

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

POURQUOI M.P.S. INC., etc. x Index
Number 4883 2005

-against- Motion
Date January 24, 2007

WORLDSTAR INTERNATIONAL, L.T.D. Motion
Cal. Number 47

x Motion Seq. No. 3

The following papers numbered 1 to 12 read on this motion by plaintiff Pourquoi M.P.S., Inc. d/b/a L.I.F.E. International for, inter alia, leave to renew its prior motion for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6
Reply Affidavits	7-9
Other (Memoranda of Law)	10-12

Upon the foregoing papers it is ordered that:

That branch of the plaintiff's motion which is for an order drawing an "adverse inference" against defendant Worldstar regarding the latter's affirmative defenses is denied with leave to seek an adverse inference charge at the trial.

That branch of the plaintiff's motion which is for an order drawing an adverse inference against the defendant's president, Sonya Chiang, and holding her liable on the complaint is denied.

That branch of the plaintiff's motion which is deemed to be for an order permitting the plaintiff to serve a supplemental summons and an amended complaint on Sonya Chiang joining her as a defendant is granted. The plaintiff shall serve the supplemental summons and amended complaint within 20 days of the service of a copy of this order with notice of entry.

That branch of the plaintiff's motion which is for leave to renew its prior motion for summary judgment against defendant Worldstar is granted. Upon renewal, those branches of the instant motion which are for summary judgment against defendant Worldstar are denied.

Those branches of the motion which are for summary judgment against defendant Chiang are denied as premature.

(See the accompanying memorandum.)

Dated: May 8, 2007

ORIN R. KITZES, J.S.C.

MEMORANDUM J.S.C.

SUPREME COURT : QUEENS COUNTY
IA PART 17

POURQUOI M.P.S. INC., etc.	X	INDEX NO. 4883/05
-against-		MOTION SEQ. NO. 3
WORLDSTAR INTERNATIONAL, L.T.D.		BY: KITZES, J.
		DATED: MAY 8, 2007

x

Plaintiff Pourquoi M.P.S., Inc. d/b/a L.I.F.E. International has moved for, inter alia, leave to renew its prior motion for summary judgment.

From December 2003 to February 2004, the plaintiff, a California corporation, sold to the defendant garlic at a price of \$161,004.00. The defendant did not pay for the garlic, and the plaintiff began this action on March 3, 2005, asserting causes of action for breach of contract, unjust enrichment, and an account stated. Ana Chan, the plaintiff's President, swears that the garlic was "of conforming quality and condition" and that the defendant did not complain about or reject the garlic. On the other hand, the defendant alleges that the garlic shipped by the plaintiff had already begun to deteriorate. Sonya Chiang, the defendant's President, swears that the garlic "was completely unusable by us. We practically gave it away. We had to dump a

good deal of it." She also alleges that she "consistently complained about the condition of the garlic and other matters to my shipper in China who had engaged the corporate plaintiff as its importer***." The defendant further alleges that the plaintiff continued to ship the garlic after notice from the former that the goods were unmarketable.

On March 15, 2006, the plaintiff submitted a motion for summary judgment dismissing the affirmative defenses raised by the defendant and for summary judgment on its complaint. By decision dated May 24, 2007 [sic: 2006] and order dated May 24, 2006, this court, inter alia, (1) granted that branch of the plaintiff's motion which was for summary judgment dismissing the affirmative defenses raised by the defendant except for the ninth (failure of consideration), twelfth (breach of contract), seventeenth (nonconforming goods), twentieth (offset), twenty-ninth (breach of warranties), thirty-third (failure to mitigate damages), and thirty-fourth (non-marketability) and (2) denied that branch of the plaintiff's motion which was for summary judgment on its complaint. The court found that the defendant had successfully raised "a triable issue of fact concerning whether the plaintiff sold it defective garlic, i.e., garlic not 'fit for the ordinary purposes for which such goods are used.'" The court also found that there was a triable issue of fact "pertaining to whether the defendant

buyer timely notified the plaintiff seller of the alleged non-conformity of the goods.”

In or about October 2006, defendant Worldstar filed a certificate of dissolution with the Office of the Secretary of State. On November 17, 2006, the plaintiff filed a note of issue and a certificate of readiness acknowledging the completion of discovery in this case.

That branch of the plaintiff’s motion which is for an order drawing an “adverse inference” against defendant Worldstar regarding the latter’s affirmative defenses is denied with leave to seek an adverse inference charge at the trial. (See, Rodriguez v 551 Realty LLC, 35 AD3d 221.) The plaintiff alleges that the defendant has not adequately complied with discovery demands seeking documents pertaining to the affirmative defenses remaining in this case. Although an adverse inference charge may be directed or an adverse inference may be drawn prior to trial (see, Gryphon Domestic VI, LLC v APP Intern. Finance Co., B.V., 18 AD3d 286; Ifraimov v Phoenix Industrial Gas, LLC, 4 AD3d 332), the plaintiff waived its right to seek pre-trial sanctions for failure to make disclosure by filing a note of issue and certificate of readiness. (See, Malloy v Madison Forty-Five Co., 13 AD3d 55; Simpson v City of New York, 10 AD3d 601; Brown v Veterans Transp. Co., Inc., 170 AD2d 638; Jones v Hercules Const.

Co., 14 Misc 3d 1212[A]; Tavares v New York City Health and Hospitals Corp., 2003 WL 22231534 [n.o.r.].) Nevertheless, the trier of fact may draw an unfavorable inference where a party fails to produce evidence under his control and which he is naturally expected to produce. (See, Seward Park Housing Corp. v. Cohen, 287 AD2d 157; Ausch v St. Paul Fire & Marine Ins. Co., 125 AD2d 43.) In order to obtain an adverse inference charge against an opponent who fails to produce a document, a party must show that the document actually exists, that the document is under the opponent's control, and the opponent has no reasonable explanation for failing to produce it. (See, Cidieufort v New York City Health and Hospitals Corp., 250 AD2d 720; Wilkie v New York City Health and Hospitals Corp., 274 AD2d 474.) In the case at bar, there are issues of fact in that regard which should be left for trial. To the extent that the plaintiff is seeking summary judgment dismissing the affirmative defenses as meritless, such relief is precluded by issues of fact. (See this court's prior decision.)

That branch of the plaintiff's motion which is for an order drawing an adverse inference against the defendant's president, Sonya Chiang, and holding her liable on the complaint is denied. Sonya Chiang is not yet a party to this action.

That branch of the plaintiff's motion which is deemed to be for an order permitting the plaintiff to serve a supplemental

summons and an amended complaint on Sonya Chiang joining her as a defendant is granted. The plaintiff shall serve the supplemental summons and amended complaint within 20 days of the service of a copy of the order to be entered hereon with notice of entry. The plaintiff seeks to pierce the corporate veil and to impose liability for the corporate debt upon Sonya Chiang personally. (See, Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135.) CPLR 3025(b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just." (See, Holchender v We Transport, Inc., 292 AD2d 568; St. Paul Fire & Marine Ins. Co. v Town of Hempstead, 291 AD2d 488; Whitney-Carrington v New York Methodist Hosp., 289 AD2d 326.) As a general rule, the amendment of a complaint will be permitted where there is no significant prejudice or surprise to the defendant. (See, Edenwald Contr. Co. v City of New York, 60 NY2d 957; Holchender v We Transport, Inc., supra; Dal Youn Chung v Farberov, 285 AD2d 524.) "Prejudice in this context means that the nonmoving party has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position**." (Dumesnil v Proctor and Schwartz Inc., 199 AD2d 869, 870.) Although the plaintiff has tardily moved to join Sonya Chiang as a defendant, she, the sole owner of the defendant corporation, did not adequately demonstrate prejudice. In determining whether to permit a party to amend a complaint to

add a cause of action, the court must examine the merits of the proposed cause of action. (See, Morgan v Prospect Park Associates Holdings, LP, 251 AD2d 306; McKiernan v McKiernan, 207 AD2d 825.) The amendment will not be permitted where the proposed cause of action is patently lacking in merit. (See, McKiernan v McKiernan, supra.) The proposed cause of action to pierce the corporate veil is not patently lacking in merit under all of the facts and circumstances of this case, including Sonya Chiang's dissolution of the defendant corporation while this action was pending, purportedly for unprofitability, despite showing gross receipts of \$249,121 on the corporation's 2003 federal tax return. "Carrying on a business without substantial capital and leaving the corporation without substantial assets to meet its debts can justify piercing the corporate veil." (Directors Guild of America, Inc. v Garrison Productions, Inc., 733 F Supp 755, 762; see, Serio v Ardra Ins. Co., Ltd., 304 AD2d 362; Rebh v Rotterdam Ventures Inc., 252 AD2d 609; DeWitt Truck Brokers, Inc. v W. Ray Flemming Fruit Co., 540 F2d 681.) A judgment creditor can pierce a debtor's corporate veil where a principal has, inter alia, exerted complete domination and control, disregarded corporate formalities, and undercapitalized the corporation. (See, Rotella v Derner, 283 AD2d 1026; Austin Powder Co. v McCullough, 216 AD2d 825.) The corporate veil may be pierced where a principal dissolves a corporation to prevent the satisfaction of a judgment. (See, Solow

v Domestic Stone Erectors, Inc., 269 AD2d 199 ["Timing and circumstances of individual's decision to wind down judgment debtor's business raised fact issue as to whether that decision was based on a legitimate business judgment, or was designed to achieve the fraudulent purpose of preventing judgment creditors from satisfying their judgment"].)

That branch of the plaintiff's motion which is for leave to renew its prior motion for summary judgment against defendant Worldstar is granted. Upon renewal, those branches of the instant motion which are for summary judgment against defendant Worldstar are denied.

Those branches of the motion which are for summary judgment against defendant Chiang are denied as premature. (See, CPLR 3212[a].)

Short form order signed herewith.

J.S.C.