

**Local 1181-1061, Amalgamated Tr. Union, AFL-CIO  
v Wayzata Opportunities Fund, LLC**

2016 NY Slip Op 33214(U)

June 30, 2016

Supreme Court, New York County

Docket Number: Index No. 653772/15

Judge: Charles E. Ramos

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motion sequence number 001, to dismiss the complaint for failure to state a claim and based upon documentary evidence.

In motion sequence number 002, defendant AIS Highbury Liquidation SPV, L.P. (AIS) moves to dismiss the complaint on the same grounds. Defendants Wayzata Opportunities Fund Offshore, L.P., Wayzata Opportunities Fund Offshore II, L.P., GSCP II Holdings (AE), LLC, and PEQ Northern Investments L.P. submit no papers in connection with the instant motions.

#### Factual Allegations

The complaint alleges that Local 1181 represented employees of nonparties Amboy Bus Co., Inc., Atlantic Escorts, Inc., and Atlantic Queens Bus Corp. (collectively, Atlantic Companies). Atlantic Express Transportation Corp. (Atlantic Express) was the sole owner and holding company of the Atlantic Companies, and "the corporate vehicle through which the defendants exercised control of the Atlantic Companies." Complaint, ¶ 12. Defendants are allegedly the 10 largest shareholders of Atlantic Express. *Id.*, ¶ 13.

On March 19, 2013, the Atlantic Companies and Local 1181 were negotiating a collective bargaining agreement when the Atlantic Companies presented their "best and final offer ('BAFO')." *Id.*, ¶ 18. The Atlantic Companies then "canceled the remaining scheduled bargaining session, declared that the parties were at an impasse, announced that they would cease bargaining

and impose the terms of the BAFO effective March 22, 2013, and walked away from the bargaining table." *Id.* At that time, the Atlantic Companies, along with other companies providing school bus transportation services to the New York City Department of Education, "began implementing the BAFO notwithstanding that [they] had a legal obligation to maintain the status quo." *Id.*, ¶ 19.

When the bus transportation companies declared an impasse, Local 1181 filed charges against them with the National Labor Relations Board (NLRB), alleging unfair labor practices in violation of the National Labor Relations Act (NLRA). On June 10, 2013, the NLRB issued a complaint against the Atlantic Companies, among others, and received authorization to seek injunctive relief in federal court. *Id.*, ¶ 23.

On August 28, 2013, the United States District Court for the Eastern District of New York granted the NLRB's petition for injunctive relief, ordering that certain debtors, including the Atlantic Companies, "restore to the bargaining unit employees the terms and conditions of employment that were in effect prior to the unilateral changes effectuated by the Settling Debtors," and to "continue those in effect until the parties reach an agreement or good faith bargaining impasse." Pasquale affirmation, exhibit 2, Appendix 1 at 1 n 1; complaint, ¶ 24.

On September 9, 2013, these "Settling Debtors restored to

their bargaining unit employees the contractually required wage rates in effect prior to their implementation of unilateral changes to employees' wages and benefits." Pasquale affirmation, exhibit 2, Appendix 1 at 1 n 1; complaint, ¶ 30.

On September 20, 2013, the Administrative Law Judge of the NLRB found that the Atlantic Companies violated the NLRA, and directed that the debtors "make their employees whole, with interest, for the loss of any earnings or benefits resulting from any changes in the terms and conditions of their employment made after March 19, 2013." Pasquale affirmation, exhibit 2 at Appendix 1 at 1; complaint, ¶¶ 25-26.

On April 21, 2015, the NLRB issued an order affirming the Administrative Law Judge's September 20, 2013 rulings and findings and adopted his recommended order, as modified by the NLRB. Pasquale affirmation, exhibit 2 at Appendix 1 at 1; complaint, ¶ 28.

On November 4, 2013, the Atlantic Companies and Atlantic Express filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York, in the action captioned *In re Metro Affiliates, Inc., et al.*, Case No. 13-13591 (SHL) (Bankruptcy Action). Pasquale affirmation, exhibit 2, Appendix 1 at 2; complaint, ¶¶ 5, 10. On June 11, 2014, the Bankruptcy Court entered an order confirming a plan of

liquidation, and on June 30, 2014, all conditions of the plan were satisfied or waived. Pasquale affirmation, exhibit 2, Appendix 1 at 2; complaint, ¶ 7.

In the Bankruptcy Action, Local 1181 filed proofs of claim against the debtors, including the Atlantic Companies, totaling approximately \$19 million, for its represented employees' lost earnings and benefits contributions resulting from violations of the NLRA. Pasquale affirmation, exhibit 2, Appendix 1 at 3-4; complaint, ¶ 30. The NLRB filed proofs of claim totaling approximately \$18 million. Pasquale affirmation, exhibit 2, Appendix 1 at 3; complaint, ¶ 31. On October 6, 2015, the liquidating trustee in the Bankruptcy Action moved for approval of a "Stipulation of Settlement" to allow approximately \$1.175 million to be distributed toward payment of claims that Local 1181 and the NLRB filed in the Bankruptcy Action. *Id.*, ¶ 32; Pasquale affirmation, exhibit 2. On October 30, 2015, the Court in the Bankruptcy Action "approved in its entirety" the Stipulation of Settlement, leaving Local 1181 "able to collect only a small fraction of its claims on behalf of former employees of the Atlantic Companies in the bankruptcy proceedings." Pasquale affirmation, exhibit 2 at 1; complaint, ¶¶ 33-34.

#### Analysis

In its sole cause of action, Local 1181 claims that defendants are liable, under section 630 of the BCL, for "back

pay owed to the employees of the Atlantic Companies." Complaint, ¶ 40. On the motions to dismiss before the Court, the parties dispute whether Local 1181 complied with the notice requirements of section 630. The parties also dispute whether section 630 applies to defendants, as they are not shareholders of the Atlantic Companies, but rather, they are shareholders of the holding company, Atlantic Express. In addition, AIS argues that Local 1181 failed to exhaust its remedies in the Bankruptcy Action, thereby failing to satisfy a condition precedent to bringing its claim under section 630 of the BCL.

Section 630 (a) of the BCL provides, in pertinent part, as follows:

"The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed, of every domestic corporation or of any foreign corporation, when the unpaid services were performed in the state, no shares of which are listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or an affiliated securities association, shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such shareholder for such services, he shall give notice in writing to such shareholder that he intends to hold him liable under this section. Such notice shall be given within one hundred and eighty days after termination of such

services . . . . ."

It is well-settled that "'legislative enactments in derogation of common law, and especially those creating liability where none previously existed,' must be strictly construed." *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 (2008); see also *Rust v Reyer*, 91 NY2d 355, 360 (1998) ("a statute in derogation of the common law must be strictly construed"); *Doremus v Incorporated Vil. of Lynbrook*, 18 NY2d 362, 365 (1966) (where the statute "is in derogation of the common law," courts "should not be at pains to write anything into it"). "The Court of Appeals has ruled that [a] statute that imposes upon the stockholders of a corporation a personal liability for the corporation's debts is in derogation of the common law." *Klepner v Dorfman*, 2001 WL 36174637 (Sup Ct, NY County 2001) (strictly construing BCL § 630 as "in derogation of common law"), citing *Chase v Lord*, 77 NY 1 (1879); see also *Stuto v Kerber*, 26 Misc 3d 535, 537 (Sup Ct, Albany County 2009) (reasoning that, because BCL § 630 is "'penal in its nature,'" it "'should receive a strict construction by the courts and if there is any reasonable doubt as to its application . . . the defendant is entitled to its benefit'"), *affd* 77 AD3d 1233 (3d Dept 2010), *affd* 18 NY3d 909 (2012).

For purposes of calculating the 180-day notice requirement under BCL § 630, the trial court in *Grossman v Sendor* interpreted

the phrase "after termination of such services" as "'services' . . . which have already been 'performed', and for which wages are 'due and owing'." 89 Misc 2d 952, 955 (Sup Ct, NY County 1977), *affd as mod* 64 AD2d 561 (1<sup>st</sup> Dept 1978). The court concluded that "the prospective relationship of the employer and employee is not material, since the statute makes stockholders liable only for services which have already been completed and not for those which will be completed at some point in the future. 'Termination' therefore refers to the services, not to the employment relationship." *Id.* The First Department affirmed this portion of the trial court's holding. *Grossman*, 64 AD2d 561.

In *Gannone v Wittman*, the First Department reiterated that compliance with the 180-day notice requirement focused on when "the unpaid services in question were performed," not on when the employees were terminated. 232 AD2d 298, 298 (1<sup>st</sup> Dept 1996). Failure to timely serve "notice of intent . . . requires dismissal of the action." *Id.*; see also *Beam v Key Venture Capital Corp.*, 152 AD2d 825, 826 (3d Dept 1989) (dismissing complaint for failure to comply with 180-day limitation period of section 630 [a]).

Here, the unpaid services terminated on September 9, 2013, when the employees of the Atlantic Companies were restored to their "contractually required wage rates in effect prior to [the

Atlantic Companies'] implementation of unilateral changes to employees' wages and benefits." Pasquale affirmation, exhibit 2, Appendix 1 at 1 n 1. Accordingly, Local 1181 was required to comply with the notice requirement by March 10, 2014, the first business day after the expiration of the 180-day notice period. McKinney's Cons Laws of NY, ch 22, art 2, § 25-a (1) (when statute calls for computation of time from a certain day that ends on a weekend, the act contemplated "may be done on the next succeeding business day").

The complaint alleges that "Local 1181 gave each Defendant timely notice that it intends to hold each defendant liable, jointly and severally, under BCL § 630 for the back pay owed to the employees of the Atlantic Companies." Complaint, ¶ 40. However, Wayzata and AIS submit documentary evidence showing that Local 1181's earliest notice letter served on defendants was dated April 9, 2014, well past the 180-day notice requirement of section 630 (a). Pasquale affirmation, exhibit 3 (notice letters sent to Wayzata beginning April 9, 2014); King affirmation, exhibit G (notice letters sent to AIS on April 10, 2014). Therefore, Local 1181's allegation that it gave timely notice is "clearly contradicted by documentary evidence," and its failure to timely serve the notice as required under section 630 (a) of the BCL requires dismissal of the complaint against Wayzata and AIS. *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1<sup>st</sup> Dept 2003).

Local 1181 concedes that, "[i]n April 2014, [it] provided each of the Defendants notices that it intends to hold them liable under BCL § 630 . . . ." Local 1181 opp brief at 14. Although defendants Wayzata Opportunities Fund Offshore, L.P., Wayzata Opportunities Fund Offshore II, L.P., GSCP II Holdings (AE), LLC, and PEQ Northern Investments L.P. submit no papers in connection with the instant motions, Local 1181's provision of notice to these defendants in April 2014 likewise requires dismissal against them as these notices were untimely.

The Court notes Local 1181's reliance upon the First Department's prior decision in *Gannone*, where the Court stated that "'termination of such services' under" section 630 (a) "should be construed as the termination of the employment relationship." 201 AD2d 433, 433 (1<sup>st</sup> Dept 1994). This statement appears to be limited to the facts and procedural posture of that case, as the same Court's subsequent holding expressly focused on when "the unpaid services in question were performed," and not on the termination of employment. *Gannone*, 232 AD2d at 298.

Significantly, the Court in the subsequent *Gannone* decision expressly stated that the "[l]aw of the case doctrine [was] not applicable" in the procedural context of the case, and that it was not obligated to follow the reasoning of its previous decision. *Id.* Therefore, both *Grossman* (89 Misc 2d 952, *affd as*

mod 64 AD2d 561) and the Court's more recent decision in *Gannone* (232 AD2d 298) are controlling on the issue of timing for the notice requirement, and the Court's prior decision in *Gannone* (201 AD2d 433) does not warrant a different result.

The complaint is subject to dismissal for the additional, independent reason that none of the defendants are alleged to have been shareholders of the Atlantic Companies. Section 630 (a) of the BCL applies to "[t]he ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed," imposing upon these shareholders personal liability "for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation."

According to the complaint, defendants are among the 10 largest shareholders of Atlantic Express, "the corporate vehicle through which the defendants exercised control of the Atlantic Companies." Complaint, ¶¶ 12-13. However, Local 1181 concedes that "Atlantic Express was a holding company and the sole owner of the Atlantic Companies." *Id.*, ¶ 11. The allegations of the complaint make clear that the employees for whom Local 1181 seeks recovery performed services to the Atlantic Companies, not to Atlantic Express. Complaint, ¶ 1 (alleging that "[c]ertain New

York City bus transportation companies failed to pay their employees . . . wages due for services that the employees performed for their employers," and that "[t]he defendants . . . were among the ten largest shareholders of the holding company that was the owner of the bus companies that failed to pay their employees"); *id.*, ¶ 3 (alleging that "Local 1181 represented for purposes of collective bargaining, among other workers, employees of . . . the 'Atlantic Companies'"); *id.*, ¶ 29 (claiming that "the Atlantic Companies owe their employees back pay").

As discussed above, BCL § 630 "must be strictly construed" (*Vucetovic*, 10 NY3d at 521; *Rust*, 91 NY2d at 360; *Klepner*, 2001 WL 36174637; *Stuto*, 26 Misc 3d at 537), and nothing contained in the statute extends liability beyond the shareholders of the Atlantic Companies, as the entity for which the employees performed their services. BCL § 630 (a); *Eastern Paralyzed Veterans Assn. v Metropolitan Transp. Auth.*, 79 AD2d 516, 517 (1<sup>st</sup> Dept 1980) ("[i]t is a general rule of construction that omissions in a statute, where the act is clear and explicit in its language, cannot be supplied by construction").

As none of the defendants are alleged to be shareholders of the Atlantic Companies, they are not subject to liability under section 630 (a) of the BCL, and, accordingly, the complaint is dismissed in its entirety against all defendants.

