

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

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ALLAN LANDIS,

Plaintiff,

Index No.653847/15
Mot Seq 005

-against-

383 REALTY CORP., BUNITA L. WEINER, THE
ESTATE OF BUNITA WEINER, EPHRAIM BULOW,
AS EXECUTOR OF THE ESTATE OF BUNITA
WEINER, EPHRAIM BULOW, AS TRUSTEE OF THE
SALLY CARRUBBA TRUST and SALLY CARRUBBA,

Defendants.

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OSTRAGER, J.:

Plaintiff Allan Landis commenced this action in November of 2015 against only defendant 383 Realty Corp. ("the Corporation"), asserting that he was entitled to compensation for property management services he had provided at four rental buildings owned by the Corporation and for brokerage services he had provided in connection with the sale of the buildings. The Court granted the Corporation's pre-answer motion to dismiss to the extent of severing and dismissing the First Cause of Action sounding in breach of an implied covenant of good faith and fair dealing and further dismissing as time-barred all claims that pre-date November 23, 2009, a date six years before the action was commenced (see NYSCEF Doc. No. 13). Thereafter, plaintiff amended the complaint to add the additional parties stated in the caption above and additional causes of action (see Amended Complaint, NYSCEF Doc. No. 74).

Before the Court at this time is a pre-answer motion by the recently added defendants to dismiss the Fifth and Sixth Causes of Action in the Amended Complaint, and plaintiff's cross-motion for summary judgment in his favor on all of his claims.

During oral argument on July 19, 2017, plaintiff's counsel agreed to withdraw without prejudice all claims against Bunita L. Weiner, now deceased, and all claims against Ephraim Bulow, as Trustee of the Sally Carrubba Trust. Plaintiff declined to dismiss against The Estate of Bunita Weiner, despite the admonition by defense counsel in its Memorandum of Law that "estates are not made parties to this type of action. The proper person to sue as the *only* new Defendant is Mr. Bulow, as preliminary executor of the Estate." (See NYSCEF Doc. No. 113, p 2). However, as defendant cited no law to support that proposition and plaintiff objected, that aspect of the motion is denied without prejudice.¹

As indicated during the oral argument, plaintiff's cross-motion for summary judgment is denied. For the reasons stated below, defendants' motion is granted to the extent of severing and dismissing the Fifth Cause of Action but is denied with respect to the Sixth Cause of Action.

Background Facts²

The Corporation owned four apartment buildings on First Avenue and 22nd Street in Manhattan. Defendant Bunita L. Weiner was the sole shareholder and principal of the Corporation. Pursuant to an alleged oral agreement between the parties, the

¹ Counsel also indicated that the motion had not been made on behalf of defendant Sally Carrubba as Ms. Carrubba had not been served, but asserted that all the arguments would apply equally to Ms. Carrubba. After oral argument, plaintiff's counsel filed proof of service (Doc. No. 167), and defendant disputed both the timeliness of the filing and the allegations regarding service (Doc. No. 168). To promote judicial efficiency, this Court will determine the moving arguments as applied to Ms. Carrubba as well, without prejudice to either party's right to make any appropriate motion regarding service of process or otherwise.

² The Background Facts are based on allegations in the Amended Complaint, the truth of which is assumed for purposes of this motion unless refuted by documentary evidence.

Corporation engaged plaintiff Landis as a rental agent for the buildings beginning in or about 2002. In or about 2007, when Ms. Weiner moved to Cutchogue, Long Island, the parties allegedly orally agreed that Landis would perform some management functions at the buildings.

Further, the parties entered into a written Listing Agreement dated December 2, 2014 and effective for 90 days, pursuant to which Landis served as the exclusive broker for the sale of the buildings at a price of \$30 million for a stated commission of 3% should the buildings be sold for a price below \$25 million and 5% should the buildings be sold for a greater price (NYSCEF Doc. No. 110). The Agreement was amended in a writing dated February 16, 2015 to extend its terms through March 1, 2015, but the only copy of the amendment provided by the parties is one signed by Landis only (NYSCEF Doc. Nos. 110, 136). While both parties acknowledge the validity of the initial 2014 Listing Agreement and perhaps the February 2015 amendment as well, the parties disagree as to whether the Agreement was orally extended after March 1, 2015.

According to the affirmation of defendant Ephraim A. Bulow (NYSCEF Doc. Nos. 146, 150), Ms. Weiner died on February 11, 2017, and Mr. Bulow became the Executor of the Estate and the President of the Corporation. Bulow has confirmed that a sale of the buildings to East Side Ventures, LLC for \$18.5 million occurred on September 11, 2015 before Ms. Weiner's death. The Corporation received \$14,669,139.23 in proceeds after expenses, which was deposited into a corporate account. As the buildings were the sole asset of the corporation, Ms. Weiner as the sole shareholder and officer of the Corporation withdrew \$14,200,765.95 from the Corporation's account five days later, on September 16, 2015, leaving a balance of \$273,821.60 in the corporate account. (See Affirmation and Chase banking statement Doc. No. 112).

Landis has confirmed that after the sale closed, the Corporation paid him \$200,000.00 for his services as a broker in two checks for \$100,000.00 dated September 21 and 22, 2015 (NYSCEF Doc. No. 138). About a month later, by letter dated October 23, 2015, counsel for Landis wrote to the Corporation and Bulow as outside counsel indicating that Landis had been paid only "\$205,000.00" and was due an additional \$350,000.00, which sum he demanded be paid within 10 days (NYSCEF Doc. No. 159). Landis then commenced this action by filing on November 22, 2015, seeking to recover the \$350,000.00 plus \$814,466.88 as the "reasonable value of the property management services" he claims he provided over a period of seven years from 2008 to 2015 (NYSCEF Doc. No. 2).

Landis has asserted five causes of action in the Amended Complaint filed on May 15, 2017 and at issue here, denominated Second through Sixth based on the dismissal of the previously asserted First Cause of Action as follows: (2) Breach of contract against the Corporation relating to the brokerage agreement; (3) Breach of contract against the Corporation relating to management services allegedly provided; (4) Unjust enrichment as an alternative to the Third Cause of Action; (5) Fraudulent conveyance against all defendants; (6) Piercing the corporate veil against Bunita Weiner and her Estate.

Plaintiff's Cross-Motion for Summary Judgment in his Favor

As indicated at oral argument, plaintiff's cross-motion for summary judgment is denied in its entirety, as plaintiff has not "met his burden to establish 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *William J. Jenack Estate*

Appraisers & Auctioneers, Inc. v Rabizadeh, 22 NY3d 470, 475 (2013), quoting *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); see also CPLR 3212(b). Specifically, with respect to the Second, Third and Fourth Causes of Action, issues of fact exist as to whether any brokerage agreement was in place at the time of the sale, and what management services, if any, plaintiff provided over the years with the Corporation's consent, the value of those services, and any amount of compensation received by Landis, including any "key money" purportedly received from tenants.

The denial of plaintiff's motion for summary judgment is also appropriate in light of the limits placed by the Dead Man's Statute, CPLR § 4519, on the admissibility of evidence proffered by plaintiff as to his conversations with defendant Weiner, now deceased. See, e.g., *Wall St. Assoc. v Brodsky*, 295 AD2d 262 (1st Dep't 2002). The Fifth and Sixth Causes of Action will be addressed more fully below in conjunction with defendants' pre-answer motion to dismiss those claims.

Defendants' Pre-Answer Motion to Dismiss the Fifth Cause of Action

Defendants move to dismiss the Fifth Cause of Action for fraudulent conveyance pursuant to CPLR § 3211(a)(1) and (7) based on documentary evidence and failure to state a cause of action. As defendants correctly note, the pleadings fail to cite any statutory basis for the cause of action and include only conclusory allegations, and the affidavit of plaintiff Landis adds little to the pleadings (NYSCEF Doc. No. 134).

Defendants do not dispute that Weiner was the owner and sole officer of the Corporation and that upon the sale of the buildings the Corporation transferred a significant portion of the proceeds to Weiner (see Bulow Aff, NYSCEF Doc. No. 146). However, defendants vigorously dispute the allegations that the transfer was made

"without fair consideration" and that it rendered the Corporation "insolvent" with the "intent to hinder, delay or defraud the creditors" of the Corporation, identified only as plaintiff. These allegations fail to state a claim, or are defeated by the documentary evidence, when analyzed under any of the applicable statutes, thus precluding summary judgment in plaintiff's favor and compelling dismissal of the claim.

Debtor and Creditor Law (DCL) § 273 states in relevant part that:

Every conveyance made ... by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made ... without a fair consideration.

DCL § 274, related to persons in business, states in relevant part that:

Every conveyance made without fair consideration when the person making it is engaged ... in a business ... for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors ... during the continuance of such business ... without regard to his actual intent.

The alternative claim under DCL §276 invalidates transfers made "with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors." Such a claim cannot merely assert conclusions that simply track the language of the statute. *NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 412 (1st Dep't 2010). To determine actual intent, the courts look at allegations relating to the "badges of fraud" such as "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 (1st Dep't 1999).

The "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thus warranting dismissal of the fraudulent

conveyance claim pursuant to CPLR 3211. *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 (2007), citing *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 (2005), quoting *Held v Kaufman*, 91 NY2d 425, 430-31 (1998). The Corporation's bank records with Chase establish that on September 11, 2015, the date the sale of the buildings closed, \$14,669,139.23 was deposited into the Corporation's bank account and \$14,200,765.95 was withdrawn on September 16 (NYSCEF Doc. No. 112, 145). As Bulow attested, the former sum was the proceeds of sale after expenses, and the withdrawal was made by Ms. Weiner "in the ordinary course of selling the sole asset of the Corporation," leaving a balance of \$273,821.60 (NYSCEF Doc. No. 146; see also 150). Plaintiff acknowledges that the Corporation gave him two checks dated September 21 and 22, 2015 for \$100,000.00 each in recognition of services provided (NYSCEF Doc. No. 138), and that he did not demand any additional sum beyond that \$200,000 for more than a month, when his counsel wrote a letter dated October 23, 2015 (NYSCEF Doc. No. 159).

Thus, it cannot be said that the September conveyance, when the Corporation had no knowledge of plaintiff's claim, was in any way fraudulent as defined by the Debtor and Creditor Law, particularly as it neither left the Corporation insolvent nor with unreasonably small capital when no evidence has been presented that the Corporation had significant outstanding debts as of that date. Nor is the element of "fair consideration" referenced in DCL §273 or §274 relevant, as plaintiff cannot reasonably dispute that Weiner, as owner and sole shareholder, was entitled to withdraw the proceeds of the sale once the Corporation's expenses were paid.

Plaintiff urges this Court to consider subsequent events, including the aforementioned October 23, 2015 letter demand and the commencement of this action

on November 22, 2015 (NYSCEF Doc. No. 1). And plaintiff's counsel makes much of another Chase bank statement in the name of Bunita Weiner, rather than the Corporation, showing a balance in May 2017, a date after Weiner's death, of over \$2 million, which sum was transferred out (NYSCEF Doc. No. 126). However, as Bulow states and documents, that account was held in trust for Sally Carrubba and it passed directly to Ms. Carrubba on Ms. Weiner's death and therefore cannot constitute evidence of a fraudulent conveyance. (NYSCEF Doc. No. 150, 154).³

The fraudulent conveyance claim fails. The Corporation is still active (NYSCEF Doc. No. 133), and Bulow has confirmed that he is the President of the Corporation, as well as the Preliminary Executor of Weiner's Estate and Bulow is presently marshaling all assets (NYSCEF Doc. No. 150). Thus, even assuming plaintiff prevails and obtains a money judgment in his favor in this action, there is no evidence that the Corporation completed any transfer without fair consideration leaving the Corporation insolvent or unable to pay a debt to Landis, should one be determined in the future. Accordingly, the Fifth Cause of Action is severed and dismissed.

Defendants' Pre-Answer Motion to Dismiss the Sixth Cause of Action

Defendants move to dismiss the Sixth Cause of Action against Weiner and her Estate based on the theory of piercing the corporate veil. To pierce the corporate veil, the plaintiff must establish that the "owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice

³ This Court notes that an earlier motion includes an affirmation from Bulow and a Chase banking statement indicating that Weiner may have drawn the corporate account balance down to about \$6500.00 in December 2015 while this action was pending (NYSCEF Doc. No. 67 and 72). But neither party discusses that evidence here.

against that party such that a court in equity will intervene." *Matter of Morris v New York State Dept. Of Taxation & Fin.*, 82 NY2d 135, 142 (1993). Plaintiff has pleaded these elements, albeit in a somewhat conclusory fashion.

However, defendants acknowledge that Weiner was the sole owner and shareholder of the Corporation, and the banking documents confirm that as soon as the sale closed, the proceeds were deposited in the Corporation's account and then transferred immediately thereafter to Weiner's personal account, as if the Corporate account was a mere pas-through account. And plaintiff contends that an injustice was done in that he was deprived of compensation due him based in part on Weiner's handling of the corporate account.

While the allegations are limited, if the Court accepts them as true, as required to do on this pre-answer motion to dismiss, they suffice to state a claim for piercing the corporate veil, although they certainly do not permit summary judgment in plaintiff's favor at this time. As plaintiff has withdrawn claims against Weiner, now deceased, that part of the Sixth Cause of Action is dismissed, but dismissal of the claim against the Estate is at this point denied.

Accordingly, it is hereby

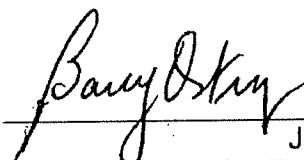
ORDERED that defendants' motion is granted to the extent of directing the Clerk to sever and dismiss all claims against Bunita Weiner individually and against Ephraim Bulow, as Trustee of the Sally Carrubba Trust, and to sever and dismiss the Fifth Cause of Action in its entirety, but the motion is denied insofar as it seeks dismissal of the Sixth Cause of Action as against the Estate of Bunita Weiner; and it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied in its entirety; and it is further

ORDERED that the remaining moving defendants shall Answer within twenty (20) days of the date of this Decision and Order; and it is further

ORDERED that the parties shall complete all discovery and plaintiff shall file a Note of Issue by September 8, 2017, and any dispositive motion shall be filed by Order to Show Cause no later than October 10, 2017. The trial is adjourned to November 20, 2017. Counsel shall appear for a status conference on September 5, 2017 at 9:30 a.m.

Dated: July 31, 2017



J.S.C.
BARRY R. OSTRAGER
JSC