

Brenhouse v Zadrina
2018 NY Slip Op 33607(U)
November 7, 2018
Supreme Court, Westchester County
Docket Number: 56347/2016
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
MARLENE BRENHOUSE, AS EXECUTOR
OF THE ESTATE OF ARNOLD A. BRENHOUSE,
DECEASED,

Plaintiff,

-against-

DECISION & ORDER
Index No. 56347/2016
Motion Date: Nov. 5, 2018
Seq. Nos. 6, 7

JAC ZADRIMA, GENESIS REALTY GROUP LLC,
WILLRAB REALTY CORP., EAST 163RD LLC, WIIS REALTY
LLC, ISWIL REALTY LLC, 684 EAST 22ND REALTY CO. LLC,
FERRAB REALTY LLC, 1735 REALTY LLC, RAQUEL REALTY
LLC, 2550 BAINBRIDGE CORP., 116 MOSHOLU LLC,
666 LLC, 1651 LLC, 1250-1260 REALTY CO. LLC, 1225
REALTY CORP., and 151 NAGLE REALTY CORP.,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read upon defendants' motion seeking an order pursuant to CPLR 2304 and 3101 quashing the subpoenas dated August 14, 2018 served by plaintiff on Signature Bank (the "subpoenas") and issuing a protective order prohibiting plaintiff from seeking the discovery sought in the subpoenas, and for such other and further relief as is right and proper (sequence 6) and plaintiff's motion seeking an order pursuant to CPLR 3124 directing defendants to produce at their depositions documents responsive to document demand numbers 21, 22 and 23 and for such other and further relief as the court may deem just and proper (sequence 7).

Seq. No. 6

Order to Show Cause- Affirmation in Support of David Yeger, Esq. -
Affirmation in Support by Jac Zadrime ("Zadrime") - Exhibits A-H
Affirmation in Opposition of Robert H. Rosh, Esq. - Exhibits A-D
Affidavit of Service

Seq. No. 7

Order to Show Cause - Affirmation in Support- Exhibits A-F
Affirmation in Opposition

Upon the foregoing papers and the proceedings¹ held on November 5, 2018, these motions are decided as follows.

As previously stated in this court's (Ruderman, J.) Decision and Order dated September 15, 2017, this case involves the alleged nonpayment by defendants for oil deliveries made to 19 commercial buildings allegedly owned, managed, maintained or controlled by defendants Willrab Realty Corp. ("Willrab"), East 163rd LLC ("East 163rd"), Wiis Realty LLC ("Wiis"), Iswil Realty LLC ("Iswil"), 684 East 222nd Realty Co. LLC ("684 East 222nd"), Ferrab Realty LLC ("Ferrab"), 1735 Realty LLC ("1735"), Raquel Realty LLC ("Raquel"), 2550 Bainbridge Corp. ("Bainbridge"), 116 Mosholu LLC ("Mosholu"), 666 LLC ("666"), 1651 LLC ("1651"), 1250-1260 Realty Co. LLC ("1250-1260"), 1225 Realty Corp. ("1225") and 151 Nagle Realty Corp. ("151 Nagle")(collectively the "properties").² The oil was provided by now defunct heating oil company known as Need Oil Corporation and later known as Need Oil Service Corporation ("Need Oil"). Need Oil's claims were assigned to plaintiff Marlene Brenhouse as the executor of the estate of Arnold A. Brenhouse, by an assignment dated April 22, 2016, executed by Martin Shkreli ("Shkreli") as president of Need.

Plaintiff commenced this action on May 4, 2016 by filing a summons and complaint. Plaintiff amended the complaint on November 8, 2016 and was granted leave to file a second amended complaint ("complaint").³ In the complaint plaintiff alleges that Need Oil entered into a single master oil delivery contract with Zadrina and Genesis Realty Group LLC ("Genesis Realty"), by which Need Oil agreed to deliver oil to the 19 commercial buildings listed in the complaint. Although plaintiff alleges a master contract, no written contract is submitted or alleged to exist. Plaintiff contends that the contract is evidenced by billing statements, oil delivery tickets and demand letters regarding the unpaid bills. Plaintiff asserts that the partial payments under the alleged master contract were made in 2012 after Shkreli and Zadrina

¹ Plaintiff and defendants appeared at oral argument by co-counsel however there is no authority for such "co-counsel" arrangements in the absence of a court order (*see Citimortgage v Marks*, [Sup Ct, Westchester County, Index no. 66198/2013, April 19, 2016] and *Wells Fargo v Hymes*, [Sup Ct, Westchester County Index no. 55006/2014, December 1, 2015]).

² Plaintiff alleges that defendants owned, managed, controlled, and/or maintained the following properties Willrab (312 East 163rd Street, Bronx, New York, 400 East 187th Street, 295-299 East 162nd Street, 1441 Edward L. Grant Highway, Bronx, New York); East 163rd (935 East 163rd Street, Bronx, New York, 945 East 163rd Street, Bronx, New York); WIIS(1535 Walton Avenue, Bronx, New York); ISWIL (1764 Walton Avenue, Bronx, New York); 684 East 222nd (684 East 222nd Street, Bronx, New York); Ferrab (2008 Hughes Avenue, Bronx, New York); 1735 (1735 Davidson Avenue, Bronx, New York); Raquel (18 East 198th Street, Bronx, New York); Bainbridge (2550 Bainbridge Avenue, Bronx, New York); Mosholu (116 East Mosholu Parkway, Bronx, New York); 666 (666 East 181st Street, Bronx, New York); 1651 (1651 Williamsbridge Road, Bronx, New York); 1250-1260 (1250-1260 Leland Avenue, Bronx, New York); 1225 (1225 Morris Avenue, Bronx, New York); Nagle (151 Nagle Avenue, New York, New York).

³ Decision and Order dated September 15, 2017, (Ruderman, J.).

communicated by telephone and text messages concerning the unpaid bills.⁴ Plaintiff asserts causes of action against the defendants for: breach of contract, account stated, unjust enrichment, quantum meruit.

Defendants served their verified (amended) answer, asserting, inter alia, that no monies are owed to Need Oil because with respect to the oil deliveries Need Oil over charged and under delivered.

The subpoenas sought the deposition of Signature Bank (“Signature”), and documents concerning bank accounts held by Signature for almost all of the 17 named defendants,⁵ as well as the following nonparty entities or individuals: Webster Ave. Holding LLC, Drima Assets LLC, AKS 183rd Realty LLC, 703 West 180th Realty Co., LLC, 96 Wadsworth LLC., Joel H. Rabine, Esq. (“Rabine”) and William Fernandez (“Fernandez”) (collectively the “23 entities”). The subpoenas sought documents evidencing the signatories on any account maintained by Signature for the 23 entities during the period of January 2004 through and including January 2013, and documents showing transfers of funds to or from the 23 entities during the period of January 2004 through and including January 2013, including but not limited to, any of the 15 accounts listed on the subpoenas. In schedule A of the subpoena plaintiff claims that the documents sought are relevant to plaintiff’s claim that the oil deliveries by Need Oil to the named defendants were part of “a global agreement, as opposed to separate contracts with each of the defendants.”

Defendants seek to quash the subpoenas and for a protective order. Defendants argue that the subpoenas should be quashed because they are overly broad and the materials they seek are irrelevant to what defendants contend is nothing more than a simple collection action. Defendants contend that the subpoenas are overly broad in that they seek documents from 2004 which is outside the applicable four-year statute of limitations. Additionally, defendants contend that since the unpaid invoices are dated several years later there is no basis for seeking documents from 2004. Defendants also argue that the documents sought are irrelevant in that they seek information concerning signatories and transfers for any account held by Signature for any of the 23 entities and that these documents are not limited to transfers between the 23 entities but between any one of the 23 entities and anyone else in the world. Defendants contend that the bank records of nonparties are irrelevant. Defendants also state that the subpoena seeks bank records of individuals which would include records from their personal accounts, including Rabine who is a practicing attorney, whose accounts may include attorney trust accounts bearing his name. Defendants argue that plaintiff has failed to offer any evidence of, and that the discovery exchanged so far in this case does support, plaintiff’s allegations of the existence of a global agreement.

Defendants argue that Need Oil invoiced each entity separately for oil deliveries to the properties owned by that entity. Defendants assert that each entity separately paid for the oil that was delivered to its property and payment checks were drawn from each individual bank account.

⁴ The complaint contains excerpts of what purport to be text messages exchanged between Zadrina Shkreli, however, plaintiff does not provide the actual text messages.

⁵ 1735 Realty LLC is not included on the list.

Defendants argue that plaintiff has not explained in what manner whether the 23 entities share signatories or whether there were transfers between some of the 23 entities is relevant to the allegation that there was a global agreement. Defendants observe that plaintiff has not asserted claims for piercing the corporate veil, fraudulent conveyance, or alter ego theory. Defendants contend that the global agreement allegation is a tactic being used by plaintiff to defeat defendants' statute of limitations defense. Defendants also proffer the affidavit of Zadrina who denies the existence of a global agreement. He avers that each oil delivery was a stand alone contract, that the invoices were sent by Need Oil to each property and each property owner paid for the oil deliveries to its properties from its own checking account.

In opposition to the motion to quash plaintiff argues that defendants lack standing to bring this motion. Plaintiff also argues that the subpoenas seek information that is material and relevant to the claims and allegations of the complaint. Plaintiff asserts that although this state does not recognize a separate cause of action to pierce the corporate veil, that does not preclude the availability of that remedy and that plaintiff has made clear allegations of dominion and control in the complaint against Zadrina and Genesis Realty consistent with a claim to pierce the corporate veil. Plaintiff argues that based upon the allegations to pierce the corporate veil the documents sought by the subpoena are relevant. Plaintiff also asserts that the alter ego relationship between Zadrina, Genesis Realty and the remaining defendants is demonstrated by the action entitled *Sheehan v Zadrina et al.*, which is pending in Supreme Court, Suffolk County Index No. 612716/2015 (the "Sheehan litigation").⁶

Plaintiff also seeks to compel defendants to produce documents responsive to document demand numbers 21, 22 and 23 as set forth in plaintiff's notice to take depositions of defendants upon oral examination dated August 30, 2018 ("plaintiff's deposition notice"). Demand number 21 seeks evidence of the individual signatories, including but not limited to Zadrina, Fernandez and/or Rabine ... with respect to each business account for accounts held by Signature on behalf of all the defendants.⁷ Demand number 22 seeks all documents (including but not limited to, bank statements, checks - front and back, general ledgers, cash receipt and cash disbursement journals), showing transfers between, or otherwise involving one or more of the 23 entities, during the period of January 2004-January 2013. Demand number 23 seeks documents showing the ownership interest, control (including governance documents), membership and/or officer status of each of the defendants, including "ties ... among the [23 entities]" during January 2004 through January 2013. Similar to her argument above, plaintiff contends that these documents are relevant and necessary to the theory of piercing the corporate veil and alter-ego claims. Plaintiff argues that the documents demanded are relevant to the allegations in the complaint of dominion

⁶ In that action plaintiff alleges that defendants Zadrina, Fernandez and Rabine managed / dominated the properties and transferred "monies interchangeably and without regard to formality ... in such a fashion that they are alter egos of each other and are deemed to constitute a singular enterprise."

⁷ The demand refers to accounts held by the "following defendants" and lists all of the 23 entities, including the nonparty entities and individuals included on the subpoena. Once again, 1735 Realty LLC is not included on the list.

and control which plaintiff argues are indicia of a situation where veil piercing is appropriate.

Defendants argue, as they did in their objections to the deposition notice dated October 4, 2018, that the demanded documents are irrelevant to the present action. Defendants restate their arguments asserted on their motion to quash that the demands are overly broad and irrelevant as plaintiff has demanded signatories on any business account held by the defendants and involving any transfers with respect to any of the 23 entities. Defendants argue that plaintiff has not asserted claims in the complaint of alter ego liability or a piercing the corporate veil remedy. Defendants state that the only allegations in the complaint which plaintiff uses to support her contentions of domination and control are that defendants share office space and that Zadrina allegedly told Shkreli that he had authority to mortgage defendants' properties to pay Need Oil. Defendants argue that these are insufficient to establish alter ego liability. Defendants also argue that the documents demanded by plaintiff would not establish alter ego liability. Defendants argue that the claims against Zadrina, the sole individual defendant, are contractual. Defendants also state that plaintiff is imperishably seeking records for entities who are not named parties to this action. Additionally defendants argue that three of the 23 entities are individuals and as such the demanded documents would include records from their personal bank accounts. Defendants also argue that the Sheehan litigation is unrelated and irrelevant to the present action.

Defendants also contend that the demands are overly broad and include documents outside of the applicable four-year statute of limitations. Defendants state the documents as demanded would include documents which predate the date of any unpaid invoices. Lastly defendants object to the demands on the grounds that they are vague and ambiguous in that they seek documents concerning "ties" between the 23 entities, or for documents showing "control" over the defendants.

Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; see *Matter of Kapon v Koch*, 23 NY NY3d 32 [2014]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

With respect to defendants' motion to quash plaintiff correctly notes that a depositor has no ownership or other interest in a bank's records of his accounts and therefore has no standing to object to a subpoena directed at them (*AQ Asset Management LLC v Levine*, 111 AD3d 332 [1st Dept 2013]). However, as observed by the court in *AQ Asset Management*, that does not end the inquiry as the court has power to control and order discovery (*Id.*).

In New York piercing the corporate veil does not constitute a cause of action independent of that against the corporation, rather it is an assertion of facts and circumstances which the proponent seeks to persuade the court to impose the corporate obligation on its owners (*Morris v New York State Dept. Of Taxation and Finance*, 82 NY2d 135 [1993]). Piercing the corporate veil requires a showing that (1) the owners exercised complete domination of the corporation in respect to the transaction being attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*Morris v New York State Dept. Of Taxation and Finance*, 82 NY2d at 141). However, even a showing of complete domination is not enough and the plaintiff must establish that the owners 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 (*Morris v New York State Dept. Of Taxation and Finance*, 82 NY2d at 42; see *TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339 [1998] [plaintiff bears "heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences"]; and see *E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 132 [2d Dept 2009], *affd*, 16 NY3d 775 [2011]). This standard also applies to LLCs (see *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073, 1075 [2d Dept 2012]).

"At the pleading stage, "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (*East Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.*, 16 N.Y.3d 775, 776 [2011]). The plaintiff must adequately allege the existence of a corporate obligation and that defendant "exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong'" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47-48 [2018]).

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 AD3d 1073, 1075 [2d Dept 2012], see *Wm. Passalacqua Builders, Inc. v Resnick Developers South, Inc.*, 933 F.2 131, 139 [2d Cir. 1991] factors that tend to show defendant was a dominated corporation include (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own).

Plaintiff's assertions that Zadrina's control over the other defendant entities and their

properties is demonstrated by the fact that the invoices for oil were addressed to Zadrina at the property locations, that the corporate defendants share an office space, and the wholly unsubstantiated statements allegedly made by Zadrina to Shkreli are insufficient to establish a basis for allowing the discovery which plaintiff now seeks on allegations of the existence of an alter ego situation which would establish grounds for veil-piercing. Additionally, a review of the complaint fails to support plaintiff's contentions that she has demonstrated entitlement to the discovery she seeks on grounds of claims of alter ego theory or piercing the corporate veil liability as alleged therein. Moreover, plaintiff has not demonstrated any connection to the nonparty entities which would entitle plaintiff to discovery of their financial documents.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

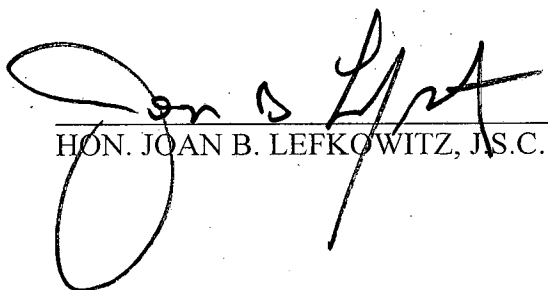
ORDERED that defendants' motion (sequence 6) to quash the subpoenas dated August 14, 2018 and for a protective order is granted; and it is further

ORDERED that plaintiff's motion (sequence 7) to compel defendants' responses to plaintiff's demands is denied; and it is further

ORDERED that defendants are directed to serve a copy of this Order with Notice of Entry upon plaintiffs and upon nonparty Signature Bank within ten (10) days of entry; and it is further

ORDERED that counsel are directed to appear in the Compliance Part, Courtroom 800, on November 20, 2018 at 9:30 a.m. for a conference.

Dated: White Plains, New York
November 7, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Service upon all counsel via NYSCEF

Signature Bank
565 5th Avenue
New York, New York 10017
Attn: Legal Dept
By First Class Mail

CC: Compliance Part Clerk