facts pled]; *Barneli & Cie SA v Dutch Book Fund SPC, Ltd.,* 95 AD3d at 737 [same]; *see also Kats v East 13th St. Tifereth Place, LLC*, 73 AD3d 706, 707-708 [2d Dept 2010] [CPLR 3211 dismissal of claims seeking to hold corporate officers individually liable for corporation's breach of contract on theory officer induced contract breach for his own personal gain]).

With respect to defendant Gross, the only allegation directly referring to him is that he is a principal of GPC "who provided substantial financing to CNY and was instrumental in negotiating the [Settlement Agreement]." This clearly is insufficient to state a veil piercing claim. As to K. Colao and S. Colao, the complaint repeatedly refers to them as the "Colaos," with no differentiation, and no specific allegations of how they dominated GPC, and what they did to commit a wrong against Lam Platt.

Lam Platt's attempt to fish for facts in discovery to support veil piercing is unavailing *(see Vandashield Ltd. v Isaacson*, 146 AD3d 552, 555 [1st Dept 2017] [plaintiff failed to plead facts indicating defendants abused corporate form for purpose of causing it harm, and its plea for discovery is unavailing]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d at 128-129).

The remainder of the first cause of action, however, is sufficiently stated. Whether Lam Platt terminated the contract for cause, pursuant to section 14.2 of the contract, which required Lam Platt to obtain "certification by the Architect that sufficient cause exists to justify such action," is not an issue appropriate for resolution at this early stage in the litigation.

Lam Platt asserts that Architect was connected to GPC and refused to issue a letter. It submits proof of its request, and the Architect's assertion that it had no contractual obligation to issue a certification. Lam Platt's failure to obtain such certification, particularly where it alleges that GPC interfered with its efforts to obtain the certification, is sufficient to defeat this pre-answer motion to dismiss for Lam Platt's alleged failure to plead compliance with the condition precedent.

Injury to Property Cause of Action

The fourth cause of action for injury to property is pled in connection with GPC's filing of the mechanics lien. As to the individual moving defendants and defendant CNY Group LLC, it is clear from the face of the lien that none of them were the lienors. Rather, the lien was filed by defendant GPC as the contractor that furnished the labor, services, materials, and/or equipment for the project. There are no allegations that they affirmatively acted, personally committed, or participated in the commission of a tort (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 558-559 [1st Dept 2009] [corporate officer who participates in commission of tort may be held personally liable, but liability must be based on affirmative tortious act, not for failure to act]; *Greenway Plaza Off. Park-1 v Metro Constr. Servs.,* 4 AD3d 328, 329-330 [2d Dept 2004]). This cause of action therefore fails as to the individual moving defendants and CNY Group.[1]

Lam Platt also asserts the injury to property cause of action against GPC. Section 39 of the Lien Law provides that: "In any action ... to enforce a mechanic's lien ... if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be has thereon" (New York Lien Law § 39). Where a lien has been discharged under section 39, Lien Law § 39–a allows the recovery of damages. Thus, section 39–a

[1] To the extent that Lam Platt seeks to assert a veil piercing theory with respect to liability for the injury to property cause of action, it is unavailing. As discussed above with respect to the breach of contract claim, Lam Platt fails to plead sufficient facts to satisfy either of the two required elements for such liability.

provides: "'Where in any action ... to enforce a mechanic's lien ... the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor'" (New York Lien Law § 39-a; *see Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 166-167 [1st Dept 2000]). Where there is no existing foreclosure action, there is no claim for willful exaggeration of the lien (*see Wellbilt Equip. Corp. v Fireman*, 275 AD2d at 166-167; *see also Harrington v Smith,* 138 AD3d 548, 548 [1st Dept 2016]).

In *E-J Electric Installation Co. v Miller & Raved* (51 AD2d 264, 265-266 [1st Dept 1976]), the defendant sought to allege various common-law counterclaims, including negligence and breach of duty based on the plaintiff's alleged filing of an exaggerated mechanic's lien. The First Department held that the mechanic's lien is a creature of statute, which existed neither in common-law nor in equity. The intent of the statute is to punish willful exaggeration, and to protect the property owner or contractor against fictitious or groundless fraudulent liens (id. at 265). The court further held that the exclusive remedy for false or willful exaggeration is Lien Law § 39-a, and other common law claims cannot be maintained (id.; *see Key Bank of N. N.Y., N.A. v Lake Placid Co.*, 103 AD2d 19, 31 [3d Dept 1984]).

Because the exclusive remedy for willful exaggeration is Lien Law § 39-a, Lam Platt's common law cause of action for damages for willful exaggeration, asserted in the fourth cause of action as a claim for injury to property, is not viable (see *Wellbilt Equip. Corp. v Fireman,* 275 AD2d at 166-167; *Great Am. Restoration Servs., Inc. v Flaton*, 48 Misc 3d 78, 79-80 [App Term, 2d Dept 2015] [damages for willfully exaggerating

mechanic's lien are available only in action to enforce lien]; *Power Air Conditioning Corp. v Batirest 229 LLC*, 2017 NY Slip Op 30750 [U] at * 5, 2017 WL 1375262 [Sup Ct, NY County 2017] [remedies for willful exaggeration of mechanic's lien are set forth in Lien Law §§ 39 and 39-a, and are exclusive]; *Fulton Quality Foods LLC v Arcon Constr. Group Inc.,* 2014 NY Slip Op 31618 [U] at * 3, 2014 WL 2861565 [Sup Ct, NY County 2014] [injurious falsehood claim with regard to the willfully exaggerated lien is dismissed, exclusive remedy is Lien Law § 39-a]).[2]

In accordance with the foregoing, it is

ORDERED that the motion to dismiss by defendant Golden Pearl Construction LLC (motion seq. no. 001) is granted to the extent that the claim for unjust enrichment and restitution and the request for lost profits and consequential damages in the first cause of action is dismissed, and the fourth cause of action is dismissed; and it is further

ORDERED that the motion to dismiss by defendants Ken Colao, Steven Colao, Harry Gross, and CNY Group LLC (motion seq. no. 002) is granted, and the first and fourth causes of action as against them are dismissed. It is further

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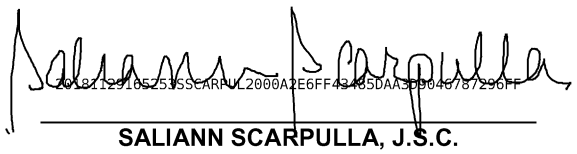
[2] Contrary to Lam Platt's contention, *Lippes v Atlantic Bank of N.Y.* (69 AD2d 127 [1st Dept 1979]) does not support its common-law claim. *In Lippes v Atlantic Bank of N.Y.*, the issue was whether comparative negligence under CPLR 1411 applied to a commercial transaction for injury to property. The court relied upon General Construction Law § 25-b and concluded that certain commercial torts may be found within the purview of the term "injury to property," as used in CPLR 1411. The court did not hold that "injury to property" may be pleaded as an independent common-law claim for willful exaggeration of a mechanic's lien.

ORDERED that defendant Golden Pearl Construction LLC is directed to answer the complaint within thirty (30) days of the date of this decision and order.

This constitutes the decision and order of the Court.



11/29/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE