

Abyssinian Dev. Corp. v Bistricher
2018 NY Slip Op 30984(U)
May 18, 2018
Supreme Court, New York County
Docket Number: 151793/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFEPART 12*Justice*

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ABYSSINIAN DEVELOPMENT CORPORATION,
WINDELS MARX LANE & MITTENDORF, LLP,

Petitioners,

INDEX NO. 151793/2017

MOTION DATE _____

- v -

MOTION SEQ. NO. 1

DAVID BISTRICER, CLIPPER EQUITY
HOLDINGS LLC, CLIPPER EQUITY LLC, GUNKI
HOLDINGS LLC, CLIPPER EQUITY LP, CLIPPER
EQUITY GP, LLC,

Respondents.

DECISION AND JUDGMENT

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The following e-filed documents, listed by NYSCEF document number 2, 48, 49, 50, 51, 52, 53, 54, 55,
56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 73

were read on this application to

enforce judgment

By notice of petition, petitioners seek orders: (1) permitting them to pierce the corporate veil of respondent/judgment debtor Clipper Equity Holdings LLC (Clipper Holdings); and (2) amending the judgment to permit collection of it, jointly and severally, from respondent Bistricher personally, Clipper Holdings, and the other respondents or, alternatively, for a judgment against them, plus costs, disbursements, and attorney fees. In opposition, respondents submit an answer and objections in point of law.

I. BACKGROUND

A. Prior action

In the prior action (index number 115576/08), plaintiffs sued defendants Bistricher and Clipper Holdings for breach of contract, an account stated, and unjust enrichment for their failure to pay for the services they performed for them. Bistricher was sued as the president and controlling shareholder of Clipper Holdings, and all three claims were asserted against both defendants jointly. In 2011, the account stated and unjust enrichment claims against Bistricher were dismissed. (Decision and order dated June 3, 2011).

On or about October 10, 2013, after a non-jury trial, the justice then presiding over the action entered judgment for plaintiffs and awarded them damages against Clipper Holdings but dismissed the breach of contract claim against Bistricher.

By decision and order dated November 10, 2015, the Appellate Division, First Department, affirmed the trial court's decision, holding that plaintiffs' claim for breach of contract against Bistricher personally for failure to pay legal fees was properly dismissed on the ground that he is not personally liable for the fees as his alleged oral promise to pay is barred by the statute of frauds. (133 AD3d 435).

B. Instant proceeding

Having obtained a judgment against Clipper Holdings, petitioners now seek to enforce it against Bistricher personally and several other allegedly related entities, jointly and severally, by piercing Clipper Holdings's corporate veil. As pertinent here, petitioners allege that in or about June 2010 Clipper Holdings and the related entities ceased to exist under Delaware law; that while petitioners were generally aware at the inception of their contractual relationship with respondents that there were related entities involved in the transaction at issue, they were

unaware of a mistake as to which entity had signed the agreement; that during the trial of the first action Bistricher testified that he generally used the name Clipper to refer to all of the related entities; and that from the inception of the transaction, Bistricher informally moved money among the various entities. As a result of post-judgment discovery, petitioners claim to have learned that Clipper and the other entities have minimal corporate documents, had no assets or bank or other accounts, kept no books or records, prepared no financial statements, and neither filed nor paid federal or state taxes. They thus maintain that the Clipper Holdings and the related entities are shams or shell corporations, are not properly constituted corporate entities, are dominated by Bistricher, were never capitalized and are judgment-proof, observed no corporate formalities, and were used by Bistricher to defraud them. (Petition, dated Feb. 8, 2017).

In May 2017, respondents answered the petition and raised objections in point of law, including that the petition is procedurally improper, that petitioners fail to prove their claim, that the proceeding is barred as an improper second attempt to hold Bistricher personally liable, that the proceeding is untimely, that the petition lacks a factual basis, and that no legal basis exists for petitioners' attorney fees claim. (Mem. in Opposition to Petition, dated May 14, 2017).

II. PETITION AND ANSWER

A. Procedural considerations

Pursuant to CPLR 5225(b), upon a special proceeding commenced by the judgment creditor against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, and where it is established that the judgment creditor is entitled to possession of the property or money, such person must pay the money or deliver the personal property to satisfy the judgment. Petitioners' commencement of a CPLR 5225 proceeding to obtain a judgment holding Bistricher personally liable is proper. (*See O'Brien-*

Kreitzberg & Assocs. v K.P., Inc., 218 AD2d 519 [1st Dept 1995] [where plaintiff sought to enforce judgment against principal of corporate judgment debtor, relief sought more appropriately obtained in CPLR 5225 special proceeding rather than plenary action]).

That New York does not recognize a separate and distinct cause of action for the piercing of a corporate veil is irrelevant, as petitioners proceed pursuant to CPLR 5225, which permits an attempt to enforce their judgment by piercing the judgment debtor's corporate veil. (*See e.g., Matter of EAC of New York, Inc. v Capri 400, Inc.*, 49 AD3d 1006 [3d Dept 2008] [in CPLR 5225 proceeding, affirming trial court's decision to pierce corporation's veil in order to hold corporation's principal personally liable on judgment against corporation; *O'Brien-Kreitzberg & Assocs.*, 218 AD2d at 519 [action to pierce veil in order to hold principal individually liable should have been brought at special proceeding pursuant to CPLR 5225]).

While respondents argue that petitioners improperly seek to amend or modify the judgment, to the extent that the outcome of this proceeding may be a judgment directing respondents to satisfy the judgment at issue or awarding damages in the amount of the underlying judgment, it is not equivalent to amending the judgment, and respondents cite no authority to the contrary.

B. Res judicata

A claim is barred by a prior litigation when a final judgment on the merits was rendered thereon, there is an identity of parties or privity among them, and there is an identity of claims in the two actions. If these elements are demonstrated, any claims that were or should have been brought in the first action are barred. (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64 [2018]).

Here, it is undisputed that all three elements are present: the prior action was resolved on its merits by a final judgment, petitioners and Bistricher were parties to it, and Bistricher's alleged personal liability for the unpaid fees owed to petitioners is raised in both actions, albeit based on different theories of recovery.

In *Rosen v Watermill Dev. Corp.*, the plaintiffs brought a contract action against various entities, including an attempt to pierce the corporate veil against an individual defendant, which claim was dismissed, and judgment was later entered against a corporate defendant. (2002 WL 34460624 [Sup Ct, Suffolk County 2002]). In affirming the trial court, the Court determined that the evidence was insufficient to pierce the veil to hold the individual defendant personally liable (*Rosen v Watermill Dev. Corp.*, 1 AD3d 424 [2d Dept 2003]).

Thereafter, the plaintiffs commenced a post-judgment enforcement action against the individual defendant, again seeking to pierce the corporate defendant's veil to hold the individual liable. The court dismissed the action, finding that the plaintiffs had a full and fair opportunity to litigate the issue of piercing the corporate veil in the first action and thus could not maintain the second action. (15 Misc 3d 1139[A] [Sup Ct, Suffolk County 2007]). On appeal, the Court held that the action was precluded because, *inter alia*, it arose from the same transactions as the prior action and the two proceedings were identical except for the theory of recovery. (51 AD3d 761 [2d Dept 2008] [internal citations omitted]).

Here, by contrast, petitioners did not attempt to pierce the veil in the prior action. Rather, they allege that the facts underlying their claim to hold Bistricher liable here were unknown to them until after the judgment was entered and they received post-judgment discovery. Thus, it remains to be determined whether piercing Clipper Holdings's corporate veil post-judgment is warranted. (*See Am. Fed. Title Corp. v GFI Mgt. Svces., Inc.*, 39 F Supp 3d 516, 524 [SD NY

2014] [rejecting argument that veil-piercing claim was barred as it could have been brought in earlier action; claim must logically have arisen before prior action but plaintiff asserted it was unaware of corporation's inadequate assets until after judgment entered, and to dismiss on that basis would mean that "any time a plaintiff sues a corporation, it would effectively be required to join the corporation's owners or be barred from later recovering on the judgment from the owners in a separate veil-piercing claim."]).

Respondents thus fail to establish that the instant proceeding is barred by the prior action. (*See First Cap. Asset Mgt., Inc. v N.A. Partners, L.P.*, 260 AD2d 179 [1st Dept 1999], *lv denied* 93 NY2d 817 [dismissal of action against individual in prior action was based on finding that he was not personally liable for agreement, and "did not preclude a subsequent proceeding to enforce the judgment against (the individual) based on allegations that would support piercing the corporate veil of the judgment debtors," as evidence needed to sustain claims in both actions varied]; *RENP Corp. v Embassy Holding Co.*, 229 AD2d 381 [2d Dept 1996] [dismissal of second action not warranted as first action based on breach of contract while second action involved individual's alleged self-dealing and undercapitalization of corporate judgment debtor, and thus differences existed related to relief sought, facts to be proved, and law to be applied]).

Chiomenti Studio Legale, L.L.C. v Prodos Cap. Mgt. LLC is inapposite as there the cause of action to pierce the corporation's veil was dismissed based on a lack of supporting evidence. (140 AD3d 635 [1st Dept 2016]). While the Court also held that the corporate defendant's alleged failure to pay legal fees in breach of the parties' agreement did not constitute a fraud or wrong sufficient to justify piercing the corporate veil (*id.*), here petitioners allege that the fraud or wrong at issue was Bistricher's use and domination of Clipper Holdings and the other entities in order to evade liability and render themselves judgment-proof. (*See e.g., Grigsby v*

Francabandiero, 152 AD3d 1195 [4th Dept 2017] [plaintiff alleged that defendant acted to make corporation judgment-proof by undercapitalizing LC, and dissolving and transferring corporation's funds to new entity, without reserving funds to satisfy judgment debt]; 9 E. 38th *Assocs., L.P. v George Feher Assocs., Inc.*, 226 AD2d 167 [1st Dept 1996] [claim stated for piercing veil and assigning personal liability to defendant as it was alleged that defendant exercised complete dominion and control over corporation and had fraudulently conveyed corporate assets to avoid corporation's contractual obligations]).

C. Statute of limitations

Given the 20-year statute of limitations for the enforcement of a judgment, this proceeding is timely. (CPLR 211[b]; *Solow v Domestic Stone Erectors, Inc.*, 229 AD2d 312 [1st Dept 1996] [claim to pierce corporate veil governed by 20-year statute of limitations]).

D. Piercing the veil

A plaintiff seeking to pierce the corporate veil bears the heavy burden of showing that: (1) the corporation's owners exercised complete domination of the corporation related to the transaction at issue; and (2) such domination was used to commit a fraud or wrong against the plaintiff which caused the plaintiff's injury. (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30 [2018]). The claim is particularly factual and "not well-suited" for summary resolution. (*First Bank of Am. v Motor Car Funding, Inc.*, 257 AD2d 287, 294 [1st Dept 1999]).

While petitioners submit proof that Bistricher dominated and utilized Clipper Holdings and the other entities interchangeably for various business dealings, and that Clipper Holdings was undercapitalized and lacking in corporate formalities, they do not establish, as a matter of law, that the purpose of the domination and control was to commit a fraud or wrong against petitioners which resulted in their injury, rather than for legitimate business related to the

transaction. (See e.g., *Matter of WBP Cent. Assocs., LLC v DeCola*, 50 AD3d 693 [2d Dept 2008] [turnover petition denied and matter remitted for further proceedings as judgment creditor failed to demonstrate as matter of law that corporation's veil should be pierced]; see also *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135 [1993] [piercing corporate veil unwarranted as, among others, it appears corporation had legitimate business purpose in its formation and no showing that it was set up as sham or to avoid taxes]; *Springut Law PC v Rates Tech. Inc.*, 157 AD3d 645 [1st Dept 2018] [dismissing veil-piercing claim where it was alleged that president ignored corporate formalities, dominated and controlled corporate defendants, and made their business decisions]; *Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda v Elman Investors, Inc.*, 117 AD3d 447 [1st Dept 2014] [allegations of undercapitalization and intermingling of assets, along with domination by principal, insufficient]).

Even if petitioners had met their *prima facie* burden, respondents assert that Clipper Holdings and the other entities were formed for legitimate business purposes and before any agreement was entered into among them and petitioners, thereby negating an inference that they were formed to defraud petitioners. They also maintain that Clipper was to be funded once the transaction at issue was consummated, and that the movement of funds among the entities, and the payment to other creditors were for legitimate and documented reasons. They explain that the various entities were formed and specifically structured as part of the transaction, and that once the transaction fell through, there was no need to maintain their corporate existence, and they submit in support thereof an affidavit from an attorney who worked on the transaction and the structuring of Clipper and the other entities. (Affidavit of David Bistricher, dated May 15, 2017; Affidavit of Lawrence M. Levinson, Esq., dated May 14, 2017).

Given these factual issues, the matter must be resolved by a hearing. (CPLR 410 [if triable issues raised, they are to be tried forthwith]; *cf* CPLR 409[b] [court shall make summary determination upon papers to extent no triable issues of fact raised]; *see e.g., Matter of WBP Cent. Assocs., LLC*, 50 AD3d at 693 [as evidence presented with petition did not establish as matter of law that corporate veil should be pierced, summary determination of proceeding inappropriate]; *Matter of Ntl. Enterprises, Inc. v Clermont Farm Corp.*, 46 AD3d 1180 [3d Dept 2007] [summary treatment of special proceeding governed by standards applicable to motion for summary judgment; as triable issues remained, hearing required]).

F. Attorney fees

As petitioners do not oppose respondents' objection to their claim for attorney fees, and otherwise submit no supporting authority for the fees, that portion of the petition is denied.

III. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied to the extent of dismissing petitioners' request for attorney fees, and is otherwise held in abeyance pending a hearing as to whether petitioner is entitled to the relief requested in the petition; it is further

ORDERED, that the matter is referred for a hearing before a Special Referee, who shall hear and report on the specific issue of whether the corporate veil of Clipper Equity Holdings, LLC, should be pierced in order to hold the other respondents liable for petitioner's judgment; it is further

ORDERED, that the Special Referee hear and report with recommendations; it is further

ORDERED, that the issue is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement forthwith and at the earliest possible date

upon the calendar of the Special Referees Part (Part SRP) which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "references" link under "Courthouse Procedures"), shall assign this matter to an available Special Referee to hear and report as specified above; it is further

ORDERED, that petitioners' counsel immediately consult with respondents' counsel and, within fifteen (15) days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee Part; it is further

ORDERED, that any motion to confirm or reject the Report of the Special Referee be made within the time and in the manner specified in CPLR 4403 and 22 NYCRR § 202.44; and it is further

ORDERED, that within 5 days of the entry of this order on the NYSCEF system, petitioners serve a copy of this order on respondents by overnight mail and on the Special Referee (spref@nycourts.gov).

5/18/2018

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

DO NOT POST

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☒

OTHER

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REFERENCE