

New World Pasta Co. v Seder Foods Corp.
2012 NY Slip Op 31313(U)
May 1, 2012
Sup Ct, Queens County
Docket Number: 16274/10
Judge: Timothy J. Dufficy
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM-PART 35-QUEENS COUNTY
 25-10 Court Square, Long Island City, N.Y. 11101

Present: HON. TIMOTHY J. DUFFICY
Justice

-----X
NEW WORLD PASTA COMPANY,

Plaintiff,

Index No.: 16274/10
Mot. Seq. 3

- against -

SEDER FOODS CORPORATION
D/B/A SEDER FOODS and EDWARD
GREENBAUM,

Defendants.

-----X

The following papers numbered 1 to 17 read on this motion by defendant **EDWARD GREENBAUM** for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's complaint as against him, or in the alternative, for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant and cross-motion by plaintiff **NEW WORLD PASTA COMPANY** for an order awarding it sanctions against the defendant's for frivolous motion practice as well as the sum of \$167,095.33 with interest plus costs and disbursements and reasonable attorney fees.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Affidavit of Service-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affirmation in Opposition-Affidavit in Opposition-Exhibits.....	7-10
Notice of Cross-Motion-Exhibits.....	11-14
Affirmation in Opposition to Plaintiff's Cross-Motion and In Reply-Exhibits.....	15-17

This motion was re-assigned to Part 35, on February 9, 2012 by the Administrative Judge of the Supreme Court, Queens County, pursuant to a Request for Reassignment of Civil Case from Justice Marguerite Grays and the papers were forwarded to Part 35 by the Motion Support Office on February 23, 2012.

Upon the forgoing papers, it is ordered that the motion by defendant **EDWARD GREENBAUM** for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's complaint as against him, or in the alternative, for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant and cross-motion by plaintiff **NEW WORLD PASTA COMPANY** for an order awarding it an order for sanctions and the sum of \$167,095.33 with interest from February 26, 2010, plus costs and disbursements and reasonable attorney fees are decided as follows:

This is an action for a breach of contract wherein the plaintiff New World Pasta Company alleges that on January 13, 2010 they entered into a business agreement with defendants Seder Foods Corporation d/b/a Seder Foods ("Seder Foods") and Edward Greenbaum for the delivery and purchase of certain foods pursuant to an "agreement". Plaintiff claims that the defendants received and accepted the plaintiff's goods without objecting to marketability, and to date the defendants have failed to pay for the goods as tendered by the plaintiff to the defendants.

Plaintiff claims that the agreed value of the subject goods is one hundred sixty-four thousand ninety-five dollars and fifty-three cents (\$164,095.53) and plaintiff demands that entire amount, along with interest from February 26, 2010, as well as forty-one thousand seven hundred seventy-three dollars and eighty-eight cents (\$41,773.88) in attorneys' fees. The plaintiff claims that attorneys' fees are due and owing pursuant to a default clause contained in the bills of lading and invoices used in this transaction which states in pertinent part that "*in the event of*

a default and the matter is sent to an attorney for collection, that the defendants would pay attorneys fees in the amount of \$41,773.88 plus costs and disbursements incurred by the plaintiff towards collection costs “ (emphasis supplied.).

The plaintiff commenced this lawsuit on June 25, 2011, with the service of a Summons and Complaint in November of 2011.

Defendant Edward Greenbaum now moves to dismiss the complaint herein on several grounds. First, defendant Greenbaum contends that the amount sued for by the plaintiff, namely one hundred sixty-seven ninety-five dollars and fifty-three cents (\$167,095.53) is an amount that the defendant Greenbaum “cannot identify...as being accurate”. See, defendant Greenbaum’s motion dated December 6, 2011, Exhibit C, paragraph 4).

Defendant Greenbaum also states that the plaintiff’s claim for attorneys’ fees, costs and disbursements in connection with the collection of the instant action should be denied because there “is no agreement for the payment of same”. See, Defendant Greenbaum’s motion dated December 6, 2011, Exhibit C, paragraph 4).

Defendant Greenbaum further contends that the complaint against him personally and individually should be dismissed because although he was the former President of Seder Foods and Seder Foods received the goods delivered by plaintiff New World Pasta Company, as the invoices show “New World Pasta dealt specifically with Seder Foods Corporation”, all invoices were made out to Seder and all payments to New World Pasta Company were made through a Seder credit line account as was done with all of Seder’s vendors. See, Defendant Grenbaum’s motion dated December 6, 2011.)

Therefore, defendant Greenbaum asks the Court to dismiss New World Pasta company's cause of action against him individually and personally where the plaintiff seeks to pierce the corporate veil of Seder Foods. The plaintiff alleges that defendant Greenbaum was co-mingling and intermingling the assets of the corporation and the shareholders. Defendant Greenbaum claims that the allegations made by the plaintiff which are contained in paragraphs five (5) and six (6) of the Amended Verified Complaint are conclusory, and do not set forth sufficient criteria to justify piercing the corporate veil.

In addition, defendant Greenbaum also claims that there was no commingling of assets or funds. Defendant Greenbaum argues that the only factual allegation made by the plaintiff to support any of the plaintiff's contentions is that defendant Greenbaum owns the property located at 21 Wilbraham Street, Palmer, Massachusetts, 01069. Plaintiff argues that since Seder Foods operates its business at that property which is conceitedly owned by defendant Greenbaum, that the corporate veil should therefore be pierced.

Defendant Greenbaum contends that he has merely owned that property for a lengthy period of time (approximately 30 years), that he did not recently transfer that property to himself as plaintiff contends in order to dissipate assets, and that the very same property was not claimed at anytime whatsoever to be an asset of Seder Foods Corporation. Defendant Greenbaum claims that there was no fraudulent transfer of that property to himself, that there was no pledge of that property made at anytime by the defendant Greenbaum to New World Pasta Company, and that there is not even an allegation that New World Pasta Company considered the property as any sort of security for the debt it claims is owed to Seder Foods.

Furthermore, defendant Greenbaum argues that no personal assets of his were pledged or provided as collateral to secure the debt of New World Pasta Company, nor is there any claim that defendant Greenbaum specifically, either in writing or orally, represented that he himself would in any respect be personally or individually responsible to New World Pasta Company for the debts of Seder

Foods. Therefore, the Court finds that is no basis whatsoever to invoke the court's power in equity to pierce the corporate veil.

Generally, the legal concept of piercing the corporate veil requires a showing that 1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and 2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. *see, In the Matter of Joseph Morris v. New York State Department of Taxation and Finance*, 82 NY2d 135 (1993).

The key factor in determining whether or not to pierce the corporate veil is whether the individual exercised complete domination over the corporation or more specifically, have the owners use the corporation as a mere device to further their own personal business, rather than the corporate business. *see, In the Matter of Joseph Morris v. New York State Department of Taxation and Finance, supra.*

Moreover, mere domination, standing alone, is not enough to justify a court to invoke the equitable remedy of piercing the corporate veil. There must be some showing of a wrongful or unjust act towards the plaintiff in order to warrant this equitable remedy.

Therefore, the party seeking to pierce the corporate veil must establish that the owner or owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against a party so that a court of equity should intervene to correct the injustice by piercing the corporate veil and holding the corporations owner or owners personally and individually liable. *see, In the Matter of Joseph Morris v. New York State Department of Taxation and Finance, supra.*

Precedent is clear that courts will not pierce the corporate veil unless it is to prevent fraud, illegality or to achieve equity. Freeline Mineola, LLC v. Barry E. Berg, 21 AD 3d 1028 (2d Dept. 2005); *see also*, Bowles v. Errico, 163 AD2d 771 (3d Dept. 1990). In addition, this is the standard even in situations where the company is controlled by a single shareholder. New York Association for Retarded Children, Inc., Montgomery County Ch. v. Keator, 199 AD 2d 921 (3d Dept. 1993).

The general rule is that a corporation exists independently of its owners who are not personally liable for the corporation's obligations and individuals frequently incorporate for the express purpose of limiting their own personal liability. Superior Transcribing Service, LLC v. Joseph L. Paul, 72 Ad3d 675 (2d Dept. 2010). Factors to be considered by a court in determining whether or not to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and the use of corporate funds for personal items. Superior Transcribing Service, LLC v. Joseph L. Paul, *supra*. An officer is not liable for his corporations engagements unless he signs individually or without some direct and explicit evidence of actual intent to be liable individually. *see*, Treeline Mineola, LLC v. Berg, 21 Ad3d 1028 (2d Dept. 2005).

In this case, the plaintiff has completely failed to establish any evidence of fraud or complete domination by the corporation's president, defendant Edward Greenbaum, or any other reason for this Court to now invoke its power of equity and to pierce the corporate veil. Here, the plaintiff has failed to raise any triable issues if fact as well.

The Plaintiff's cross-motion seeks an order for sanctions on the grounds that defendants motions constitute frivolous motion practice and for an award granting the plaintiff the sum of \$167,095.53 plus attorneys fees, costs and disbursements.

Accordingly, the court finds no reason whatsoever and no basis in fact or law to pierce the corporate veil. Therefore, defendant Greenbaum's motion for summary judgment is granted and the complaint against him personally and individually is dismissed. The cross-motion by plaintiff is for sanctions, the sum of \$167, 095.53 together with interest plus attorneys fees, costs, and interest is denied. The court finds there are triable issues of fact with respect to the complaint against Seder Foods therefore the plaintiff's motion is denied in all respects.

Dated: May 1, 2012

TIMOTHY J. DUFFICY. J.S.C.

