

Commissioners of State Ins. v A Design Built Group
2012 NY Slip Op 33269(U)
December 19, 2012
Sup Ct, New York County
Docket Number: 453112/2008
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Commissioners of State Ins.

INDEX NO. 453112/08

-v-

MOTION DATE 12/18/12

A Design Built Group

MOTION SEQ. NO. 006

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this action to recover monies allegedly due and owing to plaintiff for Workers' Compensation Insurance premiums, defendant Kristos Karastathis ("Karastathis") moves to renew his opposition to the previous motion, which was granted in favor of plaintiff and against Karastathis and his company, A Design Built Group Inc. ("ADBG") (collectively, "defendants").

Factual Background

Plaintiff, Commissioners of the State Insurance Fund ("plaintiff"), issued ADBG Workers' Compensation Insurance at ADBG's request. As a result of ADBG's failure to pay premiums, this action ensued. Plaintiff's previous summary judgment motion was granted over defendants' opposition, and the Court awarded judgment against both defendants (the "Decision").

In support of renewal, Karastathis contends that ADBG's dissolution proclamation was issued in 2000 erroneously. All of the New York State franchise tax returns for the years prior to and subsequent to the year 2000 "had been filed by the Certified Public Accountants entrusted with that task." The New York State Department of Taxation and Finance accepted franchise tax returns from ADBG without objection and in 2008, defendants' Certified Public Accountant actually filed a final return. Defendants' counsel arranged to have the dissolution proclamation

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Dated: _____, J.S.C.

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

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER ... SUBMIT ORDER ... DO NOT POST ... FIDUCIARY APPOINTMENT ... REFERENCE

reversed, and the New York State Department of State issued a certificate annulling the 2000 dissolution of ADBG. Karastathis claims he was repeatedly assured by his Certified Public Accountants that all required filings had been made, that he was completely unaware that his Corporation had been dissolved when it applied for the Workers Compensation policy in 2003, and that he had no reason to believe otherwise, given New York State's acceptance of ADGB's tax returns and tax payments. It is argued that the evidence that ADGB was erroneously dissolved and the subsequent annulment of this dissolution would change the result of the prior motion as it relates to Karastathis' individual liability. Caselaw holds that upon reinstatement of a corporation's status, individual corporate officers who had no actual knowledge of the dissolution (and therefore did not fraudulently represent the corporate status of the dissolved entity) will not be personally liable for the obligations incurred while the corporation was dissolved.

In opposition, plaintiff argues that the Complaint states that the corporation was dissolved by proclamation on December 27, 2000 and that plaintiff was therefore proceeding against the individual defendant as an officer and owner of the corporation. Karastathis failed to show any reasonable justification as required by CPLR 2221(e) for the failure to address this issue on any prior motion before this Court. The fact that the corporation was dissolved is not newly discovered evidence. In any event, the reinstatement of the corporation, 12 years after it was dissolved and four years after an action was commenced against its principal, does not serve to absolve the principal from personal liability. An officer of a corporation that has been dissolved by proclamation by the Secretary of State remains personally liable for the debts of the corporation, even if the dissolution is later annulled.

In reply, Karastathis argues that recent caselaw establishes that the annulment of ADGB's dissolution should relieve him from personal liability in the case at bar. Karastathis attests that at the time this action was commenced in 2008, he was recovering from open-heart surgery, and that neither of his former attorneys appearing on his behalf prior to the issuance of the Court's Decision informed him of the legal role that ADBG should have played in this action and that the corporate shield would have protected him from personal liability.

Discussion

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." The motion to renew, when properly made, posits newly discovered facts that were not previously available *or* a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v. Wolf*, 194 Misc.2d at 133, 751 N.Y.S.2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." (*Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d 511, *lv. dismissed* 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879.)"

Here, the Court finds that the annulment of ADGB's dissolution constitutes a new fact warranting renewal of Karastathis's opposition to plaintiff's summary judgment motion. At the

time of the prior motion, Karastathis claims he was unaware that his company ADGB was dissolved when ADGB entered into the Workers' Compensation Insurance contract, and unaware of the need to annul the dissolution until after this Court issued its Decision. The Court notes that it granted judgement against Karastathis individually, even though plaintiff's underlying motion papers did not raise the issue of Karastathis's personal liability based on the dissolution of ADGB and did not point the Court to this allegation in the Complaint. The response papers were also silent on this issue. In light of these circumstances, the Court grants renewal.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

As stated in this Court's previous Decision, plaintiff established its entitlement to judgment (a) on the First Cause of Action in the sum of \$199,646.10, plus interest from October 29, 2007; and (b) on the Second Cause of Action in the sum of \$43,922.14 for the costs in collecting such amounts (*Commissioners of State Ins. Fund v Beyer Farms, Inc.*, 15 A.D.3d 273, 792 N.Y.S.2d 380 [1st Dept 2005]).

However, the issue presented on renewal is whether Karastathis may be held personally liable for debts incurred by the corporation during the period his corporation was dissolved, even after the dissolution was annulled.

"The general rule in New York is that if an individual signs a contract on behalf of a corporation while the corporation is dissolved for failure to pay its franchise taxes, the individual assumes personal liability under the contract for the subject matter of that contract (*Nigro v Dwyer*, 438 F.Supp.2d 229 [S.D.N.Y. 2006] citing *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667, 537 N.Y.S.2d 177 [2d Dept 1989]), interpreting N.Y. Tax Law § 203-a (7); *Lodato v Greyhawk N. Am., LLC*, 39 A.D.3d 496, 834 N.Y.S.2d 237 [2d Dept 2007] (stating A "person who "purport[s] to act on behalf of a corporation which [has] neither a *de jure* nor a *de facto* existence [is] personally responsible for the obligations which he incur[s]"); *Pennsylvania Bldg. Co. v Schaub*, 14 A.D.3d 365, 789 N.Y.S.2d 112 [1st Dept 2005] (holding defendant personally liable under lease contract, "since he admits having signed it as president of a corporation that had been previously dissolved pursuant to the Tax Law, and fails to show that entering into the lease was necessary to the winding up of the corporation's affairs"))).¹

"However, once a corporation is reinstated, liability-even for contracts entered into during the period of dissolution-reverts, *nunc pro tunc*, to the corporation. This is because reinstatement

¹ The appellate briefs in *Pennsylvania Building Co v Schaub*, indicate that at the time the contract was entered into between the corporation and the plaintiff, the corporation "had been dissolved by proclamation for failing to pay New York State taxes . . . , did not exist at the time Mr. Schaub [the corporation's president and sole shareholder] signed the [lease] Extension, and *has never been reinstated*" (emphasis added). 2004 WL 5495587 [1st Dept] (Appellate Brief, pages 5-6, and fn.5)

‘shall have the effect of annulling all of the proceedings theretofore taken for the dissolution of such corporation ... and it shall thereupon have such corporate powers, rights, duties and obligations as it had on the date of the publication of the proclamation [of dissolution], with the same force and effect as if such proclamation had not been made or published’” (*Nigro v. Dwyer*, 438 F.Supp.2d 229, *supra*, citing N.Y. Tax Law § 203-a (7); *Lodato v Greyhawk N. Am., LLC*, *supra*, citing *Flushing Plaza Assoc. #2 v Albert*, 31 AD3d 494, 495 [2d Dept 2006] (when a dissolution is annulled, the entity's corporate status is reinstated *nunc pro tunc*, and contracts entered into during the period of dissolution are “retroactively validated”)).

It has also been held that “an individual who has ‘no actual knowledge of the dissolution’ . . . and thus has not ‘fraudulently represented the corporate status’ of the dissolved entity, will not be held personally liable for the obligations undertaken by the entity while it was dissolved (*Lodato v Greyhawk N. Am., LLC*, *supra*, citing *Bedford Hills Supply v Hubert*, 251 AD2d 438 [2d Dept 1998]).

As to Karastathis’s personal liability, plaintiff relies on *WorldCom Inc. v. Sandoval*, 182 Misc.2d 1021, 1024, 701 N.Y.S.2d 834 (Sup.Ct. New York County 1999), *Annicet Associates, Inc. v. Rapid Access Consulting, Inc.*, 171 Misc.2d 861, 864, 656 N.Y.S.2d 152 (Sup.Ct. Rockland County 1997), and *Poritzky v. Wachtel*, 176 Misc. 633, 27 N.Y.S.2d 316 (Sup.Ct. Putnam County, 1941] for the proposition that an officer, such as Karastathis, “remains personally liable for the debts of the corporation, even if the dissolution is later annulled.” (Affirmation in Opposition, ¶14). For example, in *Worldcom*, the Court held that “Under New York law, the individual shareholders and officers of a corporation are legally responsible for contractual obligations where the contract was entered into after the corporation was dissolved for nonpayment of franchise taxes, even if the corporation was later reinstated.”

Nigro v. Dwyer (438 F.Supp.2d 229 [S.D.N.Y. 2006]) is highly instructive on the interplay of the above cited caselaw.

In *Nigro*, plaintiffs sued a corporation’s president personally for breach of contract, alleging that he was personally liable because he signed the agreement on behalf of the corporation while the corporation was dissolved. Addressing the personal liability of the president, the Southern District Court explained:

. . . [T]he Poritzky court concluded that the facts before it smacked of possible fraud and abuse by the officers of closely-held corporations. The court expressed concern that “a former officer of a dissolved corporation could obtain credit and then upon subsequent discovery of the nonexistence of the corporation, by merely paying arrears in franchise taxes, could shift the personal liability which the law would otherwise impose upon him, back to the corporation.” . . . For that reason, the Poritzky court held Wachtel personally liable for debts he had incurred in the name of the corporation while it was dissolved.

Poritzky has been relied upon repeatedly over the years. In addition to *WorldCom*, *Annicet Associates, Inc. v. Rapid Access Consulting, Inc.*, 171 Misc.2d 861, 864, 656 N.Y.S.2d 152 (Sup.Ct. Rockland County 1997) . . . cite[s] Poritzky's concern about fraud as the basis for not permitting an individual to avoid liability after a corporation is reinstated.

. . . in *Lodato v. Greyhawk N. Am. L.L.C.*, 10 Misc.3d 418, 422, 807 N.Y.S.2d

818 (Sup.Ct. Kings Co.2005), the court, after endorsing Poritzky's reasoning, suggested a number of factors that a court should consider in deciding whether or not liability should shift back to the corporation retroactively following reinstatement. According to Lodato, liability should shift back to the corporation only when the officer did not know about the corporation's dissolution; the dissolution was "truly inadvertent," rather than a result of neglect; and the corporation quickly sought reinstatement. *Id.* The Lodato court stated that a corporate officer could not be held liable for debts incurred on behalf of a reinstated corporation unless the plaintiff made "a showing of fraud or misrepresentation." *Id.*

* * * * *

In *Prentice*, the individual defendant, Martin, was the president and chief operating officer and principal shareholder of Related Industries, Inc. Related was dissolved for failure to pay franchise taxes on June 24, 1981 and was reinstated to corporate status on January 2, 1985. After dissolution and before reinstatement, defendant, purporting to act on behalf of Related, entered into two contracts with plaintiff *Prentice Corp.* [which contracts were later breached].

. . . the court concluded that, absent fraud, a party who dealt with a corporation that was involuntarily dissolved for failure to pay franchise taxes had no remedy except against the corporation once it was reinstated, because reinstatement validated the acts taken during the period of dissolution "as if the charter had never been repealed."

Nigro, 438 F.Supp.2d at 234-236).

After discussing the various cases, the Second Circuit denied summary judgment against the corporation's president, in light of the factual issues "concerning the circumstances of the dissolution and reinstatement and [the president's] behavior during the interim period-including, specifically, his conduct at or about the time the contract was signed and his knowledge of the corporation's status at that time."

Applying the above rationale, this Court finds that unless there is evidence that Karastathis acted fraudulently or in bad faith, which must await discovery, plaintiff cannot obtain judgment against him individually. The record is insufficient to determine, at this juncture, whether Karastathis should be held personally liable for the premiums under the Workers' Compensation Insurance contract. Thus, upon renewal, the Court vacates the portion of the Decision which granted summary judgment against him, without prejudice, for the parties to conduct discovery as to the circumstances of the dissolution and reinstatement, and Karastathis's behavior during the dissolution period.

Conclusion

Based on the foregoing, it is hereby

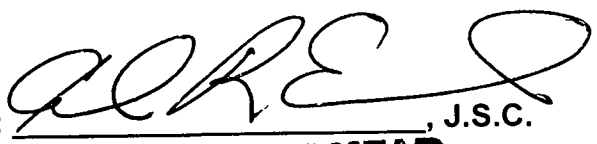
ORDERED that the motion by defendant Kristos Karastathis to renew his opposition to the previous motion which was granted in favor of plaintiff Commissioners of the State Insurance Fund and against Karastathis and his company, A Design Built Group Inc., is granted, and upon renewal, the Court vacates the portion of the Decision granting judgment against

Karastathis individually; and it is further

ORDERED that the parties shall appear for a preliminary conference on January 29, 2013, 2:15 p.m.; and it is further

ORDERED that defendant Kristos Karastathis shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 12.19.2012 ENTER:  J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE