2834 Church, LLC v Golden Krust Caribbean Bakery & Grill, Inc.
2020 NY Slip Op 35386(U)
September 18, 2020
Supreme Court, Kings County
Docket Number: Index No. 509955/17
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of September, 2020.

PRESENT:

HON. CAROLYN E. WADE,

Justice.

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2834 CHURCH, LLC,

Plaintiff,

- against -

Index No. 509955/17

seq 3

GOLDEN KRUST CARIBBEAN BAKERY & GRILL INC. AND GOLDEN KRUST CARIBBEAN BAKERY, INC.,

Defendants.

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The following e-filed papers read herein:	NYCEF Doc. Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	64-84
Opposing Affidavits (Affirmations)	91-107
Reply Affidavits (Affirmations)	109-121

Upon the foregoing papers, defendant Golden Krust Caribbean Bakery, Inc. (Bakery), moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint (motion sequence #3).

Background

The Underlying Action

In a related action, *Raymond v 2834 Church, LLC and Golden Krust Caribbean Bakery & Grill, Inc.*, Kings County index Number 10150/2014 (the underlying action), Rose Raymond (Raymond) alleged that on February 6, 2014, she slipped and fell on ice in front of Golden Krust Caribbean Bakery & Grill, located at 2846 Church Avenue in Brooklyn, New York (the subject premises). Golden Krust Caribbean Bakery & Grill, Inc. (Grill) defaulted by failing to appear in the underlying action. 2834 Church, LLC (Church) settled the underlying action for $195,000.00.

The Instant Action

Church commenced this action against defendants Grill and Bakery (collectively, "defendants") for indemnification and contribution towards payment of the settlement in the underlying action, and for failing to procure and maintain liability insurance. Bakery submitted an Answer, and cross-claimed against Grill, but Grill failed to appear in this action, and is currently in default.

At an October 15, 2018 compliance conference, the court ordered defendants to provide all contracts, if applicable, within 30 days, and ordered Bakery to provide insurance coverage information within 30 days. Bakery did not comply, and on May 7, 2019, in the final pre-note order, Bakery was again ordered to provide all contracts, insurance, and applicable policy limits by May 24, 2019. As the court did not vacate the note of issue which had been filed, and discovery was not yet complete, the parties

proceeded with depositions and discovery after the instant motion was filed.

The Lease, Sublease, and Franchising Agreement

Church, as landlord/owner, and Grill, as tenant, entered into a September 1, 2013 lease agreement for "Golden Krust Caribbean Bakery & Grill" at the subject premises for a 10-year term from September 1, 2013 through August 31, 2023 (lease). The lease contains an indemnification provision requiring Grill to indemnify Church, and hold it harmless against any claims, liabilities, losses, and damages, and to procure insurance. The lease was executed by Sadik Mann on behalf of Church and by Louis Campbell, Grill's Secretary, on behalf of Grill.

On September 25, 2013, Grill, as sublessor, entered into a sublease with "Sirrub IV LLC (Donald Burris)" (Sirrub), as sublessee, for the subject premises[1] for the full term of the master lease between Church and Grill. The stated purpose of the sublease was for Sirrub to operate a "Golden Krust Caribbean Bakery & Grill" franchise under the terms of a franchise agreement. Lowell Hawthorne (Lowell), president of Grill, and Donald Burris executed the sublease.

Five days later, on September 30, 2013, Lowell, in his capacity as CEO of Golden Krust Franchising, Inc. (Franchising) entered into a franchising agreement with Sirrub to operate a "Golden Krust Caribbean Bakery & Grill" restaurant for a ten-year period. Under the terms of the franchising agreement, Sirrub agreed to indemnify, defend, and hold

[1] The sublease states that it was made for the location "2486" instead of "2846" Church Avenue, in Brooklyn, which apparently is a transmutation of the address of the subject location.

Franchising and its affiliates harmless against all claims, obligations and damages incurred in the defense of any claim. The franchising agreement further states that under no circumstances shall the franchisor or any other indemnified party be required to seek recovery from any insurer or other third party, or otherwise to mitigate their losses and expenses in order to maintain and recover a claim against Sirrub.

Relevant Insurance Policies

At the time of Raymond's accident, "Donald & Sonia Burris/Sirrub Services, Inc. DBA Golden Krust Caribbean Bakery & Grill" maintained a liability insurance policy for the subject premises, effective from June 24, 2013 through June 24, 2014, which was issued by Utica First Insurance Company (Utica). The certificate of insurance provides that Church was an additional insured under the Utica policy. The Utica policy further provides that, effective December 6, 2003, Grill was an additional insured.

In addition, Bakery had a commercial general liability insurance policy issued by Harleysville Preferred Insurance Company (Harleysville), with limits of $1,000,000.00 for the policy term of August 1, 2013 through August 1, 2014. During the same period, Bakery also had a commercial liability umbrella policy issued by Harleysville for $10,000,000.00.

By a February 29, 2016 letter, Utica informed Sirrub d/b/a Grill, as insured under the Utica policy, of Raymond's personal injury claim. Utica advised that coverage under the Utica policy does not apply, directed them to the form "Business Owners Special Policy" regarding notice to the carrier, and Utica disclaimed coverage on that basis.

Bakery's Motion for Summary Judgment

Bakery contends that it is entitled to summary judgment dismissing Church's claims for contractual indemnification and contribution because it never entered into any contract with Church. Bakery further contends that it never occupied the subject premises, and that it is not a proper party to this lawsuit.

Bakery submits an affidavit from Lorraine Hawthorne-Morrison (Morrison), Bakery's Chief Administrative Officer, attesting that Bakery: (1) was not responsible for negotiating, drafting or revising the terms of the leases, subleases or franchising agreements associated with, or on behalf, of Grill; (2) did not have any contractual duties or responsibilities to remove snow or ice from adjacent sidewalks at the subject premises; (3) did not have any written or verbal lease or maintenance/repair agreements with Church, Grill or Sirrub for the subject premises; (4) did not own, operate, control or have any other proprietary interest in the building or sidewalks of the subject premises; (5) did not manage, supervise control or direct employees or agents at the subject premises; (6) did not maintain or manage the subject premises, and never hired outside persons to remove snow and ice from the subject premise; (7) did not occupy the subject premises; (8) did not receive complaints from any person or entity about the presence of snow, ice or debris on sidewalks adjacent to the subject premises; and (9) otherwise had no contractual obligations with respect to the subject premises. Morrison further attests that Bakery never had a business relationship, either in writing or by custom and practice, with Grill, Sirrub or any other entity regarding the building and sidewalk adjacent to the subject premises.

Bakery contends that it is merely a manufacturer and supplier of Jamaican beef patties and bakery items to supermarkets and has nothing to do with the Golden Krust restaurants or retail operations. Bakery argues that the non-existence of any contracts entered into by Bakery for the subject premises, and its complete lack of a role, duty, or responsibility for the subject premises, refutes Church's claim for contractual indemnification and contribution.

Regarding Church's second cause of action based on Bakery's alleged failure to procure liability insurance, Bakery similarly contends that it did not enter into any written agreement requiring it to procure insurance, so that claim is also subject to dismissal. Bakery asserts that to the extent that plaintiff argues that Bakery breached some agreement to procure insurance, Bakery's insurance policy contains a broad form additional insured endorsement, which satisfies any such obligation.

Church's Opposition

Church contends that Bakery and Grill are the same entity doing business under the Golden Krust Brand, and that issues of fact and credibility as to ownership, operation and control of Grill preclude summary judgment in favor of Bakery. In support of this contention, Church asserts that Bakery's witness, Daren Hawthorne (Daren), president of Franchising's restaurant division, testified that the Golden Krust brands were a family run business started by his father, Lowell Hawthorne (Lowell). Daren testified that Lowell was the CEO of Bakery, Grill and Franchising at the time that the lease, sublease and franchising agreement for the subject premises were executed. Daren also testified that in

2013-2014, the directors and officers of Bakery, Grill and Franchising would collaborate, discuss, and come to mutual decisions benefitting the Golden Krust brand entities. Daren further testified that he had previously been legal counsel to the Golden Krust brands. Church contends that despite being a high ranking Franchising officer, Daren could not or would not provide a response regarding: (1) whether he also attends corporate meetings for Grill; (2) whether Morrison, who is CAO for Franchising and Bakery, was also CAO for Grill; and (3) the identities of the officers/leadership team members of Franchising's, Bakery's, or Grill's Board of Directors. Church also points out that Daren testified on behalf of Bakery, despite the fact that he was a Franchising employee and testified that they were separate entities.

Church, in further support of its contention, asserts that Teddy Mann (Mann), real estate manager for the subject premises,[2] testified that "Golden Krust was a tenant," "we rented to Golden Krust, that is all I know" and "Golden Krust is Golden Krust." Mann further testified that that after Lowell passed away, Daren told him that Grill and Bakery were one and the same entity.

Church argues that the fact that Grill is listed as an additional insured on Bakery's Harleysville policy demonstrates that Grill and Bakery are the same entity. Church states that Bakery provided discovery of the policy only after it moved for summary judgment.

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[2] Mann testified in the underlying action that he was employed by Church. However, in this action, Mann testified that he was employed by 3M management, a separate, family-owned company. Notably, the subject lease was executed by Mann's father, Sadik Mann, on behalf of Church. Daren testified that Mann was the landlord for multiple Golden Krust properties. Lowell signed the lease on behalf of Grill.

Church further notes that the first time that it learned of the relevant franchising agreement was when Bakery attached it in support of the instant motion. Church contends that Bakery failed to provide any reasonable explanation as to how it came into possession of key documents involving Grill – including the lease agreement, the sublease, the franchising agreement, and the certificate of liability insurance for Grill – if Bakery did not have any relationship with Grill.

Church further asserts that Morrison's statements that Bakery never had any business relationship with Grill, Sirrub or any other party for the subject premises are contradicted by Bakery's insurance policy, which lists Grill as an additional insured, and by Sirrub's certificate of liability insurance, which demonstrates that Sirrub was doing business as Grill. Church argues that the fact that Sirrub was doing business as Grill, and that Lowell was a principal in Bakery, Grill and Franchising, demonstrates that Bakery, Grill, Sirrub and Franchising are intertwined and owned, operated and controlled by the same officers and directors.

Church also asserts that the timing of Lowell signing the franchising agreement with Sirrub d/b/a Grill on September 30, 2013, four weeks after Grill leased the subject premises from Church (which was also five days prior to Lowell, on behalf of Grill, signing the sublease agreement with Sirrub, also known as Grill), suggests an interrelationship between the parties, and that Lowell was operating his family business interrelatedly and in charge of all of these corporations. Church contends that there is a question of fact as to whether the relationship between Sirrub d/b/a Grill and Franchising was that of franchisor-

franchisee or rather was a parent-subsidiary relationship.

In addition, Church claims that it is an out-of-possession landlord, and that the lease required the tenant to perform maintenance and repairs, including garbage and snow removal. Church also argues that the lease further required tenant to indemnify landlord and save him harmless from any liability, and to procure insurance. Church contends that Bakery's summary judgment motion must be denied because Bakery would be vicariously liable for negligence of additional insured Grill under their policy, since the record demonstrates that those entities were both operated and controlled by Lowell.

Church further asserts that Bakery has frustrated its discovery regarding the relationship between Bakery and Grill, that discovery regarding the corporate relationships is outstanding and that, at the very least, there are material questions of fact.

Bakery's Reply

Bakery, in reply, contends that Church failed to plead alter ego, piercing the corporate veil and vicarious liability in its complaint, and improperly raised these issues for the first time in its opposing papers. Bakery argues that simply demonstrating that Lowell holds the same leadership position in the different Golden Krust entities is insufficient to allege alter ego status or to pierce the corporate veil. Bakery asserts that Lowell executed the documents to the subject premises in his capacity as CEO of Grill or Franchising, not of Bakery, and that the law recognizes such distinctions. Bakery further claims that the fact that Lowell was CEO of Bakery, Grill and Franchising is insufficient to hold Bakery vicariously liable for Grill's alleged negligence.

Bakery also contends that its insurance policy does not cover Grill's alleged negligence. Bakery thus argues that the location of the subject building is not listed on the covered locations under Bakery's policy. Bakery also points out that the Utica policy issued to Grill reflects that the subject address is covered under Grill's policy, and that Bakery is an additional insured under Grill's policy. Bakery argues that Church overlooks the fact that the provisions of Bakery's policy excludes coverage for bodily injury. Finally, Bakery contends that Church is liable for the underlying personal injury action pursuant to New York City Administrative Code § 7-210.

Discussion

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Korn v Korn*, 135 AD3d 1023, 1024 [2016]). Failure to make this prima facie showing requires denial of the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish an issue of material fact requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562; *Graffeo*, 46 AD3d at 615). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management,*

Inc., 1 NY3d 381, 383 [2004] [internal quotations omitted]).

Here, Bakery has met its prima facie burden of demonstrating that there was no contract between Bakery and Church for the subject premises (*see Rivera v 203 Chestnut Realty Corp.*, 173 AD3d 1085 [2019] [cross claim for contractual indemnification dismissed where there was no question that there was no contractual relationship]; *Tilford v Greenburgh Housing Authority*, 170 AD3d 1233, 1235 [2019] [same]; *Pantaleo v Bellerose Senior Hous. Dev. Fund Co., Inc.*, 147 AD3d 777, 778 [2017] [modifying lower court's order by granting contractor's motion for summary judgment on plaintiff and co-defendant owner's claim for contractual indemnification and failure to procure insurance claim in underlying slip and fall case, as contractor met its prima facie burden of establishing that there was no contract between it and the owner, and the opponents did not raise a triable issue of fact];; *Araujo v City of New York*, 84 AD3d 993, 994 [2011] [same]; *Leiner v F. Schumacher & Co.*, 78 AD3d 1131, 1132 [2010]; *see also Tingling v C.I.N.H.R., Inc.*, 74 AD3d 954, 955 [2010] ["A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with"]; *Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2009] [same]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2s 738, 739 [2003] [same]). The lease, sublease and franchising agreement demonstrate that Bakery was not a party to any of these agreements.

However, Church has raised material questions of fact regarding the relationships

between the Golden Krust entities – Bakery, Grill and Franchising – that warrant denial of Bakery's motion. "The general rule . . . is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability" (*Town-Line Car Wash, Inc. v Don's Kleen Mach. Kar Wash, Inc.*, 169 AD3d 1084, 1085 [2019]; *Vivir of L I, Inc. v Ehrenkranz*, 145 AD3d 834 [2016]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2009], *affd* 16 NY3d 775 [2011]). "The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation" (*id.*). "A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (*East Hampton Union Free School District*, 66 AD3d at 126). "[T]he party seeking to pierce the corporate veil must also establish that the owners, through their domination, abused the privilege of doing business in the corporate form" (*id.* [internal quotation marks omitted]). In addition, to pierce the corporate veil, some showing of a wrong or unjust act toward the plaintiff is required (*see Vivir of L I,* 145 AD3d at 836; *Olivieri Constr. Corp. v WN Weaver St., LLC*, 144 AD3d 765, 766 [2016]; *Seuter v Lieberman*, 229 AD2d 386, 386 [1996]). Factors considered in determining whether the owner abused the privilege of doing business in the corporate form include failure to adhere

to corporate formalities and commingling of assets (*id.*). "[W]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego," the corporate veil will be pierced even absent fraud (*Olivieri*, 144 AD3d at 767).

Testimony that Golden Krust was a family business, that Lowell was CEO of all three corporations and evidence that Grill essentially subleased the subject premises to itself (as Sirrub was doing business as Grill) while at the same time obtaining a franchise from Golden Krust, raises questions of fact as to the degree of control exercised on Grill by Bakery or any other Golden Krust entity (*see Almonte v Western Beef, Inc.*, 21 AD3d 514, 515-516 [2005] [Western Beef Retail not entitled to summary judgment on the ground that it was Western Beef's alter ego because it failed to submit sufficient evidence to demonstrate, as a matter of law, that its parent corporation exercised complete dominion and control of its day-to-day operation]; *Longshore v Davis Sys. of Capital Dist.*, 304 AD2d 964, 965 [2003] ["Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct."]).

Bakery's contention that Church's argument regarding alter ego status and piercing the corporate veil should not be considered because it was raised for the first time in its opposition is without merit. Bakery did not provide Church with discovery regarding the

Golden Krust corporate entity relationships – including the franchising agreement, the relationship between Grill, Sirrub and Lowell, and the insurance policies – until after filing the instant motion. There are questions of fact as to the degree of control that Franchising had over Sirrub d/b/a Grill that preclude summary judgment in Bakery's favor, given the questions regarding Bakery's relationship with Grill and Sirrub (*see Khanimov v McDonald's Corp.*, 121 A.D.3d 1050, 1051 [2014]).

In sum, the evidence failed to eliminate all questions of fact as to whether Bakery and Grill were alter egos, as the relationship between these entities remain unclear (*see DeMartinon v 3858, Inc.*, 114 AD3d 634 [2014]; *Almonte,* 21 AD3d 514. Moreover, Mann's testimony on behalf of Church conflicts with Daren's testimony and Morrison's affidavit submitted on Bakery's behalf regarding the relationship between Bakery and Grill. It is not the courts function on a motion for summary judgment to assess credibility or to engage in weighing of evidence (*see Chimbo v Bolivar*, 142 AD3d 944, 945 [2016]). Accordingly, it is

ORDERED that Bakery's summary judgment motion (mot. seq. three) is denied.

This constitutes the decision and order of the court.

ENTER,

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

A.J. S. C.

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