

Nguyen v Indosuez

2004 NY Slip Op 30213(U)

July 6, 2004

Supreme Court, New York County

Docket Number: 0600197/2003

Judge: Harold B. Beeler

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

PRESENT: HAROLD BEELER
J.S.C.

PART 9

0600197/2003

NGUYEN, PHAT TAN
VS
INDOSUEZ, BANQUE

INDEX NO. 600197/2003

MOTION DATE 003

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

SEQ 3

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
FILED
JUL 27 2004
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant's
Credit Agricote Indosuez and Credit Agricote Indosuez
North America, Inc. to dismiss the complaint
is resolved in accordance with the ordered
memorandum decision of today's date.

A preliminary conference is scheduled for
Tuesday, September 7, 2004 at 3:00pm
at lot 9, 71 Thomas St. Rm 304

7/1/04

HAROLD BEELER
J.S.C.

NOTICE/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 9

-----X
PHAT TAN NGUYEN, individually and on
behalf of all employees similarly
situated; NGOC VAN NGUYEN, individually
and on behalf of all employees similarly
situated; LIEU THI DINH, individually and
on behalf of all employees similarly
situated; LARA HO, aka, TUYET T. HO,
individually and on behalf of all
employees similarly situated; TRAN BAO
THAI, individually and on behalf of all
employees similarly situated; LE-DUNG T.
NGUYEN, individually and on behalf of all
employees similarly situated;

Index No.
600197/03

Motion Seq: 003

Plaintiffs,

-against-

BANQUE INDOSUEZ, CREDIT AGRICOLE INDOSUEZ,
CREDIT AGRICOLE INDOSUEZ NORTH AMERICA,
INC., COMPAGNIE FRANCAISE DE L'ASIE, aka
BANQUE FRANCAISE DE L'ASIE, BANQUE
FRANCAISE COMMERCIALE,

Defendants.

-----X

HAROLD BEELER, J.:

In motion sequence 003, defendants Credit Agricole Indosuez
(CAI) and Credit Agricole Indosuez North America, Inc., (CAINA)
move, pursuant to CPLR 3212, for an order granting summary
judgment and dismissing the complaint of plaintiffs in its
entirety. In a previous order of this court, in which motion
sequence numbers 001 and 002 were consolidated, the relevant
facts in the action were articulated. They will not be fully
repeated herein.

Plaintiffs, who were employees of former defendant CFA (previously known as Banque Francaise de l'Asie) and named defendant Banque Francaise Commerciale (BFC), seek back pay and pensions allegedly promised to them upon the fall of Saigon, Viet Nam in 1975.¹ By order of this court dated November 10, 2003, CFA was dismissed from this action due to improper service. Defendants assert, and plaintiffs do not contest, that BFC has never been served in this matter.

CAINA is a subsidiary of CAI and a sister corporation of CFA and BFC. Plaintiffs make no allegations whatsoever about CAINA in their complaint or motion papers. In oral arguments, plaintiffs also failed to set forth any claims against CAINA. Further, CAINA has affirmed that it has no relationship with CFA, BFC, or any of the actions or transactions that are the subject of this litigation. See Walsh Affidavit, ¶¶ 5-13. Finally, plaintiff has not opposed CAINA's motion for summary judgment (or even mentioned CAINA in their Memorandum of Opposition). As such, the motion for summary judgment dismissing CAINA from the action is granted.

¹Plaintiffs are proposed as class representatives to bring actions against defendants for constructive trust, resulting trust, breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, fraud, conversion, and an accounting. By oral order of this court, on May 20, 2004, plaintiffs time for application for class certification has been extended pending decision on this motion.

Plaintiffs maintain that CFA and BFC have made assurances on several occasions that they intend to fulfill their obligations to compensate plaintiffs for back pay and pensions. According to plaintiffs, on April 9, 1998, in a letter from its President to the President of the French National Assembly, CAI again acknowledged the debts owed to plaintiffs. Plaintiffs made demand for payment on October 26, 1998; defendants did not make payment. On January 20, 1999, defendants repudiated the alleged financial obligations to plaintiffs.

Plaintiffs maintain that CAI, CFA, and BFC do not have separate corporate identities, but rather are alter egos of each other. Plaintiffs contend that the financial obligations may be attributed to CAI because CAI is the parent and owner of almost all voting shares of both CFA and BFC. To support this contention, plaintiffs submit the opinion of a forensic business expert that "the purported subsidiaries cannot be fairly said to be separate from their would be parent corporation." Sultan Affidavit in Opposition, ¶ 12.

The opinion of the forensic business expert was based upon the Notes to the Consolidated Financial Statements of CAI. CAI owns 100% and 99.55% of the voting shares of CFA and BFC, respectively, and claims full consolidation, under French law, of CFA and BFC on its balance sheets. Full consolidation under French law is required when there is: (I) ownership of more than

50% of the voting rights of the entity; (ii) ownership of 40% of the voting rights and appointment of the majority of the board for two successive fiscal years; or (iii) "dominant influence" over the entity. Annual Report, Sultan Affidavit, Exhibit 1 at 71.

That full consolidation, in the words of CAI's Annual Report includes "[f]inancial statements of financial institutions, finance, real estate or portfolio management companies over which [CAI] has exclusive control." *Id.* (emphasis added). In turn, Note 2 of the Annual Report states that "[e]xclusive control is assumed when it is possible for [CAI] to manage the financial and operational policies of another entity so as to benefit fully from the activities of the relevant entity." Sultan Affidavit, Exhibit 1 at 71 (emphasis added).

Summary judgment is governed by CPLR 3212, under which CAI must show that plaintiffs' cause of action has no merit. Here, CAI must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 (1985); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957).

CAI affirms, and has submitted materials tending to show, that: (I) CFA and BFC are adequately capitalized; (ii) all

corporate formalities have been observed; (iii) CFA and BFC are incorporated separately; (iv) the boards of directors have no persons in common among the corporations; (v) tax returns have been filed separately; (vi) there has been no commingling of funds; and (vii) there has been no guarantee of underlying debts or indemnification of liabilities of CFA and BFC by CAI.

CAI, CFA, and BFC all aver that there is no contract or provision in their memoranda and articles of association which would allow CAI to direct the use of the subsidiaries' assets, liabilities or off-balance sheet items in the same way and to the same extent it controls its own. See Pascale Dauplains Affidavit, ¶¶ 2, 3; Boutaudou Reply Affidavit, ¶¶ 2, 3; Badjoko Wa Lileko Reply Affidavit, ¶ 2.

Nonetheless, the Notes to the Consolidated Financial Statements of CAI state, quite clearly, that "[i]n the absence of contracts or provisions of the memorandum and articles of association, the consolidating company is assumed to exercise dominant influence on financial institutions or investment companies provided it holds at least 20% of the voting rights and that no other shareholder or group of shareholders holds more than that percentage." CAI Annual Report, Sultan Affidavit, Exhibit 1 at 71 (emphasis added).

Dominant influence, according to the CAI Annual Report, exists "when the consolidating company has the possibility of

using or of directing the use of assets, liabilities or off-balance sheet items in the same way that it controls such items in its own entity." Id.

Thus, although the affirmations submitted by CAI attempt to establish that there is no dominant influence, the Annual Report conflicts with such a conclusion. An Annual Report is the type of outside material upon which an expert could base a preliminary opinion as to the function and relationship of subsidiaries vis-a-vis their parent corporation. Hence, the evaluation of the Annual Report by plaintiffs' forensic business expert is sufficiently probative to raise this issue of fact. See Romano v Stanley, 90 NY2d 444, 452 (1997); see also O'Sullivan v Presbyterian Hosp. In City of New York at Columbia Presbyterian Medical Center, 217 AD2d 98, 101 (1st Dept 1995) (expert testimony of nonmovant is entitled to favorable inference on summary judgment).

Further, reviewing the Annual Report, the court finds that the conclusions of plaintiffs' expert are not so highly speculative as to deem them devoid of probative force, or insufficient to withstand summary judgment. Diaz v New York Downtown Hosp., 99 NY2d 542, 544-545 (2002). The plain language of the Annual Report would give rise to the inferences that: (I) CAI has "exclusive control" of the entities; (ii) CAI manages the financial and operational policies of the entities so as to

benefit fully from the activities of the entities; or (iii) that an assumption that CAI exercises dominant influence on the entities is valid. See CAI Annual Report, Sultan Affidavit, Exhibit 1 at 71, 79.

Moreover, given that CAI and plaintiffs have conflicting analyses of the implications of the statements in the Annual Report, in order to reach a determination, the court would be constrained to weigh the credibility of the deductions and inferences contained in the Sultan Affidavit. It is now well established that where expert testimony is in conflict, an evaluation of the credibility of the testimony is the province of the trier of fact, and summary judgment is inappropriate. Scahall v Unigard Ins. Co., 222 AD2d 1070, 1071 (4th Dept 1995) (conflicting expert opinion should not be resolved on summary judgment); Roundpoint v V.N.A. Inc., 207 AD2d 123, 126 (3rd Dept 1995) (the credibility and weight afforded an expert opinion are outside the scope summary judgment and solely within the province of the jury); Coates v Peterson & Sons, Inc., 48 AD2d 890 (2nd Dept 1975) (weight to be accorded expert testimony is matter for the jury).

Furthermore, it is also well established that on summary judgment, conflicts between the facts averred by the movant and the nonmovant should be resolved in favor of the nonmovant. Myers v Fir Cab Corp., 64 NY2d 806 (1985); Rotuba Extruders, Inc.

v Ceppos, 46 NY2d 223, 231 (1978) (summary judgment should not be granted where there is any doubt as to the existence of a triable issue).

CAI also argues that plaintiffs have not shown that the alleged actions of CAI, as an alter ego of CFA and BEC, were fraudulent. CAI concludes that, as a matter of law, this fatal omission requires the dismissal of plaintiff's claim. The court disagrees. There are two elements necessary to an action to pierce the corporate veil of a defendant: (i) that "the owners exercised complete domination of the corporation in respect to the transaction attacked"; and (ii) "that such domination was used to commit fraud or wrong against the plaintiff which resulted in plaintiff's injury." Morris v New York State Dept. of Fin., 82 NY2d 135, 141-142 (1993) (citations omitted) (emphasis added). Subsequently, in the same decision, the Court of Appeals describes the required showing as one that the corporation "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" against the party. Id. at 142 (emphasis added).

Therefore, while fraud will satisfy one of the requirements to pierce the veil of a corporation, abuse of the corporate form to perpetrate a "wrong" against plaintiff also satisfies that requirement. Here, plaintiffs allege that CAI used their status as parent to avoid their financial obligations and deny

plaintiffs their back pay and pensions. If proven, such facts might be sufficient, under New York law, to disregard CAI's corporate form. See e.g. International Aircraft Trad. Co. v Manufacturers Trust Co., 297 NY 285, 292 (1948) (courts may pierce the corporate veil to "prevent fraud or to achieve equity") (emphasis added).

As a final matter, plaintiffs maintain that facts essential to justify their opposition to the motion for summary judgment are under the control of CAI. CPLR 3212(f). Particularly, plaintiffs maintain that CAI's handling of the back-pay and pensions liabilities on their books may be probative. While the court agrees that such information may be probative of responsibility for the financial obligations, it is hard to imagine that such information could be fully gleaned without scrutiny of the books of CFA and BFC, who remain unserved in this matter.

Nonetheless, as issues of fact precluding summary judgment have been raised, and the plaintiffs are entitled to every favorable inference, the motion of CAI to dismiss claims against it is denied.

Accordingly, it is hereby

ORDERED that the motion of defendants Credit Agricole Indosuez and Credit Agricole Indosuez North America, Inc., to dismiss the complaint of plaintiffs is granted to the extent of

dismissing the complaint against Credit Agricole Indosuez North America, Inc., and the complaint is hereby severed and dismissed as against that defendant, and the Clerk is directed to enter judgment in favor of Credit Agricole Indosuez North America Inc. Inc. and the motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

A preliminary conference is scheduled for Tuesday, September 7, 2004 at 3:00 pm at Part 9, 71 Thomas Street, Room 304.

This constitutes the decision and order of the court.

Dated: July 6, 2004

ENTER:



HAROLD. B. BEELER, JSC

HAROLD BEELER
J.S.C.

FILED
JUL 27 2004
NEW YORK
COUNTY CLERK'S OFFICE