

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

2009 NY Slip Op 32117(U)

September 14, 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: HON. RICHARD B. LOWE
Justice

PART 54

JP Shellfish

INDEX NO. 002-762/06

MOTION DATE 8/20/09

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

Best Buy

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 _____

Repeating 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

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LOWE, III

Dated: 9/14/09

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: I.A.S. PART 56

-----X
J.P.'s SHELLFISH, INC.,

Plaintiff,

-against-

BEST BUY SHELLFISH, INC. and
JOHN LAROCCA,

Defendants.

Index No. 602762/06
DECISION & ORDER

FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

RICHARD B. LOWE III, J.:

Motion sequence numbers 005 and 006 are consolidated for disposition.

By order and judgment dated February 2, 2009, this court granted plaintiff, J.P. Shellfish, Inc.'s (Shellfish or plaintiff) motion for summary judgment on the complaint in the amount of \$631,029 and granted plaintiff's request for an order permitting it to pierce the corporate veil to reach defendant John LaRocca's (LaRocca) personal assets. In motion sequence 006, defendants LaRocca and Best Buy Shellfish, Inc. (Best Buy)(collectively, defendants) move, pursuant to CPLR 2221(e), to renew the February 2, 2009 order and judgment and, upon renewal, to vacate that decision and order. Alternatively, defendants move, pursuant to CPLR 5015, to vacate the March 26, 2009 judgment entered against LaRocca.

In motion sequence 005, plaintiff moves, pursuant to CPLR 2001, 2221 and/or 5019, to resettle the March 26, 2009 judgment to award plaintiff pre-judgment interest, costs and disbursements and its legal fees.

Motion Sequence 006

A. Motion to Renew

On this renewal motion, defendants once again admit that they owe plaintiff \$631,029.91

for goods sold and delivered (Def. 19-a Statement, #8). However, they seek to renew the branch of the motion that granted plaintiff's request for an order permitting plaintiff to pierce the corporate veil in order to reach LaRocca's personal assets to satisfy Best Buy's indebtedness. It is defendants' contention that the decision resulted from "law office failure," in that defendants' prior attorney, Harold Seligman (Seligman): 1) miscalculated the date that opposition papers were due on the summary judgment motion, 2) submitted the opposition papers two days late, and 3) those opposition papers omitted critical facts and documents and failed to include a Rule 19-a statement. Plaintiff correctly argues that renewal is not warranted because defendants' submissions do not contain new facts that would change the outcome of the case and, in any event, LaRocca has not supplied any reasonable justification for his failure to present them earlier.

Here, the documents contained in the County Clerk's file reveal that on June 23, 2008, plaintiff served and filed its motion for summary judgment seeking, inter alia, to pierce the corporate veil to reach LaRocca's personal assets. Plaintiff served a Rule 19-a statement along with its others papers in support of the motion. By stipulation dated July 3, 2008, the parties adjourned the return date of the motion to August 28 and adjourned the date that defendants' responsive papers were due to August 4, 2008 (Wybiral Aff., Ex. C). Seligman did not submit opposition papers to his adversary or to the court on August 4, 2008. On August 5, Seligman contacted the court and requested an extension of time to submit opposition papers and, thereafter, on August 6, Seligman submitted an affirmation in opposition to the motion along with LaRocca's affidavit in opposition. He did not submit a Rule 19-a Counter Statement of

Material Facts.¹ On August 8, the court inadvertently issued a short form order granting the summary judgment motion on default.

Thereafter, by Order to Show Cause dated September 16, 2008, defendants moved to vacate and/or renew the August 8, 2008 order. On October 9, 2008, pursuant to the stipulation of the parties, the court granted the motion to vacate the default and on October 10, 2008, Seligman submitted exactly the same opposition papers he had originally served on the court on August 6. Once again, he did not include a Rule 19-a Counter Statement of Material Facts. On October 24, plaintiff submitted its reply papers. On February 2, 2009, this court issued an order and judgment that granted plaintiff's motion for summary judgment in its entirety, stating, in pertinent part:

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 statement 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) (citations omitted).

¹ 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 statement required to be served by the opposing party.

