

**Treeline 1 OCR, LLC v Nassau County Indus. Dev.  
Agency**

2010 NY Slip Op 32697(U)

September 21, 2010

Supreme Court, Nassau County

Docket Number: 001007/2009

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

TREELINE 1 OCR, LLC,  
Plaintiffs,

-against-

INDEX NO.: 001007/2009  
MOTION DATE: 07/30/2010  
MOTION SEQUENCE: 005

NASSAU COUNTY INDUSTRIAL  
DEVELOPMENT AGENCY, JOHNSON &  
HOFFMAN MANUFACTURING CORP.,  
AMEC NEW YORK, INC., JOHNSON &  
HOFFMAN, LLC, NL VENTURES IV VOICE,  
L.P., NL VENTURES VOICE MANAGEMENT,  
L.L.C., MANLEY HOLDINGS, INC., ABC CORPS 1-5,

Defendants.

JOHNSON & HOFFMAN, LLC,  
Defendant/Third-Party Plaintiff,

-against-

AMERICAN METAL INDUSTRIES, INC., NL  
VENTURES IV VOICE, L.P., NL VENTURES IV  
VOICE MANAGEMENT, LLC, AIC VENTURES, L.P.,  
PAUL M. ROBshaw, PETER S. CARLSEN, and  
JOHN DOES 1-5,

Third-Party Defendants.

The following papers were read on this matter:

Notice of Motion, Affidavit, Affirmation & Exhibits Annexed .....	1
Memorandum of Law in Support of Motion to Dismiss .....	2
Affidavit of Douglas J. Bohn in Opposition & Exhibits Annexed .....	3
Memorandum of Law in Opposition to Motion to Dismiss .....	4
Reply Affirmation of Paul D. Sylvestri in Further Support & Exhibits Annexed ....	5
Reply Memorandum of Law in Further Support of Motion .....	6

### PRELIMINARY STATEMENT

Third-party defendants NL Ventures IV Voice, L.P., NL Ventures IV Voice Management, LLC, AIC Ventures, L.P., (the Venture third-party defendants), Paul M. Robshaw, and Peter S. Carlsen (the individual third-party defendants) move to dismiss the third-party complaint on the grounds that the Court has already determined that it has no jurisdiction over Ventures, LLC and Ventures LP in that both parties are Texas entities which have ceased to exist, extinguishing claims against them; that the third-party complaint fails to state a claim for indemnification pursuant to successor liability theory against Ventures LLC and AIC because there is no successor relationship between Ventures LP and either party, an express assumption of Ventures LP's liability by either party, a consolidation, merger, continuation, or fraud; against individuals Robshaw and Carlsen because there is no evidence of sufficient relationship between them and Ventures, LP or any type of fraudulent activity or intent upon the part of the individuals so as to warrant a piercing of the corporate veil to impose liability upon them.

Moving third-party defendants also claim that the third-party complaint fails to state a cause of action for negligence since there is no allegation that any of the Ventures defendants had ownership interest in the property at 40 Voice Road, Carle Place, or control over J&H or any other tenant that occupied, controlled, and operated the property at any time; nor has J&H alleged a duty or breach of duty necessary to establish negligence.

## BACKGROUND

The action involves a claim on behalf of the former owner of One Old Country Road, Carle Place, New York, a 5-story office building with parking garage. It is located on the north side of Old Country Road, south of premises 40 Voice Road, and divided by a LIRR right-of-way. Plaintiffs contend that the use of 40 Voice Road by Defendants for the manufacture of machined metal parts, including metal stamping, deburring, and washing, resulted in the introduction of pollutants into the ground beneath One Old Country Road, including volatile organic vapors (“VOC’s”), tetrachlorethylene (“PCE”), and trichlorethylene (“TCE”). Plaintiff contends that the existence of these contaminants caused the termination of a contract of sale for \$71,250,000; and that the premises were eventually sold for \$65,000,000, reflective of the damage caused by the contaminants.

## DISCUSSION

### Exposure of Ventures LP and Ventures LLC under the laws of Texas

Ventures LP and Ventures LLC are not subject to the jurisdiction of the Court by virtue of the fact that, under the laws of Texas, upon their dissolution on October 24, 2007, the authority to commence an action against them expired. These entities are not subject to involuntary revival for initiating or defending an action. This is the law of the case.

The inapplicability of the three-year revival provisions of Texas law was discussed at length in the September 22, 2009 decision. Johnson and Hoffman, LLC was a party to the action from its inception, and had full and fair opportunity to voice its position on the issue of post-dissolution revival of Ventures LP and Ventures LLC for the purpose of initiating or defending an action at law. They did not do so; nor, does the Court believe that their participation would have resulted in a different opinion by the Court on the subject.

### Claim for Indemnification

An Assignment, Assumption, and Amendment to the lease agreement between NL

Ventures IV Voice, L.P. a Texas limited partnership, and AMI Johnson, LLC, a Delaware limited liability company, is annexed to the affidavit in opposition to the motion. NL Ventures signed it on January 31, 2005. ¶ 5(b) provides as follows:

Landlord shall indemnify and hold harmless J&H (and any corporation, limited liability company, partnership, trust, or other entity in control of, controlled by or under common control with, Jade, and any officer, director, manager, general partner, equity holder, or trustee of any corporation, limited liability company, partnership, trust, or other entity in control of, controlled by, or under common control with Jade (collectively, "Jade Affiliates")), and their respective agents against any and all actual losses, liabilities, damages, or expenses, including reasonable fees and expenses of experts and counsel, but not including any punitive, exemplary, incidental, special, or consequential damages resulting from any complaint, claim, prosecution, indictment, action, suit, arbitration, or proceeding by or before any governmental authority or arbitrator (whether involving a third party or between the parties to this Assignment) that J&H or any Jade Affiliates or any of their respective agents may suffer or become subject to as a result of, or arising out of, in connection with, any Pre-Assignment Conditions. The provisions of the Section 5.b shall survive the expiration or sooner termination of the Term of the Lease.

Movant's position is correct, that they should be indemnified by NL Ventures IV Voice, L.P. for claimed damages which preceded the January 31, 2005 Assignment. Unfortunately, Texas law permitted Ventures L.P. to dissolve in 2007 without being subject to the Texas Business Organization Code provisions for revival, since that section of the Code did not apply to domestic entities created prior to January 1, 2006, of which Ventures L.P. was one. There is, therefore, no viable entity against which they can enforce their claim for indemnification.

*Piercing the Corporate Veil*

In its third-party complaint J&H, LLC identifies Paul M. Robshaw and Peter S. Carlsen as directors, officers, managers, shareholders and/or owners of AIC Ventures,

Ventures LLC and/or Ventures LLC. In order to enforce a claim under the doctrine of piercing the corporate veil, allegations to hold a principal of a corporation liable, a simple allegation that an individual dominates a corporation is inadequate, since this could be said about virtually any single-person corporation. The party seeking to pierce the corporate veil must also establish “that the owners, through their domination, abused the privilege of doing business in the Corporate form.”<sup>1</sup> Factors to be considered in determining whether or not there has been such abuse include whether there was a “failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.”<sup>2</sup>

In circumstances in which the complaint alleged that the principal of the corporation exercised “bad faith” in negotiating a replacement contract for the supervision of construction work, and that he was the only point of contact with whom the school district negotiated, this was insufficient to state a cause of action to justify piercing of the corporate veil.<sup>3</sup>

These principles are equally applicable to limited liability companies, and limited partnerships.<sup>4</sup> Third-party plaintiff has failed to identify any tortious conduct on the part of the individuals such as would deprive them of the privilege of proceeding in the capacity of a limited liability company or limited partnership.

### Claims of Negligence

The motion asserts that third-party plaintiff has not (and can not) make a claim for negligence since none of the Venture defendants or individual defendants had a duty to

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<sup>1</sup> *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993).

<sup>2</sup> *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016—1017 (2d Dept. 2007).

<sup>3</sup> *East Hampton Union Free School District v. Sandpebble Builders, Inc.*, 2009 WL 2245755 (2d Dept. 2009).

<sup>4</sup> *Smith v. Delta Intern. Machinery Corp.*, 69 A.D.3d 840 (2d Dept. 2010).

them. A review of the third-party complaint fails to reveal any evidence of a claim for negligence on the part of any of the moving defendants.

The sole allegation of the third-party complaint at ¶¶ 32 — 34 is that AIC Ventures, 8080 North Central Expressway, Suite 1080, Dallas, Texas 75206, serves as the mailing address for Ventures LP, as well as their registered agent and general partner, Ventures LLC. There is absolutely no evidence of AIC's interest or participation in the transactions complained of in the third-party complaint.

Third-party defendants motion to dismiss the third-party complaint against NL Ventures IV Voice, L.P., NL Ventures IV Voice Management, LLC, AIC Ventures, L.P., Paul M. Robshaw, Peter S. Carlesen, and John Does 1 - 5, to the extent that they are intended to represent officers, directors or shareholders of Ventures LP or Ventures LLC is granted.

This constitutes the Decision and Order of the Court.

Dated: September 21, 2010

*Jan B. Warshawsky*  
J.S.C.

**ENTERED**  
**SEP 24 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**