Update, Inc. v Resolution Real Estate Partners LLC
2021 NY Slip Op 31892(U)
June 4, 2021
Supreme Court, New York County
Docket Number: 651399/2021
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	HON. ARLENE P. BLUTH, *Justice*	PART	IAS MOTION 14

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UPDATE, INC.,

Plaintiff,

- v -

RESOLUTION REAL ESTATE PARTNERS LLC,242 WEST 38TH STREET, LLC,GERARD NOCERA, MICHAEL REID, DANA MOSKOWITZ, IRA FISHMAN

Defendant.

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INDEX NO. 651399/2021

MOTION DATE 06/03/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24
were read on this motion to/for DISQUALIFY COUNSEL.

The motion by defendants to dismiss is denied (the branch of the motion to disqualify counsel for plaintiff is moot pursuant to the substitution of attorney notice [NYSCEF Doc. No. 15]).

Background

Plaintiff claims it is a tenant at a building in Midtown Manhattan and leases the second and third floors well as portions of the eleventh and eighteenth floors. It contends that it subleased the third floor to non-party HSP NY Holdings LLC ("Holdings") who later assigned its interest to HSP Real Estate Group ("HSP"). Plaintiff contends that defendant Nocera, Reid, Moskowitz and Fishman controlled and managed HSP.

Plaintiff contends that HSP stopped paying rent due under the sublease in April 2020. Plaintiff later commenced a separate action against HSP for unpaid rent. It argues that prior to HSP vacating the premises, defendants formed defendant Resolution Real Estate Partners LLC

("Resolution"). Plaintiff contends that this entity was formed in order to avoid liability under the sublease. It also alleges that HSP transferred assets to Resolution without any fair consideration and that Resolution leased new premises under a lease with defendant 242 West 38th Street LLC, an entity that is purportedly managed and controlled by defendant Fishman.

Plaintiff brings five causes of action: breach of the sublease against Resolution as HSP's successor, breach of the sublease against Resolution as HSP's alter ego, breach of sublease against the individual defendants based on a piercing the corporate veil theory, fraudulent conveyance under New York Debtor and Creditor Law and tortious interference with contract.

Defendants move to dismiss the complaint and contend that the purpose of this case is harassment. They point out that plaintiff brought another case against the sublessee (HSP). Defendants contend that plaintiff's causes of action should be dismissed because they assert legal conclusions without factual support. They attach the affidavit of defendant Michael Reid, who claims that HSP continues to operate, Resolution did not expressly or impliedly assume HSP's liabilities and any transactions between HSP and Resolution were done for fair consideration. Mr. Reid also argues that HSP and Resolution were never merged.

In opposition, plaintiff contends that while HSP was informing plaintiff that it could not meet the sublease obligations, it was arranging a "soft landing" for the business. It observes that defendants created Resolution (an entity that allegedly provides the same real estate services as HSP) and found a new location just two blocks away at a building owned by an entity affiliated with defendant Fishman. Plaintiff maintains that Resolution's website is nearly identical to HSP's website and HSP appears to provide hosting services for Resolution's webpages. Plaintiff also points out that 18 of the 28 real estate properties listed by HSP can be found on Resolution's website.

In reply, defendants contend that HSP is not insolvent and contends that HSP merely decided to move out of the premises. They contend that plaintiff is mischaracterizing a letter sent by HSP about this vacatur as proof that HSP could no longer meet its obligations. Defendants argue that plaintiff has not shown that assets were transferred from HSP to Resolution without fair consideration and that the complaint must be dismissed.

Discussion

"On a motion to dismiss a complaint pursuant to CPLR 3211, we must liberally construe the pleading and accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Dismissal under CPLR 3211(a)(7) is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 2021 NY Slip Op 03485 [2021]).

The Court observes that in the other litigation brought by plaintiff against HSP (Index No. 654899/2020), the judge assigned to the case awarded plaintiff two months of rent payments (the final two months before HSP moved out) and HSP subsequently paid this amount ($93,690.62). However, a motion for summary judgment by plaintiff for the full amount due under the sublease was submitted in February 2021 and remains pending.

Breach of Sublease: Successor Liability

Successor liability is permitted where "(1) the acquiring corporation expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling

corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243, 248, 712 NYS2d 526 [1st Dept 2000]).

The Court denies this branch of the motion to dismiss. At this early stage of the litigation, plaintiff has stated a cognizable theory upon which it could recover. It claims that HSP knew it could not satisfy its obligations under the sublease with plaintiff so it created another real estate company to do the same work to avoid those obligations. Although Mr. Reid claims that none of the circumstances apply under which successor liability would be relevant, the Court finds that discovery is required.

Moreover, the Court cannot ignore the exhibits submitted by plaintiff in opposition which further suggest that discovery must occur. Defendants appear be using HSP email addresses at their new company (Resolution) and they share some of the same real estate listings (NYSCEF Doc. No. 18). Contrary to defendants' arguments, plaintiff need not prove its case on a motion to dismiss; it need only state a cause of action and it has stated a claim for breach of the sublease under a successor liability theory.

Breach of Sublease: Alter Ego Liability

"In order to state a claim for alter-ego liability plaintiff is generally required to allege complete domination of the corporation . . . in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407, 997 NYS2d 67[1st Dept 2014] [internal quotations and citation omitted]).

The Court denies the branch of the motion that seeks to dismiss this cause of action. Plaintiff's claim is that defendants created a new entity to operate the same business in order to

avoid its obligations to plaintiff. As stated above, discovery is necessary to explore the status of HSP. That defendants claim that HSP is still operating does not compel a different outcome especially given the fact that Resolution (the new entity) is also a real estate company with many of the same individuals and advertises many of the same property listings.

Breach of Sublease: Piercing the Corporate Veil

"To make out a cause of action for liability on the theory of piercing the corporate veil because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene. Piercing of the corporate veil is not a cause of action independent of that against the corporation; it is established when the facts and circumstances compel a court to impose the corporate obligation on its owners, who are otherwise shielded from liability" (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174, 970 NYS2d 178 [1st Dept 2013] [citations omitted]).

This branch of the motion is also denied. Discovery is required to explore the involvement of the individual defendants in creating Resolution, moving the business to another location and what assets were transferred. Mr. Reid claims in his affidavit that any transactions between HSP and Resolution were done for fair value—discovery about this issue is also necessary. The Court cannot simply assume it was proper.

Debtor and Creditor Law §§ 273, 276

Under Debtor and Creditor Law § 273, "[a] conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration" (*CIT Group/Commercial Services, Inc. v 160-09 Jamaica Ave. Ltd.*

Partnership, 25 AD3d 301, 302, 808 NYS2d 187 [1st Dept 2006]). Pursuant to Debtor and Creditor Law § 276 "[E]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Plaintiff properly pled this cause of action. It alleges that HSP is insolvent and that the assets were transferred to Resolution so that plaintiff will be unable to recover the unpaid rent from HSP. Plaintiff is entitled to seek discovery about the circumstances surrounding the creation of Resolution and the roles that the individual defendants played.

Tortious Interference with Contract

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424, 646 NYS2d 76 [1996]).

Plaintiff adequately pled this cause of action by asserting that defendants conspired to not pay rent to plaintiff (breach of the contract) under the sublease with HSP by forming Resolution. Plaintiff alleges that defendants "drained HSP dry" and left HSP without any assets to satisfy its obligations to plaintiff.

Summary

Given the nature of the allegations asserted by plaintiff in this action, discovery is required to investigate what exactly occurred with respect to the formation of Resolution. It is entirely understandable that plaintiff would not possess intimate details about the formation of Resolution or the potential transfer of assets between HSP and Resolution. Facts about those

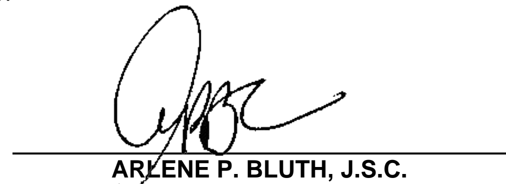
allegations are exclusively within the knowledge of defendants. Plaintiff alleges that while HSP has no assets, Resolution has nearly all the same principals, appears to do the same exact business and seems to have taken some real estate listings from HSP. On a motion to dismiss for failure to state a cause of action, the Court cannot simply ignore those allegations or simply credit defendants' factual assertions.

To the extent that the parties discuss whether HSP is a necessary party, the fact is that defendants did not identify the nonjoinder of a necessary party in their notice of motion or in their moving papers except for a brief remark about the absence of HSP in their affirmation in support (NYSCEF Doc. No. 9, ¶ 16). In any event, dismissal for failure to join a necessary party is not appropriate because HSP can be added to the case. The parties are free to make an application to add HSP, although the Court makes no finding about whether HSP is a necessary party.

Accordingly, it is hereby

ORDERED that the motion by defendants to dismiss is denied and defendants are directed to answer pursuant to the CPLR.

Remote Preliminary Conference: October 5, 2021.



6/4/2021				
DATE		ARLENE P. BLUTH, J.S.C.		
CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE