W H Imports, Inc. v Next Level Floral Design, Inc.
2013 NY Slip Op 33434(U)
December 2, 2013
Supreme Court, New York County
Docket Number: 112765/10
Judge: Donna M. Mills

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT : DONNA M. MILLS PART 58
Justice

W H IMPORTS, INC.,

Plaintiff,

-v-

NEXT LEVEL FLORAL DESIGN, INC., NEXT LEVEL FLORAL DESIGN II, INC., NLFD.NC, INC. and NEXT LEVEL NURSERIES INC.,

Defendants.

INDEX NO. 112765/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1-3
Answering Affidavits– Exhibits	4
Replying Affidavits	5-6, 7

CROSS-MOTION: ✓ YES _____ NO

Defendants Next Level Floral Design, Inc. ("NLFD"), Next Level Floral Design II, Inc. ("NLFD II"), NLFD.NYC, Inc. ("NLFD NYC"), and Next Level Nurseries Inc. ("NL Nurseries") seek an Order vacating the default judgment against NLFD based on improper service and a meritorious defense, and dismissing plaintiff's Amended Verified Complaint as to all defendants, based on the fact that the Supplemental Summons and Amended Verified Complaint is a nullity; that the Court lacks personal jurisdiction over these defendants; that the allegations in the Amended Verified Complaint are barred by collateral estoppel, res judicata and discharge in bankruptcy. Plaintiff, W H Imports, Inc.

("WHI") opposes the motion and cross moves for leave, to the extent necessary, to amend the complaint, nunc pro tunc.

This is an action for breach of contract, based on a dispute of flowers allegedly sold to defendants NLFD and NLFD II. All orders were made by either Thomas Salamone ("Salamone"), the principal of NLFD and NLFD II, himself or by his employee, Manny Kostakis ("Kostakis"). This action was commenced by WHI on September 29, 2010 upon the filing of a Summons and Verified Complaint to recover a money judgment against the defendants NLFD and NLFD II, in the amount of $53,664.80, plus interest, costs and disbursements. The Summons and Verified Complaint were served upon both NLFD and NLFD II via the New York Secretary of State pursuant to CPLR §311 and Business Corporation Law §306 on October 8, 2010. Defendants failed to appear or answer, and on December 2, 2010, a judgment in the sum of $60,420.80 was duly entered in favor of WHI and against NLFD.

On April 15, 2013, WHI filed a Supplemental Summons and Verified Amended Complaint. The allegations in the Verified Amended Complaint are the same as those made in the original Verified Complaint, except that the Verified Amended Complaint includes NLFD NYC and NL Nurseries as defendants and an additional cause of action for alter ego liability.

On or about May 17, 2013, defendants served a notice of rejection pursuant to CPLR 3022 of the Supplemental Summons and Verified Amended Complaint. Defendants also served a Verified Answer denying all the material allegations of the Amended Verified Complaint and included thirteen Affirmative Defenses.

Pursuant to CPLR 5015(a), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just." This statute sets forth certain grounds for vacatur, including excusable default, newly-discovered evidence, fraud, misrepresentation, and lack of jurisdiction. As recognized by the Court of Appeals, the drafters of CPLR 5015 did not envision that this statute would provide an exhaustive list of the grounds for vacatur (see Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62, 68, 760 N.Y.S.2d 727, 790 N.E.2d 1156). Instead, a court retains "its discretionary power to 'vacate its own judgment for sufficient reason and in the interests of substantial justice' " (Goldman v. Cotter, 10 A.D.3d 289, 293, 781 N.Y.S.2d 28, quoting Woodson v. Mendon Leasing Corp., 100 N.Y.2d at 68, 760 N.Y.S.2d 727, 790 N.E.2d 1156; see Ladd v. Stevenson, 112 N.Y. 325, 332, 19 N.E. 842). However, "[a] court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect" (Matter of McKenna v. County of Nassau Off. of County Attorney, 61 N.Y.2d 739, 742, 472 N.Y.S.2d 913, 460 N.E.2d 1348 [internal quotation marks omitted]; see Long Is. Light. Co. v. Century Indem. Co., 52 A.D.3d 383, 384, 861 N.Y.S.2d 616; Quinn v. Guerra, 26 A.D.3d 872, 873, 811 N.Y.S.2d 238).

While this Court favors determination of actions on their merits . . ., this preference will not justify vacating a default judgment where the moving party fails to satisfy the two-prong burden of showing a meritorious defense and a reasonable excuse for the default..." (Eisenstein v Rose, 135 AD2d 369, 370 [1987]). Here, the

defendants failed to establish grounds warranting relief under CPLR 5015(a)(1). Under the circumstances of this case, the failure of the corporate defendants to receive service of process due to its breach of its obligation to keep a current address on file with the Secretary of State (Business Corporation Law § 306) does not constitute a reasonable excuse for its defaulting in this action (see Widgren v. 313 E. 9th Assoc., 295 A.D.2d 146 [2002]). Corporations are obligated to keep a current address on file with the Secretary of State and the failure to receive copies of process served upon the Secretary of State due to a breach of this obligation will not constitute a "reasonable excuse" for a corporation seeking to vacate a default under CPLR 5015 (subd. [a]) (Vogel v. Asgrow Mandeville Co., 74 A.D.2d 940, 426 N.Y.S.2d 137, affd. 55 N.Y.2d 675, 446 N.Y.S.2d 944, 431 N.E.2d 305; cf. Cecelia v. Colonial Sand & Stone Co., 85 A.D.2d 56, 448 N.Y.S.2d 617).

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." Jones Lang Wooton USA v LeBoeuf, Lamb, Greene & McRae, 243 AD2d 168, 176 (1st Dept 1998), quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 (2001). However,

where the allegation in the complaint consist only of bare legal conclusions, or of factual claims which are inherently incredible or are flatly contradicted by documentary evidence, the foregoing considerations do not apply. See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V., 258 AD2d 349 (1st Dept 1999).

Generally, to pierce the corporate veil and impose alter ego liability, a plaintiff must show that: (1) the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue; and (2) such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury (TNS Holdings., Inc. v. MKI Securities Corp., 92 N.Y.2d 335, 339–40 [1998]; Morris v. New York State Dept. of Taxation and Fin., 82 N.Y.2d 135, 141–42 [1993]; Teachers Ins. Annuity Assn. of Amer. v. Cohen's Fashion Optical of 485 Lexington Ave. Inc., 45 AD3d 317 [1st Dept 2007]). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (TNS Holdings, Inc. v. MKI Securities Corp., 92 N.Y.2d at 339, citing Morris v. New York State Dept. of Taxation and Fin., 82 N.Y.2d at 141–42). While this theory and its application depend on the facts and circumstances of each case, several factors have emerged in determining domination and control. These factors include: the absence of corporate formalities; inadequate capitalization of the corporation; personal use of corporate funds; commingling of personal funds; overlap in officers, directors and personnel; and common office space, phone numbers and addresses with other commonly owned corporate entities (see William Passalacqua Builders, Inc. v. Resnick

Developers South, Inc., 933 F.2d 131, 139 [2d Cir1991]). The theory of piercing the corporate veil involves a fact laden inquiry that is not well suited for resolution on a pre-answer, pre-discovery motion to dismiss (see Ledy v. Wilson, 38 AD3d 214, 214 [1st Dept 2007]; Kralic v. Helmsley, 294 A.D.2d 234, 235–36 [1st Dept 2002]; First Bank of Ams. v. Motor Car Funding, 257 A.D.2d 287, 294 [1st Dept 1999]; see also Berry Packing Corp. v. Atlantic Veal Corp., 302 A.D.2d 417, 418 [2d Dept 2003]).

Within the four corners of this complaint, it appears that cognizable claims for piercing the corporate veil as to defendants NLFD NYC and NL Nurseries have been stated. At the very least, plaintiff is entitled to obtain the necessary discovery to ascertain whether there are grounds to pierce the corporate veil of NLFD NYC and NL Nurseries (see First Bank of Ams. v. Motor Car Funding, 257 A.D.2d at 294). The Verified Amended Complaint includes allegations that: NLFD NYC and NL Nurseries are in the same business as the NLFD and NLFD II; the alter ego defendants are wholly owned by the same common sole principal as NLFD and NLFD II: Salamone; the alter ego defendants were created for the express purpose of taking over and carrying on NLFD's exact same business, in order to hinder, delay and defraud WHI.

In the absence of significant prejudice or surprise to the opposing party, leave to amend a pleading should be freely given (see CPLR 3025 [b], unless the proposed amendment is palpably insufficient or patently devoid of merit (see Bernardi v Spyratos, 79 AD3d 684, 688 [2010]). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of [permitting amendment]" (Otis El. Co. v 1166 Ave. Of

Ams. Condominium, 166 AD2d 307 [1990]). Prejudice to warrant denial of leave to amend requires " 'some indication that the defendant[s] ha[ve] been hindered in the preparation of [their] case or has been prevented from taking some measure in support of [their] position' "(Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 504 [2011]). "Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position" (Valdes v Marbrose Realty, 289 AD2d 28, 29 [2001]).

Here, the Court has already determined that the proposed amendment is neither palpably insufficient nor patently devoid of merit. The Court has considered defendants' other contentions and finds them without merit.

Accordingly, it is

ORDERED that defendants' motion to vacate the default judgment is denied; and it is further

ORDERED that defendants' motion to dismiss the Amended Verified Complaint is denied; and it is further

ORDERED that plaintiff's cross motion to file and serve the Verified Amended Complaint is granted, and the Verified Amended Complaint annexed to the moving papers is deemed served, nunc pro tunc.

Dated: 12/2/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION