

Klein v Cavi Acquisition, Inc.
2006 NY Slip Op 30103(U)
October 11, 2006
Supreme Court, New York County
Docket Number: 0060129/2006
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART 16 **IA Part 16**

Joel J. Klein

INDEX NO. 601299/06

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

Cavi Acquisition, Inc.

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

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

PLEASE DO NOT REMOVE JUDGMENT
and the County Clerk
obtain only by email or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Dated: OCT 11 2006

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Alice Schlesinger
ALICE SCHLESINGER

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

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

-----X

JOEL J. KLEIN,

Petitioner,

-against-

Index No. 601299/06

Motion Seq. No. 001

CAVI ACQUISITION, INC., and LOEB HOLDING
CORPORATION,

Respondents..

-----X

SCHLESINGER, J.:

Petitioner Joel J. Klein has moved for relief in the following two ways. First, he urges me to find that there was a fraudulent transfer of funds between Cavi Acquisition, Inc. ("Cavi") and Loeb Holding Corporation ("Loeb"). Klein has a money judgment against Cavi, obtained by default in Federal District Court for the Southern District of New York on December 29, 2005. Second and related to the first, Klein urges me to find that Cavi and Loeb are alter-ego entities, thereby making Loeb liable for this judgment. As to the alleged fraudulent transfer of funds, Klein is referring to a loan in the amount of \$193,245 made by Loeb to Cavi dated May 28, 2004 which was filed as a secured loan pursuant to the UCC on April 28, 2005. Klein says this loan violates New York's Debtor and Creditor Law. Loeb and Cavi strenuously oppose all requested relief.

Some historical background as to the relationship between these and related parties is highly relevant here. In 1996, Joel Klein commenced working for Opinion One ("Opinion") as its Executive Director. His work continued in this capacity until January of 2003 when he was offered and accepted an Employment Agreement with

a successor to Opinion One, known as Opinion One Holding Company, LLC ("Opinion Holding"). Klein was to continue as Executive Director and perform the same duties as he had been performing for Opinion One. The Agreement was for a term of three years but could be terminated for cause. The Agreement defined "cause" and further provided that the remuneration to which Klein was entitled upon termination for cause was extremely limited. However, if he was terminated for some reason other than for cause, Klein would be entitled to a generous severance payment. The Agreement was signed by Klein as "employee" and by Thomas L. Kempner as President of Loeb Holding Corporation, a "Managing Member" of the employer corporation Opinion One Holding Company, LLC. The Employment Agreement also contained sections dealing with Confidentiality (#6) and Arbitration (#13).

On February 20, 2004, Klein's employment was terminated. He received a letter of that date signed by "Opinion One, Inc.'s" President and CEO Thomas J. Zoretich that read in its entirety as follows:

Dear Joel,

Please be advised that Opinion One, Inc. is in default under certain obligations to a secured creditor of the company that holds liens against all assets of the company and, as a result, such creditor has taken possession of substantially all of the company's assets. Accordingly, Opinion One, Inc. is ceasing its operations effective immediately and will, therefore, neither require your continued services nor be able

to pay any additional money to you, except for services rendered through the date of this letter.

What preceded the February 20th termination letter were two Agreements between Opinion and Opinion Holding in which Opinion was described as the “debtor” and Opinion Holding as the “secured party.” The first document, a Security Agreement dated February 6, 2004, described an indebtedness in the amount of \$3,305,140, \$758,300 of which Opinion Holding held pursuant to promissory notes originally executed in favor of Loeb Holding Corporation. Zoretich signed for Opinion as President and CEO, and Kempner signed as President of Opinion Holding. The second Agreement between these entities, dated February 18, 2004 and named “Voluntary Repossession and Release Agreement,” was also signed by Zoretich and Kempner in their same capacities. This Agreement stated that the notes earlier referred to were in default and therefore the debtor company (Opinion) had agreed to surrender its assets to the secured party (Opinion Holding) in full satisfaction of its obligations.

Then on March 19, 2004 another Agreement was entered into, this time between Cavi Acquisition, Inc. (Cavi Acquisition) and Loeb Holding Corp. and individuals William J. Wilson, Bruce Lev and Thomas Zoretich, the shareholders of Cavi Holding, Inc. It was termed a Share Exchange Agreement and by its terms Cavi Acquisition would obtain all the shares of Cavi Holding.

On May 25, 1984 Klein filed a demand for arbitration against Opinion One with the American Arbitration Association pursuant to his January 1, 2003 Employment Agreement. Then Cavi, in June 2004, commenced litigation in Ohio against Klein, claiming that Klein had breached his confidentiality agreement with Opinion Holding. Klein answered. He then filed a second demand for arbitration in New York on September 10, 2004. On October 12, 2004 Cavi Holding, Opinion and Loeb Holding filed an Order to Show Cause here in New York to stay the arbitration pursuant to CPLR 7503(b), arguing they were not signatories to Klein's Employment Agreement. They also argued the dispute was not subject to arbitration.

This motion came before this Court on October 27, 2004, wherein after hearing oral argument I found first that the termination was arbitrable, and secondly that the arbitration should include all entities named except for Loeb Holding Corporation, Inc. In making that determination, I said the following (at pages 6-7):

There is no question that there was a connection between Loeb Holding Corporation and these other entities, specifically Opinion One Holding, which, I guess had taken over from Opinion One Incorporated which then became Cavi Holding and now apparently is some kind of successor moreover is now Cavi Acquisition.

But Loeb itself had nothing really more than a connection. It wasn't a successor or assignee....

I then went on to discuss the Court of Appeals' decision *TNS Holding Inc. v. MKI Securities*, 92 NY2d 335 (1998), which held that when a party is seeking to

pierce the corporate veil in circumstances as these, he must satisfy a two- pronged test, and produce evidence of domination together with evidence to show that their non-inclusion in the arbitration would lead to some kind of inequity, fraud or malfeasance. I found then that the test had not been satisfied.

But the controversy before this Court did not end there because Klein, this time as petitioner, asked me to direct that Cavi Acquisition, not mentioned in the earlier demand to arbitrate, be included in the arbitration. Cavi Acquisition vigorously opposed this request, arguing that it had never signed any agreement with Klein and that when the Employment Agreement was signed in January 2003, Cavi was not even on the scene. Counsel for Cavi again cited the *TNS Holdings* case. However, this time I did find that Cavi Acquisition's non-inclusion in the arbitration would lead to an inequitable result. I pointed to the earlier agreements in February and March of 2004 and how they formed a predicate for Cavi's having standing to bring its lawsuit against Klein in Ohio in June of 2004. I found it inconsistent for Cavi to have standing to argue in Ohio that it had acquired all the rights under the Confidentiality Agreement while denying that it had obligations under the Employment Agreement sufficient to justify its participation in the arbitration in New York. I also found that Cavi and Opinion Holding were carrying on the same business with the same management, except for Klein, and thus there was a consolidation or merger between the earlier and the successor corporations.

After that, on December 19, 2004 Cavi withdrew its claims in Ohio without prejudice. However, it brought a second complaint against Klein and his new company Ocucom on May 19, 2005, alleging unfair competition and other related causes of action.

Arbitration in New York was held on June 21 and June 22, 2005. The arbitrator found that Klein had been terminated without cause and in violation of his Employment Agreement. The issue of damages was put off for additional briefing and on August 30, 2005, Klein was awarded \$434,583 plus attorneys' fees of \$150,000.

Then, on August 31, 2005, Cavi entered into an Asset Purchase and Sale Agreement with Interviewing Services of America ("ISA") which was signed on behalf of "The Company," Cavi, by Thomas Zoretich and on behalf of Loeb Holding Corp. by William J. Wilson and Bruce Lev. Made a part of the Agreement is Schedule 3.6 which summarizes the earlier discussed arbitration and litigation to which the "Company" was a party and concludes by stating:

If he (Klein) prevails completely, Klein could obtain an award in excess of \$500,000. Neither Holding Opinion One nor Cavi is likely to have sufficient assets to satisfy any judgment for material money damages awarded to Klein.

Earlier, in Article VIII entitled "Survivals, Indemnity", the Company and the stockholders agreed jointly and severally to indemnify Purchaser for "any litigation or claim disclosed on Schedule 3.6 ... to this agreement." [See subd. (e)].

It should be noted that the "stockholders" are described at the outset as consisting of "Loeb, Wilson, Lev and Zoretich" and the Agreement is between ISA, Inc. as the purchaser and Cavi Acquisition, Inc., Loeb Holding Corporation and William J. Wilson, Bruce L. Lev and Thomas J. Zoretich, as the seller of the assets. Specifically, Loeb was listed as the owner of 74% of the outstanding capital stock of Cavi. The purchase price of the Cavi assets (Article II) was \$10,000 payable at the closing and minimum payments of \$24,000 payable on the first anniversary of the sale, \$32,000 on the second anniversary, and \$40,000 on the third year anniversary.

The next event of significance that occurred was the Ohio trial, wherein Cavi was suing Klein. This trial commenced on October 17, 2005 and in a decision by a jury, Klein prevailed in having all of Cavi's claims dismissed. However, despite its very limited assets at this time, Cavi admitted that it had spent \$50,000 to retain an expert and incurred legal fees totalling over \$100,000. It appears from records submitted by *Petitioner* that *Loeb* paid these costs of Cavi's in their entirety. As mentioned earlier, petitioner Klein obtained a judgment on default against Cavi in Federal District Court on September 29, 2005.

On December 1, 2005, a number of documents were signed by the defendants. It appears first that Thomas Zoretich, on behalf of Cavi, wrote to William J. Wilson, Bruce Lev, Loeb Holding and himself, i.e., all the Cavi shareholders, that as of that date, Cavi "no longer has the ability to pay its debts as they become due, including, without limitation, any amounts due and owing under the above referenced

promissory note.” This letter was followed by an identical demand dated December 1, 2005 to Cavi by all the shareholders, Zoretich, Kempner, Lev and Wilson, for the immediate repayment of the *promissory note of May 28, 2004* in the principal sum of \$250,000, now with interest for a total sum of \$268,750.

The third document of this date consists of a Voluntary Repossession and Release Agreement between Cavi and its shareholders, including Loeb, which notes the default and notes that it has resulted in the surrender of all of Cavi's assets to the secured parties. The assets are then described on Schedule A, including accounts receivable. And in fact in this regard, in a letter of April 4, 2006 to Anthony Kretzmer of ISA, Duane L. Berlin, apparently acting on behalf of Loeb, directs that all amounts due to Cavi under the Asset Purchasing Agreement henceforth be paid to Loeb. Berlin explains this by citing to Cavi's foreclosure in favor of the secured noteholders pursuant to the various loan documents. “Cavi certified that it was unable to pay its debts, including payments due on the note.”

Finally, there have been allegations and denials from the parties as to whether bank accounts between Cavi and Loeb have been “used” interchangeably by themselves and others.

Discussion

Debtor and Creditor Law §273-a defines a fraudulent conveyance as a conveyance made “without fair consideration” by a defendant in an action for money damages if, after final judgment for the plaintiff, the defendant fails to satisfy the

judgment, without regard to defendant's actual intent. Klein essentially argues that the loan from Loeb to Cavi was a fraudulent conveyance which lacked fair consideration because Loeb is Cavi's alter ego. The argument is akin to piercing the corporate veil to prevent fraud and achieve equity.

As explained by the Court of Appeals in *TNS Holdings, Inc. V MKI Securities Corp.*, 92 NY2d 335, 339 (1998)(citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY 2d 135):

Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences ... Evidence of domination alone dose not suffice without an additional showing that it led to inequity, fraud or malfeasance ...

This Court has thought long and hard to see if a determination could be made now as to whether the required showing has been made by petitioner, or whether instead respondents have demonstrated that no basis for the claim exists. Supplemental papers were directed and reviewed, in addition to the original papers, and oral argument was held. The papers certainly reveal that some relationship between respondents Cavi and Loeb existed at the relevant times.

As suggested by the above recitation of facts, the corporate maneuvers addressed by the parties in their papers are many and complex, and the inner workings of the various entities, the roles played by their various officers and

shareholders, and the legitimacy of the transactions pose issues of fact which preclude the summary determination of this matter on papers. Therefore, the petition is denied without prejudice at this time. It may well be that a hearing or trial will be needed to resolve the matter. It may well be, also, that discovery will be needed, either in anticipation of a hearing or to obtain sworn testimony and documents which may allow for a summary determination when the petition is renewed. But neither party has presented information or documentation to allow for the determination of this proceeding as a matter of law at this time.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied without prejudice; and it is further

ORDERED that the parties shall appear for a conference on Wednesday, November 15, 2006 at 3:45 p.m. to discuss any discovery requests and the procedures to be followed to allow for the final determination of this matter on the merits.

Dated: October 11, 2006
OCT 11 2006

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT
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10