

**Do Gooder Prods., Inc. v American Jewish
Theatre, Inc.**

2008 NY Slip Op 31281(U)

April 29, 2008

Supreme Court, New York County

Docket Number: 0604135/2004

Judge: Carol R. Edmead

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

PRESENT: CAROL EDMEAD
J.S.C. Justice

PART 35

Do Gooder

- v -

American Jewish

INDEX NO. 604135/04
MOTION DATE 1/30/06
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion sequence 004, 005 and 006 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion by plaintiff Do Gooder Productions, Inc. for summary judgment and/or an order of discovery sanctions as against defendant Stanley Brechner is denied (004); and it is further

ORDERED that the motion by defendant Stanley Brechner for an order granting summary judgment in his favor, dismissing the complaint and all claims asserted against him is granted (006); and it is further

ORDERED that the complaint is dismissed as against defendant Stanley Brechner and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the action is severed and, in accordance with the order of this court, dated May 3, 2005 (entered May 20, 2005), an assessment of damages against defendant American Jewish Theatre, Inc. is directed, and it is further

Dated: _____ J.S.C.

Page 1 of 2

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that the motion by defendant Stanley Brechner for an order precluding plaintiff Do Gooder Productions, Inc. from introducing certain items into evidence (005) is denied as moot; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendant.

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated 4/29/08

ENTER *[Signature]* J.S.C.
CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
DO GOODER PRODUCTIONS, INC.,
Plaintiff,

Index No. 604135/04

-against-

DECISION/ORDER

AMERICAN JEWISH THEATRE, INC. and
STANLEY BRECHNER,
Defendants.
-----X

FILED
MAY 05 2008
COUNTY CLERK'S OFFICE
NEW YORK

EDMEAD, J.:

MEMORANDUM DECISION

Motion sequence numbers 004, 005 and 006 are consolidated for disposition.

Plaintiff Do Gooder Productions, Inc. (Do Gooder) and defendant Stanley

Brechner (the president/officer of defendant American Jewish Theatre, Inc. [AJT]), each make mirror-image summary judgment motions, resolution of which depends upon the applicability or inapplicability of the doctrine of piercing the corporate veil.

In motion 004, Do Gooder seeks summary judgment as against Brechner, holding him personally liable for the May 20, 2005 default judgment entered in Do Gooder's favor against AJT. Alternatively, Do Gooder contends that, pursuant to CPLR 3126, discovery sanctions should be imposed against Brechner resolving the issue of piercing the corporate veil as between AJT and Brechner in Do Gooder's favor.

In motion 006, Brechner seeks an order granting summary judgment in his favor, dismissing the complaint and all claims asserted against him in this action on the ground that there is no basis to hold him personally liable under the terms of the written agreement between Do Gooder and AJT, and that there is no basis upon which to pierce the corporate veil in the

absence of proof of gross negligence on Brechner's part, under Not-For-Profit Corporation Law § 720-a, which showing has not been made.

For the reasons set forth herein, Do Gooder's motion for summary judgment is denied (004) and Brechner's motion for summary judgment is granted (006).

In light of the above, motion 005, a discovery motion by Brechner seeking an order precluding Do Gooder from introducing certain bates-stamped numbered documents into evidence, is denied as moot.

BACKGROUND

Non-party Mutual Housing Authority, is the owner of the building, located on West 26th Street, New York, New York (Premises). There is a performance space located in the basement of the Premises, known as the Raymond J. Greenwald Theatre, consisting of a 148-seat, rotunda-style theatre (Theatre). AJT, a domestic not-for-profit corporation, was the lessee of the Theatre pursuant to a lease with Mutual Housing Authority.

This action arises from a written agreement, entitled "License Agreement," dated August 14, 1998, between Do Gooder and AJT (License Agreement), for Do Gooder's use of the Theatre for the production of a play entitled "2 ½ Jews." Do Gooder entered into occupancy of the Theatre on or about November 29, 1998. However, according to Do Gooder, the condition of the Theatre was (or thereafter became) unsuitable, unsafe and unsanitary. Among other things, Do Gooder alleges that there were floods at the Theatre, resulting in mold-related problems, roach and rodent problems, as well as lighting equipment problems. As a result, Do Gooder vacated the Theatre on November 14, 1999.

On or about December 31, 1999, AJT returned to Do Gooder its security deposit.

AJT also returned to its theatre patrons the subscription payments made by such patrons to AJT for the canceled performances. Additionally, after Do Gooder's vacatur, AJT continued to pay rent owed under the main lease to the owner, Mutual Housing Authority, for the Premises.

Do Gooder commenced this action five years later by summons and complaint, dated December 6, 2004 (Complaint).

Do Gooder moved for a default judgment against AJT because it did not appear or answer the Complaint. By order, dated May 3, 2005 (entered May 20, 2005), that motion was granted on default. The order provides, in relevant part, that "damages against defendant American Jewish Theatre, Inc. will be assessed at the time of trial of the action or disposition of the action against the remaining defendant Stanley Brechner."

Subsequently, Do Gooder's attorneys, Jones Day, moved for permission to withdraw as counsel for Do Gooder. That motion was granted by order, dated February 28, 2006 (entered March 10, 2006). That order, by its terms, stayed this action (including discovery) for a period of 45 days in order to permit Do Gooder to obtain new counsel.

During the interim, document and deposition discovery proceeded. It is noteworthy that document production revealed two AJT checks that were apparently drawn by Brechner for personal use, to wit: (a) a check, dated November 4, 1997, in the amount of \$6,600, payable to the sellers of a home Brechner was purchasing; and (b) a check, dated November 6, 1997, in the amount of \$798.22, payable to MSB Bank, the holder of the mortgage on the above-referenced home.

There were some discovery disputes and delays, concerning, among other things, Do Gooder's demand upon Brechner to produce certain canceled AJT bank checks and other

bank records from AJT's bank. The parties also disagreed on which party should bear the costs of such production. On at least one occasion, there was a conference call with the court that resulted in a written discovery order.

In September 2006, Brechner produced the requested bank records and canceled checks. However, the production did not include any bank records or checks created prior to September 1999 because the subject bank's retention policy was to retain such records for only seven years. As discussed *infra*, Do Gooder takes the position that Brechner should be penalized for the bank's failure to produce these records, because such non-production purportedly was attributable to Brechner's delay. As such, Do Gooder asserts that the court should deem that these records and canceled checks would have demonstrated that Brechner commingled and misappropriated AJT's funds for his personal use. Brechner denies any such wrongdoing, and claims that the complications were caused by many factors, including, but not limited to, Do Gooder's delay in the commencement of this action, and the stay of the action when Do Gooder's attorneys were relieved as counsel.

Do Gooder now seeks to hold Brechner liable for the default judgment obtained against AJT based on the theory of piercing the corporate veil. Brechner opposes that motion and moves for summary judgment on the ground that there is no basis to hold him personally liable herein.

DISCUSSION

Do Gooder contends that the evidence shows that AJT operated as Brechner's alter ego, that Brechner operated AJT for his own benefit, completely ignored the corporate form during the relevant time period from 1998 to 1999, during which time AJT was inadequately

capitalized and that Brechner used AJT funds for his own personal use.

Brechner denies any wrongdoing and claims that there is no support for Do Gooder's claim that AJT was undercapitalized at the relevant point in time, that AJT's corporate formalities were ignored, that Brechner dominated AJT by conducting his own, rather than AJT's business, or that he used AJT to commit a fraud. Rather, Brechner contends that he has shown that, during the relevant time period, AJT was in fact sufficiently capitalized, that corporate formalities were actually observed, and that there was no commingling of AJT's funds. Brechner further submits that summary judgment in his favor is appropriate because any and all actions performed by him were done in his capacity as an agent or officer of AJT, and, as such, there is no basis to establish individual or personal liability by him. In this regard, Brechner submits that the crux of the underlying case is a dispute between Do Gooder and AJT arising out of the License Agreement between Do Gooder and AJT. Since it is undisputed that he was not a party to the License Agreement, he argues that, whatever rights, responsibilities, liabilities, and/or causes of action may exist, can only be alleged or asserted by and between Do Gooder and AJT. Therefore, Brechner concludes that there is no basis to hold him, as a director, officer or trustee of AJT, personally liable for the obligations of AJT.

To pierce the corporate veil, one must show "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" (Sheridan Broadcasting Corp. v Small, 19 AD3d 331, 332 [1st Dept 2005], quoting Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]).

As explained by the Third Department in Heim v Tri-Lakes Ford Mercury, Inc.

(25 AD3d 901, 902 [3rd Dept 2006]):

“Piercing the corporate veil is an equitable doctrine which allows courts to disregard the corporate form whenever necessary to prevent fraud and hold corporate owners liable for the corporations' obligations (see Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 140-141 [1993]; State of New York v Robin Operating Corp., 3 AD3d 769, 771 [2004]). . . . "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (Matter of Morris v New York State Dept. of Taxation & Fin., *supra* at 142).”

Generally, piercing the corporate veil requires that the owners exercised complete domination over the corporation with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong against the plaintiff, causing injury (First Capital Asset Mgt., Inc. v N.A. Partners, L.P., 300 AD2d 112, 116 [1st Dept 2002]). A plaintiff bears a heavy burden of establishing domination (Matias v Mondo Props. LLC, 43 AD3d 367, 367-68 [1st Dept 2007]). Indicia of conduct sufficient to justify veil-piercing includes: (1) the absence of corporate formalities; (2) inadequate capitalization; (3) whether funds are put in and taken out of the corporation for personal, rather than for corporate purposes; (4) overlap in ownership; and (5) the payment or guarantee of debts of the dominated corporation by other corporations in the group (Shisgal v Brown, 21 AD3d 845, 848 [1st Dept 2005]). The determination to pierce the corporate veil is often a fact-laden inquiry, that is not susceptible to summary judgment resolution (Ledy v Wilson, 38 AD3d 214, 215 [1st Dept 2007]; Forum Ins. Co. v Texarkoma Transp. Co., 229 AD2d 341 [1st Dept 1996]).

Being an officer of an entity, without more, does not provide a basis to establish individual or personal liability. “[I]t is well settled that ‘[t]hose seeking to pierce a corporate veil

. . . bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences' (Sheridan Broadcasting Corp. v Small, *supra*, 19 AD3d at 332, citing TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 [1998]; *see also* CDR Créances S.A. v Euro-American Lodging Corp., 40 AD3d 421 [1st Dept 2007]).

Brechner contends that the evidence demonstrates that AJT was not undercapitalized at the time Do Gooder vacated the Theatre, relying on the evidence showing that: (a) AJT continued to pay rent for the Theatre to the owner of the Premises; (b) AJT returned Do Gooder's security deposit to it; and (c) AJT returned subscription payments to its patrons. He contends that this, and other evidence, tends to refute Do Gooder's allegations that AJT was undercapitalized at the pertinent time, or that the corporate entity was used by Brechner to commit a fraud.

Despite Do Gooder's repeated declarations of Brechner's alleged wrongdoing, the two checks, drawn in 1997, are the only evidence that provide any support for Do Gooder's claim that Brechner used AJT's funds to cover his personal expenses. It is from this limited evidence that Do Gooder claims that it has shown a pattern of commingling of funds sufficient to pierce the corporate veil as against Brechner. However, this evidence, without more, is insufficient to warrant the drastic relief of piercing the corporate veil (*see e.g.*, Prichard v 164 Ludlow Corp., ___ AD3d ___, 854 NYS2d 53 [1st Dept 2008]). Neither the quality nor quantity of evidence rises to the serious level needed to justify piercing the corporate veil (*see* Prichard v 164 Ludlow Corp., ___ AD3d ___, 854 NYS2d 53 [1st Dept 2008]). As such, the court rejects Do Gooder's contention that the facts in this case are similar to those presented in cases such as Wm. Passalacqua

Builders, Inc. v Resnick Developers South, Inc., (933 F 2d 131, 139 [2d Cir 1991]).

Other than the above-mentioned checks, Do Gooder has failed to provide any evidentiary support for its repeated claim of improper domination and control of AJT by Brechner. Cases, such as American Baptist Churches of Metropolitan New York v Galloway (271 AD2d 92, 100 [1st Dept 2000]) do not compel otherwise, since, here, there was no proof that Brechner's domination of AJT was used to "commit a wrong" against Do Gooder (see also CH v RH, 18 Misc3d 268 [Sup Ct Nassau County 2007]).

To summarize, Do Gooder has failed to show that there was any wrongful domination and control of AJT by Brechner, that AJT was undercapitalized, or that there has been a disregard of corporate formalities by AJT. The court concludes that Do Gooder has failed to meet its burden of demonstrating any of the elements required to justify piercing the corporate veil (see Sheridan Broadcasting Corp. v Small, *supra*).

From the discovery perspective, Do Gooder maintains that Brechner's delay prevented Do Gooder from obtaining crucial evidence to establish Brechner's domination and control over AJT, and that, as such, his actions were akin to actual destruction of key financial records. Do Gooder claims that, since those documents might have established Brechner's use of AJT's funds for his personal use, an inference should be drawn against Brechner to that effect. Do Gooder thus urges the imposition of sanctions against Brechner for his spoliation of evidence, and maintains that the appropriate sanction is an order piercing the corporate veil and an order barring Brechner from offering any evidence regarding the control and domination of AJT or lack thereof.

Brechner submits that he complied with his discovery obligations. He further

asserts that Do Gooder has failed to articulate any duty he owed to maintain these bank documents that were not in his possession and control, especially since Do Gooder waited five years to commence this action, and could have independently subpoenaed the records directly from the bank.

Upon review, it is apparent that a number of factors, in addition to any alleged delay by Brechner, are responsible for any discovery delays herein, including the commencement of this action by Do Gooder five years after the facts giving rise to the action, as well as Do Gooder's change of counsel in 2006. Furthermore, Brechner did not exercise direct possession or control over the bank's records, and there is no showing that Brechner acted deliberately in order to avoid such production. Accordingly, the court rejects Do Gooder's claim that Brechner was guilty of spoliation of evidence, and/or that the facts presented would warrant the sanctions suggested by Do Gooder.

Turning to Brechner's motion for summary judgment, Brechner has adequately demonstrated that he acted solely in a representative capacity of AJT, and Do Gooder has failed to raise any factual issues sufficient to defeat Brechner's entitlement to summary judgment. No evidence has been submitted showing that Brechner may have acted in an individual capacity or that he acted in any capacity other than as a representative of AJT. Nor, as stated above, is there sufficient evidence to determine that a basis exists for the court to disregard the corporate form and pierce the corporate veil in order to prevent fraud or equivalent wrongdoing.

Accordingly, the court denies Do Gooder's motion for summary judgment (004), and grants Brechner's motion for summary judgment dismissing the complaint against him (006). In light of the foregoing, motion 005 is denied as moot.

CONCLUSION

It is ORDERED that the motion by plaintiff Do Gooder Productions, Inc. for summary judgment and/or an order of discovery sanctions as against defendant Stanley Brechner is denied (004); and it is further

ORDERED that the motion by defendant Stanley Brechner for an order granting summary judgment in his favor, dismissing the complaint and all claims asserted against him is granted (006); and it is further


ORDERED that the complaint is dismissed as against defendant Stanley Brechner and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the action is severed and, in accordance with the order of this court, dated May 3, 2005 (entered May 20, 2005), **an assessment of damages against defendant American Jewish Theatre, Inc. is directed, and it is further**

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that the motion by defendant Stanley Brechner for an order precluding plaintiff Do Gooder Productions, Inc. from introducing certain items into evidence (005) is denied as moot.

Dated: April 29, 2008


ENTER

Carol Robinson Edmead, J.S.C.

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