

Beauty Gen., Inc. v Sparkles Mfg. Corp.

2007 NY Slip Op 30941(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0600671/2005

Judge: Doris Ling-Cohan

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

PRESENT: HON. DORIS LING-COHAN

PART 36

Justice

*Beauty Gem, Inc +
Sundaram Exports*

- v -

*Sparkles Manufacturing Corp.
et al.*

INDEX NO. 600671/05
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Summary judgment

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

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>3</u>
Replying Affidavits	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary judgment* is granted as to defendant *Gerald Greif*, in accordance with the attached memorandum decision.

FILED
APR 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 4/12/07


HON. DORIS LING-COHAN S.C.

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Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X

BEAUTY GEM, INC. and SUNDARAM EXPORTS,
Plaintiffs,

Index No. 600671/05

-against-

Motion Seq. No. 001

SPARKLES MANUFACTURING CORP., A.L.A.
CASTING CO., INC., and GERALD GREIF,
Defendants.

-----X

DORIS LING-COHAN, J.:

Defendant Gerald Greif (Greif) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint against him.

This is an action to recover monies based upon plaintiff Beauty Gem, Inc.'s (BGI) sale and delivery of loose diamonds to defendant Sparkles Manufacturing Corp. (Sparkles), between 2001 and 2004. At the relevant times, Sparkles was in the business of selling diamond jewelry and other precious stones. It purchased components for its jewelry merchandise from various suppliers, including defendant A.L.A. Casting Co., Inc. (ALA), and BGI. Greif was the president and sole shareholder of Sparkles.

The complaint alleges that plaintiffs are unsecured trade creditors of Sparkles; that there is a balance of \$353,648.17 due and owing to BGI, and a balance of \$105,572.50 due and owing to Sundaram Exports, for goods sold and delivered to Sparkles.

Sarju Shah (Shah), president of BGI, claims that, in

2003/2004, in order to induce BGI to increase Sparkles' credit limit, Greif told him, inter alia, that Sparkles was doing \$10 million in annual sales; that Sparkles owed ALA approximately \$1,000,000; that ALA was giving Sparkles almost unlimited credit; and that ALA was confident that it would get paid by Greif.

In late 2004, Shah was told by Greif that Sparkles was out of business, and that BGI could not be paid the monies it owed. Shah maintains that one week before he was told by Greif that Sparkles was out of business, Greif showed him purchase orders from QVC and Home Shopping Network, and told Shah that Greif was expecting, within one week, a payment from QVC in the amount of \$500,000.

At that same meeting, which was held at Sparkles' premises, Shah contends that he observed people busy processing orders, numerous parcels of diamonds and colored stones, and finished jewelry. He claims that it was at this meeting that he learned, for the first time, that Greif had given a security interest in all of Sparkles' assets to ALA; that ALA had foreclosed on its security interest, and that ALA had seized all of Sparkles' assets.

Greif claims that, from its inception, Sparkles had financial difficulties, and by Spring of 2004, Sparkles owed ALA more than \$1 million. Following negotiations between the attorneys for ALA and Sparkles, on or about April 21, 2004, Greif, as president of Sparkles, executed a Security Agreement

and a UCC Financing Agreement, granting to ALA a security interest in Sparkles' inventory and other assets (the Collateral). In the Security Agreement, Sparkles acknowledged its debt to ALA in the amount of \$1,010,703.17. In addition, Greif, and Scott Martin (Martin) of Sparkles, each signed a personal guarantee, guaranteeing Sparkles' obligations to ALA under the Security Agreement. It is alleged that in consideration of these agreements, ALA agreed to fill Sparkles' orders for castings totaling \$582,000.

Greif alleges that, in early October 2004, Sparkles' debt to ALA exceeded \$1,200,000, and that Jeffrey Adwar (Adwar), ALA's president, demanded that Sparkles turn over its Collateral to ALA. Sparkles turned over the Collateral to ALA, and a Turnover Agreement was executed between the parties. The Turnover Agreement states that, as of November 3, 2004, Sparkles owed to ALA the sum of \$1,183,578 plus interest. Greif claims that the Collateral was valued at less than \$1,100,000, and that Sparkles transferred sums in its bank account to ALA, which were credited prior to the recitation of the debt that is set forth in the Turnover Agreement.

The Turnover Agreement preserved the security interest, and released and terminated Martin's and Greif's personal guarantees. Shortly thereafter, Sparkles shut down. Following the demise of Sparkles, Greif entered into a consulting arrangement with Alarama Jewelry (Alarama), an affiliate of ALA, with a salary of

\$4,000 per week, with a potential over-ride of 1% on sales in excess of \$5 million. Greif affirms that, during the 17 months he worked for Alarama, he never earned any monies for over-ride, but merely received his base compensation.¹

Plaintiffs claim that, in or about May 2004, ALA conspired with Sparkles and Greif to insulate Sparkles from the claims of its creditors, and to provide Greif with a job, while at the same time giving ALA a preferred secured position in Sparkles' assets.

The complaint asserts three claims against Greif. The first cause of action alleges a claim under Debtor and Creditor Law (DCL) §§ 278 (1) (a) and 276-a².

Under DCL § 276, a conveyance is considered fraudulent when there is an "actual intent ... to hinder, delay, or defraud either present or future creditors."

DCL § 278, entitled "Rights of Creditors whose claims have matured," states, in relevant part:

- (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor . . . may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately [sic] from such a purchaser,
 - a. Have the conveyance set aside or

¹Greif claims that approximately five of Sparkles' employees, including Martin, also entered into employment arrangements with Alarama.

²DCL § 276-a is the attorney's fee provision of New York's fraudulent conveyance law, which enables prevailing creditors to recover legal fees which they incurred to establish the debtor's liability.

obligation annulled to the extent necessary
to satisfy his claim

Generally, "the creditor's remedy in a fraudulent conveyance action is 'limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance' [citations omitted]" (Manufacturers and Traders Trust Co. v Lauer's Furniture Acquisition, 226 AD2d 1056, 1057 [4th Dept], lv denied 88 NY2d 962 [1996], citing Marine Midland Bank v Murkoff, 120 AD2d 122, 133 [2d Dept 1986], appeal dismissed 69 NY2d 875 [1987]; accord Geren v Quantum Chemical Corp., 832 F Supp 728, 736-37 [SD NY 1993], affd 99 F3d 401 [2nd Cir 1995]).

However, under New York Law, there is no remedy for damages against a party who is alleged to have participated in a scheme of fraudulent conveyance, without the party being a transferee of the assets, or a beneficiary of the alleged fraudulent conveyance (see Federal Deposit Insurance Corp. v Porco, 75 NY2d 840, 842 [1990]; Gallant v Kanterman, 198 AD2d 76, 80 [1st Dept 1993]).

Plaintiffs assert that Greif engaged in fraudulent conveyances with the actual intent to defraud Sparkles' trade creditors. They allege, upon information and belief, that Greif transferred Sparkles' assets to ALA without fair consideration; used Sparkles' funds to pay personal obligations; took unauthorized loans from Sparkles and failed to repay them; and conspired with ALA in the transfer of Sparkles' assets to ALA, without proper consideration. Plaintiffs further allege, upon

information and belief, that Greif's consulting fees were actually an agreed upon amount which represented compensation for the transfer of Sparkles' assets to ALA.

Greif denies all of plaintiffs' allegations. He maintains that the subject transaction was bona fide, and that there was no intent to defraud creditors. He argues, *inter alia*, that, even assuming *arguendo*, there was a fraudulent conveyance, plaintiffs cannot recover damages from Greif for his alleged participation in the claimed fraudulent conveyance, since he was neither a transferee of Sparkles' assets, nor a beneficiary of the conveyance to ALA.

Greif denies that the consulting fees that were paid to him by Alarama were actually a payment by ALA for the Collateral transferred to it by Sparkles. He maintains that the consulting job for Alarama was a real job, where he worked full-time, five days a week, from an office at Alarama's premises, and that his compensation derived solely from his work as a consultant.

It is axiomatic that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact (see Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the

existence of material issues of fact which require a trial of the action. Mere conclusions, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557, supra). Summary judgment will be granted only if the court determines that no issues of material fact exist (Friends of Animals, Inc. v Associated Fur Mfrs., 46 NY2d 1065, 1067[1979]).

Greif's papers in support of his motion for summary judgment demonstrate a prima facie entitlement to judgment as a matter of law. Beyond mere conjecture and conclusory allegations, plaintiffs have failed to offer any evidence to substantiate their claims that Greif received monies from ALA, disguised as consulting fees which were in reality compensation for the alleged fraudulent conveyance. Merely receiving a salary from ALA is insufficient to conclude that Greif was a transferee or beneficiary of the transferred assets (Roselink Investors, L.L.C. v Shenkman, 386 F Supp 2d 209, 227 [SD NY 2004]). Accordingly, Greif's motion for summary judgment dismissing the first cause of action is granted.

The third cause of action seeks to pierce the corporate veil of Sparkles in order to recover against Greif personally. Plaintiffs allege, upon information and belief, that Greif failed to follow corporate formalities, and that he mixed his personal affairs with Sparkles' business. It is well settled that the party seeking to pierce the corporate veil has the burden of

establishing that there is a basis to do so (Katz v N. Y. Tint Taxi Corp., 213 AD2d 599 [2d Dept 1995]; see also Marino v Dwyer-Berry Constr. Corp., 146 AD2d 750 [2d Dept 1989]). Here, plaintiffs have failed to meet their burden.

"It is settled that, a corporation exists independently of its owners, as a separate legal entity, [and] that the owners are normally not liable for the debts of the corporation'..." (Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 109 [1st Dept 2002], quoting Matter of Morris v New York State Dept. of Taxation and Finance, 82 NY2d 135, 141 [1993]). Merely being a president and sole shareholder of a corporation is not sufficient to pierce the corporate veil, absent a showing that corporate formalities were not observed (see P. A. Building Co. v Elwyn D. Lieberman, Inc., 227 AD2d 277 [1st Dept 1996]). The general rule governing the concept of piercing the corporate veil is set forth in Matter of Morris v New York State Department of Taxation and Finance, (82 NY2d at 141), as follows:

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 plaintiff's injury [citations omitted].

An important factor to consider is whether the corporation is a feigned corporation which, in reality, is carrying on the

business of its individual stockholders "in their personal capacities for purely personal rather than corporate ends" (Port Chester Elec. Constr. Corp. v Atlas, 40 NY2d 652, 657 [1976], quoting Walkovszky v Carlton, 18 NY2d 414, 418 [1966]).

Here, even though plaintiffs discuss Greif's relationship with ALA, and its officer Adwar, and Greif's control of Sparkles' finances and business operations, the plaintiffs have failed to put forth any evidence that Greif was not acting in his corporate capacity as president of Sparkles. In addition, plaintiffs have not provided any evidence that there were no corporate minutes, no board of directors, no shareholders, and no corporate books, records, or bank accounts (see McMullin v Pelham Bay Riding, Inc., 190 AD2d 529 [1st Dept 1993]).

On the other hand, Greif avers that he never converted or used any of Sparkles' assets for his own benefit; that Sparkles' funds and Greif's personal funds were never commingled; that Sparkles maintained customary books and records; that Sparkles had separate financial statements and income tax returns; and that Sparkles leased premises and maintained a bank account.

In view of the fact that Greif has made out a prima facie entitlement to summary judgment, and plaintiffs have failed to offer any evidence to raise an issue of fact, Greif has established his entitlement to summary judgment dismissing the third cause of action.

Finally, the seventh cause of action seeks an accounting of

the monies received by Greif from ALA. Plaintiffs' right to an accounting is premised upon Greif's alleged receipt of monies from ALA/Alarama, which monies allegedly represented compensation for the transfer to ALA of Sparkles' assets. Plaintiffs have not set forth any facts which would entitle them to an accounting.

The court possesses the jurisdiction to order an accounting when there exists a confidential or fiduciary relationship in connection with the subject matter in question (Town of New Windsor v New Windsor Volunteer Ambulance Corps, Inc., 16 AD3d 403 [2d Dept 2005]; Chalasanani v State Bank of India, New York Branch, 235 AD2d 449 [2d Dept 1997]). A fiduciary relationship exists when one party "reposes confidence in another and reasonably relies on the other's superior expertise or knowledge [citations omitted]" (WIT Holding Corp. v Klein, 282 AD2d 527, 529 [2d Dept 2001]).

Plaintiffs have failed to establish the existence of a fiduciary relationship between themselves and Greif. Arms-length business relationships, do not give rise to fiduciary relationships (id.; see also Wiener v Lazard Freres & Co., 241 AD2d 114 [1st Dept 1998]). Further, this court has already determined that plaintiffs have failed to set forth any evidence that the monies received by Greif from Alarama were not for consultancy work, but were actually compensation for the transfer of Sparkles' assets to ALA. Based upon the foregoing, the seventh cause of action for an accounting is dismissed.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is severed and dismissed as against defendant Gerald Greif, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursement as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that within 30 days of entry of this decision/order, defendant Greif shall serve a copy upon all parties with notice of entry.

Dated:

4/12/07



Hon. Doris Ling-Cohan, J.S.C.

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