

Kahn v Bacote

2008 NY Slip Op 31006(U)

March 17, 2008

Supreme Court, Richmond County

Docket Number: 0080377/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 80377/06
Motion No.: 3**

TALIB KAHN,

Petitioner

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**BRENDA BACOTE, PHILIP PERCY PERSONALLY,
MOJI PERCY SOLAR, as owner/president of SOLAR
REALTY,**

Respondents.

The following items were considered in the review of this motion to vacate:

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1
Answering Affidavits	2
Replying Papers	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Respondent, Moji Percy Solar (“Solar”) seeks to vacate this court’s prior order, dated August 7, 2007, pursuant to CPLR §5015(a)(1) and dismissing any and all claims against respondent as owner/president of Solar Realty pursuant to CPLR §3211(a)(7).

This cause of action was originally filed as a Verified Petition, requesting the return of certain unrecorded real property transfer documents. This action stems from a real estate transaction between petitioner, Talib Khan, and respondent, Brenda Bacote, for the purchase of the premises known as 206 Benziger Avenue, Staten Island, New York, in which respondent, Philip Percy, acted as real estate agent. Respondent, Brenda Bacote, thereafter defaulted on her payment obligations and petitioner now seeks payment. Respondent, Moji Solar-Percy, s/h/a “Moji Percy Solar, as owner/president of solar Realty, now seeks to vacate the default judgment made by this court, dated August 7, 2007, pursuant to CPLR §5015(a)(1).

Discussion

CPLR 5015(a)(1) empowers the court, regarding the reopening of default issues, to use their discretion to relieve a party of its default with proof of both reasonable excuse of default and a valid meritorious claim.¹ Courts have long supported the principle that cases should be heard on the merits, rather than being dismissed on technicalities. The general policy of the courts is “to permit actions to be determined by a trial on the merits wherever possible and for that purpose a liberal policy is adapted with respect to opening a default judgment in furtherance of justice to the end that parties may have their day in court to litigate the issues....”²

Respondent Solar-Percy argues that she never had any knowledge of the proceedings until served with Notice of Entry on or about September 15, 2007 claiming that the receptionist at Solar Realty, Anton Bishop, was working closely with respondent Philip Percy, and conspired with Philip Percy to purposefully withhold said petition from her. Petitioner, Khan, claims that the respondent was aware of the cause of action. The petitioner’s counsel fails to produce sufficient evidence to support their contention that their client will be prejudiced if the complaint is restored against the respondent Solar-Percy. In adhering to the general liberal policy that actions be determined by a trial on the merits whenever possible, this court grants respondent Solar-Percy’s motion to vacate the default judgment, dated August 7, 2007.

Additionally, respondent Solar-Percy seeks an order dismissing any and all claims against her as owner/president of Solar Realty, pursuant to CPLR §3211(a)(7), on the ground that she is not, nor has she ever been the owner or president of said entity. Petitioner’s basis for naming the respondent as owner/president of Solar Realty, is that the respondent, Solar-Percy, allegedly advised petitioner that she was the owner of Solar Realty. Solar-Percy claims that Solar Realty has always been owned and operated by respondent, Philip Percy, her husband, and that she was merely a salesperson or agent for Solar Realty. Petitioner claims that Solar-Percy has held herself out to the community as the owner and seeks court intervention to “pierce the corporate veil.”

¹See *Law Firm of Joel Brandes, P.C. v. Ferraro*, 257 A.D.2d 610 [2nd Dept 1999].

²38 *Holding Corp. v. New York*, 179 A.D.2d 486, 487 [1st Dept 1992].

Generally, a corporate entity will be disregarded only to prevent fraud or illegality or to achieve equity.³ Contrary to petitioner's argument, however, piercing the corporate veil generally requires a showing 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.⁴ Here, the petitioner fails to meet the first prong because by her own admission, she states that respondent Solar-Percy did not have any involvement with the transaction under three months after the alleged fraud took place at the closing on January 30, 2006. Petitioner does not dispute that the respondent did not have personal dealings with the petitioner prior to the closing on January 30, 2006, that petitioner did not "list" the house with the respondent, that the respondent was not present at the closing, and that the respondent did not have any conversations with the petitioner until three months after the closing. Petitioner, therefore, fails to establish that the respondent had complete domination of the corporation which is the key to piercing the corporate veil.⁵

Accordingly, it is hereby:

ORDERED, that respondent, Moji Solar-Percy's, s/h/a "Moji Percy Solar, as owner/president of Solar Realty" motion to vacate this court's prior order, dated August 7, 2007, pursuant to CPLR §5015(a)(1), is granted; and it is further

ORDERED, that respondent, Moji Percy-Solar's motion to dismiss any and all claims against her as owner/president of Solar Realty, Inc. pursuant to CPLR §3212(a)(7), is granted.

ENTER,

DATED: March 17, 2008

Joseph J. Maltese

³*Bartle v Home Owners Co-op.*, 309 NY 103 [1955].

⁴*Morris v New York State Dept of Taxation and Finance*, 82 NY2d 135 [1993], citing *Matter of Guptill Holding Corp v State of New York*, 33 AD2d 362, 364-365 [3d Dept 1993].

⁵*Walkovszky v Carlton*, 18 NY2d 414, 417 [1966].

Justice of the Supreme Court