

**Simmons v AAA Buffalo Development Corp.**

2001 NY Slip Op 30019(U)

February 20, 2001

Sup Ct, Suffolk County

Docket Number: 0014272/2721

Judge: Donald Kitson

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INDEX  
NO. 97-14272

**SUPREME COURT - STATE OF NEW YORK**  
**PART 29 SUFFOLK COUNTY**

Present:

Hon DONALD KITSON  
JUSTICE

MOTION DATE: 11/01/00  
SUBMIT DATE: 01/18/01  
MOTION NO.: 002 MD  
003 MD

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ANNA MARIE SIMMONS and JEFFREY SIMMONS, JR.,  
both infants under 14 years of age, by their  
parents and natural guardians, LISA MARIE  
SIMMONS and JEFFREY SIMMONS, Individually,  
Plaintiffs,

PLTF'S/PET'S ATTY:  
LEWIS, JOHS, AVALLONE, AVILES &  
KAUFMAN  
425 BROAD HOLLOW ROAD STE - 325  
MELVILLE, NY 11747-4712

DEFT'S/RESP'S ATTY:  
GANDIN, SCHOTSKY, RAPPAPORT,  
GLASS & GREENT, LLP  
445 BROAD HOLLOW ROAD  
MELVILLE, NY 11747

- against -  
AAA BUFFALO DEVELOPMENT CORP., AAA BUFFALO  
ONE DEVELOPMENT CORP., LAWRENCE LOSCALZO,  
VICTOR PAFUNDI, and JACKIE FHIMA,

MICHAEL V. SCHULMAN, P.C.  
255 EXECUTIVE DRIVE STE. 305  
PLAINVIEW, NY 11803

Defendants.

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The Court in its deliberations herein has considered:

1. Notice of Motion and supporting papers, including Memorandum of Law;
2. Notice of Cross-Motion and supporting papers;
3. Affirmation in Opposition and Memorandum of Law;
4. Affirmation in Reply;
5. Reply Affirmation and Memorandum of Law.

Defendant, LAWRENCE LOSCALZO, seeks summary judgment pursuant to CPLR §3212. Defendant, VICTOR PAFUNDI, cross-moves for summary judgment.

Plaintiffs commenced this action for personal injuries sustained in a fire occurring on 518 Main Road, Aquebogue, NY. The two (2) infant plaintiffs, ANNA MARIE SIMMONS and JEFFREY SIMMONS, JR., sustained serious injuries, the most serious being suffered by ANNA MARIE SIMMONS who sustained second degree burns over almost seventy (70%) percent of her body resulting in degloving of the face, scalp, hands, trunk, chest, back, hips and destruction of her ears, nose and loss of her fingers and hair. The plaintiffs allege that defendant, LAWRENCE LOSCALZO, failed to provide smoke detectors on the premises, failed to provide for the safety of the plaintiffs and warn the plaintiffs of the hazardous condition. There are

also alleged code violations of the Riverhead Town Code and Title 9 of NYCRR.

The premises in question are owned by defendant, AAA BUFFALO ONE DEVELOPMENT CORP. The alleged owner of the premises, AAA BUFFALO ONE DEVELOPMENT CORP., did not have any insurance on the premises. LAWRENCE LOSCALZO is President of said corporation. Defendant, VICTOR PAFUNDI, rented the premises to the SIMMONS family. Plaintiffs paid their share of rent for the premises to Mr. PAFUNDI. The balance of the rent was paid by the Department of Social Services. Counsel for LAWRENCE LOSCALZO states that summary judgment should be granted to his client because a corporate officer cannot be held personally responsible for any alleged corporate wrongdoing. Counsel further argues that plaintiffs have failed to meet their burden for piercing the corporate veil. (see, **Maggio v Becca Const. Co., Inc.**, 229 AD2d 426, 644 NYS2d 802, (2<sup>nd</sup> Dept., 1996))

Counsel for defendant, VICTOR PAFUNDI, argues for summary judgment in that this defendant was acting as agent for AAA BUFFALO ONE DEVELOPMENT CORP. and an agent cannot be held liable for a disclosed principal on breach of contract or negligence. The Court notes that the Housing Verification form lists Mr. PAFUNDI as authorized agent.

Summary judgment is a drastic remedy which should not be granted if there is any doubt as to the existence of a triable issue. (**Barclay v Denckla**, 182 AD2d 658, 582 NYS2d 252 (2<sup>nd</sup> Dept., 1992)) It is a well-settled that the movant has the burden of proof to demonstrate the absence of any material issues of fact. (**Tessier v New York City Health and Hospitals Corporation**, 177 AD2D 626, 576 NYS2D 331 (2<sup>ND</sup> Dept., 1991)). Thereafter, the opposing party must produce evidentiary proof, in admissible form, which demonstrates that a trial is required because of material questions of fact. (**Taylor-Warner Corp. v Minskoff**, 167 AD2d 382, 561 NYS2d 797 (2<sup>nd</sup> Dept., 1990)).

Defendant, VICTOR PAFUNDI, has failed to show entitlement to summary judgment. It is true that an agent for a disclosed principal, acting within his representative capacity and under the direction of the principal cannot be held liable. (see, **Lennon v Oakhurst Gardens Corp.**, 229 AD2d 897, 645 NYS2d 652, (3<sup>rd</sup> Dept., 1996)) Nevertheless, according to the Housing Verification form, Mr. PAFUNDI wrote that he was the agent for Mr. LOSCALZO. He did not disclose that he was the agent for the corporate owner of the premises. Both defendants, LOSCALZO and PAFUNDI, now allege that AAA BUFFALO ONE DEVELOPMENT CORP., was the owner of the leased premises.

It is clear to this Court that, at best, defendant/PAFUNDI was acting as an agent for a partially disclosed principal and as such, he cannot be absolved of liability. (see, **Tarolli Lumber Co., Inc v Andreassi**, 59 AD2d 1011, 399 NYS2d 739 (4<sup>th</sup> Dept., 1977); **New England Marine Contractors, Inc. v Martin**, 156 AD2d 804, 549 NYS2d 535 (3<sup>rd</sup> Dept., (1989); **Continental Manor II Condominium Homeowners Association v Depew**, 2000 NY Slip Op. 10193, 717 NYS2d 206 (2<sup>nd</sup> Dept.) Accordingly, the motion for summary judgment of defendant, PAFUNDI, is denied in its entirety.

Defendant LOSCALZO, has shown entitlement to summary judgment because he is a corporate officer only, and not the owner of the premises.

Plaintiffs, however, demonstrate factual issues precluding summary judgment. The alleged owner of the premises, AAA BUFFALO ONE DEVELOPMENT CORP., did not have any insurance on the premises. The Department of Social Services supplemented the payment of rent and paid \$300 for monthly rent directly to LAWRENCE LOSCALZO. No payments were made to the corporate defendant. The Housing Verification form and the Vendor Data mentioned LAWRENCE LOSCALZO as the landlord and list his social security number. All rent payments by the plaintiff were given to defendant, PAFUNDI, in cash, which was delivered to LAWRENCE LOSCALZO. The corporate defendant reported on its income tax returns for 1996 \$1,800.00 in rental income. The rental payments consisted of \$600.00 per month in total and as such, the corporate defendant only reported half of the income received.

Based on this information, the Court finds that plaintiffs have met their burden of showing a triable issue of fact. The decision to pierce the corporate veil depends on particular facts and circumstances of each case. In order to pierce the corporate veil, plaintiffs must show that the owner exercised complete domination in respect to the rental property and that such domination was used to commit fraud or wrong against the plaintiffs resulting in plaintiffs' injuries. (see, **Morris v NYS Department of Taxation and Finance 82 NY2d 135, 603 NYS2d 807 (1993)**). In this case, there exists a question of fact as to Mr. LOSCALZO's complete domination of the corporation. The rental payments were made to Mr. LOSCALZO. The forms listed Mr. LOSCALZO as landlord. The total rental income was not declared by the corporation and as such, the Court finds that summary judgment is precluded. (see, **Anderson Street Realty Corp. v RHMB New Rochelle Leasing Corp., 243 AD2d 595, 663 NYS2d 279 (2<sup>nd</sup> Dept., 1997)**)

Based on the foregoing, both motion and cross-motion for summary judgment are denied in their entirety.

The foregoing constitutes the ORDER of this Court.

Dated: February 20, 2001

  
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J.S.C.