Abyssinian Dev. Corp. v Bistricer
2020 NY Slip Op 30623(U)
March 4, 2020
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 JAFFE **PART** IAS MOTION 12EFM

Justice

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

Petitioners,

- v -

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

Respondents.

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INDEX NO. 151793/2017

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION + JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109-191 were read on this motion to disapprove report.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 109-191 were read on this cross motion to confirm report.

By decision and judgment dated May 18, 2018, petitioners' petition for an order pursuant to CPLR 5225(b) piercing the corporate veil of respondent/judgment debtor Clipper Equity Holdings LLC (Holdings) was held in abeyance pending a report on the issue by a special referee (NYSCEF 75). By report dated July 22, 2019, following a hearing, a judicial hearing officer set forth her finding that petitioners had failed to satisfy their burden of proving that the corporate veil should be pierced (NYSCEF 97). The parties filed opposing motions pursuant to CPLR 4403 (NYSCEF 109, 113).

I. GENERAL BACKGROUND

In February 2007, Bistricer, on behalf of respondent Clipper Equity LLC (LLC), entered into an agreement by which LLC would acquire, subject to governmental approval, real property

formerly known as Starrett City for $1.3 billion. (NYSCEF 56-59). Bistricer, on LLC's behalf, deposited into escrow $50 million, obtained from respondent Gunki Holdings LLC, two trusts, and a small amount from Bistricer himself. On February 15, 2007, Bistricer caused LLC to assign the Starrett City purchase agreement to respondent Clipper Equity LP (LP).

Holdings was established as a single-purpose entity related to the purchase and was not to be funded until after the purchase was complete. On behalf of Holdings, Bistricer hired numerous consultants and professionals to help with the purchase. Payments to most of the consultants were not contingent on the property purchase closing.

Bistricer opened a checking account in LP'S name to pay pre-closing expenses. From this account, between February 15, 2007 and January 30, 2008, Bistricer paid consultants and professionals, other than petitioners, for services performed for the venture.

By letter of intent dated April 30, 2007, the parties here expressed their intent to enter into a joint venture among one or more special purpose entities (SPEs) with the purpose of redeveloping the property. (NYSCEF 138). Abyssinian and Holdings are identified therein, respectively, as developer and owner. Petitioner law firm (Windels) performed legal work for the venture.

II. PROCEDURAL BACKGROUND

Petitioners sued respondents Bistricer, as Holdings's president and controlling shareholder, and Holdings for breach of the letter of intent, an account stated, and unjust enrichment for their failure to pay for petitioners' services rendered in connection with the venture, and Bistricer, personally, for breach of two alleged oral promises to pay Windels's fees and expenses. (*Abyssinian Dev. Corp., et al. v David Bistricer, et al.*, Index No. 115576/2008). On June 3, 2011, another justice of this court dismissed as against Bistricer personally the

account stated and *quantum meruit* claims. (NYSCEF 135, ¶¶ 7, 8).

On or about October 10, 2013, following a non-jury trial, the justice entered judgment for petitioners against Holdings for breach of the letter of intent and for an account stated, dismissed the cause of action for breach of contract as against Bistricer as a violation of the statute of frauds, and dismissed with prejudice respondents' counterclaim for fraud. (NYSCEF 80). The trial court's decision was affirmed on appeal. (NYSCEF 81; 133 AD3d 435 [1st Dept 2015]).

As Holdings had become judgment-proof, petitioners commenced this proceeding pursuant to CPLR 5225(b) to pierce Holdings's corporate veil in order to enforce the judgment against Bistricer personally, along with several other allegedly related entities, jointly and severally. (NYSCEF 1, 2).

III. SPECIAL REFEREE'S DECISION (NYSCEF 97)

While the special referee found that petitioners had succeeded in proving Bistricer's exercise of complete domination of the SPEs in connection with the venture, she also found that they had not sustained their heavy burden of demonstrating that Bistricer had dominated the corporate form with the intention of defrauding petitioners and thereby caused petitioners' injury, namely, the inability to enforce the judgment.

The special referee relied on the testimony at the hearing of Bistricer and his lawyer that the use of SPEs for ventures such as the one in issue is common, given the interest in keeping the responsible entity apart from a developer's other interests, and that the custom is to fund them at the closing when the financing occurs. She observed that in the letter of intent, it was agreed that respondents "shall" pay petitioners, "subject to occurrence of the closing under the [purchase agreement], a non-refundable closing transaction fee in the amount of $750,000," and that before the closing, respondents must pay Abyssinian consulting fees, all of which must be credited

against, and reduce, the closing transaction fee: (i) $25,000 upon signing the letter of intent and (ii) $10,000 per month payable in arrears at the end of each month, with the first payment on April 30, 2007, until closing or termination.

Moreover, she noted, the letter of intent provides that all of the reasonable costs and expenses of Windels and other professional advisors from March 5, 2007 through the date of closing must be paid by respondents "promptly at such closing after receiving an invoice from such third party providers as approved by [Abyssinian]," and that "[a]ny such Consulting Fees paid shall be non-refundable and shall be credited against the Closing Transaction Fee, which shall only be due and payable upon closing under the [purchase agreement]." (NYSCEF 138). And, as the $50 million deposit for the transaction was never in Holdings's possession, the special referee opined that it was not "untoward" for Bistricer to return to the investors the money they had put into it, after paying more than $1 million to other consultants and lawyers.

The special referee relied on Bistricer's testimony that petitioners were not paid because in his view, they did not earn their fees. Consequently, she concluded, Bistricer's decision not to pay did not essentially differ from an intentional breach of contract and she distinguished and compared the facts with those set forth in several decisions.

For those reasons, and although acknowledging that the case is "close," the special referee found that petitioners had failed to prove that Bistricer abused the corporate form with the intent to commit a wrong or fraud against petitioners and by doing so, caused injury, and she specifically found that Bistricer's failure to fund Holdings, which resulted in Holdings being judgment-proof, "was not an intended result . . ." as respondents, as well as petitioners, "wanted the deal to go through."

IV. PETITIONERS' MOTION TO REJECT (NYSCEF 109-172, 174, 175)

A. Contentions

1. Petitioners

Petitioners rely on certain undisputed facts established at the hearing before the special referee. As the special referee found that petitioners had established that Bistricer had dominated the SPEs, only those facts concerning whether he dominated them with the intent to defraud petitioners are listed.

1) Agreements with numerous consultants hired by Bistricer to assist with the acquisition of the property, including two law firms and a financial consultant, were signed on behalf of Holdings. The agreement with the financial consultant was the sole agreement conditioned on a closing.

2) Bistricer did not fund Holdings nor did he intend to do so until the closing of the Starrett sale.

3) Bistricer assigned to another entity more than $51 million that had been assigned to Holdings's wholly-owned subsidiary, thereby rendering Holdings and the subsidiary insolvent, incapable of paying petitioners, and owing them and other creditors more than $3 million, whereas other respondents dominated by Bistricer paid Holdings's bills.

4) In January 2008, soon after petitioners had threatened to sue, the name of the escrow account where the deposit had been held was changed from Madison Title Agency LLC to Kent Realty LLC, an entity controlled by Bistricer, who was unable to explain the name change.

Petitioners argue that the special referee not only erred in relying on Bistricer's alleged belief that payment to them was conditioned on a closing, but also erred in relying on Bistricer's claim that his defense to the breach was valid. They maintain, in effect, that the special referee

was bound by the trial court's affirmed findings and on the testimony before her of Bistricer's lawyer, Bistricer's payments to the other consultants, and the appellate division's determination that payment to Windels was not contingent on closing.

Bistricer's agreement to pay petitioners before closing while intending to withhold capitalizing Holdings absent a closing, petitioners maintain, constitutes "a clear admission of fraud," as payment on their contracts was not contingent on a closing, and Bistricer fraudulently intended to render Holdings incapable of performing the contracts. Given the circumstances, petitioners characterize as "anomalous" the special referee's finding that the breach of the letter of intent is insufficient to demonstrate that Bistricer had dominated the corporate form with intent to defraud them and they posit that under the special referee's logic, an owner of an entity against which a judgment is entered may successfully rely on a claim that a rejected defense permits veil-piercing conduct. Here, petitioners assert, Bistricer "inequitably" used the corporate shield to avoid paying the attorney fees while piercing the corporate veil to prosecute his counterclaim for fraud against Abyssianian by falsely claiming that Holdings, which was not capitalized, had paid its creditors in reliance on the purported fraud.

Petitioners also argue that the special referee was obliged to give weight to the prior credibility findings of the trial and appellate courts, and that Bistricer's belief in his defenses to the breach of the letter of contract is irrelevant to whether he had abused the corporate form and thereby injured them. They, moreover, maintain that because Holdings's defenses were rejected by the two prior courts, and given Bistricer's "privity" with Holdings, he is barred and/or estopped by the "parol evidence rule" from relitigating the defense or from relying on his defense here.

2. Respondents (NYSCEF 176, 179-191)

Respondents argue that petitioners failed to prove that Bistricer's domination of Holdings was intended by him to perpetrate a fraud or similar against them. Thus, Bistricer's intent is relevant, and there is nothing about what he did that was deceitful or fraudulent. Rather, testimony was offered in support of the manner in which he formed the SPEs and the non-capitalization of Holdings. Respondents also observe that petitioners fail to prove a fraud or wrong against them that is independent of the breach of contract giving rise to the judgment, and that the repayment of those who contributed funds to the deposit does not constitute a fraud or a wrong. Moreover, pursuant to the letter of intent, the entities were to operate after the closing.

B. Analysis

Pursuant to 22 NYCRR 202.44(a), a special referee's report may be confirmed or rejected. "[T]he report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility." (*Busche v Grover*, AD3d , 2020 NY Slip Op 01255 [1st Dept 2020]). The special referee "is considered to be in the best position to determine the issues presented." (*Nager v Panadis*, 238 AD2d 135 [1st Dept 1997]). The dispositive question is whether the referee's findings are supported by the record, which is the standard even on appeal. (*Muhlstock v Cole*, 245 AD2d 55 [1st Dept 1997]).

Here, petitioners do not allege or show that the facts adduced at the hearing are disputed in any way. Nor do they contend that the special referee did not clearly define the issues or resolve matters of credibility. Rather, petitioners take issue with whether the special referee correctly analyzed the meaning and impact of those facts in deciding whether Bistricer may be held personally liable for the judgment. The issue they posit, therefore, is not whether the special

referee's findings are supported by the record, but whether her determination is correct. However, unless petitioners establish that the special referee "overlooked or misconstrued any of the relevant facts or law," the report must be confirmed, not rejected. (*Hopper v Premier Coach, Inc.*, 111 AD3d 508 [1st Dept 2013]).

In order to pierce the corporate veil, the movant bears "the 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." (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 [1st Dept 2005]). The use of the corporate form must have been intended for the commission of a fraud or wrong upon the plaintiff. (*Rose v Different Twist Pretzel, Inc.*, 175 AD3d 597 [2d Dept 2019]). Where there is a legitimate business purpose for the alleged bad conduct, and no indication that the purpose of the conduct was to harm the plaintiff specifically, the corporate veil is not pierced. (*Aspire Music Group, LLC v Cash Money Records, Inc.*, 169 AD3d 441 [1st Dept 2019]; *JTS Trading Ltd. v Trinity White City Ventures Ltd.,* 139 AD3d 630 [1st Dept 2016] [dismissing corporate veil claim as no evidence that party entered into transaction at issue in order to harm plaintiff]). Thus, in *TNS Holdings, Inc. v MKI Secs. Corp.*, the Court of Appeals held that "an inference of abuse does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business." (92 NY2d 335 [1998]). Moreover, a breach of contract, without more, does not constitute a wrong that warrants the piercing of the corporate veil. (*Rose*, 175 AD3d at 599).

Here, the special referee credited the testimony that the SPEs were structured to emulate that of the seller of Starrett City, with a view to conforming to the expectations of the pertinent regulatory agencies. She also credited the testimony that the use of SPEs in the real estate business was common and often desired by lending banks, and that the custom was to fund them

at the closing of the transaction takes place. While petitioners argued and continue to argue that Bistricer's decision to not fund Holdings until after the closing evidences his fraudulent intent, the testimony of respondents and their witnesses as to the legitimate business reason and custom for Holdings's structure was unrebutted.

In any event, the undercapitalization of a corporation, without more, does not warrant piercing the corporate veil. (*Am. Fed. Title Corp. v GFI Mgt. Svces., Inc.*, 2016 WL 4290525 [Dist Ct, SD NY 2016], *affd* 716 Fed Appx 23 [2d Cir 2017] ["mere formation of (single-purpose entity that was signatory to contract) as an asset-less entity" insufficient proof of fraud or abuse absent evidence that defendants used corporate form to engage in wrongful or unjust act toward plaintiff]). And here, petitioners were aware from the outset of the parties' agreement that Holdings would not be funded until after the closing. (*See e.g., Bd. of Mgrs. of Modern 23 Condominium v 350-52 W. 23, LLC*, 171 AD3d 433 [1st Dept 2019] [as alleged undercapitalization was specifically disclosed, allegation that defendant acted fraudulently expressly belied]).

The referee thus properly concluded, based on the record, that the SPEs were formed and structured for legal and legitimate business purposes, and not for the purpose of harming or defrauding petitioners, including the decision to not fund Holdings until after the deal closed.

Moreover, after the deal to purchase Starrett City was terminated and respondents were refunded their down payment, respondents paid all of Holdings's creditors, lawyers, and consultants, except for petitioners and one other company, in the total sum of approximately $1.4 million. This evidence demonstrates that Bistricer did not structure and use Holdings to render it judgment-proof and defraud all of the entities that it hired in connection with the purchase. To accept petitioners' logic would mean that Bistricer formed and structured Holdings to defraud

petitioners only and specifically, while simultaneously intending to pay its other creditors, which is, in any event, unsupported by the record. Thus, the fact that Holdings was not funded and/or had insufficient funds to pay all of its alleged obligations does not establish that it was inadequately funded to shield itself from an obligation to pay creditors, given the evidence that Holdings had paid its other creditors.

And, petitioners' allegation that Bistricer "stripped" Holdings of its assets in the form of the $50 million deposit in order to make it judgment-proof is contradicted by the evidence that the deposit had been funded by other people and entities, and that when the deal terminated and the deposit was refunded, Holdings repaid the funds to those entitled to them. From the same deposit, Holdings paid debts owed to other lawyers and consultants. The evidence therefore does not support petitioners' claim that Holdings was stripped of its assets to avoid paying its debts, given respondents' reasonable explanation for why and how it dispersed the deposit.

The special referee also credited Bistricer's testimony that he personally decided not to pay petitioners because he believed that they had not complied with the letter of intent and did not deserve to be paid. Therefore, his intent in not paying petitioners arose from actions that occurred after the SPEs were formed, which are immaterial to whether his intent in forming, and not funding, Holdings was fraudulent. Moreover, that the justice presiding in the other action had found that petitioners had not breached the parties' agreement does not mean that Bistricer did not, at the time he chose not to pay them, believe otherwise. In other words, that the justice disagreed with Bistricer about whether petitioners deserved to be paid does not invalidate Bistricer's belief, held before the justice rendered his decision, to the contrary. While petitioners argue that the special referee erroneously credited Bistricer's testimony and found it to be legally significant, she was authorized to not only determine credibility but to make legal findings based

on those determinations. (*See e.g., Cusumano v Riley Land Surveyors, LLP*, 179 AD3d 593 [1st Dept 2020] [court properly deferred to referee's findings related to credibility determinations]; *see also Cohen v Akabas & Cohen*, 71 AD3d 419 [1st Dept 2010] [decision of fact-finding court should be not be disturbed, especially where findings of fact rest mainly on credibility of witnesses]).

Petitioners also cite no authority for the proposition that Bistricer's intent is irrelevant to whether the corporate veil may be pierced, and the authority is to the contrary. (*See Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 143-144 [1993] [while individual dominated corporation, veil not pierced as "no evidence of an intent to defraud by using the corporation as a tax shield"]; *Rose v Different Twist Pretzel, Inc.*, 175 AD3d 597 [2d Dept 2019] [use of corporate form must have been intended for the commission of fraud or wrong upon plaintiff]; *see also Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013] [plaintiff failed to raise triable issue as to whether defendant's use of corporate form "was intended for the commission of a fraud or wrong upon plaintiff"]).

Moreover, as the special referee found, Bistricer's breach of the parties' agreement by failing to pay petitioners is insufficient proof of abuse or fraud sufficient to pierce the corporate veil. (*Rose v Different Twist Pretzel, Inc.*, 175 AD3d 597 [2d Dept 2019]; *Chiomenti Studio Legale, LLC v Prodos Cap. Mgt. LLC*, 140 AD3d 635 [1st Dept 2016] [defendant's failure to pay legal fees owed under parties' agreement did not warrant piercing of corporate veil]).

The special referee also observed that petitioners and the other creditor that were not paid by Holdings both had in their agreements with Holdings language indicating that they would be paid only upon the closing of the Starrett City deal, which never happened. Thus, petitioners may not have had a reasonable expectation of payment without the closing of the deal. This fact is

ignored by petitioners when they argue that Bistricer fraudulently agreed to make pre-closing payments to petitioners.

Other evidence relied on by the special referee to find an absence of proof as to Bistricer's fraudulent intent or intent to harm petitioners included that it was not respondents' intention to have the deal collapse so that Holdings would be judgment-proof. Rather, they wanted to deal to close, and even though Holdings was not funded, Bistricer could have paid petitioners through other means or bank accounts. Thus, that Holdings may have been judgment-proof did not prevent petitioners from being paid by respondents.

Therefore, based on the testimony adduced the hearing, the special referee made credibility determinations and clearly identified the issues which she then resolved, and her findings are supported by the record, including her ultimate determination that plaintiffs did not meet their heavy burden of establishing that Holdings's corporate veil should be pierced in order to hold Bisticer personally liable for petitioner's judgment. For that reason, plaintiffs here also fail to meet their burden of establishing that the special referee's report should be rejected.

To the extent that petitioners assert that all of respondents should be considered a single entity and all of their corporate veils be pierced to hold Bistricer liable, the petition is directed at Holdings and its two now-defunct subsidiaries, LP and Clipper Equity GP, LLC, only, and petitioners also do not allege a basis on which to pierce the corporate veil of the two subsidiaries. (NYSCEF 1).

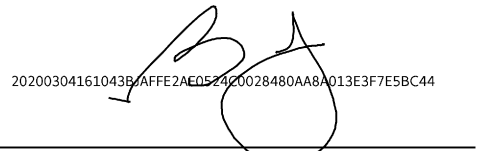
V. CONCLUSION

Accordingly, it is hereby

ORDERED, that petitioners' motion to reject the special referee's report is denied; it is further

ORDERED, that respondents' cross motion to confirm the report is granted; and it is further

ADJUDGED and ORDERED, that upon confirmation of the report, the petition is denied and the proceeding is dismissed.



3/4/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE