

**Lambiasi v Masone's Family Mkt. Place, Inc.**

2007 NY Slip Op 33678(U)

November 13, 2007

Supreme Court, Suffolk County

Docket Number: 0009474/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 8-30-07 (005)  
9-20-07 (006)  
ADJ. DATE 9-20-07  
Mot. Seq. # 005 - MD  
006 - MD

-----X		
EILEEN LAMBIASI, as Administrator of the	:	RAYANO & GARABEDIAN, P.C.
Estate of MICHAEL LAMBIASI,	:	Attorneys for Plaintiff
	:	267 Carleton Avenue, Suite 222
Plaintiff,	:	Central Islip, New York 11722
- against -	:	
	:	MICHAEL J. LANG, ESQ.
MASONE'S FAMILY MARKET PLACE, INC.,	:	Attys for Defs Borchick & Five B. Realty
JOSEPH BORCHICK and FIVE B. REALTY	:	686 Broadway
CORP.,	:	Massapequa, New York 11758
Defendants.	:	
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Upon the following papers numbered 1 to 35 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 26; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 27 - 33; Replying Affidavits and supporting papers 34 - 35; Other \_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant Joseph Borchick for summary judgment and the motion by defendant Five B. Realty Corp. for summary judgment are consolidated and determined herein; and it is further

**ORDERED** that the motion by defendant Joseph Borchick for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him is denied; and it is further

**ORDERED** that the motion by defendant Five B. Realty Corp. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint as against it is denied.

Plaintiff commenced this action to recover payment allegedly due her now deceased husband, Michael Lambiasi (Lambiasi), pursuant to a stock purchase agreement dated October 24, 2001 that he executed with his brother-in-law, defendant Joseph Borchick (Borchick). Lambiasi and Borchick had been secretary and president, respectively, of a corporation, Masone's Family Market Place, Inc., that was formed to purchase and operate a delicatessen/supermarket business known as Masone's Family Market located at 1992 North Jerusalem Avenue in North Bellmore, New York. The agreement dated September 30, 2000 and its attached

rider for the purchase of the business indicated that Borchick and Lambiasi or a corporation in which they had a fifty percent ownership interest with the Borchick or Lambiasi family had the option to purchase the business' property from the seller non-party Gremco Corp. within the first three years of the lease term for the sum of \$550,000.00. Said agreement also indicated that the purchaser would execute a lease for a continuous term of 15 years and that the rent would be \$8000.00 per month for the first two years with annual increases of three percent thereafter and a provision for an additional payment of any increases in real estate taxes from the current tax year.

The October 24, 2001 stock purchase agreement, entitled sales agreement, indicated that Lambiasi wanted to sell his fifty shares and terminate his relationship with Masone's Family Market Place, Inc. and that Masone's Family Market Place, Inc. would purchase said fifty shares at a price of \$150,000.00 to be paid at the rate of \$300.00 per week for 500 consecutive weeks without interest. In addition, said agreement provided that the first \$38,494.00 of said debt was personally guaranteed by Borchick. The agreement contained provisions for payment in the event that the business was sold. The stock purchase agreement was signed by Borchick as president of the corporation. Plaintiff alleges that Lambiasi only received approximately \$40,200.00 of the \$150,000.00 price and that the payments stopped after June 21, 2004.

Plaintiff points to certain events that occurred one year prior to the cessation of payments and alleges that Borchick arranged said events to prevent further payments by the corporation under the stock purchase agreement. Plaintiff questions the motives behind Borchick's request of Lambiasi in early April 2003 to sign a statement acknowledging that Lambiasi had no interest or responsibility for the purchase of the store building and property so as to allow Borchick to exercise the lease option for their purchase as well as the April 12, 2003 execution by Lambiasi of an acknowledgment to the store's landlord that Lambiasi had divested himself from the delicatessen business at the subject premises and that he would make no claim against the landlord in connection with the sale of the premises to Borchick. Plaintiff then points out that the store building and property were purchased in August 2003 by a corporation, Five B Realty Corp., created in April 2003 by Borchick and his immediate family. She notes that Borchick mortgaged his personal residence, that the mortgage listed Five B Realty Corp. and Masone's Family Market Place, Inc. as the mortgagors but that Masone's Family Market Place, Inc. was absent from the deed. Plaintiff further notes that Masone's Family Market Place, Inc. was not given an interest in the purchased store building and property.

By her complaint, plaintiff alleges a first cause of action against Borchick and Masone's Family Market Place, Inc. for breach of the stock purchase agreement; a second cause of action for unjust enrichment claiming that Borchick is attempting to avoid personal liability for the remaining balance of \$64,800.00 by asserting that the stock purchase agreement limits his exposure; and a third cause of action claiming waste and dissipation of corporate assets and unfair dealing resulting in the business' decline rendering it difficult for Lambiasi to receive his promised compensation under the stock purchase agreement. In addition, plaintiff alleges a fourth cause of action claiming that Borchick fraudulently induced Lambiasi to sign the April 2003 acknowledgments; a fifth cause of action pursuant to Business Corporation Law § 628 claiming that defendants are jointly and severally liable to Lambiasi for the unpaid balance of monies due Lambiasi under the stock purchase agreement; a sixth cause of action to pierce the corporate veil of Five B Realty Corp. and Masone's Family Market Place, Inc.; and seventh and eighth causes of action seeking to recover under the Debtor and Creditor Law based on claims that the manner of the purchase of the store building and property was to shield Borchick and Masone's Family Market Place, Inc. from judgment creditors such as Lambiasi.

The amended answer of Borchick and Five B Realty Corp. contained affirmative defenses to the effect that Borchick's personal guaranty under the stock purchase agreement had been satisfied such that he was no longer personally liable under the agreement; that after Lambiasi withdrew from the corporation, its business declined and the corporation became insolvent despite all reasonable efforts to keep it viable thus rendering the corporation unable to meet its obligation under the stock purchase agreement; that Borchick was not unjustly enriched but instead had to use personal funds and mortgage his home in an effort to keep the store's operation viable and sustained losses; and that the mere fact that Borchick was the sole stockholder and president of Masone's Family Market Place, Inc. and Five B Realty Corp. did not imply a lack of corporate formalities and that there is no other basis upon which to pierce the corporate veil and render Borchick personally liable under the stock purchase agreement.

The Court's computer records indicate that the note of issue in this action was filed on July 6, 2007.

Borchick and Five B Realty Corp. now seek summary judgment dismissing the complaint as against them on the grounds that Borchick's sole personal involvement was in the form of a limited guaranty of payment under the October 24, 2001 agreement which was satisfied inasmuch as plaintiff acknowledged in the complaint receipt of more than the guaranteed amount. In addition, Borchick and Five B Realty Corp. assert that there is no specific and detailed allegation of how Lambiasi was fraudulently induced by Borchick to enter the April 2003 agreements particularly since Lambiasi had previously indicated at a family gathering that he had no interest in purchasing the business property. Borchick and Five B Realty Corp. also assert that there is no evidence of corporate waste or a failure to follow corporate formalities in the operation of Masone's Family Market Place, Inc. but rather failed attempts by Borchick after Lambiasi withdrew from the business to maintain the business' solvency through personal funding, hiring personnel, and selling the premises to another corporate entity. Borchick and Five B Realty Corp. further assert that the only significant allegations as against Five B Realty Corp. are that said corporation paid no consideration to the other defendants for the purchase of the premises and that there was a failure of proper corporate procedure and that said allegations lack merit inasmuch as no consideration was necessary in the fair market value purchase and there is no basis upon which to pierce the corporate veil.

In support of their requests for summary judgment, they submit affidavits from Borchick; the amended summons and verified complaint; the agreement dated September 30, 2000 between property owner Gremco Corp. and Borchick and Lambiasi with attached riders; the agreement dated October 24, 2001; Lambiasi's acknowledgment to the landlord dated April 12, 2003; the verified amended answer of Borchick and Five B Realty Corp.; the agreement dated October 18, 2000 transferring the deli/supermarket business from Gremco Corp. to Masone's Family Market Place, Inc. for one dollar consideration; the store lease dated October 18, 2000 between the landlord non-party MFMP Realty Corp. as owner and Masone's Family Market Place, Inc. as tenant and its attached rider; and a portion of plaintiff's deposition transcript.

By his affidavit, Borchick stated that he and Lambiasi contributed unequal amounts toward the purchase of the business, specifically, that Lambiasi contributed approximately \$40,000.00 more than Borchick. According to Borchick, eventually, for financial and personal reasons, it was agreed between Lambiasi and Borchick that Lambiasi would leave the business and sell his stock back to Masone's Family Market Place, Inc. for \$150,000.00 and that Borchick would personally guarantee the sum of \$38,494.00, which was the amount by which Lambiasi's investment in the business exceeded Borchick's investment. He emphasized that the corporation made the required payments until an amount in excess of the guaranteed sum

was paid and that payments subsequently ceased due to a decline in business and the eventual closing of the business.

Borchick noted in his affidavit that the agreement to purchase the business provided Lambiasi and Borchick with the option to purchase the real property on which the store was located. He then pointed to plaintiff's deposition testimony to support his position that Lambiasi advised him at a family function in April 2003 that he had no interest in purchasing the business property. According to Borchick, it was at the seller's insistence that he requested Lambiasi to commit his position to writing to enable Borchick to proceed to purchase the premises. Borchick stated that the main reason for purchasing the building was an attempt to save the delicatessen business inasmuch as Borchick had calculated that the mortgage payments would be significantly less than the rent being paid pursuant to the lease. He explained that the building was purchased for the sum of \$550,000.00, \$500,000.00 of which was obtained through an SBA loan. According to Borchick, the sole reason for the involvement of Masone's Family Market Place, Inc. in the procurement of the loan was due to the lender's requirement that the loan be guaranteed by the building owner and the operating corporation. He added that no assets of Masone's Family Market Place, Inc. or Borchick were used in the purchase of the building.

Borchick continued in his affidavit that at the time that he decided to purchase the building, he was advised by his accountant and attorney that it was preferable to have the building owned by a separate entity to prevent any debts or liabilities of the operating company from affecting the ownership of the real property. According to Borchick, this was the sole reason for his formation of Five B Realty Corp.; there was no intent on his part or on the part of Five B Realty Corp. to deprive plaintiff of any funds; and the fact that plaintiff was not paid the entire \$500,000.00 under the agreement was due to the failure of Masone's Family Market Place, Inc.'s business despite all best efforts to maintain its viability.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

The common law elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*see*, 2 N.Y. PJI § 4:1 602 [2007], *citing Furia v Furia*, 116 AD2d 694, 498 NYS2d 12 [2d Dept 1986]). A familiar and eminently sensible proposition of law is that when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]). Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing or to create an ambiguity in a document which is otherwise clear and unambiguous (*id.*). Whether or not a writing is ambiguous is a question of law to be resolved by the courts (*id.*).

"[A]n individual who signs a corporate contract and indicates the name of the corporation and the nature of his representative capacity on the contract is generally not subject to personal liability" (*Matter of Gifford*, 144 AD2d 742, 744, 535 NYS2d 154 [3d Dept 1988]; *see, Gordon v Teramo & Co.*, 308 AD2d 432, 433, 764 NYS2d 144 [2d Dept 2003]; *Gottehrer v Viet-Hoa Co.*, 170 AD2d 648, 567 NYS2d 71 [2d Dept

1991]). Here, the moving defendants established that Borchick executed the subject stock purchase agreement solely in his capacity as corporate officer, and without any intent to become personally liable to perform thereunder beyond the sum that he guaranteed (*see, Metro. Switch Bd. Co. v Amici Assocs.*, 20 AD3d 455, 799 NYS2d 531 [2d Dept 2005]).

The law is well settled that except in the well-defined situations prescribed in the statute, a corporation may only purchase or redeem its stock out of surplus (*see, BCL § 513 [a]; Nakano v Nakano McGlone Nightingale Advertising, Inc.*, 84 Misc 2d 905, 377 NYS2d 996 [Sup Ct, New York County, Sep 02, 1975]). If a surplus which existed at the time of the agreement by the corporation to purchase or redeem its stock disappears, or shrinks to a deficit, the agreement is rendered unenforceable (*see, id.*). The burden of proof rests upon the corporation to establish its insolvency if it asserts it as a defense to a breach of stock purchase agreement (*see, BCL 513 [a]; Vowteras v Argo Compressor Service Corp.*, 77 AD2d 945, 431 NYS2d 136 [2d Dept 1980], *appeal denied* 55 NY2d 605, 447 NYS2d 1028 [1982]; *Nakano v Nakano McGlone Nightingale Advertising, Inc.*, 84 Misc 2d 905, 377 NYS2d 996 [Sup Ct, New York County, Sep 02, 1975]; *see also, LaSorsa v Algen Press Corp.*, 105 AD2d 771, 481 NYS2d 716 [2d Dept 1984]).

Here, the moving defendants' claim of the absence of surplus and the existence of a deficit with respect to Masone's Family Market Place, Inc. is premised upon the barest and most general allegations contained in their answer and in Borchick's affidavit (*see, Nakano v Nakano McGlone Nightingale Advertising, Inc., supra; compare Vowteras v Argo Compressor Service Corp., supra*). No financial records or proof have been submitted to substantiate this claim, no statement of assets and liabilities has been provided, and no list of creditors and the respective amounts owed to each has been supplied to the Court (*see, id.*). There is no indication as to approximately when after the October 2001 agreement the business began its decline and on what date it ceased operation. Defendants merely assert that a deficit existed at the time that payment under the stock purchase agreement was to be made (*see, id.*).

With respect to piercing the corporate veil, it requires a showing that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see, Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141, 603 NYS2d 807 [1993]; *Seuter v Lieberman*, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil (*see, Morris v New York State Dept. of Taxation and Fin., supra* at 141-142; *Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821, 823, 545 NYS2d 333 [2d Dept 1989]). "The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" (*Weinstein v Willow Lake Corp.*, 262 AD2d 634, 635, 692 NYS2d 667 [2d Dept 1999]). "Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (*First Bank of Americas v Motor Car Funding*, 257 AD2d 287, 294, 690 NYS2d 17 [1<sup>st</sup> Dept 1999] cited by *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 825 NYS2d 274 [2d Dept 2006]).

The parties moving for summary judgment, Borchick and Five B Realty Corp., had the initial burden of demonstrating, among other things, that Masone's Family Market Place, Inc. had adequate capitalization, that there was no intermingling of personal and corporate funds, and more details as to exactly when and why the corporation's business declined to show that there was no basis to pierce the corporate veil (*see, Zuckerman v City of New York, supra; cf. Brunswick Corp. v Waxman*, 599 F 2d 34 [2nd Cir 1979] [at trial,

the party seeking to pierce the corporate veil has the burden of establishing that there is a basis to do so)). The moving defendants failed to demonstrate prima facie entitlement to summary judgment through their submission of Borchick's affidavit merely repeating the affirmative defense claims that there was no basis to pierce the corporate veil (*compare, John John, LLC v Exit 63 Development, LLC*, 35 AD3d 540, 541, 826 NYS2d 657 [2d Dept 2006]; *see generally, Commercial Sites, Co. v Prestige Photo Studios, Inc.*, 272 AD2d 360, 707 NYS2d 491 [2d Dept 2000]).

Without the abovementioned financial records and proof the moving defendants have also failed to demonstrate their entitlement to dismissal of the fraudulent conveyance claims under Debtor and Creditor Law (*see, Rebh v Rotterdam Ventures, Inc.*, 252 AD2d 611, 675 NYS2d 234 [3d Dept 1998], *appeal denied* 96 NY2d 705, 725 NYS2d 277 [2001]; *see also, Northpark Assocs., L.P. v S.H.C. Mergers, Inc.*, 8 AD3d 642, 779 NYS2d 549 [2d Dept 2004]). In determining whether a conveyance was fraudulent, the courts will consider "badges of fraud," which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent (*Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386, 658 NYS2d 407 [2d Dept 1997]). These badges of fraud include lack or inadequacy of consideration, family, friendship, or close associate relationship between transferor and transferee, the debtor's retention of possession, benefit, or use of the property in question, the existence of a pattern or series of transactions or course of conduct after the incurring of debt, and the transferor's knowledge of the creditor's claim and the inability to pay it (*see, Steinberg v Levine*, 6 AD3d 620, 774 NYS2d 810 [2d Dept 2004]).

Based solely on Borchick's affidavit and the documentation provided, the moving defendants failed to demonstrate, prima facie, that there was no basis upon which to pierce the corporate veil and enforce the stock purchase agreement as against Borchick or that Borchick had not otherwise engaged in any actionable conduct concerning the agreement (*cf. Friedenbergh v 31 Calvary Drive Corp.*, 24 AD3d 606, 807 NYS2d 610 [2d Dept 2005]). Therefore, Borchick and Five B Realty Corp. failed to satisfy their initial burdens of demonstrating entitlement to summary judgment.

In any event, plaintiff in opposition to the requests for summary judgment by Borchick and Five B Realty Corp. raised triable issues of fact with respect to Borchick's possible personal liability as the sole shareholder and officer of both Masone's Family Market Place, Inc. and Five B Realty Corp. with respect to his decision to purchase the business' property with a newly created corporation and then sell the property without selling the business so as to avoid the outstanding obligation of Masone's Family Market Place, Inc. under the stock purchase agreement. Plaintiff submitted, among other things, Borchick's deposition transcript.

Borchick's deposition testimony reveals that he closed the store in June 2005, about a week or two prior to Lambiasi's death, after the last tenant, Joanne's Farm Stand, which sold produce left. According to Borchick, at that point there was no possibility of bringing any other tenant in. He stated that Joanne's Farm Stand had a lease with Five B Realty, which had purchased the property, and explained that Masone's was not even able to pay rent at the time, it did not have any money coming in, so Borchick decided to have "it leased with Five B." According to Borchick, when Lambiasi was involved he did all the bookkeeping and from the very beginning of the business it was losing money and checks were bouncing and they were having a difficult time paying their bills. Although the purchase agreement with Gremco Corp. had guaranteed that they would be making \$27,000.00 per week, Borchick testified that in actuality they were making \$7,000.00 to \$8,000.00 per week gross. In addition, Borchick testified that after Lambiasi sold his shares of the business,

Borchick took over the responsibilities of bookkeeping and recordkeeping which he did using computer programs. Borchick could not recall how much the store brought in 2001 and 2002 but stated that business declined after 2000. He stated that "[a]fter 9/11 it just got harder and harder and harder. There also were other factors. There were larger stores opening. There was a Wal-mart that just opened in the neighborhood. The supermarkets in the neighborhood had been renovating. We just couldn't compete on price or product."

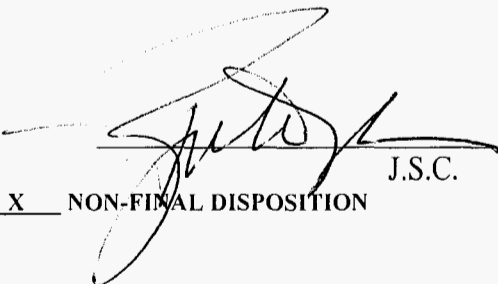
Notably, Borchick testified that he told Lambiasi that he could not continue paying the \$8,000.00 per month rent as well as continue paying Lambiasi under the stock purchase agreement so he decided to purchase the store's property because the mortgage payments would be \$6,000.00 per month as compared to the \$8,000.00 per month rent. However, Borchick later testified that after Five B. Corp. purchased the property, Masone's Family Market Place, Inc. was still paying rent, this time to Five B. Corp., but never had any money and that Five B. Corp. never terminated the lease of Masone's Family Market Place, Inc. Instead he closed the store and sold the property, which he had purchased for \$550,00, for \$875,000.00 to Rosa's Better Batter. Borchick testified that with the money from said sale he repaid the \$80,000.00 his brother loaned him to purchase the property, he repaid his mother a portion, approximately \$100,000.00, of the money she loaned to purchase the property and he has been repaying the loan to Gremco Corp., about \$2,300.00 per month. He stated that he had no intention of paying plaintiff under the stock purchase agreement because he purchased the property with money that he obtained from his family not from Masone's Family Market Place, Inc. Borchick also stated that he closed the business because it was insolvent but that he never filed for bankruptcy; that the business had no inventory left; and that some of the fixtures were thrown out and others, some refrigerators and shelving, were in his garage.

The Court notes that the stock purchase agreement contained no provision in the event that the business was closed rather than sold. Thus, based on the terms of the stock purchase agreement and Borchick's testimony, even though the business was losing money at the time the parties entered into the stock purchase agreement they contemplated that the obligation under the agreement would be satisfied through the business' income or through the proceeds of the sale of the business (*see generally, W.W.W. Assoc., Inc. v Giancontieri, supra*).

Therefore, plaintiff in her opposition papers raised issues of fact as to, among other things, whether Masone's Family Market Place, Inc. lost business due to competition and the inability to keep vendors such that the corporation could not satisfy its obligations under the stock purchase agreement after June 2004 and whether Borchick as sole shareholder and officer of Masone's Family Market Place, Inc. created Five B Realty Corp. so as to obtain funds from the sale of the business' real estate without ever selling the business itself so as to avoid the terms of the stock purchase agreement (*cf. Friedenbergl v 31 Calvary Drive Corp., supra*).

Accordingly, the instant requests by Borchick and Five B Realty Corp. for summary judgment dismissing the complaint as against them is denied.

Dated: NOV 13 2007

  
 \_\_\_\_\_ J.S.C.  
 FINAL DISPOSITION     NON-FINAL DISPOSITION