

**Commissioners of the State Ins. Fund. v Isis
Staffing Solutions, Inc.**

2010 NY Slip Op 30976(U)

April 16, 2010

Supreme Court, New York County

Docket Number: 401568/09

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C.

PART 57

Index Number : 401568/2009
STATE INSURANCE FUND
vs.
ISIS STAFFING SOLUTIONS. INC.
SEQUENCE NUMBER : 002
DEFAULT JUDGMENT

INDEX NO. 401568/09

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Refrain
this motion is for turnover Proceeding

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

23
4, 4a, 5

Memos of Law M1, M2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this *motion* is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1419).

Dated: 4-16-10

M S F
MARCY S. FRIEDMAN, 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
THE COMMISSIONERS OF THE STATE
INSURANCE FUND,

Index No.:401568/09

Petitioner,

- against -

DECISION/ORDER

ISIS STAFFING SOLUTIONS, INC., CYNTHIA
CRUICKSHANK and KENRICK CORT,

Respondents,

- and -

UNIQUE SUPPORT STAFFING, INC. and
UNIQUE SUPPORT SERVICES, INC.,

Judgment Debtors.

_____ x

In this turnover proceeding, petitioner, The Commissioners of the State Insurance Fund (“SIF”), seeks to collect a judgment recovered in a separate action against Unique Support Staffing, Inc. (“Unique 2”) for unpaid workers’ compensation premiums. The judgment, entered on January 8, 2009, in Commissioners of the State Ins. Fund v Cynthia Cruickshank, (Sup Ct, New York County, Index No. 403747/05) (“second action”) is in the amount of \$184,308.81 with interest from May 23, 2005, plus costs, totaling \$264,253.78.¹ Petitioner contends that

¹The second action was commenced to recover an unpaid judgment entered on May 23, 2005 in a prior action entitled Commissioners of the State Ins. Fund v Unique Support Services, Inc. [Unique 1], (Sup Ct, New York County, Index No. 403709/03) (“first action”). The judgment in the first action was in the amount of \$107,936.44 with interest from July 23, 1997, totaling \$184,308.81.

respondents Isis Staffing Solutions, Inc. (“Isis”), Cynthia Cruickshank, and Kenrick Cort are liable for payment of the judgment on the following grounds, which are similar to those alleged as the basis for Unique 2’s liability in the second action: that there was a de facto merger between Unique 2 and Isis; that respondents are alter egos of Unique 2; that respondents made fraudulent conveyances to Isis in violation of Debtor and Creditor Law (“DCL”) § 273-a; that respondents made transfers with the intent to hinder petitioner’s attempts to collect the monies owed on the judgment in the second action, in violation of DCL § 276; and that petitioner is entitled to attorney’s fees under DCL § 276-a. By separate motion in this proceeding, petitioner seeks appointment of a pre-judgment receiver, pursuant to CPLR 6401, to collect the accounts receivable of Unique 2 from the Port Authority of New York and New Jersey (“Port Authority”) stemming from a contract Unique 2 had with the General Services Administration (“GSA”).² By separate petition, entitled Isis Staffing Solutions, Inc. v The Commissioners of the State Insurance Fund and Unique Support Staffing, Inc., (Sup Ct, New York County, Index No. 112658/09) (“Isis Petition”), brought pursuant to CPLR 5239, Isis seeks to void a levy placed on monies owed by the Port Authority to Unique 2. This petition also seeks an order transferring the Port Authority funds to Isis to satisfy a debt that Isis claims it is owed from Unique 2 arising out of a separate contract between the parties. The petitions of SIF and Isis are consolidated for purposes of disposition.

CPLR 5225(b) authorizes a judgment creditor to commence a special proceeding “against a person in possession or custody of money or other personal property in which the judgment

²The papers on the motion to appoint a receiver (Pet. Motion) contain more factual detail than the papers on the petition and will be considered by the court in determining the petition.

debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee." A turnover proceeding may be used not only to litigate Debtor and Creditor Law claims, but also to hold the transferee liable for the judgment as an alter ego. (See Matter of WBP Central Assocs., LLC v DeCola, 50 AD3d 693 [2d Dept 2008].)

De Facto Merger

Petitioner's first cause of action against Isis alleges there was a de facto merger between Isis and Unique 2. A corporation may be held liable for the pre-existing liabilities of a predecessor or acquired corporation where there has been a de facto merger. As the Appellate Division has explained:

"The hallmarks of a de facto merger include: continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, continuity of the management, personnel, physical location, assets and general business operation."

(Fitzgerald v Fahnestock & Co., 286 AD2d 573, 574 [1st Dept 2001]; Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp., 22 AD3d 750, 752 [2d Dept 2005] [corporation held liable for debts of predecessor corporation where it "was a mere continuation" of predecessor].)

This court found a de facto merger between Unique 1 and Unique 2 in its December 24, 2008 decision in the second action. Similarly here, petitioner makes a prima facie showing of a de facto merger between Unique 2 and Isis. In support of its petition, SIF submits evidence demonstrating that Unique 2 ceased to maintain a separate office and that Unique 2 and Isis had

the same address and telephone number. (See “Current Registration Status” printout for Unique 2 [Pet., Ex. 6]; Unique 2’s contact information from its website [*id.*, Ex. 10]; a New York State Department of State document showing registration information for Isis [*id.*, Ex. 9]; and Isis’s webpage providing its contact information [*id.*, Ex. 7].) Petitioner also shows that both Unique 2 and Isis operated the same business: The mission statements on the websites for both Unique 2 and Isis are identical, as is the description of the company as a full service temporary staffing service “providing long and short term staffing support.” (Pet., Exs. 10-11.)³

Petitioner also produces evidence from Cynthia Cruickshank, Unique 2’s sole shareholder and officer (Cruickshank’s Answer to Pet., ¶ 2), which makes a compelling showing that Unique 2 ceased operations and transferred its business to Isis. In a letter, dated July 12, 2006, from Ms. Cruickshank to Horizon Healthcare, she advised it that Unique 2 would be changing its name to Isis Staffing Solutions, Inc. as of July 1, 2006. (*Id.*, Ex. 8.)⁴ In an April 1, 2009 affidavit, submitted in opposition to the second action, Ms. Cruickshank stated that “[o]n a day-to-day basis, the operations of Unique [2] have been previously transferred to Isis.” (See Cruickshank Aff., ¶ 14 [annexed to Pet.].) She further admitted this fact in paragraph two of her Answer to the Petition. Ms. Cruickshank also testified at the trial in the second action that Unique 2 did not have a location, office, or staff (May 20, 2009 Tr. [“Tr.”], at 66), and she confirmed, without qualification, that Isis is in fact Unique 2. (*Id.* at 60.)

In addition, petitioner submits an insurance Policy Change Endorsement by Tower

³The court also notes that both Unique 2 and Isis state on their website that they were established in 1984. However, Isis was only first incorporated on March 1, 2006.

⁴While the Unique 2 letterhead appears to be missing from this document, Isis does not dispute that the predecessor company to which Ms. Cruickshank refers is Unique 2.

Insurance Company of New York showing that, as of February 7, 2007, the named insured under the policy was changed from Unique 2 to Isis. (Pet., Ex. 13.) Petitioner also submits a letter, dated August 22, 2006, from Isis's attorney, David Friedberg, to the GSA regarding Isis's request to take over Unique 2's contract. This letter stated that Unique 2 was insolvent, that it had no other assets than its rights under the GSA contract, that Isis would be acquiring all of Unique 2's assets but not its debt, that Ms. Cruickshank was serving as an officer of Isis, and that Isis had hired two employees from Unique 2. (Pet., Ex. 14.)

Petitioner's evidence also conclusively demonstrates that Unique 2 sought to transfer its GSA contract to Isis. Francis Wilson, the contracting officer from the GSA assigned to the Unique 2 contract, states in an affidavit, submitted with SIF's petition, that the GSA received a request to novate the Unique 2 contract in favor of Isis. (Wilson Aff., dated Feb. 25, 2009, ¶ 6.) While respondents claim that the GSA contract was never actually transferred to Isis, Ms. Cruickshank testified to the contrary during the trial in the second action. Specifically, she stated that she "assigned" the GSA contract to Isis for no consideration. (Tr. at 29-30.) Whether or not the GSA formally approved the transfer, however, the evidence unquestionably shows that Unique 2 attempted to transfer its principal asset to Isis.

Petitioner also submits an ERM-14 form to Tower Insurance requesting that Unique 2's policy be transferred to Isis. (*Id.*, Ex. 12.) On page three of the form, Kenrick Cort is listed as the owner of both Unique 2 and Isis, and the form is endorsed by Mr. Cort on page four. While Isis contends that the information listing him as owner of both entities was not included at the time Mr. Cort signed the document, the court need not rely on this disputed document, as it finds that the overwhelming evidence submitted by petitioner, without the ERM-14 form, makes a

prima facie showing of a de facto merger.

In opposing SIF's petition, respondents claim that Isis and Unique 2 remained separate entities. However, they support their claim largely with self-generated documents that are lacking in probative value. Respondents thus rely on a March 26, 2007 agreement between Isis and Unique 2 which, by its terms, provides for Isis to finance the payroll of Unique 2 employees who render temporary staffing services to government agencies under Unique 2's GSA contract, and to report the wages paid, and for Unique 2 to reimburse Isis for its "expenditures." (Isis's Opp. to Pet. Motion, Ex. A.) In order to show the bona fides of this agreement, Isis submits invoices billing Unique 2 for the payroll services. These invoices are irregular on their face, as the amounts differ materially from the amounts in invoices for the same period which Isis produced to SIF in discovery and which SIF submits in reply.⁵ Moreover, Isis offers no proof that any of the invoices was ever paid. Isis's own "paid" stamp on one of the invoices is patently insufficient to raise a triable issue of fact in this regard. Unique 2's bank statements likewise fail to prove, or to raise a triable issue of fact as to whether, Unique 2 ever made payments to Isis on account of the parties' alleged payroll agreement. The bank statements show that Unique 2 continued to maintain a separate bank account in its name, and that there were substantial deposits into this account in the period from February 1, 2008 through January 31, 2009. (Cruickshank's Aff. in Opp. to Pet. Motion, Ex. E.) What these statements do not show is the source of the funds in the account or the payees. In particular, they do not show that Unique 2

⁵While new factual matter is ordinarily not properly considered on a reply (see Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1982]), the new evidence that petitioner submitted responded to Isis's argument in opposition to the petition that the invoices evidenced the existence of two separate companies. The new evidence is therefore properly entertained. (See Anderson v Beth Israel Med. Ctr., 31 AD3d 284 [1st Dept 2006].)

retained payments from the GSA contract or that Unique 2 made payments on account of that contract directly to Isis. The documentary evidence on which Isis relies is thus plainly insufficient to raise a triable issue of fact as to Unique 2's status as a separate entity.

The court notes that respondents dispute that Ms. Cruickshank is an owner or officer of Isis. Mr. Cort attests that he is the "sole officer and sole shareholder of respondent Isis." (Cort Aff. in Opp. to Pet. Motion, ¶ 1.) At the trial in the second action, Ms. Cruickshank similarly testified that Mr. Cort, a long-time "friend," was the owner of Isis. (Tr. at 32.) She also testified that, while she was at one point a Vice President of Isis and is now a "consultant" for Isis, she never owned any shares of that company. (Tr. at 32-33, 38.) Respondents thus clearly raise an issue as to whether there is complete identity of ownership between Isis and Unique 2.

Even crediting respondents' testimony that Mr. Cort is the sole owner of Isis while Ms. Cruickshank is the sole owner of Unique 2, respondents fail to raise a triable issue of fact as to whether there was a de facto merger between the two corporations.

It is well settled that not all of the hallmarks of a de facto merger must exist in order to find such a merger. Even legal dissolution of the predecessor corporation is not required "[s]o long as the acquired corporation is shorn of its assets and has become, in effect, a shell." (Fitzgerald, 286 AD2d at 575.) While Ms. Cruickshank may not have a formal ownership interest in Isis, respondents do not make any showing that Unique 2 continues to maintain an office, or to employ personnel, or that it functions in any respect as a going concern. Notably, respondents wholly fail to address the substantial evidence that Unique 2 ceased to do business and that Ms. Cruickshank transferred Unique 2's business to Isis, continuing in the business as a "consultant." Respondents also do not dispute that Ms. Cruickshank has shorn Unique 2 of its

principal asset, the GSA contract, by making the purported payroll agreement under which Isis would receive the proceeds of the GSA contract.

In its determination of the second action, the court found a de facto merger between Unique 1 and Unique 2, corporations controlled by Ms. Cruickshank, based on her acts in ceasing to do business as Unique 1 and transferring Unique 1's principal asset, the GSA contract, to Unique 2. Here, again, in the face of the 2005 judgment against Unique 1 and the 2005 (second) action against Unique 2, Ms. Cruickshank ignored corporate formalities, ceased to do business under Unique 2, and continued to do business under Unique 2's GSA contract through Isis. The court accordingly holds that Isis is liable for the judgment against Unique 2.

Alter Ego

The second cause of action seeks to pierce the corporate veil of Unique 2 in order to impose liability against Cruickshank and Cort under an alter ego theory. It is well settled that courts will only pierce the corporate veil when necessary to prevent fraud or achieve equity. (See Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 140 [1993] quoting Walkovszky v Carlton, 18 NY2d 414.) A party seeking to pierce the corporate veil must show 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." (Matter of Morris, 82 NY2d at 141.) In Holme v Global Minerals and Metals Corp. (63 AD3d 417, 418 [1st Dept 2009]), a recent case involving similar allegations, the plaintiff claimed that the shareholders of the judgment debtor caused it to cease doing business, stripping it of assets and leaving it a moribund shell to avoid payment to plaintiff, and that they continued to operate the business through other corporate entity

defendants that the shareholders also dominated. This Department held that these “allegations of continuity, domination and fraudulent transfers, which are particularized with considerable detail” were sufficient to support causes of action seeking not only to impose liability on the successor corporation for de facto merger, but also to impose liability on the individual shareholders under an alter ego theory. (*Id.* at 418; Godwin Realty Assocs. v CATV Enters., Inc., 275 AD2d 269 [1st Dept 2000].)

Applying this standard here, the court holds that respondent Cort is not liable to SIF under an alter ego theory. There is no evidence in the record to show that Mr. Cort was an officer or shareholder of Unique 2, or that he dominated Unique 2. While his corporation benefitted from the transfer of Unique 2’s business to it, there is no evidence that Mr. Cort, as opposed to Ms. Cruickshank, effectuated the transfer. In contrast, the court holds, based on the evidence summarized above on SIF’s de facto merger claim, that Ms. Cruickshank exercised complete domination of Unique 2, and exercised that domination to commit a fraud or wrong against SIF by transferring Unique 2’s business to another corporate entity, Isis, in the face of SIF’s efforts to collect the judgment against Unique 2. Ms. Cruickshank is accordingly liable for the judgment against Unique 2 as its alter ego.

In so holding, the court finds that Ms. Cruickshank fails to raise a triable issue of fact on her apparent defense that she had a legitimate reason for entering into the contract with Isis. She alleges that she entered into the 2007 agreement with Isis because she “could not get the proper disability and other insurances to perform the contract with GSA.” (Cruickshank Aff. in Opp. to Pet.’s Motion, ¶18.) Even if this allegation is accepted as true, it does not explain why Ms. Cruickshank applied to transfer the GSA contract to Isis. Nor does it address Ms. Cruickshank’s

repeated admissions in the record that Unique 2 had ceased to do business and was the same entity as Isis. (See supra at 4.)

The court also rejects respondent's claim that the decision of Justice Lehner collaterally estops SIF from asserting an alter ego claim against Ms. Cruickshank. This court's December 24, 2008 decision in the second action held that Unique 2 was liable for the judgment against Unique 1 under the de facto merger doctrine, but found triable issues of fact as to whether Ms. Cruickshank so dominated Unique 1 and Unique 2 as to entitle plaintiff to judgment against Ms. Cruickshank individually. Trial of the alter ego claim was held before Justice Lehner, who held, in a decision on the record on May 20, 2009, that Ms. Cruickshank was not liable as an alter ego. This decision appears to rely on the finding that Ms. Cruickshank did not personally benefit as an individual from the transfer. (Tr. at 77-80.)

Assuming arguendo that personal benefit to the shareholder is an element of recovery against the shareholder under an alter ego theory (but see Holme v Global Minerals and Metals Corp., 63 AD3d 417, supra), that requirement is satisfied here, as Ms. Cruickshank herself testified that she is receiving payment from Isis of \$100,000 per year for her "consulting" work on the GSA contract. (Tr at 33.) In addition, the facts have changed since the trial of the second action. The evidence now shows that Ms. Cruickshank has engaged in a pattern of transferring the assets of the Unique entities she controlled -- first from Unique 1 to Unique 2, then from Unique 2 to Isis -- thereby rendering Unique 2 incapable of satisfying its obligations under the judgment against it.

Finally, in light of the above holdings on the de facto merger and alter ego claims, the court does not reach SIF's remaining claims under the Debtor and Creditor Law. These claims

will be severed.

Pre-judgment Receiver

As this court has decided above that a judgment should be granted in favor of petitioner SIF and against respondent Isis, the court will deny petitioner's motion for appointment of a pre-judgment receiver for Isis. CPLR 6401(c) provides that "[a] temporary receivership shall not continue after final judgment unless otherwise directed by the court." Petitioner does not dispute that Isis, by letter dated July 29, 2009, terminated its contract with Unique 2 as of August 28, 2009. (Isis's Pet., Ex. D.) Petitioner does not allege the existence of any other contract between Isis and Unique 2 that would necessitate a receiver for Isis after this judgment is entered. Nor, on this record, is there any showing that the GSA has yet approved the novation of Unique 2's contract with the GSA to Isis. Ms. Cruickshank also represents that the Port Authority is the only agency using the staffing services under the GSA contract. It is undisputed that payments due from the Port Authority are the subject of an outstanding levy. Under these circumstances, the court declines to appoint a post-judgment receiver for Isis, but will direct Isis and Ms. Cruickshank to notify SIF promptly in the event the GSA formally approves transfer of the Unique 2 contract to Isis, in which event petitioner may renew its request for a receiver.

Isis's Petition

Isis brings a petition against SIF and Unique 2, pursuant to CPLR 5239, for an order voiding a levy served by City Marshal Ocasio on the Port Authority, and transferring the monies owed by the Port Authority under the GSA contract from Unique 2 to Isis.

In support of its petition, Isis relies on its March 26, 2007 agreement with Unique 2 and the invoices it sent to Unique 2 for services allegedly provided under that contract. (Isis's Pet.,

Ex. B.) Isis also submits a UCC Financing Statement, dated January 26, 2009, and filed with the New York State Department of State, which lists as collateral all accounts receivable of Unique 2. (Id., Ex. C.) Isis argues that it is therefore a secured creditor of Unique 2 and entitled to the funds being held by the Port Authority.

Isis's petition must be denied based on the court's holding, in determining SIF's petition, that there was a de facto merger between Isis and Unique 2, and that the contract and invoices are self-generated documents lacking in probative value.

In the alternative, and apart from the finding of de facto merger, the court holds that Isis fails to show that it has an enforceable security interest in the withheld funds. UCC 9-203(b) provides, in pertinent part, that a security interest is enforceable against the debtor and third parties with respect to collateral only if value has been given, the debtor has rights in the collateral, and the debtor has authenticated a security agreement that provides a description of the collateral. (See generally Fundex Capital Corp. v Reichard, 172 AD2d 420 [1st Dept 1991], appeal dismissed 78 NY2d 1007.) Isis does not submit any document authenticated by Unique 2 or any document that describes the proceeds from the Port Authority contract as collateral. Nor does the March 26, 2007 agreement between Isis and Unique 2 give Isis a security interest in these proceeds or describe them as collateral. The UCC Financing Statement is the sole document that Isis submits to show that it has a security interest and is insufficient, without more, to establish such an interest.

In contrast, the evidence submitted by SIF shows that SIF is a secured creditor with priority over any claim by Isis to the payments from the Port Authority. The judgment in favor of SIF was entered on January 8, 2009, and it was executed on or about August 6, 2009. (SIF's

Answer to Isis's Pet., Exs. 1, 3.)

It is well settled that a judgment creditor who properly levies on funds owing to the judgment debtor before another party perfects its security interest has a superior right to those funds. (See Citibank, N.A. v Prime Motor Inns Ltd. Partnership, 98 NY2d 743, 744-745 [2002]; Berkowitz v Chavo Intern., Inc., 144 AD2d 263 [1st Dept 1988], appeal dismissed 73 NY2d 974 [1989].) Here, as there is no showing that Isis has a perfected security interest, its petition will be denied.

It is accordingly hereby ORDERED and ADJUDGED that the petition of The Commissioners of the State Insurance Fund is granted to the extent of awarding judgment in favor of petitioner and against respondents Isis Staffing Solutions, Inc. and Cynthia Cruickshank, jointly and severally, in the amount of \$264,253.78 with interest from January 8, 2009, together with costs and disbursements as taxed by the Clerk; and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the motion of petitioner, The Commissioners of the State Insurance Fund, to appoint a pre-judgment receiver for respondent Isis Staffing Solutions, Inc. is denied. Provided that: Respondents Isis Staffing Solutions, Inc. and Cynthia Cruickshank shall promptly notify petitioner in the event that the General Services Administration ("GSA") approves a novation to Isis Staffing Solutions, Inc. of the contract between the GSA and Unique Support Staffing, Inc. This denial is without prejudice to petitioner's renewal of a motion for appointment of a receiver in the event such novation is approved; and it is further

ORDERED and ADJUDGED that the petition of Isis Staffing Solutions, Inc. in Isis Staffing Solutions, Inc. v The Commissioners of the State Insurance Fund and Unique Support

Staffing, Inc., (Sup Ct, New York County, Index No. 112658/09) is denied; and it is further

ORDERED that the remaining claims in SIF's proceeding are severed and shall continue;
and it is further

ORDERED that the parties shall appear for a status conference regarding the remaining
claims in SIF's proceeding, in Part 57 of this Court on May 20, 2010 at 11:00 a.m.

This constitutes the decision, order, and judgment of the court.

Dated: New York, New York
April 16, 2010


MARCY FRIEDMAN, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).