DePetris v Traina
2015 NY Slip Op 30866(U)
May 21, 2015
Sup Ct, Suffolk County
Docket Number: 11-17146
Judge: H. Patrick Leis III
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SHORT FORM ORDER

INDEX No. 11-17146
CAL No. 14-00200OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 16 - SUFFOLK COUNTY

PRESENT:

Hon. H. PATRICK LEIS III
Justice Supreme Court

MOTION DATE 7-24-14 (#003)
MOTION DATE 12-18-14 (#004)
ADJ. DATE 2-19-15
Mot. Seq. # 003 - MotD
004 - XMD

WILLIAM B. DEPETRIS,

Petitioner,

- against -

JOSEPH TRAINA, JR.,

Respondent.

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Upon the following papers numbered 1 to 19 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers 10 - 16 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 17 - 19 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the petitioner for an order pursuant to CPLR 3212 granting summary judgment in his favor is deemed a re-notice of the petition herein; and it is further

ORDERED that this petition for a turnover order pursuant to CPLR 5225 and CPLR 5227 is granted to the extent that the matter is set down for an immediate trial, and is otherwise denied; and it is further

ORDERED that the cross motion by the respondent for an order pursuant to CPLR 3212 granting summary judgment dismissing the petition is denied.

This special proceeding was commenced to enforce a judgment obtained by the petitioner in an action entitled *William B. DePetris v J.T. Jr. Club, LLC doing business as Havens Bar*, Supreme Court, Suffolk County, Index No. 05-07187 (underlying action). Said action was commenced to recover for personal injuries suffered by the petitioner William B. DePetris (DePetris) when he was assaulted after visiting said bar. It is undisputed that the petitioner, as the Petitioner in the underlying action, obtained a

default judgment against the defendant in the underlying action, J.T. Jr. Club, LLC (the LLC) based on the latter's failure to answer or appear in said action. It is also undisputed that the respondent, Joseph Traina, Jr. (Traina) was the sole member of the LLC, and that the LLC has not made any payment on the outstanding judgment.

In his petition, DePetris alleges that the LLC and Traina "are one and the same, and that ... Traina is the alter ego of [the LLC]," that Traina "intentionally and willfully dissipated and/or wasted assets and funds" of the LLC, and that Traina violated Debtor and Creditor Law 273-a. DePetris now moves for summary judgment in this special proceeding seeking to "pierce the corporate veil" of the LLC, and to enforce said money judgment against Traina pursuant to CPLR 5225 and the Debtor and Creditor Law. In support of the motion, DePetris submits the affirmation of his attorney, the pleadings, a copy of the preliminary conference order in this special proceeding, and the transcript of Traina's deposition testimony herein. The petition includes as exhibits, a copy of the money judgment obtained by DePetris, and Traina's deposition held in the underlying action.

It is well settled that a judgment creditor may utilize CPLR 5225(b) as a method to pierce the corporate veil (***Morris v New York State Dept. of Taxation and Finance***, 82 NY2d 135, 603 NYS2d 807 [1993], and as the means to set aside a transfer made by a judgment debtor to defraud its creditors (***Planned Consumer Mktg. v Coats & Clark***, 71 NY2d 442, 527 NYS2d 185 [1988]; ***Matter of WBP Cent. Assoc., LLC v DeCola***, 50 AD3d 693, 855 NYS2d 210 [2d Dept 2008]). Here, the petitioner has properly commenced a special proceeding as required by said statute. However, this special proceeding is not a plenary action and, as such, a motion for summary judgment is an improper procedural vehicle herein (*see e.g.* ***New York v Long Island Airports Limousine Service Corp.***, 110 Misc2d 338, 442 NYS2d 365 [1981] *affd as mod* 91 AD2d 1149, 458 NYS2d 751 *on reargument* 96 AD2d 998, 467 NYS2d 93 *affd* 62 NY2d 846, 477 NYS2d 613; ***Hecht v Maness***, 23 Misc2d 889, 206 NYS2d 587 [App Term, 2d Dept 1960]). Nonetheless, a court is required to make a summary determination of a special proceeding using the same test that is applied to a summary judgment motion (see CPLR 409[b]; ***Mega Personal Lines Inc. v Halton***, 297 AD2d 428, 746 NYS2d 204 [3d Dept 2002]; ***Lefkowitz v McMillen***, 57 AD2d 979, 394 NYS2d 107 [3d Dept 1977]).

At his deposition held relative to the underlying action, Traina testified that he was the "sole owner" and only member of the LLC, that the LLC purchased the subject bar and commenced operations in 2002, and that said bar closed in the beginning of 2007, when its lease expired. He stated that the LLC purchased the bar for $100,000 of which he contributed $10,000, with the remainder coming from a friend and his father, and that, although there were no formal agreements, he hoped to be able to repay the "loans" from the profits generated from the business. He indicated that the LLC renovated the existing bar approximately one year later, and that the value of the furniture, fixtures and equipment purchased in 2003 was "maybe two hundred thousand dollars. I really don't know ..." Traina further testified that he was active in the operations of the bar until the middle of 2004, when he realized that he "was a terrible operator and needed to get out of the business and tried to sell it, tried to extend the lease, [and] was unable to do so, and I took another job in the city and hired Doug Fierst" as manager of the bar. He stated that "[t]hroughout the course of the lease my father had provided, on several occasions, short-fall funding. We weren't able to pay bills, rent, invoices." He indicated that the LLC maintained a business checking account at Capital One Bank, that the LLC had no other bank accounts, and that he

and his sister were signatories on said account. Traina further testified that the LLC had not transferred or disposed of any property since 2005, that the LLC was not owed any money, and that he was not paid, neither did he make any personal withdrawals from the LLC, since 2005. He stated that he was aware of DePetris' underlying action, and that he did not submit a claim to the insurance carrier for the LLC because the "incident happened off of the property." He indicated that "[b]y the end of the lease, business was so bad ... I couldn't afford to order anything, so we had just depleted everything that was left," that the furniture, fixtures and equipment purchased in 2003 was "left in place" when the bar closed its doors. Traina further testified that the items were left in place due to "laziness," and that he believes that the landlord threw everything out.

At his deposition in this special proceeding, Traina testified that he did not recall the details of certain credits and debits as reflected in specific bank statements of the LLC for the years 2004 to 2005, and that the LLC was not always able to meet its liabilities without help from family members. He stated that the March 31, 2006 bank statement for his personal account reflected deposits from his work at a firm in the city, and that he did not recall the source of a deposit for $15,000 dated February 21, 2006. He also indicated that deposits to his personal bank account made on December 27, 2007, June 7, 2007, July 11, 2007, September 19, 2007, and October 9, 2007 were all transfers from his savings account to his checking account. Traina further testified that he did not know the meaning of, or recall the details regarding, certain entries in the LLC's ledgers purported by DePetris to have been prepared by the LLC's accountants. He stated that he did not recall the value of the fixtures or equipment left in place upon the closing of the bar, and that most of the furniture was "built in."

In order to prevail in an action to pierce the corporate veil, a plaintiff must show that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see* ***Matter of Morris v New York State Dept. of Taxation and Fin.***, 82 NY2d at 141, 603 NYS2d at 810-811; ***Seuter v Lieberman***, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil (*see* ***Matter of Morris v New York State Dept. of Taxation and Fin.***, 82 NY2d at 141-142, 603 NYS2d at 811; ***Abelman v Shoratlantic Dev. Co.***,153 AD2d 821, 545 NYS2d 333 [2d Dept 1989]). It is well established that a business can lawfully be incorporated for the very purpose of enabling its proprietor to avoid personal liability (***Seuter v Lieberman***, *supra*). Absent a showing that "control and domination was used to commit wrong, fraud, or the breach of a legal duty, or a dishonest and unjust act" New York will not allow a piercing of the corporate veil (*see* ***Electronic Switching Indus., Inc. v Faradyne Elec. Corp.***, 833 F2d 418, 424 [2d Cir 1987]). Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (*see* ***Millennium Const. v Loupolover***, 44 AD3d 1016, 845 NYS2d 110 [2d Dept 2007]; ***Shisgal v Brown***, 21 AD3d 845, 801 NYS2d 581 [1st Dept 2005]). In addition, the decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" (***Weinstein v Willow Lake Corp.***, 262 AD2d 634, 635, 692 NYS2d 667 [2d Dept 1999]). "Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (***First Bank of Americas v Motor Car Funding***, 257 AD2d 287, 294, 690 NYS2d 17 [1st Dept 1999]; *see also* ***Damianos Realty Group, LLC v Fracchia***, 35 AD3d 344, 825 NYS2d 274 [2d Dept 2006]).

Here, it is determined that there are issues of triable fact, at a minimum, as to whether Traina failed to adhere to corporate formalities, inadequately capitalized the subject business operation, commingled assets, or used corporate funds for personal use (citations omitted). That is, DePetris has failed to establish his prima facie entitlement to a judgment "piercing the corporate veil." Similar to a proponent of a summary judgment motion, the petitioner must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Furthermore, the parties' competing interests must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). In a special proceeding, the court is entitled to make a summary determination to the extent that no triable issues of fact are raised, and to make any orders permitted on a motion for summary judgment (CPLR 409[b]).

In addition, DePetris has failed to establish his entitlement to a judgment that Traina has violated the Debtor and Creditor Law. Debtor and Creditor Law 273-a provides that "[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." Debtor and Creditor Law 270, entitled "Definition of terms" provides that the term "'[c]onveyance' includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance." "To prevail on such a fraudulent conveyance claim, the movant must establish three elements: (1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final judgment has been rendered against the transferor that remains unsatisfied (***Fischer v Sadov Realty Corp.***, 34 AD3d 632, 633, 829 NYS2d 108, 110 [2d Dept 2006]; *see also* ***Neshewat v Salem***, 365 FSupp2d 508 [SDNY 2005]; ***Loreley Fin. (Jersey) No. 4 Ltd. v UBS Ltd.***, 40 Misc3d 323, 963 NYS2d 566 [Sup Ct, New York County 2013]).

In her affirmation in support of the motion, counsel for the petitioner contends that "[b]y virtue of the acts constituting the intentional waste and dissipation of the furniture, fixtures and equipment of [the LLC], the assets of [the LLC] were conveyed without fair consideration." Here, there are issues of triable fact including, but not limited to, the value of the aforesaid assets of the LLC at the time it closed its doors, whether Traina intentionally wasted said assets, and if the facts and circumstances regarding Traina's actions can be found to be a conveyance under the applicable statute.

Traina now cross moves for summary judgment dismissing the petition. In support of his motion, Traina submits, among other things, the affirmation of his attorney, a copy of the police report regarding the subject assault and DePetris' supporting deposition statement to the police, and a transaction account statement from one of his father's companies. The "police" documents are unauthenticated and have not been considered by the Court in making this determination. It is a prerequisite to the admission of official records of a court or government office offered in evidence by a party to an action that the document be authenticated as being what it purports to be in order to be

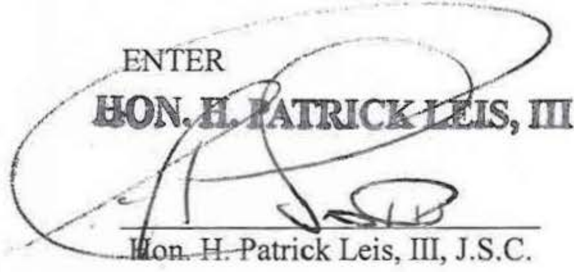
admissible under exceptions to hearsay rule (CPLR 4540; ***People v Ricks***, 71 AD3d 1444, 899 NYS2d 756 [4th Dept 2010]; ***People v Smith***, 258 AD2d 245, 697 NYS2d 783 [4th Dept 1999]). The transaction account statement is unauthenticated and has not been considered by the Court in making this determination. It is a prerequisite to the admission of a private document offered in evidence by a party to an action that the authenticity and genuineness of the document be established (*see* ***Horowitz v Kevah Konner, Inc.***, 67 AD2d 38, 414 NYS2d 540 [1st Dept 1979]; ***Prestige Fabrics v Novik & Co.***, 60 AD2d 517, 399 NYS2d 680 [1st Dept 1977]).

In his affirmation, counsel for Traina contends, among other things, that the "police" documents show that the LLC did not have liability insurance coverage as the subject incident "did not take place at the premises operated by [the LLC]," and that Traina had an honest belief that it was not necessary to notify the LLC's insurance carrier. The submission does not include a copy of the subject insurance policy or policies, or any evidence that Traina reasonably believed, under all the circumstances, in LLC's nonliability for the subject incident (*see e.g.* ***Argentina v Otsego Mut. Fire Ins. Co.***, 86 NY2d 748, 631 NYS2d 125 [1995]; ***Hermitage Ins. Co. v Arm-ing, Co.***, 46 AD3d 620, 847 NYS2d 628 [2d Dept 2007]). In addition, the submission does not establish Traina's prima facie entitlement to summary judgment herein regarding the allegation that he controlled and dominated the LLC or the allegation that he violated the Debtor and Creditor Law, requiring a denial of his cross motion.

Accordingly, the matter shall be set down for an immediate trial to determine the extent of Traina's liability, if any (*see* CPLR 410).

The petitioner is directed to serve forthwith a copy of this order with notice of its entry upon all parties to this proceeding. The petitioner is also directed to serve and file a note of issue and certificate of readiness. Following such service, the petitioner shall serve copies of this order, the note of issue and certificate of readiness, together with proof of service and the fee paid, upon the Calendar Clerk, who is then directed to place this matter on the Trial Assignment Calendar for the next available date.

Dated: 5/21/15
Central Islip, NY



____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**