

Hauser v Merriweather
2008 NY Slip Op 31144(U)
April 11, 2008
Supreme Court, Nassau County
Docket Number: 8058-07/
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

SUSAN HAUSER,

Plaintiff,

-against-

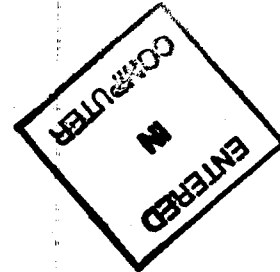
PARISH MERRIWEATHER,

Defendant.

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 8058/07

MOTION DATE: Feb. 29, 2008
Motion Sequence # 001



The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Affidavit in Support..... X
- Reply Affirmation X

This motion, by plaintiff, for an order pursuant to CPLR Rule 3212 granting plaintiff summary judgment as to her Verified Complaint, finding defendant Parish Merriweather liable to plaintiff for her existing judgment against "Merriweather Good & Associates, Ltd." in the amount of \$140,376.74 on the grounds that defendant acted through and on behalf of that non-existent corporation and was the alter ego of that purported "corporation", along with such other and further relief as the Court deems just and proper, is determined as hereinafter set forth.

FACTS

The plaintiff entered into an agreement with “Merriweather Good & Assoc.” (hereinafter “MG&A”) for the renovation of the plaintiff’s property. After a dispute over the workmanship of the services provided, plaintiff won an award from AAA Construction Industry Arbitration in the amount of \$140,376.74 against MG&A and “Merriweather Good Ltd.” (hereinafter “MG”). Pursuant to CPLR article 75, this judgment was confirmed by Hon. Tammy S. Robbins. On January 12, 2007, the Honorable Tammy S. Robbins denied a motion by MG&A and MG to vacate the judgment. In that proceeding, the Honorable Tammy S. Robbins also denied the plaintiff’s cross claim to have the corporate veil pierced and to hold the defendant in this action, Mr. Parrish Merriweather, personally liable for the judgment. In the instant action, the plaintiff seeks to have the corporate veil pierced and have her arbitration award applied against the defendant, Mr. Parrish Merriweather, personally.

PLAINTIFF’S ASSERTIONS

The plaintiff contends the company she hired for the renovations to her Lido Beach N.Y. apartment, MG&A, never existed as a legal corporation. Although MG is a corporation filed under New York Law, the plaintiff maintains she was never cognizant she was doing business with that entity. All of the invoices and checks during the course of business were made out to MG&A, and the original contract for the construction was in the name of MG&A. The plaintiff contends she only discovered the MG entity through its endorsement of her checks into their account. Plaintiff was awarded a judgment against both MG&A and MG and then did an asset search. The plaintiff discovered that MG was a New York corporation with the defendant, Mr. Parrish Merriweather as its CEO. This entity was subsequently found to be assetless. A search of the records further revealed that the entity MG&A never existed with the New York State Department of Corporate Entities, nor with the New York State Division of Corporations. She adds that MG&A is also not licensed by the Nassau County Office of Consumer Affairs. Accordingly, because Mr. Merriweather conducted his dealings with the plaintiff under the false entity of MG&A, the plaintiff contends that the corporate veil should be pierced and to have her judgment enforced against the defendant, Mr. Parish Merriweather, personally.

DEFENDANTS’ ASSERTIONS

The defendant contends that the plaintiff’s claims are barred by the doctrine of res judicata, on the grounds that the plaintiff made that application in a cross motion before the

Honorable Tammy S. Robbins, which was denied. The defendant further claims that the plaintiff has not produced enough evidence to “pierce the corporate veil” and attach the judgment to the defendant personally. He maintains that he did business with the plaintiff, not in his personal capacity, but as the MG entity and therefore he cannot be held personally liable for the judgment against the corporation. Lastly, the defendant contends that summary judgment is inappropriate due to the fact sensitive nature of the “piercing the corporate veil” doctrine and therefore the plaintiff’s motion should be denied.

DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651, 1994):

“It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (State Bank of Albany v McAuliffe, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; Zuckerman v City of New York, *supra*, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)”.

Applying those principles to the facts in the case at bar has warranted an intensive examination of the record as presented to this Court, which includes the pertinent pleadings, and other relevant data. Every reasonable inference which can be reasonably drawn from the

evidence provided shall be viewed in the light most favorable to the defendant.

As a primary matter the doctrine of res judicata is not appropriate in the instant action. “Res judicata provides finality in the resolution of disputes to assure that parties may not be vexed by further litigation.” (Matter of Reily v Reid, 45 N.Y.2d 24, 28). “Under New York’s transactional approach to res judicata, once a claim is brought to final conclusion, all other claims arising out of the same transaction ... are barred, even if based upon different theories....” (O’Brien v City of Syracuse, 54 N.Y.2d 353, 357).

In order to evoke the doctrine of res judicata, the issue in dispute has to have been, or could have been, adjudicated upon its merits. (Martines v Wood, 232 A.D. 407). In the proceeding before Justice Robbins, Mr. Parrish Merriweather was not a party. The merits of the plaintiff’s claims against this defendant were never reached. That action was brought to confirm the arbitration award against MG and MGA, not this defendant, as such proceeding could not have included Mr. Merriweather, as he was not a party in the original arbitration. The defendant in the instant action has appeared in this proceeding and submitted his affidavit in opposition to the instant motion. His activity in the entities could not be properly adjudicated in the prior proceeding, therefore res judicata is not appropriate.

It is a legitimate purpose to incorporate for the purpose of limiting personal liability. (Bartle v Home Owners Cooperative, 309 N.Y. 103, 106, 127 N.E.2d 832, 1955). “Nevertheless, equity will intervene to pierce the corporate veil and permit the assertion of claims against individuals who control the corporation, in order to avoid fraud or injustice.” (Matter of Morris v New York State Dept. of Taxation and Fin., 82 N.Y.2d 135, 140, 1993).

A plaintiff asserting the “piercing the corporate veil” theory of recovery must demonstrate:

1. The defendant exercised complete dominion and control over the corporation.
2. And used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury.

(Id. at 141). Bare assertions that the corporation acted as the “alter ego” of the defendant will

not, without more, support this theory of recovery. (*Id.* at 142). “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 A.D.2d 287, 294, 1st Dept., 1999).

Applying these precedents to the case at bar, however, compels a judgment in favor of the plaintiff. The defendant exercised complete dominion and control over the MG&A entity. This entity is a non registered corporation, unlicensed to do business in the County. The agreement for the construction was between the plaintiff and MGA; this is undisputed, and in fact, the defendant submits that agreement as his “Exhibit B”. All of the plaintiff’s checks were made out to MGA, that they were deposited in MG’s account does not change the fact that the defendant was, in his exercise of his dominion and control, interchangeably using the two entities to suit his own purposes. The defendant firmly asserts that the “entity” MGA was doing all the work; this “entity” is merely a trade name; it is not incorporated, registered or licensed with any State or municipal authority. The fact that material men and subcontractors were paid by MG is of no moment when those transactions did not involve the plaintiff. The wrong precipitated by the defendant is evidenced by his conduct. He, doing business as MGA, submitted the agreement which provided for arbitration so that the plaintiff could ostensibly proceed against an entity that was assetless, and his attempts to hide behind his corporation when it suits him. Further, Justice Robbins has determined that the entities, (the trade name and the corporation) do not have a meritorious defense. Generally, since this defendant executed the agreement on behalf of a nonexistent corporation, he may be held personally liable (**Bay Ridge Lumber Co., Inc. v Groenendaal**, 175 AD2d 94, 96, 2nd Dept., 1991). This leads to the inevitable conclusion that MG&A essentially is Mr. Parrish Merriweather, i.e. his “alter ego”. The plaintiff specifically did business with MG&A as evidenced by the contract between them. These transactions with the entity resulted in a wrong done to the plaintiff which the arbitration hearing fully litigated.

“An individual who acts on behalf of a non-existent corporation is personally liable for the obligations incurred in the name of that corporation.” (**Bay Ridge Lumber Co., Inc. v Groenendaal**, 175 A.D.2d 94, 2nd Dept., 1991). “In order to achieve the immunity from personal liability which the law accords to the doing of business in corporate form there must be ... corporate organization....” (**PS&A Realties v Lodge Gate Forest, Inc.**, 205 Misc. 245, Sup. Ct. N.Y. Co. 1954). The MG&A entity is not a corporation under the laws of New York. Thus the defendant can be held personally liable for the judgment awarded to the plaintiff. Therefore, the plaintiff has sustained her burden of proof and the burden now shifts to the defendant to demonstrate an issue of fact.

HAUSER v MERRIWEATHER

Index no. 8058/07

There is no evidence submitted by the defendant, just an assertion that the MG corporation was disclosed to the plaintiff. All evidence submitted supports the conclusion that she did not know of the MG entity. Every invoice and check had the words MG&A on it, as did the initial contract between the parties.

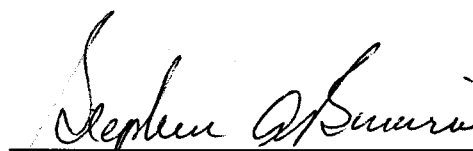
The defendant's bald assertions that the plaintiff knew she was doing business with MG without more, is insufficient as a matter of law to overcome the evidence that the plaintiff submits. In sum, the plaintiff has made a **prima facie** case which the defendant has failed to raise a triable issue of fact upon and therefore the plaintiff's motion is **granted** in the amount of \$140,376.74.

The plaintiff's counsel may obtain a Clerk's judgment.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated APR 11 2008


XXX J.S.C.

ENTERED

APR 16 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE