

Long Is. Limousine Serv. Corp. v Metro Limo Car & Coach, Inc.

2009 NY Slip Op 33201(U)

December 28, 2009

Supreme Court, Suffolk County

Docket Number: 25592/2008

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 25592/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

LONG ISLAND LIMOUSINE SERVICE
 CORP.,

Plaintiff,

-against-

METRO LIMO CAR & COACH, INC., METRO
 LIMO INC., METRO COACH CORP., METRO
 LIMO SERVICE, LLC, JEANNE MANAS,
 JAMES MANAS, VALERIE MANAS,
 GEORGE MANAS and NICHOLAS MANAS,

Defendants.

ORIG. RETURN DATE: JANUARY 20, 2009
 FINAL SUBMISSION DATE: MARCH 5, 2009
 MTN. SEQ. #: 001
 MOTION: MOT D

ORIG. RETURN DATE: FEBRUARY 3, 2009
 FINAL SUBMISSION DATE: MARCH 5, 2009
 MTN. SEQ. #: 002
 MOTION: MG

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Upon the following papers numbered 1 to 8 read on these motions _____
TO COMPEL AND PRECLUDE AND FOR SUMMARY JUDGMENT

Notice of Motion and supporting papers 1-3; Notice of Motion and supporting papers 4-6;
 Affirmation in Opposition and supporting papers 7, 8; it is,

ORDERED that this motion by plaintiff LONG ISLAND LIMOUSINE SERVICE CORP. for an Order: (1) pursuant to CPLR 3124, compelling all defendants to serve responses to plaintiff's Notice of Discovery and Inspection; (2) compelling all defendants to appear for depositions pursuant to the Preliminary Conference Stipulation and Order dated October 20, 2008; (3) pursuant to CPLR 3126, precluding all defendants from offering evidence or testimony at trial pertaining to the merits of plaintiff's claim; (4) awarding counsel fees to plaintiff; and (5) sanctioning defendants, is hereby **GRANTED** solely to the extent provided hereinafter; and it further

ORDERED that this motion by defendants JEANNE MANAS, JAMES MANAS, VALERIE MANAS, GEORGE MANAS and NICHOLAS MANAS ("individual defendants") for an Order, pursuant to CPLR 3212, granting summary judgment in favor of the individual defendants dismissing the action as alleged against the individual defendants, is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received an affirmation of plaintiff's counsel in opposition to this application.

This action sounding in breach of contract was commenced on or about August 8, 2008. Plaintiff alleges, by its first cause of action, that at the specific instance and request of defendants, between on or about August 3, 2007 and continuing through April 10, 2008, plaintiff provided buses and vans to defendants for an agreed-upon fee, to wit: \$64,275.00. Plaintiff further alleges, by its second cause of action, an account stated in the foregoing amount. Thus, plaintiff seeks a money judgment against defendants in the amount of \$64,275.00, plus statutory interest and fees.

Plaintiff has now filed the instant application seeking, among other things, to compel all defendants to serve responses to plaintiff's Notice of Discovery and Inspection, dated October 20, 2008, and to compel all defendants to appear for depositions. The Court notes that the Notice of Discovery and Inspection attached to plaintiff's moving papers was directed only to defendant METRO LIMO INC.; however, defendants have submitted copies of Notices of Discovery and Inspection, all identical and also dated October 20, 2008, which were directed to each of the individual defendants. Plaintiff alleges that defendants have wholly failed to respond to the Notices of Discovery and Inspection, and have failed to appear for depositions notwithstanding the fact that the deposition date was adjourned once at the request of defendants' counsel.

In opposition, defendants argue that plaintiff's discovery demands are overbroad, unduly burdensome, and palpably improper, as they seek information from the individual defendants concerning, among other things, their personal banking records, investment records, real estate deeds, credit cards, and life insurance policies, from 2003 through the present. As such, defendants did not respond thereto. As a result, defendants allege that plaintiff refused to conduct the depositions of defendants on the agreed-upon adjourn date as plaintiff had not received the requested discovery.

Regarding defendants' motion for summary judgment dismissing the action as alleged against the individual defendants, defendants argue that plaintiff has failed to satisfy the elements to pierce the corporate veil and hold the individual defendants responsible for the corporate liability. Defendants allege that this action involves a simple breach of contract between two corporations, and that plaintiff has not pled any allegations of fraud or other wrongdoing against the individual defendants which would warrant piercing the corporate veil. Defendants allege that the individual defendants did not enter into any contracts with plaintiff in their individual capacity, or personally guarantee any of the transactions of the corporations. In support thereof, defendants have submitted affidavits of all of the individual defendants who aver to the foregoing. Finally, defendants acknowledge that three checks given to plaintiff were returned for insufficient funds, but that those checks only totaled \$19,095.50. Therefore, defendants argue that plaintiff's claim of an account stated should be limited to that amount, which may be further reduced by a setoff relative to "cross referrals" for livery jobs.

