

**City of New York v Grasso**

2007 NY Slip Op 30445(U)

March 27, 2007

Supreme Court, New York County

Docket Number: 0404460/2006

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM PART 13  
*Justice*

The City of New York, Environmental Control Board

**FILED**  
MAR 30 2007

EX NO. 404460/06  
MOTION PAGE 12/20/06\*  
SEQ. NO. 001

- v -

Jeffrey Grasso, Alfred Grasso,  
Edward Corallo, Jimmy Yu, et al.

MOTION CAL. NO. \_\_\_\_\_  
\*Fully submitted 1/2/07

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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 petition for an order and judgment pursuant to CPLR 5225 and 5227 and Debtor and Creditor Law §§ 273-a, 276, 276-a and 278 is granted and the cross-motion by respondents for an order dismissing the petition is denied.

The petition alleges that respondents, individually and through businesses that they have created, obtained permits from the City of New York Department of Transportation to dig up City streets and sidewalks to install or repair water and sewer connections, and that collectively, they have had more than \$1.7<sup>1</sup> million dollars in fines imposed by the Environmental Control Board ("ECB") and docketed as judgments that are

<sup>1</sup>The amount of the judgments indicated in the petition equals over \$1.6 million, not over \$1.7 million.

unpaid.

The judgments that are the subject of this proceeding were docketed against Rite-Way Subsurface Corp.,(\$1,193,592), Dun Rite Water Mains & Sewers, Inc.,(\$460,316), Chinatown Plumbing & Heating Inc., (\$4,400) and Jimmy Yu (\$12,495) between October 1998 and April 2006. According to the petition, the debtor respondents performed the work improperly or did not complete it. Notices of violations were issued which resulted in decisions against these respondents. They did not appeal those decisions to the ECB and consequently, the ECB rendered final orders in administrative proceedings, and docketed those orders pursuant to section 1401 (d) (1) of the City Charter.

According to the petition:

Jeffrey Grasso is the son of Alfred Grasso and is and/or was an owner of Rite-Way Subsurface Corp., Rite-Way Water Main & Sewer Corp., Dun-Rite Sub Surface Contracting Corp., Chinatown Plumbing & Heating, Inc., and On-Time Subsurface Corp., and in addition, is and/or was the President of Rite-Way Subsurface Corp and On-Time Subsurface Corp. Alfred Grasso is and/or was an owner of Rite-Way Water Main & Sewer Corp., Dun-Rite Water Mains & Sewers, Inc. and Chinatown Plumbing & Heating, Inc., and in addition, is and/or was the Vice-President of Dun-Rite Water Mains & Sewers, Inc. Edward Corallo was and/or is an owner of Rite-Way Subsurface Corp. and Lafata-Corallo Plumbing & Heating, and in addition, is and/or was the Vice-President of Rite-Way Subsurface Corp. Jimmy Yu was and/or is an owner of Chinatown Plumbing & Heating, Inc., and Dun-Rite Water Mains & Sewers, Inc., and in addition, is and/or was the President, Chairman and Chief Executive Officer of Chinatown Plumbing & Heating, Inc., and President of Dun-Rite Water Mains & Sewers, Inc.

Petitioner alleges that the individual respondents created the corporate respondents and failed to properly observe corporate formalities by, among other things, failing to prepare or maintain proper corporate documents

including financial statements, tax returns, and shareholder agreements and certificates and that they dominated the corporate respondents in order to perpetrate a fraud or injustice upon the City. The petition also includes allegations that the individual respondents used the funds of the corporation for their personal uses and to pay their personal debts, improperly caused the corporate respondents to engage in the payment and/or guarantee of debts of other corporate respondents, fraudulently conveyed funds and assets of the corporations without receiving fair consideration, created additional corporate respondents which obtained DOT permits and fraudulently conveyed the funds and assets of the previously existing corporations to the newly created corporations without those corporations receiving fair consideration and prevented the corporate respondents from satisfying any additional judgments against them.

Petitioner asserts that in or around May 2006, it began supplementary proceedings against the debtor respondents and the other respondents in order to determine the financial status of the respondents and whether any funds were improperly transferred from the corporations to the individual respondents. All of the respondents were served with subpoenas and subpoenas duces tecum requesting production of corporate records. Chinatown Plumbing & Heating, Inc. responded to some of the requests and produced some bank statements and cancelled checks and corporate tax returns for the years 1998 through 2004. The other corporate respondents did not produce any corporate records other than a generic cover page entitled "Minute Book Certificate book and Stock Ledger of a Corporation Organized Under the Laws of the State of New York". They did not produce tax returns, financial statements, any documents showing the names and addresses of all related entities, or any documents showing agreements between the corporate and individual respondents as requested in the subpoenas duces tecum. They did produce incomplete bank statements for Dun Rite Water Mains & Sewers Inc. and Rite-Way Subsurface Corp.

The individual respondents failed to produce any documents at all, with the exception of Jimmy Yu, who produced a tax return from 2005.

At their depositions, the individual respondents essentially refused to answer any questions posed by petitioner with respect to the formalities of the existence of the corporate respondents, the addresses of the corporations, their relationship to the corporations, etc., but instead invoked their Fifth Amendment rights. For example, Mr. Yu testified that he is a licensed plumber who performs his work through Chinatown Plumbing & Heating and that he is the President of that corporation. Although he initially stated that he worked with Dun-Rite, he retracted that statement and said he worked only for Chinatown Plumbing and would not answer any questions about Dun-Rite, such as whether he was an officer of, or had anything to do with the creation of Dun-Rite; had ever taken any funds out of Dun-Rite, or received any funds from Dun-Rite. He invoked the Fifth Amendment when asked for the address and telephone number of Dun-Rite. He would not answer whether there was any connection between Chinatown Plumbing and Dun-Rite, or whether the corporate tax returns that he had produced accurately reflect the business that he did under the name Chinatown Plumbing.

Jeffrey Grasso would not answer any questions with respect to documents related to Dun-Rite, including whether he had looked for any financial statements related to Dun-Rite. He would not answer whether he had ever received any payments from Rite-Way; whether he held an office or had an ownership interest in Rite-Way; whether it was his signature that appeared on a permittee application; whether he had any connection with On Time Subsurface Corp.; or whether On Time Subsurface Corp. had ever received any of the assets of Rite-Way or handled any of Rite-Way's previous business. He would not respond to a question asking him "Who is Sal Grasso?" and declined to answer when asked about Arlene Grasso (it was revealed in Alfred Grasso's deposition that Arlene Grasso is Alfred's

wife), Jimmy Yu, Edward Corallo, Al Lafata and Chinatown Plumbing and Heating.

The other individual respondents were similarly non-responsive, having invoked the Fifth Amendment to questions posed by petitioner (although after initially invoking the Fifth Amendment when asked if he knew Arlene Grasso, Alfred Grasso did eventually answer that she is his wife, but would not answer whether she was involved with any of the corporate respondents).

Petitioner has demonstrated the connections between and among the individual and corporate respondents. It has alleged that the various factors necessary to a piercing of the corporate veil are present here (see JSC Foreign Economic Association Technostroyexport v. Int'l Dev. and Trade Servs., 386 F. Supp. 2d 461 [S.D.N.Y. 2005]). Additionally, petitioner has alleged that the debtor respondents fraudulently conveyed assets to the individual respondents and other corporations without fair consideration (Debtor and Creditor Law §§ 273, 276). With the exception of Chinatown Plumbing, respondents did not provide any substantive response to petitioner's subpoenas seeking corporate documents, and all of the respondents invoked the Fifth Amendment when questioned about the corporations' existences, addresses, owners, officers, capitalization, etc.

Although the burden of proof is on the creditor seeking to set aside a fraudulent conveyance to establish that the debtor's conveyance was made without fair consideration, " . . . where the creditor asserts that the transferees paid insufficient consideration and evidentiary facts as to the nature and value of the consideration are within the transferee's control, the burden of coming forward with evidence disclosing the . . . fairness of the consideration, therefore, should be cast upon the transferees (citation omitted)." (Gelbard v. Esses, 96 AD2d 573, 576 [1983]; see also National Communications Corp., v. Bloch, 259 AD2d 427 [1999]).

Respondents have not come forward with any such evidence in

opposition to the petition or in support of their cross-motion to dismiss.

In arguing that no adverse inference arising out of respondents' invocation of the Fifth Amendment can be drawn against them with respect to the allegations of the petition, respondents' counsel asserts that petitioner did not ask the pertinent questions, and thus respondents did not refuse to answer any questions regarding whether any assets of the corporations were transferred, whether the assets were transferred with little or no consideration or whether any of the corporations were even aware of the ECB judgments (Coupey affirmation, p. 7). Counsel is inaccurate because as pointed out above, the individual respondents would not answer questions as to whether they had ever received funds or assets of the corporations. Furthermore, although respondents have moved to dismiss the petition, they have not answered any of the questions that their counsel has identified as relevant to this proceeding. In fact, the only sworn testimony in support of the cross-motion to dismiss was affidavits that were improperly submitted for the first time in reply to petitioner's opposition instead of in support of the cross-motion to dismiss. And those affidavits do not raise any issue of fact that would preclude the granting of the petition or would indicate that the court should permit respondents to answer the petition upon denial of the cross-motion to dismiss (CPLR 404 (a)).

As for their assertion of the Fifth Amendment privilege against self-incrimination, "[w]hile a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence." (Access Capital, Inc., v. DeCicco, 302 AD2d 48, 51 [2002]).

Based upon the foregoing, petitioner is granted judgment pursuant to CPLR 409 (b). The issue of attorneys' fees awarded pursuant to Debtor and Creditor Law § 276-a is referred to a Special Referee to hear and report (or to

hear and determine pursuant to stipulation of the parties).

**SETTLE JUDGMENT** supported by an affirmation that addresses the discrepancy noted in footnote 1 of this decision.

Dated: 3/27/07

AA-S

J.S.C.

Check one:  **FINAL DISPOSITION**       **NON-FINAL DISPOSITION**

Check if appropriate:       **DO NOT POST**       **REFERENCE**