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

PRESENT: HON. LELAND DEGRASSE Justice

PART 25

Index Number : 402792/2006
STATE INSURANCE FUND
vs
IOVINE, GREGORY
Sequence Number : 001
DISMISS ACTION

INDEX NO. 402792/06
MOTION DATE 1/19/07
MOTION SEQ. NO. 001
MOTION CAL. NO. 127

motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

FILED
APR 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

APR 10 2007

Dated: _____

_____ J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

THE COMMISSIONERS OF THE STATE INSURANCE FUND,

Plaintiff,

-against-

GREGORY IOVINE, CAROL BUS TRANSPORTATION CORP., OLY BUS CORP., and 57th STREET TRANSPORTATION,

Defendants.

Index No.: 402792/06

Cal. No.: 127 of 1/19/07

DeGRASSE, J.:

Defendants move for an order, pursuant to CPLR 3211 (a) (7), dismissing the entire complaint for failure to state a cause of action.

FACTS

Plaintiff commenced an action in Supreme Court, New York County, entitled *The Commissioners of the State Insurance Fund v Cupie Transportation Corp., Bayview Transportation Corp., Carol Transportation Corp., Roe Roe Transportation Corp., Olympia Transportation Corp., and Brook Bus Corp.*, Index No. 4106001/02, seeking to recover $58,738.20 in unpaid workers' compensation insurance premiums, plus interest, costs and disbursements. On December 13, 2002, plaintiff obtained a default judgment against the debtor corporations in the amount of $92,967.79, of which $92,967.79, together with interest thereon from December 13, 2002 remains due and unpaid. On July 14, 2006, plaintiff commenced the instant action against defendant Gregory Iovine,

individually, and corporate defendants Carol Bus Transportation Corp.("CBT"), Oly Bus Corp. ("OBC"), and 57th Street Transportation Corp. ("57th Street"), seeking a judgment declaring that CBT, OBC and 57th Street (collectively the "successor corporations") are the alter egos of the debtor corporations and therefore, the successor corporations and the individual defendant, Iovine, are liable for the December 13, 2002 judgment.

DISCUSSION

"When assessing the adequacy of a complaint in light of a CPLR 3211 (a) (7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff ... 'the benefit of every possible favorable inference'" (*AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582, 591 [2005], quoting, *Leon v Martinez*, 84 NY 2d 83, 87 [1994]). Affidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims, and the court's attention should be focused on whether the plaintiff has a cause of action rather than on whether he or she has properly stated one (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The relevant inquiry is whether the requisite allegations of any valid cause of action cognizable by the court can be fairly gathered from the four corners of the complaint (*Foley v D'Agostino*, 21 AD2d 60, 64-65 [1964]).

Defendants move to dismiss the complaint on two grounds. First, defendants maintain that plaintiff has failed to state a valid cause of action for fraud or piercing the corporate veil inasmuch as plaintiff's claims are not pleaded with the specificity required by CPLR 3016. Second, defendants maintain that the complaint as a whole fails to state a cause of action such that the court and

defendants are apprised of the subject matter of the controversy as required by CPLR 3013. In his affidavit in support of the motion, Iovine does not dispute that he was the sole shareholder, officer and director of the debtor corporations and the successor corporations. However, Iovine avers that with the exception of CBT, all of the debtor corporations and the successor corporations have ceased operations. Iovine further avers that "[w]hen each corporation ceased operations, none of its assets ... were transferred into any other existing corporation." Additionally, Iovine avers that "[the successor corporations] did not begin doing business until December 2004[,] which is several years after the [debtor corporations] ceased operations." The court notes that Iovine has not submitted a certificate of incorporation for each of the successor corporations indicating when their corporate existence began.

In opposition, plaintiff argues that the allegations in the complaint are sufficient to warrant piercing the corporate veil and treating Iovine, and each of the successor corporations as a single personality for the purposes of enforcing the judgment that plaintiff obtained against the debtor corporations. Plaintiff bases its argument on allegations that Iovine, as the sole shareholder, officer and director of the six debtor corporations and the three successor corporations, exercised complete domination and control over all nine corporations. Thus, plaintiff argues that Iovine and the successor corporations are liable for the judgment entered against the debtor corporations based on a piercing the corporate veil theory in that the successor corporations are the alter egos of the debtor corporations. Plaintiff further argues that Iovine can be held personally responsible for the judgment because he fraudulently transferred the assets of the debtor corporations to the successor corporations, without consideration. Lastly, plaintiff argues that defendants can be held liable for the judgment under the theory that the transfers effected a de facto merger between the debtor

corporations and the successor corporations.

Generally, "piercing the corporate veil requires a showing 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 the plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]; *Bowles v Errico*, 163 AD2d 771, 773 [1990]). "Under New York Law, the corporate veil can be pierced where there has been, *inter alia*, a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment" (*Forum Ins. Co. v Texarkomo Transp.* Co., 229 AD2d 341, 342 [1996]). Though total domination is the key to piercing the corporate veil, evidence of control alone does not suffice "without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Given the courts' reluctance to disregard the corporate form, a plaintiff must allege, with the requisite "particularized statements detailing fraud or other corporate misconduct," facts that would warrant piercing the corporate veil (*Sheridan Broadcasting Corp v Small*, 19 AD3d 331, 332 [2005]; *Sheinberg v 177 E. 77*, 248 AD2d 176, 177 [1998], *lv denied* 92 NY2d 844 [1998]). A plaintiff is not required to plead or prove actual fraud in order to pierce the corporate veil, but must prove only that the individual defendant's control of the corporate defendant was used to perpetrate a wrongful or unjust act toward plaintiff (*Rotella v Derner*, 283 AD2d 1026 [2001], *lv denied* 96 NY2d 720 [2001], *rearg denied* 286 AD2d 1003 [2001]).

