

Sinanaj v City of New York

2013 NY Slip Op 30976(U)

May 6, 2013

Sup Ct, New York County

Docket Number: 117469/08

Judge: Manuel J. Mendez

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PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

XHEVAHIRE SINANAJ and SELVI SINANOVIC as
 Co-Administrators of the Estate of RAMADAN KURTAJ,
 Deceased & SELVI SINANOVIC Individually,

INDEX NO. 117469/08
 MOTION DATE 4-29-2013
 MOTION SEQ. NO. 044
 MOTION CAL. NO. _____

Plaintiff(s)

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
 OF BUILDINGS, MICHAEL CARBONE, PATRICIA J.
 LANCASTER, ROBERT LIMANDRI, NEW YORK CRANE
 & EQUIPMENT CORP., JAMES F. LOMMA, LOMMA
 TRUCKING & RIGGING, JF LOMMA RIGGING AND
 SPECIALIZED SERVICES, BRADY MARINE REPAIR CO.,
 TESTWELL, INC., BRANCH RADIOGRAPHIC
 LABORATORIES INC., CRANE INSPECTION SERVICES, LTD.,
 SORBARA CONSTRUCTION CORP., 1765 FIRST ASSOCIATES,
 LLC, LEON D. DEMATTEIS CONSTRUCTION, MATTONE GROUP
 CONSTRUCTION CO., LTD., MATTONE GROUP LTD., MATTONE
 GROUP LLC, CITY OF NEW YORK SCHOOL CONSTRUCTION
 AUTHORITY, CITY OF NEW YORK SCHOOL CONSTRUCTION FUND,
 HOWARD I. SHAPIRO & ASSOCIATES CONSULTING ENGINEERS,
 P.C., NEW YORK RIGGING CORP., TOWER RIGGING
 CONSULTANTS, INC., TOWER RIGGING, INC., UNIQUE RIGGING
 CORP., LUCIUS PITKIN, INC., MCLAREN ENGINEERING GROUP,
 M.G. MCLAREN, P.C. and JOHN/JANE DOES 1 THROUGH 10,

Defendant(s)

AND ALL RELATED ACTIONS

The following papers, numbered 1 to 6 were read on this motion and cross-motion to/ for
 Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants',
 Mattone Group Construction Co. Ltd., Mattone Group Ltd., and Mattone Group LLC
 (collectively "Mattone"), Motion dismissing Mattone as an improper party and for
 Summary Judgment dismissing the Complaint and all cross-claims against
 Mattone is denied.

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

This case relates to the collapse of a Kodiak Tower Crane (#84-052) (the "Crane") on May 30, 2008, at East 91st Street, New York County. All actions related to the Crane collapse have been joined for the supervision of discovery.

Plaintiff, Xhevahire Sinanaj, Administrator of the Estate of Ramadan Kurtaj ("Sinanaj") commenced this action to recover damages as a result of personal injuries suffered by and death of Ramadan Kurtaj on May 30, 2008, when the Crane collapsed.

Mattone argues that it is not a proper party to this lawsuit. Mattone asserts that it is not the owner, lessor, developer, project manager, general contractor, construction manager, or a subcontractor on the construction project at which the Crane was operating when it collapsed (the "Azure Project").

Mattone relies on an affidavit submitted by Joseph M. Mattone, the deposition before trial of Christopher Todd, and various contracts referred to during Mr. Todd's deposition that had been executed in connection with the Azure Project to support its assertion that it was not involved in or related to the Azure Project.

Joseph M. Mattone is Chairman and Chief Executive Officer of Mattone. In his affidavit, Mr. Mattone states that the Mattone entities did not have any involvement or duties related to the Azure Project.

Mr. Mattone states that the Azure Project is owned by 1765 First Associates, LLC ("1765").

Mr. Mattone goes on to state that 1765's principal members are MG 1765 First Avenue, LLC ("MG") and DM First Avenue, LLC ("DM"). Mr. Mattone states that he is the Chief Executive Officer of MG. Mr. Mattone then asserts that MG is a separate and distinct legal entity from Mattone.

Christopher Todd was deposed on behalf of Mattone in these proceedings. During his deposition, Mr. Todd explained that the Ground Lease for the Azure Project was executed between the New York City Educational Construction Fund and 1765.

Mattone submitted the Operating Agreement for 1765, which was executed between DM and MG.

Mattone states that neither MG nor DM are parties to this lawsuit.

In order to prevail on a motion for summary judgment, the proponent must

make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. See *Klein v. City of New York*, 89 N.Y.2d 883, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party. See *SSBS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 A.D.2d 583, 677 N.Y.S.2d 136 (N.Y.A.D. 1st Dept. 1998); *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184 (N.Y.A.D. 1st Dept. 1997).

Sinanaj refers to and incorporates by reference the Affirmation submitted by co-wrongful death Plaintiff, Donald R. Leo, Administrator of the Estate of his son, Donald Christopher Leo ("Leo") in the companion Leo matter, Index Number 117294/2008, Motion Sequence Number 69.

Sinanaj argues that Mattone is the developer and owner of the Azure Project. Sinanaj argues that MG and 1765 are merely shell corporations and that Mattone should be liable as the real developer.

During Mr. Todd's deposition, Leo asked Mr. Todd:

- Q: Again, do we have a situation where [Mattone] formed [MG], to limit its liability at [the Azure P]roject?
- A: Yes.
- Q: And did [MG], then take the additional step of forming with [DM] a further entity, [1765]?
- Q: Again, for the purpose of limiting liability, and distancing itself from any liability on [the Azure P]roject?
- A: Yes.

Sinanaj argues that Mattone should not be able to avoid its duties and responsibilities as developer/owner of the Azure Project by use of shell corporations.

It is true that, on occasion, the courts will disregard the separate legal personality of the corporation and assign liability to its owners where necessary to prevent fraud or to achieve equity. But, such liability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary. At the very least, there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored. *Billy v. Consol. Mach.*

Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 934 (1980)

Sinanaj submits media which purports to promote the Azure Project. One piece of media purports to be an offering document seeking residential tenants for the apartments of the Azure Project. Another piece of media is from the *New York Times* and purports to be an advertisement also seeking residential tenants for the Azure Project. Both the offering document and the *New York Times* ad bear the logo of Mattone and state "A joint development of the DeMatteis Organizations and the Mattone Group."

Sinanaj also includes a letter (the "RFP Letter") dated September 30, 2004, from "the DeMatteis Organizations" to CB Richard Ellis, Inc. ("CBRE"). CBRE was the contact accepting bids on what would become the Azure Project. The RFP Letter's first sentence states that, "The DeMatteis Organizations and The Mattone Group are pleased to submit our bid response to New York City Educational Construction Fund's ("ECF") Request for Proposal for [the Azure Project]."

MG and 1765 were created on or about March 9, 2005, four months after the RFP Letter was submitted. Mr. Todd admitted that MG was created for the sole purpose of shielding Mattone from liability and taxes for the Azure Project. Mr. Todd also admitted that the officers of MG are the officers of Mattone. The RFP Letter states that Mattone, not 1765 or MG, is the entity responsible for the bid on the Azure Project.

Sinanaj also includes a printout which purports to be of the website for Mattone. A large banner on the site boasts about Mattone's "Latest Projects" and features an ad for the Azure Project.

A motion to dismiss should be granted only when "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 A.D.2d 243, 712 N.Y.S.2d 526 (N.Y.A.D. 1st Dept. 2000).

Mattone has not conclusively established a defense as a matter of law.

At the very least, Mattone is holding itself out to the public as somehow involved in the Azure Project, which means there is a question of fact as to the extent of that involvement and what duties and/or liability that involvement imputes to Mattone in relation to the Crane.

Beyond the questions of fact and/or of credibility regarding Mattone's direct involvement in the Azure Project, there is Sinanaj's argument asking this Court to pierce the corporate veil between Mattone and MG and 1765.

An attempt of a third party to pierce the corporate veil...is an assertion of facts and circumstances which will persuade the court to impose the corporate

obligation on its owners...Generally, however, 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 plaintiff's injury...some showing of a wrongful or unjust act toward plaintiff is required ...The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene. *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 623 N.E.2d 1157 (1993).

There is a question of fact as to how much Mattone has dominated MG and 1765. Additionally, there is a question of fact as to whether Mattone's use of MG and 1765 for the sole purpose of shielding itself from liability, can be said to be a fraud, wrong, or unjust act against Sinanaj's Decedent, a worker who died as a result of a construction accident on the Azure Project, such that it would be appropriate to pierce the corporate veil and impute the duties and/or liabilities of MG and 1765 to Mattone.

Simply put, has Mattone abused the privilege of doing business in the corporate form by claiming responsibility for the Azure Project while simultaneously seeking to shirk any liability for that same project?

Finally, the Court notes that 1765 submitted an Affidavit in partial opposition to the Motion. 1765's Affidavit opposed Mattone's Motion only in so far as 1765 objected to Mattone's assertion that 1765 was the owner of the Azure Project.

Accordingly, it is the decision and order of this Court that Mattone's Motion dismissing Mattone as an improper party and Motion for Summary Judgment dismissing the Complaint and all cross-claims against Mattone is denied.

Accordingly, it is ORDERED that Mattone's Motion dismissing Mattone as an improper party and for Summary Judgment dismissing the Complaint and all cross-claims against Mattone is denied.

ENTER :

Dated: May 6, 2013



 MANUEL J. MENDEZ
 J.S.C. **MANUEL J. MENDEZ**
 J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE