

PGC Constr. Corp. v Fudge

2014 NY Slip Op 30052(U)

January 3, 2014

Supreme Court, Suffolk County

Docket Number: 13-4890

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-4-13
ADJ. DATE 8-6-13
Mot. Seq. # 001 - MG

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PGC CONSTRUCTION CORP.,

Plaintiff,

- against -

JAMES E. FUDGE and JANICE B. FUDGE,

Defendants.

-----X

JAMES E. FUDGE and JANICE B. FUDGE,

Counterclaim Plaintiffs,

- against -

PETER GMELCH,

Additional Counterclaim Defendant.

-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant on the counterclaim, dated April 25, 2013, and supporting papers; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiffs, dated July 13, 2013, and supporting papers; (4) Reply Affirmation by the defendant on the counterclaim, dated August 1, 2013, and supporting papers; (5) Other Memoranda of law (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant on the counterclaim Peter Gmelch for an order dismissing the counterclaims against him is granted.

Plaintiff PGC Construction, Inc., commenced this action to recover money allegedly owed for construction and renovation work it performed on real property known as 98 Awixa Avenue, Bay Shore, which is owned by defendants James Fudge and Janice Fudge. Pursuant to a written contract entered into in May 2012, PGC Construction agreed to construct a second floor addition, covered porch and portico, and to perform demolition and renovation work, to the Fudge's residence in accordance with drawings made by the architect for the project. In exchange for supplying the work, equipment and materials for the project, the Fudges agreed to pay PGC Construction the sum of \$223,359, with progress payments made during different stages of construction. During the period from May 21, 2012 through July 26, 2012, PGC Construction allegedly provided labor, materials and other services to the Fudges under the contract. By correspondence from their counsel dated August 1, 2012, the Fudges terminated the contract with PGC Construction "for cause," alleging, among other things, "repeated failures to protect and secure the house from rain resulting in damage to the first floor ceilings and living room wood floor," "construction defects," and "periodic lapses in worker's compensation insurance." On August 16, 2012, PGC Construction filed a notice of mechanic's lien against the subject property claiming the Fudges owe \$67,493 for labor and materials.

Thereafter, PGC Construction commenced this action to recover money allegedly owed under the terms of its agreement with the Fudges. The first cause of action seeks a judgment declaring PGC Construction has a valid lien against the premises at 98 Awixa Avenue in the sum of \$67,493 and ordering a sale of the premises to satisfy the judgment. The second cause of action seeks damages for breach of contract, and the third cause of action is for an account stated. The fourth cause of action seeks recovery under the theory of quantum meruit, and the fifth cause of action seeks damages for unjust enrichment.

The Fudges' answer to the complaint names Peter Gmelch, the sole shareholder of PGC Construction, as a counterclaim defendant, and interposes various counterclaims against PGC Construction and Gmelch, referred to collectively in the answer as the "PGC Parties." It alleges, in part, that PGC Construction, "under the sole control of Gmelch, is undercapitalized, does not hold or conduct regular meetings, commingles funds with Gmelch, and otherwise does not adhere to corporate formalities." The first counterclaim seeks damages for breach of contract and alleges the PGC Parties, among other things, failed to provide and pay for the labor and materials necessary to complete the project, failed to provide and perform work that was free from defects, and failed to keep insurance in full force and effect. The second counterclaim, brought under Lien Law §39-a, alleges the Fudges paid for all work and materials supplied by the PGC Parties and seeks damages for willful exaggeration of the mechanic's lien filed against their property. The third counterclaim alleges slander of title, and the fourth counterclaim alleges liability for improper diversion of statutory trust assets. Finally, the fifth counterclaim, asserted only against Gmelch, alleges that he was negligent in performing the contract and that, as the sole shareholder of PGC Construction, he is liable for the corporation's negligent performance.

Gmelch now moves for an order dismissing the counterclaims against him based on documentary evidence and failure to state a cause of action (*see* CPLR 3211 [a][1], [7]). An affidavit of Gmelch alleges, among other things, that the construction contract at issue was between PGC Construction and the Fudges; that the Fudges made payments on such contract to PGC Construction; that PGC Construction paid the costs for materials and labor; that PGC Construction paid for and maintained the required insurance policies relating to the project; that PGC Construction hired and paid all the subcontractors used on the project,

except the heating, ventilation and air condition (HVAC) contractor, which was not paid because the Fudge's stopped making payments to PGC Construction; and that PGC Construction is licensed, has assets and continues to perform construction work. Gmelch argues the Fudges' claims that PGC Construction is undercapitalized and does not follow corporate formalities are false, and that there is no legal basis for disregarding the corporate form and holding him personally liable. Evidence submitted in support of the motion includes copies of the pleadings, the construction contract documents, the letter from the Fudge's attorney terminating the contract, the mechanic's lien filed by PGC Construction against the Fudge's property, the demand for an itemized statement served on PGC Construction by the Fudges, various billing and insurance records, and the home improvement contractor license issued to Gmelch under the business name PGC Construction.

The Fudges oppose the motion, arguing the documentary evidence presented by Gmelch is insufficient to prove PGC Construction "is sufficiently capitalized, that [it] holds or conducts regular meetings, does not commingle funds with Gmelch and otherwise adheres to corporate formalities." They further allege that Gmelch, "as President and sole shareholder, officer and director of PGC [Construction], failed to pay at least the HVAC contractor," and, therefore, may be held personally liable under Article 3-A of the Lien Law for the diversion of trust assets. Similarly, they argue "as the sole shareholder, officer and director of PGC [Construction]," Gmelch is personally liable for wrongfully filing a "frivolous and willfully exaggerated" mechanic's lien against their property. They further assert Gmelch failed to meet his burden on the motion with evidence refuting allegations in the complaint that he completely dominated PGC Corporation, and that he abused the privilege of operating under the corporate form to commit a wrong against them. An affidavit by James Fudge submitted in opposition to the motion alleges that certain work was performed improperly by PGC Construction and by subcontractors on the project; that new contractors had to be hired to repair the defective work and complete the project; that, while they paid PGC Construction \$110,000, the "fair and reasonable value" of such work was only \$107,117; and that Gmelch's and PGC Construction's breach of the construction contract caused them to sustain \$14,016 in damages. As to the claim PGC Construction was undercapitalized, James Fudge's affidavit asserts that during the time period PGC Construction was working on the Fudges' residence, he was informed by the HVAC contractor that PGC Construction had bounced checks it had issued to him on prior construction projects. He also alleges an electrical subcontractor informed him that he agreed to work on the Fudges' residence "so that Gmelch would pay him the amounts that he was owed in connection with work that [the electrical contractor] had performed on a prior project."

When a party moves under CPLR 3211 (a)(7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). A court must determine whether, accepting the facts as alleged in the pleading as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Affidavits may be used to remedy pleading defects, thereby preserving "inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314 [1976]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444

[4th Dept 1984]; see *DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; *Greschler v Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). Furthermore, dismissal under CPLR 3211(a)(1) may be granted only if the documentary evidence “utterly refutes plaintiff’s factual allegations” and conclusively establishes a defense to the asserted claim as a matter of law (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; see *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972).

Business enterprises establish corporate structures to obtain business and legal advantages and to shield them from instances of liability. A corporation exists independent of its shareholders, as a separate legal entity, and its shareholders normally are not liable for the debts of the corporation (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140, 603 NYS2d 807 [1993]; see *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879 [1980]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009], *affid* 16 NY3d 775, 919 NYS2d 496 [2011]). “Indeed, the avoidance of personal liability for obligations incurred by a business enterprise is one of the fundamental purposes of doing business in the corporate form” (*Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 63, 432 NYS2d 879; see *Flushing Plaza Assoc. #2 v Albert*, 102 AD3d 737, 958 NYS2d 713 [2d Dept 2013]). Nevertheless, a court may disregard the separate legal form of the corporation – “pierce the corporate veil” – and assign liability to its shareholders where necessary to prevent fraud, illegality or to achieve equity (see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140, 603 NYS2d 807; *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 432 NYS2d 879; *Treeline Mineola, LLC v Berg*, 21 AD3d 1028, 801 NYS2d 407 [2d Dept 2005]; *Bowles v Errico*, 163 AD2d 771, 558 NYS2d 734 [3d Dept 1990]). Generally, a party seeking to pierce the corporate veil and hold a shareholder personally liable for a corporate obligation must show that the shareholder exercised complete dominion of the corporation with respect to the transaction at issue and “‘abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party’” (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776, 919 NYS2d 496, quoting *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142, 603 NYS2d 807). Factors to be considered by a court in determining whether a shareholder has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127, 884 NYS2d 94; *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1075, 944 NYS2d 623 [2d Dept 2012]; see *Flushing Plaza Assoc. #2 v Albert*, 102 AD3d 737, 958 NYS2d 713; *Godwin Realty Assoc. v CATV Enters.*, 275 AD2d 269, 712 NYS2d 39 [1st Dept 2000]). Furthermore, “[s]ince, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer . . . personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in ‘bad faith’ while representing the corporation” (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776, 919 NYS2d 496). Rather, as the concept of piercing the corporate veil is equitable in nature and assumes the corporation will be held liable for the obligation sought to be imposed, a decision on whether to exercise such power depends upon the particular facts or circumstances of a case (see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 603 NYS2d 807; *Flushing Plaza Assoc. #2 v Albert*, 102 AD3d 737, 958 NYS2d 713; *Hyland Meat Co. v Tsarakis*, 202 AD2d 552, 609 NYS2d 625 [2d Dept 1994]).

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Accepting the facts as alleged in the counterclaims as true, and according the Fudges the benefit of any possible favorable inference, the Court finds James Fudge and Janice Fudge failed to state any viable counterclaim against Gmelch. Here, the counterclaims contains vague, conclusory allegations that PGC Construction is undercapitalized, commingles its funds with Gmelch's personal funds, and fails to adhere to corporate formalities. It does not allege any particularized facts showing Gmelch abused the privilege of doing business as a corporation to perpetrate a wrong against the Fudges and, therefore, under the theory of piercing the corporate veil, may be held personally liable for PGC Construction's obligations (*see Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 971 NYS2d 289 [1st Dept 2013]; *AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 867 NYS2d 169 [2d Dept 2008]; *Albstein v Elany Contr. Corp.*, 30 AD3d 210, 818 NYS2d 8 [1st Dept], *lv denied* 7 NY3d 712, 824 NYS2d 604 [2006]; *Lester v Braue*, 25 AD3d 769, 808 NYS2d 778 [2d Dept 2006]; *cf. Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 944 NYS2d 623; *Perry v United Capital Corp.*, 84 AD3d 1201, 924 NYS2d 470 [2d Dept 2011]; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 877 NYS2d 95 [2d Dept 2009]). Furthermore, the evidentiary material submitted to amplify the Fudges' conclusory allegations that Gmelch misused the corporate form to commit a wrong against them, namely the hearsay statements contained in James Fudge's affidavit regarding PGC Construction's dealings with other contractors, and the documentary evidence that the HVAC subcontractor filed a mechanic's lien against the Fudge's property, are insufficient to remedy the pleading defect with respect to the claim for piercing the corporate veil (*see Allstate ATM Corp. v E.S.A. Holding Corp.*, 98 AD3d 541, 949 NYS2d 483 [2d Dept 2012]; *Archie v Ma's & Papa Joe's, Inc.*, 70 AD3d 985, 896 NYS2d 121 [2d Dept 2010]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127, 884 NYS2d 94). Accordingly, dismissal of the counterclaims against Gmelch under CPLR 3211 (a)(7) is granted.

Dated: _____

1/3/14



PETER H. MAYER, J.S.C.