The Court notes the line of cases cited by Local 1181 in

support of its argument that "the ten largest shareholders" is "determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed . . . ." BCL § 630 (a); Local 1181 opp brief at 12-14. For example, in *Sasso v Gallucci*, the defendants argued that they were not the corporation's 10 largest shareholders, as they were merely beneficiaries of the trust that held stock of the employer corporation. 112 Misc 2d 865, 866-867 (Sup Ct, Nassau County 1982). The trial court stated that "[t]he identity of the corporation's 10 largest shareholders is to be determined by the fair value of their beneficial interest," and that "[t]he term 'beneficial interest' is commonly used to designate the interest of a beneficiary of a trust." *Id.* at 867. The court reasoned that:

"[b]y specifying in the statute 'their beneficial interest' with reference to the 'shareholders' the Legislature made clear its intention not to make a fiduciary such as a trustee holding legal title personally liable therein but patently intended to make the equitable owners entitled to the beneficial enjoyment of the stock in the corporation responsible for payment of employee wage claims."

*Id.* at 868.

*Jacoy v Tawil*, also cited by Local 1181, involved an employee who obtained a judgment against his employer for unpaid wages but did not execute judgment on the employer. Instead, the

employee sued the defendant Abraham Tawil (Tawil), the ostensible owner of the employer, under BCL § 630. 1988 WL 98504, 1988 US Dist LEXIS 12140 (D NJ 1988). Tawil claimed that he was "merely an officer, rather than a shareholder" of the employer, and that his wife was the employer's sole shareholder. *Jacoy*, 1988 WL 98504 at \*2, 1988 US Dist LEXIS 12140, \*5. Applying New York law, the United States District Court for the District of New Jersey held that the employer company "was, at all relevant times, a family business wholly owned by" the defendant and his wife, evidenced by the defendant's admission that he "has always maintained beneficial ownership and control of the stock" of the employer company, and an unaudited financial statement in which the Tawils indicated that the employer "was 100% owned by Abraham and Paula Tawil." *Jacoy*, 1988 WL 98504 at \*2, 1988 US Dist LEXIS 12140, \*4-\*5. The court concluded that the employer company fell within the parameters of BCL § 630, and that the defendant was personally liable on the outstanding judgment.

Here, the complaint does not allege the existence of a trustee-beneficiary relationship analogous to *Sasso*. Nor do the allegations of the complaint support the conclusion that defendants owned the Atlantic Companies directly, or that defendants maintained beneficial ownership and control of the Atlantic Companies analogous to the family business owned by Tawil in *Jacoy*. Neither *Sasso* nor *Jacoy* addressed the

applicability of BCL § 630 to a holding company that allegedly owns the "beneficial interest" of the employer corporations. Therefore, *Sasso* and *Jacoy* are distinguishable on their facts. Furthermore, in *Pope v Halloran*, also cited by Local 1181, the First Department majority dismissed the complaint based upon the plaintiff's failure to give timely notice, without addressing - and, therefore, implicitly rejecting - the dissenters' contention that "control is the key," not ownership of the corporation. 76 AD2d 770, 772 (1<sup>st</sup> Dept 1980).

In essence, Local 1181 focuses on the "beneficial" nature of the interest held rather than the holder's statutory status as a "shareholder" under section 630 (a). It is axiomatic that "[s]hareholders in holding companies are not shareholders, nor entitled to the rights of shareholders, in other corporations a part of whose stock is owned by the holding company . . . ." 12B Fletcher Cyc. Corp. § 5767. BCL § 630 "operates, in effect, to 'pierce the corporate veil' and impose personal liability against corporate shareholders for the debts of their corporation." *Stuto*, 26 Misc 3d at 537 (citation omitted).

Thus, the statute must be strictly construed, as it "constitutes an exception to the general rule that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability." *Id.* (internal

quotation marks and citations omitted); see also *Vucetovic*, 10 NY3d at 521; *Rust*, 91 NY2d at 360; *Klepner*, 2001 WL 36174637. Local 1181 fails to cite to any legal authority that would support treating the shareholders of a holding company as shareholders of its subsidiary.

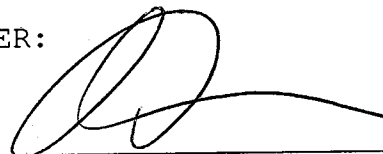
Because the complaint is dismissed for failure to comply with the notice requirement of section 630, and because defendants are shareholders of Atlantic Express and not the Atlantic Companies, the Court does not address AIS's additional argument that Local 1181 failed to exhaust its remedies in the Bankruptcy Action.

Accordingly, it is hereby

ORDERED that the motions to dismiss this action (motion sequence numbers 001 and 002) are granted and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk upon presentation of a bill of costs.

Dated: June 30, 2016

ENTER:



J.S.C.

**CHARLES E. RAMOS**