

**612 Wortman, LLC v Varsity Bus Co., Inc.**

2015 NY Slip Op 32560(U)

February 6, 2015

Supreme Court, Nassau County

Docket Number: 601121/14

Judge: Anthony L. Parga

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY  
Present: HON. ANTHONY L. PARGA  
Justice

PART 6

-----X  
612 WORTMAN, LLC.,

Plaintiff,

-against-

INDEX NO. 601121/14

MOTION DATE: 01/09/15

SEQUENCE NO: 003,004,  
005

VARSITY BUS CO., INC., ANDREW  
BRETTSCHEIDER and STANLEY  
BRETTSCHEIDER,

XXX

Defendants.

-----X

Notice of Motion, Aff, Affm, & Exhs.....	<u>1</u>
Notice of Def. Motion, Affm, Affs. & Exhs.....	<u>2</u>
Memorandum of Law in Support of Def. Motion.....	<u>3</u>
Notice of Cross Motion, Affms, Exhs.....	<u>4</u>
Memorandum of Law in Support of Defs. Motion & Opposition to Cross Motion.....	<u>5</u>

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Upon the foregoing papers, plaintiffs' unopposed motion pursuant to CPLR §3215 (a), for entry of a judgement against the defendant Varsity Bus Co., Inc. (hereinafter Varsity); the motion by defendant's Andrew Brettschneider and Stanley Brettschneider (hereinafter defendants Brettschneider) which seeks an order dismissing plaintiff's complaint as against defendants Brettschneider and the plaintiff's cross motion which, *inter alia*, seeks sanctions against defendants Brettschneider, are determined as follows:

The within action arises out of the breach of a commercial real estate lease and surrender agreements entered into between the plaintiff and the defendant, Varsity. This court previously granted a default judgment against defendant Varsity and plaintiff now seeks to have the clerk enter judgment against Varsity for the sum of \$113,340.32 plus interest at the statutory rate of nine percent (9%), from January 9, 2013, the date of service upon Varsity of a notice of default. Interest would amount to the sum of \$19,177.18 for a total judgment amount of \$132,517.50

The plaintiff's motion is unopposed and therefore the motion is granted and the plaintiff shall submit a judgment to the judgment clerk on notice to all defendants. Plaintiff is not seeking

to have attorney's fees determined at this time and therefore the judgment to be submitted to the clerk shall not include attorney's fees.

Turning to the motion of the defendants Brettschneider, which seeks to dismiss the plaintiff's action as against them, same is granted.

The lease and surrender agreement documents upon which the action is based, which have been annexed as exhibits to the motions, clearly and unequivocally state that the are between the plaintiff and defendant Varsity. The lease and surrender agreements were signed by defendant Andrew Brettschneider in his title as President of Varsity.

The plaintiff's complaint, in the second and third causes of action, names the defendants Brettschneider. The second cause of action alleges a breach of contract and alleges that Varsity was insolvent and that defendants Brettschneider breached their duty to maintain Varsity's assets for the benefit of its' general creditors, including the plaintiff.

The third cause of action is to "Pierce the Corporate Veil" and to impute personal liability to defendants Brettschneider for Varsity's obligation to plaintiff.

The plaintiff opposes defendants Brettschneider's motion and seeks sanctions against defendants Brettschneider in its' cross motion, essentially arguing that defendants Brettschneider have not engaged in the discovery process, therefore defendants Brettschneider motion is premature and that they should be sanctioned for not complying with the court's Preliminary Conference Order dated October 8, 2014 which required responses to plaintiff's interrogatories on or before December 21, 2014.

The court shall first address the allegations contained in the complaint's second cause of action alleging that defendants Brettschneider somehow breached a trust and/or fiduciary duty to plaintiff, as an unsecured general creditor, by satisfying certain debts owed to a secured creditor, GE Capital.

The court finds that such allegations fail to state a cause of action against defendants Brettschneider and are without merit. "It has been hornbook law for more than a century that, in the absence of statutory restrictions an insolvent debtor has the right to sell and transfer the whole or any portion of his property to one or more of his creditors in payment of or to secure the debts, when that is the honest purpose, although the effect of the sale or the transfer is to place his property beyond the reach of his other creditors and render their debts uncollectible. (*Dodge v*

*McKechnie*, 156 NY 514, 529, 51 NE 268 [1898], citing *Tompkins v Hunter*, 149 NY 117, 43 NE 532 [1896]; see *Ultramar Energy v Chase Manhattan Bank*, 191 A.D.2d 86, 599 N.Y.S.2d 816 [1993]" (*Micalden Investments S.A. v. Olaf Guerrand-Hermes*, 30 A.D.3d 341, 342, 343, 819 N.Y.S.2d 228, 229 [1<sup>st</sup> Dept. 2006]).

At common law and in the absence of any statutory prohibition, such as the Bankruptcy Law or the Debtor Creditor Law, a debtor, even an insolvent debtor, has the right to prefer one creditor over another and such preference is not prohibited nor does it give rise to a claim under the circumstances alleged in the complaint against defendants Brettschneider. (*Lehrenkrauss v. Bonnell*, 199 NY 240, 92 N.E. 637 [1910]).

The payment of Varsity's debt, as alleged in the complaint, was clearly to a non-related, third party secured creditor, GE Capital. GE Capital's debt was secured by vehicles owned by Varsity and the payment of same is the type of transfer permitted by the Court of Appeals in the *Tompkins* case (*supra.*) and its' progeny. Even the actions of Varsity in paying other creditors, which was raised by plaintiff in its' cross motion ( *Asby Fuel Oil Corp. and the Hess Corp.*, which related to diesel fuel provided to Varsity) are the type of payments that are permitted to be made by a debtor.

Turning next to the allegations in the plaintiff's third cause of action which seeks to pierce the corporate veil, the court also finds that the complaint fails to state a cause of action and that the complaint merely makes conclusory statements without providing specific factual allegations.

The doctrine of piercing the corporate veil typically is asserted by a party seeking to circumvent the limited liability of the officers, shareholder and principals of a corporation and requires a very high standard of proof as well as a showing of a wrongful or unjust act toward the plaintiff. (*Baccash v. Sayegh*, 53 A.D.3d 636, 862 N.Y.S.2d 564 [2<sup>nd</sup> Dept. 2008]).

As a general rule a corporation exists independently from its owners, officers and shareholders, who are not liable for the corporations debts and liabilities. It is this very limitation on liability which causes individuals to incorporate. (*Azte Inc. v. Auto Collection Inc.*, 2015 NY App. Div. LEXIS 721, 2015 Slip Op 00711 [2<sup>nd</sup> Dept. 2015] citing *East Hampton UFSD v. Sandpebble Bldrs. Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 [2<sup>nd</sup> Dept. 2009], *aff'd* 16 NY3d 775, 919 N.Y.S.2d 496 [2011]). The plaintiff, in seeking to pierce the corporate veil must not only

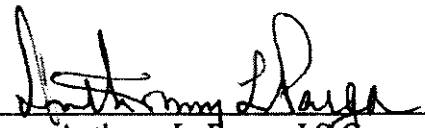
show “domination over corporate conduct” relating to the subject commercial lease and surrender agreements, it must show that “the owners, through their domination, abused the privilege of doing business in the corporate form...” and that “there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets and use of corporate funds for personal use...” (*Matter of Queens West Development Corp. v. Nixbot Realty Associates*, 121 A.D.3d 903, 995 N.Y.S.2d 84 [2<sup>nd</sup> Dept. 2014]). Other than setting forth conclusory allegations in the complaint, no such facts to support the piercing of the corporate veil in the present case were set forth.

The argument made by the plaintiff in its’ cross motion; namely, that discovery has not been completed and that such discovery might lead to the existence of facts to support the plaintiff’s claims set forth in the second and third causes of action, is insufficient to delay the determination of the viability of such claims. The plaintiff has failed to offer an evidentiary basis for the proposition that further discovery might lead to evidence to support its’ claims. (*Frank v. Continental Casualty Co.*, 2014 N.Y.App. Div. LEXIS 8727, 2014 NY Slip Op 08808 [2<sup>nd</sup> Dept. 2014]; *Talon Air, Inc. v. Madden*, 80 A.D.3d 747, 915 N.Y.S.2d 298 [2<sup>nd</sup> Dept. 2011]).

Accordingly, plaintiff’s motion for an order permitting the submission of a judgment to the judgment clerk, as against defendant Varsity, is granted. The motion of the defendants Brettschneider for an order dismissing the plaintiff’s complaint as against them and directing summary judgment in their favor is granted. The cross motion of the plaintiff for sanctions to be imposed against defendants Brettschneider is denied.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: February 6, 2015

  
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 Anthony L. Parga, J.S.C.

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**ENTERED**

FEB 13 2015

NASSAU COUNTY  
 COUNTY CLERK'S OFFICE