CPLR 2221(e)(2),(3)states, in relevant part, that a motion to renew, “shall be based on new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion.” It is well settled that a motion “to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” (*Sobin v Tylutki*, 59 AD3d 701, 702 [2nd Dept 2009][citations omitted]; see also *NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576, 577 [1st Dept 2007]; *Chelsea Piers Mgt. v Forest Electric Corp.*, 281 AD2d 252 [1st Dept 2001]).

During the original briefing of plaintiff’s motion, LaRocca submitted an affidavit in which he averred that Best Buy always maintained its own bank accounts, business offices and corporate identity. In his June 4, 2009 affidavit in support of renewal, LaRocca reiterates these assertions. However, in that affidavit, he does not deny many of the facts that the court relied upon in permitting plaintiff to pierce the corporate veil. For instance, he does not deny that he loaned Best Buy more than \$700,000 in 2004 and 2005 to fund Best Buy’s operating expenses and that no loan documents were prepared to memorialize the terms of the loan. He also fails to deny that Best Buy was undercapitalized because it could not have met its financial obligations without cash infusions from LaRocca’s personal assets. In addition, LaRocca admits that he used personal funds to pay vendors and that he used at least part of the money he received from the sale of Best Buy’s cooperative stalls at the New Fulton Fish Market to pay down his personal line of credit. Accordingly, LaRocca’s affidavit on renewal does not present new facts that would change the prior determination.

Moreover, defendants admit that the “new” documents annexed to defendants’ moving

papers existed at the time of defendants' original submission (Maschio Aff., para. 10 [AA]) and a review of those documents demonstrates that the bank records, tax returns and insurance policies would not change the court's determination that LaRocca exercised complete domination of the corporation with respect to the transaction attacked which resulted in plaintiff's injury (*Hyland Meat Co. v Tsagarakis*, 202 AD2d 552 [2nd Dept 1994])[piercing the corporate veil requires a showing that the owners dominated the corporation with respect to the subject transaction and that the domination was used to commit a wrong against plaintiff that resulted in plaintiff's injury]).

Finally, defendants have failed to come forward with a reasonable justification for their failure to present the "new" facts and documents earlier. "The Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion" (*Sobin v Tylutki*, 59 AD3d at 702). Even though defendants' August 6, 2008 submissions were prepared in haste, defendants were given a second opportunity to submit opposition papers to plaintiff's motion for summary judgment. By letter dated October 8, 2008, plaintiff's counsel informed the court that, "[p]laintiff has agreed to consent to vacate the default [entered in favor of plaintiff on the summary judgment motion] and permit defendants to submit opposition papers on or before October 13, 2008. Plaintiff will submit a reply on or before October 24, 2008." On October 10, defendants choose to resubmit exactly the same opposition papers they submitted to the court on August 6, 2008. On renewal, defendants have failed to come forward with a reasonable justification for failing to submit these facts and documents and the Rule 19-a statement in October. Thus, the portion of the motion seeking renewal is denied.

B. Vacate Default

CPLR 5015 (a) permits a court to relieve a party from a judgment upon the grounds of excusable default or newly discovered evidence which would, if introduced earlier, have changed the result.

Assuming, arguendo, that defendants' failure to submit a Rule 19-a statement and corporate documents constitutes such a default, defendants have failed to come forward with a reasonable excuse for the default (*Hyundai Corp. v Republic of Iraq*, 20 AD3d 56, 62 [1st Dept 2005])[in order to demonstrate excusable default, the defaulting party must demonstrate a reasonable excuse and a meritorious defense]). Although defendants claim "law office failure," as discussed above, on October 8, 2008, defendants were granted a second opportunity to submit opposition papers on the motion for summary judgment. At that time, they inexplicably choose to resubmit the original August 2008 affirmation in opposition and affidavit in opposition without adding documents which were in existence and which defendants had exchanged in discovery. They also inexplicably failed to submit a Rule 19-a Counter Statement of Material Facts (*Piton v Cribb*, 38 AD3d 741, 742 [2nd Dept 2007])[“a conclusory and unsubstantiated claim of law office failure will not rise to the level of a reasonable excuse)].

In addition, as more fully discussed above, the newly submitted evidence fails to refute the court's findings regarding LaRocca's domination of Best Buy, and such evidence would not have produced a different result if it had been submitted earlier (*Olwine, Connelly, Chase, O'Donnell & Weyher v Valsan, Inc.*, 226 AD2d 102, 103 [1st Dept 1996])[movant must show that the newly discovered evidence is material, not cumulative, that it would probably change the result and that it could not have been discovered previously by the exercise of due diligence]). Accordingly, the branch of the motion seeking to vacate the judgment pursuant to CPLR 5015 is

denied.

Motion Sequence 005

Plaintiff's motion to resettle the March 26, 2009 order is granted to the extent that plaintiff is awarded its statutory costs and disbursements and pre-judgment interest on its breach of contract claim. The branch of the resettlement motion that seeks attorneys' fees is denied.

CPLR 8101 states that, in most instances, the prevailing party is entitled to costs of the action and CPLR 8301 provides that if the prevailing party is awarded costs, he or she is also entitled to receive necessary disbursements. A prevailing party is entitled to an award of costs as of right if the trial judge does not state a reason for a denial of such costs (*Delulio v 320-57 Corp.*, 99 AD2d 253 [1st Dept 1984]). In this case, the court did not state any reason for the denial of costs and disbursements and, therefore, plaintiff is awarded the costs and necessary disbursements of this action (*see, Armendariz v Tiramisu Restaurant, Inc.*, 170 AD2d 334 [1st Dept 1991]).

CPLR 5001(a) states:

Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

In *Spodek v Park Property Dev. Assocs.* (96 NY2d 577, 581 [2001]), the Court of Appeals held that, "the plain language of the statute . . . mandates the award of interest to verdict in breach of contract actions." Section 5001(b) provides that pre-judgment interest begins to run on a breach of contract action "from the earliest ascertainable date the cause of action existed . .

..”

The complaint in this matter states a cause of action for breach of contract and on February 2, 2009, this court granted plaintiff’s motion for summary judgment on the complaint. Therefore, pursuant to CPLR 5001, plaintiff is entitled to nine percent pre-judgment interest on its breach of contract claim for the 163 unpaid invoices, and interest should be computed upon each invoice from the date the invoice became due.

Defendants’ argument that plaintiff’s claim against LaRocca to pierce the corporate veil is equitable and therefore that the pre-judgment interest, if any, is at the court’s discretion, is without merit. In *Matter of Morris v New York State Department of Taxation and Finance*, (82 NY2d 135, 141 [1993]), the Court of Appeals opined:

The concept [of piercing the corporate veil] is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. Thus, 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 (citations omitted).

In this case, the court granted judgment in favor of plaintiff on its breach of contract claim against the corporation. The grant of plaintiff’s request to pierce the corporate veil does not constitute a separate equitable cause of action. Rather, it permits plaintiff to impose Best Buy’s obligations for its breach of contract against the owner, LaRocca.

However, plaintiff’s request for an award of legal fees is denied because the court did not find that defendants engaged in fraud or acted with malice (*see Mastic Fuel Service v Van Cook*, 55 AD2d 599 [2nd Dept 1976]; *see also Fugazy Travel Bureau v Ernst & Ernst*, 31 AD2d 924 [1st

Dept 1969][recognizing right to attorney's fees where fees were incurred as a result of fraud]).

The general rule in New York is that, in the absence of a contractual or statutory liability, each litigant is required to pay his/her attorneys fees. Here, the court found the corporation liable on plaintiff's claims for breach of contract, goods sold and delivered and account stated. There was no separate cause of action against LaRocca and no finding of fraud or malice. Accordingly, in this action each party is liable for its own attorneys' fees (*Harpercollins Publishers, L.L.C. v Arnell*, 23 Misc.3d 1117[A], 2009 NY Slip Op. 50794[U][Sup Ct NY County 2009])

Therefore, it is

ORDERED that the branch of defendants' motion (sequence 006) that seeks to renew this court's decision and order dated February 2, 2009 is denied; and it is further

ORDERED that the branch of defendants' motion that seeks to vacate the March 24, 2009 judgment is denied; and it is further

ORDERED that plaintiff's motion to resettle the March 26, 2009 judgment is granted to the extent that plaintiff is awarded costs and disbursements and prejudgment interest as described above, and the motion is otherwise denied.

DATE: September 14, 2009

ENTER:

HONORABLE JUDGE B. LOWE, III
J.S.C.
FILED
SEP 16 2009
COUNTY CLERK'S OFFICE
NEW YORK
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