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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

DAVID S. DEXTER,

Plaintiff,

- against -

DONALD McCAULEY,

Defendant.

Motion Sequence #1
Submitted May 22, 2009

INDEX NO: 13850/08

The following papers were read on this motion:

Notice of Motion.....1
Defendant's Memorandum of Law.....2
Affidavit in Opposition.....3
Plaintiff's Memorandum of Law 4
Affirmation in Reply 5

Defendant, DONALD McCAULEY, moves for an order, pursuant to CPLR §3212, granting him summary judgment dismissing the complaint. Plaintiff, DAVID S. DEXTER, opposes the motion, which is determined as follows:

In his complaint, plaintiff alleges that he and defendant are "jointly and severally liable" for all tax liabilities due to the New York State Department of Taxation and Finance (hereinafter referred to as "the Department") arising from the alleged failure to collect sales taxes at a restaurant named McCauley's that the parties operated together during the tax period ending August 31, 2000. As of April 21, 2008, a consolidated statement of tax liabilities shows the total sum including interest and penalties to be $165,289.36 (Exhibit

"A" to the complaint). Plaintiff seeks contribution of one-half of all amounts already paid in satisfaction of this tax liability, and a declaration that defendant is required to pay plaintiff one-half of all future amounts to be paid for this tax liability. On the instant motion, defendant moves for summary judgment dismissing the complaint in its entirety.

Summary judgment is the procedural equivalent of a trial (*Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A. 1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk Cty Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 608 NYS2d 940 [C.A. 1984]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397, 790 NE2d 772 [C.A. 2003]); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations (*Zuckerman v City of New York*, *supra*).

The question presented on defendant's motion is, what is the legal basis for plaintiff's claims of joint personal liability?

Before turning to the question presented, the Court denies dismissal on the grounds of the sixth affirmative defense in defendant's amended answer, namely expiration of the relevant limitations period. Plaintiff's claims are for contribution, which are subject to a six

(6) year limitations period (CPLR §213) and a claim for contribution accrues at the time of payment of the underlying claim (*Ruiz v Griffin*, 50 AD3d 1007, 856 NYS2d 214 [2nd Dept. 2008]). As the first payment towards plaintiff's personal tax liability was made in 2003, and this action was commenced in 2008, defendant's sixth affirmative defense is unavailing, and must be dismissed.

In search of the source of the parties' alleged joint liability, the first place that the Court turns is to the parties' agreements, of which three (3) are presented. The first Agreement, dated March 12, 1997, (Exhibit "C" to the moving papers), expressly provides that defendant is to be a "passive financial investor," and directs that plaintiff shall have responsibility for "all financial and accounting decisions" including "all tax matters."

Next, the record contains a Shareholders' Agreement, dated June 12, 1998 (Exhibit "B" to plaintiff's opposition papers), wherein both plaintiff and defendant were required to devote their full time to the affairs of the corporation, and to be "physically present on the premises of the corporation at such times as are reasonably necessary for the good and efficient management, supervision and operation of a restaurant and bar thereon." By its own terms (¶ 16), the Shareholders' Agreement never became effective because the New York State Liquor Authority never approved the addition of defendant McCAULEY to the liquor license.

A third agreement, dated August 18, 2000 (Exhibit "C" to plaintiff's opposition papers), is referred to by plaintiff as a "Buy Out Agreement" (Dexter Affidavit in Opposition, ¶11), which provides for certain payments by plaintiff to defendant in exchange for his interest in the corporation and restaurant. Plaintiff admits that he did not meet the payment

schedule in this Buy Out Agreement (Dexter Affidavit,¶12).

While the agreements do establish that defendant invested in the restaurant, none of them provide for losses to be shared. As the parties themselves did not agree to joint liability for tax losses, the Court next turns to the corporate law generally, which permits incorporation of a business for the very purpose of escaping personal liability(*cf. Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 [C.A. 1993]; *Bartle v Home Owners Co-op.*, 309 NY 103, 127 NE2d 832 [C.A. 1955]). The Court finds no statutory basis for joint personal liability herein.

For the record, the existence of some form of tort liability is a prerequisite to contribution (*Board of Education of Hudson City School District v Sargent, Webster Crenshaw & Folley*, 71 NY2d 21, 523 NYS2d 475, 517 NE2d 1360 [C.A. 1987]). However nowhere in his complaint does plaintiff allege the existence of tort liability.

Finally, the Court turns to the Tax Law, which provides a statutory exception to the general Corporate Law, that allows personal liability for uncollected sales taxes. Tax Law §1131(1) defines a "person required to collect tax" as "any officer, director or employee of a corporation or of a dissolved corporation . . ." Tax Law §1133 imposes personal liability on every "person required to collect tax" (*see generally*, *Lorenz v Division of Taxation of the Department of Taxation and Finance*, 212 AD2d 992, 623 NYS2d 455 [4th Dept. 1995], *affd*, 87 NY2d 1004, 642 NYS2d 621, 665 NE2d 191 [C.A.1996]). A corporate employee is a person required to collect sales tax, when the person is "authorized to sign a corporation's tax returns" or is "responsible for maintaining the corporate books," or is "responsible for the corporation's management" (20 NYCRR §526.11[b]). The

determination is a factual one (*Cohen v State Tax Commission* of *the State of New York*, 128 AD2d 1022, 513 NYS2d 564 [3rd Dept. 1987]), and issues of credibility are matter for the taxing authority to resolve (*Brahms v Tax Appeals Tribunal*, 256 Ad2d 822, 681 NYS2d 699 [3rd Dept. 1998]).

In order to protest a Notice of Determination of the assessment of personal tax liability, one must either request a Conciliation Conference or request a hearing before an administrative law judge within ninety (90) days (Tax Law §1138). When plaintiff received his Notice of Determination, he did neither. The failure to timely proceed with administrative remedies forecloses review of the original determination of tax due, except in cases of abuse of discretion by the State Tax Commission (*Halperin v Chu*, 138 AD2d 915, 526 NYS2d 660 [3rd Dept.], *app dsmd in part and den in part,* 72 NY2d 938, 532 NYS2d 845, 529 NE2d 175 [C.A. 1988]).

Defendant had also received a Notice of Determination, dated December 3, 2001 (Exhibit "D" to the moving papers), for sales and use tax due from him for the restaurant in the amount of $104,781.16. Defendant's attorney requested a Conciliation Conference (Exhibit "D" to the moving papers), with the following explanation:

> It is the taxpayer's position that he is NOT a responsible party. Mr. McCauly (sic) was not a corporate officer, as to be an officer by New York State law he would be required to be on the liquor license (EXHIBIT A). He was a signer on the check, but his powers to write checks were limited by the agreement (copy enclosed, EXHIBIT B).
> He did not prepare nor sign any tax return or leases (EXHIBIT C).

The agreement annexed as EXHIBIT B was the first Agreement, dated March 12, 1997, and EXHIBIT C was the lease for the restaurant signed only by plaintiff.

A Conciliation Conference for defendant was scheduled but, before it could take

place, defendant's attorney was notified, on April 11, 2002, that defendant's file for the sales and use tax for the period 9/1/98 to 8/31/2000 was "now closed" (Exhibit "E" to the moving papers).

On the record herein, where defendant began the protest process regarding the assessment of sales taxes against him personally, and plaintiff did not, there is no legal basis in the tax law for this Court to determine that both parties are "jointly and severally" liable for the unpaid taxes. Defendant has presented a *prima facie* case that plaintiff has no claim against him for "joint liability" for the unpaid taxes.

In opposition, plaintiff insists that both he and defendant had a common burden to make sure that the corporate sales taxes were remitted to the Department and that 75% of the time defendant would draw checks, including checks for sales tax payments, and would ask plaintiff to sign them. Plaintiff further submits copies of three (3) checks for sales taxes that purportedly bear his signature but allegedly were signed in his name by defendant. These arguments fail to raise a triable issue of fact because they should have been made to the administrative law judge. They are no longer available to plaintiff due to his failure to pursue his administrative remedies.

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiff has failed to raise a triable issue of fact, and there is no basis to find defendant "jointly and severally liable" for the taxes assessed against the plaintiff by the Department, and the motion by defendant for summary judgment dismissing the complaint must be granted. It is therefore

ORDERED, that defendant's motion for summary judgment dismissing the complaint

is granted; and it is further

ORDERED, that defendant's counterclaims are severed and continued; and it is further

ORDERED, that defendant shall serve a certified copy of this order, with Notice of Entry, by personal service upon the Clerk of the Supreme Court, County of Nassau, and the Clerk of the Supreme Court is directed to issue a Nassau County Index Number, on the counterclaims, without charge, and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on October 13, 2009, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings on the counterclaims. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 8, 2009

WILLIAM R. LaMARCA, J.S.C.

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