165 E. 72nd Apt. Corp. v Invite Health Stores, Inc.
2020 NY Slip Op 30266(U)
January 22, 2020
Supreme Court, New York County
Docket Number: 653342/2015
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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165 EAST 72ND APARTMENT CORPORATION,

Plaintiff,

- v -

INVITE HEALTH STORES, INC.,INVITE HEALTH, INC.,INVITE HEALTH AT 72ND STREET, INC.

Defendant.

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INDEX NO. 653342/2015

MOTION DATE 01/15/20

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 111, 112, 113, 114, 115, 116, 117, 118, 143, 144, 153, 154, 155, 156, 157, 158, 159, 160, 162
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 145, 146, 147, 148, 149, 150, 151, 152, 161, 163, 164
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The critical issue in this case is whether a landlord may seek to pierce the corporate veil to hold a tenant's parent company liable for the debts of the tenant where the landlord executed a release of the parent. Because this court concludes that it cannot, and for the reasons set forth below, Invite Health Stores, Inc. (the **Tenant**), Invite Health, Inc. (the **Parent**), and **Invite Health at 72nd Street, Inc.'s** (**Invite at 72nd**; the Tenant, the Parent and Invite at 72nd, hereinafter, collectively the **Defendants**) motion (Mtn. Seq. No. 5) for partial summary judgment dismissing the second (breach of contract as against the Parent), third (breach of contract as against Invite at 72nd), fifth (fraud), and sixth (Violations of Sections 273, 274, 275, and 276 of the New York Debtor & Creditor Law) causes of action in their entirety and the fourth (attorneys' fees against

all Defendants) cause of action solely to the extent that 165 East 72nd Apartment Corporation (the **Landlord**) asserts a claim for attorneys' fees as a separate cause of action is granted, and the Landlord's motion (Mtn. Seq. No. 6) for summary judgment is granted solely as to the first cause of action as against the Tenant and any costs and attorneys' fees, but is otherwise denied.

THE RELEVANT FACTS AND CIRCUMSTANCES

Reference is made to a (i) certain Agreement of Lease (the **Original Lease**), dated February 28, 1997, between Landlord and Hickey Chemists III, Ltd. (**Hickey Chemists**) as tenant (NYSCEF Doc. No. 123) pursuant to which Hickey Chemists leased Store #5 in the building located at 1258 Third Avenue, New York, New York for a ten (10) year term commencing on March 1, 1997 and terminating on February 28, 2007 (the **Original Term**) which, pursuant to Section 61 of the Original Lease, was guaranteed by Gerard Hickey, and which Original Lease was assigned by Hickey Chemists to Mariposa Acquisition Corp. (**Mariposa**) pursuant to (ii) a certain Assignment of Lease (the **2001 Assignment**), made as of April 4, 2001 (NYSCEF Doc. No. 39), by and between Hickey Chemists and Mariposa, and modified pursuant to a certain Modification of Lease (the **2001 Modification**), dated of even date therewith, by and among the Landlord, Gerard Hickey and Samuel D. Benjamin, pursuant to which Mr. Benjamin was added as an additional guarantor of the Lease, and which was further amended by (iii) a certain Lease Modification and Extension Agreement (the **2007 Modification**), dated January 23, 2007, by and among Landlord, Invite Health Stores, Inc. (f/k/a Mariposa, hereinafter, the **Tenant**) and Steven P. Kornblatt, the CEO of the Parent (NYSCEF Doc. No. 124), and a Release (the **Release)**, dated of even date therewith, by Landlord in favor of Mr. Hickey and Mr. Benjamin, which (a) extended the Original Term for an additional ten (10) year term commencing on February 28,

2007 and terminating on February 28, 2017, (b) modified the rent, and (c) released Mr. Hickey and Mr. Benjamin as guarantors of the Lease and added Mr. Kornblatt as a guarantor of the Lease, and as further amended by (iv) a certain Modification of Lease, dated November 2, 2009 (the **2009 Modification;** the Original Lease, the 2001 Assignment, the 2001 Modification, the 2007 Modification, together the Release, together with the 2009 Modification, hereinafter, collectively, the **Lease**), by and among Landlord, Tenant and Mr. Kornblatt, pursuant to which (a) the rent was reduced and (b) the guaranty was modified.

The Release provides in relevant part:

> "Landlord unconditionally releases and discharges each Guarantor [*i.e.*, Gerard Hickey and Samuel Benjamin] ***and his affiliates,*** predecessors, successors, assigns and agents (except for Invite Health Stores, Inc. and Steven P. Kornblatt) from all covenants, liabilities, damages, judgments, claims and demands whatsoever, in law or in equity, which Landlord had, may have, or may hereafter have, arising from the Lease and/or the Guaranty" (NYSCEF Doc. No. 116 ¶ 1 [emphasis added]).

Notably, it is undisputed that Mr. Hickey and Mr. Benjamin are owners and affiliates of the Parent (Kornblatt Aff. ¶ 10). It is also undisputed that Invite at 72nd is a wholly-owned subsidiary of the Parent (*id.* ¶ 1) and is therefore also an affiliate for the purposes of the 2007 Release. In addition, as relevant, Section 58 of the Lease provides that the victorious party in any action or proceeding is entitled to recover reasonable attorneys' fees and disbursements.

On March 28, 2014, Mr. Kornblatt notified the Landlord that he was closing the store and that the Tenant would vacate the premises on or about June 30, 2014 (NYSCEF Doc. No. 128) and as of that date, the Tenant vacated and made no further rent or escalation payments.

Subsequently, the Landlord sued not only the Tenant and Mr. Kornblatt, but also the Parent and Invite at 72nd pursuant to a second amended complaint on March 28, 2016 (the **Second Amended Complaint**) (i) alleging breach of Contract by (1) the Tenant (the first cause of action), (2) the Parent (the second cause of action), and (3) Invite at 72nd (the third cause of action) against the Tenant, (ii) seeking attorneys' fees from the Defendants (the fourth cause of action), (iii) asserting fraud (the fifth cause of action) against the Defendants and (iv) alleging violations of Sections 273, 274, 275, and 276 of the New York Debtor and Creditor Law (sixth cause of action), against the Defendants.

Discussion

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*id.*). Failure to make such a showing requires denial of the motion (*id.,* citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

I. Defendants' Motion: Partial Summary Judgment is Granted in Part (Mtn. Seq. No. 5)

a. *Piercing the Corporate Veil*

For its remaining claims, the Landlord seeks to pierce the corporate veil to hold the Parent and Invite at 72nd liable for the Tenant's breach of the Lease. To pierce the corporate veil, a plaintiff must establish that "the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff" (*Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]). A plaintiff seeking to pierce the corporate veil "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998]).

Pursuant to the Second Amended Complaint (NYSCEF Doc. No. 20), the Landlord asserts that the Defendants are really all one entity and should be disregarded and that the corporate veils should be pierced to permit recovery against the Parent and Invite at 72nd (*id.* ¶¶ 101-117, 118-135).

For their part, the Defendants argue that the Landlord in this case received exactly what it bargained for and that there has been no wrongdoing here as it relates to the Landlord. Put another way, the Defendants argue that having rejected the Parent's offer to have the Parent stand behind the Lease obligations, and having released the Parent pursuant to the 2007 Release, it is patently absurd to now permit the Landlord to recover against the very entity that it did not want to have guaranty the Lease and which it expressly released from all liability. The court agrees.

The Defendants have established that they did not abuse the corporate form ***to perpetrate a fraud or similar wrongdoing***. Quite the contrary. The evidence shows that the Defendants openly and honestly disclosed the fact that Tenant was a single-purpose, wholly-owned subsidiary of the Parent (NYSCEF Doc. No. 125 at 2-3) and that the Plaintiff was provided with consolidated financials for the Parent and the Tenant (NYSCEF Doc. No. 135) showing all of the assets being held by the Parent and only listing the Tenant as a wholly-owned subsidiary on such financials.

To wit, the Defendants' emails show that, before agreeing to the 2007 Extension, John Newhouse, counsel for the Landlord, sent an email to Geoffrey Bass, counsel for the Defendants, and Steven Kornblatt, seeking information regarding the Parent. In his email, dated, August 23, 2006, Mr. Newhouse inquired as to the corporate structure of the Parent, the identity of its principals, and whether it would be the operating entity or a "shell" (NYSCEF Doc. No. 125 at 2). Mr. Newhouse also requested the Parent's financials for the last several years or from its inception (*id.*). In response to Mr. Newhouse's email, Mr. Bass replied on behalf of the Parent, clarifying that: "Mariposa Acquisition Corp. changed its name to Invite Health Stores, Inc., and remains the tenant. Invite Health Stores, Inc. is a ***wholly owned subsidiary of Invite Health, Inc.*** We will arrange for financial statements of Invite Health, Inc. to be provided to you" (*id.* [emphasis added]).

The evidence also shows that Mr. Newhouse inquired as to whether Mr. Hickey and Mr. Benjamin were "still actively involved in the operation of the company" and whether they were to continue to be guarantors under the 2007 Extension (*id.*). Mr. Bass replied that "Messrs. Hickey and Benjamin are no longer involved in management. ***We would suggest that the good-***

guy guarantee be provided by Invite Health, Inc., the parent company with assets" (*id.* at 3 [emphasis added]). Mr. Bass subsequently provided consolidated financials for the Parent's business as a whole to Mr. Newhouse (NYSCEF Doc. No. 135). Significantly, the Landlord could have requested the separate financials of the Tenant or made appropriate further due diligence requests in connection with the 2007 Modification. It did not. And, notwithstanding Mr. Kornblatt's offer to have the Parent be liable as a guarantor, the Landlord rejected that offer.

In other words, the documentary evidence establishes that the Landlord is a sophisticated party, was represented by counsel at all relevant times, was aware of the corporate structure of the Parent and the Tenant, received and reviewed the Parent's consolidated financials, had ample opportunity to seek additional information and conduct further due diligence, and declined the offer to have the Parent be the guarantor. There is simply no evidence to suggest that the Parent or Invite at 72nd used their domination and control of the Tenant to mislead or defraud the Landlord with respect to the transactions at issue, or that they abused the corporate form to intentionally render the Tenant insolvent and leave the Landlord without recourse.

In addition, and equally significantly, the documentary evidence shows that the Parent and Invite at 72nd were released from all liability pursuant to the 2007 Release (NYSCEF Doc. No. 116). The 2007 Release expressly bars any claims by the Landlord against Mr. Hickey and Mr. Benjamin as guarantors and against their affiliates (*id.*). It is undisputed that Mr. Hickey was, at the time of the execution of the 2007 Release, one of the principals and an employee of the Parent, and Mr. Benjamin is the founder of the Parent and is a former shareholder and Chief Science Officer of the Parent (Kornblatt Aff. ¶ 10). Under a plain reading of the 2007 Release,

Mr. Hickey and Mr. Benjamin were affiliates of the Parent and its subsidiaries. Notably, the 2007 Release expressly carves out claims against Mr. Kornblatt and the Tenant, but does not carve out claims against the Parent or Invite at 72nd. All claims against the Parent and Invite at 72nd are, therefore, barred by the 2007 Release.

Relying on *Austin Powder Co. v McCullough* (216 AD2d 825 [3d Dept 1995]), the Landlord argues that the 2007 Release does not extinguish the Parent's liability because the Parent dominated and controlled the Tenant as its alter ego. The Landlord's reliance is misplaced.

In *Austin Powder Co.*, the plaintiff sought to pierce the corporate veil to hold the defendant liable for the debts of two corporations that were controlled by the defendant (*id.* at 826). The Court in *Austin Powder Co.* stated that the defendant operated the corporations "as one entity by commingling assets, conducting operations from the same office and paying management fees" from one corporation to the other in order to divert funds from creditors (*id.* at 827). Concluding that the two corporations were "inextricably intertwined" and were so dominated and controlled by the defendant as to be considered his alter egos, the Court held that it was appropriate to disregard the corporate form to achieve an equitable result (*id.*).

Importantly, *Austin Powder Co.* did not involve a release of the party that the plaintiff sought to hold liable, and therefore lends no support to the Landlord's argument. Indeed, the Landlord cites no authority for the proposition that a party may assert a claim seeking to pierce the corporate veil to hold a party liable that was expressly released from all claims and liabilities pursuant to a written release.

In addition, the Landlord's argument that the 2007 Release is not valid because it was not supported by adequate consideration is without merit. First, pursuant to section 15-303 of the New York General Obligations Law, a written release will not be deemed invalid due to a lack of consideration (NY Gen. Obligations Law § 15-303; *accord Serbin v Rodman Principal Investments, LLC*, 87 AD3d 870, 870 [1st Dept 2011]). Second, the documentary evidence shows that in exchange for releasing Mr. Hickey, Mr. Benjamin, and their affiliates, the Landlord received a 10-year extension of the lease, increased rent and escalation payments, and the benefit of having Mr. Kornblatt as guarantor (NYSCEF Doc. No. 124 ¶¶ 2-6, 9). This bargained-for exchange of value constitutes adequate consideration for the 2007 Release.

II. Landlord's Motion: Summary Judgment is Granted in Part (Mtn. Seq. No. 6)

b. ***Breach of Lease (Against Tenant)***

To prevail on a breach of contract claim, a plaintiff must establish "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The documentary evidence offered by the Landlord in support of its motion establishes the existence of the Lease, which is a valid and binding contract, the Landlord's performance, the Tenant's default by unilaterally vacating the Premises and failing to pay base rent, additional rent, escalations, and late charges, and the resulting injury to the Landlord. The Landlord has therefore met its burden in coming forward and showing its *prima facie* entitlement to judgment.

To the extent that the Tenant argues that the breach of contract claim is barred because the named plaintiff in this action was not a party to the 2007 Extension, the argument is unavailing. Although the 2007 Extension was executed in the name of 165 East 72nd Street Apartment Corp. – *i.e.*, inserting "Street" in the name – rather than 165 East 72nd Apartment Corp., this is clearly an inadvertent and immaterial drafting error. Approximately thirteen years of performance demonstrates that the parties understood that the named plaintiff was, in fact, a party to the 2007 Extension. Put another way, the Tenant fails to raise an issue of fact, and accordingly, the Landlord's motion for summary judgment is granted as to the first cause of action.

To the extent that the fourth cause of action in the Second Amended Complaint seeks attorneys' fees, it is procedurally improper and is therefore dismissed (*Pier 59 Studios L.P. v Chelsea Piers, L.P.*, 27 AD3d 217, 217 [1st Dept 2006]). Attorneys' fees are only recoverable as an element of contract damages if a breach is proven and may not be asserted as a separate cause of action (*id.*). However, because the Parent is awarded summary judgment on its cause of action for breach of contract against the Tenant, the Parent is entitled to an award of attorneys' fees against the Tenant pursuant to Section 51 of the Lease.

For the foregoing reasons, the defendants' motion for partial summary judgment is granted and the plaintiff's motion for summary judgment is granted solely with respect to the first cause of action for breach of the Lease against the Tenant, and is otherwise denied.

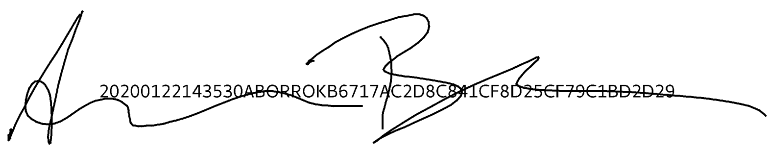
Accordingly, it is

ORDERED that the defendants' motion for partial summary judgment (mtn. seq. no. 005) is granted, and the second, third, fourth, fifth, and sixth causes of action are dismissed; and it is further

ORDERED that the Clerk is directed to order judgment dismissing the second, third, fourth, fifth, and sixth causes of action accordingly, and it is further

ORDERED that the plaintiff's motion for summary judgment (mtn. seq. no. 006) is granted solely with respect to the first cause of action against Invite Health Stores, Inc., and the Clerk is directed to enter judgment as to liability on this cause of action accordingly; and it is further

ORDERED that, upon the filing by the plaintiff with the General Clerk's Office (60 Centre Street, Room 119) of a copy of this Order with notice of entry, the Clerk shall place this matter upon the inquest calendar for an assessment of damages and attorneys' fees.



1/22/2020		ANDREW BORROK, J.S.C.	
DATE			
CHECK ONE:	[X] CASE DISPOSED	[ ] NON-FINAL DISPOSITION	
	[ ] GRANTED [ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[x] REFERENCE