

<b>Hovering Around Long Is., Inc. v Sklar</b>
2007 NY Slip Op 32580(U)
August 17, 2007
Supreme Court, Suffolk County
Docket Number: 0024403/2004
Judge: Sandra L. Sgroi
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

PUBLISH

INDEX NO.24403-2004

SUPREME COURT - STATE OF NEW YORK  
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 003M D

Present:

Hon. SANDRA L. SGROI

Adj'd Date: 8-9-07

Return Date: 4-30-07

\_\_\_\_\_  
 HOVERING AROUND LONG ISLAND, INC.,  
 and ALBERT ILARDI,

Plaintiffs,

-against-

STUART SKLAR

Defendant.  
 \_\_\_\_\_

SCOTT MICHAEL MISHKIN, P.C.

Attorney for Plaintiff

One Suffolk Square

Suite 240

Islandia, New York 11749

LAW FIRM OF ANTHONY D. DENARO, P.C.

Attorney for Defendant, Stuart Sklar

62 Nichols Court, Suite 200

Hempstead, New York 11550

Upon the following papers numbered 1 to 14 read on this Motion: Notice of Motion and supporting papers 1-8; Affirmation in opposition and supporting papers 9-10; Reply affirmation and supporting papers 11-14; it is,

**ORDERED** that the motion of the Defendant, Stuart Sklar, to dismiss the Plaintiffs' Complaint is denied.

The Defendant, Stuart Sklar, has moved for dismissal of the complaint of the Plaintiffs, Hovering Around Long Island and Albert Ilardi, pursuant to **CPLR** § 3211(a)(7) and **CPLR** § 3211(a)(10). A motion to dismiss a complaint based upon **CPLR** § 3211(a)(7) will be successful if the complaint fails to state any cognizable cause of action against the Defendant. A motion pursuant to **CPLR** § 3211(a)(10) will be granted when it is shown that a person who is indispensable to the action has not been joined in the action as a party and that person cannot be joined as a party in the action.

The Defendant's moving papers have not shown an entitlement to dismissal of the action to the extent that

the motion is based upon *CPLR* § 3211(a)(10).

The attorney for the Defendant is asserting that Quality Mica, Inc., the entity that the Plaintiff Hovering Around Long Island wrote checks to for payment for furniture, is the indispensable Defendant that should have been made a party to this action. When this action was commenced in 2004, the Plaintiffs had named Quality Mica, Inc. as a Defendant and it was Plaintiffs' subsequent choice to discontinue the action against the then corporate Defendant, Quality Mica, Inc. At that time the complaint was amended to name Sklar as a Defendant in his individual capacity. A review of the amended complaint, as this Court previously found in the decision permitting a supplemental amended complaint, states a cause of action against the individual Defendant Sklar (see, *Wolstencroft v. Sassower*, 124 A.D.2d 582, 507 N.Y.S.2d 728; see also, *Shields v. Katz*, 143 A.D.2d 743, 533 N.Y.S.2d 451) because joint tort-feasors are not necessary parties ( see, *Hecht v. City of New York*, 60 N.Y.2d 57, 62, 467 N.Y.S.2d 187, 454 N.E.2d 527; *Amsellem v. Host Marriott Corp.*, 280 A.D.2d 357, 721 N.Y.S.2d 318; *Siskind v. Levy*, 13 A.D.2d 538, 539, 213 N.Y.S.2d 379). Whether the Plaintiffs will be successful in this action against Sklar is another issue that is not being determined by this order.

The Defendant also alleges that the Amended Complaint does not state a cause of action against him (see, *CPLR* § 3211(a)(7)). "On the question of whether the complaint states a cause of action sufficient to withstand a motion to dismiss pursuant to *CPLR* 3211(a)(7), the pleading is to be liberally construed, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference (see *Leon v. Martinez*, 84 N.Y.2d 83, 87 [614 N.Y.S.2d 972, 638 N.E.2d 511] )" (*Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 714, 803 N.Y.S.2d 135).

The first three causes of action in the amended complaint attached to the motion to dismiss allege claims against the Defendant Sklar personally.<sup>1</sup> The final cause of action in the proposed amended complaint seeks to pierce the corporate veil and impose liability on Sklar on that basis.

The proposed complaint states in relevant part:

Sklar told Ilardi that it would be "no problem" for him to manufacture a custom-made bedroom set as depicted\*\*\*.

On November 6, 2002, Sklar orally offered to Ilardi to manufacture a custom-made bedroom set\*\*\*.

Over the next two(2) years, Ilardi went to Mica's office\*\*\* every Saturday to inquire of Sklar as to the status\*\*\*.

During these visits, Sklar told Ilardi "You're next in line," and "You're the next priority."  
 During these visits Sklar admitted his delay in processing Ilardi's order.

---

<sup>1</sup>The Court notes that Stuart Sklar was named in his capacity as shareholder of Quality Mica, Inc. and he was not served in his personal capacity when the action initially was commenced. Sklar was added as a party when the Plaintiffs moved for leave to serve and file an amended Complaint.

*Hovering Around Long Island, Inc., v. Sklar*

Index No. 24403-2004

Page 3

On or about June 2004, Sklar told Ilardi that he was “next in line” to receive his furniture. As a Shareholder, Officer, and Director, of Mica, Sklar exercises dominion and control over the corporation which is so complete that the corporation has no separate mind, will, or existence of its own.

\*\*\*Sklar exercised his dominion and control to purposefully and willfully refuse to perform his duties under the terms of the offered and accepted agreement, and maliciously convert the purchased goods to his own use.

Because Sklar accepted Fifteen Thousand Eight Hundred Twenty Three (\$15,823.63) Dollars and Sixty-Three Cents from plaintiffs, failed to deliver the purchased goods, and maliciously converted the purchased goods for his own use, the plaintiffs have been damaged by Sklar’s dominion and control in the amount of Fifteen Thousand Eight Hundred Twenty Three (\$15,823.63) Dollars and Sixty-Three Cents.

In his affirmation in support of the motion to dismiss, the attorney for the Defendant states that the action of the Plaintiffs is based upon the premise that the agreement in 2002 to construct the furniture was made between the Plaintiffs and the Defendant Sklar but in reality the agreement was between the Plaintiffs and Quality Mica, Inc. However, while the Amended Complaint can be read to support this view, the pleading should be given a broader interpretation upon a fair reading of the alleged facts.

A simple breach of contract is not considered a tortious act unless a duty independent of the contract is alleged to have been violated(see, *Probst v. Cacoulidis*, 295 A.D.2d 331, 743 N.Y.S.2d 509). Further, in an appropriate case, it is possible that the personal liability protection afforded a corporate entity may be lost and the corporate veil may be pierced even if a tortious act was not committed by the individual Defendant.

A corporation has an existence separate and distinct from that of the shareholders of the corporation (see, *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152, 432 N.Y.S.2d 879, 412 N.E.2d 934). Under ordinary circumstances a shareholder such as Sklar would not be personally liable for the acts and obligations of the Quality Mica, Inc. and this is true even where the corporation has only one shareholder who is necessarily carrying on the business of the corporation alone (see, *Bowles v. Errico*, 163 A.D.2d 771, 558 N.Y.S.2d 734). However, when equity requires, in extremely circumscribed fact patterns, a Plaintiff may go behind or “pierce” the limited liability of the corporate existence in order to impose personal liability on a shareholder and to hold the owner liable for some corporate obligation. The Plaintiff must show that the owner exercised complete domination of the corporation with respect to the specific transaction in issue and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the Plaintiff’s injury. Generally, in support of the cause of action, the Plaintiff will show that the Defendant misused the corporation because the corporation was inadequately capitalized, personal funds and corporate funds were commingled by the Defendant and the individual sought to be held responsible for the corporate debt operated the corporation without regard to corporate formalities. The Plaintiff may also show that the corporation was used for the purpose of perpetrating a fraud.

Therefore, although the corporate form is a legitimate means of avoiding personal liability, the Court may disregard the corporate form and impose liability upon the individual Defendant upon a showing that the

Defendant abused the status of the corporate entity that contracted with the Plaintiff and that, as a result of the individual Defendant's failure to respect the corporate entity's status, the Plaintiff was injured (see, *Total Care Health Industries, Inc. v. Department of Social Services*, 144 A.D.2d 678, 535 N.Y.S.2d 15).

While a principal of the corporation may be liable because of active participation in an alleged tort (see, *Rothstein v. Equity Ventures*, 299 A.D.2d 472, 750 N.Y.S.2d 625; *Widlitz v. Scher*, 148 A.D.2d 530, 540 N.Y.S.2d 179), the Court will generally respect the existence of the corporate entity and hold only the corporation liable for a contractual debt that it has incurred. As the Appellate Division noted in *New York Assn. for Retarded Children, Montgomery County Ch. v. Keator*, (199 A.D.2d 921, 606 N.Y.S.2d 784):

While the 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 lightly to be disregarded. Indeed precedent is clear that courts will pierce the corporate veil only to prevent fraud, illegality or to achieve equity (see e.g. *Bowles v. Errico*, 163 A.D.2d 771 [558 N.Y.S.2d 734]). This is true even in situations such as this where the corporation is controlled or dominated by a single shareholder (*New York Assn. for Retarded Children, Montgomery County Ch. v. Keator*, 199 A.D.2d 921, 606 N.Y.S.2d 784).

The party seeking to pierce the corporate veil must establish through the facts of the case that the owner of the corporation, through his control and domination, abused the privilege of doing business in the corporate form and used that corporate entity to perpetrate a wrong or injustice against the plaintiff that requires a court in equity to intervene and disregard the corporation's existence to impose liability on the individual that caused the loss (see, *Matter of Guptill Holding Corp. v. State of New York*, 33 A.D.2d 362, 307 N.Y.S.2d 970 aff'd 31 N.Y.2d 897, 340 N.Y.S.2d 638, 292 N.E.2d 782; *National Labor Relations Bd. v. Greater Kan. City Roofing*, 2 F.3d 1047, 1052-1053). A Plaintiff who alleges that he has been harmed by an individual hiding behind the existence of a corporation and that the individual defendant abused the privilege of acting through a corporation would generally require some discovery to prove the allegations in the complaint (see, *Dromgoole v. T-Foots, Inc.*, 309 A.D.2d 1186, 764 N.Y.S.2d 900).

The Plaintiff has the burden of showing that the corporate veil should be pierced (see, *Maggio v. Becca Construction Corp.*, 229 A.D.2d 426, 644 N.Y.S.2d 802). An agent of a corporation does not become personally bound if his capacity as an agent was disclosed when the contract was executed by the parties (see, *Weinreb v. Stinchfield*, 19 A.D.3d 482, 797 N.Y.S.2d 521, 523; *Palisades Office Group, Ltd. v. Kwilecki*, 233 A.D.2d 490, 650 N.Y.S.2d 990; *Leonard Holzer Associates, Inc. v. Orta*, 250 A.D.2d 737, 672 N.Y.S.2d 915, 916). While conclusory statements in a complaint that a corporation is "dominated or controlled" by the Defendant are insufficient to sustain a cause of action against the shareholder in his individual capacity (see, *Itamari v. Giordan Dev. Corp.*, 298 A.D.2d 559, 748 N.Y.S.2d 678), the amended complaint herein, which has been verified by the Plaintiff, alleges specific facts concerning Sklar's actions and the Court has no affidavits to refute those statements.

While New York does not recognize a separate cause of action to pierce the corporate veil (see, *Fiber Consultants, Inc. v. Fiber Optek Interconnect Corp.*, 15 A.D.3d 528, 792 N.Y.S.2d 89 lv to app'l dism'd 4

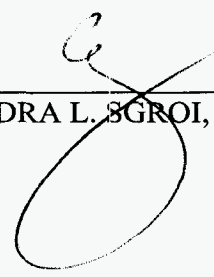
*Hovering Around Long Island, Inc., v. Sklar*  
*Index No. 24403-2004*  
*Page 5*

N.Y.3d 882, 831 N.E.2d 971, 798 N.Y.S.2d 726), the allegations supporting the imposition of civil liability properly are pled in the amended complaint and are interposed as part of the factual allegations used to support the other causes of action in the proposed amended complaint.

The Defendant attorney's affirmation submitted in support of the motion to dismiss lacks evidentiary value because this attorney has no personal knowledge of the events that gave rise to the Plaintiff's claims against the Defendant Sklar (see, *Farina v. Pan American World Airlines, Inc.*, 116 A.D.2d 618, 497 N.Y.S.2d 706). Further, in reviewing a motion pursuant to *CPLR* 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the Plaintiffs will be accorded the benefit of every possible favorable inference, and the Court will determine only whether the facts as alleged in the Complaint fit within any cognizable legal theory ( see, *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 754 N.E.2d 184; *Lupski v. County of Nassau*, 32 A.D.3d 997, 822 N.Y.S.2d 112; *Richmond Shop Smart v. Kenbar Dev. Ctr., LLC*, 32 A.D.3d 423, 820 N.Y.S.2d 124; *Simmons v. Edelstein*, 32 A.D.3d 464, 820 N.Y.S.2d 614).

This Court previously found that the amended complaint stated cognizable legal causes of action against the Defendant Sklar and the motion papers of the Defendant do not provide any reason for the Court to modify that prior holding at this time.

Dated: 8/17/07

  
\_\_\_\_\_  
SANDRA L. SGROI, J. S. C.