

<b>Ciavarella v Zagaglia</b>
2013 NY Slip Op 34191(U)
November 21, 2013
Supreme Court, New York County
Docket Number: 650776/2010
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY  
PRESENT: Hon. Eileen Bransten, Justice PART 3

GABRIELE CIAVARELLA, individually and as a member of Manhattan Stone Imports, LLC, and in the right of and on behalf of Manhattan Stone Imports, LLC, and  
MANHATTAN STONE IMPORTS S.R.L.,

Plaintiffs,

- against -

Index No.: 650776/2010  
Motion Date: 06/19/13  
Motion Seq. No.: 008

LUCA ZAGAGLIA, individually and as a manager and member of Manhattan Stone Imports LLC and as manager and member of RLK Ventures LLC d/b/a Manhattan Stone and Tile, LLC, RLK VENTURES LLC, d/b/a Manhattan Stone and Tile LLC,  
MANHATTAN STONE IMPORTS LLC,

Defendants,

- and -

MANHATTAN STONE IMPORTS LLC,

Nominal Defendant.

The following papers, numbered 1 to 3, were read on this motion for Summary Judgment.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1

Answering Affidavits - Exhibits No(s) 2

Replying Affidavits No(s) 3

Cross-Motion:  Yes  No

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

DECIDED in accordance with the accompanying memorandum decision.

Dated: November 21, 2013

  
Hon. Eileen Bransten

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X

GABRIELE CIAVARELLA, individually and as a member of Manhattan Stone Imports, LLC, and in the right of and on behalf of Manhattan Stone Imports, LLC, and MANHATTAN STONE IMPORTS, S.R.L.,

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Defendants,

- *and* -

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Nominal Defendant.

-----X

BRANSTEN, J.

This case arises out of a business dispute between former partners in two Italian stone import companies. In motion sequence number 008, Plaintiff Gabrielle Ciavarella and Plaintiff Manhattan Stone Imports S.R.L.’s (“SRL,” collectively, “Plaintiffs”) move for partial summary judgment seeking to pierce the corporate veil. Defendant Luca Zagaglia (“Defendant”) opposes. For the reasons stated below, Plaintiffs’ motion is denied.

### **Background**<sup>1</sup>

From 2008 until 2010, Defendant Luca Zagaglia operated two businesses that imported stone from Italy for use in commercial construction projects in the United States, RLK Ventures LLC (“RLK”) and Manhattan Stone Imports LLC (“MSI LLC,” together with RLK, “Corporate Defendants”). (Plaintiffs’ Rule 19-a Statement of Undisputed Facts (“Stat.”) ¶¶ 1, 4, 12.) Zagaglia also operated a third business, SRL, which was an Italian company that Zagaglia used to pay the Corporate Defendants’ Italian stone suppliers. (Affirmation of Craig M. Flanders in Support of Plaintiffs’ Motion for Partial Summary Judgment (“Flanders Affirm.”) Ex. H, Zagaglia Depo. 178:2-180:9).

Plaintiff Ciavarella, based in Italy, provided contacts for Zagaglia and oversaw quality control for production of stones that were imported by Zagaglia. (Flanders Affirm. Ex. H, Zagaglia Depo. 169:20-170:8.) Ciavarella also ran some of SRL’s operations. (*Id.* 216:17-217:13.)

Zagaglia did not observe any corporate formalities, such as board meetings or electing officers and directors, while operating the Corporate Defendants. (Stat. ¶¶ 14-21,

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<sup>1</sup> The majority of facts in this section are derived from Plaintiffs’ Rule 19-a Statement of Undisputed Facts. Due to Defendants failure to submit a counter-statement specifically controverting the numbered paragraphs in Plaintiffs’ Rule 19-a Statement, Plaintiff’s 19-a Statement has been deemed admitted in its entirety by Zagaglia for purposes of this motion. *See* 22 N.Y.C.R.R. § 202.70 (Rule 19-a(d)). The remaining facts are derived from the Affirmation of Craig M. Flanders made in support of Plaintiffs’ motion for summary judgment.

6-10). Zagaglia also transferred various funds into and out of the Corporate Defendants' bank accounts without any documentation. (Stat. ¶¶ 5, 13, 44).

In the spring of 2009, Zagaglia suspected Ciavarella of stealing money from the SRL and their relationship deteriorated. (Flanders Affirm. Ex. H, Zagaglia Depo. 151:3-151:5, 394:19-396:23.) On June 29, 2010, Ciavarella filed the Complaint in this action, and on August 16, 2012, default judgment was entered against Corporate Defendants. Ciavarella now moves for partial summary judgment seeking to disregard the corporate form of the Corporate Defendants and hold Zagaglia personally liable for the default judgment amount.

### Analysis

#### **I. Summary Judgment Standard**

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to

require a trial of any issue of fact.” CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562. When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

## **II. Plaintiffs’ Motion for Summary Judgment**

In order to prevail on a summary judgment motion to pierce the corporate veil, a movant must show, by proof in admissible form, that: (1) the owners of a corporation exercised complete domination of the corporation with respect to the transaction attacked; and that (2) such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury. *See Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 40 (1st Dep’t 2012).

### *1. Domination and Control*

There are several factors that courts will examine to determine if a corporate owner has dominated and controlled a corporation. *See Fantazia Int’l Corp. v. CPL Furs N.Y., Inc.*, 67 A.D.3d 511, 512 (1st Dep’t 2009). “Factors to be considered include the disregard of corporate formalities . . . intermingling of funds; overlap in ownership, officers, directors, and personnel; common office space or telephone numbers; the degree

of discretion demonstrated by the allegedly dominated corporation; whether dealings between entities are at arm's length; [and] whether the corporations are treated as independent profit centers . . . . No one factor is dispositive." *Fantazia Int'l*, 67 A.D.3d at 512.

Here, there is little question that Zagaglia dominated and controlled both RLK and MSI LLC. First, Zagaglia did not observe any corporate formalities. *See Stat.* (Para ¶¶ 6-10, 14-21). Second, Zagaglia extensively intermingled the companies' funds, such that, for example, checks written to one company were actually deposited into the other's bank account. *See Stat.* ¶¶ 24, 37, 44, 46-48, 70). Third, Zagaglia withdrew funds from the Corporate Defendants for personal use. *See Stat.* 51, 64, 68. Fourth, the companies shared office space, telephone numbers, and email addresses. *See Stat.* 26, 40. Fifth, Zagaglia alone ran the daily operations and exercised complete discretion over both of the Corporate Defendants. *See Stat.* 49, 50, 52. Finally, dealings between Zagaglia and the Corporate Defendants, such as the various undocumented deposits, withdrawals and interest-free loans made between Zagaglia, MSI LLC and RLK, were not at arm's length. *See Stat.* 46, 48, 55, 60, 63, 65, 67-68).

2. *Domination Not Used to Injure Plaintiffs*

Next, after establishing that Zagaglia dominated and controlled the Corporate Defendants, the burden is on the Plaintiffs to show that Zagaglia exercised his corporate domination in order to perpetrate some wrong against the Plaintiffs. *See Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141-142 (1993) (“some showing of a wrongful or unjust act toward plaintiff is required”). However, the Plaintiffs have, at most, shown that there were a series of deposits and withdrawals by Zagaglia and that the corporations no longer have assets. *See Stat.* 51, 64, 68. Plaintiffs fail to show that the companies are now defunct for some fraudulent reason, rather than that they were simply not profitable.

A. *Fraudulent Transfers Are Not “Law of the Case”*

Plaintiffs contend that evidence of fraudulent transfers from Corporate Defendants to Zagaglia is sufficient to prove that Zagaglia abused the corporate form to defraud Plaintiffs. Plaintiffs further contend that they have sufficiently alleged fraudulent transfers in the Complaint, and that because default judgment has been entered against the corporate defendants, the fraudulent transfers are now “law of the case.”

Plaintiffs’ argument ignores the Court of Appeals’s holding that “preclusion under the law of the case contemplates that the parties had a ‘full and fair’ opportunity to litigate

the initial determination.” *People v. Evans*, 94 N.Y.2d 499, 502 (2000) (citing *Arizona v. California*, 460 U.S. 605, 619 (1983)). By definition, a default judgment against a third-party does not supply a “full and fair” opportunity to litigate, and therefore cannot form the basis of a law-of-the-case argument. *See Cobb v. City of New York*, 272 A.D.2d 117 (1st Dep’t 2000) (“Plaintiff is precluded from relitigating any issue that was necessarily decided and that is dispositive of his present claims, so long as he already had a full and fair opportunity to litigate the issue”). There has been no proof submitted and no argument heard regarding the fraudulent transfers alleged in the Complaint. Therefore, there has been no “full and fair” opportunity for Zagaglia to litigate the issue, and Plaintiffs’ law-of-the-case argument is unavailing.

B. *No Evidence Showing Illicit Transfers*

Plaintiffs’ uncontroverted Rule 19-a Statement of Material Facts shows that Zagaglia withdrew funds from both MSI LLC and RLK and that the corporations now have insufficient funds to repay their debts. *See Stat. §§ 11, 22, 48, 55*. However, Plaintiffs still fail to establish that the corporate shells were used to commit a wrong that resulted in Plaintiffs’ injuries. *See Morris v. New York State Dep’t of Taxation & Fin.*, 82 N.Y.2d 135, 141-142 (1993).

Plaintiffs' claims fail because, although Zagaglia withdrew some funds from corporate bank accounts, the record also reveals that Zagaglia deposited at least \$200,000 of his personal money into the Corporate Defendants. *See Stat.* ¶¶ 32, 59, 60, 65. The record also shows that Zagaglia paid various expenses of the Corporate Defendants and otherwise supported them financially. *See Stat.* ¶¶ 32, 59, 60, 65. The record is simply devoid of when, how, or why the Corporate Defendants no longer have assets. New York law requires that Plaintiffs "connect the dots" and demonstrate that Zagaglia's domination caused Plaintiffs' injuries. *See Fantazia Int'l Corp. v. CPL Furs N.Y., Inc.*, 67 A.D.3d 511, 513 (1st Dep't 2009) ("Plaintiff failed to demonstrate that Centropel's alleged domination and control of CPL caused this loss . . . plaintiff has offered no evidence whatsoever that CPL is either judgment-proof, or that it was put in that position by Centropel's domination").

Without showing that the corporate form was used to perpetrate a wrong against Plaintiffs, Plaintiffs have not carried their burden and summary judgment must be denied. *See Sound Commc'ns, Inc. v. Rack & Roll, Inc.*, 88 A.D.3d 523, 524 (1st Dep't 2011) ("The complaint merely alleges that Rack and Roll functioned as the moving defendants' alter ego. It is not sufficiently alleged that Rack and Roll's status as a[n] [LLC] was used to commit a fraud against plaintiff").

Plaintiffs' remaining contentions have been considered and are unpersuasive.

Defendant's other arguments are rendered moot.<sup>2</sup>

*(Order of the Court appears on the following page.)*

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<sup>2</sup> Zagaglia argues that Ciavarella has failed to properly allege standing to bring a derivative suit. However, Zagaglia waived the lack of standing defense because he failed to properly assert the lack of standing in either a motion to dismiss or his answer. *See, e.g., Sec. Pac. Nat. Bank v. Evans*, 31 A.D.3d 278, 280-81 (1st Dep't 2006) ("The Court of Appeals . . . [has] consistently held that . . . the failure to raise the defense of lack of standing in a motion to dismiss or answer results in a waiver of such defense") (citing *Dougherty v. City of Rye*, 63 N.Y.2d 989, 911 (1984)).

**CONCLUSION**

Accordingly, it is hereby


**ORDERED** that Plaintiffs' motion for partial summary judgment is DENIED; and  
it is further

**ORDERED** that the parties are directed to appear for a pre-trial conference at 60  
Centre Street, Part 3, Room 442 at 10:45 a.m. on January 14, 2014.

This constitutes the decision and order of the court.

Dated: New York, New York  
November 21, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.