

Hyman v Captus Group, Inc.

2008 NY Slip Op 31365(U)

May 7, 2008

Supreme Court, Suffolk County

Docket Number: 0014684/2005

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 14684/2005

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 STANLEY HYMAN,

Plaintiff,

-against-

 THE CAPTUS GROUP, INC., NORTH FORK
 BANK and COUNTY OF SUFFOLK,

Defendants.

ORIG. RETURN DATE: JANUARY 29, 2008
 FINAL SUBMISSION DATE: JANUARY 31, 2008
 MTN. SEQ. #: 004
 MOTION: MD

PLAINTIFF'S ATTORNEY:

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Upon the following papers numbered 1 to 7 read on this motion _____
TO PIERCE THE CORPORATE VEIL

Notice of Motion and supporting papers 1-3; Affidavit in Opposition 4, 5; Replying Affidavits
 and supporting papers 6, 7; it is,

ORDERED that this motion by plaintiff for an Order granting plaintiff
 leave to pierce the corporate veil, is hereby **DENIED** for the reasons set forth
 hereinafter. The Court has received an affidavit in opposition to the instant
 application from counsel for defendant THE CAPTUS GROUP, INC. ("CAPTUS")
 and non-party MICHAEL DANZI.

This action was commenced to recover damages for the value of a certain motor vehicle, described as a 2000 Toyota Avalon, sold to plaintiff by CAPTUS in May of 2003. On or about April 20, 2004, the Suffolk County Police Department impounded the vehicle as a stolen vehicle. By Order dated November 6, 2006 (Werner, J.), the Court granted summary judgment in favor of plaintiff and against CAPTUS on the issue of liability, finding that the subject vehicle was indeed a stolen vehicle on the date of purchase.

By Order dated March 1, 2007, this Court granted a motion by plaintiff to sever this action as to CAPTUS, and to set the matter down for an Inquest as to the issue of damages against CAPTUS. The Inquest was held on April 19, 2007, in which plaintiff presented competent evidence in support of his claim against CAPTUS. Thereafter, on June 6, 2007, plaintiff entered judgment against CAPTUS in the amount of \$37,269.75.

Plaintiff now moves for an Order permitting plaintiff to pierce the corporate veil to enforce his judgment against MICHAEL DANZI, the sole officer and shareholder of CAPTUS. Plaintiff indicates that Mr. Danzi appeared for a deposition on November 15, 2007, in response to a subpoena *duces tecum* served by plaintiff's counsel pursuant to CPLR 5224. Although the subpoena commanded Mr. Danzi to bring with him certain documents and records relative to CAPTUS and the underlying sale of the vehicle, plaintiff indicates that he failed to do so. Mr. Danzi testified that in March of 2004, all the books and records of CAPTUS were turned over to the banks that funded the leases. In addition, Mr. Danzi testified that he collected a salary from CAPTUS in 2004 of \$50,000.00, even though the corporation only conducted business until March of 2004. Moreover, Mr. Danzi testified that he has never been president of any other corporation, however, plaintiff alleges that Mr. Danzi is the president of at least six other corporations with the same address as CAPTUS. Plaintiff alleges that Mr. Danzi refused to answer any further questions at the deposition as to the location of the corporation's assets. As such, plaintiff argues that Mr. Danzi has effectively precluded plaintiff from collecting his judgment.

In opposition, counsel for CAPTUS and Mr. Danzi argues that plaintiff's motion must be denied in its entirety as Mr. Danzi is not a party to this action, and therefore this Court does not have jurisdiction over him. Counsel further argues that the questions posed to Mr. Danzi during his deposition were inappropriate, as they related to his personal assets and not those of the corporation. As a result, Mr. Danzi's counsel terminated the deposition once plaintiff's counsel's "true motives became apparent."

Piercing the corporate veil 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 (*see Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135 [1993]; *Matter of Goldman v Chapman*, 44 AD3d 938 [2007]; *Pae v Chul Yoon*, 41 AD3d 681 [2007]). While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. 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 (*see Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, *supra*; *Shisgal v Brown*, 21 AD3d 845 [2005]).

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. Accordingly, New York does not recognize a separate cause of action to pierce the corporate veil. An action to pierce the corporate veil merely requires that the controlled corporation be named as a defendant in the action (*Hart v Jassem*, 43 AD3d 997 [2007]; *Old Republic Natl. Title Ins. Co. v. Moskowitz*, 297 AD2d 724 [2002]). As such, CAPTUS' argument that plaintiff's motion must be denied as Mr. Danzi is not a party to this action is unavailing.

The Court is mindful that the testimony of Mr. Danzi at his deposition establishes he had complete domination of the corporation. The testimony indicates that Mr. Danzi was at all times the sole person involved in the operation of CAPTUS. Further, it is undisputed that the vehicle CAPTUS sold to plaintiff was a stolen vehicle. As such, it appears that such domination by Mr. Danzi was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury, thereby satisfying the two-prong test set forth hereinabove.

However, as this application was made during plaintiff's attempts to enforce his judgment against CAPTUS, and as plaintiff has claimed that the transfer of \$50,000.00 to Mr. Danzi in 2004 was fraudulent and an attempt to frustrate CAPTUS' creditors, the appropriate remedy is for plaintiff to commence a turnover proceeding against Mr. Danzi, pursuant to CPLR 5225(b), to set aside


the alleged fraudulent conveyance and to enforce his judgment against Mr. Danzi individually (see CPLR 5225[b]; *Matter of WBP Cent. Assoc., LLC v. DeCola*, 2008 NY Slip Op 3014 [2d Dept]; *Matter of TNT Petroleum, Inc. v Sea Petroleum, Inc.*, 40 AD3d 771 [2007]; *FDIC v Conte*, 204 AD2d 845 [1994]; *Gelbard v Esses*, 96 AD2d 573 [1983]). Pursuant to the “trust fund doctrine” (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541 [2000]), plaintiff may litigate, in a special proceeding pursuant to CPLR 5225(b), his claim that the transfer was made without fair consideration, that Mr. Danzi is the alter ego of CAPTUS, and that the corporate veil may be pierced (see *Julien J. Studley, Inc. v Lefrak*, 48 NY2d 954 [1979]; *Matter of Goldman v Chapman*, 44 AD3d 938 [2007]; *First Capital Asset Mgt. v N. A. Partners*, 300 AD2d 112 [2002]).

Accordingly, for the foregoing reasons, the instant motion is **DENIED** without prejudice to plaintiff commencing a special proceeding against Mr. Danzi pursuant to CPLR 5225(b).

Finally, the alternative relief requested by plaintiff that this Court direct Mr. Danzi to appear for a further deposition with corporate records, that Mr. Danzi be made to answer all questions, and that sanctions be imposed for leaving his deposition, is **DENIED**, as plaintiff failed to seek this alternative relief in his notice of motion (see CPLR 2214[a]).

The foregoing constitutes the decision and Order of the Court.

Dated: May 7, 2008



HON. JOSEPH FARNETI
Acting Justice Supreme Court