

Schenker, Inc. v Ashkenazie
2012 NY Slip Op 30167(U)
January 23, 2012
Supreme Court, New York County
Docket Number: 112721/10
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECENT.

RAKOWER

PART 15

Index Number : 112721/2010

SCHENKER, INC.

VS

ASHKENAZIE, ISAAC

Sequence Number : 001

COMPEL DISCLOSURE

INDEX NO.

112721/10

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2, 3, 4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE

WITH ATTACHED ORDER + DECISION

FILED

JAN 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

1/23/12

Hon EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

☐ REFERENCE

☐ SUBMIT ORDER/JUDG.

☐ SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
SCHENKER, INC.,

Plaintiff,

- against -

Index No.
112721/10
**ORDER AND
DECISION**
Mot. Seq.: 001

ISAAC ASHKENAZIE d/b/a TV & Computer
Sales, TV & Furniture Sales, and Efurniture,
TV & COMPUTER SALES, INC., EFURNITURE
SALES, INC. and SHOPDIGITAL ONLINE. COM
CORP. d/b/a Efurniture,

Defendants.

-----X
EILEEN A. RAKOWER, J.S.C.

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff, Schenker Inc., a company which provides transportation and freight services, brings this action for breach of contract, account stated and quantum meruit. Plaintiff provided freight services for defendants, after merging with its predecessor, non-party Bax Global, Inc. ("Bax") in 2009, and taking over Bax's accounts. Defendants are alleged to have defaulted on payments in the total amount of \$100,387.97. Defendants counterclaim in the amount of \$38,400.00, alleging that plaintiff caused the subject goods to be "damaged, destroyed, lost or stolen, and unusable," and that plaintiff over billed for its transportation services.

Plaintiff alleges in its complaint that individual defendant Isaac Ashkenazie, among other things, "disregarded the corporate formalities" of defendants TV & Computer Sales ("TVCS"), Efurniture Sales, Inc. ("Efurniture") and Shopdigitalonline.com Corp. d/b/a Efurniture ("Shopdigital") (collectively "corporate defendants"), and that he exerted complete dominion and control over the corporate defendants. Plaintiff also alleges that Ashkenazie submitted "misleading and self-referencing Commercial Credit Applications for Shop Digital and TVCS in order to deceive Bax... and obtain commercial credit . . . without proper capitalization . . ."

Plaintiff now moves to compel a response to its discovery demands served upon defendants in November 2010. Defendants cross-move to dismiss the action as against Isaac Ashkenazie individually. In support of their cross-motion, defendants submit: a printout from the NYS Department of State Division of Corporations, a printout from the Better Business Bureau ("BBB"); the printout of an article from the BBC; and a copy of the pleadings.

Defendants claim that plaintiff cannot "pierce the corporate veil" because all business was conducted under Shopdigital and not multiple entities, as alleged by plaintiff. Any irregularities contained in the credit applications, defendants assert, is due to the instructions of Bax's then account manager.

In opposition to the cross-motion, plaintiff submits the entity information for Shopdigital, TVCS and Efurniture, which shows that both TVCS and Efurniture are registered in New York under the same service address, and TVCS is incorporated in New Jersey. Plaintiff also submits the credit applications, one of which is for Shopdigital and the other for TVCS. Plaintiff points out that both applications list the same business locations, phone numbers, Federal Ids, and bank account numbers. Plaintiff argues that the motion is premature as there has been no discovery produced by defendants regarding the corporate entities, and that the numerous irregularities contained in the credit applications warrant denial of the motion.

In support of its motion to compel, plaintiff points out that defendants have failed to respond to discovery demands and notice of deposition for Ashkenazie served upon them in November 2010. Included in its demands are, for example: corporate minute books, corporate resolutions, financial statements, tax returns, leases, bills and invoices for the corporate defendants.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d

255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Initially, pursuant to CPLR 3212(f), a motion for summary judgment is premature if there appears to be facts essential to justify opposition which exist, but are presently unavailable to the party opposing the motion. Moreover, a "fact-laden claim to pierce the corporate veil is particularly unsuited for resolution on summary judgment." (*Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 AD2d 341[1996]). "The corporate veil can be pierced where there has been, *inter alia*, a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment." (*Id.* at 342).

Here, even the limited evidence in plaintiff's possession raises issues of fact for resolution at trial. The credit applications list two different corporations with identical contact, tax and banking information.

Pursuant to CPLR 3124:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

Despite having served discovery demands several months ago, defendants have failed to object to the requests, or produce the requested documents and answers to the interrogatories.

Wherefore it is hereby

ORDERED that the motion to compel is granted; and it is further

ORDERED that defendants shall respond to plaintiff's discovery demands and interrogatories within 10 DAYS of service of a copy of this Order with notice of entry; and it is further

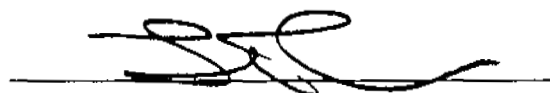
ORDERED that the failure to respond to timely respond will be deemed willful

and cōntumacious; and it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on Tuesday March 20, 2012 at 9:30 a.m. in Room 308 at 80 Centre Street.

DATED: January 23, 2012


EILEEN A. RAKOWER, J.S.C.

FILED

JAN 25 2012

NEW YORK
COUNTY CLERK'S OFFICE