

Spinnell v Seldon

2007 NY Slip Op 31500(U)

May 21, 2007

Supreme Court, New York County

Docket Number: 0101921/2007

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

SPINNELL, ANDREW

Plaintiff,

-v-

SELDON, PHILIP et al.,

Defendants.

INDEX NO. 101921/07

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL NO. _____

The following papers, numbered 1 to 11 were read on this motion for Summary Judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 8

Answering Affidavits- Exhibits 2, 3, 4, 5, 11

Replying Affidavits 6, 7, 9, 10

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
MAY 31 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5-21-07

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

----- X

ANDREW J. SPINNELL, ESQ.,

Petitioner-Judgment-Creditor,

INDEX NO.
101921/07

-against-

JP MORGAN CHASE BANK, N.A.,

Respondent,

-and-

PHILIP SELDON,

Respondent-Judgment-Debtor,

----- X

FILED
MAY 31 2007
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DONNA M. MILLS, J.:

Petitioner moves for an order pursuant to CPLR 5225 and 5227 directing that all funds in the JP Morgan Chase Bank, N.A. (Chase) accounts under the names of Philip Seldon (Seldon), Birddog Associates and Birddog Associates, Inc. (sometimes referred to as the Corporation) be turned over to any sheriff or marshal of the City of New York upon presentation of a duly issued property execution, or, in the event the instant petition is denied, for an order pursuant to CPLR 3120 compelling Chase to produce copies of all bank records of the Corporation's accounts, including monthly statements, bank signature cards, initial applications and corporate seal records.

Respondent Seldon cross-moves for an order (i) dismissing the petition, (ii) vacating the notice petitioner served upon Chase restraining the accounts of Birddog Associates, Inc., and (iii) prohibiting plaintiff from serving any further notices restraining the accounts or other assets of

Birddog Associates, Inc. without court permission.

On November 17, 2006 petitioner entered a judgment against Seldon in the amount of \$515,013 based on a jury verdict that was rendered on August 3, 2006. Petitioner is now seeking to satisfy the judgment by levying on, *inter alia*, the Corporation's account(s) at Chase contending that the Corporation is Seldon's *alter ego* and that the funds in the account(s) are Seldon's personal property. To support his contention petitioner points to the following: in two prior actions between petitioner and Seldon personally, Seldon paid motion costs and sanctions with checks drawn on the Corporation's account; petitioner's initial research yielded no record of active corporate status for Birddog Associates, Inc.; the Corporation and Seldon share an apartment; the Corporation pays all or part of Seldon's rent; Seldon has failed to maintain corporate formalities, *e.g.*, he failed to produce corporate records or tax returns for the eight years that the Corporation was dissolved (March 1, 1999-January 30, 2007); the Corporation was in a state of dissolution at the time the restraining notice was served (January 25, 2007); and, Seldon paid commissions the Corporation owed to its affiliates with his personal credit card using funds from the Corporation's account with Chase. In his reply papers petitioner asks the court to apply the theory of reverse piercing of the corporate veil to find that Birddog Associates, Inc. is liable for Seldon's debts.

In opposition and in support of his cross-motion Seldon contends that the Corporation is not his *alter ego* because he never operated under the name of Birddog Associates, Inc. and because the funds in the Corporation's accounts belong to the Corporation, not him. He then makes the following arguments: the restraining notice served by petitioner was fraudulent because it designated the judgment debtor as "Philip Seldon d/b/a Birddog Associates, Inc."

instead of “Philip Seldon d/b/a Birddog Associates”; Birddog Associates, Inc. has existed since 1997 even though its charter was voided on March 1, 1999 for failing to pay franchise taxes because on January 30, 2007 the Corporation’s charter was revived retroactive to February 28, 1999; Seldon has not been a shareholder of the Corporation since 1998; bank statements reflect that the money in the accounts comes almost exclusively from credit card processing companies, proof that they are funds paid by customers for products purchased on the websites serviced by the Corporation; the Corporation’s account is used to pay its staff as well as its vendors; although Seldon is the president of the Corporation, Cathy Barker, the Vice President of Operations who is located in Norman, Oklahoma, is responsible for supervising the day-to-day activities of the Corporation’s four staff members; to the extent that Seldon has paid personal debts with checks drawn on the Corporation’s accounts, the funds were loaned to him; and, by serving a restraining notice on the accounts of the Corporation petitioner has obtained an *ex parte* preference over all the other creditors of the Corporation even though he has no judgment against the Corporation. In subsequent submissions Seldon adds the following: the court has no power to grant relief against the Corporation because it is not a named party and not properly before the court; Delaware law is controlling because Birddog Associates, Inc. is a Delaware corporation; petitioner’s “reverse piercing” theory is not recognized under Delaware law; the Corporation uses Seldon’s credit card to pay commissions to its network affiliates because it could not obtain a corporate credit card with a sufficient credit limit; and, the Corporation maintains a loan account in Seldon’s name, secured by Seldon’s promissory notes, for payment of his personal charges on the card and for personal loans.

As a threshold matter the court finds that New York, rather than Delaware, law is

applicable to this proceeding because the parties, the judgment, the assets and the acts complained of all have a New York nexus (see *Intercontinental Planning v. Daystrom, Inc.*, 24 NY2d 372, 382 [1968] [law of jurisdiction most intimately concerned with outcome of the particular litigation applicable]). Broadly speaking, the courts will disregard the corporate form, *i.e.*, pierce the corporate veil, when necessary to prevent fraud or achieve equity (see *Matter of Morris v. New York State Department of Taxation and Finance*, 82 NY2d 135, 140 [1993]). Generally, piercing the corporate veil requires a showing that the owners exercised complete domination of the corporation. “The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene [citation omitted]” (*id.*, at 142). Under New York law, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual and its separate entity so ignored that it primarily transacts the dominator’s business instead of its own and can be called the other’s *alter ego* (see *Matter of Island Seafood Company, Inc. v. Golub Corporation*, 303 AD2d 892, 893 [3d Dept 2003]). While piercing the corporate veil allows a creditor to disregard the corporation and hold the controlling shareholders personally liable for the corporate debt, reverse piercing flows in the opposite direction and makes the corporation liable for the debt of the shareholder (see *Sweeney, Cohn, Stahl & Vacarro v. Kane*, 6 AD3d 72, 75 [2d Dept 2004]).

Although Seldon claims that he has not been a shareholder since 1998, the identity of the shareholder(s) remains a mystery. It is undisputed that Seldon paid his personal expenses (*e.g.*, motion costs and sanctions) with the Corporation’s money and paid the Corporation’s expenses

(e.g., affiliate commissions) with his money (*viz.*, his personal credit card). Seldon and the Corporation shared the same apartment(s) and rental obligation(s). Seldon failed to maintain corporate formalities for the eight years that the Corporation was in a state of dissolution, which alone could justify piercing the corporate veil (see *Forum Ins. Co. v. Texarkoma Transportation Co.*, 229 AD2d 341, 342 [1st Dept 1996]). Seldon showed no interest in reviving the Corporation until petitioner obtained the jury verdict in August 2006. The Oklahoma affidavit of Cathy Barker, who states she has been Vice President of Operations of Birddog Associates, Inc. since 2004, will not be entertained because it is not authenticated as required by CPLR 2309(c) (see *Majestic Co., Inc. v. Wender*, 24 Misc 2d 1018, 1019 [Sup Ct Nassau Co 1960]). The court notes, however, that in 2004 the Corporation was in a state of dissolution and concludes that Ms. Barker may have been employed by Seldon or Seldon d/b/a Birddog Associates but could not have been employed by Birddog Associates, Inc. because that entity did not exist in 2004.

Although petitioner appears to have the better argument, the papers before the court are not dispositive. Given the parties' conflicting assertions, the court finds that a factual hearing appears mandated on the issue of whether or not Birddog Associates, Inc. is Seldon's *alter ego* sufficient to warrant piercing (or reverse piercing) the corporate veil.

Accordingly, it is hereby

ORDERED that the issue of whether Birddog Associates, Inc. is Seldon's *alter ego* is referred to a Special Referee to hear and report with recommendations except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that respondents shall produce at the hearing copies of all bank records of the Corporation's accounts, including monthly statements, bank signature cards, initial applications, corporate seal records, and any other documentation in their possession pertinent to the Corporation's ownership, status and relationship to Seldon and/or Birddog Associates; and it is further

ORDERED that this motion and cross-motion are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that pending receipt of the Special Referee's report Chase and Seldon and their representatives are directed to maintain the status quo and not withdraw or allow to be withdrawn or transfer any monies from Birddog Associates, Inc.'s Chase account(s) to the extent of \$415,013; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee. Petitioner shall also serve a copy of this decision and order on Birddog Associates, Inc., which is hereby granted leave to participate in the hearing to be held herein. Upon request, Seldon shall supply petitioner with the address at which Birddog Associates, Inc. may be served.

DATED: 5/21, 2007

FILED
MAY 31 2007
NEW YORK
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J.S.C.