

Gottesman Co. v Royce Hosiery, LLC

2014 NY Slip Op 32337(U)

September 3, 2014

Supreme Court, New York County

Docket Number: 150412-2010

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver
Justice

PART 10

GOTTESMAN COMPANY,

INDEX NO. 150412-2010

- v -

MOTION DATE _____

ROYCE HOSIERY, LLC, TCFKRH, LLC, DRIFT BOARDWEAR, LLC, VANADIUM, INC., WILSHIRE PROPERTIES, LLC, ALPHA 6 DISTRIBUTIONS, LLC, DRAGON COEUR, LLC, II-D, EDWARD ARNOLD, MATTHEW BRUDERMAN, BRUDERMAN BROTHERS, INC., KEYSTONE HOLDINGS, LLC, JOHN AND JANE DOES 1 THROUGH 100, JOHN DOE CORPORATIONS 1 THROUGH 10 and JOHN DOE ENTITIES 1 THROUGH 10

MOTION SEQ. NO. 001

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The following papers, numbered 1 to 6, were read on this motion for _____

Notice of Motion/ Order to Show Cause – Affirmation – Affidavit(s) – Exhibits	FILED SEP 04 2014	No(s). <u>1, 2</u>
Answering Affirmation(s) – Affidavit(s) – Exhibits		No(s). <u>3, 4</u>
Replying Affirmation – Affidavit(s) – Exhibits		No(s). <u>5, 6</u>

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

In this action to enforce a judgment pursuant to CPLR §5201(b), Defendants TCFKRH, LLC (formerly Royce Hosiery, LLC) (“Royce”), Drift Boardwear, LLC, Vanadium, Inc., LLC, Wilshire Properties LLC, Alpha 6 Distributions, LLC, Dragon Coeur LLC (“DC”), II-D, Edward Arnold (“Arnold”), Matthew J. Bruderman (“Bruderman”), Bruderman Brothers Inc., Bruderman Enterprises, Inc, and Keystone Holdings, LLC (“Keystone”) (collectively “Defendants”) move pursuant to CPLR §3212 for an Order granting Defendants summary judgment and dismissing Plaintiff Gottesman Company’s (“Plaintiff”) complaint. Plaintiff opposes this motion.

Plaintiff introduced Defendant Keystone to a deal involving the acquisition of Royce Hosiery Mills, Inc. (“Royce Inc.”) and arranged for Keystone’s purchase of Royce Inc. in a transaction worth over \$50 million dollars. Keystone created the entity Royce Hosiery LLC (“Royce”) solely to acquire Royce Inc. Plaintiff claimed it was entitled to a finders fee for the introduction of Royce Inc. to Keystone. Plaintiff brought suit against Keystone to recover its finders fee (Index No. 6033352-2003). Plaintiff won at trial and recovered a finder’s fee and Judgment was entered (after appeals) on September 25, 2007 for \$1,182,231.23. During discovery in the proceedings following the entry of judgment, Plaintiff uncovered evidence focusing on Royce and its relationship to Keystone. Plaintiff alleges that as of December 2004 (the date in which alleged transfers were made), Keystone was the sole owner of Royce and as such, Plaintiff can seek enforcement of the judgment against Royce and other companies under the control of Keystone. Therefore, Plaintiff brought suit against each of the named Defendants pursuant to CPLR §5201(b), alleging that the Defendants are using the corporate form as alter egos and as such, the individual defendants’ assets may be reached by piercing Keystone’s corporate veil.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

COUNTY CLERK'S OFFICE
NEW YORK

In support of their motion to dismiss, Defendants argue, through Affidavits from Arnold and Bruderman and through their attorney's affirmation, that Plaintiff cannot seek to enforce the judgment against any Defendants other than Keystone. Defendants aver that Keystone gave up its ownership interest in Royce and ceased acting as managing member and owner more than 6 years prior to the filing of the complaint. More specifically, Defendants argue that Plaintiff cannot seek to enforce the judgment it holds against Keystone as against Royce where Royce never owned Keystone or had an interest in it.¹ Arnold created a bank account in Royce's name after DC acquired total ownership of Royce and used it to disburse funds for his business and investments. Further, Defendants argue that Royce never received funds from Keystone after December 3, 2004. Defendants aver that all eight of Plaintiff's causes of action are subject to a six year statute of limitations and it cannot challenge any transfers of assets from Keystone to the other Defendants made prior to December 13, 2004. In 2005 and 2006, Royce, Drift Boardwear, and Alpha 6 transferred money to Keystone to pay for legal services required to defend against the original action against Keystone and for a concurrent lawsuit in Colorado. Plaintiff has not and cannot challenge these transfers, as transfers for legal services rendered in the course of a joint defense are not fraudulent.

Further, Defendants aver that the record lacks evidence to support piercing the corporate veil where Royce was never an owner of Keystone Holdings, and while both Arnold and Bruderman were owners of Keystone at one time, the complaint does not identify transfers made by either of them. Additionally, Defendants argue that closely associated corporations will not be considered alter egos if they were formed for different purposes, if their assets and finances aren't commingled or integrated, and the principals treat the two as separate and distinct. Defendants argue that it is impossible for Plaintiff to prove that Royce or any other Defendant perpetuated a wrong or injustice by funding Keystone's defense in its pending litigation.

In opposition, Plaintiff argues that Defendants are not entitled to summary judgment and Plaintiff is entitled to enforce its judgment against each of the above-listed corporate Defendants. First, Plaintiff avers that its claims are not barred by the Statute of Limitations where the first challenged transfer for \$3.06 million was made by Royce to DC on December 13, 2004 and all other challenged transfers were made after December 2004. Plaintiff avers that there are issues of fact concerning Keystone's ownership/control of Royce which permits Defendants' motion for summary judgment to be denied. In 2003, Keystone, the sole owner of Royce, had the power to assign and transfer the property of Royce and Plaintiff argues that Royce and Keystone are not genuinely separate entities. While Defendants claim that as of December 2004 Keystone was no longer the owner of Royce, Defendants have failed to show evidence how Keystone is different from Royce. Plaintiff argues there are issues of fact as to Arnold's conflicting representations as to his ownership of and involvement with Royce and these conflicting statements cannot be reconciled at this time, as neither Royce nor Keystone filed tax returns from 2004 forward. Post-2004, Plaintiff avers that Keystone was a vessel to which money from Royce and other Defendants could be transferred for Keystone to pay its expenses, all of which is substantiated by paperwork from the State Bank of Long Island. Plaintiff argues that all of these substantial transfers of money in and out of the bank account between Keystone and the other Defendants substantiates that the companies are not genuinely separate and have been used in an effort to hide funds from creditors and Plaintiff, specifically. Further, Plaintiff argues that Bruderman testified that he was unable to identify the purpose of any of the transfers. The transfers, which Defendants conceded (at least the existence of), were made from Royce to the individual Defendants and were unsupported by fair consideration. When asked about the transfers made by Royce to Drift, Alpha 6, Keystone, Vanadium, and DC for loans, consulting fees, and office expenses, Bruderman had no recollection or information about the transfers,

¹TCFKRH was created to replace Royce in order to avoid confusion between Royce Too, LLC and itself. For purposes of this motion, the Court refers to the company as Royce.

even though Bruderman was Owner/manager/officer for each of the above stated companies who received the transfers, as well as the manager of Royce. As to the loans to the various Defendants, Bruderman claims he has no information on repayment dates, interest rates, documentation for the loans, whether they have been repaid, and is unsure whether the loans were secured by collateral. Further, as to the transfers for alleged office expenses and consulting fees, Bruderman has no information as to the substance of these transfers. Thus, Plaintiff argues that it is clear that none of the transfers were supported by fair consideration.

Lastly, Plaintiff argues that Bruderman falsified facts in his Affidavit. He is a principal in all of the corporate Defendants except DC and in 2008, Plaintiff filed an ancillary judgment enforcement action against Bruderman and the parties settled the case where Bruderman swore that he had not (himself or on behalf of any of the other corporate Defendants), at any time after October 2003, received money or transfers from Keystone/Royce. Plaintiff argues that this statement is obviously false according to the documented transfers between the.

In Reply, Defendants argue that after a decade of pursuing the enforcement of this judgment, Plaintiff has no evidence which would support his causes of action that would allow it to enforce the judgment against any Defendant other than Keystone. Keystone did not have the authority/power to assign or transfer interest in Royce or any asset of Royce on December 13, 2004, six years prior to the filing of the complaint in this action, as Keystone had transferred all of its interest in Royce to DC prior to that date. Further, Defendants aver that the only transfers made out of Keystone since December 13, 2004 have been to its attorneys and none of the other Defendants received any transfers from Keystone within six years of the filing of the complaint. Additionally, Defendants argue that the Plaintiff has no basis for stating that transfers made between the Defendants (who are not the judgment debtors) were without fair consideration. If Defendant Arnold wants to transfer millions of dollars between two companies he owns, neither of which is a judgment debtor, he may do so without explanation.

Analysis

“A party moving for summary judgement must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material issue of fact.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). The motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212 [b]). To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717, 497 NE2d 680, 506 NYS2d 313 [1986]; *Zuckerman*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, 49 NY2d at 562). Summary judgment is a drastic remedy that should only be employed where no doubt exists as to the absence of triable issues (*Leighton v Leighton*, 46 AD3d 264 [1st Dept 2007]). Defendants are specifically moving to dismiss Plaintiff’s cause of action for piercing the corporate veil and for fraudulent conveyances pursuant to Debtor and Creditor Laws § 273, 274, 275, and 276.

Piercing the Corporate Veil/Alter Ego

Courts will pierce the corporate veil “and disregard the corporate form...whenever necessary ‘to prevent fraud or to achieve equity’”. (*internal citation omitted*) (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140 [1993]) Further, 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." (*Id.* at 141) Additionally, "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required ..." (*Id.* at 142) The first question to be addressed in assessing Plaintiff's claim for piercing the corporate veil is whether the individuals (Arnold and Bruderman) used the corporate form of Keystone and Royce as their alter egos and exercised complete dominion and control over both Keystone and Royce that requires the individuals to be held liable for Keystone's obligations to Plaintiff. (*See generally, Trans Intern. Corp. v Clear View Tech., Ltd.*, 278 AD2d 1 [1st Dept 2000]). The timing of ownership of both Keystone and Royce is particularly relevant to this cause of action. Prior to Keystone purchasing Royce Inc., Arnold owned 12.5% of Keystone, and Bruderman and two others owned the remainder of the company. On July 30, 2003, DC (wholly owned by Arnold) made a \$10 million dollar Bridge Loan ("Bridge loan") to Keystone in exchange for a \$12 million dollar note, and in the event that Keystone should default on the loan, DC would be granted a security interest in 100% of Keystone's interest in Royce. In September 2003, Arnold personally loaned \$3 million dollars to Keystone, and in return, Arnold increased his ownership in Keystone to 91.25%. In May 2004, according to Arnold's Affidavit, Arnold (on behalf of DC) sent Keystone a notice of default on the bridge loan.² As such, according to Arnold, as of June 2004, DC solely owned Royce (pursuant to Keystone's default on the bridge loan) and Arnold owned 91.25% of Keystone. There remain issues of fact as to the accuracy of Arnold's account of ownership of both Royce and Keystone where the timing of ownership varies among the individual Defendants and documents in this case: Bruderman states in his Response to the Information Subpoena (dated February 29, 2008) that Keystone transferred all of its interest in Royce to Arnold on March 14, 2004 and, conversely, the Asset Purchase Agreement, dated November 1, 2004, states that 100% of the interests of seller (Royce) are held by Keystone (C-60 of the document).

The inconsistencies regarding who owned both Keystone and Royce, and when, present genuine issues of fact as to whether the entities are independent of one another. Further, questions of fact remain as to whether Arnold and Bruderman used the corporate forms of Keystone and Royce as their alter egos and exercised complete dominion and control over both Keystone and Royce, allowing them as individuals to be held liable for Keystone's obligations to Plaintiff. (*See generally, Trans Intern. Corp. v Clear View Tech., Ltd.*, 278 AD2d 1 [1st Dept 2000]). "Factors to be considered [to pierce the corporate veil] include the disregard of corporate formalities; inadequate capitalization; 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 the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity. No one factor is dispositive." (*Fantazia Intern. Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]) The record reflects the presence of many of these factors, including specifically the overlap in ownership/officers/directors, the intermingling of funds, inadequate capitalization, and the fact that the dealing between the entities were at arms length, among others. Further, "to make out a cause of action for liability on the theory of piercing the corporate veil because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene... Piercing of the corporate veil is not a cause of action independent of that against the corporation; it is established when the facts and circumstances compel a court to impose the corporate obligation on its owners, who are otherwise shielded from liability." (Internal citations omitted) (*Tap Holdings, LLC v Orix Fin. Corp.*,

²The Court notes that at the time Arnold sent Keystone the notice of default on behalf of DC, Arnold owned 91.25% of Keystone.

109 AD3d 167, 174 [1st Dept 2013]) Thus, there remain issues of fact as to Arnold's and Bruderman's ownership of both Keystone and Royce, their control over the corporate entities, and whether the entities are truly separate and independent from one another. Further, Plaintiff has established that it was harmed as a result of the alleged fraud against it, where it is unable to enforce its judgment.

Fraudulent Conveyance

Multiple transfers were made by Royce to the named corporate defendants between 2004 and 2007 which are conceded by Defendants. Debtor and Creditor Law §273 states that, "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." (Debtor and Creditor Law § 273) "In order to prevail under Debtor and Creditor Law § 273-a, respondents were required to prove that the transferor was a defendant in an action for money damages at the time of the transfer, the transferor has not satisfied the resulting judgment and the transfer was made without fair consideration (*see Berner Trucking v Brown*, 281 AD2d 924, 925 [2001])...." (*Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004]) Defendants make their prima facie case by stating that the only transfers between the insolvent judgment debtor and the defendants were for legal services rendered which in this case are not considered fraudulent transfers (*HBE Leasing Corporation v. Frank*, 48 F.3d 623). Further, Defendants aver that all of the transfers which Plaintiff is attacking are between the non-judgment debtor (Royce) and businesses which Arnold and Bruderman personally own. Defendants successfully argue this cause of action should be dismissed where Debtor and Creditor Law § 273 is only applicable to transfers made between the *judgment debtor* and other corporations (emphasis added). However, the record raises an issue of fact as to whether the initial transfer made between Keystone and Dragon Couer/Arnold for Royce was made with fair consideration. "Fair consideration exists when, in exchange for property or an obligation, 'as a fair equivalent therefor, *and in good faith*, property is conveyed or an antecedent debt is satisfied' (Debtor and Creditor Law 272[a])[emphasis added]." (*Mega* at 555) Further, "the transfer of corporate assets to an insider establishes a lack of good faith as a matter of law, [and] we note that the principle requires the transfer of assets either directly to the insider or to an entity controlled by the insider" (*Id.*) Accordingly, there are issues of fact remaining as to whether the transfers were made with fair consideration and as such, Defendants' motion to dismiss this cause of action is denied.

To address Defendants' arguments as to the statute of limitations bar, the statute of limitations relevant to claims for piercing the corporate veil and fraudulent conveyances are subject to a six year statute of limitations. (CPLR 213(7)(8)) However, where there are issues of fact concerning Keystone's ownership and control over Royce, the Court cannot determine the date when the statute of limitations began to run (if at all) against the Defendants in this action. If Keystone and Royce are deemed independent and separate from one another, Defendants' argument that the cause of action should be barred by the statute of limitations would be more convincing. However, at this time, such a determination cannot be made by this Court. Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a conference in Room 422, 60 Centre Street, on October 28, 2014 at 9:30AM; and it is further

ORDERED that the movant shall serve a copy of this order, with Notice of Entry, upon all parties, within thirty (30) days of entry.

FILED

SEP 04 2014

George J. Silver
George J. Silver, J.S.C.

Dated: 'SEP 03 2014
New York County

COUNTY CLERK'S OFFICE
NEW YORK