

Fray v Figueroa

2009 NY Slip Op 32011(U)

August 27, 2009

Supreme Court, New York County

Docket Number: 115089/06

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Index Number : 115089/2006
FRAY, TREVOR
vs.
FIGUEROA, ADRIAN R.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

FILED
AUG 31 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: August 27, 2009

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X

Trevor Fray,
Plaintiff,

-against-

Adrian R. Figueroa and A.R.
Figueroa Architect, LLC.

Defendants.

-----X

Adrian R. Figueroa and A.R.
Figueroa Architect, LLC.,

3rd Party Plaintiffs,

-against-

SAT Construction, Inc. and
Ramnarine Singh,

3rd Party Defendants

-----X

DECISION/ ORDER

Index No.: 115089/06
Seq. No.: 004

PRESENT:

Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
591160/07

FILED

AUG 3 1 2009

**COUNTY CLERK'S OFFICE
NEW YORK**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
SAT & Singh's n/m (3212) w/ SGC affirm, RS affid, exhs	1
ARF opp w/ARF affid, ABF affirm, exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action in which plaintiff Trevor Fray ("Fray") alleges defendants Adrian R. Figueroa and A.R. Figueroa Architect, LLC. ("Figueroa") a licensed architect and his firm engaged in professional malpractice. The third party action is by the architects against the 3rd party defendants ("SAT" and "Singh") for common law contribution and indemnification. Issue has been joined by Singh who now moves for summary judgment

dismissing the 3rd party complaint against him. CPLR § 3212. Figueroa, the third party plaintiff, opposes the motion. Fray has taken no position on it and Singh and SAT are jointly represented.

Plaintiff filed the note of issue on May 7, 2009 and Singh brought this motion timely thereafter. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). Since it is timely, the motion will be decided on the merits.

Arguments

In the main action, Fray alleges that he hired Figueroa, a licensed architect, to obtain the necessary approvals and permits to build a 4 story, 3 family, brick residence in Jamaica, Queens on property Fray owns. Fray claims that because the zoning regulations for that location changed mid-project, he could not build the building he had intended and he suffered monetary damages as a result. He contends that Figueroa committed professional malpractice because he filed for DOB approval of the project too late (on October 28, 2004) and by then the new zoning regulations had already gone into effect (i.e. on October 13, 2004). SAT was the construction company for the project and Singh is its principal. Neither SAT nor Singh are named defendants in Fray's lawsuit. Figueroa commenced a third party action against SAT and Singh for common law indemnification on the basis that if he is found liable to plaintiff, such liability is vicarious and Singh (and SAT) are the active tort-feasors.

Singh argues that he is entitled to summary judgment dismissing all claims against him individually because he is the president of SAT and protected by its corporate structure. He denies there is any basis to pierce the corporate veil or that he signed the construction contract with Fray (discussed later in this decision) in a personal capacity.

He also argues that his construction contract is with Fray, not Figueroa, and therefore, he is not individually liable to Figueroa because there is no contractual relationship (privity) between them.

Singh denies that any of the delay in filing the plans with the Department of Buildings is his fault. He contends that he interfaced with Figueroa, as his contract with Fray provides. Singh argues further that he diligently worked to get the work done on time, even coming to the worksite after he broke his foot.

The construction contract ("construction contract"), dated July 10, 2004, identifies "SAT Construction, Inc." as the contractor. It lists SAT's business address (same as registered with the Division of Corporations), and SAT's license and Federal tax identification numbers. The construction contract lists Fray (and someone else) as the owner of the land where the building was to be built. The construction contract is signed by Singh as contractor and Fray as owner. Section 2.2 of the construction contract is applicable to this dispute and it provides as follows:

"2.2 TIME OF COMPLETION

The CONTRACTOR shall complete the performance of all WORK under this Contract no later than **250 calendar days** after receipt by him of the acceptance of this proposal.

The CONTRACTOR'S obligation for the performance and completion of the Work within the time or times provided for in this Contract is of the essence of this Contract. The CONTRACTOR guarantees that the can and will complete the performance of the Work within the time herein before stipulated, weather permitting."

As per the construction contract, SAT was to work "in strict accordance with the Architectural Drawings and Specifications and any future changes therein by the [Department of Buildings]." By definition, the "work" was to "start on or before

SEPTEMBER 1, 2004." The construction contract does not contain or specify a deadline by which SAT had to begin pouring or complete the foundation. It does specify however that upon completion of the foundation, Fray will pay an additional \$50,000 to Singh.

Singh states in a sworn affidavit that as soon as he was hired, he took steps to prepare for the laying of the foundation. Those steps included hiring a subcontractor to do the excavation and pour the concrete.

The construction contract, dated July 10, 2004, identifies the contractor for the project as "SAT Construction, Inc." It lists SAT's business address and SAT's license and Federal tax identification numbers. The construction contract is signed by Singh as "contractor" and Fray as "owner." To prove that SAT is a domestic corporation, Singh provides a print out from the New York State Department, Division of Corporations. The printout shows that "SAT Construction, Inc." is an active domestic business corporation and Singh is its chairman or CEO.

In opposition to the motion, Figueroa argues that he had a contract with Fray to obtain the necessary permits for the project. Although no copy of the contract is provided, Figueroa states in a sworn affidavit that the contract was made March 12, 2004. Figueroa was also deposed and at his examination before trial, he testified that in accordance with a written proposal to Fray, he was required to get permits within six weeks of February 24, 2004. That proposal has not been provided to the court either.

According to Figueroa's sworn affidavit, he obtained the necessary permit to start excavation for the foundation on September 20, 2004. Figueroa states that he provided the permits to Singh that day and orally notified him about the imminent change in the zoning laws. Figueroa contends that had Singh started right away, the foundation would have been 80% completed by the effective date of the change and the project would have

been approved by the Department of Buildings. Figueroa argues that Singh admitted at his deposition that he "did nothing" between July 2004 and September 2004, but should have already been hard at work on the project.

In support of his argument, that SAT is Singh's alter ego, Figueroa contends that Singh is SAT's only employee. Furthermore, Figueroa argues that Singh was required, but failed, to obtain insurance, and therefore, he should not be allowed to avoid personal liability. Finally, Figueroa argues that Singh was personally negligent because he was dilatory in doing the work he was hired to do.

Applicable Law

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, *supra* at 563-64. 562 (1980). Only if this burden is met, will it then shift to the opposing party who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Discussion

Singh has established that he is the principal of SAT, a domestic corporation, and that under his contract with Fray, he was required to complete the work he was hired to do "no later than 250 calendar days after receipt by him of [Fray's] acceptance of [Singh's]." The effective date of the changed zoning laws occurred only weeks after Fray hired Singh as his contractor. Singh has also proved that he did not have a contract to do work for Fray until July 2004. According to the construction contract, Singh's work began September 1, 2004. There is no deadline in Singh's construction contract for the completion of the foundation, nor any reference that the foundation had to be completed by the effective date of the change in the zoning for that area.

Singh has also proved that once Figueroa notified him on September 24, 2004 that he had obtained the permit necessary for the excavation he immediately hired a subcontractor to start on the excavation so the foundation could be poured. Although Figueroa argues that Singh should have been working on the project during the months of July and August 2004, there is no basis for this claim. Singh's contract with Fray required that he start working on September 1, 2004, not before. Not only is there is no written agreement between Figueroa and SAT that required SAT to start the work sooner, the architect does not raise triable issues of fact that the owner of the property would have allowed that, paid for it, or requested it.

Singh did not sign the construction contract in his personal capacity, but as the principal of SAT, contractor. Figueroa nonetheless argues Singh is personally liable. This is based upon Figueroa's claim that that SAT is really Singh's alter ego because Singh is SAT's sole shareholder and possibly only employee. Piercing the corporate veil

requires a showing that: (1) the owner exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff's injury. Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141 (1993); First Capital Asset Management, Inc. v. N.A. Partners, L.P., 300 A.D.2d 112 (1st Dept 2002). A corporation, even when wholly owned by a single individual, has a separate legal existence from its shareholders. Harris v. Stony Clove Lake Acres Inc., 202 A.D.2d 745 (3rd Dept.1994). Figueroa raises no issues of fact that would require a trial of his claim that there is a basis to pierce the corporate veil to allow claims against Singh individually.

Where, however, a corporate officer participates in the commission of a tort, s/he may be held individually liable, regardless of whether s/he acted on behalf of the corporation and regardless of whether the corporate veil is pierced. American Express Travel Related Services, Corp. v. North-Atlantic Resources, Inc., 261 AD2d 310, 311 (1st Dept 1999) (*internal citations omitted*). Assuming Figueroa can prove his facts at trial, that Singh was dilatory in getting the foundation poured on time, this is not fraudulent conduct, and does not support the imposition of personal liability upon Singh either.

Other arguments that Singh should be held accountable to Figueroa because Singh was required to keep insurance for the benefit of the owner have not been raised by Fray (the owner) and Figueroa does not have a contract with Singh. They do not defeat Singh's motion for summary judgment.

There is therefore, no basis to keep Singh in this action. His motion for summary judgment dismissing the claims against him is granted. The claims against 3rd party defendant Singh are hereby severed and dismissed.

Conclusion

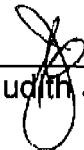
Singh's motion for summary judgment is hereby granted for the reasons provided. The Clerk shall enter judgment in favor of 3rd party defendant Ramnarine Singh severing and dismissing 3rd party plaintiff's claims against him.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: August 27, 2009
New York, New York

So Ordered:



Hon. Judith J. Gische, J.S.C.

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