

Cupit v Aiello

2007 NY Slip Op 31376(U)

May 22, 2007

Supreme Court, Suffolk County

Docket Number: 0032877/2006

Judge: Melvyn Tanenbaum

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**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #001-Mot D
R/D: 020507
S/D 021307

ANDREW CUPIT

PLTF'S/PET'S ATTY:
ANDREW T. CUPIT, Pro-se
5 Deauville Court
Northport, New York 11768

Plaintiff,

- against -

JOSEPH AIELLO

DEFT'S/RESP'S ATTY:
SOMER & HELLER, LLP
2171 Jericho Turnpike, Suite 350
Commack, New York 11725

Defendants.

Upon the following papers numbered 1 to 16 read on this motion for an order pursuant to CPLR §3211 (a) (5) & (7)

Notice of Motion/Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers
Answering Affidavits and supporting papers 15-16 Replying Affidavits and supporting papers
Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant Joseph Aiello for an order pursuant to CPLR §3211 (a) (5) & (7) dismissing plaintiffs complaint is denied.

In September, 1998 plaintiff Andrew Cupit ("Cupit") entered into an agreement to have his car engine replaced by C.C.J. Auto Sales D.B.A. Motorworks ("CCJ"). Beginning in January, 1993 defendant Joseph Aiello and Carmine Cicio were operating "CCJ". Plaintiff claims the replacement engine "CCJ" installed was defective and had to be replaced.

In January, 2000 plaintiff commenced an action against defendants "CCJ", Precision Engine, Inc., and "Motorworks" in the District Court seeking damages based upon claims including breach of contract, negligence and breach of warranty. On November 20, 2003 a default judgment was entered against "CCJ". A trial on the issue of damages was held on August 15, 2005 and a Judgment (Flanagan, J.) for \$10,048.68 was granted on October 5, 2005.

Plaintiff commenced this action against defendant "Aiello" in November, 2006. Plaintiffs action seeks to impose individual liability against defendant "Aiello" for "CCJ's" corporate indebtedness claiming that "Aiello" fraudulently transferred "CCJ's" assets and intentionally concealed the corporate/judgment debtor's status as a defunct corporation to prevent plaintiff from collecting the judgment.

Defendants motion seeks an order dismissing plaintiffs complaint claiming no valid cause of action is stated against "Aiello" and asserting that the statute of limitations has expired. In support of the motion defendant "Aiello" submits an affidavit together with an attorney's affirmation and claims that no valid claim seeking to pierce the corporate veil can be maintained since no independent cause of action can be stated against "Aiello". Defendant also claims that plaintiff's action is time barred by the applicable limitations period for commencing a breach of contract and a fraud claim. Defendant argues that the six year limitations period for commencing a breach of contract claim expired on April 30, 2005 based upon the date of last repair and the two year or six year limitations period for fraud expired in September, 2004 or, at the latest, January, 2006 based upon plaintiffs claim that he discovered the fraud in January, 2004. Defendant claims the corporate status of "CCJ" is a matter of public record which reveals that "CCJ" was dissolved on December 27, 2000. Defendant also claims that plaintiff has failed to set forth sufficient evidentiary facts in the complaint to support viable causes of action for breach of contract or fraud against "Aiello". Defendant also maintains that plaintiff has failed to provide adequate proof to justify piercing the corporate veil since there is no showing that "Aiello" exercised complete domination of "CCJ" and that such domination was used to commit fraud resulting in "Cupit's" injury.

In opposition plaintiff Andrew Cupit submits an affirmation and claims that no basis exists to dismiss this action based upon failure to state viable claims against defendant "Aiello" and expiration of the statute of limitations period. Plaintiff claims sufficient facts are pled to make out a valid cause of action to pierce the corporate veil. Plaintiff asserts that "Aiello" misrepresented "CCJ's" corporate status beginning at contract inception and throughout the legal proceedings in District Court resulting in a judgment against a defunct corporation. It is plaintiffs position that substantial facts are submitted to support a showing of the elements necessary to pierce the corporate veil including: 1) defendant's conduct in continuing to do business and enter into written contracts doing business in the corporate form; 2) defendant's verification of pleadings and admissions during the District Court action that "CCJ" was a "going concern" even though "Aiello" now asserts that "CCJ" ceased doing business in March, 1996; 3) defendant's retention of the proceeds of "CCJ's" assets without transfer of "CCJ" liabilities; 4) defendant's submission of affidavits which contradict "CCJ's" corporate existence. Plaintiff claims this action is not time barred since he discovered "CCJ's" dissolved corporate status in January, 2004 and attempted to commence this action in Supreme Court in August, 2004. Plaintiff claims that the Supreme Court (Oliver, J.) denied with leave to renew "Cupit's" petition seeking to pierce the corporate veil and assert a claim against "Aiello". Plaintiff contends that once Judgment was entered in District Court against "CCJ" in October, 2005 movant recommenced this action. It is plaintiff's position that this action is not time barred since the "relation-back" doctrine tolls the statute of limitations period. Plaintiff claims the evidence shows both claims arise from the same transaction, defendant "Aiello" is united in interest with the corporate defendant "CCJ" and defendant "Aiello" was aware that but for plaintiffs mistake in not timely naming him as a party defendant the underlying action would have been brought against "Aiello" as well. Plaintiff also contends that defendant is equitably estopped from maintaining a statute of limitations defense, since "Aiello" is responsible for consistently misrepresenting the corporate defendant's status in the District Court action.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

CPLR §213 provides that a cause of action based upon a contractual obligation or liability must be commenced within six years. A cause of action based upon actual fraud must be commenced within six years of the commission of the fraud, or two years from the date the fraud could reasonably have been discovered, whichever is later (CPLR §213 (8); 203 (g); Lefkowitz v. Appelbaum, 258 AD2d 563, 786 NYS2d 460 (2nd Dept., 1999)).

A claim against a new party will relate back to the date upon which the plaintiff's claim was interposed against the original defendants where: 1) both claims arose out of the same conduct, transaction, or occurrence; 2) the new party is "united in interest" with the original defendants, and 3) the new party knew or should have known that the action would have been against him as well, but for a mistake by the plaintiff as to the identity of the proper parties. (Buran v. Coupal, 87 NY 2d 173, 638 NYS 2d 405 (1995); Brock v. Bua, 83 AD2d 61, 443 NYS 2d 407 (2d Dept., 1981); Preferred Electric v. Duracraft, 166 AD 2d 425, 560 NYS 2d 489 (2d Dept., 1990); see also Mondello v. NY Blood Center, 80 NY 2d 219, 590 NYS 2d 19 (1992)).

In order to sustain a valid cause of action for fraud, plaintiff must allege that: 1) defendant made material, false representations to it, 2) which were known to defendant to be false and 3) upon which plaintiff relied to its detriment. (See LYONS v. QUANDT, 91 AD2d 709, 457 NYS2d 615 (3rd Dept., 1982); VITALE v. COYNE REALTY, INC., 66 AD2d 562, 414 NYS2d 388 (4th Dept., 1979); GERVASIO v. DINAPOLI, 126 AD2d 514, 510 NYS2d 634 (2nd Dept., 1987); see also SHARP v. KOSMALSKI, 40 NY2d 119, 386 NYS2d 72 (1976); GARGANO v. VC&J CONSTRUCTION CORP., 148 AD2d 417, 538 NYS2d 955 (2nd Dept., 1989); LESTER v. ZIMMER, 147 AD2d 340, 542 NYS2d 855 (3rd Dept., 1989)). Plaintiff must show not only that he actually relied on the misrepresentations but also that such reliance was reasonable (CPC INTERNATIONAL v. McKESAN CORP., 704 NY2d 268.285 (1988)).

Ordinarily an individual who is a corporate officer or agent cannot be held personally liable for actions performed within the authority conferred unless there is a clear and explicit evidence of an intention to substitute his own personal liability for that of the corporation (KESKAL v. MODRAKOWSKI, 49 NY 406 (1928); CCNY v. FINALCO, 93 AD2d 792, 461 NYS2d 830 (1st Dept., 1983)). In order to pierce the corporate veil and impose personal liability, a plaintiff must show: 1) that the owner exercised complete domination over the corporation with respect to the transaction in issue and 2) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the corporate veil (DEGRAZIANO v. VERIZON, 325 Fsupp 2d 238 (2004)).

Plaintiffs complaint sets forth sufficient factual claims to assert an arguably meritorious cause of action against the individual defendant "Aiello" based upon imposition of personal liability for the judgment entered against the corporate defendant "CCJ" in the underlying District Court action. Moreover, plaintiffs action is not time barred by the applicable statute of limitations period for commencing a fraud action to pierce the corporate veil since the "relation-back" doctrine (Buran v. Coupel, supra) tolls the statute where

Page 4
Cupit v. Aiello
Index # 32877-2006

plaintiff has submitted sufficient facts to show that he discovered the fraud in January, 2004 and attempted to commence this action in August, 2004. The prior Order (Oliver, J.) dated November 4, 2004 dismissed movant's petition without prejudice to recommence once a judgment was obtained against the corporate defendant in the District Court. Plaintiff thereafter timely commenced this action after judgment was entered in the District Court. Defendant's motion for an order pursuant to CPLR §3211(a) (1) (5) & (7) must therefore be denied, and it is further

ORDERED that a preliminary conference shall be held on June 26, 2007 at 9:30 a.m. at the Supreme Court Trial Term Part XIII, 400 Carleton Avenue, Central Islip, New York to resolve all outstanding discovery issues. No appearance shall be required if the parties enter into a preliminary conference disclosure and discovery schedule and submit same to the Court prior to June 26, 2007. A copy of the form is attached to this order for the parties use and convenience. All discovery proceedings must be completed on or before December 13, 2007.

Dated: May 22, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION