

DiMauro v United LLC
2014 NY Slip Op 33334(U)
May 5, 2014
Supreme Court, Westchester County
Docket Number: 58165/12
Judge: James W. Hubert
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOSEPH DIMAURO and JOSEPH DIMAURO, AS TRUSTEE
OF THE DIMAURO TRUST UNDER AGREEMENT DATED
SEPTEMBER 28, 1984, AS AMENDED BY AMENDED
AGREEMENT OF TRUST, DATED JUNE 11, 1987,

Plaintiffs,

-against-

UNITED LLC, AGNES NANCY VARSAMES, PAUL A.
VARSAMES, LOUIS VARSAMES, JOHN VARSAMES,
JEAN VARSAMES, INDIVIDUALLY AND AS BENEFICIARY
OF THE JEAN VARSAMES IRREVOCABLE TRUST, PAUL
VARSAMES DEVELOPMENT, LLC and ANV ESTATES, LLC,

Defendants.

-----X
Hubert, A.J.S.C.

DECISION & ORDER

Index No. 58165/12
Motion Date: Nov. 25, 2013
Seq. No. 5

The following papers were read on this motion by defendants for an order pursuant to CPLR 3211(a)(7) for failure to state a cause of action; or alternatively pursuant to CPLR 3212 granting defendants summary judgment on their affirmative defenses and dismissing the complaint.

- Notice of Motion-Affidavit-Affirmation
- Memorandum of Law
- Answering Affirmation-Affidavit
- Replying Affirmation
- Exhibits

In the present action, the plaintiffs, as judgment creditors, seek, *inter alia*, to set aside allegedly fraudulent conveyances of funds from the defendant United's bank account maintained at Provident Bank, during the period from July 11, 2005 to August 15, 2006. The parties have been litigating the underlying dispute, through court or arbitration, since 2005.¹ The movants now assert that all causes of action based on allegations of fraud must be dismissed pursuant to CPLR 213(8) and to the extent that claims are asserted against the individual defendants, as members of the LLC, the action must be dismissed on the grounds of res judicata.

This motion is opposed by the plaintiffs. They assert that the single motion rule is intended to prohibit parties from making successive motions to dismiss a pleading (see CPLR 3211 [e]; *Ramos v City of New York*, 51 AD3d 753). CPLR 3211(e) provides, in pertinent part, “[a]t any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in subdivision (a), and no more than one such motion shall be permitted.” Although a motion based on the ground that the complaint fails to state a cause of action may be raised at any time, a party may not make a second motion pursuant to CPLR 3211(e) based on that ground.

¹A prior action for breach of contract and negligence in the performance of the construction agreement was dismissed, based upon the existence of an arbitration clause in the agreement. The defendants' motion to stay the action pending arbitration was granted (Bellantoni, J., 12/13/05); Joseph DiMaura obtained a \$1.1 million award against United; and the arbitration award was affirmed pursuant to CPLR 7510 (Adler, J., 11/30/11). The first decision on the motion to dismiss, states in pertinent part that: “ORDERED, that defendants' motion to dismiss the complaint pursuant to CPLR 3211 is GRANTED to the extent that any claim in the first and second causes of action based on DCL 273-a should be limited to the July 18, 2005 transfer and in all other respects is DENIED....” (Adler, J., 1/8/13). In accordance with CPLR 3101(a), discovery related motions have been decided in the Compliance Part (Lefkowitz, J., 6/17/13 and 7/29/13).

The Court finds that the successive motion, seeking relief pursuant to CPLR 3211(a)(7), is improper. Based upon the foregoing, the motion to dismiss is denied.

The branch of defendants' motion seeking dismissal of the complaint pursuant to CPLR 3212, in their favor on their affirmative defense that the action is barred by the statute of limitations is, likewise, denied. The prior motion to dismiss the complaint on statute of limitation grounds, made in this action, was denied (Adler, J., 1/8/13). When an issue of ultimate fact has been determined, that issue cannot be again litigated between the same parties. Accordingly, the prior order constitutes law of case, and that branch of the motion is denied.

With respect to the branch of the motion which seeks dismissal on the grounds of res judicata and Limited Liability Law § 609, defendants maintain that res judicata applies because the claims against defendants Paul A. Varsames and Louis Varsames in the "original" action and in the present action are "related to the same business deal."

The Court does not agree. Based upon a review of the Complaint in the 2005 action, it is clear that piercing the corporate veil was not an issue that was alleged or addressed (Bellantoni, J., 12/13/05). In the present action, however, the motion, pursuant to CPLR 3211(a)(7), to dismiss the cause of action to pierce the corporate veil, was denied (Adler, J., 1/8/13). Accordingly, the prior order constitutes law of case, and that branch of the motion which seeks dismissal on the grounds of res judicata and Limited Liability Law § 609, is denied.

A summary judgment motion may be denied as premature when "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212 [f]). "This is especially so when the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Gardner v Cason, Inc.*, 82 AD3d 930, 931 [2d Dept 2011]; see *Dietrich v Grandsire*,

83 AD3d 994 [2d Dept 2011]; *Nicholson v Bader*, 83 AD3d 802 [2d Dept 2011]; *Gruenfeld v City of New Rochelle*, 72 AD3d 1025 [2d Dept 2010]; *Amico v Melville Vol. Fire Co.*, 39 AD3d 784 [2d Dept 2007]). Where the party opposing the motion for summary judgment has not had the opportunity to conduct discovery of issues within the knowledge of the moving party, the court has held that the summary judgment motion was premature (*Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712 [2d Dept 2005]). In the case at bar, it is undisputed that depositions are outstanding.

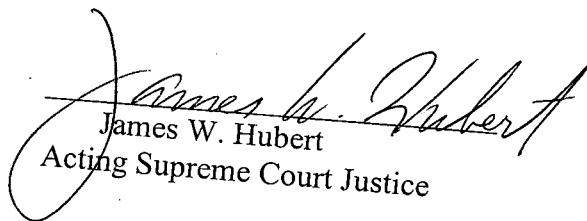
Accordingly, the motion for summary judgment is denied, with leave to renew upon the completion of discovery (*Jones v American Commerce Ins. Co.*, 92 AD3d 844 [2d Dept 2012]; *Evangelista v Kambanis*, 74 AD3d 1278 [2d Dept 2010]; *Gruenfeld v City of New Rochelle*, 72 AD2d at 1026).

Upon the foregoing papers, it is ORDERED that the motion is denied in its entirety; and it is further

ORDERED that movant shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry; and it is further

ORDERED that all counsel shall appear for a conference in the Compliance Part, Courtroom 800, on May 29, 2014 at 9:30 a.m. as previously directed.

Dated: White Plains, New York
 May 5, 2014


 James W. Hubert
 Acting Supreme Court Justice