SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

GOLDBERG & CONNOLLY,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 8/19/10

XAVIER CONSTRUCTION CO., INC., and FRANK XAVIER ACOCELLA,

INDEX NO.: 6663/10

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Petition.....1
Affirmation in Sur-Reply.....2
Answer with Counterclaims.....3
Reply to Counterclaims.....4

Application by petitioner, Goldberg & Connolly, for a judgment pursuant to CPLR §5225 (b) directing respondents, Xavier Construction Co., Inc. ("Xavier Construction") and Frank Xavier Acocella, to turn over funds in an amount sufficient to pay a judgment awarded in its favor against Xavier Contracting, LLC. ("Xavier Contracting") is **denied**. Counterclaims by respondents for a judgment assessing sanctions against the petitioners for frivolous conduct are **denied.**

On March 9, 2009, petitioners were awarded a judgment against Xavier Contracting in an underlying breach of contract action for its failure to pay for legal services rendered on its behalf. Petitioner alleges in this petition that: respondent, Xavier Construction, is the successor corporation of Xavier Contracting and is therefore liable for payment of the judgment; Xavier Contracting's assets were fraudulently conveyed to Xavier Construction and/or Frank Acocella, the primary or sole shareholder and manager of both entities, to avoid liability and payment of the judgment; and that Frank Acocella

has secreted, dissipated and commingled the assets of Xavier Contracting and expended them for his own use.

FACTS

In 2009, petitioner recovered a judgment for payment due for legal services rendered in a breach of contract action entitled *Goldberg & Connolly v Xavier Contracting, LLC*, Index No. 008713/06 (the "Underlying Action"). In May, 2006, petitioner commenced the Underlying Action by filing a summons and complaint. Xavier Contracting, an active New York corporation managed by Frank Acocella, is not actively engaged in business. It is insolvent at this time and was insolvent at all times during the pendency of the Underlying Action and the pendency of the instant petition. Further, Xavier Contracting has several judgments against it which includes two in favor of the New York State Department of Labor, and there is a pending claim against it by the City of New York in the amount of $1,123,189.73.

On or about December 8, 2006, Xavier Construction filed its Certificate of Incorporation which names Frank Acocella as its Chairman and/or Chief Executive Officer, with New York State Department of State. The petitioner alleges that Xavier Contracting and Xavier Construction are a merged and consolidated entity as they engage in a similar business, use the same addresses, offices and telephone numbers, and filed joint tax returns and combined balanced sheets. As such, Xavier Construction is liable for the judgment in the Underlying Action. In addition, petitioner alleges that Frank Acocella has controlling interests in both entities, and has either transferred, commingled, dissipated, or secreted the assets of Xavier Contracting in an attempt to frustrate the petitioner's ability to collect on the judgment.

Respondents maintain that the business entities are separate and distinct operations and deny the petitioner's allegations. In addition, respondents state that Xavier's Contracting's insolvency arose from losses suffered in the destruction of their offices due to flooding, and outstanding judgments and claims against it.

DISCUSSION

CPLR §5225 (b) permits a special proceeding to be brought against, and recovery to be had from, "a transferee of money or other personal property from the judgment debtor" if it can be demonstrated that the judgment debtor is entitled to the property or that the creditor's interest is superior to that of the transferee. This provision furnishes a mechanism for obtaining a money judgment against the recipient of a fraudulent conveyance who has, in the interim, spent or dissipated the property conveyed (see, *Federal Deposit Ins. Corp. v Heilbrun* , 167 AD2d 294 [1st Dept 1990]). Although the petitioner expressly seeks relief directing the respondents to turn over monetary assets, the petitioner implicitly seeks to pierce the corporate veil and/or set aside the fraudulent conveyance. In either event, adequate proof is required to justify such relief and to reach funds in the possession of Xavier Construction or Frank Acocella.

Generally, a party seeking to pierce the corporate veil must establish that the owners exercised complete domination of the corporation in respect to the transaction attacked, and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury (see *Matter of Morris v New York State Dept. of Taxation & Fin.,* 82 NY2d 134 [1993]; *Goldman v. Chapman*, 44 AD3d 938[2nd Dept 2007]). The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as an "alter ego" without evidence, is insufficient (see *Matter of Morris v. New York State Dept. of Taxation & Fin.,* supra at 135; *Damianos Realty Group, LLC v. Fracchia,* 35 A.D.3d 344[2nd Dept 2006). While complete domination and/or management of the corporation is the key element, some showing of a wrongful or unjust act toward petitioner is required (see *Cone v. Acme Markets, Inc.*, 41 AD2d 409[4th Dept.1973]).

Regarding a remedy under the doctrine of fraudulent conveyance, Debtor and Creditor Law § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Courts have noted that direct evidence of fraudulent intent is often elusive. Therefore, intent may be inferred from facts and circumstances that are usually present in

fraudulent transfers (see *Steinberg v. Levine*, 6 AD3d 620 [2nd Dept 2004]). Such facts and circumstances include, but are not limited to, the close relationship among the parties to the transaction, the inadequacy of the consideration, the transferor's knowledge of the creditor's claims and the transferor's inability to pay them, and the retention of control of property by the transferor after the conveyance (see *O'Brien-Kreitzberg & Associates v. K.P., Inc.*, 218 AD2d 519 [1st Dept1995]; *Dempster v. Overview Equities, Inc.*, 4 AD3d 495 [2nd Dept 2004]).

Although the record does indicate a close relationship between the two business entities in that Frank Acocella is a principal in both, and that the respondents were aware of the underlying action when Xavier Construction was formed, the record is devoid of evidence that there was any actual conveyance of monetary assets from Xavier Contracting to Xavier Construction, and consequently it cannot be determined that Xavier Construction is retaining such monetary assets.

In sum, the petitioner has not established that the judgment debtor's assets were actually transferred to another party or transferred without fair consideration; that a transfer was made while its action against the judgment debtor was still pending; that the transfer rendered the judgment debtor insolvent; that circumstances suggest that the judgment debtor acted with actual intent to defraud, or that the assets were secreted, disposed of, commingled or expended for the personal use by Frank Acocella. Accordingly, the petition is **denied** in its entirety (see *Riback v. Margulis,* 43 AD3d 1023 [2nd Dept 2007], *WBP Cent. Associates, LLC v. DeCola*, 50 AD3d 693 [2nd Dept 2008]).

As to the respondent's counterclaims, factors to be considered in determining whether the imposition of sanctions is appropriate is whether the conduct at issue was continued when it became apparent, or should have been apparent, that conduct was frivolous, or when such was brought to attention of parties or to counsel.(see N.Y .Ct. Rules,§ 130-1.1 (c), *Levy v. Carol Management Corp.*, 260 AD2d 27,[1st Dept1999]). There is nothing on record to indicate that the petitioner's conduct in filing this motion was frivolous to the extent that this Court should assess sanctions against its counsel. Accordingly, the respondent's counterclaims are **denied.**

This constitutes the Order of the Court.

ENTERED
JAN 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: December 17, 2010

J.S.C.