

**Long Is. Med. & Gastroenterology Assoc., P.C. v
Lligam Assoc., Inc.**

2010 NY Slip Op 33082(U)

October 26, 2010

Supreme Court, Nassau County

Docket Number: 005500-10

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

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**LONG ISLAND MEDICAL AND
GASTROENTEROLOGY ASSOCIATES, P.C.
and DAY OP OF NORTH NASSAU, INC.,**

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

Plaintiffs,

-against-

**Index No: 005500-10
Motion Seq. No: 1
Submission Date: 9/8/10**

**LLIGAM ASSOCIATES, INC., formerly
known as MAGILL ASSOCIATES, INC.
and TEMPOSITIONS, INC.,**

Defendants.

-----X

Papers Read on this Motion:

**Notice of Motion, Affirmation in Support, and Exhibits.....X
Affirmation in Opposition.....X**

This matter is before the court on the motion by Plaintiffs filed August 20, 2010 and submitted September 8, 2010. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiffs Long Island Medical and Gastroenterology Associates, P.C. ("LIMG") and Day Op of North Nassau, Inc. ("Day Op") (collectively "Plaintiffs") move for an Order granting Plaintiffs a default judgment against Defendant Lligam Associates, Inc., formerly known as Magill Associates, Inc. ("Magill") and setting the matter down for an inquest and assessment of damages against Magill.

Defendant Tempositions, Inc. ("TemPositions") opposes Plaintiffs' motion on the grounds that 1) Plaintiffs have alleged that Magill is an "alter ego" of TemPositions;

2) TemPositions has timely interposed an Answer denying the allegations; and 3) the Court should afford TemPositions the opportunity to defend against the underlying claims.

B. The Parties' History

In the initial Complaint (Ex. 1 to Aff. in Supp.), Defendant TemPositions was not a named defendant. In the Amended Verified Complaint (Ex. 4 to Aff. in Supp.) ("Amended Complaint"), Plaintiff added TemPositions as a named defendant. The Amended Complaint alleges as follows:

LIMG is a professional corporation and Day Op is a domestic corporation with their principal places of business in Nassau County, New York. Plaintiffs are engaged in the practice of medicine and the provision of medical services to the general public.

Magill is a domestic corporation with its principal place of business in Nassau County, New York and TemPositions is a domestic corporation with its principal places of business in New York County, New York. Defendants are engaged in the business of an employment and staffing agency for medical professionals and health care providers.

Plaintiffs allege in the Amended Complaint that Magill and TemPositions ("Defendants") are alter egos of each other as demonstrated by the facts, *inter alia*, that 1) their employees are the employees of both Defendants; 2) their employees were assigned interchangeably to both Defendants; and 3) Defendants hold themselves out as Magill and/or TemPositions to the public and Plaintiffs interchangeably; and 4) the business, assets and liabilities of Defendants were managed as a single entity (Amended Compl. at ¶ 7).

Prior to July 11, 2007, Plaintiffs hired Defendants to search for and recommend potential candidates for employment by Plaintiffs in the position ("Position") of Practice Administrator. Plaintiffs allege that Defendants knew that this Position was a confidential and sensitive Position because the selected employee would have access to Plaintiffs' financial information, funds and credit facilities for the purchase of supplies and other items. Defendants represented and warranted to Plaintiffs that they were skilled and knowledgeable in the medical staffing industry, including the investigation of the background of potential employees.

On or about July 2, 2007, Defendants recommended Sonia Morales Bonilla ("Bonilla") for the Position. Defendants represented to Plaintiffs that they conducted a background check of Bonilla, including a review of her criminal background, and their investigation disclosed no prior criminal conduct or other negative information regarding Bonilla. Defendants also advised

Plaintiffs that Defendants interviewed a prior employer of Bonilla who provided no negative information about Bonilla.

In reliance on Defendants' representations, Plaintiffs hired Bonilla for the Position on or about July 11, 2007 and paid to Defendants the agreed-to \$15,000 agency fee. Plaintiffs terminated Bonilla on or about January 13, 2010 after discovering that she had embezzled approximately \$900,000 of Plaintiffs' funds by conduct including the issuance of Plaintiffs' checks to fictitious payees on fictitious invoices and forged endorsement of checks payable to Plaintiffs. Plaintiffs reported Bonilla's conduct to law enforcement authorities.

Plaintiffs allege that Defendants' representations to them about Bonilla were false. Plaintiffs allege that Bonilla 1) was previously convicted and incarcerated in the State of New Jersey in 1994 for theft and illegal possession of stolen property; 2) previously filed for bankruptcy protection; 3) had judgments and tax liens filed against her for unpaid taxes and other obligations; and 4) had acquired luxury automobiles beyond her means based on her stated income. Plaintiffs also allege that Bonilla was previously discharged from prior employment in the medical field due to allegations of embezzlement and larceny by her. Plaintiffs allege that if Defendants had performed the appropriate background check of Bonilla, Plaintiffs would not have hired Bonilla and been the victim of her embezzlement.

The Amended Complaint contains four (4) causes of action. In the first, Plaintiffs allege that Defendants breached their contract with Plaintiffs. In the second, Plaintiffs allege that Defendants were grossly and wantonly negligent. In the third, Plaintiffs seek compensation for damage that Bonilla caused to their computer system and operational manuals. In the fourth, Plaintiffs seek the refund of the \$15,000 agency fee. Plaintiffs demand judgment against the Defendants, jointly and severally 1) in a sum of not less than \$900,000 on the first and second causes of action, 2) in a sum of not less than \$300,000 on the third cause of action, and 3) in the sum of \$15,000 on the fourth cause of action.

In his Affirmation in Support, Plaintiffs' counsel affirms that Plaintiffs served Magill with the initial Complaint and provides Affidavits in Support reflecting that service. Magill failed to timely appear and answer and its time to do so has expired and has not been extended. Although not required to, Plaintiffs served Magill with the Amended Complaint on May 24, 2010 as reflected by the Affidavit of Service provided (Ex. 5 to Aff. in Supp.). Magill again did not appear and answer and has not requested an extension of time in which to answer.

Plaintiffs' counsel submits that Magill is in default and that the Court should award Plaintiffs judgment against Magill and schedule the matter for an inquest and assessment of damages against Magill.

In her Affirmation in Opposition, counsel for TemPositions affirms that TemPositions timely interposed an Answer to the Amended Complaint in which it denied the allegation that it is the alter ego of Magill. She submits that, as Plaintiffs seek to hold TemPositions liable for the alleged breach of contract and negligence of Magill on the theory that they are alter egos, which allegations TemPositions denies, then the Court should afford TemPositions the opportunity to defend against the underlying claims. She argues, further, that TemPositions would be severely prejudiced if the Court were to permit Plaintiffs to obtain a default judgment against Magill, and then seek to enforce that judgment against TemPositions on an alter ego theory, without first establishing the truth of their allegations that the Defendants are alter egos of each other.

C. The Parties' Positions

Plaintiffs submit that in light of Magill's failure to appear and answer, the Court should grant Plaintiffs a default judgment against Magill and schedule the matter for an inquest and assessment of damages against Magill.

TemPositions opposes Plaintiffs' application, submitting that TemPositions should have the opportunity to litigate Plaintiffs' allegation that the Defendants are alter egos of each other and that it will be prejudiced by the entry of a default judgment as to Defendant Magill.

TemPositions cites no cases in support of this argument.

RULING OF THE COURT

A. Default Judgments

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

Although a defaulting defendant is deemed to have admitted all the allegations in the complaint, the legal conclusions to be drawn from such proof are reserved for the Supreme Court's determination. *McGee v. Dunn*, 75 A.D.3d 624, 624 (2d Dept. 2010), quoting

Venturella-Ferretti v. Ferretti, 74 A.D.3d 792 (2d Dept. 1992) and citing, *inter alia*, CPLR § 3215(b). There is no mandatory ministerial duty to enter a default judgment against a defaulting party. *Id.*, citing *Resnick v. Lebovitz*, 28 A.D.3d 533, 534 (2d Dept. 2006), quoting *Gagen v. Kipany Prods.*, 289 A.D.2d 844, 846 (2d Dept. 2006) (internal citations omitted). Instead, the court must determine whether the motion was supported with enough facts to enable the court to determine that a viable cause of action exists. *Id.*, quoting *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62, 71 (2003). In determining whether the plaintiff has a viable cause of action, the court may consider the complaint, affidavits, and affirmations submitted by the plaintiff. *Id.* at 625, quoting *Litvinskiy v. May Entertainment Group, Inc.*, 44 A.D.3d 627, 627 (2d Dept. 2007). In *McGee*, the Second Department affirmed the trial court's denial of plaintiff's motion for leave to enter judgment upon the defendant's default in answering and for an assessment of damages on the grounds that plaintiff's motion papers failed to set forth sufficient facts to enable the court to determine that there existed a viable cause of action to recover damages for either libel or malicious prosecution. *Id.*

B. Relevant Causes of Action

The elements of a cause of action for breach of contract are: 1) formation of a contract between the parties, 2) performance by plaintiff, 3) defendant's failure to perform, and 4) resulting damage. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

Gross negligence is the failure to exercise even slight care or slight diligence. *Gentile v. Garden City Alarm*, 147 A.D.2d 124, 131 (2d Dept. 1989), quoting *Food Pageant v. Consolidated Edison Co.*, 54 N.Y.2d 167, 172 (1981). It is conduct that is so careless as to show complete disregard for the rights and safety of others. *Id.*

C. Piercing the Corporate Veil

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*, 66 A.D.3d 122, 126 (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*, 66 A.D.3d at 126, 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*, 66 A.D.3d at 126, 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*, 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

D. Application of these Principles to the Instant Action

The Court concludes that Plaintiffs have not demonstrated their entitlement to a default judgment against Magill based on the Court’s conclusion that Plaintiffs’ motion papers do not set forth sufficient facts to enable the court to determine that there exist viable causes of action to recover damages for breach of contract or gross negligence. The Court’s primary concern is that Plaintiff has not provided the Court with a copy of the contract between Plaintiff and Magill. Accordingly, the Court has an insufficient basis from which to conclude that Magill breached that contract, or was grossly negligent with respect to its recommendation of Bonilla. Moreover, Plaintiff has not adduced sufficient facts from which the Court may infer that Magill is liable for Bonilla damaging Plaintiffs’ computer system and destroying Plaintiffs’ operational manuals.

The Court is mindful that on or about October 1, 2010, after the instant motion was submitted, Plaintiffs and TemPositions executed a Stipulation and Order of Confidentiality (“Stipulation”), which the Court so-ordered on October 12, 2010. That Stipulation places restrictions on the disclosure of confidential and highly confidential materials, but permits disclosure of those materials to the Court. It also provides that any confidential or highly confidential materials to be filed with the Court shall be filed under seal in accordance with applicable Court rules and procedures. The contract between the parties may constitute materials within the purview of the Stipulation.

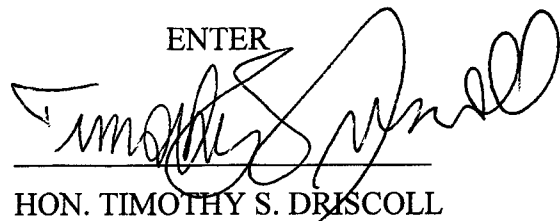
On the record before it, the Court cannot grant the requested relief. Accordingly, the Court denies Plaintiffs’ motion without prejudice.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiffs and TemPositions of their required appearance before the Court for a conference on February 28, 2011 at 9:30 a.m.

DATED: Mineola, NY
October 26, 2010

ENTER

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
OCT 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE