

Last Time Beverage Corp. v F & V Distrib. Co., LLC

2010 NY Slip Op 31972(U)

July 15, 2010

Sup Ct, Nassau County

Docket Number: 011778-00

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
LAST TIME BEVERAGE CORP., et al.,

Plaintiffs,

-against-

**F & V DISTRIBUTION COMPANY, LLC and
HORNELL BREWING CO., INC.,**

Defendants.

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

**Index No: 011778-00
Motion Seq. No: 5
Submission Date: 6/1/10**

-----X
**J.C. TEA, INC., A.K. DISTRIBUTION CORP., G&G
BEVERAGE CO., INC., and LAWRENCE PUGLISI,**

Plaintiffs,

-against-

**F & V DISTRIBUTION COMPANY, LLC and
HORNELL BREWING CO., INC.,**

Defendants.

-----X
Papers Read on this Motion:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Defendants' Reply Affirmation and ExhibitsX**

This matter is before the court on the motion by Defendants filed on April 1, 2010 and submitted on June 1, 2010, for an Order permitting reargument of the Court's Order dated February 25, 2010 (the "Prior Order") confirming the Report ("Report") of the Honorable Thomas V. Dana, Special Referee ("Referee") dated June 17, 2009, and upon that reargument

vacating the Prior Order and dismissing the complaints in this matter. The Court grants the motion insofar as to permit Defendants to reargue, and upon that reargument, denies the remainder of the motion in its entirety. As set forth in the Prior Order, the Court refers the issue of damages to the Referee to hear and determine per the prior Order of Justice Leonard B. Austin in open court on February 14, 2007.

BACKGROUND

The Parties' History is outlined in detail in the Prior Order, as well as the Report issued by the Referee. The Report itself was issued following over 40 days of testimony over which the Referee presided.

In the Prior Decision, the Court noted, *inter alia*, that the determination of a referee appointed to hear and report is entitled to great weight, particularly where conflicting testimony and matters of credibility are at issue. The Court ruled that the Referee properly resolved credibility issues, defined and discussed the relevant legal issues, and made findings that were amply supported by the record. Moreover, the Court determined that the Referee's legal conclusions were proper, and confirmed the Referee's conclusions of law regarding (a) piercing the corporate veil, and (b) the ultimate obligations of defendants to plaintiffs.

RULING OF THE COURT

The arguments now raised by the Defendants appear similar to those already made in opposition to Plaintiffs' motion to confirm the Report. The Court has already considered those arguments, and adheres to its earlier conclusion. Moreover, to the extent that any of Defendants' arguments were not raised previously, the Court rejects any new arguments made now. In so doing, the Court recognizes that motions for reargument are addressed to the sound discretion of the court. Such motions may only be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). The remedy is not designed to provide an unsuccessful party with successive opportunities to make repetitious applications, rehash questions already decided or present arguments different from those originally presented. *Id.*; *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992), *app. den. in part, disp. in part*, 80 N.Y.2d 1005 (1992).

Here, the Defendants essentially repeat their earlier arguments in their opposition to Plaintiffs' motion to confirm the Referee's report, and thus assert that the Referee should have reached a different conclusion. The Court has already ruled to the contrary, and will thus rely on its earlier decision.

There are three arguments now made by Defendants that deserve detailed treatment.

First, Defendants claim that this Court erred as a matter of law in confirming the Referee's report because the Court and the Referee failed to recognize that alter ego liability could not be present absent proof that Hornell's domination of F & V was used to commit a fraud or wrong against Plaintiffs that resulted in Plaintiffs' injury. The record demonstrates otherwise.

Indeed, there is no question that the legal principles enunciated by Defendants govern. The parties essentially agreed as such at oral argument. More importantly, the Referee recognized and specifically applied those principles. Indeed, the Referee's Report states at pp. 34-35, citing to hornbook and case law,

A court will not pierce the corporate veil . . . in the absence of a showing that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked (emphasis in original Report).

* * *

Control of the corporation by its stockholders is crucial; the control must be used to commit a . . . wrong that causes plaintiff's loss.

* * *

[T]he domination need not be complete as to every detail but must be complete only as to the transaction attacked (emphasis in original Report).

This Court confirmed the Referee's report. Thus, the correct legal standard has been recognized, cited, and applied, at every point in this proceeding.

Moreover, the facts, as found by the Referee, warranted application of the legal principles set forth above, thereby piercing the corporate veil. Indeed, the Referee provided, at pp. 37-40 of the Report, a detailed recitation of facts to support the conclusions that Hornell was the alter ego of F & V, and that its domination related to the specific actions forming the basis

for the complaint in this case. In short, the facts as found by the Referee provide sufficient basis under the case law for his ultimate conclusions.

Second, Defendants claim that the testimony of Dominick Vultaggio, who is an officer of both F & V and Hornell, did not provide a sufficient basis to pierce the corporate veil. Defendants specifically point to the following colloquy before the Referee between Vultaggio and Plaintiffs' counsel during the Plaintiffs' direct examination of Vultaggio:

Plaintiffs' Counsel: Since you asked me a question I will deal with it this way. When you are dealing with nonparties, CNS and other companies, if you have a contract with them obviously you're stuck. F&V and Hornell are one and the same. You have the same ownership, the same stockholders. You have treated them as one company.

Mr. Vultaggio: Right.

Defendants assert that "Mr. Vultaggio's ambiguous "Right" which followed Plaintiffs' counsel's statement did not mean he was agreeing with Plaintiffs' counsel's gratuitous statement that F & V and Hornell were in fact one and the same, but only that he understood the factual context [on which] Plaintiffs' counsel was questioning him." Affirmation at p. 11, § 24. The Court disagrees.

First, a central issue in this case was obviously the extent to which F & V and Hornell are alter egos. There is no reason to believe that Vultaggio, a sophisticated businessman, would be less than diligent in answering a question, or even providing information, on such a key point. Tellingly, Defendants did not make any effort on cross-examination to induce Vultaggio to retract or otherwise clarify the statement.

Second, even if the Defendants' interpretation of Vultaggio's use of the word "Right" is plausible, the person in the best position to make this determination was the Referee, who scrupulously oversaw this case throughout over 40 days of testimony. The Referee was thus uniquely positioned to assess whether certain words might have a less than ordinary meaning (such as whether the word "Right" constitutes agreement in response to a statement from an adverse attorney) in the context of auditory inflections, facial expressions, and the overall credibility of the witness. The Referee not only declined to make such an interpretation, but

specifically determined that Vultaggio's answer amounted to an admission. That finding is entitled to great weight.

Third, Vultaggio's admission is hardly the sole evidence before the Referee that established domination and control to warrant piercing the corporate veil. Rather, the record is replete with evidence to support the Referee's conclusion. That evidence is cited by Plaintiffs at pp. 12-14 in their Affirmation in Opposition, and portions of that evidence were specifically cited by the Referee in pp. 37-40 of his Report. This Court will thus adhere to its earlier ruling and will not disturb the Referee's conclusion.

Finally, the Court is not persuaded by Defendants' claim that either this Court or the Referee somehow improperly relied upon the "custom and usage" of the parties. The Court is well aware that custom and usage cannot supply the term of an agreement that is otherwise absent. *See, e.g., Daylay Egg Farm, Inc. v. A&W Egg Co.*, 21 Misc. 3d 1127(a), 875 N.Y.S.2d 819 (Sup. Ct. 2008). Here, however, evidence of the parties' custom and usage did not supply the terms of any agreement between them. Rather, akin to the practice of wearing a belt and suspenders, the parties' obligations, as set forth in written contractual provisions, are further confirmed by the parties' custom and usage.

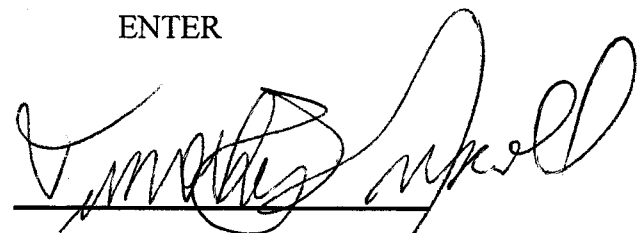
All matters not decided herein are hereby denied.

This constitutes the Decision and Order of the Court.

Pursuant to Justice Austin's earlier ruling, the issue of damages is referred to the Referee to hear and determine on August 17, 2010 at 10:00 a.m.

DATED: Mineola, NY
July 15, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

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JUL 20 2010
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