

At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 4th day of May 2020

PRESENT:
HON. CAROLYN E. WADE,

Justice

-----X
TANIA M AMADOR,

Plaintiff,

Index No. 509663/2019

-against-

DECISION and ORDER

854 HERKIMER STREET CORP, DARREN WAINER
AND FREEDOM MORTGAGE CORPORATION,

Defendants.
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Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant DARREN WAINER's motion to dismiss (seq. #1) and defendant FREEDOM MORTGAGE CORPORATION's motion to dismiss (seq. #2):

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	1,2
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	3,4
Reply Affidavits/Affirmations.....	5
Memorandum of Law.....	

Upon the foregoing cited papers, and after oral argument, defendant DARREN WAINER moves, pursuant to CPLR 3211(a)(1) and (a)(7), for an Order dismissing the Complaint against him. Defendant FREEDOM MORTGAGE CORPORATION also moves for the same relief pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7).

Relevant facts

This action arises out of a real estate transaction concerning property located at 491 Milford Street, Brooklyn, NY (the "Property"). On April 22, 2016, defendant 854 HERKIMER STREET CORP ("854 Herkimer") sold the Property to plaintiff TANIA M AMADOR ("Plaintiff"). However, on that day, 854 Herkimer did not have the Certificate of Occupancy ("CO") for the premises, which was required under the contract of sale. Consequently, an escrow agreement was executed by Plaintiff and 854 Herkimer (the "Escrow Agreement"), which provided that the former's mortgage lender, defendant FREEDOM MORTGAGE CORPORATION ("Freedom") would hold \$25,000.00 in escrow, until the documentation was submitted to Plaintiff. Defendant DARREN WAINER ("Wainer") executed the Escrow Agreement on behalf of 854 Herkimer (Miller aff, exhibit "B"). Plaintiff alleges that, to date, 854 Herkimer has failed to deliver her the CO.

Plaintiff then commenced the instant action. Three causes of action were alleged against Wainer: (1) breach of contract; (2) costs and loss of value of the Property; and (3) attorneys' fees. The fourth cause of action, asserted against Freedom, claims that Plaintiff is currently working with an expediter and contractor to obtain the CO. Thus, she alleges that she is entitled to the \$25,000.00 deposit, which was allegedly submitted by seller 854 Herkimer to Freedom.

The instant motions ensued.

Wainer's motion to dismiss

Arguments

In support of his motion, Wainer argues that Plaintiff has failed to assert any wrongdoing against him in his individual capacity. He notes that the Escrow Agreement was entered by Plaintiff and 854 Herkimer, not Wainer. Moreover, Wainer contends that Plaintiff fails to state a claim for attorney's fees.

Plaintiff, in opposition, claims that Wainer is personally named in this action because he was present at the closing, signed all of the documents there, and was aware of the work that needed to be completed to obtain the CO. She further alleges that Wainer is the sole owner of 854 Herkimer; and that he uses it as a shell corporation to circumvent his responsibilities.

In reply, Wainer argues that the above statements are unsubstantiated, and are not alleged in the Complaint. Rather, they are made by counsel without actual knowledge of the facts, and are insufficient to pierce the corporate veil. He further asserts that Plaintiff waived opposition to the branch of his motion seeking dismissal of the cause action for attorney's fees.

Analysis

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-04 [2d Dept 2008] [citation omitted]). “However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference” (*id.*).

The only issue presented here is whether, under the doctrine of piercing the corporate veil, the Complaint contains allegations sufficient to state a cause of action holding Wainer personally liable for the actions he took on behalf of 854 Herkimer. “The general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability” (*E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 126 [2d Dept 2009]).

“The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation” (*id.*, citing *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140-141 [1993]). A plaintiff seeking to pierce the corporate veil must demonstrate that “the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff” (*id.*). “Factors to be considered in determining whether the owner 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’ ” (*id.*, citing *Millennium Const., LLC v Loupolover*, 44 AD3d 1016, 1017 [2d Dept 2007]).

Here, Plaintiff has failed to allege any of the above-referenced material elements in her Complaint; nor did she proffer an affidavit in opposition to assert the same. Without any allegation that Wainer’s conduct constituted an abuse of the privilege of doing business in the corporate form, the Complaint lacks a requisite element to support a cause of action against him under the theory of piercing the corporate veil (see *id.*).

Freedom's motion to dismiss

Arguments

In support of its motion, Freedom cited the following texts from the Escrow Agreement (Freedom is designated as both the "Lender" and "Escrowee"):

"To induce Lender to make the Loan to the Borrower, [] Borrower [] Seller (hereinafter known as the "Depositor") will deposit \$25,000.00 with Escrowee to hold in escrow, (hereinafter known as "Escrow Deposit") **without interest**, pursuant to the terms of this Agreement.

The Parties hereby release Escrowee from any claim, obligation or liability relating to this Agreement. It being understood that Escrowee is acting as such as an accommodation and **subject only to Lender's written instructions with respect to said sum and that Escrowee's sole obligation is to comply with Lender's written instructions with respect to said sum.**

In no event shall sums deposited hereunder be released by Escrowee prior to fourteen (14) days after satisfactory proof the Required Work has been completed."

(Weisenberg aff, exhibit "B," ¶ 4 [emphasis added]).

The Escrow Agreement also provides that Freedom "is the only judge of whether the Required Work (*i.e.*, the CO) or conditions listed above are finished or met in a satisfactory manner" (*id.*, ¶ 7).

Freedom contends that the Escrow Agreement is legally insufficient to give rise to an escrow relationship, as Plaintiff does not allege, nor does the document establish, that any party delivered \$25,000.00 to it to be held in escrow. Freedom also avers that Plaintiff fails to state a breach of contract claim, as there exists no contract between them. It further argues that the Escrow Agreement expressly provides that "[i]n no event shall sums deposited hereunder be released by Escrowee prior to fourteen (14) days after satisfactory proof the Required Work has been

completed” (*id.*, ¶ 4). Freedom maintains that Plaintiff failed to plead any claims of breach or damages against it. Lastly, it notes that the Escrow Agreement provides that Plaintiff released it from liability.

Plaintiff, in opposition, argues that further discovery needs to be conducted to determine whether Freedom or its attorneys are holding the escrow funds. She asserts that Freedom and the co-defendants were all parties to the Escrow Agreement, and that they were to work towards obtaining the CO. Upon her receipt of the CO, Freedom would return the \$25,000 deposit to 854 Herkimer.

Analysis

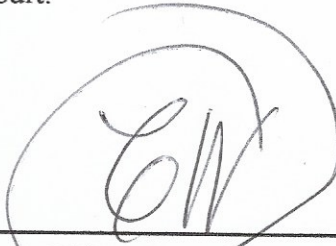
“Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Further, “[a] release ‘that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms’ ” (*Kulkarni v Arredondo & Co., LLC*, 151 AD3d 705, 706 [2d Dept 2017], citing *Inter-Reco, Inc. v Lake Park 175 Froehlich Farm, LLC*, 106 AD3d 955 [2d Dept 2013]).

Here, even assuming, *arguendo*, there is a contractual relationship between Plaintiff and Freedom arising from the Escrow Agreement – which Freedom is not a signatory – the Escrow Agreement expressly states, *inter alia*, that (1) both Plaintiff and 854 Herkimer release Freedom from any claim, obligation or liability relating to the Escrow Agreement; and (2) in no event shall Freedom release the deposit prior to fourteen days after satisfactory proof that the CO has been provided (Weisenberg aff, exhibit “B,” ¶ 4).

The only argument advanced by Plaintiff is that she should be awarded the deposit so that she can obtain the CO on her own. However, Plaintiff acknowledges that (Galani aff, ¶ 4), the deposit was to be released to 854 Herkimer once it produced the CO. Notably, if the deposit was in fact made, as admitted by Plaintiff, it would be 854 Herkimer's monies (Galani aff, ¶ 11). The Escrow Agreement does not articulate a mechanism for the deposit to be released to Plaintiff. In addition, the language of the release¹ was clear, unambiguous (*Davis v Rochdale Vil., Inc.*, 109 AD3d 867, 867 [2d Dept 2013]), and must be enforced.

Accordingly, based all of the above, it is **ORDERED** that Defendant DARREN WAINER's motion to dismiss is **GRANTED**; and it is further **ORDERED** that defendant FREEDOM MORTGAGE CORPORATION's motion to dismiss is **GRANTED**. The Verified Complaint is hereby dismissed against them.

This constitutes the Decision and Order of the court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

¹ "The Parties hereby release [Freedom] from any claim, obligation or liability relating to [the Escrow Agreement]" (Weisenberg aff, exhibit "B," ¶ 4).