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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY: CIVIL TERM: PART 43

-----X
PRIME 135 NYC, LLC,

: Index No.
651966/2017

Plaintiff(s).

-against-

MAJOR CONSTRUCTION CO., INC., and
JOSEPH MENDLER,

Defendant(s).
-----X

60 Centre Street
New York, New York 10007

April 25, 2019

B E F O R E:

THE HONORABLE ROBERT R. REED, Justice

A P P E A R A N C E S:

LAW OFFICES OF MICHAEL J. KAPIN
Attorney for the Plaintiff
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By: MICHAEL J. KAPIN, ESQ.

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Attorneys for the Defendants
88 Pine Street
New York, NY 10005
By: DONALD F. SCHNEIDER, ESQ.

JEANETTE LAKE-MASON, CSR, RMR
Official Court Reporter

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(Whereupon, the following takes place in open court, in the presence of the Court, Mr. Kapin, and Mr. Schneider:)

THE COURT: Appearances, please.

MR. KAPIN: Michael J. Kapin, Michael J. Kapin, P.C., for the plaintiff.

MR. SCHNEIDER: Donald Schneider, of Silverman Shin, for defendants.

THE COURT: Go ahead, Counsel.

MR. SCHNEIDER: Thank you, your Honor.

This is a motion to dismiss the amended complaint against defendant Joseph Mendler, who was brought into the case by an amended summons.

THE COURT: Keep your voice up, Counsel.

MR. SCHNEIDER: Thank you, your Honor. I will.

Two claims are pled against Mr. Mendler. The first is a veil piercing claim. The amended complaint alleges that Mendler is the "alter ego of defendant Major and as such exercised complete domination of entities with respect to the facts alleged herein; and such domination was used to commit a wrong against the plaintiff. Amended complaint paragraph 46. This is the sole allegation in the pleading concerning veil piercing.

As your Honor stated in your opinion in *Dream Come True K9 LLC v. Happy Dogs, Inc.*, the pleader of a Jeanette Lake-Mason, SCR

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1 veil piercing claim bears a heavy pleading burden. Your
2 Honor recognized the heightened pleading standard for
3 veil piercing claims, requiring the pleading of
4 particularized facts of the essential elements of such a
5 claim. Your Honor's decision is consistent with the
6 appellate authorities that we cited in our moving
7 memorandum of law.

8 Here, the amended complaint fails to allege
9 particularized facts concerning veil piercing in three
10 respects. There's not a single specific fact alleged as
11 to (1) the conclusory allegation that Mendler dominated
12 the corporation, nor is there a single fact alleged
13 concerning alleged abuse of the corporate form by
14 Mendler, nor is there a single fact alleged concerning
15 how such abuse caused plaintiff's alleged injury or loss.
16 And for those -- for that reason, we submit that the veil
17 piercing claim should be dismissed.

18 Now, the other claim against Mr. Mendler is
19 contained in the second cause of action alleging fraud.
20 There are two distinct claims of fraud against
21 Mr. Mendler. The first concerns alleged statements about
22 the "anticipated" conduct of the neighbors in the
23 vicinity of plaintiff's planned restaurant. Plaintiff's
24 pleading concedes that it seeks a breach as to a
25 anticipated, meaning future, conduct.

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Notably, the amended complaint goes on to allege that Mr. Mendler stated that the neighbors agreed with him that they would not object to -- that they would in fact cooperate with any restaurant coming into the space. These purported representations made by Mendler to the plaintiff of what the neighbors would do are of an anticipated cooperation and are statements of future conduct which cannot support a fraud claim. In addition, the plaintiff has not alleged justifiable reliance in this respect.

Public records show that the community board's prior recommended denial of the liquor license to a proposed establishment at the subject premises was based on numerous complaints from community residents, including 15 -- I'm sorry -- 13 residents of the subject building in which the premises are located. That can be seen from Exhibit 2 -- I'm sorry -- Exhibit E at page two of our moving papers. Such documentary evidence shows that plaintiff had the means available to it in the public record to determine the truth or the falsity of the alleged representation.

Indeed, before Mr. Mendler even made the motion to dismiss, in a writing which is attached as Exhibit C to our moving papers, plaintiff's counsel wrote that the public community board's meeting minutes showed the Jeanette Lake-Mason, SCR

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1 opposition of the neighbors to the opening of a bar at
2 the subject premises before he signed the lease. In
3 fact, just weeks before he signed the lease. And as a
4 result, justifiable reliance cannot -- has not and cannot
5 fairly be alleged.

6 The second alleged misrepresentation is that
7 Mr. Mendler purportedly told Prime's principal that his
8 father rather than he was the principal of the landlord.
9 This too was a matter of public record that was easily
10 discernible. In fact, again herein, in a writing by
11 plaintiff's counsel before the motion to dismiss was
12 made, plaintiff's counsel noted specifically that public
13 records on ACRIS proved the falsity of the alleged
14 representation; and those records existed at the time
15 plaintiff entered into the lease.

16 So for those reasons, we submit that the fraud
17 claim should be dismissed.

18 We also argued a failure to allege fraud with
19 particularity, and we will refer to our memo of law for
20 the specifics of that argument.

21 Thank you, your Honor.

22 THE COURT: Go ahead, Counsel.

23 MR. KAPIN: Good morning again, your Honor.

24 I'll address one of his last points first, as
25 far as whether the representations were things that could
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1 be verified. That's the general rule. There is an
2 exception for misrepresentation of facts which are
3 peculiarly within the defendant's knowledge; so if he's
4 representing things about details of community board
5 meetings that he was at, we can rely on those kind of
6 statements. We don't -- he, he would argue that we have
7 a duty to investigate every single thing that he says
8 that could be verified in public records anywhere, no
9 matter how obscure; and that's not the law.

10 THE COURT: No. I think the argument is that
11 you're saying that your client was duped by certain
12 statements; and what he's saying is that if your client is
13 prepared to engage in a significant financial transaction
14 with respect to real property, that simple due diligence
15 suggests that you evaluate public records and that the
16 public records would show community board opposition to the
17 transaction, or potential transaction; and public records
18 would show who the true owner of the property was.

19 So that it's reliance, you know, you can't
20 simply -- when you're talking about expending significant
21 sums of money and when you are, you know, not someone who
22 is -- you know, needs a guardian, you should be expected,
23 before engaging in a significant financial transaction,
24 to engage in due diligence. And the argument is that
25 there is no justifiable reliance if public records that
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1 you would see if you actually engaged in due diligence
2 would show the limitations or falsities of a statement.
3 So you can't just rely on an at face value statement and
4 then later on claim fraud; you need -- the reliance has
5 to be justifiable. Particular knowledge, sure, it's
6 something that only that person knows; but by necessity,
7 if the argument is that there's public records, that's
8 not in someone's particular knowledge.

9 MR. KAPIN: I would argue, your Honor, that this
10 is a question of fact that I think goes to, you know, the
11 specific details here. What -- there's two different
12 tenants in place before -- well, one tenant and one
13 potential tenant; and there was a certain volume of
14 complaints made against them, some of which might have been
15 buried in public records. They could have been found how
16 obscure, how diligent of a search would have had to have
17 been taken in fact finding.

18 Just because there is a public record somewhere
19 which would have disclosed some of this information if,
20 if he represented to my client that there were agreements
21 in place for these tenants to cooperate, one mention in
22 the public records somewhere that they were not
23 cooperating, maybe that wouldn't put us on notice if he's
24 advocating strongly that they were in agreement for this
25 purported purpose.

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1 And I think at this stage pre-motion -- pre
2 discovery motion to dismiss, I think there's really a
3 question of fact here. I think discovery would have to
4 be done before it would be proper to dismiss on those
5 grounds.

6 As far as the allegations related to veil
7 piercing, it's not that just that he lied about -- it's
8 not just the allegations -- there's not just a general
9 allegation that, that he dominated and controlled. You
10 actually get into the specifics about how he lied about
11 the ownership of the building and his father's name and
12 used that to get us to enter into a deal with his
13 construction company, believing they were separate and
14 distinct; and then we layout all the details about how he
15 used this separate construction company to benefit the
16 landlord, who we thought was a separate individual.
17 Turns out it's himself. He's charging us to do work that
18 some of the work doesn't have anything to do with our
19 restaurant. It's improvements for the building and for
20 other aspects of the building that don't necessarily
21 benefit us. And so the use of the corporation in this
22 fashion is grounds for piercing the corporate veil.

23 I cite to the *TNS v. MKI* case. And they say
24 where you're using a dummy corporation to advance another
25 corporation or person's interests, they can pierce the
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1 corporate veil. In that case it's Batch Corp. (ph) was
2 the dummy corporation used to advance MKI's interests as
3 part of a software sale transaction.

4 And so it's, it's this use by Mendler of Major
5 Construction and, you know, in addition to his -- the,
6 the, the fiction that he created that the landlord was
7 owned by a different person, it was this arrangement that
8 he created, these false misrepresentations, which led my
9 client into this transaction under false circumstances.

10 As far as the allegations that these were
11 the -- that the fraud misrepresentations were
12 misrepresentations of future intent to act, that's not
13 what we're saying, your Honor. Respectfully, we're
14 saying that Mr. Mendler knew that the individuals that he
15 was saying he had an agreement with, he knew he didn't
16 have an agreement with them. He knew they were
17 vehemently opposed to this project.

18 He was just flat out lying. He, he was -- it's
19 clear he had no intent to tell the truth at the time.
20 And there's an exception to that rule that if you can
21 show that the person making the statements knew they were
22 false at the time, that that can be actionable fraud.

23 As far as particularity, I would, I would assert
24 that we've -- we pled the representations, we pled the
25 specific locations, the dates, who, who, who they were
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1 made to throughout the complaint, such that the fraud is
2 pled with particularity.

3 Thank you, your Honor.

4 THE COURT: Anything?

5 MR. SCHNEIDER: I'll be very brief, your Honor.

6 I would just note for the record statements made
7 in plaintiff's counsel's letter of October 30, 2018,
8 which was written in response to a written request that
9 the claims against Mr. Mendler be withdrawn and an
10 explanation for that.

11 And with respect to the issue of public records,
12 plaintiff's counsel used the existence of public records
13 to demonstrate and verify the allegations of the
14 complaint. On page one of Exhibit C, in two sentences it
15 is asserted, Plaintiff has alleged in the first amended
16 complaint that Joseph Mendler represented to plaintiff
17 that the landlord of the subject premises was owned
18 solely by his late father Harry Mendler. This
19 representation was completely false. This can be
20 verified through public records on an ACRIS, and it could
21 be verified by public records on an ACRIS which existed
22 at the time that the subject lease was entered into.

23 In addition, with respect to the other alleged
24 fraud, on page two of the letter it states, As to your
25 second point, your argument misses the point. Plaintiff
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1 has not alleged misrepresentations about Joseph Mendler
2 or Major's promises of anticipated future performance.
3 Rather, it alleges misrepresentation of present facts.
4 At trial plaintiff will provide documentary evidence,
5 including community board meeting minutes, showing the
6 neighboring residents' stern opposition to MHA opening a
7 bar at the subject premise a matter of weeks before
8 plaintiff's lease with the landlord and contract with
9 Major.

10 Thank you, your Honor.

11 MR. KAPIN: Just one, one final point.

12 From my recollection, the issue with the
13 disclosure of the Matty's Bar, this was a potential
14 tenant who was looking to lease the place immediately
15 before my client. There's no actual proof at this point
16 that any of these public records were actually available
17 at that time when my client was negotiating the lease.
18 The fact that I found them two years after the fact
19 doesn't mean that they were published at the time or
20 available. It's certainly an issue of fact.

21 THE COURT: The Court has heard from both counsel
22 with respect to the motion by defendant pursuant to CPLR
23 3211(a)(1) and 3211(a)(7) and CPLR 3016 to dismiss the
24 amended complaint as against the individual defendant
25 Joseph Mendler.

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1 Obviously, under 3211(a)(1) or 3211(a)(7) the
2 Court accepts the pleaded allegations as -- pleaded
3 factual allegations as true and accords the plaintiff
4 every inference in the plaintiff's favor.

5 Under 3211(a)(1), pleading shall be dismissed if
6 there is documentary evidence utterly refuting the
7 claims.

8 Under 3016 certain matters need to be pleaded
9 with particularity, including matters of fraud.

10 Here, the defendant, individual defendant
11 challenges the idea that the corporate veil should be
12 pierced, his case or the case brought against him
13 directly. The courts, generally speaking, will
14 reflect -- excuse me -- will respect the corporate form
15 even in cases where there's indicated a sole shareholder.
16 And often, in fact, there are individuals who may be the
17 sole shareholder of multiple corporations, and the law
18 allows that in the absence of abuse.

19 Domination and control of a corporation must be
20 coupled with alleged conduct evidencing a perversion of
21 the privilege to do business in a corporate form in order
22 for it to be actionable. A mere allegation of domination
23 and control doesn't suffice. The whole case addressing
24 that *is Walkovszky v. Carlton*, 18 NY2d 14 -- excuse
25 me -- 414, at 420-421.

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1 *Walkovszky* require that at the pleading stage
2 that conduct must be alleged sufficiently particularized
3 to show that the corporation is a dummy for its
4 individual stockholders who are in reality carrying on
5 business in their personal capacities for purely personal
6 rather than corporate ends; and the person is -- person
7 or persons who are in control of the corporation are
8 actually doing business in their individual capacities,
9 shuttling their personal funds in and out of the
10 corporation without regard to formality and to suit their
11 immediate convenience.

12 Here, there is no such specified claim such as
13 would satisfy a claim of piercing the corporate veil in
14 order to reach the individual Joseph Mendler.

15 Separately, there is the argument that the
16 individual Joseph Mendler made particular representations
17 of fact, particular representations of fact that were
18 false; and that plaintiff's reliance on those facts
19 caused it financial harm.

20 On the one hand, fraud needs to be pleaded with
21 particularity; and on the other hand, whether or not
22 there has been justifiable reliance is, generally
23 speaking, something that is a fact question and probably
24 should be informed by discovery before making a
25 conclusion about that. However, here, the
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1 representations that are alleged to have been relied upon
2 strike the Court as representations that are, or would be
3 easily verifiable with any sort of due diligence.

4 First, there was a statement as made that the
5 individual Joseph Mendler suggested that there was no
6 community opposition, or no neighborhood opposition to
7 the location of a business of the type anticipated in the
8 transaction at this particular location, or location of
9 that business at that site.

10 Now, an argument is -- the argument by the
11 defendant Mendler is, first, that the anticipated -- that
12 what was represented is anticipated future conduct, which
13 is necessarily not a fraud; that seems that it is a
14 challenging area for fraud to suggest that you have
15 agreements with neighbors for their -- what they are
16 prepared to do in the future hypothetical sense. I think
17 we could just look at the proposed Amazon deal in Queens
18 to see that you simply have no idea of knowing what a
19 neighborhood will do as you move forward to try to
20 finalize a transaction. So that's one thing.

21 The argument by plaintiff is that, well, there
22 was a representation of specific agreements with the
23 neighborhood with respect to the current position. If
24 that is the case, then we also have to look at the
25 element of fraud that says that there must be justifiable
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1 reliance. And while we don't normally want to short cut
2 that determination at a pleading stage, well, here there
3 is a way of determining whether or not neighbors actually
4 entered into some agreement.

5 You look for the agreement in writing, you talk
6 to the neighbors; or, as has been suggested here by
7 defendant Mendler, you take a look for public records,
8 including recent community boards, to see if there is any
9 activity by neighbors indicating their support or
10 opposition to the particular transaction that's under
11 scrutiny, or the type of transaction that's under
12 scrutiny.

13 In the business context, I find it difficult to
14 accept that there's justifiable reliance when ordinary
15 due diligence would satisfy you of the basis of the
16 representation to you, whether it's true or whether it's
17 false. At a minimum a business person exercising due
18 diligence would want to have one conversation or two
19 conversations with some purported neighbor who has agreed
20 that there would be no opposition. Business person in
21 the exercise of due diligence would want to see written
22 agreements; and if the agreements aren't written, then,
23 obviously, there's no reason to rely upon that
24 representation as justifiable because it's in that oral
25 agreement with respect where you locate a business that's
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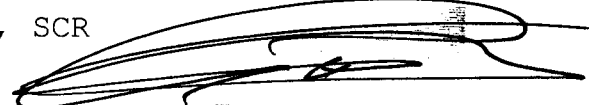
There was an argument that the individual Mendler lied about his father's ownership of the property. That's available in the public record, and I don't believe that we can allow people simply to hide behind claims of fraud by saying that they accepted an oral representation of a certain fact that is easily verified by coming to the clerk's office and checking the ownership records relating to a particular property. In that context, I do not believe that the fraud claim here also meets the particularity concerns that are established by CPLR 3016.

Accordingly, it is hereby ordered that the motion to dismiss the amended complaint as and against the individual defendant Joseph Mendler is hereby granted; and, therefore, it is ordered the clerk is respectfully requested to dismiss the complaint to the extent that it is directed as against the individual defendant Joseph Mendler and to mark his records and files accordingly.

Direct that counsel for the moving party order a copy of the transcript of today's proceedings. Present them to the clerk of Part 43 for so ordering. That will reflect the Court's decision and order of this date.

MR. KAPIN: Thank you, your Honor
Jeanette Lake-Mason, SCR

SO ORDERED:



5/13/19

Hon. Robert R. Reed

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MR. SCHNEIDER: Thank you.

(Whereupon, the matter concluded.)

* * *

C E R T I F I C A T E

This is certified to be a true and accurate transcription of the stenographic minutes taken in the above proceedings.

Jeanette Lake-Mason
JEANETTE LAKE-MASON,
Senior Court Reporter

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