

Stone v Rivera

2014 NY Slip Op 31101(U)

April 24, 2014

Supreme Court, New York County

Docket Number: 103085/2012

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

Index Number : 103085/2012

STONE, PAULA L.

vs

RIVERA, DELAND W.

Sequence Number : 002

OTHER RELIEFS

PART 11

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 to be decided in accordance with
the answered memorandum Decision and Order

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

RECEIVED
APR 29 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED

APR 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 24, 2014

_____, J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY, IAS PART 11

-----X
PAULA L. STONE

Index No.: 103085/2012

Plaintiff,

-against-

DELAND W. RIVERA, and DELAND MOVING &
STORAGE INC.,

FILED

Defendants.

APR 30 2014

-----X
JOAN A. MADDEN, J.:

COUNTY CLERK'S OFFICE
NEW YORK

Defendant Deland W. Rivera ("Rivera") moves for summary judgment dismissing the complaint against him and to stay disclosure pending the court's determination of the motion. Plaintiff Paula L. Stone ("Stone") opposes the motion and cross moves for discovery sanctions.

Background

Stone hired defendant Deland Moving & Storing Inc. ("Deland, Inc."), a moving company, to package, remove, transport and store Stone's furniture and other possessions, including certain possessions at issue in this action, which Stone alleges were not delivered to the final destination on April 20, 2012, or at any date thereafter. Stone maintains that on May 20, 2012, Rivera personally informed Stone that Deland Inc.'s employees had stolen the missing possessions. Subsequently, Stone claims that Rivera repeatedly apologized orally and in writing for the thefts, and informed her that three of Deland, Inc.'s employees had failed polygraph examinations, and had been terminated.

In this action, Stone asserts causes of action against defendants for (1) conversion; (2) negligence; and (3) breach of contract. With respect to Rivera, the complaint alleges that he

informed Stone that the three employees/agents failed a lie detector test, that certain of Stone's possession had been stolen by these employees/agents and that Rivera (and Deland, Inc.) had "negligently hired and/or supervised" the employees/agents." Complaint, ¶s 9, 10. The complaint seeks to hold defendants jointly and severally liable for damages in the amount of \$251,274.00, with interest from March 19, 2012. Rivera answered the complaint and asserted affirmative defenses and two counterclaims seeking sanctions based on allegations that Stone knew that Rivera acted solely in his corporate capacity and that allegations against him were false and in bad faith.

In her reply to the counterclaims, Stone alleges that Rivera exercised domination over the corporate defendant and personally profited from the breach of contract.

Rivera now moves to for summary judgment, arguing the claims against him conclusory and speculative. With respect to the breach of contract claim, Rivera submits the relevant contract and bills of lading showing that only Deland, Inc. and not Rivera had a contractual relationship with Stone. Rivera also asserts that his dealings with Stone were solely in a corporate capacity; that Rivera fails to make any allegation which would allow the imposition of personal liability by piercing the corporate veil, or that he participated in any tortious conduct, or directed, controlled, approved, or ratified a decision, which led to Stone's loss. In his affidavit, Rivera states that he did not participate in the move and did not see any of the items that were alleged to be stolen. He also states that he never made any representations to Stone that he intended to be bound as an individual under the agreement with Deland, Inc.

Stone opposes the motion, arguing that it is premature as discovery has not been completed and Rivera has not yet been deposed. Stone points out that the complaint alleges that Rivera negligently hired and/or negligently supervised the employees/agents who stole Stone's

possessions, and asserts that Rivera used his domination and control to hire and supervise the employees who committed the thefts. Stone also cross moves for sanctions, asserting that defendants have failed to comply with the court's discovery orders, including the direction of the court appointed Special Referee David Solomkin, who directed that Stone take Rivera's deposition on November 4, 2013.

In reply, Rivera asserts that he did not seek to circumvent the court's discovery orders, and that he sent Referee Solomkin a letter notifying the Referee and counsel for Stone of this motion.

By order dated January 16, 2014, this court adjourned Rivera's deposition pending a determination of Rivera's motion.

Discussion

On a motion for summary judgment, the proponent "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 from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

A court will disregard the corporate form when it is necessary "to prevent fraud or to achieve equity." Walkovszky v. Carlton, 18 NY2d 414, 417 (1966). To pierce the corporate veil it must be shown 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 NY2d 335, 339-40 (1998); Morris v. New York State Dept. of Taxation and Fin., 82 NY2d 135, 141-42 (1993). However, “while the courts are empowered to pierce the corporate veil in appropriate circumstances [...] the corporate form is not lightly to be disregarded.” Treeline Mineola, LLC v. Berg, 21 AD3d 1028, 1029 (2d Dept. 2005) quoting Bowles v. Errico, 163 AD2d 771 (3d Dept 1990). Although specific factual allegations –such as self-dealing, commingling of funds, use of corporate funds for personal use or lack of corporate formalities –in a complaint accord plaintiffs the benefit of a “favorable inference, bare legal conclusions and inherently incredible assertions are not entitled to favorable inference.” McMullan v HRH Construction, LLC, 2008 WL 827905, (N.Y. Sup. Ct. Mar. 13, 2008) quoting Sud v. Sud, 211 AD2d 423, 424 (1st Dept 1995). See Hartej Corp. v. Pepsico World Trading Co., Inc., 255 AD2d 233, 233 (1st Dep’t 1998).

Here, the complaint does not contain adequate allegations to state a claim for piercing the corporate veil, such that Rivera can be held individually liable for any breach of the contract entered into between the corporate defendant and Stone.

The remaining issues concern the viability of the claims against Rivera for negligent hiring/supervision and conversion. It is well established that “a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced”” Peguero v. 601 Realty Corp., 58 AD3d 556, 558 (1st Dept 2009), quoting, Espinosa v. Rand, 24 A.D.3d 102, 102 (1st Dept 2005)(internal quotation marks omitted) “The ‘commission of a tort’ doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act.” Id. at

559 (internal citations omitted).

Under these legal principles, it cannot be said that Rivera is entitled to summary judgment dismissing the claims against him for negligent hiring/supervision and for conversion, particularly as Rivera's deposition has not been conducted. Accordingly, Rivera's motion for summary judgment is granted only to the extent of dismissing the breach of contract claim against him.

Stone's cross motion for discovery sanctions is denied as the record provides no basis for awarding such sanctions.

Conclusion


In view of the above, it is

ORDERED that Rivera's motion for summary judgment is granted to the extent of dismissing the third cause of action against him for breach of contract and is otherwise denied; and it is further

ORDERED that Stone's cross motion is denied; and it is further

ORDERED that parties shall appear for a compliance conference on May 15, 2014 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: April 24, 2014


J.S.C.

FILED
APR 30 2014
COUNTY CLERK'S OFFICE
NEW YORK