

Anthony v Horowitz

2008 NY Slip Op 31540(U)

May 21, 2008

Supreme Court, Nassau County

Docket Number: 8351-06/

Judge: Thomas A. Adams

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,

Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

MARILYN ANTHONY,

Plaintiff(s),

MOTION DATE: 5/6/08

INDEX NO.: 8351/06

-against-

SEQ. NO. 2 & 3

KATHERINE HOROWITZ and PINE HOLLOW STABLES,
INC.,

Defendant(s)

The parties' respective motions, pursuant to CPLR 3212, for awards of summary judgment are determined as hereinafter provided.

The plaintiff and her daughter, Christine, previously stabled and leased horses at the defendant Pine Hollow Stables, Inc. (hereinafter Pine Hollow) (see defendants' Exhibit G, July 12, 2007 deposition, p.5, L22). In addition, Christine worked there (p.9, L20). Although the defendant Katherine Horowitz is the President of Pine hollow (see defendants' Exhibit I, April 23, 2007 deposition, p.8, L6), her husband, Edward, a non-party, is alleged to have exclusively operated, managed and controlled the facility with the assistance of a bookkeeper, Marie Robinson. However, both Mr. and Mrs. Horowitz received regular paychecks from Pine Hollow until approximately July, 2005 (see defendants' Exhibit I, p.31, L13, p.322, L6; p.41, L21; plaintiff's Exhibit 1).

In November, 2002, Mr. Horowitz telephoned the plaintiff and inquired as to whether she was interested in investing in one of the horses he anticipated acquiring during an upcoming trip to Holland (see defendants' Exhibit G, p.11, L20; p.14, L16, p.15, L14). After discussing the matter with her husband, the plaintiff spoke to Mr. Horowitz and agreed to loan him \$60,000.00 (p.20, L22; see plaintiff's Exhibit 2, check number 1040). No promissory note or written contract was executed (p.21, L14) and no specific distribution of the anticipated profits was agreed upon (p.16, L6-19). She did, however, believe that he was acting on behalf of

Pine Hollow (p.18, L8).

The plaintiff was subsequently informed by Christine that Mr. Horowitz returned from his trip with several new horses, one of which she had invested in (p.24, L16; p.24, L22). On or about April 2, 2004 she received a \$10,000.00 check from Pine Hollow (see plaintiff's Exhibit 3) as a partial reimbursement and Mr. Horowitz offered her the option of reinvesting the money (p.27, L21; p.29, L25). She consulted with her husband once more and thereafter directed Mr. Horowitz to reinvest that sum (p.30, L20; p.34, L6-13).

In the Spring of 2004, Mr. Horowitz returned from another trip with more new horses (p. 35, L13) and he allegedly indicated that one of them was purchased with the plaintiff's investment (p.35, L21). She did not receive any additional payments (p.32, L16) and in or about October, 2005 a notice was mailed to her in which Ms. Horowitz, in her capacity as President of Pine Hollow, announced, inter alia, that it was "no longer an active corporation" and would be "terminating all aspects of the business" (see plaintiffs' Exhibit 5). On or about December 1, 2005 she received a separate letter from Mr. Horowitz attributing the demise of Pine Hollow to his illness and he and his wife's acrimonious divorce action (see plaintiff's Exhibit 6). He also declared, inter alia, that he had been unaware of the earlier missive or his wife's purported unilateral actions. Indeed, he expressed a desire to individually "re-connect" with each customer in order to "resume" their "valued relationship[s]". Nevertheless, despite the plaintiff's repeated subsequent attempts to contact him, Mr. Horowitz reportedly "never picked up his phone" (p.38, L4) or returned her calls.

Ultimately, on April 25, 2006 she filed this action. Separate causes of action sounding in conversion and for unjust enrichment are pleaded against each of the defendants (see defendants' Exhibit A). Following joinder of issue and the completion of disclosure, the case was certified for trial on August 20, 2007 and on November 20, 2007 a note of issue was filed.

During an April 23, 2007 deposition, Ms. Horowitz testified, inter alia, that in or about September, 2005, during the pendency of their divorce action, Mr. Horowitz left her a note instructing

her to sign and forward the October, 2005 letter to clients announcing that Pine Hollow was "no longer an active corporation" (see plaintiff's Exhibit 5; p.7, L8-24). She reportedly had no involvement with the business and only visited the site on occasion so that her daughters could ride (p.13, L24 - p.14, L2). In fact, prior to this action she did not know the plaintiff (p.29, L20) and first learned of her claim upon commencement of the action (p.29, L25 - p.26, L3). She did, however, acknowledge that her husband had regularly traveled throughout the country and abroad to acquire horses - some of which were for clients and others for investments (p.30, L11). Yet, due to her limited involvement in the business, she allegedly is unaware as to the amount of profit, if any, that Pine Hollow derived from Mr. Horowitz's activities (p.32, L24).

As previously noted, she and Mr. Horowitz did, however, receive salaries until in or about July, 2005 and the corporation has not been dissolved (p.38, L14-18). Rather, it is apparently in the process of winding-up its affairs and she (or it) has reimbursed some investors (e.g., her father's company, MetaPony Trust) and paid the State \$200,000.00 for unpaid sales taxes (p.22, L10; p.47, L3).

Presently, each side seeks an award of summary judgment (see CPLR 3212). The defendant contends, inter alia, that no liability exists as against Ms. Horowitz in her individual capacity. Conversely, the plaintiff asserts, in pertinent part, that sufficient admissible evidence exists to permit the court to pierce Pine Hollow's corporate veil and reimburse her for the unsatisfied loan or investment.

"An attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (Morris v Dept. of Taxation, 82 AD2d 135, 141). However, "[t]hose seeking to pierce a corporate veil of course 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" (TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339; see Morris supra at 141). "Moreover, a claim to pierce

the corporate veil is fact-laden and thus not well suited for [summary determination]' (WBP Central Associates, LLC v DeCola, ___ AD3d ___ [2d Dept; April 1, 2008], quoting Alpha Bytes Computer Corp. v Slation, 307 AD2d 349, 350).

Here, for example, while Ms. Horowitz denied that she ever diverted corporate funds for personal purposes (p.41, L11), Pine Hollow's general ledger reveals, inter alia, that on August 2, 2005 she received \$20,000.00 reportedly to reimburse her for an unspecified "loan and expenses" (see plaintiff's Exhibit 7). It can not, however, be presently determined as a matter of law whether that payment constituted the appropriate repayment of a valid personal loan which pre-dated the plaintiff's investment (see April 29, 2008 reply affirmation of Jeffrey Pincus, Esq., para. 18) or the fraudulent diversion of corporate funds to the disadvantage of other preexisting obligations including, but not limited to, the plaintiff's loan (see May 5, 2008 reply affirmation of Peter J. Creedon, Esq., para.s 4-7).

Accordingly, neither movant has established a prima facie entitlement to summary relief and the parties' respective motions, pursuant to CPLR 3212, for awards of summary judgment are therefore denied.

Dated: 5-21-08


A.J.S.C.

ENTERED

MAY 27 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**