Plaintiff seeks to pierce the corporate veil between the debtor corporations and the successor corporations, and recover the judgment it obtained against the debtor corporations directly from Iovine and the successor corporations on the ground that Iovine used his domination and control to transfer assets from the debtor corporations to the successor corporations so as to prevent plaintiff from satisfying its judgment. The instant complaint specifically alleges that Iovine was the sole shareholder, officer and director of the debtor corporations and the successor corporations. It is further alleged that the debtor corporations and the successor corporations were under the domination and control of Iovine, that the successor corporations are the alter egos of the debtor corporations, and that Iovine caused the debtor corporations to transfer their business operations to the successor corporations without consideration. It is also alleged that the debtor corporations were in the business of providing transportation to children attending the New York City public schools, and that the successor corporations provided the same type of service. The successor corporations allegedly "used substantially the same employees as were used by the [debtor corporations] prior to the time their business operations ceased, continued to perform substantially the same type of work that was performed by the [debtor corporations] and serviced the same clients as were serviced by the [debtor corporations]." Iovine is alleged to have transferred the debtor corporations' "buses and other vehicles, ... equipment, money, accounts receivable, office furniture, telephone numbers, ... office space, [and] corporate opportunities" to the successor corporations. Iovine is also alleged to have caused the debtor corporations to make the conveyances "with the intention of insuring that the [j]udgment would not be paid." It is also alleged that as a result of Iovine's actions, plaintiff is unable to collect its judgment from the debtor corporations because they "have been stripped of their assets."

Viewing the complaint liberally and in the light most favorable to plaintiff (*see Morone v Morone*, 50 NY2d 481 [1980]), the court finds that the complaint adequately states a cause of action for piercing the corporate veil by alleging that as the sole shareholder, officer and director of the debtor corporations and the successor corporations, Iovine dominated and controlled all of the corporations; that the successor corporations are the alter egos of the debtor corporations; and that this arrangement worked a fraud on plaintiff (*see Chase Manhattan Bank v 264 Water St. Assocs.*, 174 AD2d 504 [1991]). These allegations, if proven, would be sufficient to warrant treating the debtor corporations and the defendants in the present action as a single personality for the purpose of enforcing plaintiff's judgment (*see Solow v Domestic Stone Erectors, Inc.*, 229 AD2d 312 [1996]; *see also Chase Manhattan Bank*, 174 AD2d at 505).

As for plaintiff's claim of a de facto merger, the court finds that plaintiff has sufficiently established the elements required for stating a cause of action for successor liability under the doctrine of de facto merger. "The de facto merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible thereby for the pre-existing liabilities of the acquired corporation" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [2001]). A de facto merger is found where the acquiring corporation has effectively merged with the acquired corporation, as opposed to merely holding it as a subsidiary (*id.* at 574). The elements of a de facto merger include: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the acquired company; (3) assumption by the successor of the liabilities necessary for the continuation of the business of the acquired company; and (4) continuity of management, personnel, physical location, assets and general business operation (*id.*; *see also In re New York City Asbestos Litig.*, 15 AD3d 254, 256 [2005]).

Here, plaintiff alleges that there was a de facto merger between the debtor corporations and the successor corporations, and that Iovine and the successor corporations are therefore responsible for the judgment plaintiff obtained against the debtor corporations. Specifically, plaintiff alleges that (1) after acquiring the debtor corporations' assets, Iovine, the sole shareholder, officer and director of the debtor corporations, became the sole shareholder, officer and director of the successor corporations; (2) after Iovine caused the debtor corporations to transfer their business operations to the successor corporations, the debtor corporations ceased to exist; and (3) the management, personnel, assets and general business operation of the successor corporations are largely the same as those of the debtor corporations. These allegations, if proven, would be sufficient to demonstrate that a de facto merger had occurred (*see Fritzgerald*, 286 AD2d at 574).

As to the requirement that the successor corporation assume the liabilities of the predecessor corporation, it is clear that this criterion for de facto merger cannot be established in that there was no assumption of the liabilities of the debtor corporations by the successor corporations. Nevertheless, it is well settled that not all of these factors are necessary to establish a de facto merger, rather, these factors are only indications that tend to show a de facto merger (*Sweatland v Park Corp.*, 181 AD2d 243, 246 [1992]; *In re New York City Asbestos Litigation*, 15 AD3d at 256). The key is to determine whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will and the right to use the acquired corporation's name (*Fitzgerald,* 286 AD2d at 575).

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CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the complaint is denied. The parties shall appear for a preliminary conference in Part 25, Room 428, on May 21, 2007 at 2:00 p.m.

This constitutes the decision and order of the court.

DATED:

APR 10 2007

J.S.C.

HON. LELAND DeGRASSE