

**Matter of B.R.M. Concrete Inc. v Portland Tr.-Mix,  
Inc.**

2010 NY Slip Op 31689(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 604125/07

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 604125/2007

**B.R.M. CONCRETE**

VS.

**PORTLAND TANSIT-MIX**

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. 604125/07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

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

*and cross-motion are decided  
in accordance with accompanying  
memorandum decision*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

JUL 02 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/29/10

**BARBARA R. KAPNICK S.C.**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

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In the Matter of

B.R.M. CONCRETE INC.,

On behalf of itself and as a representative For all others who may be deemed beneficiaries of a certain Trust Created Pursuant to Lien Law Article 3-A,

Plaintiff,

-against-

PORTLAND TRANSIT-MIX, INC., BEDROCK CONCRETE INC., MARCELLO SPAGNOLO and ELISA SPAGNOLO,

Defendants.

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BARBARA R. KAPNICK, J.:

**DECISION/ORDER**

Index No. 604125/07  
Motion Seq. No. 005

**FILED**  
JUL 02 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action brought to enforce a statutory trust pursuant to Article 3-A of the Lien Law, plaintiff B.R.M. Concrete Inc. ("BRM"), a manufacturer of concrete, seeks to recover a balance due in the sum of \$193,927.54 for concrete allegedly supplied to defendant Portland Transit-Mix, Inc. ("Portland") for sale and delivery to concrete contractors, including defendant Bedrock Concrete Inc. ("Bedrock").

The Complaint sets forth claims for: (i) a Trust Fund Accounting pursuant to Lien Law § 77 (first cause of action); (ii) unlawful diversion of Trust Funds created under Article 3-A of the Lien Law (second cause of action); (iii) breach of contract (third

cause of action); (iv) quantum meruit (fourth cause of action); and (v) account stated (second 'fourth' cause of action).

The Complaint also seeks to hold defendant Elisa Spagnolo and her brother, Marcello Spagnolo (collectively, the "Spagnolo defendants") personally liable, and to hold defendant Bedrock liable claiming that Bedrock and Portland "failed to follow corporate formalities such that they are mere instrumentalities, agents and/or alter egos of the other and of the Spagnolo defendants" (fifth cause of action).<sup>1</sup>

By Decision/Order dated December 22, 2008, this Court granted a default judgment against defendant Portland, and directed an inquest and assessment of damages to be held at the time of trial of plaintiff's claims against the co-defendants.<sup>2</sup>

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<sup>1</sup> The Complaint alleges that the Spagnolo defendants are the sole shareholders and/or officers of Bedrock and Portland. According to the defendants, Marcello Spagnolo is neither an officer nor an owner of either corporation, and Mr. Spagnolo testified that he merely helps out on occasion with his sister's businesses by washing and greasing trucks. Plaintiff, however, claims that Marcello Spagnolo was the primary contact in its dealings with the defendant corporations, and notes that Elisa Spagnola, the President of the corporations, lacked sufficient knowledge to answer basic questions at her deposition with regard to the formation, funding and operation of the corporations.

<sup>2</sup> Defendant Bedrock and the Spagnola defendants do not dispute that Portland purchased concrete from BRM and that Portland failed to fully pay BRM.

Defendants Bedrock and the Spagnolo defendants now move, under motion sequence number 005, for summary judgment dismissing the Complaint against them.

Plaintiff cross-moves for an order:

(1) pursuant to CPLR § 3212 granting it summary judgment on the grounds that Bedrock's corporate veil should be pierced and the debt owed to plaintiff is undisputed, or in the alternative;

(2) pursuant to CPLR §§ 3124 and 3126 (a) deeming the issues to which the information and documents (and specifically, the tax returns and bank records, relevant to the alter ego issue which were demanded at the depositions of the Spagnolo defendants) not produced by defendants relevant and resolved in favor of plaintiff; (b) prohibiting the defendants from opposing plaintiff's claims; (c) prohibiting defendants from introducing as evidence any items or testimony not previously produced or producing witnesses not previously disclosed; (d) striking defendants' Answer; and/or (e) compelling the defendants to adequately respond to discovery demands; and

(3) pursuant to Lien Law § 77(3)(a)(v) requiring defendant Bedrock and the Spagnolo defendants, as trustees of Trust Funds, to give security to insure the proper distribution of the trust assets.

