

Dependable Contr. Servs. Corp. v Maletta
2016 NY Slip Op 32748(U)
June 7, 2016
Supreme Court, Queens County
Docket Number: 705333/2016
Judge: Leslie J. Purificacion
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

DEPENDABLE CONTRACTING x
SERVICES CORP.,

Index
Number 705333/2016

Plaintiff,

Motion
Date 01/26/ 2017

-against-

Motion Seq. No. 2

ROBERT MALETTA,

Defendant.

x

FILED
JUN 18 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF51 to EF98 read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	EF51-EF56, 96
Answering Affidavits - Exhibits	EF57-EF95
Reply Affidavits	EF97-EF98

Upon the foregoing papers it is ordered that the motion is determined as follows:

In this action, plaintiff-creditor seeks to pierce the corporate veil to recover funds from defendant, as an individual. Defendant was the sole shareholder of SAI 1, a now-dissolved corporation against which plaintiff obtained a money judgment in the amount of \$113,924.55 on May 1, 2012. The gravamen of plaintiff's complaint is that after repeated demands for payment of the outstanding debt, but a few months prior to plaintiff commencing the instant action, defendant, the sole shareholder and owner of SAI 1 wrongfully dissolved the company and formed SAI 2, allegedly in an effort to avoid payment of the judgment. For this reason, plaintiff seeks to pierce the corporate veil of SAI1 to

collect its awarded money judgment against Maletta personally. Defendant moves to dismiss the complaint based on documentary evidence and for failure to state a cause of action, pursuant to CPLR 3211 (a)(1) and (7), respectively. Plaintiff opposes the motion.

Facts

The complaint alleges the following: that Dependable Contracting Services Corp. (Dependable), was a construction company that performed, inter alia, framing work. Dependable was dissolved by proclamation on October 28, 2009, but is authorized to sue, as per Business Corporation Law, §1006. SAI General Construction Corporation (“SAI 1”), a dissolved corporation was owned solely by defendant Robert Maletta. On or around June, 15, 2006, plaintiff and SAI 1 entered into an agreement, pursuant to which Dependable agreed to provide labor in connection with the framing of a building. Dependable provided the said labor in the Spring and Summer of 2006. SAI 1 failed to pay Dependable in full for its services in the amount of \$75,852.00. In November, 2006, plaintiff sent defendant an invoice setting forth the amounts owed by SAI 1 and Maletta acknowledges receipt of the invoice.

Thereafter on November 24, 2007, plaintiff commenced an action seeking to collect on the claim, entitled Dependable Contracting Services Corp. v SAI General Construction Corp., under Index number 21242/2007. Defendant hired an attorney to defend SAI 1 in that action and on or about November 28, 2007, SAI 1 filed and served an Answer to the complaint and served discovery demands upon plaintiff. The Demands were answered by plaintiff. However, during the pendency of the 21242/2007 Action, plaintiff served upon SAI 1 a “Demand for Verified Bill of Particulars”, dated February 1, 2008. Despite numerous demands for a response to the Demand, including requests by SAI 1's attorney for extensions of time, as late as October 2009, SAI 1 never responded to that Demand. As a result, the court struck SAI 1's answer.

On or about February 23, 2009, plaintiff served upon SAI 1, a ‘Notice to Produce’ wherein plaintiff demanded, among other things:

1. Certificate of Incorporation of SAI 1, and any amendments;
2. For the time period between and including January 1, 2006 through the present, all bills, invoices, correspondence, copies of checks and/or other documents that evidence or reflect defendant's payments to plaintiff;

3. For the time period, documents sufficient to reflect defendant's method of accounting and how it has financially accounted for its transactions with plaintiff.

SAI 1 did not respond to that Notice to Produce, despite requests for extensions of time to respond by its attorney as late as October 2009.

Plaintiff submits that its November 2006 invoice, the commencement of the 21242/2007 Action and plaintiff's request for financial documents relating to the transactions between the parties, all placed SAI 1 and Maletta on notice that said documents had to be preserved.

On May 1, 2012, the court granted a default judgment entered in favor of plaintiff and against SAI 1 on the claim, in the amount of \$113,924.55 ("Judgment"). Between May 1, 2012 and 2014, plaintiff unsuccessfully sought to obtain discovery regarding SAI 1's assets, from SAI 1 via Robert Maletta, through the service of an information subpoena and other subpoenas. On or about January 28, 2014, plaintiff's counsel served a subpoena upon Maletta seeking, inter alia, documents for the period of time from 2006 through 2011; its corporate income tax returns, general ledger, sales tax returns, sales and purchase journals, cash receipts and check disbursements, accounts receivable and accounts payable data, sales invoices/contracts, bank statements; all credit card statements and all contracts and or other agreements into between SAI 1 and any other entity ("SAI 1 Subpoena"). SAI 1 responded to the SAI 1 Subpoena, on or about April 17, 2014, through an attorney, by producing SAI 1's tax returns for 2006, 2007 and 2008. SAI 1 claimed that it did not have custody and or control of any of the other documents demanded in the SAI 1 Subpoena.

Plaintiff submits that a review of the 2006 and 2007 SAI 1 tax returns revealed that SAI 1 went from 2006 gross receipts of \$911,760.00 and total income of \$110,969.00 to 2007 gross receipts and total income of zero because on or about January 3, 2007, Maletta discontinued operating SAI 1 and instead opened SAI Contracting Corp. (SAI 2), which was incorporated on January 3, 2007. Plaintiff further submits that the transition from SAI 1 to SAI 2 occurred on or around the time that SAI 1 owed monies to plaintiff and when plaintiff was attempting to collect these monies. Maletta is also the sole shareholder of SAI 2.

Plaintiff subpoenaed the financial documents of SAI 2, to explore whether SAI 1 moved its business to SAI 2, thereby avoiding its obligations to plaintiff. Thus, on May 10, 2014, plaintiff subpoenaed SAI 2 through Maletta and demanded that SAI 2 produce, inter alia, documents for the period of time from 2006 through 2011, its corporate income tax returns, general ledges, sales tax returns, sales and purchase journals, cash receipts and check disbursements, accounts receivable and accounts payable data, sales invoices/contracts, bank

statements; all credit card statements and all contracts and or other agreements entered into between SAI 2 and any other entity (“SAI 2 Subpoena”). Notwithstanding a court order and alleged assurances from Maletta’s (then) attorney, the documents were never produced,

Plaintiff submits that Maletta dissolved the first corporation and formed the second corporation to avoid payment of the Judgement. Plaintiff submits that Maletta’s complete dominion and control over SAI 1 was used to commit a wrong against plaintiff in that Maletta deliberately failed to maintain corporate formalities and records for SAI 1 so that plaintiff would be unable to trace SAI’s assets and collect upon plaintiff’s judgment against SAI 1. Alternatively, plaintiff submits that Maletta purposely discarded SAI 1’s books and records so that plaintiff would be unable to trace SAI 1’s assets and collect upon plaintiff’s judgment against SAI 1.

Maletta asserts that the said documents were discarded as a result of the passage of time and that, in any event, plaintiff should not be able to collect from him personally as plaintiff neglected to timely collect against the judgment.

Discussion

At the outset, the branch of the motion which is to dismiss the complaint pursuant to CPLR 3211 (a)(1), is denied, as the documentary evidence that the defendant submitted in support of that branch of his motion does not establish a defense as a matter of law (*see Martinez v La Colonia Rest.*, 55 AD3d 801 [2008]).

“On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Smith v Meridian Tech., Inc.*, 52 AD3d 685, 686 [2008]). Thus, “a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]; *see Leon v Martinez*, 84 NY2d at 87-88; *Fisher v DiPietro*, 54 AD3d 892, 894 [2008]; *Clement v Delaney Realty Corp.*, 45 AD3d 519, 521 [2007]). Moreover, the sufficiency of a complaint must be measured against what the law requires of pleadings in the particular case. The complaint here is not required to meet any heightened level of particularity in its allegations (*cf.* CPLR 3016). Instead, it need only contain “[s]tatements . . . sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause

of action” (CPLR 3013). The issue then is whether, under the doctrine of piercing the corporate veil, the complaint contains allegations sufficient to state a cause of action holding Maletta personally liable for actions he took as SAI 1's president and principal owner.

Because a decision whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities, the New York cases may not be reduced to definitive rules governing the varying circumstances when the power may be exercised (*see*, Presser, Piercing the Corporate Veil § 2.33 [1], at 2-291--2-293). Generally, however, piercing the corporate veil requires a showing that: the owners exercised complete domination of the corporation in respect to the transaction attacked; that such domination was used to commit a fraud or wrong against the plaintiff and which resulted in plaintiff's injury (*see*, *Matter of Guptill Holding Corp. v State of New York*, 33 AD2d 362, 364-365, *affd* 31 NY2d 897; *Lowendahl v Baltimore & Ohio R. R. Co.*, 247 App Div 144, 157, *affd* 272 NY 360; *American Protein Corp. v AB Volvo*, 844 F2d 56, 60 [2d Cir 1988] [analyzing New York law and citing *Lowendahl (supra)*]; *International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 NY 285, 292; *see generally*, Presser, Piercing the Corporate Veil § 2.33 [3], at 2-304--2-313). 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 (*see*, *Walkovszky, supra*, at 417), such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required (*see*, *Guptill, supra*, at 365; *Lowendahl, supra*, at 157; *Passalacqua Bldrs. v Resnick Developers S.*, 933 F2d 131, 138 [2d Cir 1991] [applying New York law]; *see generally*, 18 Am Jur 2d, Corporations, § 51). The party seeking to pierce the corporate veil must establish that the owner[s], 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 (*see*, *Guptill, supra*, at 365; *National Labor Relations Bd. v Greater Kan. City Roofing*, 2 F3d 1047, 1052-1053).

Each of the requirements for piercing the corporate veil—domination and control, resultant damages, and abuse of the privilege of doing business in corporate form—must be pleaded for a complaint to be deemed adequate under CPLR 3013. Indeed, for a plaintiff to satisfy the requirements of CPLR 3013, the plaintiff cannot rely upon mere “buzz words” or vague or conclusory allegations, but must instead set forth facts that truly address the underlying transactions and occurrences and the material elements of the claim (*see* CPLR 3013; *Walkovszky v Carlton*, 18 NY2d 414, 420 [1966]; *Sheinberg v 177 E. 77*, 248 AD2d 176, 177 [1998]; *Cooperstein v Patrician Estates*, 97 AD2d 426, 427 [1983]; *accord EED Holdings v Palmer Johnson Acquisition Corp.*, 387 F Supp 2d 265, 274 [2004] [applying analogous Federal Rules of Civil Procedure rule 8 (a) and New York substantive law]).

With the foregoing as backdrop, the court finds that the instant complaint adequately pleads a cause of action against Maletta for the alleged wrong committed by SAI 1 under a “piercing of the corporate veil” theory (*see Ventresca Realty Corp. v Houlihan*, 28 AD3d 537, 538 [2006]; *Board of Mgrs. of Regal Walk Condominium I v Community Mgt. Servs. of Staten Is.*, 226 AD2d 414, 415 [1996]). The complaint alleges, as to the first requirement for piercing the corporate veil, that Maletta exercised complete dominion and control over SAI 1. Indeed, the complaint alleges that Maletta was the principal owner of SAI 1, and that Maletta directed all of its acts and omissions.

The complaint also properly alleges, with respect to the second and third requirements, that Maletta’s dominion and control was used to commit a wrong against the plaintiff which resulted in injury to plaintiff. The complaint further alleges, relative to these next two requirements for piercing the corporate veil, that the individual defendant exercised his dominion and control over SAI 1, to perpetuate the alleged wrongs through the corporate form. The reasonable intendment of paragraphs 16 through 25, is the alleged abuse of the privilege of doing business in corporate form. The complaint further alleges, in paragraph 30, that Maletta’s purposeful failure to maintain the books and records of SAI 1 and or his deliberate disposal of said books and records, especially in light of the notice of plaintiff’s claim not later than November, 2006, is “a perversion of the privilege to do business in corporate form.” Maletta’s alleged “perversion of the privilege of doing business in corporate form,” is the predicate by which the plaintiff seeks to pierce the corporate veil. This conduct is specifically alleged in the complaint as consisting of his repeated efforts to avoid disclosure of information pertaining to the financial status of SAI 1, to which he allegedly agreed on multiple occasions while seemingly all in a deliberate effort to delay plaintiff’s efforts to obtain the information and thereby collect on the Judgment. Whether the plaintiff’s theory for piercing the corporate veil proves to be successful or unsuccessful is beside the point. It appears that the complaint’s alleged “perversion of doing business in corporate form”, conduct may be deemed an abuse of corporate form, which provides the plaintiff with a procedural and alleged predicate for piercing the corporate veil. Should the defendant desire more detail as to the plaintiff’s allegations, he can demand a bill of particulars (*see* CPLR 3041, 3042) or obtain other discovery such as depositions (*see* CPLR 3107).

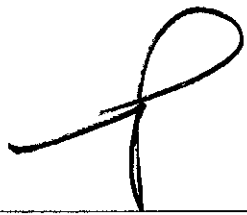
The complaint, given a liberal construction, meets the requirement of CPLR 3013 as it provides the defendants with notice of the transactions or occurrences on which the claim is based and addresses all three of the material elements established by relevant decisional authorities for piercing the corporate veil (*see Love v Rebecca Dev., Inc.*, 56 AD3d 733, 733-734 [2008]; *Ventresca Realty Corp. v Houlihan*, 28 AD3d at 538; *Meachum v Outdoor World Corp.*, 235 AD2d 462, 463 [1997]; *Long Is. Diagnostic Imaging v Stony Brook Diagnostic Assoc.*, 215 AD2d 450, 452 [1995]). Thus, applying the above standards to the allegations set forth in the instant complaint, the court finds that plaintiff has sufficiently alleged facts

from which it may be inferred that the defendant may have engaged in acts amounting to an abuse or perversion of the corporate form (*see E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.*, 16 N.Y.3d 775, 776 [2011]; *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-42, 623 N.E.2d 1157 [1993]).

As to defendant's claim of laches as against plaintiff, the record does not support defendant's claim that plaintiff delayed in his efforts to collect on the Judgement.

The defendant's corporate veil remedy, if any, resides within the summary judgment provisions of CPLR 3212 after relevant discovery, and is not found here under the dismissal provisions of CPLR 3211.

Accordingly, the motion to dismiss is denied.



Dated:

JUN 07 2016

Hon. Leslie J. Purificacion, J.S.C.

FILED
JUN 13 2017
COUNTY CLERK
QUEENS COUNTY