

Matter of Christopher v Weisbrod Chinese Art, Ltd.
2009 NY Slip Op 33251(U)
November 19, 2009
Supreme Court, New York County
Docket Number: 601098/07
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. SHIRLEY W. KORNREICH

PRESENT: _____

PART 54

Justice

Index Number : 601098/2007
CHRISTOPHER, STEVE
VS.
WEISBROD CHINESE
SEQUENCE NUMBER : 003
STRIKE ANSWER

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

is decided in accordance with the annexed decision/ order.

FILED

NOV 30 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

11/19/09

JUSTICE SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 54

-----X

In the Matter of the Application of
STEVE CHRISTOPHER,

Plaintiff,

-against-

WEISBROD CHINESE ART, LTD,
and MICHAEL WEISBROD,

Defendants.

-----X

KORNREICH, SHIRLEY WERNER, J.:

DECISION & ORDER
Index No.: 601098/07

FILED
NOV 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

This action arises from a consignment agreement for 44 Chinese antiquities. Gerald Weisbrod, defendant Michael Weisbrod's father, allegedly is WCALTD's president and sole shareholder. Michael Weisbrod allegedly is a consultant and the manager of WCALTD. Plaintiff, Steve Christopher, sues defendants for breach of contract, unjust enrichment, wrongful detention and conversion. Defendants counterclaim for breach of contract, fraud, and conversion.

Christopher, now, moves for summary judgment. In the alternative, he asks for an order striking defendants' answer and counterclaims for failure to respond to plaintiff's September 17, 2007 Bill of Particulars and discovery requests. Defendants oppose, move for summary judgment on the conversion claim and to dismiss Michael Weisbrod as a defendant and ask for 60 days to comply with plaintiff's discovery requests.

I. Plaintiff's Motion

It is undisputed that, from January 28, 2003 through February 10, 2005, Christopher

consigned 44 Chinese antiques for sale.¹ After the consignment agreements expired, Christopher alleges he contacted Michael Weisbrod and demanded that WCALTD return the antiques or pay for any which it had sold. The items were not returned nor, he alleges, was payment received for them. On April 4, 2007, Christopher filed this action. The parties agree that on January 3, 2008, 30 of the antiquities were returned at a meeting between Christopher and Michael Weisbrod at Michael Weisbrod's apartment.

A. January 2008 Checklist

Christopher, through his attorney, has submitted a copy of a document listing 44 numbered items (Checklist). Thirty of the items have a dark checkmark next to the number on the left. Defense counsel, by affirmation, avers that he was present at the January 2008 meeting and that the checkmarks to the left of the numbers indicate the 30 items returned on that date. The top of the document originally read, "Consignments from Steve Christopher To Michael Weisbrod," but according to counsel, at Michael Weisbrod's insistence, his name was crossed out and replaced with "Weisbrod Chinese Art Ltd." The bottom of the document reads, "This is the original and a copy of this exact worksheet was colorcopied for Weisbrod Chinese Art LTD. All items above with a check next to their number were returned to Steve Christopher on 1/3/08 at Mr. Weisbrod's apartment. The remaining items without a check mark have not been returned." The 14 items remaining have some other handwritten marking next to them, on the right -- either 6 checkmark (items 16, 22, 29, 39, 40, 41), 2 "Christopher has" (items 2, 31), 4 "sold" (items 21, 23, 34, 38), or 2 "to be determined"(items 32, 36). This writing, according to counsel, was added

¹ Christopher has submitted copies of consignment agreements between the parties, on Weisbrod Chinese Art letterhead, dated from January 28, 2003 to April 27, 2004.

later by defendants. The document is signed by Christopher and by Michael Weisbrod. Under Mr. Weisbrod's signature line is written "Weisbrod Chinese Art, LTD." Again, counsel states this was done at Mr. Weisbrod's insistence.

B. Christopher Affidavit

Christopher avers that: he is the rightful owner of the 44 items listed on the Checklist; these items were wrongfully retained by defendants after consignment; they were listed on WCALTD's website for sale, as of September 5, 2007; the items, pursuant to consignment agreement, are valued at \$239,000; on January 3, 2008, plaintiff, accompanied by his attorney, went to Michael Weisbrod's apartment; 30 of the items were returned; Michael Weisbrod told plaintiff that he had closed his gallery, that he had sold some of the 44 items and that he had to find the remainder of the items; 14 items were still not returned; and those missing items are valued at \$66,700.

C. Plaintiff's Additional Submissions

Plaintiff has submitted, among other things: the consignment contracts, written on Weisbrod Chinese Art Ltd. invoices but signed by Michael Weisbrod individually; a March 28, 2006 letter written by Christopher to Michael Weisbrod at the WCALTD address, demanding return of the items; and Weisbrod web pages advertising the items.

II. Defendants' Submissions in Opposition and Cross-Motion

A. Michael Weisbrod's Affidavit

Michael Weisbrod has submitted an affidavit, claiming that he was a consultant for WCALTD and assisted in managing its showroom. He argues that he is not personally liable since the consignment agreements were with WCALTD, not him, and that he signed the

agreements only in his capacity as manager of WCALTD.

Moreover, Michael Weisbrod opposes summary judgment in favor of Christopher, stating: items 40 and 41 are ready to be returned; item 22 is at Sotheby's in London and can be retrieved by Christopher; items 2, 16, 31, 32 and 36 were returned to Christopher in March 2006 in the presence of a police detective (WCALTD has provided a copy of what it says is an employee's notepad, dated March 7th, recording a call from a Detective Carney who wants to speak to Weisbrod "about an investigation"); and items 29 and 34 were sold and the money paid to Christopher.

Furthermore, he avers that WCALTD owns a Purple Splashed Junyao Dish (Splashed Dish), which had been advertised at auction at Christies on March 22, 1999, but did not sell. WCALTD has provided a copy of a catalog page from Christie's showing an 8 inch, "PURPLE-SPLASHED JUNYAO SAUCER DISH" for sale for \$20,000-\$30,000 and a copy of what it claims is a fax from Christie's demonstrating the return of a "purple-splashed junyao saucer dish" to the gallery, with a release date of April 13, 1999. The invoice is addressed to Weisbrod Antiques Ltd. Mr. Weisbrod alleges that, after its return, he kept the dish in his office at WCALTD and it disappeared "one day" after Christopher visited. According to Michael Weisbrod, "several months later," Christopher came to WCALTD and offered to sell the Splashed Dish. He avers that he has demanded the return of the Splashed Dish, but Christopher has refused to return it. He annexes an April 17, 2007 invoice to Christopher from WCALTD, for \$129,500. The Splashed Dish is valued at \$100,000 and 4 other items are listed as purchased from Christopher but "not genuine." The invoice states these items, which are the basis for WCALTD's first, second and third counterclaims, are to be "Return[ed]." In their June 2007

verified answer, defendants assert that the 4 items were accompanied by purchase orders (dated February 28, 2003, April 8, 2005, March 21, 2003 and April 19, 2005) warranting their authenticity and that WCALTD is entitled to their purchase price of \$29,500. They also ask for costs totaling \$47,650. The Splashed Dish is the subject of WCALTD's fifth and sixth counterclaims asking for monetary and injunctive relief. The fourth counterclaim asks for \$10,750 in storage costs for the items not returned after consignment.

Finally, Michael Weisbrod states that items 21, 23, 38 and 39 have been sold; item 21 sold for \$8,000, and item 38 sold for \$10,000 to Beach Lane Estate Corp. He explains that Christopher has not been paid for these items since Christopher owes WCALTD money.

B. Gerald Weisbrod's Affidavit

Gerald Weisbrod, who signed his affidavit in Canada, avers that he is the president of WCALTD and its sole shareholder. He states that he has read Michael Weisbrod's affidavit and attests to its truth. Additionally, he contends that: the consignment invoices were generated by WCALTD; Michael Weisbrod was a consultant to WCALTD, assisted in managing its business and signed the consignments on its behalf; and 2 items are ready to be retrieved, 6 items were returned, "many" items were sold, and WCALTD has monetary claims against Christopher surpassing his claims for the consigned goods.

C. Opposition to Cross-Motion

Christopher contends that defendants' claim regarding the Splashed Dish is a misrepresentation, not supported by any documentation proving his ownership and, in fact, is owned by another. Christopher avers that: he provided the dish to defendants on a two month consignment and it was returned upon request; the dish was owned by John Ellinas, who

purchased the dish from Chick La Ganke for \$4,500 on November 3, 2001; Mr. Ellinas consigned the dish to Christopher for \$12,000 on March 22, 2005; the dish was returned to Mr. Ellinas on September 13, 2005; and approximately six months later, Mr. Weisbrod contacted Christopher and sought to purchase the dish. In support of his contentions, Christopher annexes an affidavit from Mr. Ellinas, an handwritten receipt from Mr. La Ganke for a Shun Yao Chinese plate for \$4,500, and a March 22, 2005 consignment agreement between Christopher and Mr. Ellinas for a Junyao, 8 inch splashed dish, among other things. Mr. Ellinas confirms Christopher's contentions and further states that he has never been contacted by Mr. Weisbrod or WCALTD.

In addition, Christopher addresses defendants' claim regarding the sale of four inauthentic items. Christopher describes the customary business dealings of the litigants, whereby the parties' agreed defendant could test any item for authenticity, and if found to be inauthentic, the item would be returned upon presentation of a Thermo Luminescence Analysis report, at no charge to defendants. He annexes an example of such a report.

In regard to defendants' remaining assertions, Christopher avers that: he had never seen the April 17, 2007 invoice until he received defendants' motion papers; defendants never returned items 2, 16, 31, 32 and 36 to him; and he was never paid for items 29 through 34.

Finally, Christopher argues that Michael Weisbrod should be held liable here since he has complete dominion and control of WCALTD and has used it to shield himself and defraud Christopher. He annexes a copy of a web page from the New York State Department of State, Division of Corporations website, indicating that WCALTD is currently inactive. He also annexes a second web page from the Division of Corporations indicating that there exists an

active entity called Weisbrod Oriental Art, Inc. He further alleges that Beach Lane Estate Corp., the entity named as the buyer of item 38 in defendants' invoice is a corporation owned by Michael Weisbrod

D. Defendants' Reply

Michael Weisbrod contends that he has "not used" Weisbrod Oriental Art, Inc. for many years" and denies that he is or has ever been a shareholder of Beach Lane Estate Corp. He annexes his WCALTD business card describing him as a "Consultant-Appraiser." Further, he argues that WCALTD is the rightful owner of the Splashed Dish as evidenced by the April 1999 Christie's invoice and that the La Ganke sales receipt refers to a different dish and insufficient to prove Ellinas' ownership.

F. June 9, 2009 Hearing

At oral argument, it was admitted that item 22, which had been at Sotheby's in London, had been sold and the consignment amount of \$4,000 was ordered paid to Christopher. The consignment payments for items 21 and 23 were ordered turned over to Christopher. The parties could not agree on the consignment amounts due to Christopher from items 38 and 39, and the parties were to search for the relevant consignment agreements and either turn over the money due Christopher or the amount to be turned over would be decided at trial. Items 40 and 41 were to be returned to Christopher.

II. Conclusions of Law

A. Summary Judgment

Summary judgment is appropriate only when no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 325 (1986). The moving party has the burden of making a *prima*

facie showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If the moving party makes a *prima facie* showing, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. *Alvarez, supra* at 324; *Zuckerman, supra* at 562. The court examines the papers submitted in a light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope may not defeat a summary judgment motion. *Zuckerman, supra* at 562. The court must deny the motion if it has any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

On this record, issues of fact exist as to whether items 2, 16, 31, 32 and 36 were returned to Christopher, whether items 29 and 34 were paid for and what the consignment price for items 38 and 39 were. Consequently, plaintiff's motion for summary judgment is denied.

Similarly, issues of fact exist as to the ownership of the Splashed Dish. Defendants' motion for summary judgment on their fifth cause of action, therefore, is denied.

B. Motion to Dismiss Michael Weisbrod

As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and, consequently, will not impose liability upon shareholders for the acts of the corporation.... on occasion, the courts will disregard the separate legal personality of the corporation and assign liability to its owners where necessary "to prevent fraud or to achieve equity."

Billy v Consolidated Machine Tool Corp., 51 NY2d 152, 163 (1980). To pierce the corporate

veil, a party has the heavy burden of showing complete domination of the corporation as to the transaction attacked and that such domination was used to commit fraud or other wrong, injuring the party and abusing the right to do business under corporate form. *TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998). "The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed." *Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 (1993). Moreover, it is not a separate cause of action but rather "an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." *Id.* Veil-piercing is fact specific and some of the factors to be considered are: disregard of corporate formalities, undercapitalization, intermingling of funds, overlap of ownership and personnel, common office space and the degree of discretion demonstrated by the dominated corporation. *Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 2009 NY Slip Op 8165, 1 (1st Dept. Nov 12, 2009). Typically, however, the remedy of veil piercing is wielded against the corporation's owner. The question of whether a non-shareholder can be held liable under the theory is an open question. *Morris, supra* at 142.

Here, Gerald Weisbrod and Michael Weisbrod have averred that Gerald is WCALTD's sole shareholder and that Michael was its manager and consultant. Given defendants' recalcitrance in responding to discovery demands, plaintiff has little to refute these allegations. What he does allege are facts demonstrating: that WCALTD was undercapitalized; that WCALTD's gallery has closed; that WCALTD is an inactive corporation; that he dealt with Michael Weisbrod who made all of the decisions for the corporation; that Michael signed all necessary contracts, sometimes without signifying that he was doing so as a manager or consultant; that he received from Michael payments and the return of some of the items at issue,

which were stored in Michael's apartment; and that there was an intermingling of funds between Michael and WCALTD. Although not dispositive, at the very least, these facts raise a question of corporate dominance of WCALTD, unjust enrichment and conversion on the part of Michael Weisbrod. Michael Weisbrod's motion for summary judgment, therefore, is denied.

Accordingly, it is

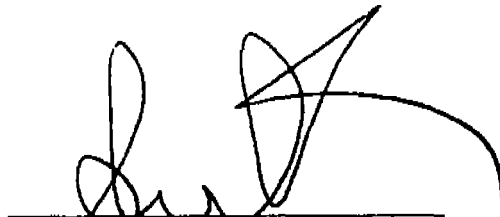
ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that WCALTD's motion for summary judgment on their fifth cause of action is denied; and it is further

ORDERED that the parties are to appear in Part 54 for a status conference at 10:30 in the forenoon on December 3, 2009.

Dated: November 19, 2009

ENTER:



J.S.C.

FILED
NOV 30 2009
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