Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IA PART 19
Justice

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ROBERTINA NIKOLBIBAJ,

Plaintiff,

-against-

McROBERTS PROTECTIVE AGENCY, INC.,
and NOVATEK SECURITY SYSTEMS, INC.,

Defendants.

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Index: 13715/09

Motion Date:1/10/11

Seq. No. 002

The following papers numbered 1-15 read on Defendant's Motion for Summary Judgment (1) Seeking to dismiss the Plaintiff's complaint and all cross-claims against McRoberts Protective Agency, Inc. ("McRoberts") pursuant to CPLR 3212, or, alternatively (2) Seeking to strike the Note of Issue pursuant to 22 NYCRR 202.21(e); and (3) Seeking any other and further relief the court deems just, proper and equitable; and Defendant's Cross-Motion for Summary Judgment (1) Seeking to dismiss Plaintiff's complaint against Novatek Security Systems, Inc. ("Novatek") pursuant to CPLR 3212; (2) Seeking to dismiss any and all cross-claims against Novatek pursuant to CPLR 3212; and (3) Seeking such other further relief the court deems just, proper and equitable.

	Papers Numbered
Notice of Motion for Summary Judgment–.....	1-4
Notice of Cross-Motion [Settled by Stipulation].....	5-9
Plaintiff's Affirmation in Opposition ..... Exhibits.....	10-12
Reply Affirmation.....	13-15

Upon the foregoing papers it is ordered that the parties' motions are determined as follows:

BACKGROUND

This is an action to recover money damages for personal injuries allegedly suffered by Plaintiff on June 4, 2006 when a large piece of metal fell from the magnetic door locks above an exit door located on the 4th Floor of Elmhurst Hospital. Plaintiff alleges recklessness, carelessness and negligence on the part of the defendants, Novatek Security Systems, Inc. ("Novatek") and McRoberts Protective Agency, Inc. ("McRoberts"), which she contends either installed the magnetic door locks at issue or were responsible for those who did. Subsequently, the complaint and all cross-claims against Novatek were dismissed by stipulation of the parties dated January 7, 2011. McRoberts moves for summary judgment under CPLR §3212 to dismiss the complaint on the grounds that 1) McRoberts is not directly liable for Plaintiff's alleged injuries as it never performed the installation or maintenance work at Elmhurst Hospital, and 2) McRoberts is not vicariously liable for Plaintiff's alleged injuries since the magnetic locks were installed and maintained by Prosec Protection Systems, Inc. ("Prosec"), a separate and distinct entity, and that piercing the corporate veil would be inappropriate in this case because McRoberts does not exercise dominion or control over Prosec.

PROCEDURAL HISTORY

Plaintiff commenced the instant action by filing a summons with notice on May 26, 2009, whereby McRoberts joined issue by service of an answer dated July 22, 2009. Shortly thereafter, McRoberts filed a Motion for Summary Judgment based on the grounds that it was not involved in the installation or maintenance of the magnetic door lock at Elmhurst Hospital and that any claim against McRoberts' wholly-owned subsidiary Prosec is barred by the Statute of Limitations.

On January 11, 2010, the Court issued an order denying McRoberts' Motion, without prejudice, with leave to renew its motion for summary judgment upon the completion of discovery.

Specifically, the Court ordered the parties to engage in discovery to assess the propriety of a "piercing the corporate veil" claim against McRoberts with regard to the acts of its wholly owned subsidiary, Prosec.

On November 12, 2010, McRoberts filed this instant motion for summary judgment. Subsequently, the parties signed a stipulation dated December 13, 2010, withdrawing the portion of McRoberts' motion seeking to vacate the note of issue, which has been "so ordered" by the court. On January 7, 2011, the parties stipulated to discontinue, without prejudice, the action against co-defendant Novatek, including cross-claims asserted by McRoberts, and any and all cross-claims and counterclaims made by Novatek. On January 10, 2011, the within motion and cross-motion were respectfully referred to this court.

RULING

The court holds, as more fully set forth below, that the portion of McRoberts' motion for summary judgment seeking dismissal of the action against it pursuant to CPLR §3212 based on direct liability is granted and the portion of its motion for summary judgment seeking dismissal of the action against it pursuant to CPLR §3212 based on vicarious liability or a piercing the corporate veil is denied.

PROCEDURAL RULINGS

Initially, Plaintiff argues that McRoberts' motion should be denied on the grounds that McRoberts failed to submit a copy of all the pleadings pursuant to CPLR §3212(b); specifically, Novatek's answer was not attached to the moving papers. "[A] procedure defect may be overlooked if the record is 'sufficiently complete'" (Welch v. Hauck III, 18 AD3d 1096, 1098 (3rd Dept. 2005) quoting Greene v. Wood 6 AD3d 976 [2004]; see also *Stiber v Cotrone*, 153 AD2d 1006, 1007 [3rd

Dept 1989] lv denied 75 NY2d 703 [1989])). Although the CPLR section 3212(b) does require the submission of all prior pleadings, the court is not constrained by the papers submitted in the instant motion and may look to prior submissions to correct such a defect. (*Stiber*, 153 AD2d 1006, 1007 [3rd Dept 1989] lv denied 75 NY2d 703 [1989]). Since Novatek's answer was filed with the court in the prior summary judgment motion, which was denied with leave to renew after discovery, the papers are deemed sufficiently complete and Plaintiff's argument fails.

Plaintiff next argues that McRoberts' summary judgment motion should be denied on the grounds that the court's previous order prohibits this current motion and that the current motion is premature in that she requires additional time for discovery on the issue of vicarious liability. As noted above, the court dismissed McRoberts' motion specifically without prejudice to renewal so as to provide the parties with additional time to engage in discovery. Plaintiff has failed to demonstrate that she has engaged in any significant efforts to pursue additional discovery during the approximately one year period since the original order. A party may not oppose summary judgment based on that party's own inaction in effectuating discovery (*Doe v City of New York*, 19 Misc3d 936, 940 [Sup Ct, Queens County 2008]). Consequently, Plaintiff's contention that the current motion is premature is rejected, as is her argument that the prior order prohibited McRoberts from renewing its motion for summary judgment.

MCROBERTS' MOTION FOR SUMMARY JUDGMENT

McRoberts moves to dismiss Plaintiff's complaint pursuant to CPLR §3212, contending that the company 1) is not directly liable for Plaintiff's alleged injuries as it was not involved in the installation or maintenance of the magnetic door lock at Elmhurst Hospital; and 2) is not vicariously liable for the work done by Prosec, a wholly-owned subsidiary of McRoberts, as Prosec is a distinct

entity that operates independently of McRoberts and that piercing the corporate veil would be inappropriate in this case because McRoberts does not exercise dominion or control over Prosec.

In a motion for summary judgment under CPLR §3212, the moving party must tender sufficient evidence to demonstrate the absence of a material issue of fact entitling that party to a judgment as a matter of law (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Once the moving party has satisfied this requirement, the burden then shifts to the opposing party to demonstrate that an issue of material fact does in fact exist which will require a trial (*Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 129 [2000]). Summary judgment is a "drastic remedy" that should be denied in cases where there is even a small likelihood that a genuine issue of material fact may exist (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Defendant's first contention - that McRoberts is not directly liable for Plaintiff's alleged injuries is backed by two sworn affidavits submitted by McRoberts - one from McRoberts' President and CEO Meredith McRoberts dated July 23, 2009 attesting to the fact that McRoberts did not install or maintain the magnetic door locks on the 4th floor of the Elmhurst Hospital and one from Prosec's President Mark Kosloski stating that it was Prosec alone that installed and maintained such locks.

The burden then shifts to the Plaintiff, who fails to offer 1) evidence contradicting McRoberts' assertion that Prosec and not McRoberts was solely responsible for installing the magnetic door locks, or 2) any other evidence suggesting that McRoberts was in any way *directly* liable to Plaintiff. Consequently, the court will grant Defendant partial summary judgment on the issue of direct liability.

Defendant next argues that, as a matter of law, it cannot be held vicariously liable for Plaintiff's injuries based on the conduct of Prosec because McRoberts and Prosec are separate and

distinct entities and that piercing the corporate veil would be inappropriate in this case because McRoberts does not exercise dominion or control over Prosec.

Vicarious liability represents a situation in which one party is held liable for the actions of another and is predicated upon a party possessing "authority or control over the alleged wrongdoer" (*Kavanaugh v Nussbaum*, 71 NY2d 535, 546 [1988]). 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" (*Matter of Morris v New York State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 (1993)]. Among the factors courts will consider when deciding whether to pierce the corporate veil include an "overlap in ownership, officers, directors, and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form" (*John John, LLC v Exit 63 Dev., LLC*, 35 A.D.3d 540, 541 [2d Dept 2006]).

In the within action, Plaintiff has proffered evidence, in support of its contention that there is an overlap in ownership, demonstrating that McRoberts and Prosec share the same CEO, headquarters and corporate phone number. Therefore, plaintiff contends that McRoberts and Prosec may be one in the same rendering Prosec a "mere instrumentality" of McRoberts (*id.).*

However, McRoberts argues that the evidence supporting Plaintiff's claim was downloaded from the internet and thus is inadmissible hearsay as this evidence was not authenticated, and thus is insufficient, by itself, to warrant the denial of summary judgment.

The Court in *Zuckerman* clarified that although the movant in a summary judgment motion must tender evidentiary proof in admissible form, the standard applicable to the opposing party "is more flexible" and "as contrasted with the movant, [the opposing party] may be permitted to

demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

"Rules of evidence should be guardedly and cautiously applied on an application for summary judgment, particularly where there are many exceptions to general rules and where the application of a rule of evidence or the exceptions thereto can best be determined upon evidence offered at a trial" (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311-312 [1972] *quoting Exchange Leasing Corp. v Bundy*, 29 AD2d 828 [4th Dept 1968]).

Although "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v New York*, *supra*), courts appear to be more lenient in cases where there is reasonable likelihood that a substantial issue of material fact may be at play. For instance, in an action involving the introduction of medical testimony, the court in *Vermylen* permitted information gleaned from Internet websites rather than the sworn testimony of a medical expert to be used in helping to decide a motion for summary judgment (*Vermylen v Genworth Life Ins. Co. of N.Y.,* 28 Misc 3d 1236A (Sup Ct, New York 2010]). The court implied that since "courts often rely on medical texts to decipher the meaning of medical terms," an internet search may represent an acceptable means of substitution for this traditional method of research (*id.*). The court in *Vermylen* also pointed out in its decision that "[n]otably, plaintiffs do not challenge the reliability of these internet sites, nor contend that [defendant] has misrepresented the meaning of these medical terms" (*id.*).

Analogous to searching for medical terms on the internet, it is common for people seeking out public information regarding a company's CEO, telephone number or corporate address to consult the internet; reciprocally, companies often use the internet to present their company in a way

that they wish to have it perceived by the public. Significantly, as in *Vermylen*, McRoberts does not contend that the Plaintiff's internet research is inaccurate, only that it is not submitted in admissible form.

In the within action, Plaintiff sets forth an affidavit of her attorney stating the substance and basis for her allegations – specifically, that preliminary research indicates that there is a reasonable likelihood that McRoberts may exhibit dominion and control over Prosec or that the two may actually be one in the same for all practical purposes. Further, Plaintiff provides an excuse that she requires additional time for discovery to decipher the true relationship between McRoberts and Prosec. Taken together, the Plaintiff's submissions and excuse are sufficient to deny a motion for summary judgment, especially in light of New York's judicial philosophy that "[v]eil piercing is a fact-laden claim that is not well suited for summary judgment resolution" (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 344 [2d Dept 2006]) and that "[s]ummary judgment should be denied where there is any doubt, at least any significant doubt, whether there is a material, triable issue of fact" (*Phillips v Joseph Kantor & Co.*, *supra* at 311). Consequently, Defendant's motion for summary judgment seeking dismissal of the action against it pursuant to CPLR §3212 based on vicarious liability or a piercing the corporate veil is denied.

Based on the forgoing, it is

ORDERED that the portion of Defendant's motion for summary judgment seeking dismissal of the action against it pursuant to CPLR §3212 based on direct liability is granted; it is further

ORDERED that the portion of Defendant's motion for summary judgment seeking dismissal of the action against it pursuant to CPLR §3212 based on vicarious liability or a piercing the corporate veil is denied.

This constitutes the order of the court.

Dated: March 4, 2011
Jamaica, New York

Hon. Bernice D. Siegal
J.S.C.