SBE 44 Wall, LLC v New 44 Wall St., LLC
2013 NY Slip Op 32104(U)
August 29, 2013
Sup Ct, New York County
Docket Number: 654038/2012
Judge: Melvin Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

SBE WALL, LLC and BARUCH 44 WALL, LLC

-v-

NEW WALL STREET, LLC et al

INDEX NO. 654038/2012

MOTION DATE

MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s).

Answering Affidavits — Exhibits ____ No(s).

Replying Affidavits ____ No(s).

Upon the foregoing papers, it is ordered that this motion by defendants to dismiss the complaint as against Paul Elliott is GRANTED,

defendants' motion to dismiss all causes of action as against the remaining defendants is DENIED as per the attached Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 29, 2013

MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

SBE 44 WALL, LLC and BARUCH 44 WALL, LLC, Plaintiffs, -against- NEW 44 WALL STREET, LLC, KOMMERSIELLA FASTINGHETER IN NY 3 CORP, and PAUL ELLIOT Defendants.	Index No. : 654038/2012 DECISION AND ORDER Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

This case involves a freeze out merger in which plaintiffs are minority members of a limited liability company.

Plaintiffs bring causes of action to enjoin the merger, for declaratory relief, for specific performance or removal, to impress a constructive trust or equitable trust, and for an accounting.

Defendants move for an order, pursuant to CPLR 3211 (a) (1), (4), and (7) to dismiss the complaint.

Background

The following facts are drawn from the complaint.

Plaintiffs are minority members of 44 Wall Street, LLC (44 Wall). 44 Wall was organized in 2003 as a New York limited liability company to operate real estate known as 44 Wall St, 43-49 William St, and 41-45 Pine St., New York, New York (Real Estate). The real estate at 44 Wall Street is owned by 44 Wall Owner, LLC (Owner) and operated by defendant Kommersiella Fastigheter in NY 3 Corp. (KFS).

SBE 44 Wall, LLC (SBE) is a domestic limited liability company and 12.2% member of 44 Wall. Baruch 44 Wall, LLC (Baruch) is a Delaware limited liability company and 9.6% member of 44 Wall. KFS is a domestic corporation that has the sole purpose of owning and managing its interest in the Real Estate. KFS is a 78.2% member in 44 Wall, and the 100% member in New 44 Wall. As of March 1, 2009, KFS was the managing member of 44 Wall. Defendant, Paul Elliott (Mr. Elliott), is the President of KFS.

New 44 Wall is a single member limited liability company formed to receive the assets, business, and interests of 44 Wall by merger of 44 Wall into New 44 Wall.

On December 19, 2011, KFS purported to make a capital call, which allegedly was not supported by a legitimate business purpose, was not explained or supported by documentation, and violated 44 Wall's Operating Agreement (Operating Agreement), which required that any capital call be in accordance with its "Annual Plan" or based upon an "Emergency Situation." Plaintiffs allege that the capital call was not in accordance with the "Annual Plan," and no "Emergency Situation" existed.

On January 30, 2012, KFS declared plaintiffs in monetary default for not answering the capital call, but KFS never exercised its claimed default rights. On February 10, 2012, each plaintiff demanded copies of the 2012 Annual Plan and certain other materials and declared KFS to be in breach of the Operating Agreement. KFS never attempted to cure its breach under the Operating Agreement.

KFS, as managing member of 44 Wall and New 44 Wall, purported to execute and make effective an Agreement of Merger, dated July 9, 2012. The merger was effectuated by KFS utilizing a Written Consent of Members in Lieu of a Meeting of 44 Wall. KFS delivered written notices to plaintiffs of the merger on July 10, 2012 and on July 11, 2012. Defendants claim that

the merger of 44 Wall into New 44 Wall was necessary to "enable it to raise equity capital to continue its existence" as per the Written Consent of Members in Lieu of a Meeting, and to "enable it to raise needed capital" as per the Special Proceeding referred to below. Plaintiffs assert that 44 Wall had access to capital markets to no less degree than New 44 Wall and has not taken any steps to raise capital since the purported merger.

On July 11, 2012, KFS asserted that a value of "zero" for the membership interest of plaintiffs represented the "fair consideration of said membership interest" and asserted that all membership interests of the plaintiffs in 44 Wall or New 44 Wall were "cancelled for no consideration." KFS offered each of the plaintiffs "zero" for their membership interests in 44 Wall or New 44 Wall on July 17, 2012. The offer of "zero" was rejected by each of the plaintiffs.

Defendants commenced an appraisal proceeding under LLCL 1005 and BCL 623 (Special Proceeding), alleging that plaintiffs were entitled to "zero" and that their rejection of the offer of "zero" for their membership interest was "arbitrary, vexatious and not in good faith." On November 21, 2012, plaintiffs instituted this plenary action seeking equitable relief based on alleged fraud and unlawful conduct by KFS as the majority member of 44 Wall, and against Mr. Elliot.

Discussion

Special Appraisal Proceeding Does Not Preclude this Plenary Action

The defendant's motion to dismiss this action pursuant CPLR 3211 (a) (4) is denied for the following reasons.

On a motion to dismiss on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States, the court

need not dismiss upon this ground but may make such order as justice requires." CPLR 3211 (a) (4). The court has broad discretion as to the disposition of an action when another is pending and where there is a substantial identity of parties for the same cause of action. *Maroney v Hawkins*, 24 Misc 3d 1227 (A) (Sup Ct 2006), *affd* 50 AD3d 862 (2d Dept 2008). For an action to warrant dismissal pursuant to CPLR 3211 (a) (4), "the two actions must be sufficiently similar and the relief sought must be the same or substantially the same. It is unnecessary that the precise legal theories presented in the first proceeding also be present in the second proceeding. Rather, it is necessary that the pleadings be based on the same actionable wrong." *Id.* The purpose of CPLR 3211 (a) (4) is to protect parties from having to defend against the same claims in two separate actions, which could expose defendants to the possible entry of two different judgments. *See N. Fork Bank v. Grover*, 3 Misc 3d 341, 345 (Dist Ct 2004).

Defendants argue that this plenary action is duplicative of the Special Proceeding and should be dismissed because all of plaintiffs' claims can be addressed in the context of the Special Proceeding, an appraisal of the value of plaintiffs' membership interests instituted by the defendants. Further, defendants argue that because plaintiffs may interpose counterclaims to allege breach of fiduciary duty and fraud in the Special Proceeding pursuant to BCL 623, there is no need for the present plenary action. Defendants assert that because New Wall instituted the Special Proceeding first, this plenary action is "merely an attempt by SBE Wall and Baruch to obtain more than the fair value for their minority interest" and should be dismissed.

Rights of Dissenting Shareholders

Under New York law, a shareholder or member dissenting with respect to a merger has the right to receive the fair value of its shares or interests. *See* BCL 623. If a dissenting shareholder or member disagrees with the price offered, generally, its exclusive remedy is to

institute an appraisal proceeding to determine its rights and fix the fair value of its shares (interests). *Walter J. Schloss Assocs. v Arkwin Indus., Inc.*, 90 AD2d 149, 154 [1982] (Mangano, Guy J. dissenting), *revd* 61 NY2d 700 (1984) (reversed for reasons stated in the dissent). However, BCL 623 (k) provides an exception to the general rule allowing dissenting shareholders (members) to bring an "appropriate action" for equitable relief for unlawful or fraudulent corporate action. BCL 623 (k). To be considered an "appropriate action," the dissenting shareholders (members) must seek "equitable relief", not just bring a cause of action over which equity would take jurisdiction. *Schloss*, 90 AD2d at 159. The equitable relief sought must be the primary relief sought, and money damages are only available if they are ancillary or incidental to the equitable relief. *Breed v Barton*, 54 NY2d 82, 87 (1981).

Plaintiffs assert seven claims, with six seeking equitable relief. They are: to set aside the merger, to enjoin the contribution of assets to New 44 Wall, and the divestiture of assets from 44 Wall, to enjoin the recordation of a deed transferring any real estate between New 44 Wall and 44 Wall, to direct the defendants to execute and file a termination of the Agreement of Merger, to direct defendants' specific performance of the Operating Agreement, to impress a constructive trust upon the membership interests and real estate of New 44 Wall, and equitable relief in the form of a declaratory judgment and an accounting. Equitable relief is the primarily relief sought, with money damages for defendants' fraud and breach of fiduciary duty being ancillary. The present action is clearly an "appropriate action" and plaintiffs, as dissenting members, are within their right to bring the present action.

Duplication

The Special Proceeding and this plenary action are not duplicative. The two pleadings are not based on the same actionable wrongs.

First, the complaint and the petition do not frame the same cause of action. The Special Proceeding petitions the court to determine the fair value of the membership interest of the dissenting members and nothing else. In contrast, this plenary action seeks equitable relief for the alleged unlawful conduct of the defendants, which would require discovery of different issues such as the alleged fraudulent and unlawful behavior by the majority members, not merely an appraisal of the value of 44 Wall.

Second, defendants' assertion that this plenary action should be dismissed as duplicative because the claims instituted here can be addressed in the context of the appraisal proceeding is unconvincing. The record shows that in the Special Proceeding the defendants opposed discovery and argued that discovery should only be "limited . . . to the valuation of the fair value of the shares," which would make it impossible for plaintiffs to fully resolve their claims for equitable relief based on the alleged misconduct of the defendants.

Documentary Evidence

The defendant's motion to dismiss pursuant CPLR 3211 (a) (1) is denied for the following reasons.

A party may move to dismiss an action if "a defense is founded upon documentary evidence." CPLR 3211 (a) (1). On a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence needs to resolve "all factual issues as a matter of law, and conclusively dispose[s] of the plaintiff's claim." *Fontanetta v Doe*, 73 AD3d 78, 83 (2d Dept 2010); *see Leon v Martinez*, 84 NY2d 83, 88 (1994) ("a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). The contents of the documents must also be "essentially undeniable" to qualify as proper "documentary evidence." *Fontanetta v Doe*, 73 AD3d 78, 85 (2d Dept 2010).

Defendants argue that their alleged "documentary evidence," i.e. the 2009 proceeding instituted by KFS, Temporary Restraining Orders ("TRO") issued by the court in the 2009 proceeding, letters requesting a capital call, independent appraisals of 44 Wall obtained by New Wall and KFS, and the failure of SE Wall and Baruch to present alternative appraisals conclusively establish that plaintiffs do not have any viable claims. Defendants allege that the "documentary evidence" contradicts material allegations in the complaint because the documents show that the financial condition of 44 Wall was such that the defendants had no choice but to merge 44 Wall with New 44 Wall, and dispels plaintiffs' claim that the merger had no legitimate business purpose, and was designed simply to eliminate plaintiffs' interest in 44 Wall.

Defendants do not provide the court with any "documentary evidence," nor do they rebut any allegations in the complaint. The "documentary evidence" offered by the defendants does not even remotely qualify as "essentially undeniable" that can "conclusively establish" a right to dismissal.

First, the 2009 action initiated by KFS alleging that plaintiffs misappropriated funds cannot be considered proper "documentary evidence" for a motion to dismiss pursuant CPLR 3211 (a) (1). Defendants argue that the TROs granted by the court, along with a settlement agreement with respect to the 2009 action, are "documentary evidence" sufficient to show that plaintiffs misappropriated company assets. This argument fails in multiple respects. Nothing was determined in the 2009 action that would show that plaintiffs actually engaged in any misconduct. Plaintiffs denied all allegations in the 2009 action in their answer to KFS's compliant. They denied all allegations of breach of fiduciary duty, fraud, and misappropriation of company assets. The TROs granted by the court do not demonstrate any misconduct by the

plaintiffs. The TROs were only short-term injunctions to maintain the status quo pending a hearing.

Defendants claim that the settlement agreement reached with respect to the 2009 action, in which plaintiffs reduced their membership interests and ceded control of 44 Wall to KFS, shows that the question of breach of fiduciary duty was resolved in KFS's favor. The defendants have never submitted a copy of the settlement agreement to the court and do not provide any evidence that the settlement agreement would "conclusively establish" that plaintiffs breached their fiduciary duty and misappropriated company funds, or how the settlement would be relevant to the present action.

Defendants argue that the TROs issued in the 2009 action and the settlement agreement that followed constitute "informal judicial admissions" which may be the basis for a motion to dismiss based on "documentary evidence." *Morgenthow & Latham v Bank of New York Co., Inc.*, 305 AD2d 74, 79 (1st Dept 2003). In *Morgenthow & Latham v Bank of New York Co*, the plaintiff's own pleadings in a prior action were proper "documentary evidence" that negated justifiable reliance in a fraud claim because the pleadings in the prior action "conclusively established" with "essentially undeniable" evidence that plaintiffs knew about the fraud, and therefore, could not have justifiably relied on the defendant's misrepresentations. *Id.* Here, defendants' "documentary evidence" does not negate any element of the allegations in the plaintiffs' complaint.

Even assuming that the 2009 action conclusively established that the plaintiffs breached their fiduciary duty and misappropriated company funds for their personal benefit, defendants do not advance any argument as to why this would be relevant to the present action. The present action asserts causes of action for an improper merger, capital calls in violation of the Operating

Agreement, breach of fiduciary duties, self-dealing, and fraud by the defendants, which all require findings of fact that have little to do with the 2009 action, and plaintiffs' alleged prior misconduct.

Second, defendants present letters requesting capital calls as "documentary evidence" to establish that the capital calls were proper and that plaintiffs refusal to answer them resulted in the merger. The letters requesting the capital calls only established that requests were made and does not "conclusively establish" that they were made pursuant to a proper business purpose or that the capital calls were not part of a scheme to freeze out the plaintiffs.

Lastly, defendants' appraisals of 44 Wall do not rebut any allegations in the complaint. Defendants do not provide any explanation as to how the appraisals would conclusively establish a defense to any of plaintiffs' claims.

Defendants ignore the standard for what qualifies as "documentary evidence" sufficient for a motion to dismiss pursuant to CPLR 3211 (a) (1) by advancing no "essentially undeniable" evidence that comes close to being able to "conclusively establish a defense to the asserted claims as a matter of law." Defendants are straining valuable judicial resources with frivolous arguments not supported by evidence, and by not explaining how the evidence that is set forth is relevant to the asserted claims.

Fraud

Defendant's motion to dismiss the fraud claim pursuant CPLR 3211 (a) (7) is denied for the following reasons.

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The

court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

When a cause of action is based on fraud, "the circumstances constituting the wrong shall be stated in detail" according to the heightened pleading requirement pursuant to CPLR 3016 (b), with the purpose "to inform a defendant of the complained-of incidents." CPLR 3016 (b); *High Tides, LLC v DeMichele*, 88 AD3d 954, 957 (2d Dept 2011). "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Where a fiduciary relationship exists, "the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive . . ." *Whitney Holdings, Ltd. v Givotovsky*, 988 F Supp 732, 748-49 (SDNY 1997).

The complaint pleads sufficient details for a cause of action for fraud. First, plaintiffs allege that KFS and other defendants represented to plaintiffs that KFS would manage 44 Wall for the benefit of its members consistent with the Operating Agreement. Plaintiffs allege that the representations made by defendants were made with the intent that plaintiffs rely on them and that plaintiffs did so rely in "settling litigation and amending the Operating Agreement and consenting to KFS' role as manager, to their damage and detriment." Second, plaintiffs allege defendants concealed their intention to cause a merger and squeeze plaintiffs out of 44 Wall and deprive them of their ownership interest in the Real Estate. Third, plaintiffs allege that

defendants concealed the alleged basis for a merger and every document on which the merger was allegedly based. Plaintiffs allege that defendants' used the need to raise capital as a sham reason for the merger when defendants' real purpose was to take the assets of 44 Wall without compensating the plaintiffs. Lastly, plaintiffs allege that defendants used their capacity as manager of 44 Wall to withhold facts of their scheme to create a sham merger transaction when the true purpose of the merger was to terminate 44 Wall and deprive plaintiffs of their rights in 44 Wall and the Operating Agreement.

The complaint adequately alleges the elements of fraud: misrepresentations or concealment of material facts, falsity, intent or scienter, justifiable reliance, and injury. *See Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 492 (2008]) ("Critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action"). The complaint pleads that defendants misrepresented their intention to manage 44 Wall for the benefit of all its members and concealed their scheme to cause an alleged scam merger to freeze out the plaintiffs, the minority shareholders of 44 Wall, without compensation. Because a fiduciary relationship exists between defendants, as manager and majority member of 44 Wall, and plaintiffs, defendants' alleged concealment of their plans to squeeze plaintiffs out of 44 Wall has the same legal effects as "affirmative misrepresentations of fact." *Whitney Holdings, Ltd. v Givotovsky*, 988 F Supp 732, 748-49 (SDNY 1997). The complaint also pleads that defendants had the intention to cause a merger and squeeze out plaintiffs from 44 Wall when the defendants made misrepresentations that they were going to manage 44 Wall for the benefit of all its members and in accord with the Operating Agreement.

Defendants argue that there is no justifiable reliance since plaintiffs had access to all financial documents and appraisals and that the relevant information was not in defendants'

"peculiar knowledge." This argument is unconvincing and does not provide a defense for the alleged fraud. *See Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320 (1st Dept 1997). Plaintiffs are alleging that they justifiably relied on misrepresentations and concealment of facts that induced them to sign the Settlement Agreement and amend the Operating Agreement giving defendants broad control over 44 Wall. There is no reason to believe that plaintiffs would have been able to discover otherwise if they had exercised extensive due diligence. The defendants' intentions of initiating a freeze out merger once they gained control of the company was in their "peculiar knowledge." There is no reason to believe that the defendants' misrepresentations and concealments would have been recorded in any financial documents available to the plaintiffs.

Finally plaintiffs plead damages in the form of losing their ownership of the Real Estate and interest income in 44 Wall when defendants executed the merger of 44 Wall and New 44 Wall.

Direct Claims

The defendants' motion to dismiss the remaining causes of action, except fraud, pursuant CPLR 3211 (a) (7) are denied for the following reasons.

The pertinent inquiry in determining whether a claim by a shareholder is a derivative or direct claim is "whether the thrust of the plaintiff's action is 'to vindicate his personal rights as an individual and not as a stockholder on behalf of the corporation.'" *Albany Plattsburgh United Corp. v Bell*, 307 AD2d 416, 419 (3d Dept 2003) (quoting *Rossi v. Kelly,* 96 A.D.2d 451, 452, 465 N.Y.S.2d 1 (1983)). When the alleged misconduct "effects a separate and distinct wrong to the plaintiff, which is independent of any wrong to the corporation," a claim is direct, not derivative. *Burnett v Pourgol*, 83 AD3d 756, 757 (2d Dept 2011).

The remaining claims asserted by the plaintiffs in the complaint are direct claims that plead "separate and distinct wrongs" to the plaintiffs, independent of the wrongs to the company. Here, the complaint alleges that defendants breached their fiduciary duties to the plaintiffs for violating the Operating Agreement and effectuating a merger without the proper consent of the plaintiffs, not that defendants breached their fiduciary duties to the company. *See Lazar v Robinson Knife Mfg. Co., Inc.*, 262 AD2d 968 (4th Dept 1999) ("The complaint alleges that plaintiffs' ownership interest in defendant corporation was diminished because of the breach by defendants of their fiduciary duties in issuing the stock option plan. Because plaintiffs allege that defendants breached a duty owed to them individually, this is not a derivative action brought on behalf of defendant corporation").

In *Venizelos v Oceania Maritime Agency, Inc.*, 268 AD2d 291 (1st Dep't 2000), the appellate division found that the defendant breached fiduciary duties he owed to plaintiffs independent of duties he owed to the company since the "sole purpose and effect of his transactions with respect to the holding company... was to steal from plaintiffs." Here, plaintiffs plead in sufficient detail that the merger freezing out plaintiffs from their ownership interest in 44 Wall for no compensation was part of the defendants' scheme to steal from them.

Additionally, the nature of the harm and the party principally harmed are the plaintiffs, as the minority members of 44 Wall. *See Higgins v New York Stock Exch., Inc.*, 10 Misc 3d 257, 266 (Sup Ct 2005) ("Accordingly, the proper inquiry in distinguishing between a direct and derivative claim is what is the nature of the harm alleged and who is principally harmed: the corporation or the individual shareholders"). The complaint details facts about how the plaintiffs were squeezed out of the company for no compensation and had their ownership interest reduced to a valuation of "zero." In contrast, the company and the majority shareholders, were not

harmed but received the benefit of retaining the assets of 44 Wall. Defendants maintained their ownership interest in the real estate and control over New 44 Wall, the newly formed company, as a result of the merger, without having to pay plaintiffs compensation for their ownership interest in 44 Wall. *See Id. at* 270. Plaintiffs are seeking to recover their assets, not assets for the company. Therefore, the pleadings are for direct claims.

Even assuming that the claims are derivative, the defendants' motion to dismiss pursuant CPLR 3211(a) (7) would be denied because of demand futility. The rule is that a "demand upon the board of directors pursuant to BCL 626 (c) will be excused where such demand would be futile or where 'the alleged wrongdoers control or comprise a majority of the directors.'" *Curreri v Verni*, 156 AD2d 420, 421 (2d Dept 1989) (quoting *Barr v Wackman* (36 NY2d 371, 378, 379)). The amended pleadings allege that defendants' were in exclusive control of 44 Wall and the pleading "sets forth sufficient details from which it may be inferred that making a demand would indeed be futile." *Id.*

Paul Elliot

The motion to dismiss the complaint against Mr. Elliot is granted.

"A corporation exists independently of its owners, as a separate legal entity, the owners are normally not liable for the debts of the corporation, and it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." *Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140 (1993). In seeking to hold Mr. Elliot individually liable, plaintiffs ask to pierce the corporate veil. "The doctrine of piercing the corporate veil applies to limited liability companies as well as to corporations." *2626 BWAY LLC v Broadway Metro Assoc., LP*, 32 Misc 3d 1234 (A) (Sup Ct 2011). Generally, "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." *Morris*, 82 NY2d at 141. Factors considered by the court "in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use." *Millennium Const., LLC v Loupolover*, 44 AD3d 1016 (2d Dept 2007). However, "conclusory allegations that a corporation's owners completely dominated the corporation will not support a claim for piercing the corporate veil." *2626 BWAY*, 32 Misc 3d 1234(A).

The complaint contains only conclusory statements that Mr. Elliot "exercised complete domination over KFS and New 44 Wall" and that "such domination was used to commit wrongs and/or fraud against each of the Plaintiffs, which resulted in injury and loss to each of them" with no allegations of fact from which conclusions can be drawn to justify piercing the corporate veil. Plaintiffs do not plead any facts to suggest that Mr. Elliot failed to adhere to corporate formalities, that 44 Wall had inadequate capitalization, that there was any commingling of assets, or Mr. Elliot used corporate funds for personal purposes. Absent any allegations warranting piercing the corporate veil, the motion to dismiss the complaint as against Mr. Elliot is granted.

Stay

This plenary action will not be stayed pending the outcome of the Special Proceeding.

Conclusion

For the foregoing reasons, the court finds that defendants' motion to dismiss the complaint in its entirety is denied. Defendants' motion to dismiss all causes of action as against

Mr. Elliot is granted. The court will not stay this action pending the outcome of the Special Proceeding.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint as against Paul Elliott is granted; and it is further

ORDERED that defendants' motion to dismiss all causes of action as against the remaining defendants is denied.

Dated: August 29, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER