

J.P.'s Shellfish, Inc. v Best Buy Shellfish, Inc.

2009 NY Slip Op 30276(U)

February 2, 2009

Supreme Court, New York County

Docket Number: 602762/06

Judge: Richard B. Lowe

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

PRESENT: [REDACTED]
Justice

PART 56

J.P.'s Shellfish

INDEX NO. 602702/06

- v -

MOTION DATE 11/12/08

MOTION SEQ. NO. 04

Best Bay

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 2/2/09

[Signature]
HON. RICHARD S. LEVINE, J.
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: I.A.S. PART 56
-----X

J.P.'s SHELLFISH, INC.,

Plaintiff,

-against-

Index No. 602762/06
ORDER & JUDGMENT

BEST BUY SHELLFISH, INC. and
JOHN LAROCCA,

Defendants.

-----X

RICHARD B. LOWE III, J:

In this action seeking \$631,029.91 for goods sold and delivered, plaintiff, J.P. Shellfish, Inc. ("Shellfish" or "plaintiff") moves pursuant to CPLR 3212 for summary judgment on the complaint and for an order permitting Shellfish to pierce defendant Best Buy Shellfish, Inc.'s ("Best Buy") corporate veil to reach John LaRocca's ("LaRocca") personal assets.

LaRocca, the sole officer, director, and shareholder of Best Buy, a wholesaler of fresh seafood and shellfish, admits that Best Buy purchased more than \$600,000 of shellfish from plaintiff, a wholesale shellfish distributor, and that Best Buy failed to pay for that merchandise. (Wybrial Aff., Ex. 5 [LaRocca Tr.], p.6, ll. 22-25, p. 7, ll. 1-10) Indeed, Best Buy has failed to submit a Counter Statement of Material Facts refuting plaintiff's factual claim that Best Buy owes plaintiff \$631,029.91 for goods sold and delivered.¹

¹ Plaintiff's rule 19(a) Statement of Undisputed Material Facts, para. 8; rule 19-a of Section 202.70 of the Uniform Civil Rules for the Supreme Court and County Court, states in pertinent part:

- (c) Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the

Accordingly, the issue on this motion is not whether Best Buy owes plaintiff \$631,029.91, but rather, whether this court should permit plaintiff to pierce Best Buy's corporate veil in order to reach LaRocca's personal assets to satisfy that debt.

As stated above, defendants have failed to submit a Rule 19-a Counter-Statement of Material Facts in opposition to the Rule 19-a statement submitted by plaintiff. Accordingly, for the purposes of this motion, the statements set forth in plaintiff's Statement of Undisputed Material Facts are deemed to be true. This is so, even though LaRocca submitted an affidavit in opposition to the motion because that opposition failed to controvert many of the facts in plaintiff's Rule 19-a statement and it failed to provide citations to the evidence in accordance with Rule 19-a(d)². (*See, Moonstone Judge, LLC v. Shainwald*, 38 A.D.3d 215 [1st Dept 2007] [appellate court did not disturb lower court's exercise of discretion in deeming plaintiff's unopposed Rule 19-a statement admitted because even if appellate court were to consider defendant's affidavit in lieu of a Rule 19-a statement, defendant failed to controvert many of the material facts alleged by plaintiff and failed to provide citations to evidence in accordance with Rule 19-a(d)]; *see also, Feinsod v. Stiefel Laboratories, Inc.*, 2004 WL 189875, *3 [Sup. Ct. Nassau County])

In this case, defendants do not deny that LaRocca was solely responsible for the

statement required to be served by the opposing party.

²Rule 19-a(d) states:

Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence Submitted in support of or in opposition to the motion.

management and operation of Best Buy (Wybiral Aff, Baylis Tr., pp. 14-15) and that in 2005 LaRocca loaned Best Buy \$500,000 from his personal line of credit (Baylis Tr., pp. 92-94; Ex. 26) so that Best Buy could meet its operating expenses; that no loan documents were prepared in connection with that loan (Wybiral Aff., LaRocca Tr., p. 250) and that LaRocca periodically received checks drawn on Best Buy's operating account to repay himself for the loan (Baylis Tr., pp. 92-94; Exs. 12, 13, 14); that, in total, he took \$145,000 out of Best Buy to repay himself for that loan, \$35,000 of which he withdrew during the last three months of Best Buy's existence. Moreover, LaRocca admits that he did not observe corporate formalities (LaRocca Tr., pp 106-107) and that he wired money from his personal account to pay at least one of Best Buy's vendors (LaRocca Tr., p. 249) and, in addition, La Rocca admits that his wife and daughter had Best Buy corporate American Express cards (LaRocca Aff. in Opp., para. 7). Moreover, LaRocca does not deny that in 2003 and 2004 he personally received construction loans and a commercial mortgage line of credit in furtherance of his personal real estate interests and that Best Buy served as guarantor for those loans (Wybiral Aff., Exs. 20, 21, 23, 24). Moreover, he does not deny that the \$950,000 he received for the sale of Best Buy's co-op units at the New Fulton Fish Market at Hunts Point Inc was used to repay his personal lines of credit. (Wybiral Aff., Ex. 27; Gilligan Tr., p. 143-144) Finally, he does not deny that when he closed Best buy in March, 2006, he opened another fish company, and folded many of Best Buy's assets into that new company. (Wybiral Aff., Ex. 14; LaRocca Tr., pp. 33, 41)

Piercing the Corporate Veil

A court should pierce the corporate veil if required to prevent fraud or achieve equity (*Hyland Meat Co. v Tsagarakis*, 202 AD2d 552, citing *Billy v Consolidated Mach. Tool Corp.*,

51 NY 2d 152,163, *Walkovszky v. Carlton*, 18 NY2d 414, 416) or if the corporation abused the privilege of doing business to perpetrate a wrong (*Anderson St. Realty Corp. v RHMB New Rochelle Leasing Corp.*, 243 AD2d 595). Equitable relief is appropriate where another person or entity dominates a corporation with respect to a transaction and uses that domination to commit a wrong against a plaintiff that, in fact, results in the plaintiff's injury (*Id.*).

Thus, piercing the corporate veil requires a showing that: "(1) the owner 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 the plaintiff's injury" (*Hyland Meat Co.*, *supra*, 202 AD2d, at 552, *citing*, *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141). Factors to be considered by the court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets and personal use of corporate funds. (*Millenium Construction, LLC v. Loupolover*, 44 A.D.3d 1016 [2nd Dept. 2007])

A. Failure to Observe Corporate Formalities

Failure to observe corporate formalities may include failure to hold shareholder's meetings and failure to maintain corporate books and records. In this case, LaRocca testified that he did not recall reading or signing corporate minutes and that, in terms of corporate record keeping, he never put anything in writing, "the process was in my head, just not reduced to a piece of paper." (LaRocca Aff., para. 9)

B. Undercapitalization

A court measures undercapitalization in terms of the size of the corporate undertaking, and will deem a corporation undercapitalized if it is "wholly reliant on [an individual] for the

operating funds necessary for its continuing existence. . . .” (*Oriental Commercial & Shipping Co. v. Rosseel, N.V.*, 502 F. Supp. 1005, 1020-1021 (S.D.N.Y. 1988). In this case, plaintiff has produced evidence that LaRocca loaned Best Buy more than \$160,000 in 2004 and \$558,000 (\$565,000 of which came from a personal line of credit) in 2005 which money was used, in large part, to fund Best Buy’s operating costs for those years. (6/20/08 Maxwell Aff., paras. 5-8) Accordingly, it appears that, in both 2004 and 2005, Best Buy was undercapitalized because could not have met its financial obligations without the cash infusions from LaRocca’s personal assets.

C. Commingling of Funds

It is undisputed that LaRocca advanced funds from his personal line of credit at Staten Island Bank & Trust (SIB&T) to Best Buy on at least two occasions (Wybrial Aff., Ex. 25 & 26). Moreover, it is undisputed Best Buy guaranteed several of LaRocca’s personal construction loans and lines of credit from SIB&T (Wybrial Aff., Ex. 20-23) and that LaRocca used the \$950,000 that Best Buy received from the sale of its cooperative stalls at the New Fulton Fish Market to pay down his personal line of credit at SIB&T. (Wybrial Aff., Gilligan Aff, p.143, ll. 1-25) Moreover, Best Buy’s bookkeeper testified that La Rocca used his personal funds to pay Pacific American, one of Best buy’s vendors (Wybrial Aff, Baylis Tr., p. 96, ll. 21-25, p. 97, ll. 1-17) and the evidence establishes that LaRocca used Best Buy’s funds to reimburse himself to the exclusion of Best Buy’s creditors. (Wybrial Aff., Ex. 12, 13, 14; Baylis Tr., pp. 92-94; LaRocca Tr., p. 247, ll. 13-20.

Here, as in *Manshion Joho Center Co., Ltd. v. Manshion Joho Center, Inc.*, 24 A.D.3d 189, 190 (1st Dcpt 2005), the unrebutted evidence supports piercing corporate veil because


LaRocca as sole shareholder, officer and director of Best Buy dominated and controlled the corporation, disregarded corporate formalities and, *inter alia*, stripped the assets of the corporation by transferring funds to himself or to SIB&T to pay back a personal line of credit which transfers rendered the corporation judgment proof. LaRocca, by his actions, perpetrated a wrong against plaintiff that resulted in plaintiff's injury. (*See, Simplicity Pattern Co. v. Miami Tru-Color Offset Svc., Inc.*, 210 A.D.2d 24 [1st Dept. 1994][plaintiff demonstrated that officer dominated affairs of corporation which caused the "wrong" to plaintiff by officer's disregard of corporate formalities; his co-mingling personal and corporate funds; his use of corporate funds to reimburse himself to the exclusion of his creditors and shifting funds back and forth to the extent that corporation was insolvent at the time the breach occurred.])

Accordingly, it is ORDERED that plaintiff's motion for summary judgment on the complaint and for an order permitting it to pierce the corporate veil to reach John LaRocca's personal assets is granted in its entirety.

Settle Order.

Date: February 2, 2009

ENTER:


HON. RICHARD B. LEVINE, JR.
J.S.C.