

Masucci v Gosnell

2007 NY Slip Op 32446(U)

August 3, 2007

Supreme Court, New York County

Docket Number: 0602438/2006

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ

PART 03

Justice

ALEX MASUCCI,

Plaintiff,

INDEX NO.

802438/2006

- v -

MOTION DATE

MOTION SEQ. NO.

.001

MELISSA GOSNELL, as Testamentary Trustee of the Trust Established Under the Will of Gerald Masucci,

MOTION CAL. NO.

Defendants:

The following papers, numbered 1 to _____ were read on this 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, the motion is decided in accordance with the accompanying Decision and Order, and, pursuant to the stipulation of the parties on dismissal, "E-Musica" is eliminated from the caption and it is

ORDERED that the above-captioned action is consolidated in this Court with Masucci v. Sonido, Inc., The Estate of Gerald Masucci, Melissa Gosnell, individually and as Trustee, Corrine Masucci Valsyn, S.A., Protel Records, Sheridan Square Entertainment, Inc., and Joseph Bianco, VZ Group (International) and E-Musica Acquisition Corp., index No. 603594/2005, under index No. 603594/2006, and the consolidated action shall bear the following caption:

ALEX MASUCCI,

Plaintiff,

- versus -

MELISSA GOSNELL, as Testamentary Trustee of the Trust Established Under the Will of Gerald Masucci,
~~SONIDO, INC., THE ESTATE OF GERALD MASUCCI, MELISSA GOSNELL, INDIVIDUALLY AND AS TRUSTEE,~~
~~CORRINE MASUCCI VALSYN, S.A., PROTEL RECORDS, SHERIDAN SQUARE ENTERTAINMENT, INC., AND JOSEPH BIANCO, VZ GROUP (INTERNATIONAL) AND E-MUSICA ACQUISITION CORP.,~~
CORRINE MASUCCI VALSYN, S.A., PROTEL RECORDS, SHERIDAN SQUARE ENTERTAINMENT, INC., AND JOSEPH BIANCO, VZ GROUP (INTERNATIONAL) AND E-MUSICA ACQUISITION CORP.,

Defendants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action, and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this Order with Notice of Entry, the Clerk shall consolidate the papers in the actions hereby consolidated under 603594/2005 and dispose of 602438/2006 and shall mark court records to reflect the consolidation, and it is further

ORDERED that a copy of this Order with Notice of Entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark court records to reflect the consolidation.

Dated: August 07, 2007

KARLA MOSKOWITZ

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

FILED
AUG 08 2007
NEW YORK COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X
ALEX MASUCCI,

Plaintiff,

Index No. 602438/2006

-against-

MELISSA GOSNELL, as Testamentary Trustee
of the Trust Established Under the Will
of Gerald Masucci,

Defendant.

DECISION and ORDER

-----X
KARLA MOSKOWITZ, J.:

This is an action for a finder's fee in connection with the sale of the assets of a music company, Sonido, Inc. ("Sonido"). Defendant Melissa Gosnell, as trustee of the trust established under the will of Gerald Masucci (the "Trust"), moves to dismiss the Verified Complaint on the grounds of res judicata and failure to state a claim (CPLR 3211[a][5] and [7]).

Background/The Verified Complaint

The court presumes familiarity with the prior proceedings and decisions in a related proceeding, Masucci v Sonido, Inc., et al, NY Co Index No. 603594/2005 (the "Sonido Action"). As is relevant here, the Sonido Action alleges the breach of a September 29, 2004 letter agreement (the "Agreement") in which Sonido agreed to pay plaintiff Alex Masucci ("Alex") a commission of not less than 3% on the sale of certain of its assets, including the Fania Latin music record label. The Agreement contained a non-circumvention clause by which Sonido agreed it would not consummate a transaction with any party that Alex had previously introduced without his prior written approval. The Agreement specifically identifies defendants Sheridan Square Entertainment, Inc. and its controlling shareholder, Joseph Bianco, as prospective purchasers that Alex had procured, and the complaint also alleges that Alex introduced defendant V2 Group (International) and non-party Morgan Stanley U.K. to Sonido.

The Agreement prohibited Sonido from engaging in transactions "with any person or entity directly or indirectly affiliated" with a party that Alex had introduced and from taking "any action which would directly or indirectly circumvent [Alex's] ability to give or withhold approval from the consummation of such a transaction."

The Sonido complaint alleges that Sonido, Sheridan Square, Bianco and other named defendants conspired to violate the Agreement and deprive Alex of his commission and other compensation by arranging for a series of sham transactions intended to disguise the ultimate sale of Sonido's Fania assets to Sheridan. Specifically, the complaint alleges that in July 2005, Sonido (1) sold Fania to Protel, that (2) transferred Fania to its subsidiary, E-Musica, that (3) sold its assets, including Fania, to defendant V2, that (4) sold its assets to defendant Sheridan. Morgan Stanley allegedly assisted in financing some of the transactions.

Alex's brother, Gerald Masucci, had owned Sonido's stock. He died in 1997 and devised all of the shares to the Trust. Masucci sued Melissa Gosnell in the Sonido Action individually and, somewhat ambiguously, as either "trustee" or "executrix" of the Estate of Gerald Masucci (the "Estate"). By order dated June 16, 2006 (the "June 2006 Order"), the court directed that she be substituted in as trustee of the Trust and then dismissed as a party in that capacity. The court further directed amendment of the caption to eliminate the Estate of Gerald Masucci and to substitute Gosnell in her capacity as executrix of the Estate. Finally, the June 2006 Order dismissed the second and fifth causes of action against Gosnell, individually and as executrix.

Plaintiff then brought this separate action that he asserted solely against Gosnell as trustee of the Trust. After repeating many of the factual allegations of the Sonido pleading, the Verified Complaint alleges:

On information and belief, Defendant Gosnell knew that V2 and Morgan Stanley were the actual buyers of the Fania assets. Alex's Non-Circumvention Agreement with Sonido was, on information

and belief, known to Defendant Gosnell.

* * *

Gosnell, acting as Trustee, has caused Sonido to close its office and is actively working to transfer the assets of Sonido out of the reach of this Court's jurisdiction.

Plaintiff further alleges that Gosnell and Trust beneficiary Corrine Masucci ("Corrine") used Sonido as their "piggy bank," treating its checkbook as their own to pay personal expenses. He asserts that Sonido did not conduct regular board meetings and that its officers are mere puppets of Gosnell and Corrine.

The Verified Complaint asserts two causes of action. The first seeks damages for breach of contract, asserting that "[t]he Trust is liable for the breaches of Sonido under the doctrine of piercing the corporate veil." The second seeks a mandatory injunction requiring the assets to be returned to the Trust.

Discussion

The court denies the motion to dismiss. As a preliminary matter, res judicata does not bar the action. The complaint originally named neither the Trust nor Gosnell, in her capacity as trustee, as defendants in the Sonido action. At oral argument on the Sonido motion to dismiss, the parties agreed that, for technical reasons, the Estate was not a proper party and that instead Gosnell should be named in her capacity as executrix. Because the Sonido complaint contained no allegations directed at the trustee, the court simultaneously dismissed the claims as against Gosnell in that capacity. However, the court did not preclude a future action against the trustee. Unlike the pleading in the Sonido action, the Verified Complaint names the trustee and contains allegations against her that were not litigated on the prior motion.

On the merits, the Verified Complaint sufficiently pleads a cause of action for piercing Sonido's corporate veil to reach the Trust. To prevail under a veil-piercing theory, the plaintiff

must show 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.” (Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]; see Sheridan Broadcasting Corp. v Small, 19 AD3d 331 1st Dept 2005]). Mere domination is insufficient absent the allegation of some wrongful or unjust act against the plaintiff. (Morris, supra at 141-42). However, “[b]ecause a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised.” (Morris, supra at 141). Moreover, “[v]eil-piercing is a fact-laden claim that is not well-suited for summary judgment resolution.” (First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287, 294 [1st Dept 1999]).

Insofar as the Verified Complaint contains numerous allegations regarding the general domination of Sonido by the Trust, defendant’s primary argument concerns whether plaintiff has adequately pled the Trust’s direct participation in the alleged scheme to defeat plaintiff’s rights under the Agreement. Here, plaintiff alleges that the Trust – the sole shareholder of Sonido and the ultimate beneficiary of the sale proceeds – knew of the Agreement and of the plan to circumvent it through successive sham transfers. These allegations are sufficient to support the conclusion that defendant authorized Sonido to be used as a vehicle to exploit plaintiff’s knowledge and contacts for the exclusive benefit of the Trust, stripping the corporation of the very assets against which recovery might be had.

While it is true that a party’s status as sole shareholder is not alone sufficient to impose liability, (see McMullin v Pelham Bay Riding, Inc., 190 AD2d 529 [1st Dept 1993]), that status does not immunize a defendant who has personally participated in or has actual knowledge of

the wrongdoing (see I. Towler, Inc. v Tarran, 236 AD2d 518 [2d Dept 1997]; Marine Midland Bank v John E. Russo Produce Co., Inc., 50 NY2d 31 [1980]). The record reflects that Gosnell retained and directed an attorney to effect the sale of Sonido. Further, as noted, the pleading alleges that the trustee had actual knowledge of the underlying scheme. There is no need, as defendant suggests, for proof that she personally conducted the contractual negotiations. If, in fact, her agent carried out the sham transactions alleged in the complaint, the Trustee cannot escape liability because "[a] principal that accepts the benefits of its agent's misdeeds is estopped to deny knowledge of the facts of which the agent was aware" [Marine Midland Bank, supra at 44]).

As the second cause of action for a mandatory injunction is identical to the sixth cause of action that this court sustained in the Sonido action, the court likewise denies the motion to dismiss. Finally, the court grants the request for consolidation with the Sonido action as this case arises out of the same underlying transactions and merely asserts additional claims against Gosnell in a different capacity.


Accordingly, it is

ORDERED, that the motion to dismiss is denied, and it is further,

ORDERED, that the above-captioned action is consolidated in this court with Masucci v Sonido, Inc., et al, NY Co Index No. 603594/2005.

Dated: August 23, 2007

ENTER:



 J.S.C.

FILED
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