INDEX NO. 2002-28896

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

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

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PUCCIO ELECTRIC CORP.

Plaintiff

-against-

LLOYD ELKOWITZ, DEANNA ELKOWITZ, PLUMB TECH INC., ISLAND EAST FRAMING CORP., DIAMOND CUT CERAMIC TILE, EAST END ASPHALT INC., DAVID MIMS d/b/a OLD TIMERS PAINTING, HOME CRAFTS INC., JIM NAPLES CONSTRUCTION INC., JIM NAPLES AND SON INC. and JAMES NAPLES,

Defendants

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Motion Sequence: 006-MG
007-MD
Original Return Date: 08/23/2006
Final Submission Date: 03/28/2007

ORDER

Before the Court are a series of applications. The application under motion sequence 006 consists of a motion for summary judgment dismissing all claims and cross-claims against the Defendants JIM NAPLES AND SON INC. and JAMES NAPLES. The application under motion sequence 007 consists of a motion for summary judgment by Defendant DAVID MIMS d/b/a OLD TIMERS PAINTING against the Defendants JIM NAPLES CONSTRUCTION INC., JIM NAPLES AND SON INC. and JAMES NAPLES together with judgment against the Defendant LLOYD ELKOWITZ and DEANNA ELKOWITZ. In addition, a document captioned as "Attorney Affirmation In Support of Cross-Motion Opposition To Motion" dated October 11, 2006, bearing an incorrect index number and filed by counsel for the Plaintiff opposes the motions by the Defendants and seeks leave to amend the Complaint. Each application has been vigorously opposed.

Due in part to the plethora of paper received in this matter as well as its companion proceeding (see *Puccio Electric Corp. v. Richard Brown, et.al.*. *Suffolk County Index No. 2002-15623*) the applications was finally deemed to be fully submitted on March 28, 2007.

The Defendants JIM NAPLES AND SON INC. and JAMES NAPLES seek an Order of this Court in accordance with CPLR § 3212 dismissing all claims and cross-claims asserted against said Defendants. In support thereof, they demonstrate to the Court that on or about March 9, 2000, JIM NAPLES CONSTRUCTION INC. ("JNC") entered into a contract with the Defendants ELKOWITZ for the purpose of home construction. Both the Plaintiff and the corporate Defendants apparently were sub-contractors thereunder. The Defendant JAMES NAPLES was the principal of JNC. Thereafter and on January 7, 2002, JNC filed a voluntary petition for relief in the United States Bankruptcy Court for the Eastern District of New York. Said petition was filed pursuant to Chapter 11 of the United States Bankruptcy Code [11 USC § 1101 et. seq.] under case no. 8-02-80125-mlc. On July 22, 2002, that case was converted to a liquidation proceeding under Chapter 7 of the United States Bankruptcy Code [11 USC § 701 et. seq.] and a Trustee was appointed. During the pendency of the insolvency proceedings, the Plaintiff and each of the Defendants herein filed claims and engaged in some participation therein, including the receipt of dividends by some of them. Of particular note is that the Defendant JIM NAPLES AND SON INC. ("JNS") entered into an agreement to purchase, for good and valuable consideration, certain assets of JNC from the Bankruptcy Trustee, which was approved by the Bankruptcy Court. The entity JIM NAPLES AND SON INC. is owned and controlled by JAMES C. NAPLES, the son of Defendant JAMES NAPLES (who is also known as JAMES V. NAPLES). The Plaintiff asserts that there has been a commingling of funds and a unity of identity and such as between JNC and JNS to permit the piercing of the corporate veil.

In the Cross-Motion filed by the Defendant MIMS, he asserts entitlement to summary judgment on a promissory note prepared by MIMS executed by JAMES NAPLES individually on July 30, 2001. The said Defendant opposes the application, claiming that he did not sign the same in his individual capacity but only as President of JNC. The movant also demands judgment against JNS and JNC in a *quantum meruit* basis for work performed in an amount equal to his claim against JNC together with judgment against the ELKOWITZ defendants.

It is apparent from all of the submissions hereunder that JNC was the general contractor on the Elkowitz job, that subsequent to the contract, JNC filed a voluntary petition for reorganization in bankruptcy which resulted in a liquidation, that the Plaintiff and other Defendants were on notice thereof and participated substantially in the bankruptcy proceedings, all of which gave rise to the present litigation.

In *State of New York v Robin Operating Corp. 3 AD 3d 769* (3rd Dept. 2004), the Court set forth the elements necessary to prevail in such a course of action, stating that generally, a party seeking to pierce the corporate veil must show that (1) the owners of the corporation exercised complete domination thereof with respect to the transaction being attacked, and (2) that such domination was used to commit a fraud or wrong against the complaining party which resulted in their injury (see also *Morris v. New York State Department of Taxation & Finance 82 NY 2d 135 [1993], Island Seafood Co. v. Golub Corp. 303 AD 2d 892 [3rd Dept. 2003])*. Further, in the matter of *EDK Enterprises Inc. v. C&S Wholesale Grocers Inc. 30 AD 3d 924 (3rd Dept. 2006)* the Appellate Division stated that evidence of domination alone does not suffice absent an additional showing that it led to fraud, inequity or malfeasance and significantly, no inference of abuse arises when a corporation was formed for legal purposes or is engaged in legitimate purposes, reminding the parties that it is perfectly legal to incorporate for the express purpose of limiting liability (See *TNS Holdings Corp. v. MKI Securities Corp. 92 NY 2d 335 (1998)*). Finally, in *Treeline Mineola LLC v. Bergi 21 AD 3d 407 (2nd Dept. 2005)* the Appellate Division stated while courts are empowered to pierce the corporate veil in appropriate circumstances, in view of the well-established fact that a business can be incorporated for the very purpose of enabling its proprietor to escape personal liability, the corporate form is not to be lightly disregarded and indeed the precedent is clear that courts will pierce the corporate veil only to prevent fraud or illegality or to achieve equity, even in situations where the corporation is controlled or dominated by one shareholder (See *Bowles v. Errico 163 AD 2d 771 (3rd Dept. 1990), New York Ass'n for Retarded Children, Montgomery County Chapter v. Keator 199 AD 2d 921 (3rd Dept. 1993)*).

In the instant proceeding the record is wholly devoid of proof that either individual shareholder of JNS or JNC, through control or domination of either corporation, perpetuated a wrong or a fraud such that a court of equity should intervene to pierce the corporate veil.

Turning next to the issue of the promissory note upon which the Defendant MIMS seeks recovery, it is axiomatic that in order for personal liability to attach, it must be clearly evinced by the signerthat he intends to supercede (or superadd) his personal liability thereto, *Hall v. Lauderdale 46 NY 70 (1871), Keskal v. Modrakowski 249 NY 406 (1928)*. Here, the document at issue is signed "Jim Naples, President." Even construing all of the evidentiary submissions in a light most favorable to MIMS, the Court finds that JAMES NAPLES signed the same in his corporate and not individual capacity.

As to the demand for summary judgment against the ELKOWITZ defendants, the applicant has not come forward with sufficient proof to demonstrate the absence of any triable issues of fact to warrant granting summary judgment.

In order to for the Court to grant summary judgment, it must clearly appear that there are no material issues of fact, *Sillman v. Twentieth Century-Fox Film Corp. 3 NY 2d 395 (1957)*. The proponent of a summary judgment application must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate the existence of any material issues of fact from the case, *Zuckerman v. City of New York 49 NY 2d 557 (1980)*. Once a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of material issues of fact requiring a trial of the action, *Zuckerman v. City of New York, supra*.

Based upon the totality of the papers submitted on this application, the Court is constrained to (1) grant, in its entirety, the application for summary judgment made by JIM NAPLES AND SON INC. and JAMES NAPLES; (2) deny the Plaintiff's application for leave to amend its Complaint; and (3) deny, in its entirety, the application by DAVID MIMS d/b/a OLD TIMERS PAINTING.

It is, therefore,

ORDERED that the application by JIM NAPLES AND SON INC. and JAMES NAPLES shall be and the same is hereby granted in its entirety; and it is further

ORDERED that this action, including all claims in chief and cross-claims shall be and the same is hereby dismissed, with prejudice, as against the Defendants JIM NAPLES AND SON INC. and JAMES NAPLES; and it is further

ORDERED that the Plaintiff's application for leave to amend its Complaint shall be and the same is hereby denied; and it is further

ORDERED that the applications by DAVID MIMS d/b/a OLD TIMERS PAINTING shall be and the same are hereby denied in their entirety.

Settle a judgment in conformance herewith. This shall constitute the Decision and Order of this Court.

Dated: June 19, 2006
Riverhead, New York

HON. JEFFREY ARLEN SPINNER
J.S.C.

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