

Lam Pearl St. Hotel, LLC v Golden Pearl Constr., LLC
2019 NY Slip Op 33750(U)
December 18, 2019
Supreme Court, New York County
Docket Number: 657487/2017
Judge: Barry Ostrager
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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INDEX NO. 657487/2017

LAM PEARL STREET HOTEL, LLC,
Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 004

- v -

GOLDEN PEARL CONSTRUCTION, LLC, CNY GROUP
LLC, KENNETH COLAO, STEVEN COLAO,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 151, 152, 153, 154, 155, 163, 165, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 192, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 213, 214, 215, 217, 218, 219, 221

were read on this motion to/for DISMISS

OSTRAGER, BARRY R., J.S.C.:

This dispute, involving less than \$1M, has gotten so bogged down with motion practice that discovery has yet to begin in earnest two years after the action was commenced.

The facts are detailed in this Court’s November 7, 2018 Decision and Order which granted the motions by all the defendants to dismiss this action in its entirety (NYSCEF Doc. No. 71). As stated there, plaintiff Lam Pearl Street Hotel LLC (“Lam”) is the owner and developer of a hotel construction project at 215 Pearl Street, New York, NY (the “Project”). Lam retained defendant Golden Pearl Construction LLC (“GPC”) as the general contractor for the Project pursuant to a written contract dated September 27, 2013 executed by Kin Chung Lam as Manager of Lam and Walter Beal as President and General Manager of GPC (the “Contract”, NYSCEF Doc. No. 142). The Contract provided that GPC would construct the Project for the sum of \$54,274,840 and obtain appropriate insurance for its work (NYSCEF Doc. No. 145).

Lam also entered into a written contract dated October 9, 2013 with CNY Consulting Services, LLC (“CNY Consulting”). That contract was signed by Kenneth M. Colao as President of CNY Consulting and an unidentified representative of Lam Pearl (NYSCEF Doc. No. 142). In the consulting contract, CNY Consulting agreed to “provide advisory services” to Lam Pearl during the construction of the Project for a monthly fee of \$6,000.

At some point, the relationship between Lam and GPC broke down, and Lam and GPC entered into a Settlement Agreement and Release dated December 18, 2014 providing for the completion of certain work by GPC in exchange for a payment by Lam of \$9,064,729.42 (the “Settlement Agreement”, NYSCEF Doc. No. 7). The Settlement Agreement was signed by Keith Lam for Lam and by Walter Beal as President of GPC. On the same date, the parties, represented by the same signatories, entered into a Voluntary Termination Agreement providing for the termination of the parties’ Contract upon the payment of the amounts set forth in the Settlement Agreement (NYSCEF Doc. No. 8).

Three years later, Lam commenced this action against GPC, CNY Group LLC (an entity allegedly affiliated with CNY Consulting and officially formed in September of 2016), and Kenneth and Steven Colao, who appear to be officers of CNY Group (together the “Colao Defendants”). The original Complaint alleged claims of breach of the covenant of good faith and fair dealing, fraudulent inducement, unjust enrichment, and conversion (NYSCEF Doc. No. 1). All the claims were based on the assertion that Lam Pearl paid GPC nearly \$1M to be used toward a premium to purchase “project-specific” insurance that was transferable and that GPC failed to obtain the proper insurance. The Court granted motions to dismiss by all the defendants by Decision and Order dated November 7, 2018 (NYSCEF Doc. No. 71).

Lam Pearl then moved to reargue, alleging that this Court had erred in applying the Releases in the Settlement Agreement and the Termination Agreement more broadly than intended. By decision dated May 21, 2019, the Court granted the motion to reargue and upon reargument reinstated only the cause of action for unjust enrichment (NYSCEF Doc. No. 139). Lam then filed an Amended Complaint on May 24 (NYSCEF Doc. No. 141) against GPC and the Colao Defendants for claims of breach of the implied covenant of good faith and fair dealing, unjust enrichment, and conversion. The conversion claim was discontinued without prejudice on September 16, 2019 (NYSCEF Doc. No. 185).

The Colao Defendants then made the instant motion to dismiss all claims against them, and plaintiff Lam cross-moved to renew, urging the Court to modify its May 21, 2019 decision and reinstate the claim for breach of the implied covenant of good faith and fair dealing. The alleged “new facts not offered on the prior motion” that purported to justify renewal pursuant to CPLR § 2221 are GPC’s filing of an Answer with a counterclaim for attorney’s fees based on its largely successful motion to dismiss the original Complaint and the acknowledgement by the Colao Defendants in this motion of the existence of the Termination Agreement (NYSCEF Doc. No. 168).

Following extensive oral argument on the record on December 10, 2019 (NYSCEF Doc. No. 223), the Court denied the cross-motion to renew, finding that Lam did not satisfy the standard for renewal under CPLR 2221. The Court further indicated that, if the merits were addressed, the implied covenant claim would be dismissed as duplicative of the unjust enrichment claim. The Court reserved decision on the motion by the Colao Defendants to dismiss. This decision determines the remaining issues raised by that motion.

Plaintiff Lam asserts that the Colao Defendants are liable for reimbursement of the insurance premium paid by Lam to GPC based solely on the theory of piercing the corporate veil. In other words, Lam asserts no direct claim for unjust enrichment against the Colao Defendants because it is undisputed that Lam paid the money for the insurance premium directly to defendant GPC, and not to the Colao Defendants. It is also undisputed that the construction Contract for the Project, the Settlement Agreement, and the Termination Agreement were all signed by Walter Beal as President of GPC and not by either of the individual Colao defendants or by a representative of defendant CNY Group.

The question is therefore whether the Amended Complaint alleges non-conclusory facts sufficient to support a veil-piercing theory related to plaintiff's claim for unjust enrichment against GPC. *See First Sterling Corp. v Union Sq., Retail Trust*, 102 AD3d 490 (1st Dep't 2013) (affirming dismissal of unjust enrichment claim as plaintiff's allegations of domination and control were conclusory and insufficient to state a veil-piercing claim). The answer to that question is no. As explained by the Court of Appeals in *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-42 (1993) (citations omitted):

piercing the corporate veil requires a showing 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 plaintiff which resulted in plaintiff's injury ... While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business ..., such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required ... The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene

Lam argues that its Amended Complaint alleges facts demonstrating domination and control of GPC by the Colao defendants, such as undercapitalization of GPC. But those allegations are for the most part asserted only on information and belief in a conclusory manner. The only specific allegation relates to the involvement of Kenneth Colao, and to a lesser degree Steven Colao, in the negotiations that led to the execution of the Settlement Agreement and the Termination Agreement by Lam and GPC. But neither those negotiations, nor those Agreements, addressed the insurance issue which is the “transaction attacked” in this case. Therefore, even if the Court were to decide that Lam had alleged sufficient facts for domination and control, Lam has not alleged sufficient facts to tie that domination and control to the insurance issue or to satisfy the second alter ego criterion that the domination was used to accomplish the specific wrongful or unjust act about which Lam complains; that is, GPC’s failure to obtain the proper insurance despite its acceptance of the premium monies from Lam.

As the alter ego theory is the only basis for the unjust enrichment claim against the Colao Defendants, and that theory has not been sufficiently alleged in the Amended Complaint, the Colao Defendants are entitled to the dismissal of all claims against them pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

Accordingly, it is hereby

ORDERED that the motion by the Colao Defendants is granted, and the Clerk is directed to sever and dismiss all claims against defendants CNY Group LLC, Kenneth Colao, and Steven Colao, with the claims against defendant Golden Pearl Construction LLC continuing; and it is further

ORDERED that the cross-motion by plaintiff to renew is denied; and it is further

ORDERED that counsel for plaintiff and the remaining defendant shall appear in Room 232 on January 14, 2020 at 9:30 a.m. for a preliminary conference. Counsel shall meet and confer in advance on a proposed schedule that provides for the filing of a Note of Issue by June 19, 2020 on the sole remaining claim of unjust enrichment against GPC.

12/18/2019
DATE

Barry R. Ostrager
BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: