

**New Pelham Parkway N. LLC v Prieto**

2024 NY Slip Op 33800(U)

October 9, 2024

Supreme Court, New York County

Docket Number: Index No. 655609/2020

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

*Justice*

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INDEX NO. 655609/2020

NEW PELHAM PARKWAY NORTH LLC,  
NEW MATTHEWS AVENUE LLC,  
NEW PARKWAY TERRACE LLC,  
NEW PELHAM PARKWAY SOUTH LLC,  
Plaintiffs/  
Judgment Creditors,

MOTION SEQ. NO. 002

- v -

D'WAYNE PRIETO,  
PRIETO HOLDINGS LLC,  
WARD CAPITAL LLC,

**DECISION + ORDER ON  
MOTION**

Defendants,

WARD CAPITAL MANAGEMENT LLC,  
Nominal Defendant/  
Judgment Debtor.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for

SUMMARY JUDGMENT

In this action, plaintiffs seek to enforce a monetary judgment awarded and entered against defendants stemming from a failed \$60 million real estate transaction involving plaintiffs and Ward Capital Management LLC, (hereinafter, "Capital Management") pursuant to an Agreement of Purchase and Sale (hereinafter, "purchase agreement"). Capital Management failed to close on the transaction due to its inability to obtain the necessary funding for the purchase. Plaintiffs were awarded the release of the \$1 million down payment which was held in escrow as the Bronx County Supreme Court (hereinafter, "previous action") found that Capital Management breached the purchase agreement (NYSCEF Doc. No. 1, *summons and complaint*).

Plaintiffs now move, pursuant to CPLR 3212, for an order granting them summary judgment in the sum of \$823,521.22 on their first cause of action for a declaratory judgment plus 9% interest from the date of entry, as well as, reasonable attorney fees incurred, costs and disbursements incident to this action (NYSCEF Doc. No. 34, *notice of motion for summary judgment*). According to plaintiffs', a payment of \$823,521.22 remains outstanding. Plaintiffs contend that they conducted an Article 52 deposition of D. Wayne Prieto (hereinafter, "Prieto"), the principal and sole member of Capital Management, wherein he averred that Capital Management has not conducted any corporate meetings; has not drafted any corporate meeting minutes; has no corporate resolutions; and has no employees. Further, Prieto testified that although Capital Management, which owns a realty brokerage license, performed services for a project known as 73 Maple Avenue during 2018, the fees due for services rendered on that

project belong to Prieto in his personal capacity only. Prieto also testified that Capital Management leases an office space at 81 Main Street, Dobbs Ferry, NY from Prieto Holdings LLC, an entity of which Prieto is the only member, for \$1 per month. The 81 Main Street, Dobbs Ferry, NY address is also Prieto's home and office. Prieto further testified that Prieto Holdings LLC pays for a vehicle that Capital Management leased, at a cost of \$1,400.00 per month. Plaintiffs submit a copy of the deposition testimony (NYSCEF Doc. No. 39, *relevant portions of the Article 52 deposition*).

Plaintiffs articulates that Prieto's testimony is not corroborated by the available proof insofar as news accounts hosted on the Capital Management website states that the entity bought Wyndham Hotel in New Rochelle through an affiliate company for \$3.65 million. According to plaintiffs, documents produced by Erenik Nezaj ("Nezaj"), a Certified Public Accountant and the designated CFO of Capital Management, in response to a subpoena duces tecum that was served upon him, demonstrates that hundreds of thousands of dollars have passed through Capital Management's checking account, much of which has benefited Prieto in his personal capacity. Plaintiffs furnish a copy of Nezaj's deposition and Capital Management's books and records in support of the motion (NYSCEF Doc. Nos. 40, 41, *relevant portions of the Nezaj deposition and Nominal Defendant's books and records*). According to plaintiffs, Capital Management acquired the property located at 81 Main Street, Dobbs Ferry, New York in 2016 but Prieto Holdings LLC now owns the property. Plaintiffs maintain that Prieto later formed Ward Capital LLC in 2018 (NYSCEF Doc. No. 45, *entity information for Ward Capital*) an entity of which he is the only member, has no assets, capital, has no designated telephone is also located at Prieto's home/office as essentially a shell company to aid Capital Management in its effort to avoid paying the outstanding amount. Plaintiffs contend that defendants' affirmative defenses should be dismissed because they are boilerplate and made in a conclusory fashion. As such, plaintiffs urge the court to pierce the corporate veil and issue a declaratory judgment holding that Prieto, individually, and Prieto Holdings and Ward Capital LLC, are jointly liable for the \$823,521.22 outstanding judgment entered against Capital Management (NYSCEF Doc. No. 35, *motion for summary judgment*).

