

<b>Arben Corp. v Durastone, LLC</b>
2019 NY Slip Op 34076(U)
January 11, 2019
Supreme Court, Westchester County
Docket Number: 63708/18
Judge: Gerald E. Loehr
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To commence the statutory time period of 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

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ARBEN CORPORATION,

Petitioner,

**DECISION AND ORDER**

Index No.: 63708/18

-against-

DURASTONE, LLC, GREENSTONE PRECAST, LLC  
d/b/a DuraStone, LLC, JAMES DUHAMEL and  
DURASTONE, INC.,

Respondents.

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LOEHR, J.

The following papers numbered 1- 7 were read on Petitioner's application to hold the Respondents liable for Petitioner's Judgment against Durastone Inc., and the motions of James R. Duhamel and Durastone LLC, and of James W. Duhamel and Greenstone Precast, LLC to dismiss the Petition.

Papers Numbered

Notice of Petition - Petition - Exhibits	1
Notice of Motion - Affidavit - Exhibits	2
Memorandum of Law in Support of Motion	3
Notice of Motion (#3)	4
Memorandum of Law in Support of Motion #3	5
Affirmation in Opposition to Motions - Exhibits	6
Petitioner's Reply Memorandum of Law	7

Upon the foregoing papers, Petitioner is a New York corporation, Durastone, Inc. is a Maine corporation, Durastone, LLC and Greenstone Precast, LLC are Maine limited liability companies and James R. Duhamel and James W. Duhamel, father and son, respectively, are residents of Maine. On September 11, 2000, Durastone, Inc. filed a Chapter 11 Petition for reorganization in the Bankruptcy Court in Maine and continued operating as a Debtor-in Possession. On December 1, 2001, Petitioner, as prime contractor, entered into a contract with the City of Yonkers on the project known as the Buena Vista Parking Garage (the “Project”) and, on February 7, 2002, Petitioner retained Duratone, Inc. as the concrete subcontractor on the Project. After Durastone, Inc. breached the subcontract, Petitioner commenced an action against Durastone, Inc. in August 2003 in this Court. It should be noted that Petitioner brought that action against only Durastone, Inc., and not also against James R. Duhamel, its sole principal, who Petitioner had presumably dealt with when Petitioner retained Durastone, Inc. and had worked with during the Project. Durastone, Inc. initially appeared but, after failing to respond to discovery, its answer was stricken and a Judgment in the amount of \$593,028.14 together with costs, disbursements and interest from October 15, 2003, was awarded to Petitioner on May 11, 2005. In the interim, on March 23, 2005, Durastone, Inc.’s Chapter 11 proceeding had been converted to a Chapter 7 liquidation. Petitioner had not been added to the list of creditors and Petitioner had no knowledge or notice of bankruptcy and therefore filed no claim. Be that as it may, Durastone, Inc. was liquidated and its assets, such as they were, were distributed to its creditors who had filed claims with the Bankruptcy Court.

GreenStone Precast, LLC was apparently formed in Maine by James W. Duhamel in 2012 and acted as a concrete subcontractor under the dba of DuraStone, LLC until May 9, 2018 when GreenStone filed a termination of that DBA with the Maine Secretary of State. On the same day, James R. Duhamel formed DuraStone, LLC in Maine – although how GreenStone could have been doing business under the name of a non-existent LLC was not explained – and is apparently also still operating as a concrete subcontractor.<sup>1</sup> Be that as it may, having discovered the foregoing, Petitioner commenced this proceeding on August 29, 2018, seeking to hold both LLC’s and James R. Duhamel liable for Petitioner’s Judgment against Durastone, Inc. as the alter

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<sup>1</sup> Perhaps the foregoing has something to do with the fact that James R. Duhamel had pled guilty in Federal Court to having embezzled money from Durastone, Inc.’s pension fund in 2011.

egos/successors of Durastone, Inc. James R. Duhamel, a domiciliary of Maine, and the LLC's, both Maine companies, were served by serving James R. Duhamel in Maine. All move to dismiss the Petition, both for a lack of jurisdiction and a failure to state a claim.

As an initial matter, in addition to jurisdictional defects, the Respondents argue that the Petitioner's Judgment against Durastone, Inc. is void for a violation of the automatic stay (11 USC § 362). Petitioner responds that there was no stay when it entered the Judgment in part because it had not been scheduled and had no notice of the bankruptcy. Whether the automatic stay was in effect in May 2005 is something this Court cannot determine on these papers. If it were, Petitioner's lack of knowledge of the bankruptcy would generally be irrelevant. Moreover, as to Petitioner's debt, it was not discharged – and not because it had not been scheduled – but because a corporation liquidated in Chapter 7 is not discharged from *any* of its debts (11 USC 727[a][1]; *National Labor Relations Board v better Building Supply Corp.*, 837 F2d 377, 378-79 [9<sup>th</sup> Cir 1988]). The corporation is liquidated only and never receives a discharge (*id.*). Thus, Durastone, Inc. emerged from bankruptcy with no assets but with all its debts. Having said that, as the Court which entered Petitioner's Judgment had subject matter jurisdiction over the matter and personal jurisdiction over Durastone, Inc., regardless of whatever defects may have existed, the Judgment is entitled to full faith and credit unless it vacated or set aside by that Court (*Crouse v McVekar*, 207 NY 213, 219 [1912]). In other words, it cannot be collaterally challenged in this Court (*id.*).

CPLR 5225(b) can be used to reach property, debt or other assets that belong to, or are payable to a judgment debtor in the hands of a third party. This is based on such property belonging to, or being payable to, the judgment debtor based on a contract between them, a fraudulent conveyance, a merger, or other continuation of the transferee's business in a way that is essentially a fraud on the transferor's creditors (*see Schumacher v Richards Shear Company, Inc.*, 59 NY2d 239, 244-45 [1983]; *Goldberg & Connelly v Xavier constructing Co., Inc.*, 94 AD3d 1117, 1118 [2d Dept 2012]; *MBIA Insurance Corporation v Contrywide Home Loans, Inc.*, 40 Misc3d 643, 657 [Sup Ct, NY Co 2013]; *Oltshim S.A. v Zebulon Industries*, 26 Misc3d 1209(A)[Sup Ct, West Co 2009]). Here, all that is alleged is that James R. Duhamel dominated and controlled Durastone Inc. and he formed and controls one or both of the Respondent LLC's who are engaged in the same type of business as Durastone, Inc. was. The answer is: so what? In the absence of even an allegation that anything of Durastone, Inc. was transferred by or to James

R. Duhamel and/or the LLC's, how has Petitioner been injured? He has not been. James R. Duhamel has every right to start up a new business, free of Petitioner's claims, as long as he has not taken any of Durastone, Inc.'s assets along the way. Moreover, the documentary evidence establishes that he could not have: as Durastone, Inc. was liquidated in bankruptcy, how could Duhamel, or his LLC's improperly received any of its assets? Finally, based on the facts as they allegedly existed in 2003, while Petitioner might have imposed Durastone, Inc.'s obligations on James R. Duhamel for his asserted disregard of the corporate form, having failed to join James R. Duhamel in that action, Petitioner is precluded, by res judicata, from doing so now (*Smith v Russell Sage College*, 54 NY2d 185 [1981][res judicata bars any claim brought, or that could have been brought, as part of a prior proceeding but was not]; *Union Street Tower, LLC*, 84 AD3d 784, 785 [2d Dept 2011]; *cf Tap Holdings, LLC v Orix Finance Corp.*, 109 AD3d 167 [1<sup>st</sup> Dept 2013]; *Rosen v Kessler*, 15 Misc3d 1139(A)[ Sup Ct, Suffolk Co 2007]).

Accordingly, whether this Court has personal jurisdiction over the Respondents, the Petition fails to state a claim. The Respondents having also moved to dismiss for a lack of jurisdiction, the Court will address the issues. As Greenstone Precast, LLC was a Maine entity and James W. Duhamel was its principal and James R. Duhamel was not, the delivery of process to the latter was not proper service. Even if it were, to be subject to personal jurisdiction here, there must be a basis therefor. As Greenstone and Durastone LLC are Maine limited liability companies they are present only in Maine and not subject to jurisdiction here pursuant to CPLR 301 (*Daimler AG v Bauman* (134 S Ct 746 [2014])). Alternatively, while they could be subject to long arm jurisdiction here, they would only be so in accordance with CPLR 302. Thus, if they had, for example, caused or received fraudulent conveyances of Durastone, Inc.'s assets here, they could be subject to jurisdiction here under the long arm statute. But, inasmuch as there is not even an allegation of such, there is no basis for exercising personal jurisdiction over them.

For the foregoing reasons, the Petition is dismissed. This constitutes the decision and order of the Court.

Dated: White Plains, New York  
January 11, 2019



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