

**Colarossi v Daly**

2010 NY Slip Op 32154(U)

August 3, 2010

Supreme Court, Nassau County

Docket Number: 003334/2008

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER****SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU****PRESENT:****HON. IRA B. WARSHAWSKY,****Justice.****TRIAL/IAS PART 8**

GARY C. COLAROSSO, individually, and on behalf  
of himself and all other Shareholders and Members  
similarly situated of FIVE FOR FIGHTING, INC.,  
FULL ENVIRONMENTAL SERVICES, LTD. and  
D&M EXCAVATING, LLC,

Plaintiffs,

**Action No. 1**

INDEX NO.: 003334/2008

-against-

KENNETH DALY, AQUA-NOVA  
COMMERCIAL SERVICES, LLC, AQUA-NOVA, LLC,  
MARK PESONEN, KEVIN McGILLOWAY,  
FIVE FOR FIGHTING, INC., FULL ENVIRONMENTAL  
SERVICES, LTD. and D&M EXCAVATING, LLC,

Defendants.

LYON FINANCIAL SERVICES, INC.  
d/b/a/ US BANCORP MANIFEST FUNDING  
SERVICES,

Plaintiff,

**Action No. 2**

INDEX NO.: 019395/2009  
MOTION DATE: 05/03/2010  
MOTION SEQUENCE: 001

-against-

FULL ENVIRONMENTAL SERVICES, LTD.  
and GARY C. COLAROSSO,

Defendants.

GARY C. COLAROSSO, individually, and on behalf of himself and all other Shareholders and Members similarly situated of FULL ENVIRONMENTAL SERVICES, LTD.,

**Third-Party Action (Action No. 2)**

Third-Party Plaintiff,

INDEX NO.: 019395/2009

-against-

KENNETH DALY, AQUA-NOVA COMMERCIAL SERVICES, LLC, AQUA-NOVA, LLC, MARK PESONEN, KEVIN McGILLOWAY, FIVE FOR FIGHTING, INC., FULL ENVIRONMENTAL SERVICES, LTD. and D&M EXCAVATING, LLC,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion, Affidavit & Exhibits Annexed .....	1
Gary C. Colarossi's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment in Action No. 2 .....	2
Affidavit of Gary C. Colarossi in Opposition & Exhibits Annexed .....	3
Affirmation in Reply of Charles A. Gruen .....	4

**PRELIMINARY STATEMENT**

The Plaintiff, Lyon Financial Services, Inc., moves for summary judgment, damages, late charges, repossession fees, bank charges, interest from date of default, costs and attorney fees. The action arises from the Equipment Finance Agreement number 600-0011076 that the Plaintiff, Lyon Financial Services, Inc. d/b/a US Bancorp Manifest Funding Services, executed and entered into with the Defendant, Full Environmental Services, Ltd., a cesspool business which was owned by Gary Colarossi and Kenneth Daly.

**BACKGROUND**

On or about August 3, 2004, Plaintiff and Defendants entered into an Equipment Finance Agreement, in which Plaintiff agreed to provide financing for the Defendants' acquisitions of one

(1) 2003 Sterling Truck, VIN No. ZFZACGAK73AL04068 W/2500 gal. vacuum tank, and the Defendants agreed to make monthly payments to Plaintiff in the amount of \$1,751.31, plus applicable taxes, for a term of sixty (60) months. The Agreement contained an assignment clause that prohibited sale, transfer, assignment, or sublease of the equipment. Defendant Gary C. Colarossi, unconditionally personally guaranteed all obligations of Defendant, Full Environmental Services, Ltd., to Plaintiff. Defendant acknowledged receipt of the vehicle and paid Plaintiff monthly installments until March 30, 2008, when their default in payments began. As a result of the Defendants' default in payments and the acceleration clause, all of the obligations of the Defendants due at that time and to become due in the future, under the Equipment Finance Agreement, became immediately due and payable.

In or about May 2005, Full Environmental Services, Ltd., moved into the office of Aqua-Nova, LLC, and Defendant Colarossi lost control over the Cesspool Business and the Lyon Financial equipment, and was prohibited from entering the premises. Lyon Financial Services was informed that Aqua-Nova, LLC, merged with Full Environmental, purchased the assets of Full Environmental, and commenced business dealings with the new entity. While Lyon was willing to accept the assignment from Full Environmental to Aqua-Nova, it did not approve it due to a poor credit and background check. The Lyon Financial equipment was repossessed in or about July 2008, and was rated in poor condition. It was sold for \$8,000 in October 2008.

On October 15, 2008, this suit was instituted in the Supreme Court, County of Suffolk, to collect monies due as a result of the Defendants' default in payments. Pursuant to the specific terms of the Equipment Finance Agreement, Plaintiff now pursues its remedies to recover the entire balance of the Equipment Finance Agreement payments due thereunder, together with unpaid late charges, repossession fees, bank charges, costs and attorney fees.

### **DISCUSSION**

#### **Summary Judgment**

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1<sup>st</sup> Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343,

[1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1<sup>st</sup> Dept. 2003]). On a motion to dismiss, the court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1<sup>st</sup> Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Plaintiff Lyon’s motion for summary judgment against Full Environmental Service, Ltd. is granted.

“Where ... a creditor seeks summary judgment upon a written guaranty, the creditor need prove no more than an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee.” (*Kensington House Co. v. Oram*, 293 A.D.2d 304, 305 [1<sup>st</sup> Dep’t 2002]). However, when there are genuine issues as to the material fact concerning whether the principal obligor discharged the guarantor’s obligation then summary judgment will be denied. (*Caldor, Inc. v. Mattel, Inc.*, 817 F.Supp. 408, 412 [S.D.N.Y.1993]).

Courts have denied summary judgment when there are questions concerning the entity’s change in corporate structure. See, e.g., *Fulgini Orilio & F.LLI S.p.A v. Lettieri* 2007 WL

1834750, at \*4 (E.D.N.Y. 2007). “It is... argued that changes in the entity, the debts of which are guaranteed, which alter the composition, structure or form of the principal-obligor, can also serve to release the guarantor under the theory that such changes have the effect of creating a new obligation to which the guarantor never intended to become liable; that is, the changes create a new principal.” (*Fehr Bros., Inc. V. Scheinman*, 121 A.D.2d 13, [1<sup>st</sup> Dept. 1986]). There must be a determination as to “whether the changes in the entity, the debts or responsibilities of which are guaranteed, have the effect of creating a principal with a new identity and one the debts of which the guarantor never intended to guarantee when he executed the agreement.” *Id.* at 18. The relevant factors are changes in the business name, form, composition, management or ownership, the involvement of the guarantor in the business entity; and, whether the guarantor participated in the changes. *Id.* The effect of the change of the corporate entity on the debt must be significant so that it changes the obligation of the guarantor.

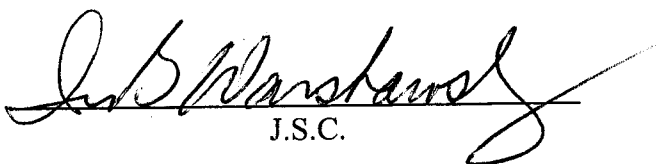
In this case, the evidence presented raises a material question of fact concerning whether Colarossi is responsible for the debt of Full Environmental pursuant to the guarantee. The record indicates that the corporate form of Full Environmental and Aqua-Nova are different. Whereas, Colarossi and Kenneth Daly had ownership interests in Full Environmental, Colarossi has no ownership interest in Aqua-Nova and was not involved in the sale. The “sale” was apparently done without his consent or knowledge. Kenneth Daly, Mark Pesonen and Kevin McGilloway are Aqua-Nova’s principals. The name of the business and its business purpose are distinguishable from Full Environmental, in that its focus is on the design of innovative cleaning equipment. Additionally, Aqua-Nova consisted of three entities other than Full Environmental, Five for Fighting, Inc., Full Cesspool Services and assets of D&M Excavating, LLC.

There is a triable issue of material fact whether the changes of the corporate entity did materially affect the relationship between the principal-debtor and the creditor and the obligation undertaken by the guarantor, Colarossi, particularly concerning the nature of the risk he assumed, resulting in the creditor attempting to bind the guarantor to a performance beyond that contemplated in the guarantee. For the reasons stated above, the court denies summary judgment against the guarantor, Colarossi.

The motion for summary judgment is granted as to Full Environmental and denied as to Gary Colarossi.

This constitutes the Decision and Order of the Court.

Dated: August 3, 2010

  
J.S.C.

**ENTERED**  
AUG 06 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE