

<b>Caring Professionals, Inc. v Landa</b>
2017 NY Slip Op 32085(U)
October 2, 2017
Supreme Court, Kings County
Docket Number: 504434/2013
Judge: Sylvia G. Ash
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At an IAS Term, Com 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2<sup>nd</sup> of October 2017.

PRESENT:  
HON. SYLVIA G. ASH,  
Justice.

-----X

CARING PROFESSIONALS, INC.  
Plaintiff,

Decision / Order

- against -

Index No. 504434/2013

BENJAMIN LANDA, ESTATE OF JENO  
GUTTMAN by its Executors LOUIS  
GUTTMAN and RYVKIE GOLDBERGER,  
EXCELLENT HOME CARE SERVICES, LLC,  
Defendants.

-----X

The following papers numbered 1 to 4 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

1 - 3  
4  
\_\_\_\_\_

Plaintiff, Caring Professionals, Inc., moves pursuant to CPLR §3124 to compel Defendants, Benjamin Landa, Estate of Jeno Guttman by its Executors Louis Guttman and Ryvkie Goldberg, Excellent Home Care Services, LLC, to produce discovery. Additionally, Plaintiff moves to amend its complaint. Defendants oppose and cross-move pursuant to CPLR §3211(a)(7) to dismiss Plaintiff's fifth and sixth causes of action and pursuant to CPLR §3103 to obtain a protective order. For the reasons set forth below, Plaintiff's motion to compel is GRANTED; Defendants' cross-motion to dismiss is GRANTED in part and DENIED in part; Defendant's motion for a protective order is GRANTED in part and DENIED in part.

**Background**

The underlying case stems from a 2006 contractual agreement between Plaintiff and Defendant, Excellent Home Care Services, LLC ("Excellent"). The agreement called for Plaintiff to provide licensed nurses, home health aides and personal care aides to Excellent in exchange for

payment. Alleging that Plaintiff breached their agreement by supplying it with unlicensed personnel, Excellent stopped making payments to Plaintiff.

Plaintiff disputed Excellent's allegations and commenced this action to recoup the alleged unpaid compensation, totaling approximately \$7 million. In its complaint, Plaintiff asserts six causes of action. Plaintiff's fifth cause of action alleges that Excellent violated Limited Liability Company Law § 508(a) in making distributions to Mr. Landa and the Guttman Estate, after representing that it lacked the funds to pay its alleged debt to Plaintiff. Plaintiff's sixth cause of action alleges that Mr. Landa and the Guttman Estate knew that the distributions violated LLCL § 508(a) when they received them.

With the instant motion, Plaintiff seeks to compel Defendants to produce documents and to make Mr. Landa and the Guttman Estate available for deposition. Plaintiff claims that the discovery process has so far revealed that Mr. Landa and the Guttman Estate used Excellent as a personal piggy bank and disregarded corporate formalities to avoid paying Excellent's debt to Plaintiff and other creditors.

Plaintiff seeks to obtain, among other things, the following documents: (1) Excellent and its members' bank and tax return information, (2) documents pertaining to Excellent's distributions and loans, (3) communications among Defendants concerning Excellent's assets and liabilities at the time Excellent incurred the alleged debt to Plaintiff, (4) documents pertaining to disputes between Excellent and other parties concerning failure to pay for the services of other healthcare personnel providers or improper accounting practices.

Defendants oppose Plaintiff's motion to compel and cross-move to dismiss Plaintiff's fifth and sixth causes of action and to obtain a protective order with regards to Mr. Landa and the Guttman Estate's depositions and personal bank and tax records. First, Defendants argue that they have satisfactorily met their discovery obligations because they produced Excellent's representative, Ryvkie Goldberg, for deposition. And that they provided Plaintiff between 15,000 to 16,000 pages of documents. Defendants argue that Plaintiff's additional requests are immaterial to the case and amount to a fishing expedition.

Second, Defendants argue that Plaintiff's fifth and sixth causes of action should be dismissed for failing to state claims against Mr. Landa and the Guttman Estate. Defendants maintain that Plaintiff does not allege any affirmative fraudulent act taken by either Landa or the Guttman Estate that caused Plaintiff harm. And that to the extent Mr. Landa and the Guttman Estate share any liability, they are only liable to Excellent, not to Plaintiff.

Further, Defendants argue that contrary to Plaintiff's allegations, Excellent is not judgment proof. Defendants insist that the reason Excellent has not paid the contested debt is because Plaintiff materially breached the parties' agreement by not providing properly licensed personnel, not because Excellent is insolvent. Lastly, Defendants argue that the Court should issue a protective order against Plaintiff's continued demands for documents and depositions of Mr. Landa and the Guttman Estate.

In response, Plaintiff argues that the Court should compel the production of documents by and concerning Excellent because Defendants do not oppose their motion to compel as against Excellent. For similar reasons, Plaintiff argues that the Court should deny the requested protective order as to Excellent. With regards to Defendants' motion to dismiss the complaint's fifth and sixth causes of action, Plaintiff argues that the complaint sufficiently alleges grounds for personal liability against Mr. Landa and the Guttman Estate. Specifically, Plaintiff points to the complaint's allegation that Excellent made distributions to Mr. Landa and the Guttman Estate after Excellent had represented that it lacked the funds to pay its alleged debt to Plaintiff.

Further, Plaintiff argues that if the Court finds that the complaint insufficiently alleges claims against Mr. Landa and the Guttman Estate, the Court should grant it leave to amend its complaint to add other allegations. In Plaintiff's proposed amended complaint, Plaintiff alleges that titles and official positions at Excellent are meaningless. Plaintiff claims that during its deposition of Mr. Goldberg, Mr. Goldberg could not confirm whether he is a manager or director at Excellent. And that Mr. Goldberg could not confirm the complete membership of Excellent's Board of Directors.

Additionally, Plaintiff's proposed amended complaint claims that financial transaction between Excellent, its members and the members' family and friends are not appropriately documented. And that distributions to members are made on an ad hoc basis simply at the request of one of Excellent's members. Further, the proposed amended complaint alleges that Excellent does not maintain enough assets to pay creditors when bills come due. Rather, at the end of each year, Excellent's owners, family members and friends allegedly loan funds to Excellent to meet its obligations. In addition, Plaintiff's proposed amended complaint seeks to add a claim against Mr. Landa and the Guttman Estate under New York's Debtor and Creditor Law. The proposed amended complaint alleges that the distributions that were made by Excellent to Landa and the Guttman Estate were made without fair consideration.

#### *Discussion*

Pursuant to CPLR § 3124, any party may move the court for an order to compel discovery. "New York has long favored open and far-reaching pretrial discovery" (*Anonymous v High School for Environmental Studies*, 32 AD3d 353, 358 [1st Dept 2006]). The CPLR defines the scope of discovery, and provides for full disclosure of all evidence necessary and material in prosecution and defense of an action (CPLR 3101 [a]). Trial courts liberally interpret the words "necessary" and "material" in the statutory language to permit discovery of any facts and documents pertaining to the controversy in issue that will assist a party in its preparation for trial, providing the documents sought are not protected from discovery (*see Polygram Holding Inc., v Cafaro*, 42 AD3d 339, 340-341 [1st Dept. 2007]; *see also Anonymous*, 32 AD3d at 358).

Here, Excellent's financial documents and communications are relevant to Plaintiff's case because Plaintiff alleges that Excellent's distributions to Mr. Landa and the Guttman Estate violated LLCL § 508(a). Similarly, deposition testimony from Mr. Landa and the Guttman Estate is relevant because Plaintiff alleges that Mr. Landa and Guttman Estate received the distributions from Excellent with the knowledge that the distributions violated the LLCL § 508(a). However,

before Plaintiff's motion to compel discovery can be granted, Plaintiff's fifth and sixth causes of action must first withstand Defendants cross-motion to dismiss.

First, Defendants move to dismiss Plaintiff's fifth cause of action. Plaintiff's fifth cause of action is premised upon Defendants' alleged violation of LLCL § 508(a). Pursuant to LLCL §508, a limited liability company is prohibited from making any distributions to a member to the extent that it exceeds the fair market value of the assets of the limited liability company. Any member who receives a distribution in violation of the provisions of subdivision (a) and who was aware at the time that the distribution violated the provisions thereof, is liable to *the limited liability company* for the amount of the distribution (LLCL §508[b] [emphasis added]).

Here, Plaintiff cannot maintain a cause of action against Defendants, premised on a violation of LLCL §508 (a) because any liability for Mr. Landa and the Guttman estate, stemming from the alleged improper distributions from Excellent, would be to Excellent, not Plaintiff. Plaintiff, an alleged creditor of Excellent's, does not enjoy the protections conferred by LLCL §508 (a) with respect to alleged improper distributions by Excellent to its member. Therefore, Defendants cross-motion to dismiss Plaintiff's fifth cause of action is GRANTED.

Second, Defendants move to dismiss Plaintiff's sixth cause of action. Plaintiff's sixth cause of action seeks to pierce Excellent's corporate veil to hold Mr. Landa and the Guttman Estate personally liable for the alleged debt. One of the primary legitimate purposes of incorporating is to limit or eliminate the personal liability of corporate principals (*see Bartle v Home Owners Coop.*, 309 NY 103, 106 [1955]). Nevertheless, equity will intervene to "pierce the corporate veil" and permit the assertion of claims against the individuals who control the corporation in order to avoid fraud or injustice (*see Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140-141 [1993]).

Generally, piercing the corporate veil requires a showing that the individual defendants exercised complete dominion and control over the corporation and used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see Seuter v Lieberman*, 229 AD2d 386 [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 Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821, 823 [2d Dept 1989]).

Factors to be considered in determining whether the owner has "abused the privilege of doing business in the corporate form" include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 1016-1017 [2d Dept 2007]); *see Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2d Dept 2009]).

Here, Plaintiff's complaint fails to allege sufficient facts to pierce Excellent's corporate veil because Plaintiff primarily alleges that Excellent made improper distributions to Mr. Landa and the Guttman Estate. And that those distributions were made and received with the knowledge that they were in violation of the LLCL § 508(a). Standing alone, the allegations in Plaintiff's complaint are insufficient to assign personal liability on Mr. Landa and the Guttman Estate for

Excellent's alleged debt. However, Plaintiff moves to amend its complaint to add other allegations to bolster its claims. Therefore, the Court must consider the validity of Plaintiff's proposed amendment.

In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*Marcum, LLP v Silva*, 117 AD3d 917, 917 [2d Dept 2014]; see CPLR 3025 [b]). The determination to permit or deny amendment is committed to the sound discretion of the trial court" (*Marcum, LLP v Silva*, 117 AD3d at 917; see CPLR 3025 [b]).

Here, Plaintiff's proposed amended sixth cause of action sufficiently asserts a claim against Mr. Landa and the Guttman Estate because Plaintiff claims that Mr. Goldberg testified that Excellent does not adhere to corporate formalities. Specifically, Plaintiff alleges that Mr. Goldberg was not able to confirm his role at Excellent, nor could he confirm the makeup of Excellent's Board of Directors. Further, Plaintiff alleges that Excellent does not maintain enough assets to pay creditors when bills come due. And that at the end of each year, Excellent's members infuse the company with enough cash to meet its obligation. Excellent is not prejudiced by the proposed amended complaint because the proposed changes originate, in part, from Mr. Goldberg's testimony. Therefore, Plaintiff's motion to amend its sixth cause of action is GRANTED and Defendants' cross-motion to dismiss same is DENIED.

Plaintiff's proposed amended complaint also seeks to add a claim under Debtor and Creditor Law § 273 (a), which states as follows: "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such 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." The law provides that where a conveyance is fraudulent as to a creditor, such creditor may, as against any person other than a bona fide purchaser, disregard the conveyance and levy execution upon the property conveyed (Debtor and Creditor Law, § 278 [1]).

Here, Plaintiff's proposed amendment asserts a viable claim for fraudulent conveyance because Plaintiff alleges that Mr. Landa and the Guttman Estate knowingly received improper distributions from Excellent. And that the alleged improper distributions were made to render Excellent judgment proof against Plaintiff's claims. Allowing Plaintiff to amend its complaint to add the fraudulent conveyance claim does not create a surprise or unduly prejudice Defendants. Therefore, Plaintiff's motion to amend its complaint to add a claim under the Debtor and Creditor Law is also GRANTED.

Turning now to Defendants' motion for a protective order. "A motion for a protective order...is addressed to the sound discretion of the trial court..." (*Boylin v. Eagle Telephonics*, 130 AD2d 538, 515 N.Y.S.2d 273 [2d Dept. 1987]). CPLR § 3103(a), provides that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating

the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Here, the production of Mr. Landa and the Guttman Estate's personal bank information and tax returns is not "material" and "necessary" to the prosecution of Plaintiff's case. This is because any information about the alleged improper distributions from Excellent to its members can be gleaned from Excellent's own bank records and tax documents. However, Mr. Landa and the Guttman Estate's knowledge regarding any alleged improper distribution by Excellent renders their deposition testimony necessary. Therefore, Defendants' motion for a protective order is GRANTED only with regards to Mr. Landa and the Guttman Estate's personal bank information and tax records, otherwise Defendant's motion is DENIED.

Accordingly, it is hereby

ORDERED that Defendants cross-motion to dismiss Plaintiff's fifth cause of action is GRANTED; it is further

ORDERED that Plaintiff's motion to amend its sixth cause of action is GRANTED and Defendants' cross-motion to dismiss same is DENIED; it is further

ORDERED that Plaintiff's motion to amend its complaint to add a claim under the Debtor and Creditor Law is GRANTED; it is further

ORDERED that Defendants' cross-motion for a protective order is GRANTED with regards to Mr. Landa and the Guttman Estate's personal bank and tax records; and it is further

ORDERED that Plaintiff's motion to compel is GRANTED, to the exclusion of Mr. Landa and the Guttman Estate's personal bank and tax records.

This constitutes the Decision and Order of the Court.

ENTER,



Sylvia G. Ash, J.S.C.

HON. SYLVIA G. ASH, JSC