

Weinberg v Picker

2017 NY Slip Op 31374(U)

April 24, 2017

Supreme Court, Kings County

Docket Number: 510746/2015

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of April, 2017.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

-----X
SEYMOUR WEINBERG,

Plaintiff,

Index No.: 510746/2015

-against-

Decision and Order

BARRY PICKER, MESHULEM AUERBACH,
PICKER & AUERBACH and PICKER, AUERBACH
AND WEINBERG, P.C.,

Defendants.

-----X

The following papers numbered 1 to 5 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Cross-Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	1,2
Opposing Affidavits (Affirmations) _____	3,4
Reply Affidavits (Affirmations) _____	5

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant makes a Motion for Partial Summary Judgment requesting this Court to (1) dismiss all causes of action in the Complaint and (2) to sever and continue the Defendant's counterclaims. Plaintiff opposes said motion.

Plaintiff cross moves the Court for an order compelling the defendants to produce documents to ascertain the names of clients and the amounts of fees received by defendants during the relevant time period. Defendant opposes said cross-motion.

ARGUMENTS

In the present case, Defendant contends the Plaintiff has had a fair opportunity to fully litigate the exact same issues in Small Claims Court and Plaintiff's causes of action in the Complaint are barred under the doctrine of *res judicata* and/or collateral estoppel.

Plaintiff contends he is not precluded from bringing this claim in Supreme Court because (1) the individual defendants named in this action were not the parties to the small claims action or judgment; (2) the doctrine of collateral estoppel as a matter of law is inapplicable to a small claims judgment; (3) and the claims raised in the small claims action are not the claims asserted in the current complaint.

Plaintiff cross moves for an order compelling the defendants to produce documents to ascertain the names of clients and the amounts of fees received by defendants during the relevant time period. Defendant contends plaintiff's cross-motion should be denied because (1) the discovery requests are precluded under *res judicata*; (2) the cross-motion does not comply with Kings County Civil Uniform Part Rules under which discovery motions are to be returnable in the Central Compliance Part and contain a separate affirmation of good faith; (3) and plaintiff has already obtained these records from the defendant in the Small Claims Action.

ANALYSIS

Summary Judgment

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the

party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.* The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2nd 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 N.Y.2d 1019 [1995]).

Collateral Estoppel / Res Judicata

The doctrine of collateral estoppel precludes a party from re-litigating "an issue **which** has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (*Gilberg v. Barbieri*, 53 N.Y.2d 285, 291, 441 N.Y.S.2d 49, 423 N.E.2d 807; see, *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 69, 298 N.Y.S.2d 955, 246 N.E.2d 725). It is a doctrine intended to reduce litigation and

conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to re-litigate an issue that has already been decided against it.

There are two requirements which must be satisfied before the doctrine is invoked. First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination (*Gilberg v. Barbieri*, , 53 N.Y.2d at p. 291, 441 N.Y.S.2d 49, 423 N.E.2d 807; *Schwartz v. Public Administrator*, , 24 N.Y.2d at p. 71, 298 N.Y.S.2d 955, 246 N.E.2d 725; see, *Koch v. Consolidated Edison *456 Co.*, 62 N.Y.2d 548, 554–555, 479 N.Y.S.2d 163, 468 N.E.2d 1, cert. denied 469 U.S. 1210, 105 S.Ct. 1177, 84 L.Ed.2d 326; *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500–501, 478 N.Y.S.2d 823, 467 N.E.2d 487).

The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (see, *Ryan v. New York Tel. Co.*, , at p. 501, 478 N.Y.S.2d 823, 467 N.E.2d 487; *Schwartz v. Public Administrator*, , 24 N.Y.2d at p. 73, 298 N.Y.S.2d 955, 246 N.E.2d 725). *Kaufman v. Eli Lilly and Co.*, 482 N.E.2d 63, 67 (N.Y. 1985).

In the present case, the defendants demonstrate the first requirement that the identical issues necessarily must have been decided in the prior action and be decisive of the present action, because they attach the prior small claims counter-claim wherein

the plaintiff, SEYMOUR WEINBERG, requests identical reliefs as the reliefs requested in the present case. Here, the plaintiff, SEYMOUR WEINBERG, is seeking monies based on payments allegedly made by his clients to the PC. Similarly, in the Small Claims action, Mr. WEINBERG, counterclaimed for monies based on payments allegedly made by his clients to the PC. The defendants have demonstrated that the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination by submitting the order following a trial in the small claims court. Additionally, the plaintiff had an opportunity to appeal said decision and elected not to do so.

Additionally, under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding (*see Matter of Josey v. Goord*, 9 N.Y.3d 386, 389, 849 N.Y.S.2d 497, 880 N.E.2d 18; *Matter of Hunter*, 4 N.Y.3d 260, 269, 794 N.Y.S.2d 286, 827 N.E.2d 269; *O'Brien v. Syracuse*, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158; *Gramatan Home Invs. Corp. v. Lopez*, 46 N.Y.2d 481, 485, 414 N.Y.S.2d 308, 386 N.E.2d 1328). "One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously 'brought to a final conclusion' " (*City *176 of New York v. Welsbach Elec. Corp.*, 9 N.Y.3d 124, 127, 848 N.Y.S.2d 551, 878 N.E.2d 966 [emphasis omitted], quoting *Parker v. Blauvelt Volunteer Fire Co.*, 93

N.Y.2d 343, 347, 690 N.Y.S.2d 478, 712 N.E.2d 647). *Blue Sky, LLC v. Jerry's Self Storage, LLC*, 145 A.D.3d 945, 44 N.Y.S.3d 173, 175–77 (N.Y. App. Div. 2016).

The Court of Appeals, while noting that privity does not have a single well-defined meaning (see *Buechel v. Bain*, 97 N.Y.2d 295, 740 N.Y.S.2d 252, 766 N.E.2d 914), has found that privity includes “those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action” (*id.* at 304, 740 N.Y.S.2d 252, 766 N.E.2d 914, quoting *Matter of Juan C. v. Cortines*, 89 N.Y.2d 659, 667, 657 N.Y.S.2d 581, 679 N.E.2d 1061). “Generally, a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party [in] the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation” (*D’Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d at 664, 563 N.Y.S.2d 24, 564 N.E.2d 634). *Blue Sky, LLC v. Jerry's Self Storage, LLC*, 145 A.D.3d 945, 44 N.Y.S.3d 173, 178 (N.Y. App. Div. 2016) (quoting the dissent). As such, plaintiff’s contention that the parties named in the present case are not the exact parties named in the small claims case is of no moment.

Moreover, this State has adopted the transactional analysis approach in deciding *res judicata* issues (*Matter of Reilly v Reid*, 45 NY2d 24). Under this analysis, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (*id.*, at pp 29-30).

Thus, *res judicata* in the sense of claim preclusion “involves the question of whether a plaintiff’s present claim, as distinguished from discrete issues previously litigated, has been extinguished by a final adjudication in a prior proceeding” (*Brown v. Lockwood*, , 76 A.D.2d p. 735, 432 N.Y.S.2d 186; *Matter of Reilly v. Reid*, 45 N.Y.2d 24, 27, 407 N.Y.S.2d 645, 379 N.E.2d 172), in which the parties, or those in privity with them, were the same as in the action presently before the court (see *Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.]*, 43 N.Y.2d p. 189, n. 2, 401 N.Y.S.2d 36, 371 N.E.2d 798; *Matter of Newsday, Inc. v. Ross*, 80 A.D.2d 1, 4–5, 437 N.Y.S.2d 376; *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485, 414 N.Y.S.2d 308, 386 N.E.2d 1328).

Claim preclusion may result from the operation of either merger or bar. In the case of merger, an existing final judgment rendered upon the merits in a plaintiff’s favor precludes further independent litigation of the adjudicated claim, the cause of action being replaced by the right to bring an action upon the judgment; a similar judgment in a defendant’s favor extinguishes the claim, barring a subsequent action thereon (*Brown v. Lockwood*, 76 A.D.2d p. 735, 432 N.Y.S.2d 186; see Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5011.08; Rosenberg, Collateral Estoppel in New York, 44 St. John’s L.Rev. 165, 166; Restatement, Judgments 2d, § 17, subds. [1], [2]; §§ 18, 19, 20).

In the present case, with regard to claim preclusion, plaintiff’s 1st, 2nd, and 5th causes of action, would be barred because those causes of action were extinguished by the judgement of the Small Claims Court, just like in the *O’Brien* case, where “all of defendants’ conduct falling in the first category was also raised during the small claims

suit as the basis for that litigation. That proceeding having been brought to a final conclusion, no other claim may be predicated upon the same incidents” See *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158 (1981). Similarly, with regard to the defendants 4th counter-claim, wherein they request monies arising from dealings and clients of the PC, as well as WEINBERG’s relationship with the PC. The defendants cannot rely on and invoke the protections of the doctrines of claim preclusion and then request this court to allow them to further litigate issues arising from the same transaction as a previously litigated issue.

In contrast, issue preclusion in the sense of collateral estoppel operates to preclude relitigation of discrete issues of law and fact determined, or necessarily determined, in a prior action or proceeding, and may arise “where the parties are the same and one is barred from relitigating an issue which was adjudicated in the prior action or where the parties are not the same but nonetheless one of the parties to the subsequent action is foreclosed from relitigating an issue which was determined in the first action” (*Matter of American Ins. Co. [Messinger-Aetna Cas. & Sur. Co.]*, 43 N.Y.2d p. 189, n. 2, 401 N.Y.S.2d 36, 371 N.E.2d 798; see, also, *Brown v. Lockwood*, 76 A.D.2d 721, 735, 432 N.Y.S.2d 186, ; and discussions in *Survey of New York Prac.*, 53 St. John’s L.Rev. 169, and *Rosenberg, Collateral Estoppel in New York*, 44 St. John’s L.Rev. 165, 166–167; *Restatement, Judgments 2d*, §§ 27, 29).

More specifically, for the doctrine of issue preclusion to apply, it is required: “that the issue as to which preclusion is sought be identical with the issue decided in the prior proceeding, that the *issue have been necessarily decided* in the prior proceeding,

and that the litigant who will be held precluded in the present proceeding have had a full and fair opportunity to litigate the issue in the prior proceeding (*Gilberg v Barbieri*, 53 NY2d 285, 291 [441 N.Y.S.2d 49, 423 N.E.2d 807]; *Schwartz v Public Administrator of County of Bronx*, 24 NY2d 65, 71 [298 N.Y.S.2d 955, 246 N.E.2d 725]; see *B.R. De Witt, Inc. v Hall*, 19 NY2d 141 [278 N.Y.S.2d 596, 225 N.E.2d 195]). The burden of establishing the first two elements rests upon the proponent of preclusion, but as to the lack of a full and fair opportunity to contest, the burden is on the opponent (*Schwartz v Public Administrator of County of Bronx*, 24 NY2d 65, 73 [298 N.Y.S.2d 955, 246 N.E.2d 725], *B.R. De Witt, Inc v Hall*, 19 NY2d 141, 148 [278 N.Y.S.2d 596, 225 N.E.2d 195],)" (*Capital Tel. Co. v Pattersonville Tel. Co.*, 56 N.Y.2d 11, 17–18, 451 N.Y.S.2d 11, 436 N.E.2d 461, emphasis supplied).

Defendants' successful invocation of the doctrine of issue preclusion is dependent upon a finding that (1) there exists at bar an identity of issue, (2) which was necessarily determined in the prior action, and which is dispositive of the present case, and (3) the party against whom the estoppel is asserted has had a full and fair opportunity to litigate the issue sought to be precluded in this subsequent action (*Capital Tel. Co. v. Pattersonville Tel. Co.*, , pp. 17–18, 451 N.Y.S.2d 11, 436 N.E.2d 461; *Schwartz v. Public Administrator of County of Bronx*, 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955, 246 N.E.2d 725).

In addressing the application of issue preclusion to this case, this court is mindful that it constitutes a corollary to the broader doctrine of claim preclusion (*res judicata*), and is a "rule of reason and practical necessity" (*Good Health Dairy Prods. Corp. v. Emery*, 275 N.Y. 14, 18, 9 N.E.2d 758; *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481,

485, 414 N.Y.S.2d 308, 386 N.E.2d 1328,). Issue preclusion is founded upon policy considerations and judicial recognition of aims which seek, *inter alia*, “to conserve the resources of the courts and litigants” (*Mayers v. D’Agostino*, 58 N.Y.2d 696, 698, 458 N.Y.S.2d 904, 444 N.E.2d 1323) and promote the finality of judgments (*Read v. Sacco*, 49 A.D.2d 471, 473, 375 N.Y.S.2d 371). However, this court must additionally recognize that “[o]n a case-by-case basis”, issue preclusion “is elusive and difficult to apply” (*Commissioners of State Ins. Fund v. Low*, 3 N.Y.2d 590, 595, 170 N.Y.S.2d 795, 148 N.E.2d 136; *Matter of Newsday, Inc. v. Ross*, 80 A.D.2d 1, 5, 437 N.Y.S.2d 376,), and must be approached without rigidity (see *Schwartz v. Public Administrator of County of Bronx*, , 24 N.Y.2d p. 73, 298 N.Y.S.2d 955, 246 N.E.2d 725; *Read v. Sacco*, , 49 A.D.2d pp. 473–474, 375 N.Y.S.2d 371). In every case, the question of fairness in its application must be the “crowning consideration” (*Read v. Sacco*, at 474, 375 N.Y.S.2d 371). *Kret by Kret v. Brookdale Hosp. Med. Ctr.*, 462 N.Y.S.2d 896, 899–901 (N.Y. App. Div. 2d Dept. 1983), *aff’d sub nom. Kret v. Brookdale Hosp. Med. Ctr.*, 462 N.E.2d 147 (N.Y. 1984).

In the present case, with regard to the plaintiff’s 1st, 2nd, and 5th causes of action the issues raised are identical to the issues that have been litigated fully before the Honorable Theresa M. Ciccotto in the Small Claims Court for the City of New York. Specifically, in the Small Claims action the Seymour Weinberg counterclaimed for an action to recover monies arising out of “payments made from my clients to PWA CPA’s PC not paid”, which are the exact claims made in the present action. Furthermore, plaintiff does not contend that he did not have a full and fair opportunity to litigate this issue. The plaintiff has had the opportunity to litigate this matter fully before the Honorable Theresa

M. Ciccotto in Small Claims Court. Therefore, the Plaintiff has failed to meet his burden of establishing he did not have a full and fair opportunity to litigate the issue. Similarly, the defendants 4th counter-claim in the present case arise from the same transaction and include the same issues as discussed above. The defendants cannot rely on the doctrines of collateral estoppel, issue preclusion and claim preclusion in an attempt to dismiss the plaintiff's causes of action and not be barred on the same basis regarding their 4th counter-claim.

Moreover, the decision of the small claims court specifically found that both parties failed to provide any proof of the claims asserted, nor did either party produce a contract, specifically the Honorable Theresa M. Ciccotto found *"after reviewing testimony and reviewing exhibits, the court finds that Mr. Picker and Mr. Auerbach failed to prove any liability on the part of Mr. Weinberg. Indeed, they proffered no proof that could establish with any degree of certainty, what clients belonged to the firm, what clients belonged to any of the principals individually, or if any of the principals were permitted to retain their clients, independent of their affiliation with the firm. Reviewing a contract with Integral would have been helpful to the Court, provided any existed."*

Uniform District Court Act § 1808

As to the plaintiff's contention that the small claims action cannot be dispositive of the present action as a matter of law, this court finds to the contrary. While the Uniform District Court Act § 1808, as amended in 2005, provides that a small claims judgment "shall not be deemed an adjudication of any fact at issue or found therein in any other action or court," the Legislative history for the 2005 amendment clearly indicates that this

language refers to “issue preclusion,” as opposed to “claim preclusion,” and that the Legislature did not intend for a plaintiff who loses a small claims action to be able sue again on the same claim (see Mem of Assembly Sponsor, Bill Jacket, L 2005, ch 443 at 3; see also *Gerstman v Fountain Terrace Owners Corp.*, 31 Misc 3d 148[A], 2011 NY Slip Op 50988[U] [2011]; *Chorekchan v Forman*, 18 Misc 3d 127[A], 2007 NY Slip Op 52362[U] [2007]; cf. **2 *McGee v J. Dunn Constr. Corp.*, 54 AD3d 1010 [2008]; *Katzab v Chaudhry*, 48 AD3d 428 [2008]). The Appellate Court notes that their decisions in *Katzab v Chaudhry* (48 AD3d 428 [2008]) and *McGee v J. Dunn Constr. Corp.* (54 AD3d 1010 [2008]) are not to the contrary, as the claims in those cases were not the same as the ones previously asserted in small claims actions. *Merrimack Mut. Fire Ins. Co. v. Alan Feldman Plumbing & Heating Corp.*, 102 A.D.3d 754, 754–55, 961 N.Y.S.2d 183 (2013).

Here, contrary to the plaintiff’s contention the small claims decision can be dispositive of the present action. Here, the plaintiff’s claims to recover for monies collected by the corporation in his 1st, 2nd, and 4th causes of action are the same as the counter-claims brought by SEYMOUR WEINBERG in the Small Claims Court, which was dismissed after trial. Since Mr. Weinberg would be barred by the doctrine of res judicata from asserting the claim, his current claim, is similarly barred (see *Westport Ins. Co. v Altertec Energy Conservation, LLC*, 82 AD3d 1207, 1209 [2011]). *Merrimack Mut. Fire Ins. Co. v. Alan Feldman Plumbing & Heating Corp.*, 102 A.D.3d 754, 754–55, 961 N.Y.S.2d 183 (2013). The same applies to the defendant’s 4th counter-claim in the present case. Therefore, the plaintiff’s 1st, 2nd, and 5th causes of action are dismissed and defendants 4th counter-claim is dismissed.

Piercing the Corporate Veil

In the present case, both parties assert claims which would require piercing the corporate veil in order to succeed as they each seek to collect from shareholders individually. Specifically, the plaintiff's 3rd and 4th causes of action, and the defendant's 1st and 2nd counter-claims. While "[t]he law permits the incorporation of a business for the very purpose of escaping personal liability" (*Bartle v. Home Owners Co-op.*, 309 N.Y. 103, 106, 127 N.E.2d 832; see *Seuter v. Lieberman*, 229 A.D.2d 386, 387, 644 N.Y.S.2d 566; *New York Assn. for Retarded Children, Montgomery County Chapter v. Keator*, 199 A.D.2d 921, 922, 606 N.Y.S.2d 784), equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice (see *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 623 N.E.2d 1157). A member of a limited liability company will not be held liable for the liabilities of the company solely by reason of being a member of the company or acting in such capacity or participating in the conduct of the business of the company (see Limited Liability Company Law § 609[a]). "[M]embers of limited liability companies, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business" (*Rothstein v. Equity Ventures*, 299 A.D.2d 472, 474, 750 N.Y.S.2d 625; see *277 Mott St. LLC v. Fountainhead Constr.*, 83 A.D.3d 541, 922 N.Y.S.2d 299; *Peguero v. 601 Realty Corp.*, 58 A.D.3d 556, 558, 873 N.Y.S.2d 17). However, the mere fact that they are members of, a limited liability company, is insufficient to impose liability upon them (see Limited Liability Company Law § 609[a]). To state a cause of action under the doctrine of piercing the corporate veil, the "plaintiff must allege

facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation [or LLC] and 'abused the privilege of doing business in the corporate [or LLC] form to perpetrate a wrong or injustice' " (*East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 16 N.Y.3d 775, 776, 919 N.Y.S.2d 496, 944 N.E.2d 1135, quoting *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142, 603 N.Y.S.2d 807, 623 N.E.2d 1157; see *Grammas v. Lockwood Assoc., LLC*, 95 A.D.3d at 1075, 944 N.Y.S.2d 623). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds" (*Grammas v. Lockwood Assoc., LLC*, 95 A.D.3d at 1075, 944 N.Y.S.2d 623).

In the present case, construing the complaint in the light most favorable to the party asserting the claim, and accepting as true the factual allegations set forth therein (see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *LoPinto v. J.W. Mays, Inc.*, 170 A.D.2d 582, 583, 566 N.Y.S.2d 357), neither party adequately pleaded a cause of action to recover against the individuals for the alleged wrongs committed pursuant to a "[p]iercing [of] the corporate veil" theory (*Weinstein v. Willow Lake Corp.*, at 635, 692 N.Y.S.2d 667; see *Brooke Realty-Dupont v. SBC Equip. Leasing Co.*, 248 A.D.2d 347, 669 N.Y.S.2d 626; *Meachum v. Outdoor World Corp.*, 235 A.D.2d 462, 652 N.Y.S.2d 749). In the present case, neither party alleged that the other exercised complete dominion and control over the corporation in order to commit a wrong (see generally *Matter of Morris v. New York State Dept. of Taxation & Fin.*, at 141, 603

N.Y.S.2d 807, 623 N.E.2d 1157; *CC Ming [USA] Ltd. Partnership v. Champagne Video*, 232 A.D.2d 202, 648 N.Y.S.2d 21; *Fern, Inc. v. Adjmi*, 197 A.D.2d 444, 602 N.Y.S.2d 615). *Ventresca Realty Corp. v. Houlihan*, 28 A.D.3d 537, 538, 813 N.Y.S.2d 196, 197 (2006).

Here, the allegations in the complaint impermissibly seek to extend liability to the defendants, BARRY PICKER and MESHULEM AUERBACH, individually, simply by virtue of their status as members of the LLC. The plaintiff's allegations that BARRY PICKER, MESHULEM AUERBACH, as members of the LLC, directly participated in the transactions at issue, without more, are conclusory at best and, thus, insufficient to extend liability to them. The plaintiff failed to allege any facts sufficient to justify piercing the corporate veil with respect to BARRY PICKER, MESHULEM AUERBACH. (*see TNS Holdings v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339, 680 N.Y.S.2d 891, 703 N.E.2d 749). The same applies to the defendant's allegations regarding SEYMOUR WEINBERG, individually. As such the plaintiff's 3rd and 4th causes of action are dismissed and the defendant's 1st and 2nd counter-claims are dismissed.

Defamation

To address defendant's 3rd Counter-claim alleging defamation per se, namely that (1)"on October 31, 2015 Weinberg walked over to Picker in a synagogue and stated that Picker is "evil" and a "crook" in front of other congregants" and that (2)"on November 1, 2015 Weinberg again walked over to Picker in a synagogue and stated that Picker is "evil" and a "crook" and stated that Picker's daughter "stole money" in front of other congregants"; and (3) that Weinberg has made and continues to make disparaging and

defamatory comments about Pickers ethic and conduct to other people; and (4) Weinberg's statements were malicious, defamatory, and false when made, and Weinberg knew the statements were false when he made them.

In any event, in order to establish a claim for defamation the elements must be met; "[t]he elements of a cause of action for defamation are (1) a false statement, (2) published without privilege or authorization to a third party, constitution fault as judged by, at a minimum, a negligence standard, and it must either (3) cause special harm or constitute defamation per se" (*Matter of Konig v CSC Holdings, LLC*, 112 AD3d 934, 935 [2d Dept 2013] [internal citation and quotation marks omitted]). "[T]o constitute actionable slander, the slanderous words must have been spoken in the presence and hearing of some person other than the one slandered, who is not entitled to hear the defamatory matter" (*Fedrizzi*, 204 AD2d at 268). "In determining whether a complaint states a cause of action to recover for damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff" (*Matter of Konig*, 112 AD3d at 935 [internal citation and quotation marks omitted]). The 3rd element requires a showing of special damages, or defamation per se. New York Law "presumes that damages result from those specifically enumerated categories of statements" that constitute defamation per se. One of these categories consists of statements that tend to injure another in his or her trade, business or profession." *Liberman v Gelstein*, 80 N.Y.2d 429, 435 (Ct. App. 1992). More importantly, the Statute of Limitations for a claim of defamation is one (1) year. NY CPLR § 215(3),

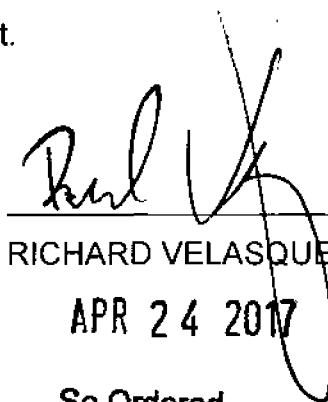
see also *Firth v. State*, 98 N.Y.2d 365 (2002); *Stephen v. Cawley*, 890 N.Y.S/2d 371. 24 <isc.3d 1204A, at *5 (N.Y. Sup. Ct. 2009).

Here, the defendants fail to establish any impact on their trade, business profession as they offer no proofs of the same. Additionally, the defendant's counterclaims fail to state a cause of action for defamation because the defendant has failed to demonstrate that a reasonable listener could have concluded that the statements were actual facts and not the plaintiff's opinion of the defendant. Moreover, the defendants counter-claim for defamation is barred by the Statute of Limitations because by the defendants own admission both statements in question were published more than one (1) year ago. As such, the defendant's 3rd Counter-claim is hereby dismissed.

Accordingly, Defendants request to dismiss all causes of action in the Complaint is hereby Granted. Defendant's request to sever and continue the defendant's counterclaims is hereby Denied. Plaintiff's request to compel discovery is hereby Denied. This matter is hereby dismissed.

This constitutes the Decision/Order of the Court.

Date: April 24, 2017


RICHARD VELASQUEZ, J.S.C.

APR 24 2017

So Ordered
Hon. Richard Velasquez

KINGS COUNTY CLERK
FILED
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