That portion of defendants' motion seeking to dismiss the third cause of action for breach of contract was granted on the record on July 31, 2009, since there is no evidence that plaintiff entered into a sales agreement or any other contract with Bedrock or either of the Spagnolo defendants.<sup>3</sup>

Those portions of defendants' motion seeking to dismiss plaintiff's fourth cause of action for quantum meruit and second 'fourth' cause of action for an account stated were also granted on the record, since BRM sold and delivered merchandise exclusively to Portland, and rendered invoices solely to Portland.

The moving defendants argue that plaintiff's first and second causes of action for a Trust Fund Accounting and unlawful diversion of Trust Funds must also be dismissed because plaintiff is not a Trust beneficiary.

Lien Law § 71 provides, in relevant part, as follows:

2. The trust assets of which a contractor or subcontractor is trustee shall be held and applied for the following expenditures arising out of the improvement of real property, including home improvement or public improvement and incurred in the performance of his

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<sup>3</sup> Plaintiff has not produced any document showing that BRM sold any merchandise to Bedrock. Any claim of an oral sales agreement or an oral guaranty of payment by the individual defendants would be barred by the Statute of Frauds (see, UCC § 2-201[1]; GOL § 5-701[a][2]).

contract or subcontract, as the case may be:

(a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen [emphasis supplied]...

Pursuant to Lien Law § 2(12), the term "materialmen" includes

any person who furnishes material or the use of machinery, tools, or equipment, or compressed gases for welding or cutting, or fuel or lubricants for the operation of machinery or motor vehicles, either to an owner, contractor or subcontractor, for, or in the prosecution of such improvement.

Defendant Bedrock and the Spagnola defendants contend that BRM is not a "materialman" with standing to bring a Lien Law action against Bedrock. Rather, defendants argue that BRM is a "materialman to a materialman", because it sold its concrete material to Bedrock's materialman, i.e., Portland, and did not supply any material directly to Bedrock. See, *Avon Elec. Supplies, Inc. v C.K. Elec.*, 297 AD2d 768, 769 (2nd Dep't 2002), which held that two suppliers lacked standing to bring actions under Article 3-A of the Lien Law against the owner and general contractor of a construction project because "they had no contractual relationship with either the property owner or the general contractor and, as such, are not beneficiaries" of their Lien Law Trust; and *Matter of Kayfield Const. Corp. v Glazed Block Corp.*, 46 Misc2d 880 (Sup Ct, Nassau Co 1965), which held that "a materialman of a 'sub-sub-contractor'" was not within the class of persons entitled under Lien Law § 12 to file a lien against a public improvement because

it did not furnish material to a contractor or his immediate sub-contractor.

Plaintiff argues that *Avon Elec. Supplies, Inc. v C.K. Elec., supra*, is distinguishable, because it is not seeking to assert a claim against the owner or general contractor's trust, but rather is merely seeking to enforce the trust that was created by defendants' acceptance of funds in connection with the project. Moreover, plaintiff argues that it is within the class of persons contemplated by the Lien Law because it dealt directly with a materialman of the sub-contractor at issue (if not the sub-contractor itself). See, *cf., Matter of Kayfield Const. Corp. v Glazed Block Corp., supra*.

Plaintiff argues that defendants should, therefore, be required to post security pursuant to Lien Law § 75(4) which provides that the "[f]ailure of the trustee to keep the books or records required by this section shall be presumptive evidence that the trustee has applied or consented to the application of trust funds actually received by him as money or an instrument for the payment of money for purposes other than a purpose of the trust as specified in section seventy-one of this chapter."

However, absent any evidence that BRM supplied any materials directly to the moving defendants, as opposed to Portland, this

Court finds that BRM lacks standing to assert a claim against them under Article 3-A of the Lien Law. Accordingly, that portion of the motion seeking summary judgment dismissing the first and second causes of action against defendant Bedrock and the Spagnolo defendants is granted, and that portion of plaintiff's cross-motion seeking relief against said defendants under the Lien Law must be denied.

Defendants next argue that the fifth cause of action which seeks to pierce the corporate veil must be dismissed because Portland and Bedrock were separate corporations which conducted separate businesses and maintained separate bank accounts, and there is no claim that the Spagnola defendants conducted any business other than in a corporate entity.

Generally, piercing the corporate veil requires a showing that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (citations omitted). The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their "alter ego", without more, will not suffice to support the equitable relief of piercing the corporate veil (citations omitted). "The decision whether to pierce the corporate veil in a given circumstance depends on the particular facts and circumstances" (citation omitted). "Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (emphasis supplied; citation omitted).

*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 (2nd Dep't 2006).

have attempted to hide behind the corporate veil to defraud and avoid an obligation to BRM.

Plaintiff points to the following factors: (a) there is an overlap in the corporate officers and shareholders, since Elisa Spagnolo is the sole shareholder and officer of both companies; (b) the corporations have the same address; (c) the corporations bank at the same location; (d) the companies hold no meetings; (e) the companies have no by-laws; (f) the companies have no records of meetings or documents regarding shareholders; and (g) the companies have no records of business transactions or other financial records.<sup>4</sup> In addition, plaintiff claims that Portland was undercapitalized and that Bedrock funds were used to pay its debts and expenses.

Moreover, Bedrock admits that it paid for at least a portion of the concrete that was delivered to Portland.<sup>5</sup>

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<sup>4</sup> Specifically, defendants have not produced any invoices, receipts, delivery tickets, bills of lading, change orders, estimates, proposals, customer files, project files, ledgers, income statements or balance sheets.

<sup>5</sup> Annexed to the parties' papers are a check dated June 1, 2007 from Bedrock to "BRM Concrete" in the amount of \$62,464.03; a check dated July 6, 2007 from Bedrock to "BRM" in the amount of \$35,000; and a check dated July 11, 2007 from Bedrock to "Brooklyn Ready Mix" in the amount of \$60,664.28. There was also one check dated August 8, 2007 from Portland to "Brooklyn Ready Mix" in the sum of \$50,000.

Accordingly, this Court finds that there are triable issues of fact as to whether Bedrock was the alter ego of Portland and as to whether the failure to maintain separate viable corporations was used to commit a fraud or wrong against BRM which resulted in injury. Therefore, that portion of the motion seeking to dismiss the fifth cause of action against Bedrock is denied.

This Court further finds that there are triable issues of fact as to whether Elisa Spagnola exercised complete dominion and control over Portland and Bedrock and whether she used that dominion and control to commit a fraud or wrong against BRM which resulted in injury.<sup>6</sup> Therefore, that portion of the motion seeking to dismiss the fifth cause of action against Elisa Spagnola is denied.

Finally, this Court finds that there are triable issues of fact as to the extent of Marcello Spagnolo's role in the corporations which preclude the dismissal of the fifth cause of action against him at this time.

Consequently, this Court also denies that portion of plaintiff's cross-motion seeking summary judgment on this cause of action.

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<sup>6</sup> Moreover, it appears that Elisa Spagnola, as an officer of Portland, may be held liable for misappropriation of trust funds by Portland. See Lien Law 79-a.

The remaining portions of the cross-motion are granted only to the extent of directing counsel to appear for a conference in IA Part 39, 60 Centre Street, Room 208 on August 4, 2010 at 10:30 a.m. in order to coordinate all outstanding discovery. Plaintiff's separate Order to Show Cause (motion seq. no. 006) for an order: (i) compelling non-parties Donald Tylutki and Jay Comacho to appear to give testimony regarding their employment at Portland; and (ii) adjudging Tylutki and Comacho in contempt for willfully failing to appear in compliance with Subpoenas Ad Testificandum dated April 10, 2009 shall also be addressed at that time.

This constitutes the decision and order of this Court.

Date: June 29, 2010

  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK  
J.S.C.**

**FILED**  
JUL 02 2010  
NEW YORK  
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