In support of in the motion, plaintiff submits a copy of the Appellate Division, First Department decision and order in the previous action. The Appellate Division, First Department affirmed the decision reached in the previous action holding Capital Management liable for failing to close on the purchase. (NYSCEF Doc. No. 38, *Appellate Division's decision and order*).

Defendants have not filed an opposition to the instant motion.

It is well-settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action or show that "facts essential to justify opposition may exist but cannot [now] be stated." (CPLR 3212[f]; see *Zuckerman*, 49 NY2d at 562).

A party seeking to pierce a corporate veil and hold an entity liable as another's "alter ego", "bears a 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." (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339, [1998]). To establish a veil piercing claim based on alter ego liability, a plaintiff must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (see *47 E. 34th St. (NY) L.P. v BridgeStreet Worldwide, Inc.*, 219 AD3d 1196, 1204 [1st Dept 2023]). CPLR 3001 provides that a court may issue a declaratory judgment "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed."

Here, plaintiff has met its *prima facie* entitlement to summary judgment insofar as the undisputed facts demonstrate that Ward Capital LLC and Pietro Holding LLC had overlapping owners, held no corporate meetings, and kept no corporate records. Pietro testified at his Article 52 deposition that Capital Management leases an office space at 81 Main Street, Dobbs Ferry, NY from Prieto Holdings LLC for \$1 per month, which is also Prieto's home and office. Prieto Holdings LLC pays for a vehicle that Capital Management leases. Pietro operated the two corporations as one entity, and there is no indicia of arms-length dealings. Ward Capital LLC was not capitalized, and the entities shared common spaces, address and an impermissible overlap in ownership (see *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005] [finding that indicia of a situation warranting veil-piercing 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"]).

As the burden shifts, defendants fail to raise an issue of fact precluding summary judgment insofar as the motion is unopposed. Therefore, the court grants that branch of the motion seeking to hold Prieto, individually, and Prieto Holdings LLC and Ward Capital LLC liable for the \$823,521.22 outstanding judgment entered against Capital Management.

Next, the court grants that branch of the motion seeking attorney fees insofar as Section 32 of the Agreement of Purchase and Sale between the parties provides that "the prevailing party shall be entitled to recover from the non-prevailing party the reasonable fees and expenses of its attorneys together with costs incurred." "Under the [general] rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Sage Sys., Inc. v Liss*, 39 NY3d 27, 30–31 [2022]). That branch of the motion seeking attorneys' fees and expenses shall be referred to a special referee to hear and determine.

Concerning the affirmative defenses, to the extent defendants have not addressed that branch of plaintiff's motion seeking dismissal of those affirmative defenses, they are deemed abandoned (see *Chelsea 8th Ave. LLC v Chelseamilk LLC*, 220 AD3d 565, 566 [1st Dept 2023]). Accordingly, it is hereby

**ADJUDGED and ORDERED** that plaintiffs' motion for summary judgment against defendants is granted and defendants WARD CAPITAL MANAGEMENT LLC, D'WAYNE PRIETO, PRIETO HOLDINGS LLC, and WARD CAPITAL LLC are jointly and severally liable to plaintiffs in the amount of \$823,521.22, plus 9% interest from the date of entry; and it is further

**ORDERED** that the affirmative defenses asserted in the answer of defendants WARD CAPITAL MANAGEMENT LLC, D'WAYNE PRIETO, PRIETO HOLDINGS LLC and WARD CAPITAL LLC are dismissed as abandoned; and it is further

**ORDERED** that that branch of plaintiff's motion seeking attorney fees shall be referred to a special referee to hear and determine; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this decision and order, with notice of entry, upon defendants, Special Referee Clerk as well as upon the Clerk of the Court, who shall enter judgment according; and it is further

**ORDERED** that service upon the Special Referee Clerk and the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh)).

This constitutes the decision and order of this court.

October 9, 2024

  
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HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: