

FX Funding LLC v Fox Rx Inc.

2024 NY Slip Op 31587(U)

May 1, 2024

Supreme Court, New York County

Docket Number: Index No. 656779/2016

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

-----X

FX FUNDING LLC,

Plaintiff,

- v -

FOX RX INC., AMERICAN TELEHEALTH NETWORK, INC.,
DR. REENA NANDI, and DR. DIPAK NANDI,

Defendants.

-----X

INDEX NO. 656779/2016

MOTION DATE _____

MOTION SEQ. NO. 009 010

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 333, 334, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 358, 360, 362, 364, 372, 373, 374, 375, 376, 377, 378

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 010) 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 335, 336, 337, 338, 357, 359, 361, 363, 365, 366, 367, 368, 369, 370, 371, 379

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this breach of contract action arising from three promissory notes, the court (Crane, J.), by order dated December 4, 2020, granted a motion by the plaintiff FX Funding LLC (“FX”), a litigation funding company, for partial summary judgment against the corporate defendants, Fox Rx, Inc. (“Fox”) and American Telehealth Network, Inc. (“ATN”) (collectively, the “Corporate Defendants”), as to two of the notes (MOT SEQ 001). On February 1, 2021, judgment was entered against the Corporate Defendants, jointly and severally, on these first two notes in the sum of \$3,936,002.06. By order dated June 28, 2021, the court denied FX’s motion for partial summary judgment as against the Corporate Defendants on the third note (MOT SEQ 004). FX appealed and, by order dated April 28, 2022, the Appellate Division, First Department reversed this court and granted the motion. On January 20, 2023, judgment was entered against the Corporate Defendants, jointly and severally, on the third note in the principal sum of \$500,000.

It appears that FX attempted to file a Note of Issue on January 2, 2023, more than six years after the action was commenced.

FX now moves pursuant to CPLR 3212 for summary judgment on the issue of piercing Fox's corporate veil to hold the individual defendants, Reena Nandi ("Reena") and Dipak Nandi ("Dipak") (collectively, the "Nandis"), jointly and severally liable as judgment debtors on the two judgments previously entered in this case (MOT SEQ 009). In effect, to amend the existing judgments. The Nandis oppose the motion and separately move pursuant to CPLR 3212 for summary judgment dismissing FX's causes of action, numbered here as in the amended complaint, for (3) breach of contract, (4) declaratory judgment, and (5) unjust enrichment, as asserted against them individually (MOT SEQ 010), which motion is in turn opposed by FX. Both motions are denied.

With respect to FX's motion—the third summary judgment motion it has filed in this case—it is well settled that "[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification." Jones v 636 Holding Corp., 73 AD3d at 409 (1st Dept. 2010); see Landis v 383 Realty Corp., 175 AD3d 1207 (1st Dept. 2019). To justify a successive summary judgment motion, purportedly "new" evidence must have been "unavailable to [the movant] before the prior motion[.]" Lorne v 50 Madison Ave LLC, 198 AD3d 483, 483 (1st Dept. 2021); see Landis v 383 Realty Corp., *supra*; Maggio v 24 West 57 APF, LLC, 134 AD3d 621, 625-26 (1st Dept. 2015). "Other justification" may include "an intervening appellate decision in the same case that clarifies or changes the controlling law." Amill v Lawrence Ruben Co., Inc., 117 AD3d 433, 433-34 (1st Dept. 2014). No such showing was made, or even attempted, by FX, on this motion. Indeed, despite its prior summary judgment motion having been initially denied as an improper successive motion, FX does not even acknowledge the fact that it is now pursuing a second successive summary judgment motion. Accordingly, FX's motion is denied. The plaintiff is aware of the post-judgment enforcement procedures provided in CPLR article 52.

The Nandis' motion is likewise denied. It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New

York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

“Generally, a plaintiff seeking to pierce the corporate veil must show 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.” Sutton 58 Assocs. LLC v Pilevsky, 189 AD3d 726, 729 (1st Dept. 2020), *quoting* Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 47 (2018). “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.” D'Mel & Associates v Athco, Inc., 105 AD3d 451, 452 (1st Dept. 2013) (internal quotation marks omitted).

By order dated July 2, 2021, this court denied a prior motion by the Nandis (MOT SEQ 003) which was made pursuant to CPLR 3211(a)(7) to dismiss the same three causes of action that are the subject of their present summary judgment motion. In that order, the court held that FX's allegations, and Dipak's sworn admissions, provided a sufficient basis for veil piercing. On appeal, the First Department affirmed, holding that individual liability was sufficiently alleged under a veil piercing theory based on allegations that:

[T]he individual defendants disregarded corporate formalities, intermingled corporate and personal funds, used loan proceeds for personal matters rather than corporate uses, and undercapitalized the corporation. In addition . . . Dr. Dipak Nandi . . . stated that he alone ran corporate defendant Fox

RX, Inc., that individual defendant Dr. Reena Nandi was an officer in name only, and that he had used loan proceeds to service his personal mortgages on two Long Island homes and to pay personal tax bills.

FX Funding LLC v Fox RX Inc., 201 AD3d 519, 519 (1st Dept. 2022). The Nandis' arguments and evidentiary submissions in support of the present motion do not dictate a different result.

The Nandis submit affidavits from Reena and Dipak, both of whom aver that, while Reena is the 100% shareholder of Fox and signed the subject promissory notes in her capacity as the company's corporate principal, she had no substantive involvement in the company, which was solely and entirely run by Dipak. They further aver that Reena was made the company's sole owner and corporate principal, and that she signed the subject promissory notes, because, *inter alia*, Reena had better credit than Dipak, which was important for purposes of Fox obtaining the subject loans from FX. These same facts, which were before the court on the defendants' prior, unsuccessful motion to dismiss, are insufficient to demonstrate, *prima facie*, that the Nandis did not completely dominate Fox in respect to the subject promissory notes.

Further, Dipak admits in his affidavit that most of the FX loan proceeds ("over \$2 Million" of the \$2,250,000 borrowed) were transferred from Fox to Princetec Inc. ("Princetec"), another corporate entity that he personally controlled and for which he was the sole decision-maker. He claims that this was done to reimburse Princetec for money it paid to the law firm of Covington & Burling, LLP ("Covington") on behalf of Fox for Covington's investigation of Fox's *qui tam* lawsuits, and not, as FX contends, to divert the loan proceeds to the Nandis' personal use. However, other than the conclusory and self-serving statements in Dipak's affidavit, the evidence in support of this claim consists of a single exhibit containing bank records for a series of wire transfers from Princetec to Covington, though there is nothing in the exhibit itself that indicates the purpose of the payments reflected therein. Moreover, the defendants submit no corporate resolutions, memos, minutes, emails, notes, bills, invoices, statements, loan documents, or financial records of any kind to demonstrate that Princetec paid or advanced money for any purpose on behalf of Fox, let alone that Fox owed money to Princetec in connection with the *qui tam* litigations. Nor do the defendants produce any documents—bills, invoices, retainer agreements, statements, or any other documents—evidencing services

rendered by Covington to either Fox or Princetec, let alone any services rendered in connection with the *qui tam* litigations.¹ In short, there is nothing to substantiate the claim that Princetec's payments to Covington were made on behalf of Fox, let alone that they had anything to do with the *qui tam* litigations or any other legitimate corporate purpose.

At best, the Nandis demonstrate, via Fox's bank records, that they did not pay for personal expenses directly out of the FX loan proceeds while those funds were being held in Fox's corporate account. However, this is insufficient to demonstrate, *prima facie*, that the Nandis did not divert the FX loan proceeds to their own personal use given Dipak's admission that the overwhelming majority of the subject loan funds were transferred from Fox to Princetec.

Moreover, even if the Nandis' submissions sufficed to establish their *prima facie* entitlement to summary judgment, which they do not, FX's evidentiary submissions in opposition are more than sufficient to raise a triable question of fact as to whether the Nandis used their domination of Fox to commit an injurious fraud or wrong against FX by diverting to their personal use all or virtually all of the proceeds of the three FX loans, which have not been repaid. Specifically, FX submits voluminous bank records for Fox, Princetec, and 30 CPS LLC ("30 CPS"), which is yet another entity that Dipak, by his own admission, solely and personally controlled. These records, together with other documents submitted by FX such as property deeds and mortgage records, demonstrate that the Nandis transferred virtually all of the FX loan funds to Princetec or 30 CPS (via Princetec), and that these funds were then used to pay hundreds of thousands of dollars in personal and family expenses, including mortgage payments, tax payments, car payments, gym memberships, country club fees, college and law school tuition, home utility bills, pool cleaning services, landscaping services, event tickets, car washes, grocery bills, nail and hair salons, checks payable to cash, checks payable to their children for foreign travel, and wire transfers in excess of \$500,000 to entities in India.

Accordingly, upon the foregoing papers and the court's prior orders, it is

¹ The court notes that, in reply to the same argument concerning Princetec's payments to Covington raised in opposition to FX's summary judgment motion, FX submits Covington's response to FX's subpoena duces tecum, dated August 15, 2022, in which Covington declares that it has no invoices, bills, statements or other documents detailing services rendered by the firm to either Fox or Princetec.

ORDERED that the motion of the plaintiff FX Funding LLC pursuant to CPLR 3212 for summary judgment (MOT SEQ 009) is denied; and it is further

ORDERED that the motion of defendants Reena Nandi and Dipak Nandi pursuant to CPLR 3212 for summary judgment (MOT SEQ 010) is denied; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/1/2024
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE