Delazzero Realty Corp. v Port Morris Tile & Marble LP
2020 NY Slip Op 32664(U)
June 8, 2020
Supreme Court, New York County
Docket Number: 656736/2019
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **IAS MOTION 7EFM**

Justice

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DELAZZERO REALTY CORP., MARJERRY REALTY CORP., VINJERRY REALTY CORP. and VINCENT REALTY CORP.,

Plaintiffs,

- v -

PORT MORRIS TILE & MARBLE LP, VANTAGE FACILITIES LP, NYC MARBLE ACQUISITIONS LP, NYC MARBLE ACQUISITIONS G.P., INC., and GEORGES BERBERI,

Defendants.

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INDEX NO. 656736/2019

MOTION DATE 04/01/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 30, 32, 42, 45, 47, 48, 49, 50

were read on this motion to DISMISS.

Kennedy Berg LLP, New York, NY (Gabriel Berg and Meital Waibsnaider of counsel), for plaintiffs.
Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York, NY (Jordan E. Stern of counsel), for defendants.

Gerald Lebovits, J.:

In this commercial landlord-tenant action, plaintiff landlords have sued their tenants and the tenants' guarantors, seeking unpaid rent and other relief. Defendants now move under CPLR 3211 to dismiss some, but not all, of plaintiffs' claims. The partial motion to dismiss is granted.

BACKGROUND

According to the allegations of the complaint, plaintiff landlords own commercial property in the Bronx. In September 2017, plaintiffs leased that property to defendants Port

Morris Tile & Marble LP and Vantage Facilities LP.[1] These leases were guaranteed by defendant NYC Marble Acquisitions LP (NYC Marble).[2]

The leases had a one-year term. (*See e.g.* NYSCEF No. 2 at 2, 4.) The leases also provided that "[a]ny holding over in possession by Tenant of all or any part of the premises after the expiration or termination" of the leases "shall not operate to extend or renew [the leases] except by the express mutual written agreement between the parties" to the leases. (*See e.g. id.* at 25 § 25.03.) In the "absence of such agreement," the tenants "shall continue in possession as . . . month-to-month Tenant[s] only," and owe double the monthly base rent. (*Id.*)

The guarantees each provided for the guarantor to "unconditionally guaranty to the [landlords] the due and punctual payment, performance and compliance with of all of the terms, covenants and conditions to be paid, performed or complied with by Tenant under the Lease and all extensions or renewals thereof." (NYSCEF No. 6 at 1 ¶ 1.) And the guarantees stated that the guarantor's liability would not be "affect[ed], change[d], or discharge[d]" by "any change in the terms of any agreement between the Tenant[s] and the [landlords]." (*Id.* at 1 ¶ 2.)

The leases also provide that if certain specified conditions are met, the landlords "may require that a new or additional Guarantor(s) be substituted in [Guarantor's] place," and that "in such event, Tenant[s] shall be obligated to provide such substitute Guarantor(s)."[3] (*See* NYSCEF No. 2 at 9 § 7.02.)

After the leases' expiration at the end of August 2018, the tenants remained in possession as holdover tenants, paying double the monthly base rent as provided for under § 25.03 of the lease. Plaintiffs allege, though, that tenants ceased paying any rent at all in April 2019—and that tenants still remain in possession of some of the properties at issue.

In November 2019, the landlords brought this action. The landlords' complaint asserted claims for (i) rent and additional rent; (ii) piercing the corporate veil to hold Berberi personally responsible for unpaid rent owed by one of the tenants; and (iii) a declaration that the tenants are obligated to name substitute guarantors. Defendants now move under CPLR 3211 to dismiss (i) that portion of plaintiffs' monetary claims that seek rent and additional rent from the guarantor

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[1] There were technically four leases, each with the same substantive provisions. Any differences among them are not relevant here.

[2] The guarantees were executed on behalf of NYC Marble by defendant NYC Marble Acquisitions G.P., Inc. (Marble GP), the general partner of NYC Marble; and by defendant Georges Berberi, president of Marble GP.

[3] In full, § 7.02 provides for substitution of guarantors if, during the term of the Lease, (i) "Guarantor ceases to exist"; or (ii) "if Guarantor files a petition in bankruptcy or is adjudicated a bankrupt, or files any petition or answer seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under any present or future Law or makes an assignment for the benefit of creditors"; or (iii) "if any trustee, receiver, or liquidator of Guarantor" shall "be appointed in any action, suit or proceeding by or against Guarantor." (NYSCEF No. 2 at 9.)

for the holdover period after the tenants' leases expired; (ii) the veil-piercing claim; and (iii) the claim for declaratory relief.

DISCUSSION

I. The Branch of Defendants' Motion Seeking Dismissal of the Unpaid-Rent Claim

Defendants seek dismissal of the claim against the guarantor for alleged unpaid rent and additional rent accruing during the holdover period. Defendants argue that under the terms of the lease and the guarantee, the guarantor is not obligated to satisfy the tenants' obligations to pay those unpaid sums. This court agrees.

Paragraph 1 of the guarantees provides that the guarantor may be held responsible for all obligations of the tenants "under the Lease[s] and all extensions or renewals thereof." (NYSCEF No. 6 at 1.) Section 25.03 of the leases provides that upon the expiration of their term, a holdover in possession by the tenants "shall not operate to extend or renew [the leases] except by the express mutual written agreement between the parties." (NYSCEF No. 2 at 25.) It is undisputed that the parties did not execute a written extension or renewal of the leases. The First Department has squarely held that in these circumstances a guarantor's obligation ceases when the lease expires, rather than continuing into the holdover period. (*See Lo-Ho LLC v Batista*, 62 AD3d 558, 560 [1st Dept 2009].)

Plaintiffs do not address the First Department decision in *Lo-Ho*. Instead, they contend that in this case the guarantor's obligations continued past the expiration of the lease because ¶ 2 of the guarantee states that those obligations are not affected or discharged by "any change in the terms of any agreement" between landlords and tenants. (*See* NYSCEF No. 45 at 8, quoting NYSCEF No. 6 at 1 ¶ 2.) But this contention merely begs the question of what the guarantor's obligations are here to begin with.[4]

Lo-Ho makes clear that in this context, a guarantor being responsible for obligations "under the Lease, and all extensions or renewals," means being responsible for obligations during the original term of the lease, plus that term as extended or renewed.[5] (*See* 62 AD3d at 560 [interpreting equivalent lease language].) *Lo-Ho* squarely rejects plaintiffs' argument (NYSCEF No. 45 at 9) that the tenants' holdover here impliedly extended the guarantor's obligations past lease expiration on the same terms as existed during the original lease. (*See id.*)

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[4] For that matter, in this case the terms of the agreements between tenants and landlords did not change. Rather, the original agreements ceased altogether. True, the tenants became responsible for paying different amounts in monthly rent when they held over—but even that increase was as provided for under the original terms of the lease. (*See* NYSCEF No. 2 at 25.)

[5] In *300 Park Avenue, Inc. v Café 49, Inc.*, cited by plaintiffs (*see* NYSCEF No. 45 at 8), the guarantee expressly defined the "Term" in which the guarantor would be responsible for the tenant's obligations under the lease as extending until the day after the tenant surrendered possession. (*See* 89 AD3d 634, 634 [1st Dept 2011]). The definition of the guarantor's obligations here did not include any comparable provision.

Indeed, plaintiff's interpretation would effectively render superfluous the language in the lease providing that a holdover-in-possession does not itself extend or renew the lease (*see* NYSCEF No. 2 at 25), and the language in the guarantee stating that the guarantor was responsible only for the tenant's obligations "under the Lease and all extensions or renewals thereof" (NYSCEF No. 6 at 1).

Accepting defendant's reading of the lease and the guarantee as halting the guarantor's obligations at expiration of the lease term (absent extension or renewal) would not render ¶ 9 of the guarantee meaningless, as plaintiffs suggest. (S*ee* NYSCEF No. 45 at 9-10.) Paragraph 9 provides that "Guarantor's liability for the Obligations [under the lease] shall be limited to the Obligations which accrue through and including the date" that tenants surrender the premises in the form specified in the paragraph. (*See* NYSCEF No. 6 at 2-3.) Even on defendants' narrower reading of the guarantor's obligations, a surrender-based cutoff under ¶ 9 still could occur during the initial term of the lease or during the term of the lease as expressly extended or renewed.

Ultimately, plaintiffs are left to argue simply that accepting defendants' interpretation would render meaningless the bargain struck by plaintiffs and unfairly benefit defendants. But Plaintiffs are sophisticated commercial entities—if they wanted to ensure that the tenant obligations being guaranteed would persist until surrender irrespective of the expiration of the original lease term, they could easily have said so in writing. They did not.

II. The Branch of Defendants' Motion Seeking Dismissal of the Declaratory-Judgment Claim

Defendants also seek dismissal of plaintiffs' claim seeking a declaration that under the terms of the leases the landlords may now require tenants to name new, substitute guarantors. The motion to dismiss this claim is granted.[6]

Section 7.02 of each lease provides that under certain specific circumstances the tenant is required to name a new guarantor upon the demand of the landlord: namely, if the guarantor ceases to exist, goes into bankruptcy or seeks a similar reorganization plan, or has a trustee, receiver, or liquidator appointed in an action involving the guarantor. (*See* NYSCEF No. 2 at 9.) As the tenants correctly argue, plaintiffs' complaint simply does not allege that any of these scenarios have occurred.

At most, the complaint alleges in conclusory terms that the existing guarantor, NYC Marble has "ceased to exist" within the meaning of § 7.02 because it has "fail[ed] to honor [its] obligations under the four Guaranty agreements by being kept undercapitalized, illiquid, or otherwise unable to pay the obligations" of the tenants. (NYSCEF No. 1 at 17 ¶ 74.) This allegation fails to state a claim.

[6] This branch of defendants' motion to dismiss also serves to rebut plaintiffs' curious assertion, made only by letter, that the tenant defendants are in default for failing to respond to any claims made against them. (*See* NYSCEF Nos. 47, 49.)

As discussed above, NYC Marble was not obligated under the guarantee to satisfy the tenants' obligation to pay post-expiration expiration rent. (*See* Point I, *supra*.) The complaint also does not include any allegations suggesting the parties to the lease understood § 7.02 to mean that a guarantor failing to satisfy its responsibilities, or "being kept undercapitalized [or] illiquid," would be tantamount to the guarantor "ceas[ing] to exist."[7] (*Id.*) That broad interpretation of "ceases to exist" would conflict with § 7.02's careful specification—and delimitation—of the circumstances under which the guarantor's failure or inability to meet its financial obligation entitles the tenants to require substitution of guarantors. And in any event the complaint does not include factual allegations indicating that defendants were, in fact, keeping NYC Marble undercapitalized or illiquid.

The complaint also alleges that § 7.02 has been triggered by defendants' decision to wind down the Port Morris business and (assertedly) move the tenants' assets to put them beyond plaintiffs' reach. But § 7.02 is based on the financial status of the *guarantor*, not the tenants. And the complaint does not allege that NYC Marble is so financially connected to the tenants that the tenants' financial status necessarily dictates that of NYC Marble.

In opposing this branch of the motion to dismiss, plaintiffs emphasize that "[t]he point of the four Guaranty agreements was to ensure that Commercial Landlords would be paid." (NYSCEF No. 45 at 12.) But again, plaintiffs—sophisticated business entities represented by counsel—chose to carry that purpose into effect by executing leases and guarantees drafted in a particular form. That plaintiffs are dissatisfied with how that form of agreement has worked out for them in practice does not give this court license to rewrite it now.

III. The Branch of Defendants' Motion Seeking Dismissal of the Veil-Piercing Claim

Finally, defendants seek dismissal of plaintiffs' claim to pierce the corporate veil and hold Georges Berberi personally liable for the debts of defendant Vantage Facilities. The motion to dismiss is granted.

Vantage is undisputedly a Delaware corporation. Delaware veil-piercing law therefore governs here. (*See Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 [1st Dept 2008].) To state a veil-piercing claim under Delaware law, a plaintiff's allegations must meet a demanding burden: (i) "demonstrat[ing] . . . complete domination and control" of the corporation, "to the point that" the corporation "no longer ha[s] legal or independent significance of [its] own"; *and* (ii) establishing that "the corporate structure cause fraud or similar injustice." (*Wallace v. Wood*, 752 A2d 1175, 1183-1184 [Del.Ch.1999] [internal quotation marks omitted; alteration in original];

[7] In opposing the motion to dismiss, plaintiffs suggest that to require such additional allegations would impermissibly draw factual inferences against the non-moving party. (*See* NYSCEF No. 45 at 11-12.) But equating "being kept undercapitalized, illiquid, or otherwise unable to pay" the tenants' unpaid rent (NYSCEF No. 1 at 17) with "ceas[ing] to exist" (NYSCEF No. 2 at 9) is a *legal* assertion about the proper interpretation of the lease. And the complaint does not provide factual allegations supporting this interpretive assertion.

see also Walnut Hous. Assoc. 2003 L.P. v MCAP Walnut Hous. LLC, 136 AD3d 403, 404 [1st Dept 2016] [discussing Delaware veil-piercing criteria].) Plaintiffs do not meet this burden here.

The only allegations in support of plaintiffs' veil-piercing claim are that (i) Vantage is "dominated and controlled by Berberi"; (ii) "[o]n information and belief Vantage has no legitimate corporate purpose, no employees and is undercapitalized," and (iii) "[a]s Vantage was not a party to the [asset purchase agreement], it is being used by Berberi to avoid payment of money owed under" the leases." (NYSCEF No. 1 at 10 ¶ 40.) Conclusory allegations of domination and control and lack of legitimate corporate purpose are not sufficient to state a veil-piercing claim. That is especially true when the allegations are made only on information and belief without identifying the source of that information. (*See Walnut Housing*, 136 AD3d at 404 [conclusory allegations insufficient]; *Apfelberg v East 56th Plaza, Inc.*, 78 AD2d 606, 607 [1st Dept 1980] [allegations on information and belief without source of information insufficient].)

In opposing the motion to dismiss, plaintiffs seek to supplement these allegations by referring to evidence introduced on plaintiffs' prior, unsuccessful motion for an order of attachment. (*See* NYSCEF No. 45 at 14, citing NYSCEF Nos. 29-32.) But the documents cited by plaintiffs show only that defendant Port Morris cut the checks for two months of Vantage's rent owed to its landlords. (*See* NYSCEF Nos. 30, 32, 42.) This evidence does not establish that *Berberi* dominated and controlled Vantage, let alone that he did so to the point that Vantage lacked any legal significance of its own.[8]

Moreover, the only wrong that plaintiffs identify in support of veil-piercing is that the tenants and guarantor "breached their obligations to plaintiffs without explanation." (NYSCEF No. 45 at 14.) But veil-piercing requires allegations of "fraud or similar injustice." (*Wallace*, 752 A2d at 1184.) An ordinary (alleged) breach of a lease agreement or guarantee is not sufficient. (*See Gristede's Foods, Inc. v Madison Capital Holdings LLC*, 174 AD3d 455, 457 [1st Dept

[8] Plaintiff's opposition to the motion to dismiss asserts that Berberi authorized the rent checks cut by Port Morris (*see* NYSCEF No. 45 at 14); but plaintiffs do not identify the basis for this assertion. Nor do the checks themselves reflect on their face that they were authorized or signed by Berberi. (*See* NYSCEF Nos. 30, 32, 42; *accord* NYSCEF No. 31 [Port Morris check paying two months of its own rent].)

2019] [applying Delaware law].[9]) Plaintiffs here have thus failed to meet either prong of the veil-piercing test under Delaware law.[10]

Accordingly, for the foregoing reasons it is

ORDERED that defendants' partial motion to dismiss under CPLR 3211 is granted.

06/08/20
DATE

HON. GERALD LEBOVITS
J.S.C.

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

[9] Plaintiffs seek to distinguish the First Department's decision in *Gristede's Foods* as having rested on the substantive insufficiency of the fraudulent-misrepresentations claim in that case. (*See* NYSCEF No. 45 at 14, citing *Gristede's Foods*, 174 AD3d at 456.) But the aspect of *Gristede's Foods* that is relevant here is the decision's discussion of the veil-piercing claim, not the fraud claim. And in affirming the trial court's dismissal of the veil-piercing claim, the First Department held that allegations of "a garden variety breach of contract"—like that asserted by plaintiffs here—"is not what is contemplated by the common law rule that piercing the corporate veil is appropriate only upon a showing of fraud *or something like fraud*." (174 AD3d at 457 [internal quotation marks omitted; emphasis in original].)

[10] Plaintiffs request leave to amend if this court dismisses their veil-piercing claim. (*See* NYSCEF No. 45 at 15-16.) But they do not explain how they would amend their complaint (or how they would remedy the legal deficiencies in their arguments) if granted leave to amend.