Thompson v BFP 300 Madison II, LLC
2008 NY Slip Op 32031(U)
July 17, 2008
Supreme Court, New York County
Docket Number: 0106770/2007
Judge: Carol R. Edmead
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SCANNED ON 7/21/2008

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

PRESENT: HON. CAROL EDMEAD, Justice

PART 35

Index Number : 106770/2007

THOMPSON, MICHAEL

vs

BFP 300 MADISON LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

this motion to/for ____

FILED JUL 21 2008 COUNTY CLERK'S OFFICE NEW YORK

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

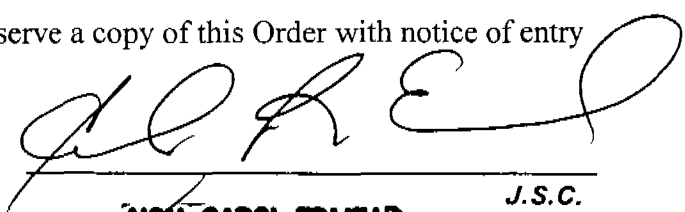
The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the application of defendant Emcor Group, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing and severing each cause of action and all cross-claims asserted against Emcor on the ground that Emcor, as parent corporation of defendant Heritage Mechanical Services, Inc. d/b/a Heritage Mandell Mechanical sued herein as Heritage Sheet Metal Fabricators, Inc., Heritage Air Systems, Inc., and Heritage Mechanical Services, Inc. (collectively "Heritage"), cannot be held liable for the alleged tortious conduct of its subsidiary Heritage, **is granted in its entirety, and the Clerk of the Court is directed to enter judgment accordingly**; and it is further

ORDERED that counsel for all parties shall appear for a Preliminary Conference before Justice Carol Robinson Edmead at Supreme Court, 60 Centre Street Room 438 on **Tuesday, September 16, 2008 at 2:15 p.m.**; and it is further

ORDERED that counsel for Emcor shall serve a copy of this Order with notice of entry within twenty days of entry on all counsel.

Dated: 7/11/08



J.S.C.

HON. CAROL EDMEAD

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: PART 35

---x

MICHAEL THOMPSON and CATHERINE THOMPSON,

Plaintiffs,

-against-

BFP 300 MADISON II, LLC, PRICE WATERHOUSE COOPERS, LLP., TURNER CONSTRUCTION COMPANY, TURNER CONSTRUCTION INTERNATIONAL, LLC., HERITAGE SHEET METAL FABRICATORS, INC., HERITAGE AIR SYSTEMS, INC., HERITAGE MECHANICAL SERVICES, INC., and EMCOR GROUP, INC.,

Defendants.

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Index No. 106770/07

DECISION/ORDER

FILED
JUL 21 2008
COUNTY CLERK'S OFFICE
NEW YORK

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Emcor Group, Inc. ("Emcor") moves for an order pursuant to CPLR 3212, granting summary judgment dismissing and severing each cause of action and all cross-claims asserted against Emcor on the ground that Emcor, as parent corporation of defendant Heritage Mechanical Services, Inc. d/b/a Heritage Mandell Mechanical sued herein as Heritage Sheet Metal Fabricators, Inc., Heritage Air Systems, Inc., and Heritage Mechanical Services, cannot be held liable for the alleged tortious conduct of its subsidiary Heritage.

Heritage's Contentions

Plaintiff Michael Thompson ("plaintiff") allegedly sustained injuries on May 22, 2004 as a result of defendants' alleged negligence and violations of the Labor Law at a construction project located at 300 Madison Avenue, New York, New York (the "construction project"). Emcor's only connection with that construction project was that its subsidiary Heritage

performed work on the project.

A parent corporation may not be held liable for the tortious acts of its subsidiary unless it exercises complete dominion and control over the operations of the subsidiary. According to Susan Reinhard, Senior Director of Claims and Risk Management of Emcor, Emcor and Heritage are separate and distinct entities, and Emcor does not exercise dominion and control over Heritage's operations. Emcor and Heritage maintain separate offices and have independent officers and shareholders. As Heritage's parent corporation, Emcor is not directly involved in Heritage's every day business and operations. Particularly, Emcor has no involvement in the sheet metal and duct work that Heritage performs.

Plaintiffs' Opposition

Other than the self-serving affidavit provided by Ms. Reinhardt, there has been no evidence and/or facts adduced as of this point to indicate that Emcor has not direction or control over the day-to-day operations of Heritage's business. There have been no depositions and no document exchanges. There has been no evidence which could enable plaintiffs to pierce the corporate veil between Emcor and Heritage.

Reply

Emcor has submitted sufficient evidence to establish its entitlement to summary judgment. Plaintiffs have failed to sufficiently rebut Emcor's evidence to avoid summary judgment.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR 3212[b]). Thus, where the

proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Piercing the Corporate Veil

As a general rule, parent and subsidiary or affiliated corporations are treated separately and independently so that one will not be held liable for the obligations of the other (*see Sheridan Broadcasting Corp. v. Small*, 19 A.D.3d 331, 332 [1st Dept. 2005], *citing Meshel v. Resorts Intl. of N.Y.*, 160 A.D.2d 211, 213 [1990]). The concept of piercing the corporate veil is a limitation on this rule (*see Morris v. New York State Dept. of Tax. and Fin.*, 82 N.Y.2d 135, 140 [1993]). Piercing the corporate veil is a procedural device to secure separately existing substantive rights (*see State v. Easton*, 169 Misc.2d 282, 283 [Sup. Ct. New York County, June 28, 1995]). It is used to hold corporate owners, in the instant case another corporation, liable for the corporate wrongdoer's obligations (*see State v. Easton*, 169 Misc.2d 282, 288 [Sup. Ct. New York County,

June 28, 1995]; *Passalacqua Builders v. Resnick Dev. S.*, 933 F.2d 131 [2d Cir. 1991]).

The concept is equitable in nature, and the decision whether to pierce the corporate veil in a given instance will depend on the facts and circumstances (*see, Matter of Morris v. New York State Dept. of Taxation & Fin., supra* at 141). Furthermore, the burden is at all times on the party seeking to pierce the corporate veil (*Id.* at 142; *Matter of Guptill Holding Corp. v. State of New York*, 33 A.D.2d 362, 365 [3rd Dept. 1970]; *State v. Easton, supra* at 288).

Emcor has stated through a person with knowledge that Emcor is not united in interest with Heritage. Plaintiff has failed to rebut that argument. "The mere existence of a parent-subsidiary corporate relationship is insufficient to establish a unity of interest between the two corporations" (*Feszczyszyn v General Motors Corp.,* 248 A.D.2d 939, 940-941, 669 N.Y.S.2d 940; *see Derso v Volkswagen of Am.,* 159 A.D.2d 937, 937-938, 552 N.Y.S.2d 938-939). Related corporations such as Emcor and Heritage "are united in interest only where one corporation is vicariously liable for the acts of the other," and, in order for such vicarious liability to exist, "'the parent corporation must exercise complete dominion and control [over] the subsidiary's daily operations'" (*Feszczyszyn,* 248 A.D.2d at 940; *see Hilliard v Roc-Newark Assoc.,* 287 A.D.2d 691, 692, 732 N.Y.S.2d 421; *Rotoli v Domtar,* 224 A.D.2d 939, 940, 637 N.Y.S.2d 894). Plaintiff failed to show that Emcor exercises complete dominion and control over Heritage (*see Feszczyszyn,* 248 AD2d at 940).

It is true that, on occasion, the courts will disregard the separate legal personality of the corporation and assign liability to its owners where necessary "to prevent fraud or to achieve equity" *(International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 NY 285, 292). But, such liability can never be predicated solely upon the fact of a parent corporation's ownership of

a controlling interest in the shares of its subsidiary. At the very least, there must be direct intervention by the parent in the management of the subsidiary to such an extent that "the subsidiary's paraphernalia of incorporation, directors and officers" are completely ignored *(Lowendahl v Baltimore & Ohio R. R. Co.*, 247 App Div 144, 155, affd 272 NY 360).

Plaintiff herein has provided the court with not basis, except the speculation that discovery may reveal a basis to retain Emcor as a party tho this action.

While it is true that CPLR 3212 (subd [f]) authorizes the court to deny summary judgment or grant a continuance pending discovery when "facts essential to justify opposition [to the motion] may exist but cannot be stated", this court cannot conclude that such action would be warranted here, since plaintiffs have given no indication as to what "essential" facts they believe exist that would justify a denial of Emcor's motion to dismiss the complaint.

"'[M]ere hope that somehow the plaintiffs will uncover evidence that will establish a basis to keep Emcor in this case, provides no basis . . . for postponing a decision on a summary judgment motion' " (*Fulton v Allstate Ins. Co.*, 14 A.D.3d 380, 381, 788 N.Y.S.2d 349, 350 [1st Dept 2005] citing *Jones v Surrey Coop. Apts., Inc.*, 263 AD2d 33, 38 [1999], quoting *Kennerly v Campbell Chain Co.*,, 133 AD2d 669 [1987]).

Consequently, Emhart is entitled to summary judgment on its motion.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of defendant Emcor Group, Inc. for an order pursuant to CPLR 3212, granting summary judgment dismissing and severing each cause of action and all

cross-claims asserted against Emcor on the ground that Emcor, as parent corporation of defendant Heritage Mechanical Services, Inc. d/b/a Heritage Mandell Mechanical sued herein as Heritage Sheet Metal Fabricators, Inc., Heritage Air Systems, Inc., and Heritage Mechanical Services, Inc. (collectively "Heritage"), cannot be held liable for the alleged tortious conduct of its subsidiary Heritage, **is granted in its entirety, and the Clerk of the Court is directed to enter judgment accordingly**; and it is further

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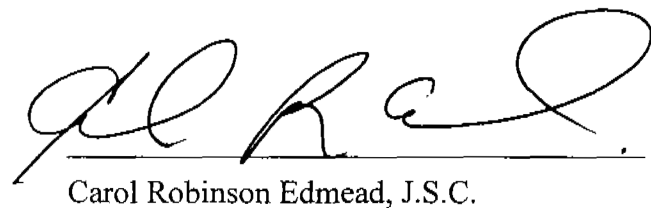
Dated: July 17, 2008



Carol Robinson Edmead, J.S.C.

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