

**Bencivenni v Vesuviano Inc.**

2010 NY Slip Op 31170(U)

May 3, 2010

Sup Ct, Nassau County

Docket Number: 019076-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**SAVERIO BENCIVENNI,**

**Plaintiff,**

**-against-**

**VESUVIANO INC. and ANTONIO AMBROSIO,**

**Defendants.**  
-----x

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Index No: 019076-09  
Motion Seq. No: 1  
Submission Date: 3/18/10**

**The following papers have been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affidavit in Support.....X**
- Affirmation in Opposition and Exhibit.....X**
- Reply Affirmation in Further Support.....X**

This matter is before the Court for decision on the motion filed by Defendant Antonio Ambrosio (“Ambrosio” or “Defendant”) on January 14, 2010 and submitted on March 18, 2010. For the reasons set forth below, the Court 1) grants Defendant’s motion to the extent that the court dismisses the first and causes of action in the Verified Complaint (“Complaint”); and 2) reserves decision on Defendant’s motion to dismiss the third and fourth causes of action, pending a further submission by Plaintiff Saverio Bencivenni (“Plaintiff”) in support of his contention that Plaintiff is the proper plaintiff in this action, given that all applicable agreements were executed by Delicious Pizzeria, Inc., of which Plaintiff was president at all relevant times.

**BACKGROUND**

**A. Relief Sought**

Ambrosio moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the

## Complaint.

Plaintiff opposes Ambrosio's motion.

### B. The Parties' History

The Complaint (Ex. A to Plaintiff's motion) alleges as follows:

Plaintiff is a resident of Glen Cove, New York and the President of Delicious Pizzeria, Inc. ("Business"). The Complaint does not contain information regarding the place of incorporation of the Business. Ambrosio is the principal shareholder and chief officer of the Defendant Corporation Vesuviano Inc. ("Vesuviano") located in Glen Cove, New York. In June of 2004, Ambrosio and Vesuviano (collectively "Defendants") entered into a contract ("Contract of Sale") to purchase the Business, also located in Glen Cove, New York. In connection with that sale ("Sale"), the Defendants entered into agreements ("Loan") to borrow \$400,000 at 6% interest towards the purchase price of the Business, and to pay monthly installments of \$4,440.82 for ten (10) years. Pursuant to the parties' agreements, Plaintiff was secured by certain collateral ("Collateral") relating to the Business, including furniture and equipment, and filed a Uniform Commercial Code ("UCC") financing statement ("Financing Statement") reflecting that security interest. Defendants were required to return the Collateral to Plaintiff in the event that they defaulted on the Loan.

Plaintiff alleges that Defendants defaulted on the Loan. Defendants returned the Business, including the keys and possession of the property, to the landlord, Goldberg Brothers Realtors Inc. ("Landlord"), instead of to Plaintiff. By so doing, Defendants "gave away" (Complaint at ¶ 24) Plaintiff's security interest in the Business to Landlord, who was not the secured party.

The Complaint contains four (4) causes of action. In the first, sounding in breach of contract, Plaintiff alleges that Ambrosio breached the terms of the Loan by 1) failing to make the required monthly payments; 2) failing to honor the Financing Statement by surrendering the Business to the Landlord instead of to Saviero; and 3) failing to keep the Business in good repair. In the second, Plaintiff alleges that Ambrosio committed fraud by agreeing to return the security interest in the Business to Plaintiff even though he did not intend to repay the Loan or return the Collateral to Plaintiff. In the third and fourth causes of action, Plaintiff makes identical allegations against Vesuviano. Plaintiff seeks judgment in the sum of \$400,000.

In his Affidavit in Support dated December 23, 2998, Ambrosio affirms as follows:

He is the President of Vesuviano, and signed all relevant agreements, including the Assignment and Assumption of Lease and Promissory Note (“Note”) in that capacity. Therefore, Ambrosio is not a debtor to Plaintiff and the claims against him individually must be dismissed.

The relevant agreements include 1) the Assignment and Assumption of Lease and Bill of Sale (Ex. C to D’s Motion), 2) the Promissory Note (Ex. D to D’s motion) and 3) the Security Agreement (Ex. E to D’s Motion). All these agreements are between the Business and Vesuviano.

Plaintiff does not provide an Affidavit in Opposition or other evidence disputing Ambrosio’s affirmation that he signed all relevant agreements and documents regarding the sale in his capacity as President of Vesuviano.

### C. The Parties’ Positions

Ambrosio submits that the Court should grant his motion to dismiss the Complaint on the grounds that 1) the Business is not a duly formed corporation or business entity organized under the law of the State of New York, and therefore is not an entity entitled to relief under the Complaint; 2) Plaintiff, acting in his individual capacity, lacks standing to pursue the claims set forth in the Complaint because the underlying dispute is between the Business and Vesuviano; 3) Plaintiff’s claim for breach of contract is not viable because there is no contract between Ambrosio and Plaintiff; 4) the allegations for fraud are insufficient, both because they lack the required particularity, and because they merely allege a breach of contract that cannot form the basis for a fraud action; and 5) Plaintiff is not the holder of the Note and, therefore, lacks standing to pursue claims based on that instrument.

In his Affirmation in Opposition, counsel for Plaintiff affirms that Plaintiff is the proper plaintiff in this action because the Business was dissolved in July 2004 (“Dissolution”) and, pursuant to Business Corporations Law § 1006(b), that Dissolution does not affect the right of the directors, officers or shareholders to pursue remedies available to the Business prior to the dissolution. Plaintiff, a New York resident, is thus the successor of the Business’ claims and may pursue this action.

In his Reply Affirmation, counsel for Ambrosio disputes Plaintiff’s assertion that

Plaintiff is the successor to the Business' claims. Rather, Ambrosio submits, any claims related to the parties' agreements remain with the parties that entered into those agreements. Moreover, Plaintiff has produced no documentation demonstrating that Ambrosio is personally liable under the Note. Finally, Ambrosio contends that Plaintiff's New York residency is irrelevant to the breach of contract claim.

### RULING OF THE COURT

#### A. Dismissal Standards

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. Personal Liability for Corporate Obligations

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 884 N.Y.S.2d 94, 98 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 884 N.Y.S.2d at 98, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate

form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton*, 884 N.Y.S.2d at 98, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has “abused the privilege of doing business in the corporate form,” the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton*, 884 N.Y.S.2d at 99, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

### C. Actions by Dissolved Corporations

Business Corporations Law § 1006, titled “Corporate action and survival of remedies after dissolution,” provides as follows:

(a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing:

(1) The directors of a dissolved corporation shall not be deemed to be trustees of its assets; title to such assets shall not vest in them, but shall remain in the corporation until transferred by it in its corporate name.

(2) Dissolution shall not change quorum or voting requirements for the board or shareholders, or provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws.

(3) Shares may be transferred and determinations of shareholders for any purpose may be made without closing the record of shareholders until such time, if any, as such record may be closed, and either the board or the shareholders may close it.

(4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitral or otherwise, in its corporate name, and process may be served by or upon it.

(b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

A corporation continues to exist, while undergoing dissolution, for so long as it is

necessary to satisfy its debits and it may sue or be sued until its business affairs are fully adjusted. *Wells v. Ronning*, 269 A.D.2d 690, 692 (3d Dept. 2000).

D. Application of these Principles to the Instant Action

Given the absence of any allegations that would warrant the Court piercing the corporate veil of Vesuviano, there is no basis for holding Ambrosio personally responsible for Vesuviano's liabilities, and the Court dismisses the first and second causes of action in the Complaint.

With respect to the appropriateness of Plaintiff pursuing the third and fourth causes of action on behalf of the Business, counsel for Plaintiff affirms that the Dissolution does not affect the right of Plaintiff, as President of the Business, to pursue this action. Plaintiff has not, however, supplied any documentary evidence reflecting the date and circumstances of that Dissolution, including any Orders issued in connection with that Dissolution that might bear on the Court's decision in this action, or explained the basis for his knowledge regarding the Dissolution.

Accordingly, the Court reserves decision on Defendant's motion as it relates to the third and fourth causes of action, and directs Plaintiff to provide the Court with an additional submission, on or before May 21, 2010, outlining the circumstances of the Dissolution and expounding on why the Court should permit Plaintiff to pursue this action on behalf of the Business. Defendant shall submit any responsive submission on or before June 11, 2010, and the parties are directed to appear before the Court for a conference on June 16, 2010 at 9:30 a.m.

All matters not decided herein are hereby denied.

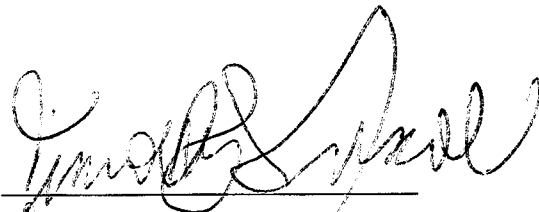
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on June 16, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

May 3, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

**MAY 06 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**