

DeWalters v Zambelli
2019 NY Slip Op 33995(U)
January 18, 2019
Supreme Court, Nassau County
Docket Number: 602219-17
Judge: Jerome C. Murphy
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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

EDWARD DeWALTERS,

Plaintiff,

- against -

**JOSEPH ZAMBELLI and EXPERT HOME
INSPECTIONS, INC.,**

Defendants.

TRIAL/IAS PART 13

Index No.: 602219-17

Motion Date: 11/21/18

Sequence No.: 002, 003

MD, MD

DECISION AND ORDER

The following papers were read on this motion:

Motion Sequence No. 002	
Notice of Motion, Affirmation in Support and Exhibits.....	1
Notion Sequence No. 003	
Notice of Motion for a Protective Order and Exhibits.....	1
Affirmation in Opposition by Perry Dean Freedman, and Exhibits.....	2
Affirmation in Opposition by Enza Brandi and Exhibits.....	3
Reply Affirmation in Further Support by Enza Brandi.....	4
Reply Affirmation.....	5

PRELIMINARY STATEMENT

In motion Sequence 002, Defendants bring this application for an Order pursuant to CPLR§ 3026 striking Plaintiff’s Complaint and dismissing this action in its entirety; and granting sanctions to be assessed against the Plaintiff and his attorney Perry Dean Freedman pursuant to NYCRR Section 130-1.1; and ordering Perry Dean Freedman, Esq. to pay over to Enza Brandi, Esq. The sum of \$3,012.45; and for such other and further relief as this Court deems just and proper. No opposition has been submitted to this application.

In motion sequence 003, Plaintiff brings forth an order pursuant to CPLR §3102(a)

granting plaintiff a protective order denying defendants' request to depose the plaintiff, on the grounds that such a deposition is not calculated to lead to discovery of any information and/or evidence which is material or necessary in the defense of the instant law suit and for such other and further relief as this Court deems just and proper.

BACKGROUND

Plaintiff obtained a judgment based upon an arbitration award, in a case entitled *Edward Dewalters v. Zambelli Construction & Restoration Mgt. Corp.*, Index No. 11117/2014 (Exh. "B"). The judgment is in the amount of \$43,013.00, with interest at the statutory rate from October 1, 2014, together with reimbursement of the Arbitrator's fee of \$475.00, for a total amount of \$45,756.93. Plaintiff has brought the current action against the principal of Zambelli Construction, and Expert Home Inspection, Inc., over which Zambelli allegedly exercises control, and which now operates the now defunct judgment debtor. Plaintiff alleges that Zambelli Construction was undercapitalized, that it failed to observe corporate formalities, such that the corporate existence of Zambelli Construction should be disregarded, and plaintiff should be authorized to pierce the corporate veil so as to reach the assets of defendants.

By Decision and Order dated July 11, 2018, this Court determined that plaintiff was entitled to material requested in his Notice for Discovery and Inspection, since there is no other way by which plaintiff could establish the elements of a claim to pierce the corporate veil. Defendants were directed to comply with the Notice for Discover and Inspection within 30 days of service of a copy of the Decision and Order with Notice of Entry (Exh. "D").

Plaintiff's deposition commenced on October 15, 2018 (Exh. "F"), but was not completed because defendants contend that counsel for plaintiff improperly obstructed the process by directing plaintiff not to answer certain questions, contending that they were not relevant to the issues in the pending action. He contended that plaintiff had obtained a judgment, and that the time within which to appeal had expired and, therefore, questions directed at the basis for the underlying judgment were irrelevant and palpably improper.

Plaintiff opposes the motion by defendants to strike the Complaint and cross-moves for a protective order denying defendants' request for a continued deposition on the ground that such deposition is not calculated to lead to discovery of any information and/or evidence which is material or necessary in the defense of the action.

DISCUSSION

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.”¹ A motion pursuant to CPLR 3211 (a)(7) will fail if, taking all facts alleged as true, and according them every favorable inference, the complaint states in some recognizable form a cause of action known to our law.²

With respect to a claim under the doctrine of piercing the corporate veil, allegations to hold a principal of a corporation liable, a simple allegation that an individual dominates a corporation is inadequate, since this could be said about virtually any single-person corporation. The party seeking to pierce the corporate veil must also establish “that the owners, through their domination, abused the privilege of doing business in the Corporate form.”³ Factors to be considered in determining whether or not there has been such abuse include whether there was a “failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.”⁴

In circumstances in which the complaint alleged that the principal of the corporation exercised “bad faith” in negotiating a replacement contract for the supervision of construction work, and that he was the only point of contact with whom the school district negotiated, this was insufficient to state a cause of action to justify piercing of the corporate veil.⁵

Defendants are entitled to discovery on the subject of the manner in which Zambelli is alleged to have dominated the Judgment Defendants so as to entitle plaintiff, if it should be

¹ *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703—704 (2d Dept. 2008).

² *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 (2d Dept. 2006).

³ *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993).

⁴ *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016—1017 (2d Dept. 2007) *see also ABN Amro Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208 [2011]).

⁵ *East Hampton Union Free School District v. Sandpebble Builders, Inc.*, 2009 WL 2245755 (2d Dept. 2009).

proven appropriate, to disregard the corporate entities and proceed on his claim against the individual defendant, and a company, allegedly dominated by Zambelli, which is in possession of assets formerly owned by Zambelli Construction & Mgt. Corp.

Defendants' motion to strike the Complaint is denied. As stated in the prior Decision and Order of July 11, 2018, striking a pleading is a draconian remedy. "Actions should be resolved on the merits, wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter of discretion with the court".⁶ Defendants' motion to dismiss the Complaint and for imposition of sanctions is denied as unwarranted under the circumstances presented.⁷ Even where a motion to strike is denied, however, courts may impose sanctions upon an attorney and defendant for obstructionist conduct during the course of a deposition.⁸

Plaintiff's motion for a protective order, precluding the further deposition of plaintiff is decided as follows: The fact that plaintiff has a judgment against Zambelli Construction & Restoration Mgt. Corp. is *stare decisis*, and the facts and circumstances leading to the judgment are patently irrelevant and improper. The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are within the sound discretion of the Supreme Court. The Supreme Court's discretion is broad because it is familiar with the action before it, and its exercise should not be disturbed on appeal unless it was improvidently exercised".⁹

A transcript of the deposition testimony of Edward Dewalters is annexed as Exh. "F" to the motion to strike, and as Exh. "D" to the motion for a protective order. The process was essentially an exercise in futility, in that questions relating to the facts and circumstances leading to the underlying judgment were somewhat cavalierly rejected as patently improper. Uniform Rule, 22 NYCRR 221 was adopted by the Office of Court Administration to incorporate admonitions and suggestions by the various Appellate Division Departments, and gave the Supreme Court authority to enforce the prohibitions on improper conduct at depositions by utilizing penalties contained in CPLR 3126 and the Uniform Rules.

⁶ *Pascarella v. City of New York*, 16 A.D.3d 472 (2d Dep. 2005)

⁷ *Brass v. Booth Memorial Hospital*, 70 A.D.2d 894 (2d Dept. 1979)

⁸ *O'Neill v. Ho*, 28 A.D.3d 626 (2d Dept. 2006)

⁹ *Cabellero v. City of New York*, 48 A.D.3d, 727 [2d Dept. 2008]; quoting *Providential Life & Cas. Ins. Co. v. Brittenham*, 284 A.D.2d 518 (2d Dept. 2001)

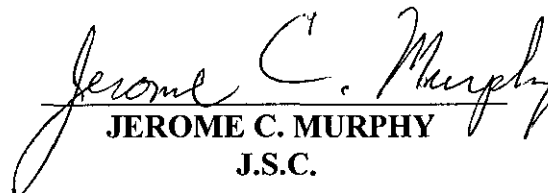
Plaintiff's motion for a protective order precluding his further deposition is denied, to the extent that plaintiff is required to appear for an additional deposition, with the questioning limited to issues relevant to the instant action to pierce the corporate veil. Counsel for defendants is advised that issues relating to the ownership, occupancy, rental status of the dwelling, and other such information is not relevant on the issue as to whether or not defendants have abused the privilege of operating in a corporate capacity, and whether plaintiff is entitled to pierce the corporate veil. Thus, questions relating to plaintiff's knowledge of defendants' alleged undercapitalization of Zambelli Construction & Restoration Mgt. Corp., his commingling of personal and corporate funds, payment of personal expenses from corporate funds, and similar inquiries regarding factors to be considered as set forth in *Millennium Construction LLC*, at fn. 4, are appropriate, and questioning is limited as such.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
January 18, 2019

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED
JAN 24 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE