11 Park Place LLC v Finkelstein, Meirowitz & Eidlisz, LLP
2021 NY Slip Op 32338(U)
November 16, 2021
Supreme Court, New York County
Docket Number: Index No. 651552/2021
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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11 PARK PLACE LLC,

Plaintiff,

- v -

FINKELSTEIN, MEIROWITZ & EIDLISZ, LLP, FME TENANT LLC, LEWIS MEIROWITZ, and MARK EIDLISZ

Defendants.

INDEX NO. 651552/2021

MOTION DATE 08/18/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38
were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action arising from a commercial lease for office space at 11 Park Place in Manhattan to the defendant law firm Finkelstein, Meirowitz & Eidlisz, LLC (the Firm), the plaintiff landlord seeks relief on claims sounding in breach of contract, fraudulent inducement, and fraudulent conveyance. The defendants now move, pre-answer, pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss the second and third causes of action of the complaint. The plaintiff opposes the motion. For the following reasons, the motion is granted in part.

II. BACKGROUND

The complaint alleges that the plaintiff, as landlord, and the Firm, as tenant, entered into a ten-year lease agreement (the lease) dated December 25, 2015, for a portion of the 15th floor of the building located at 11 Park Place (the premises). The term of the lease was set to expire on February 28, 2026. Defendants Lewis Meirowitz and Mark Eidlisz, each a partner of the Firm,

executed a "Good Guy" Guaranty agreement (the guaranty) dated December 7, 2015, in which they guaranteed, *inter alia*, the Firm's payment of all rent and additional rent during any period that the Firm was in possession of the premises. The guaranty provided that Meirowitz and Eidlisz's liability for rent and additional rent would terminate after the date of the Firm's surrender of the premises, subject to the provision that if the Firm were to become insolvent, the "Guarantor's obligations [under the guaranty] may nevertheless be enforced against the Guarantor."

Prior to executing the lease, the Firm proposed creating a new entity that would be the named tenant under the lease. While the plaintiff declined to consent to such proposal, the parties agreed to include in the lease an assignment provision (Article 53.B) allowing the Firm to assign the lease to a corporate or limited liability type entity, on the condition that "Messrs. [Irving] Finkelstein, Meirowitz & Eidlisz are the sole stockholders or membership holders, as the case may be" of the assignee and "continue to be so" during the term of the lease. Article 53.B further provided, "Upon [the Firm's] compliance with all of the conditions of this paragraph [the Firm] shall thereafter be released from any and all further obligations under the Lease."

In December 2015, Meirowitz formed FME Tenant, LLC (FME Tenant). The complaint avers that "[u]pon information and belief, Irving Finkelstein is not, and perhaps never was, a member of FME Tenant," because he is deceased. On January 1, 2016, the Firm, as assignor, entered into a written Assignment and Assumption of Lease (the assignment) wherein the Firm assigned it right, title, and interest in the lease to FME Tenant, as assignee. Meirowitz executed the assignment on behalf of the Firm and FME Tenant. Pursuant to the assignment, FME tenant agreed to assume and be bound by the lease for the remainder of its term. As part of the

assignment, Meirowitz and Eidlisz each confirmed that the guaranty remained in full force and effect.

FME Tenant ceased paying rent and additional rent under the lease as of August 1, 2020. According to the complaint, FME Tenant was also rendered insolvent as of that date by the defendants' actions. By letter dated September 15, 2020, FME Tenant provided notice to the plaintiff that it intended to vacate the premises effective December 15, 2020, and that such date would be the surrender date within the meaning of the lease, guaranty, and assignment agreements. By letter dated September 18, 2020, the plaintiff demanded all rent and additional rent for the remainder of the lease term, totaling $964,405.05. On October 19, 2020, Meirowitz and Eidlisz paid, and the plaintiff accepted, $65,416.53, which constituted all rent due and owing through December 15, 2020. Meirowitz and Eidlisz denied having any further payment obligations under the guaranty. The defendants vacated the premises on December 15, 2020. This action and the instant motion ensued.

III. LEGAL STANDARDS

A. CPLR 3211(a)(1)

Dismissal under CPLR 3211(a)(1) is warranted only when the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014); Fontanetta v John Doe 1, 73 AD3d 78 (2nd Dept. 2010). A particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially

undeniable." See VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019) (quoting Fontanetta v John Doe 1, supra).

B. CPLR 3211(a)(5)

CPLR 3211(a)(5) provides for dismissal of a cause of action where it cannot be maintained "because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." With regard to the payment and release grounds, "[t] he law is well settled that a release is merely a species of contract and, as such, its construction is governed by the same principles of law applicable to other contracts." Aetna Cas. and Sur. Co. v Jackowe, 96 AD2d 37, 41 (2nd Dept. 1983).

C. CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

IV. DISCUSSION

A. Second Cause of Action

The second cause of action of the complaint seeks to hold all defendants liable for FME Tenant's breach of the lease under a veil-piercing theory. The defendants aver that this claim is subject to dismissal for failure to state a cognizable cause of action pursuant to CPLR 3211(a)(7).

Ordinarily, a corporation exists independently of its owners, as a separate legal entity, and its owners are not liable for the actions of the corporation. See Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135 (1993). The doctrine of piercing the corporate veil is a limitation to this rule, "typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation." Id. "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." Ciavarella v Zagaglia, 132 AD3d 608, 608-609 (1st Dept. 2015) (quotation and citation omitted); see also Fantazia Int'l Corp. v CPL Furs New York, Inc., 67 AD3d 511 (1st Dept. 2009). "[U]ndercapitalization of a corporation and the corporation's owner's personal use of corporate funds, which results in the corporation's being unable to pay a judgment, constitute wrongdoing and injury sufficient to satisfy the second prong of [Matter of Morris v New York State Dept. of Taxation & Fin., supra.]" Ciavarella v Zagaglia, supra at 609. However, a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil. See Skanska USA Bldg., Inc. v Atalntic

Yards B2 Owner LLC, 146 AD3d 1 (1st Dept. 2016); Bonacasa Realty Co., LLC v Salvatore, 109 AD3d 946 (2nd Dept. 2013); Treeline Mineola, LLC v. Berg, 21 AD3d 1028 (2nd Dept. 2005).

The complaint avers that "[a]t all times relevant herein, the [Firm], Meirowitz and Eidlisz were the alter ego of FME Tenant" and are therefore liable for FME Tenant's breach of contract. The complaint further states that "[u]pon information and belief, as of August 1, 2020, Meirowitz and Eidlisz, the principals of the [Firm], either defunded, by transferring assets out of, or failed to transfer funds to, FME Tenant, rendering FME Tenant insolvent." They then caused the Firm and FME Tenant to vacate the premises "with the knowledge that FME Tenant was judgment proof."

Generally, the creation of a mere "dummy" or "shell" entity solely for the purpose of signing a lease and then evading obligations thereunder entitles a plaintiff to pierce the corporate veil and hold the ultimate parent entity liable. See Ventresca Realty Corp. v Houlihan, 41 AD3d 707 (2nd Dept. 2007); Teachers Ins. Annuity Ass'n of America v Cohen's Fashion Optical of 485 Lexington Ave. Inc., 45 AD3d 317 (1st Dept. 2007); CC Ming (USA) Ltd. Partnership v Champagne Video Inc., 232 AD2d 202 (1st Dept. 1996). However, the creation of a dummy corporation to limit personal liability under a commercial lease should be respected where the parties to the lease knowingly included provisions permitting the assignment of the lease for that purpose. See Treeline Mineola, LLC v Berg, 21 AD3d 1028 (2nd Dept. 2005); Hillcrest Realty Co. v Gottlieb, 208 AD2d 803 (2nd Dept. 1994); see also Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC, 146 AD3d 1 (1st Dept. 2016).

Here, like the lease at issue in Hillcrest Realty Co. v Gottlieb, 208 AD2d 803, 805 (2nd Dept. 1994), Article 53.B expressly permits "the very assignment which the tenant subsequently exercised in order to limit [its] personal liability under the lease." Moreover, the plaintiff alleges

that FME Tenant did, in fact, perform under the lease for approximately five years before ceasing to make payments. The plaintiff's conclusory assertion, pleaded "upon information and belief" only, that FME Tenant was shell entity intended to facilitate the defendants' avoidance of all obligations under the lease is further belied by the fact that the defendants continued to make rental payments through the date of surrender. They apparently did so even following the August 1, 2020, date when the plaintiff purports the defendants "defunded" FME Tenant in order to evade paying rent.

Construing all allegations in the plaintiff's favor, as the court is required to do at this juncture, the complaint nonetheless fails to state a claim that this is the "rare case where …. the corporate form was being used not to limit a contracted liability … but to evade it." CC Ming (USA) Ltd. Partnership v Champagne Video Inc., 232 AD2d 202 (1st Dept. 1996); see also 501 Fifth Ave. Co. LLC v Alvona LLC, 110 AD3d 494, 494 (1st Dept. 2013) (allegations that are "wholly conclusory and consist of no more than a recitation of the elements of the claim, 'upon information and belief'" do not suffice to state a veil-piercing claim); CPLR 3211(a)(7). The second cause of action is therefore dismissed insofar as it is asserted against the Firm, Meirowitz, and Eidlisz.

B. Third Cause of Action

The third cause of action, asserted as against Meirowitz and Eidlisz only, seeks to recover accelerated rent under the guaranty. The defendants aver that this claim must be dismissed pursuant to CPLR 3211(a)(1) and (5) in light of the documentary evidence they submit showing that Meirowitz and Eidlisz paid $65,416.53 to the plaintiff and that the plaintiff accepted such payment.

"The acceptance of a check in full settlement of a disputed unliquidated claim without reservation operates as an accord and satisfaction discharging the claim since the theory underlying the common law rule of accord and satisfaction is that the parties have entered into a new contract discharging all or part of their obligations under the original contract." Complete Messenger & Trucking Corp. v Merrill Lynch Money Markets, Inc., 169 AD2d 609, 610 (1st Dept. 1991) (citation omitted). However, "such agreements are enforceable only when the person receiving the check has been clearly informed that acceptance of the amount offered will settle or discharge a legitimately disputed unliquidated claim." Id. (citation omitted); see P62 LLC v WFP Retail Co. L.P., 191 AD3d 583 (1st Dept. 2021). "The subject agreement should only be read to cover matters which both parties intended to resolve." Equitable Tower Associates v Asarco Inc., 127 AD2d 456 (1st Dept. 1987) (citation omitted).

In support of their motion, the defendants have submitted the two checks Meirowitz and Eidlisz sent to the plaintiff, each including the notation, "In Satisfaction of Guarantee Obligations" on the memo lines, and an accompanying letter from counsel for Meirowitz and Eidlisz to the plaintiff, dated October 19, 2020. The letter states, in relevant part, and on behalf Meirowitz and Eidlisz only, that $65,416.53 was being tendered with the intention that it be "full and complete payment under the [guaranty], understanding that [the plaintiff] contend[s] claims may exist against [Meirowitz and Eidlisz], separate and apart from their contractual obligations under the Guarantee." The letter further states, "[W]e understand that acceptance of the foregoing would only relieve [Meirowitz and Eidlisz] of their Guarantee-based claims, and not under any other legal theory." The plaintiff concedes that it proceeded to accept the payment tendered but avers that such payment does not preclude its recovery of accelerated rent under the guaranty because payment of the $65,416.53 owed through the surrender date was full payment

of an admitted, undisputed liability. See, e.g., Manley v Pandick Press, Inc., 72 AD2d 452 (1st Dept. 1980). The plaintiff submits communications between the parties' counsel that, it avers, confirm this characterization.

The defendants' submissions do not entitle them to dismissal of the third cause of action pursuant to CPLR 3211(a)(1). Under that provision, as the court has explained, a particular paper will qualify as "documentary evidence" only if it satisfies the following criteria: (1) it is "unambiguous"; (2) it is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, supra at 193 (quoting Fontanetta v John Doe 1, supra at 86). Conversely, papers such as "letters, emails, and affidavits fail to meet the requirements for documentary evidence." Shah v Mitra, 171 AD3d 971, 973 (2nd Dept. 2019) (internal quotation marks omitted) (citations omitted). Here, the letter and other correspondence submitted by the defendants are not unambiguous or of undisputed authenticity. Nor can the contents thereof be described as essentially undeniable. To be sure, if the documents had been submitted on a motion for summary judgment, the plaintiff's submissions in opposition would likely be sufficient to generate a factual issue as to whether an accord and satisfaction was reached with respect to the third cause of action. For these reasons, while the plaintiff may not ultimately prevail on the third cause of action, it survives the instant motion.

V. CONCLUSION

Accordingly, it is

ORDERED that the defendants' motion to dismiss the second and third causes of action of the complaint is granted to the extent that the second cause of action is dismissed as against

defendants Finkelstein, Meirowitz & Eidlisz, LLP, Lewis A. Meirowitz, and Mark Eidlisz, and the motion is otherwise denied; and it is further

ORDERED that the defendants shall file an answer to all surviving claims in the complaint within 30 days; and it is further

ORDERED that the parties shall confer, commence discovery and appear for a preliminary conference, to be held via Microsoft Teams, on March 3, 2021, at 10:00 a.m.

This constitutes the Decision and Order of the court.

Dated: November 16, 2021

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON