

Boczar v Greene

2008 NY Slip Op 30138(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0603895/2006

Judge: Herman Cahn

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

PRESENT: Justice Cahn

PART 49

Index Number : 603895/2006

BOCZAR, DAVID J.

INDEX NO.

603895/06

vs

GREENE, KEVIN ROBERT

MOTION DATE

Sequence Number : 001

MOTION SEQ. NO.

DISMISS ACTION

MOTION CAL. NO.

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, it is ordered that this motion

FILED

JAN 18 2008

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE . . .**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/16/08

Hei Cui

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 49

-----X
DAVID J. BOCZAR,

Plaintiff,

-against-

Index No. 603895/06

KEVIN ROBERT GREENE,

DECISION AND ORDER

Defendant.

-----X

CAHN, HERMAN, J.:

Defendant moves, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (7) and 3016 (b), to dismiss the complaint.

FILED
JAN 18 2008
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff David J. Boczar brings this action to pierce the corporate veil of BPC Group, Inc. (BPC), and hold its former Chairman and CEO, defendant Kevin Robert Greene, liable for a judgment rendered in favor of Boczar and against BPC. Boczar alleges that while Greene was in control of BPC, he dissipated, transferred, and fraudulently concealed its assets, and thereby hindered Boczar's efforts to collect his judgment. Greene moves to dismiss on a number of grounds, including res judicata, collateral estoppel, and the failure to name the corporation as a party.

Boczar is the former president of BPC. On January 31, 2002, Greene, who was then BPC's CEO and majority shareholder, terminated Boczar's employment and sought to dispossess Boczar of his ownership interest in BPC.

In response, in February 2003, Boczar filed a Statement of Claim with the National Association of Securities Dealers, Inc. (NASD) against BPC, Greene and others. That statement of claim, which is annexed to the moving papers, set forth several different categories of claims.

First, Boczar alleged breach of an agreed-upon stock exchange of his BPC common shares for shares of a related corporation, CRA Group, which was partially owned by BPC. Boczar also alleged fraud perpetrated by Greene and others regarding the promised conversion of Boczar's BPC shares. The third category of claims related to the respondents' claimed unlawful termination of Boczar's employment, and the fourth related to tortious interference by respondents in regard to the prospective employment of Boczar. Those claims involved defamatory and disparaging comments allegedly made by respondents about Boczar and his professional abilities, to others in the securities industry.

Over a three-day period in June 2004, a hearing was held before a panel of NASD arbitrators. On July 21, 2004, the Arbitration Panel rendered a written decision and award which held that BPC was liable to Boczar for \$25,000.00 in compensatory damages, and \$86,094.88 for the outstanding shares of BPC stock owned by Boczar, for a total award of \$111,094.88. All of Boczar's other claims, including the claims against Greene, for tortious interference and defamation, were denied. Boczar then filed a petition seeking to confirm the arbitration award. On August 5, 2005, judgment was entered against BPC in the amount of \$122,104.32. To date, Boczar has been unable to enforce the judgment, and it remains unsatisfied.

In this action, Boczar seeks to hold Greene personally liable for BPC's debt on the grounds that, in his capacity as CEO and majority shareholder of BPC, Greene exercised dominion and control over BPC, ignored the corporate form, and prevented Boczar from collecting his judgment. Boczar presents evidence which indicates that, in December 2001, immediately prior to Boczar's termination, and while Greene was in control of BPC, he drew down \$117,141.00 on a BPC line of credit and, that same day, purchased a house in Woodstock,

New York. Boczar also alleges that BPC owned a majority interest in CRA, and exercised complete dominion and control over that corporation. Boczar alleges that when judgment against BPC was imminent, Greene fraudulently transferred the CRA units to himself in order to avoid payment of the judgment. Finally, Boczar alleges that when judgment against BPC was imminent, Greene decided to wind down BPC's business.

In his complaint, Boczar alleges causes of action for piercing the corporate veil (first cause of action), breach of fiduciary duty (second cause of action), fraudulent concealment (third cause of action), conversion (fourth cause of action), common-law fraud (fifth cause of action), fraudulent conveyance (sixth cause of action), misappropriation (seventh cause of action), constructive fraud (eighth cause of action), and unjust enrichment (ninth cause of action).

Greene contends that the action is barred by the doctrines of res judicata and collateral estoppel because Boczar is raising the same factual basis for recovery that he did in the arbitration proceeding, albeit on different theories of recovery. Greene points out that in his statement of claim, Boczar sought damages for conversion and common law-fraud, alleging that (i) Greene diverted BPC funds over the years for the payment of his personal expenses and debts; and (ii) Greene's diversion of corporate funds, waste, and mismanagement caused Boczar to suffer a loss in the value of his BPC shares. Greene contends that under the doctrine of res judicata, judgments in prior proceedings are conclusive in later actions not only as to any matters actually litigated, but also as to any that might have been litigated in the first proceeding.

The doctrine of res judicata is applicable to issues resolved by earlier arbitration (Rembrandt Indus. v Hodges Intl., 38 NY2d 502 [1976]). However, where an issue not passed

* 5]
upon by the arbitrators is the subject of a later action, the award is not a bar to that action (id. at 503). The First Department has stated that:

[P]etitioners' contention that *res judicata* applies not only to matters which were actually decided in arbitration but also to those which could have been asserted is simply not accurate. Unlike the courts, which derive their powers from the Constitution and jurisdiction over the parties and the subject matter, the authority of an arbitrator to decide a controversy is derived entirely from the consent of the parties. As a general rule, therefore, the arbitrator is limited to deciding only those questions submitted by the parties, unless it is apparent that they consented to a determination on additional matters [citation omitted]

(Matter of Cine-Source, Inc. v Burrows, 180 AD2d 592, 594 [1st Dept 1992]).

Here, Greene does not allege that the issue of piercing the corporate veil was actually litigated in the arbitration proceeding; he merely asserts that Boczar could have raised the issue, and that it is therefore precluded. This argument is unpersuasive.

Similarly, the doctrine of collateral estoppel precludes a party from re-litigating an issue previously decided against it in a proceeding where there was a fair opportunity to be heard on the matter (Kaufman v Eli Lilly & Co., 65 NY2d 449 [1985]; Active Media Servs., Inc. v Grant Prideco, Inc., 35 AD3d 165 [1st Dept 2006]). The record does not indicate that the issue of piercing the corporate veil was either pleaded by Boczar nor addressed by the arbitrators. It is therefore not a bar to the within action (see Rebh v Rotterdam Ventures, 252 AD2d 609 [3d Dept 1998]).

As to that portion of the motion to dismiss for failure to state a cause of action, "[t]he concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners . . . [and] that the owners are normally not liable for the debts

of the corporation . . .” (Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 140 [1993]). A court will pierce the corporate veil or disregard the corporate form whenever necessary to prevent fraud or to achieve equity (id.). A court may pierce the corporate veil to reach the controlling parent, shareholder or director upon a showing that he or she rendered the corporation unable to honor its obligations, resulting in a loss to the plaintiff (Chase Manhattan Bank (N.A.) v 264 Water Street Assocs., 174 AD2d 504 [1st Dept 1991]).

To withstand a motion to dismiss, the plaintiff must sufficiently allege that: (1) the owners exercised complete domination of the corporation in respect to the transaction at issue; 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 and Fin., 82 NY2d at 141). Here, Boczar has met that burden.

However, a plaintiff’s attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners (id.). Accordingly, New York does not recognize a separate cause of action to pierce the corporate veil (Hart v Jassem, 43 AD3d 997 [2d Dept 2007]; Old Republic Nalt. Title Ins. Co. v Moskowitz, 297 AD2d 724 [2d Dept 2002]). The first cause of action is therefore dismissed.

Further, an action to pierce the corporate veil requires that the controlled corporation(s) be named as defendants in the action (Stewart Tenants Corp. v Square Indus., 269 AD2d 246 [1st Dept 2000]).

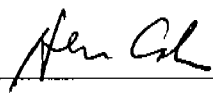
Accordingly, it is

ORDERED that defendant's motion is granted to the extent that the first cause of action, to pierce the corporate veil, is dismissed; and it is further

ORDERED that the action is stayed for 30 days from the date of entry of this order, so that plaintiff may, if so advised, serve an amended complaint to include BPC Group, Inc., and CRA Group, LP as party defendants.

Dated: January 16, 2008

ENTER:



J.S.C

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