Strachnow v Ralph Ave. Estates LLC
2015 NY Slip Op 30293(U)
March 3, 2015
Supreme Court, Kings County
Docket Number: 502851/14
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of February, 2015.

PRESENT:

HON. KAREN B. ROTHENBERG,
Justice.

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AKSANA STRACHNOW,

Plaintiff,

- against -

Index No. 502851/14

RALPH AVENUE ESTATES LLC,

Defendant.

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The following papers numbered 1 to 5 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 3-4
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5

Upon the foregoing papers in this declaratory judgment action, plaintiff, Aksana Strachnow (Strachnow), a judgment creditor, moves, by order to show cause, for an order, pursuant to CPLR 6301, granting her a preliminary injunction enjoining defendant, Ralph Avenue Estates LLC (RAE), from transferring and/or encumbering the real property located at 119 Ralph Avenue in Brooklyn (Property) if RAE does not satisfy Strachnow's money judgment against non-party, Irina Khaimov (Khaimov).

RAE cross-moves for an order dismissing the complaint, pursuant to CPLR 3211, and imposing sanctions, pursuant to 22 NYCRR § 130-1.1.

Background

Strachnow, on July 28, 2008, was granted a $143,065.72 judgment against Khaimov, Ilya Davidov and Russian Odessa Corp., jointly and severally, in the Supreme Court action entitled *Strachnow v Davidov, et al.*, Kings County Index No. 16629/08 (Money Judgment).

It appears that Nikki-Kind, Inc. (Nikki-Kind), a Nevada Corporation, acquired the Property on July 17, 2006 and subsequently sold the Property to RAE on December 4, 2013.

Strachnow commenced this action on April 2, 2014, by order to show cause, seeking a declaration that her Money Judgment is a lien on the Property and that RAE purchased the Property from Nikki-Kind subject to her Money Judgment.

Strachnow's unverified complaint alleges, upon information and belief, that Khaimov was the president and/or an officer of Nikki-Kind when the company was dissolved on July 17, 2005 (Complaint at ¶¶ 6-7) and that Khaimov, consequently, "became the de-facto owner" of Nikki-Kind's corporate assets, including the subject Property (*id.* at ¶¶ 8-10). Strachnow further alleges that: (1) the Judgment "immediately became a lien on the Property upon the dissolution of Nikki-Kind," by operation of law; (2) Nikki-Kind subsequently transferred the Property to RAE by a December 4, 2013 deed; and (3) RAE "took title to the Property subject to the Judgment" (*id.* at ¶¶ 11-13).

Strachnow, in support of her instant application for injunctive relief, submits an attorney affirmation explaining her "assumption" that Khaimov was an officer of Nikki-Kind based on "the fact that a federal lien against Khaimov was recorded against the Property."[1] Strachnow produces a computer printout from the Automated City Register Information

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[1] *See* the March 31, 2014 Affirmation of Jay S. Markowitz, Esq. in support of Strachnow's motion (Markowitz Affirmation) at ¶ 8.

System (ACRIS) website of the New York City Register's Office which reflects that the United States of America recorded a four-page document identified as a "FEDERAL LIEN, OTHER" against Khaimov at City Register File Number (CRFN) 2010000371463 on November 5, 2010, encumbering the Property. Strachnow also produces a printout from the Bizapedia.com website, which reflects that Nikki-Kind's "Status" was "Inactive – Dissolution By Proclamation/Annulmen[t]" since July 11, 2005. Strachnow contends that "upon the dissolution of Nikki-Kind, its corporate officers, including but not limited to Irina Khaimov, stepped into the shoes of Nikki-Kind . . ." (Markowitz Affirmation ¶ 10). Essentially, Strachnow seeks to pierce Nikki-Kind's corporate veil by arguing that Khaimov was "doing-business-as" Nikki-Kind when Nikki-Kind first acquired the Property in July 2006 and when it transferred the Property to RAE in December 2013 (*id.* at ¶¶ 11-12).

RAE opposes Strachnow's motion and cross-moves to dismiss the complaint based on the affirmation of its counsel, who contends that "[t]he predicate of plaintiff's motion is the untenable proposition that when a corporation is dissolved, the officers of the corporation become the owners of the dissolved corporation's assets."[2] RAE's counsel also argues that "a dissolved corporation may convey assets it acquired when it was incorporated . . ." and "corporate officers do not have an ownership or proprietary interest in a corporation and therefore would not acquire corporate assets . . ." (*see* Rosengarten Affirmation ¶¶ 8-9). RAE's counsel relies on Section 78.585 of the Nevada Revised Statutes, which provides that a dissolved corporation "continues as a body corporate for the purpose of . . . enabling it gradually to . . . dispose of and convey its property . . ." (*id.* at Exhibit C).

[2] *See* the July 21, 2014 affirmation of Solomon Rosengarten, Esq. in opposition to Strachnow's motion and in support of RAE's cross motion (Rosengarten Affirmation) at ¶ 6.

RAE, in any event, further asserts that Nikki-Kind was reinstated on May 17, 2010, well before Nikki-Kind sold the Property to RAE in December 2013 (*id.* at ¶¶ 10, 21-24). RAE produced a July 17, 2014 computer printout from "SilverFlume Nevada's Business Portal" reflecting that Nikki-Kind was incorporated in Nevada on April 20, 2005 and Iosif Khaimov was the sole officer and director of the company in April 2011 (*id.* at Exhibit A). RAE also produced Nikkki-Kind's April 30, 2011 corporate filing with the Nevada Department of State confirming that: (1) it was an "active" corporation in April 2011; and (2) Iosif Khaimov was the sole officer and director in April 2011 (*id.* at Exhibit B).

Strachnow, in reply, challenges the adequacy of RAE's moving submission because "no Affidavit from Irina Khaimov was provided . . .giving any explanation . . . as to why the Federal Tax Lien indicated on ACRIS . . . was recorded against the [P]roperty . . ." and "no evidence was presented" regarding Nikki-Kind's purported reinstatement in 2010.[3]

Discussion

(1)

Strachnow's Motion For An Injunction

CPLR 6301 provides, in relevant part, that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." The purpose of CPLR 6301

[3] *See* the December 17, 2014 reply affirmation of Jay S. Markowitz, Esq. in further support of Strachow's motion and in opposition to RAE's cross motion at ¶ 4.

is to preserve the status quo and to prevent dissipation of property which may make a judgment ineffectual (*Rattner & Associates v Sears, Roebuck & Co.*, 294 AD2d 346 [2002]).

Pursuant to CPLR 6301, the party seeking injunctive relief must demonstrate "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *see also W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981]). A preliminary injunction is a drastic remedy, which should be exercised "sparingly" (*Town of Porter v Chem-Trol Pollution Servs., Inc.*, 60 AD2d 987, 988 [1978]) and the movant's burden of proof is "particularly high" (*Council of City of New York v Giuliani,* 248 AD2d 1, 4 [1998], *lv to appeal dismissed in part, denied in part* 92 NY2d 938 [1998]).

Here, Strachnow seeks an injunction enjoining RAE from transferring and/or encumbering the Property that it purchased from Nikki-Kind on the ground that Khaimov "accomplished" the sales transaction when she was doing business as Nikki-Kind.[4] Essentially, Strachnow attempts to pierce Nikki-Kind's corporate veil in an effort to reach the corporate Property sold to RAE to satisfy her Money Judgment against Khaimov.

"As a general rule, a court will not pierce the corporate veil or disregard corporate form in the absence of 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' (*Letizia v Executive Coach Auto Repair, Ltd.*, 213 AD2d 382, 382 [1995] [quoting *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]; *see also East Hampton Union Free School District v Sandpebble Builders, Inc.*, 66 AD3d 122, 126

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[4] *See* Markowitz Affirmation ¶¶ 10-11.

[2009]). "The party seeking to pierce the corporate veil must further establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Hyland Meat Co. v Tsagarakis*, 202 AD2d 552, 552 [1994]).

Strachnow's motion papers contain a single paragraph regarding her likelihood of success on the merits based on "clear evidence":

> "There is a high likelihood of success on the merits in this lawsuit. There is clear evidence that Nikki-Kind was dissolved and that Irina Khaimov was doing business as Nikki-Kind in her capacity as an officer of Nikki-Kind. There is further clear evidence that [RAE] purchased the Property subject to the Judgment" (Markowitz Affirmation ¶ 18).

However, the only "evidence" Strachnow produced is: (1) ACRIS search results listing all documents recorded against the Property, including a federal lien against Khaimov and (2) a computer printout from Bizapedia.com reflecting that Nikki-Kind was listed as an "inactive" foreign business corporation on that unofficial website as of October 17, 2012.[5] Conspicuously missing from Strachnow's motion is any evidence that Khaimov exercised domination and control over Nikki-Kind with respect to the sale of the Property. Consequently, Strachnow has failed to demonstrate a likelihood of success on the merits, warranting the denial of her instant motion for a preliminary injunction.

(2)

RAE's Cross Motion To Dismiss

In considering a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, "the pleadings must be liberally construed" and "[t]he sole criterion is

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[5] The Bizapedia.com printout from the website states that "Bizapedia.com is not affiliated with the New York Department of State" (*see* Markowitz Affirmation Exhibit E).

whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Dinerman v Jewish Bd. of Family & Children's Servs., Inc.*, 55 AD3d 530, 531 [2008]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]).

The court may consider evidentiary material submitted by the movant to establish conclusively that no viable causes of action exist (*Simmons v Edelstein*, 32 AD3d 464, 465 [2006]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). A court considering a motion to dismiss must both accept as true the allegations in the complaint and afford the plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Great Eagle Intl. Trade, Ltd. v Corporate Funding Partners, LLC*, 104 AD3d 731 [2013]). In essence, the court must determine whether the alleged causes of action are sustainable "upon any reasonable view of the facts as stated" (*Schneider v Hand*, 296 AD2d 454, 454 [2002]; *see also Manfro v McGivney*, 11 AD3d 662, 663 [2004]).

"Conduct constituting an abuse of the privilege of doing business in the corporate form is a material element" of a cause of action asserted under the doctrine of piercing the corporate veil (*East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 127 [2009]). Here, nothing in the unverified complaint asserts or suggests that Khaimov failed to respect Nikki-Kind's separate legal existence, treated its corporate assets as her own, undercapitalized the corporation, did not respect corporate formalities, or that Khaimov, in any respect, *abused* the privilege of doing business in the corporate form. Consequently, the complaint fails to allege a material element of a cause of action against RAE under the theory of piercing Nikki-Kind's corporate veil.

Under the circumstances presented here, the imposition of sanctions is unwarranted. Accordingly, it is hereby

ORDERED that Strachnow's motion, pursuant to CPLR 6301, for a preliminary injunction enjoining RAE from transferring and/or encumbering the Property if RAE does not satisfy Strachnow's Money Judgment against Khaimov is denied; and it is further

ORDERED that the branch of RAE's motion, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action is granted; and it is further

ORDERED that the branch of RAE's motion for the imposition of sanctions, pursuant to 22 NYCRR § 130-1.1, is denied.

This constitutes the decision, order and judgment of the Court.

E N T E R,

J. S. C.

Karen B. Rothenberg
Justice, Supreme Court