

**Bright Flight Photoluminescent Safety Installations,  
Inc. v Afterglow Tech., Inc.**

2009 NY Slip Op 30716(U)

March 26, 2009

Supreme Court, New York County

Docket Number: 600623/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling - Cochan

PART 36

Index Number : 600623/2008

**BRIGHT FLIGHT PHOTOLUMINESCENT**

VS.

**AFTERGLOW TECHNOLOGIES INC**

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 600623/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for Summary judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3, 4

8, 9

Cross-Motion:  Yes  No

5, 6, 7

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the attached memorandum decision.

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

**FILED**

MAR 31 2009

COURT CLERK'S OFFICE  
1200 NASSAU ST.

HON. DORIS LING-COCHAN

Dated: 3/20/09

[Signature]  
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 36

-----x  
BRIGHT FLIGHT PHOTOLUMINESCENT  
SAFETY INSTALLATIONS, INC.,

Plaintiff,

Index No. 600623/08

-against-

Motion Seq. No. 001

AFTERGLOW TECHNOLOGIES, INC. and  
DEFENSE HOLDINGS, INC.,

**FILED**

Defendants.

MAR 31 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----x  
DORIS LING-COHAN, J.:

Defendants Afterglow Technologies, Inc. (Afterglow) and Defense Holdings, Inc. (Defense) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. Plaintiff Bright Flight Photoluminescent Safety Installations, Inc. (Bright Flight Photoluminescent) cross-moves for an order: (1) amending the above caption so as to change the name of the plaintiff to Brite Flight, Inc. (Brite); and (2) compelling defendants to respond to previously served discovery demands, pursuant to CPLR 3124.

The complaint alleges that, in or about April 2006 through December 2006, plaintiff rendered labor and installation services of photoluminescent systems for defendants at various locations within New York, at the agreed price of \$249,371.00, and that there is presently due and owing a balance of \$78,232.62. Plaintiff's causes of actions are: breach of contract; an account stated; and reasonable value of plaintiff's labor and services in the amount of \$78,232.62.

The complaint further alleges that Afterglow was a wholly owned subsidiary of Defense; that it shared the same officers, directors and shareholders with Defense; and that Afterglow was, at all relevant times, under the total dominion and control of Defense. Prior to the commencement of this action, defendant Afterglow, formerly organized under the Laws of the State of Virginia, filed its Amended and Restated Articles of Dissolution with the Virginia State Corporation Commission on April 13, 2007.

Defendants move for summary judgment, dismissing the complaint on the grounds that: (1) Afterglow and Defense are separate and distinct corporations and plaintiff's contract was solely with Afterglow; and (2) Brite was required to file its complaint in the State of Virginia within 120 days from delivery of written confirmation of the claim to the dissolved corporation, but failed to do so, pursuant to Virginia Law section 13.1-746.

The Court will first address that branch of plaintiff's cross motion that seeks to amend the instant caption so as to change the name of the plaintiff from "Bright Flight Photoluminescent Safety Installations, Inc." to "Brite Flight, Inc.". Bright Flight Photoluminescent and Afterglow were the names of the parties designated on the sub-contracts and modifications at issue (the Sub-Contracts). Plaintiff contends, and defendants do not dispute, that Bright Flight Photoluminescent was not the true corporate name. Plaintiff

claims that defendants erred in drawing the Sub-Contracts, and that the proper plaintiff should be Brite.

In opposition to the cross motion, defendants claim that "Clearview Building Services, Inc." (Clearview) is the real party-in-interest. They submit copies of invoices, canceled checks and correspondence all with Clearview's name, indicating that Afterglow paid Clearview for the subject work. In addition, defendants attach a copy of a letter, dated May 14, 2007, from Clearview's counsel, addressed to counsel for Afterglow, requesting payment for the subject work.

In his affidavit, Brite's president maintains that the parties agreed that all of the checks and correspondence relating to the Sub-Contracts would be sent to Clearview, and that Clearview would function merely as administrative support for plaintiff as a convenience to both parties. The Court notes that the Sub-Contracts do not mention the name Clearview, and that sufficient evidence was not produced to show that Clearview was the real party-in-interest to the Sub-Contracts. In fact, in support of their motion to dismiss the complaint, the affidavit of Richard J. Martin, trustee of Afterglow and President of Defense, clearly states that the Sub-Contracts were between plaintiff and Afterglow (Martin Aff ¶ 6). Thus, plaintiff's motion to amend the caption to reflect the name of the plaintiff as "Brite Flight Inc." is granted.

In support of their motion for summary judgment, defendants argue that Brite's claims against Defense should be dismissed for lack of privity. Defendants claim that the Sub-Contracts were solely between plaintiff and Afterglow, that there is no contract existing between plaintiff and Defense, and that Defense is a separate and distinct corporation from Afterglow. Defendants attach copies of invoices and statements for the subject work reflecting that they were sent only to Afterglow, and copies of Afterglow's cancelled checks, representing payment for the work. Defendants also attach copies of printouts from the website maintained by the New York Secretary of State showing Afterglow's and Defense's separate entity status information.

In opposition to defendants' motion, plaintiff claims that Defense exercised such domination and control over its subsidiary Afterglow, and was so intimately involved in the instant transactions, that the Court should pierce the corporate veil to reach Defense. Plaintiff attaches copies of documents and e-mails demonstrating Defense's involvement in the Sub-Contracts and contractual disputes. Plaintiff seeks to compel the production of previously demanded documents, in order to obtain evidence on piercing the corporate veil of Defense.

It is well settled that piercing the corporate veil generally "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

[\* 6]

commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; see also *First Capital Asset Mgmt. v N.A. Partners, L.P.*, 300 AD2d 112, 116 [1<sup>st</sup> Dept 2002]; *Matter of Guptill Holding Corp. v State of New York*, 33 AD2d 362, 364-365 [3d Dept 1970], *affd* 31 NY2d 897 [1972]).

The burden is on the party seeking to pierce the corporate veil to "establish that the [corporation], through [its] 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*, 82 NY2d at 142). "Veil piercing is a fact-laden claim that is not well suited for summary judgment resolution" (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 344 [2d Dept 2006], quoting *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1<sup>st</sup> Dept 1999]).

Because the party seeking discovery is also the party bearing the burden of proof on the issue, and because the evidence is exclusively within defendants' custody, a plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil (see *First Bank of Ams.*, 257 AD2d at 294).

Here, plaintiff served defendants on May 14, 2008 with a notice for discovery and inspection, which included demands for

[\* 7 ]

documents necessary to establish an alter-ego relationship between Defense and Afterglow. It is undisputed that defendants did not produce responses to plaintiff's document demands. Plaintiff contends that it needs such documents, which are in the defendants' exclusive possession, in order to properly respond to their instant motion. Before dismissal can be granted, a plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil (see *id.*). Based upon the allegations in the complaint, plaintiff's need for discovery, and the fact that the documentary evidence sought is exclusively within defendants' possession, the Court denies Defense's motion for summary judgment dismissing the complaint and directs that discovery continue.

Defendants further argue that Brite's claims against Afterglow should be dismissed because Afterglow was dissolved, and this lawsuit was not commenced within the time permitted under Virginia's Corporate Dissolution Statute, § 13.1-746. This statute sets forth procedures to be followed by a dissolved corporation in order to dispose of known claims against it. It states in relevant part:

- B. The dissolved corporation shall deliver to each of its known claimants written notice of the dissolution at any time after its effective date. The written notice shall:
1. Provide a reasonable description of the claim that the claimant may be entitled to assert;
  2. State whether the claim is admitted, or not admitted, and if admitted (i) the amount that

is admitted, which may be as of a given date, and (ii) any interest obligation if fixed by an instrument of indebtedness;

3. Provide a mailing address where a claim may be sent;

4. State the deadline, which may not be fewer than 120 days from the effective date of the written notice, by which confirmation of the claim must be delivered to the dissolved corporation; and

5. State that, except to the extent that any claim is admitted, the claim will be barred if written confirmation of the claim is not delivered by the deadline.

The relevant statute further provides:

C. A claim against the dissolved corporation is barred to the extent that it is not admitted:

\* \* \*

2. If the dissolved corporation delivered written notice to the claimant that his claim is not admitted, in whole or in part, and the claimant does not commence a proceeding to enforce the claim within 90 days from the effective date of such notice.

(VA Code Ann. §13.1-746).

Plaintiff argues that Afterglow failed to comply with the notice requirements in the statute. It contends that the statute requires that the dissolved corporation include in the notice specific language that a proceeding must be commenced within 90 days from the delivery of the written confirmation of the claim to the dissolved corporation. However, that interpretation is a misreading of the statute. The statute does not require such notice of the deadline to commence a lawsuit, but only notice of the deadline for *confirmation of the claim*.

[\*9]

Defendants attach a "Notice of Dissolution of AfterGlow Technologies, Inc.," (the Notice), dated April 19, 2007<sup>1</sup>, which was addressed and sent by certified mail to Clearview Building Services, in connection with the instant claim. The Notice fully complies with the statute. In the Notice, Afterglow, among other things, admits liability in the sum of \$42,874.50. The Notice also specifically cites to the applicable Virginia statute. The statute does not require that the Notice recite the contents of the statute. Afterglow sent the Notice by letter dated April 19, 2007, and Clearview responded by letter dated May 14, 2007.

In accordance with the statute, plaintiff was obligated to commence a proceeding for any claim against Afterglow that was not admitted within 90 days from delivery of its written confirmation of the claim to Afterglow. This action, which includes Afterglow's previously admitted liability in addition to liability that is not admitted, was commenced in early March 2008. To the extent that plaintiff's claim includes a claim for monies that were not previously admitted by Afterglow in its Notice, this claim is time-barred.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint is granted to the extent that the complaint includes a claim for

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<sup>1</sup>Defendants attached a copy of a certified receipt card showing that the Notice was delivered on April 21, 2007.

monies which were not previously admitted by defendant Afterglow in its Notice, and in other respects is denied; and it is further

ORDERED that plaintiff's cross motion to amend the caption is granted, and the new caption shall read:

Brite Flight, Inc.,  
Plaintiff,  
-against-  
Afterglow Technologies, Inc.  
and Defense Holdings, Inc.,  
Defendants.

**FILED**  
MAR 31 2009  
COUNTY CLERK OFFICE  
NEW YORK

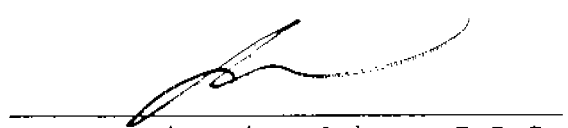
and it is further

ORDERED that defendants are to respond to previously served discovery demands within 45 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 60 days of entry of this order, plaintiff shall serve a copy upon the Clerk of Trial Support and the County Clerk, who shall amend their records to reflect the above amendment to the caption;

ORDERED that within 30 days of entry of this order, defendants shall serve upon plaintiff a copy of this order and notice of entry.

DATED: 3/26/09

  
Hon. Doris Ling-Cohan, J.S.C.