In opposition to summary judgment, plaintiff has submitted an affirmation of counsel wherein counsel acknowledges that the checks given to plaintiff that were returned for insufficient funds were drawn from the account of METRO LIMO SERVICE, LLC, but alleges that it is unknown whether defendant JEANNE MANAS signed the checks in her corporate or individual capacity. Further, counsel alleges that without the depositions of the individual defendants, the corporate status of the four corporate defendants is unknown to plaintiff, as is whether the individual defendants are officers of any of the corporate defendants. In addition, counsel argues that the action must be continued against the individual defendants as plaintiff has pled the individual defendants' involvement in the business transactions that led to the instant litigation, and that the individual defendants exercised total dominion and control over each of the corporate entities to insulate themselves from liability while defrauding creditors.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview*

Equities, Inc., 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

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 NY 103 [1955]; *Seuter v Lieberman*, 229 AD2d 386 [1996]). 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 *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2009]). Piercing the corporate veil 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 commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (see *Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135 [1993]; *Gateway I Group v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2009]).

The Court finds that defendants have made an initial *prima facie* showing of entitlement to judgment as a matter of law with respect to the individual defendants (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). The individual defendants, by sworn affidavits, have established that they did not enter into any contracts with plaintiff in their individual capacity, or personally guarantee any of the transactions of the corporations. The burden then shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action with respect to the individual defendants (*Alvarez v Prospect Hosp.*, 68 NY2d 320, *supra*). The Court finds that plaintiff failed to meet its burden. The complaint does not set forth any allegations which, if true, would justify piercing the corporate veil and holding the individual defendants liable in their individual capacity (see *Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, *supra*; *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016 [2007]; *Matter of Goldman*

v Chapman, 44 AD3d 938 [2007]; *Levin v Isayeu*, 27 AD3d 425 [2006]; *cf. Fellarin v Moon Bay Dev. Corp.*, 29 AD3d 553 [2006]). As discussed, the complaint contains only two causes of action for breach of contract and an account stated, without any allegations that the individual defendants exercised complete domination of the corporate defendants and that such domination was used to commit a fraud or wrong against plaintiff.

Moreover, in opposition to defendants' motion, plaintiff has not submitted an affidavit of someone with personal knowledge, but rather has merely submitted an affirmation of counsel who speculates as to whether the individual defendants entered into the subject transactions in their individual capacity. However, counsel's affirmation, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to defeat a motion for summary judgment (see *S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]). Further, counsel has not submitted any written personal guarantees executed by the individual defendants, or any other evidence to raise an issue of fact as to the capacity of the individual defendants.

Furthermore, although plaintiff urges a denial of the motion, speculating as to what might be revealed during depositions of the defendants, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion (see *Arbizu v REM Transp.*, 20 AD3d 375 [2005]; *Kershis v City of New York*, 303 AD2d 643 [2003]; *Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537 [2002]).

Accordingly, the individual defendants' motion for summary judgment dismissing plaintiff's complaint as asserted against them is **GRANTED**. Although defendants also seek to disqualify Ms. Stuart as counsel for plaintiff, defendants failed to seek such relief in their notice of motion (see CPLR 2214 [a]), and therefore this request must be **DENIED**.

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought

to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (see *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (see *Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

The Court finds that defendants' failure to timely comply with plaintiff's discovery demands and to appear for depositions was not wilful, contumacious, or in bad faith. As such, it would be inappropriate to preclude or sanction the defendants at this juncture. However, defendants had not moved for a protective Order with respect to these discovery demands. The failure of defendants to move for a protective Order, pursuant to CPLR 3122, within twenty (20) days after service of the Notices for Discovery and Inspection forecloses all inquiry concerning the propriety of the demands, except as to demands seeking privileged matter under CPLR 3101, or demands that are palpably improper (see CPLR 3122, 3101; *Anonymous v High School for Env'tl. Studies*, 32 AD3d 353 [2006]; *Holness v. Chrysler Corp.*, 220 AD2d 721 [1995]; *Alaten Co. Inc. v Solil Management Corp.*, 181 AD2d 466 [1992]). A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues on the case (*Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887 [2000]; *Titleserv, Inc. v Zenobio*, 210 AD2d 314 [1994]). Although defendants contend that the documents and records sought by plaintiff are not relevant to the claims herein, this objection was proffered on behalf of the individual defendants only. As such, and given the fact that defendants failed to move for a protective Order with respect to these demands, the Court is constrained to compel responses to these demands from the corporate defendants.

In view of the foregoing, this motion by plaintiff is **GRANTED** solely to the extent that the corporate defendants shall provide plaintiff with responses

to plaintiff's Notices for Discovery and Inspection, dated October 20, 2008 and directed to the corporate defendants, within thirty (30) days of the date of service of the instant Order with notice of entry upon defendants. As the corporate defendants failed to timely respond to plaintiff's demands, the corporate defendant are precluded from objecting to producing all documents and things requested, except to the extent that they infringe on the attorney-client privilege or are palpably improper (see e.g. *Handy v Geffen Realty, Inc.*, 129 AD2d 556 [1987]).

In addition, the depositions of the corporate defendants shall be conducted within thirty (30) days of the date of service of the corporate defendants' responses to plaintiff's Notices for Discovery and Inspection. If the parties agree to a date for the depositions beyond the aforementioned thirty (30) day period, it must be set forth in a stipulation and submitted to the Court to be "So-Ordered."

The foregoing constitutes the decision and Order of the Court.

Dated: December 28, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court