

Giglio v Nisivoccia

2009 NY Slip Op 32402(U)

October 13, 2009

Supreme Court, Suffolk County

Docket Number: 3812-2009

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Present:
Hon. SANDRA L. SGROI

Mot Seq: 001MG

**CASEDISPOSED-ENTER
JUDGMENT**

Adj. Date: 8-13-09
Return Date: 4-17-09

Application of

DAMON GIGLIO,

STANLEY S. ZINNER, P.C.
Attorney for Petitioner
58 South Service Road - Suite 410
Melville, New York 11747

For an Order Pursuant to Article 75 of the CPLR
Compelling Arbitration of a Certain Controversy,

Petitioner,

LAW OFFICES OF MICHAEL A. GAJDOS, P.C.
Attorney for the Respondents
31 West Main Street - Suite 203
Patchogue, New York 11772

-against-

BRIDGET NISIVOCCIA, individually and
BRIDGET NISIVOCCIA DESIGNS, LLC.

Respondents.

Upon the following papers numbered 1 to 19 read on the Petition to Compel Arbitration:
Notice of Petition and supporting papers 1-14; Answer and supporting papers 15-16; Reply
Memorandum of Law and supporting papers 17-18; Court File from County Clerk 19; it is,

ORDERED that the motion of Damon Giglio, the Petitioner, to compel arbitration is granted as to Bridget Nisivoccia Designs, LLC., one of the Respondents herein; and it is further

ORDERED that the motion of the Petitioner to compel the individual Respondent Bridget Nisivoccia to proceed to arbitration of the disputes arising under the written, contractual agreement between Bridget Nisivoccia Designs, LLC. and Damon Giglio is also granted; and it is further

ORDERED that the Petitioner is directed to enter judgment in accordance with this order.

On June 9, 2009, this Court denied the Respondents' motion to dismiss the Petition finding that the Respondents were properly served and the Petitioner acquired jurisdiction over the Respondents. After the motion to dismiss was denied, this Petition to compel arbitration was adjourned to permit the Respondents to serve an answer. The Respondents served their verified answer on or about July 16, 2009. The answer is verified by Michael A. Gajdos, Esq., the attorney for the Respondents, and he is not a person with actual knowledge of the facts. No additional proof has been submitted by the Respondents to oppose the relief requested in the Petition.

On or about January 17, 2007, the Petitioner Damon Giglio entered into a contract with the Respondent Bridget Nisivoccia Designs, LLC (hereinafter BND) wherein BND agreed to provide design services in connection with the renovation and refurbishing of a home for the payment of \$20,000.00 plus the expenses of the project. This contract contained a broadly worded arbitration clause requiring Giglio and BND to proceed to arbitration in the event any unresolvable dispute arose under the terms of the agreement. In subdivision XV, paragraph 4, the contractual agreement stated:

Any controversy or claim arising out of or otherwise relating to this contract, or the breach thereof, shall be settled by arbitration in Nassau or Suffolk Counties, New York, in accordance with the rules of the American Arbitration Association. The parties shall endeavor to agree upon a single arbitrator. Failing same, each party shall name an arbitrator and the two arbitrators shall name a third arbitrator. Unless the arbitrators shall agree completely with one party, the costs of the arbitration shall be equally shared, as determined by the arbitrators. Each party shall be responsible for the payment of its own counsel or other advisers. Judgment(s) upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

A strong policy exists favoring the resolution of disputes through arbitration when a contractual clause mandates arbitration as the remedy(see, *Matter of Exercycle Corp. v. Maratta*, 9 N.Y.2d 329, 214 N.Y.S.2d 353, 174 N.E.2d 463; *Kessner & Rabinowitz, Inc. v. Winchester Textiles, Inc.*, 46 A.D.2d 239, 361 N.Y.S.2d 933). Arbitration is the appropriate forum to resolve issues involving partnerships and other business arrangements where, as here, the parties have chosen that remedy (see, *Silverberg v Schwartz*, 81 AD2d 640, 438 NYS2d 143). The contractual clause in the written agreement providing for arbitration between BND and Giglio is enforceable because it is a clear, direct, unambiguous and broad agreement that manifests an intent that any and all unresolved disputes be determined in the arbitral forum.

Arbitration clauses will be set aside by Courts only for facts existing at or before the time of the execution of the contract which would require the revocation of any other contract or contractual provision (see, *Zimmerman v Cohen* 236 NY 15, 139 NE 764; see also *L & R Exploration Venture v. Grynberg*, 22

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A.D.3d 221, 804 N.Y.S.2d 286, leave to appeal denied, 6 N.Y.3d 749). At this time, there is no challenge to the arbitration clause in the contract. Therefore, with regard to the signatory to the contract, the Respondent BND, the motion to compel arbitration is granted.

The Petitioner also has moved to compel the individual Respondent Bridget Nisivoccia to proceed to arbitration on the contractual dispute that exists between the parties. It is clear from reviewing the contract that Bridget Nisivoccia only signed the agreement on behalf of the corporation BND and she did not sign the contract in her personal capacity. Generally, a person cannot be compelled to proceed to arbitration unless he has affirmatively contracted to refer a dispute to that forum.

However, under an appropriate fact situation, a person who has not signed a contract still may be compelled to proceed to arbitration under limited circumstances. The following three broadly stated threshold questions may be raised on a motion to compel or to stay arbitration:

- (1) whether the parties made a valid agreement to arbitrate and/or are bound to arbitrate;
- (2) if so, whether the terms of the agreement mandating arbitration have been complied with; and
- (3) whether the claim sought to be arbitrated is time-barred if it is asserted in the State court (see,

CPLR 7502[b]; 7503; *Smith Barney, Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 193, 647 N.E.2d 1308, 623 N.Y.S.2d 800, reargm't den'd 85 N.Y.2d 1033, 655 N.E.2d 404, 631 N.Y.S.2d 291; *Matter of County of Rockland [Primiano Constr. Co.]*, 51 N.Y.2d 1, 9, 431 N.Y.S.2d 478, 409 N.E.2d 951).

The issue presented herein, whether Bridget Nisivoccia should be compelled to proceed to arbitration under the contract is a threshold issue that should be resolved by the Court and is not an issue to be determined in the first instance by the arbitrator (*CPLR* § 7501).

The New York Courts have recognized various theories under which non-signatories to a binding agreement may be bound personally by a contractual clause mandating the arbitration of disputes (see, *Montrose Global Assets, Inc. v. Bennington Foods, LLC*, 17 Misc.3d 1107(A), 851 N.Y.S.2d 59; *Thomson-CSF, S.A. v. America Arbitration Assn.*, 64 F.3d 773, 777). The concept of corporate veil-piercing to bind a principal of the corporation may justify requiring a non-signatory to the contract to proceed to arbitration (supra).

Generally, a corporation has an existence separate and distinct from that of the shareholders or principals of the corporation (see, *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152, 432 N.Y.S.2d 879, 412 N.E.2d 934). Under ordinary circumstances a shareholder or principal is not personally liable for the acts and obligations of the corporation and this is true even where the corporation has only one shareholder who is carrying on the business of the corporation alone (see, *Bowles v. Errico*, 163 A.D.2d 771, 558 N.Y.S.2d 734). When equity requires, in extremely circumscribed fact patterns, a litigant may go behind or "pierce" the limited liability protections afforded by the corporate existence in order to impose personal liability on a shareholder or principal and to hold that shareholder or principal liable for a corporate obligation. To invade the protection afforded by the corporate form, the Petitioner must show that Bridget Nisivoccia exercised complete domination over BND with respect to the specific transaction in issue and that such domination was used to commit a fraud or wrong against the Petitioner which resulted in his injury (see, *Matter of Guptill Holding Corp. v. State of New York*, 33 A.D.2d 362, 307

N.Y.S.2d 970 aff'd 31 N.Y.2d 897, 340 N.Y.S.2d 638, 292 N.E.2d 782; *National Labor Relations Bd. v. Greater Kan. City Roofing*, 2 F.3d 1047, 1052-1053).¹

The factors considered in determining whether the protections afforded by a corporate entity insulating an individual from personal liability include whether the corporate principal “abused the privilege of doing business in the corporate form” and the “failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use” (*Millennium Constr., LLC v. Loupolover*, 44 A.D.3d at 1016-1017, 845 N.Y.S.2d 110; see, *Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, 62 A.D.3d 141, 877 N.Y.S.2d 95; *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 24, 867 N.Y.S.2d 169). The party seeking to pierce the corporate veil, here the Petitioner, has the burden of establishing that there is a basis to do so (see, *Katz v. N.Y. Tint Taxi Corp.*, 213 A.D.2d 599, 624 N.Y.S.2d 65).

Absent a showing of an abuse of the corporate form, a non-signatory cannot be compelled to arbitrate pursuant to an arbitration clause (see, *Roffler v. Spear, Leeds & Kellogg*, 13 A.D.3d 308, 788 N.Y.S.2d 326; *Old Republic Nat. Title Ins. Co. v. Moskowitz*, 747 N.Y.S.2d 556, 559, 297 A.D.2d 724; *International Aircraft Trading Co. v. Manufacturers Trust Co.*, 297 N.Y. 285, 292, 79 N.E.2d 249). This rule applies in determining whether a non-signatory to an arbitration agreement should be bound by that agreement (see, *Matter of Sbarro Holding (Shiaw Tien Yuan)*, 91 A.D.2d 613, 456 N.Y.S.2d 416; *TNS*

¹The Appellate Division, Second Department in *East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, (--- N.Y.S.2d ----, 2009 WL 2245755, 2009 N.Y. Slip Op. 05998, N.Y.A.D. 2 Dept. July 28, 2009) recently reviewed the general legal tenets surrounding the circumstances under which the corporate form should be disregarded:

The general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (see, *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106, 127 N.E.2d 832; *Seuter v. Lieberman*, 229 A.D.2d 386, 387, 644 N.Y.S.2d 566). The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation (see, *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140-141, 603 N.Y.S.2d 807, 623 N.E.2d 1157). A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff (*id.*; see, *Love v. Rebecca Dev., Inc.*, 56 A.D.3d 733, 868 N.Y.S.2d 125; *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 845 N.Y.S.2d 110).

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Holdings v. MKI Sec. Corp., 92 N.Y.2d 335, 339-340, 680 N.Y.S.2d 891, 703 N.E.2d 749). However, once the Court makes the threshold determination that a litigant is bound by an arbitration provision, public policy does not bar an *arbitrator* from disregarding the corporate form when there is a rational basis for doing so (see, *Habitations Ltd. v. BKL Realty Sales Corp.*, 169 A.D.2d 657, 565 N.Y.S.2d 36; *Matter of Minkoff (H & L Dress Corp.)*, 10 Misc.2d 828, 171 N.Y.S.2d 900).

The Appellate Division, Second Department in *Bergassi v. American Sur. Agency, Inc.*, (278 A.D.2d 413, 718 N.Y.S.2d 611) stated that in order to direct that an individual who has not signed the contract containing an arbitration clause to proceed to arbitration based upon a theory that the actions of that non-signatory require that the corporate veil should be pierced, the Petitioner must establish that the non-signatory-

exercised complete domination ***and that such domination was used to commit a fraud (see, *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 603 N.Y.S.2d 807, 623 N.E.2d 1157; *Weiss v. Marjam of Long Is.*, 270 A.D.2d 455, 705 N.Y.S.2d 76; *Stockacre Ltd. v. PepsiCo, Inc.*, 265 A.D.2d 398, 696 N.Y.S.2d 500; *Apollon Waterproofing & Restoration Corp. v. Bergassi*, 241 A.D.2d 347, 661 N.Y.S.2d 957).

The decision to grant or deny the Petitioner's request to disregard the corporate status of BND must be based upon the facts in the record (see, *Giarguaro S.p.A. v. Amko Intern. Trading, Inc.*, 300 A.D.2d 349, 751 N.Y.S.2d 772; see also, *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157).

Here, it is alleged that the Respondent Bridget Nisivoccia was and remains the only person controlling BND. The Petitioner alleges that Bridget Nisivoccia ignored the formalities of maintaining the corporation in her management of BND. Further, the Petitioner alleges that Bridget Nisivoccia misappropriated over \$500,000.00 paid to her by the Petitioner for construction materials, supplies and furnishings by inflating bills and creating bogus invoices. The Petitioner offers certain facts in support of these allegations by affidavits and documentary evidence attached as Exhibits to the Petition. First, the Petitioner submits as an exhibit a copy of an email from Nisivoccia wherein she gave the Petitioner her business account number with Commerce Bank. Giglio alleges that he issued checks for work that was required pursuant to the agreement between Giglio and BND. Attached as Exhibit "C" to the Petition are copies of three checks from Giglio totaling \$32,974.54 that were deposited into Nisivoccia's personal bank account. Attached as Exhibit "D" are four checks from Giglio made payable to BND totaling \$236,529.46 that were deposited into Nisivoccia's personal Fidelity money market account. There are other allegations of fraud in the Petition but those other allegations, which may or may not be true, do not, as presented, establish a prima facie factual showing sufficient to support the relief requested against Bridget Nisivoccia personally.

Where, as here, the Petitioner seeks to bind a non-signatory to the certain terms of a contract because the non-signatory used the corporate fiction to perpetuate a fraud, the Petitioner must first sufficiently plead allegations that establish that the corporate veil should be pierced and that the party who did not sign the

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agreement should be required to arbitrate the dispute. A claim that the legal protections afforded to persons doing business as a corporate entity should be disregarded because a fraud has been committed must meet the more stringent pleading requirements interposed by the *CPLR* (see, *East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, (--- N.Y.S.2d ----, 2009 WL 2245755, 2009 N.Y. Slip Op. 05998, N.Y.A.D. 2 Dept. Jul 28, 2009) .

The following three requirements for piercing the corporate veil have been alleged in this Petition:

- (1) domination and control of the corporation by the principal;
- (2) damages caused by the principal's acts; and
- (3) the abuse of the privilege of doing business in corporate form (*ibid*; *CPLR* 3013).

Since the above allegations have been supported by a factual showing of possible wrongful acts, the Petition before this Court pleads a cause of action sufficient to withstand any motion to dismiss (see, *Gateway I Group, Inc. v. Park Ave. Physicians, P.C.*, 62 A.D.3d 141, 877 N.Y.S.2d 95; *Love v. Rebecca Development, Inc.*, 56 A.D.3d 733, 868 N.Y.S.2d 125).

Pursuant to *CPLR* 409 (b), on the return date of a proceeding, the Court must "make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised." In order for the Court to grant the relief requested herein without the necessity of a hearing, the Petitioner first must make a prima facie showing that the corporate protections provided the principal should be disregarded. If the Respondents fail to raise any factual issue in response to the prima facie showing, the Court may grant the relief requested in the Petition. Here, the Petition and the supporting documents of Damon Giglio establish a prima facie showing of his right to a judgment against Bridget Nisivoccia and BND allowing him to proceed to arbitration against both Respondents. The answer interposed by the Respondents fails to raise an issue of fact.

The documentary evidence of a fraud is demonstrated by the copies of checks written by Giglio to BND for over \$236,000.00, a significant amount of money, improperly deposited into Bridget Nisivoccia's personal accounts. In addition, Giglio has submitted proof in the form of two checks that indicate that BND, an entity completely controlled by Bridget Nisivoccia, double billed Giglio the sum of \$46,604.92. These facts establish a prima facie showing that Bridget Nisivoccia engaged in a scheme to defraud the Petitioner by improperly using BND, a corporation that she controlled completely. The Respondent Bridget Nisivoccia has failed to answer these allegations and explain her actions. The proof that sums of money in the amount of over \$280,000 were wrongfully deposited into Bridget Nisivoccia's personal accounts indicates not only that a fraud occurred but that Nisivoccia wrongfully co-mingled corporate funds into her personal accounts over an extended time period and improperly disregarded and misused the corporation that she controlled.

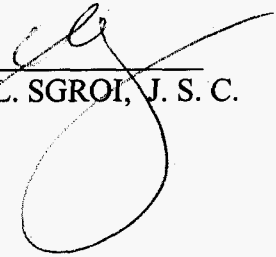
The unexplained deposit into the personal account of Bridget Nisivoccia of Giglio's checks payable to BND provide sufficient justification to breach the corporate veil of BND and hold Bridget Nisivoccia responsible under the contractual agreement. The affirmations of Michael A. Gajdos, Esq., the Respondents' attorney, are without probative value because he has no personal knowledge of the actual facts concerning co-mingling of corporate and personal funds by Bridget Nisivoccia and her alleged abuse

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of the corporate form. Therefore, the answer affirmed by the attorney and the affirmation submitted on the motion to dismiss do not raise any factual issues that require a hearing (see, *Bendik v. Dybowski*, 227 A.D.2d 228, 642 N.Y.S.2d 284).

The Petition of Damon Giglio to compel BND and Bridget Nisivoccia to proceed to arbitration is granted and the Petitioner is directed to enter judgment in accordance with this order. Once this matter is before the arbitrator, the issues concerning the liability of Bridget Nisivoccia and BND for alleged breach of contract will be litigated.

Dated: 10/13/09



SANDRA L. SGROI, J. S. C.