Nadel v Maciora
2024 NY Slip Op 35594(U)
June 3, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 606633/2022
Judge: Vincent J. Martorana
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INDEX NO: 606633/2022

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

ELLIOTT NADEL and CHERYL NADEL,

Plaintiffs,

- against-

KENNETH MACIORA,

Defendant.

ORIG. RETURN DATE: 02/05/24
ADJOURNED DATE: 02/08/24
MOTION SEQ. NO.: 001 - MG

PLTF'S/PET'S ATTY:
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Upon efiled documents numbered 20-30; it is

ORDERED that Defendant's motion to dismiss Plaintiffs' complaint is granted, based upon failure to state a cause of action.

The within action seeks to pierce a corporate veil and to impose a constructive trust in order to satisfy a judgment. It is alleged that Defendant "as President and CEO of Empire Relations Group, Inc. ("Empire"), exercised complete domination and control of said corporation and used such domination to prevent the Plaintiffs from recovering on their judgment against the corporation" and that Defendant "used the corporation as an instrumentality to further his own personal rather than corporate business, such that Empire Relations Group, Inc. became the alter ego of Defendant." It is also claimed that Defendant took a distribution from Empire in 2017 in the amount of $206,521.00, rendering Empire insolvent and unable to satisfy the judgment. The underlying judgment was allegedly issued on January 27, 2017 under index number 601558/2017 in favor of Plaintiffs in the amount of $65,265.00 against Empire Relations Group, Inc. Plaintiffs seek to hold Defendant personally responsible to pay the judgment and further seek to impose a constructive trust on the $206,521.00 that was disbursed to Defendant.

Defendant has interposed a pro se answer with counterclaims including fraud, conspiracy to defraud, and intentional infliction of emotional distress. A preliminary conference has been held. It is this court's understanding that little discovery has been produced. Defendant now seeks dismissal of Plaintiffs' complaint pursuant to CPLR §3211(a)(1) based upon documentary evidence (the complaint in a Queens County lawsuit), §3211(a)(10) and CPLR§1001 for failure to name a necessary party, §3211(a)(5) based upon res judicata, statute of limitations, and laches, and §3211(a)(7) for failure to state a cause of action.

Statute of Limitations

Defendant argues that the statute of limitations precludes Plaintiffs' claims, because the statute of limitations for a constructive trust claim starts to run upon the occurrence of the wrongful act. It is true that an "equitable claim for the imposition of a constructive trust is governed by a six-year statute of limitations, which begins to run upon the occurrence of the wrongful act from which a duty of restitution arises" (***Quadrozzi v. Estate of Quadrozzi***, 99 AD3d 688, 690, 952 NYS2d 74, 77 [2d Dept. 2012]). Here, it is alleged that the wrongful act occurred in 2017. This action was filed in 2022. Therefore it is timely. Additionally, the piercing the corporate veil and alter ego claims are timely as they are governed by the 20 year judgment enforcement statute of limitations (***Solow v. Domestic Stone Erectors, Inc.***, 229 AD2d 312, 645 NYS2d 17 [1st Dept. 1996]). Dismissal based upon statute of limitations is denied.

Res Judicata

The doctrine of *res judicata* provides that issues between the same parties that have been litigated and determined in a prior proceeding or issues that arise from the same series of transactions or facts (and therefore should have been raised in a prior proceeding) are precluded from subsequent litigation (***New York State Dormitory Auth. v. Bd. of Trustees of the Hyde Park Fire & Water Dist.,*** 239 AD2d 501, 657 NYS2d 444 [2d Dept. 1997]; ***Harley v. Hawkins***, 281 AD2d 593, 722 NYS2d 393 [2d Dept. 2001]; ***DeSanto Const. Corp. v. Royal Ins. Co. of Am.***, 278 AD2d 357, 717 NYS2d 636 [2d Dept. 2000]). Such claims are barred even if they are based upon an alternate legal theory or are seeking a different remedy (***Mooney v. Manhattan Occupational, Physical & Speech Therapies, PLLC***, 166 AD3d 957, 958–60, 89 NYS3d 707, 709–10 [2d Dept. 2018]; ***O'Brien v. City of Syracuse***, 54 NY2d 353, 355, 429 NE2d 1158, 1159 [1981]). *Res judicata* applies to final determinations on the merits; where a dismissal is not on the merits, the doctrine does not apply (***1155 Nobo Assocs., LLC v. New York Hosp. Med. Ctr. of Queens***, 181 AD3d 937, 119 NYS3d 897 [2d Dept. 2020]; ***Djoganopoulos v. Polkes***, 67 AD3d 726, 889 NYS2d 213 [2d Dept. 2009]; ***Shahid v. Legal Aid Soc'y***, 173 AD3d 1099, 100 NYS3d 874 [2d Dept. 2019]).

Here, all parties seem to agree that the judgment in the Queens County action was based upon a settlement and an affidavit of confession of judgment. Therefore, as there was no final adjudication on the merits, dismissal based upon res judicata is denied. Defendant's argument that Plaintiffs' claims are precluded because they did not raise them in the prior action cannot prevail, as there was no final adjudication on the merits in the Queens County action.

Failure to State a Cause of Action

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be give every possible favorable inference in determining whether or not they fit into any cognizable legal theory (***Chanko v. Am. Broad. Companies Inc.***, 27 NY3d 46, 52, 29 NYS3d 879 [2016]; ***Goshen v. Mut. Life Ins. Co. of New York***, 98 NY2d 314, 326, 746 NYS2d 858[2002]; ***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Saul v. Cahan***, 153 AD3d 947, 61 NYS3d 265 [2d Dept. 2017]). Bare legal conclusions; however, are not presumed to be true and do not receive the benefit of such favorable inference (***Grant v. DiFeo***, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; ***TMCC, Inc. v. Jennifer Convertibles, Inc.***, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

The Court may also consider affidavits submitted to remedy any defects in the complaint in ascertaining whether or not a cause of action exists (***Chanko v. Am. Broad. Companies Inc.***, *supra;* ***Leon v Martinez***, *supra*). "If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (***Sokol v. Leader***, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (*quoting* ***Guggenheimer v Ginzburg***, 43 NY2d at 275); ***Porat v. Rybina***, 177 AD3d 632, 633, 111 NYS3d 625 [2d Dept. 2019]). "Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR§ 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action" (***Sokol***, *supra*; ***Porat,*** *supra*). The analysis goes to whether or not a colorable cause of action exists, not whether or not such claim is ultimately likely to prevail on the merits. Although the Court may consider evidentiary material in support of a motion to dismiss on this basis, consideration of whether or not Plaintiff might survive a summary judgment motion is not part of the analysis (***Doe v. Ascend Charter Sch.***, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; ***Neuman v. Echevarria***, 171 AD3d 767, 768–69, 97 NYS3d 203, 205–06 [2d Dept. 2019]). Dismissal may be appropriate where a material fact alleged is conclusively determined not to be a material fact; however, dismissal should not eventuate unless there is no significant dispute (***Doe***, *supra*; ***McMahan v. McMahan,*** 131 AD3d 593, 15 NYS3d 190, 192 [2d Dept. 2015]; ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***TMCC, Inc. v. Jennifer Convertibles, Inc.***, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]).

In support of their claim that Defendant should be held liable for the debt of Empire, Plaintiffs allege in their verified complaint that Empire, by Defendant as CEO, "purportedly issued" 15% of Empire's outstanding shares of stock to Cheryl Nadel in 2008 but that Defendant never intended to actually issue the shares. It is unclear what connection this has to enforcing the underlying judgment, but is apparently a claim that was asserted in the Queens County action, along with a claim by Elliot Nadel that he was owed $100,000 in compensation for consulting services rendered. Plaintiffs also cite the $206,521.00 "distribution" taken from Empire by defendant, which is mentioned above. Additionally, Plaintiffs claim that Defendant, on or about March 27, 2019, "transferred his full ownership interest in the corporation to Western Financial LLC, and resigned as Chairman, sole director, and all officer positions," that "[u]pon information and belief, Western Financial LLC ("Western") was organized by Defendant's business associate, William J. Delgado, in the State of Wyoming" on March 26, 2019, one day prior to the stock transfer and that Western almost immediately became delinquent on its taxes in Wyoming and was administratively dissolved on May 9, 2020. Plaintiffs allege such transfer to be a sham. Plaintiffs also claim that Defendant used corporate bank accounts for his personal obligations, and that Defendant used his residence as the corporate place of business. In opposition to the motion, Plaintiffs rely upon the allegations in the verified complaint and their attorney's affirmation. No additional evidence or affidavits are submitted.

Defendant attests that, after judgment issued in the Queens County case, he responded to an information subpoena issued by Plaintiffs' counsel, and "at least 5 years of Empire Relations Group tax returns were produced, at least 5 years of Empire Relations Group bank statements were produced, multiple years of Empire Relations Group brokerage statements were filed, and [his]Empire Relations Group stock certificate was produced." Defendant further attests that "[i]n March of 2019, I entered into discussions with a Wyoming LLC to sell all my shares in Empire Relations Group Inc. On or around March 27, 2019, I signed a contract with Western Financial LLC, a Wyoming limited liability company to sell my shares for what I deemed to be fair consideration. The Plaintiffs were notified of that transaction virtually immediately after it closed." Defendant additionally asserts that the $206,521.00 paid to him was earned and due to him as compensation. It is unclear if this is intended to mean salary as an employee or some other compensation. Defendant states that he has a separate office in his home that he uses for business purposes.

As a general principle, owners of a corporation are not personally liable for corporate obligations, as a corporation is a distinct legal entity, and there is no policy against forming a corporation for the purpose of limiting individual liability (***Open Door Foods, LLC v. Pasta Machines, Inc.***, 136 AD3d 1002, 25 NYS3d 357 [2d Dept. 2016]; ***Sterling Park Devs., LLC v. China Perfect Constr. Corp.***, 185 AD3d 1082, 126 NYS3d 397 [2d Dept. 2020]; ***Bonanni v. Horizons Invs. Corp.***, 179 AD3d 995, 118 NYS3d 137 *lv to appeal dismissed*, 35 NY3d 1059, 152 NE3d 819 [2d Dept. 2020]). Piercing the corporate veil is a circumvention of the limitation on liability and is generally employed by a third party seeking to hold owners of a corporation liable for a corporate obligation; it is contingent upon both the existence of a corporate obligation and justification to hold the individual liable for it (***Morris v. New York State Dep't of Tax'n & Fin.***, 82 NY2d 135, 623 NE2d 1157 [1993]; ***Open Door Foods***, *supra*). Along with an adequate allegation of a corporate obligation, "piercing the corporate veil requires a showing 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" (***Morris***, *supra* at 141-142; ***Bonanni v. Horizons Invs. Corp.***, 179 AD3d 995, 118 NYS3d 137, *lv to appeal dismissed*, 35 NY3d 1059, 152 NE3d 819 [2d Dept. 2020]; ***Cortlandt St. Recovery Corp v. Bonderman***, 31 NY3d 30, 73 NYS3d 95 [2d Dept. 2018]; ***Sterling Park Devs., LLC v. China Perfect Constr. Corp.***, 185 AD3d 1082, 126 NYS3d 397 [2d Dept. 2020]). However, a showing of domination of the corporation alone is insufficient, "[t]he party seeking to pierce the corporate veil 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***, *supra* at 141-142; *see also* ***E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept. 2009], *aff'd*, 16 NY3d 775, 944 NE2d 1135 [2011]; ***Sky-Track Tech. Co. Ltd. v. HSS Dev., Inc.***, 167 AD3d 964, 91 NYS3d 119 [2d Dept. 2018]). Conduct constituting abuse of such privilege is a material element of a cause of action seeking to pierce the corporate veil (***E. Hampton Union Free Sch. Dist.,*** *supra*).

Factors to be considered in determining whether the owner has "abused the privilege of doing business in the corporate form" include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (***E. Hampton Union Free Sch. Dist.,*** *supra* at 99 (*quoting* ***Millennium Constr., LLC v. Loupolover***, 44 A.D.3d at 1016–1017; *see also* ***Sky-Track Tech,*** *supra*; ***Bonanni,*** *supra*). Additionally, "[t]hose seeking to pierce a corporate veil...bear 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, 703 NE2d 749 [1998]; *see also* ***Cortlandt St., supra***; ***Bonanni,*** *supra*). At the pleading stage, allegations of "bad faith" or improper acts of a principal representing a corporation are insufficient to state a cause of action to pierce the corporate veil (***Cortlandt St.,*** *supra;* ***E. Hampton Union Free Sch. Dist.***, *supra*).

Here, in support of piercing the corporate veil, Plaintiffs make a conclusory assertion regarding personal use of corporate bank accounts and a claim that Empire was being operated from Defendant's home. Plaintiffs also allege that Defendant conveyed assets to himself, with the implication that such conveyance was without consideration, rendering Empire insolvent. They further state that he sold his stock to an LLC. Defendant avers that 5 years of bank statements, brokerage statements and tax returns were provided to Plaintiffs' counsel in response to a post-judgment subpoena. Despite this, Plaintiffs' complaint is vague and conclusory. Defendant attests that the $206,521.00 was earned compensation. Plaintiff has not refuted this. Plaintiffs' complaint fails to set forth sufficient substantive allegations to state a claim that Defendant abused the corporate form in such a way that it perpetrated a wrong against them, and that they are entitled to a judgment holding Defendant personally responsible for the judgment against Empire. Additionally, Plaintiffs' submissions in opposition to the within motion do not establish that they have a claim. It is noted that Defendant points out that piercing the corporate veil is not actually an independent cause of action in New York, although it is often framed as one. "[R]ather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (***Morris v. New York State Dep't of Tax'n & Fin.***, 82 NY2d 135, 141, 603 NYS2d 807 [1993]; *see also* ***Open Door Foods, LLC v. Pasta Machines, Inc.***, 136 AD3d 1002, 1004, 25 NYS3d 357, 360 [2d Dept. 2016]). In this case it appears that Plaintiffs' ultimate goal is to obtain a judgment that Defendant is responsible for payment of the judgment against Empire.

The purpose of a constructive trust is to prevent unjust enrichment (***Sanxhaku v. Margetis***, 151 AD3d 778, 56 NYS3d 238 [2d Dept. 2017]; ***Diaz v. Diaz***, 130 AD3d 560, 561–62, 13 NYS3d 455, 456–57 [2d Dept. 2015]; ***Sharp v. Kosmalski***, 40 NY2d 119, 121–23, 351 NE2d 721, 723–24 [1976]). "When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee" (***Beatty v. Guggenheim Expl. Co.***, 225 NY 380, 386, 122 NE 378 [1919]; *see also* ***Galasso, Langione & Botter, LLP v. Galasso***, 176 AD3d 1176 [2d Dept. 2019]; ***Kaprov v. Stalinsky***, 145 AD3d 869, 44 NYS3d 123 [2d Dept. 2016]).

'The elements of a constructive trust are (1) a fiduciary or confidential relationship; (2) an express or implied promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment' " (***Fakiris v. Fakiris***, 192 AD3d 993, 141 NYS3d 326, 327 [2d Dept. 2021]*(internal citations omitted*); *see also* ***Sanxhaku v. Margetis***, 151 AD3d 778, 779, 56 NYS3d 238, 239–40 [2d Dept. 2017]; ***JPMorgan Chase Bank, N.A. v. Roseman***, 137 AD3d 1222, 29 NYS3d 380, 382 [2d Dept. 2016]; ***Diaz v. Diaz***, 130 AD3d 560, 561–62, 13 NYS3d 455, 456–57 [2d Dept. 2015]; ***Kaprov v. Stalinsky***, 145 AD3d 869, 44 NYS3d 123, 126–27 [2d Dept. 2016]; ***Sharp v. Kosmalski***, *supra*). These elements serve as a guideline; however, if it is in the interest of equity, a constructive trust may be imposed even if all elements are not established (***Sanxhaku v. Margetis***, , *supra;* ***Galasso, Langione & Botter, LLP v. Galasso***, *supra*; ***Kaprov v. Stalinsky,*** *supra*). "The constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice" (***Iwanow v. Iwanow***, 39 AD3d 476, 477, 834 NYS2d 251 [2d Dept. 2007]; *see also* ***Sharp v. Kosmalski***, 40 NY2d 119, 351 NE2d 721 [1976]; ***Sanxhaku***, *supra*; ***Kaprov***, *supra*).

In support of entitlement to a constructive trust, Plaintiffs argue that having a business relationship created a confidential relationship and that when Plaintiffs rendered services to Empire, it created an implied promise that Defendant, as president of Empire, would pay. However, the claim seeking payment for services rendered was litigated in Queens County and resulted in a settlement and a confession of judgment as against Empire. It is not clear if Plaintiffs are asserting that Empire's breach of contract should be imputed to Defendant individually and that the contract should be construed as a promise for the purposes of establishing a constructive trust. If so, this is not supportable in law. The claims in the complaint are asserted as judgment enforcement claims. As such, it may be that Plaintiffs are asserting that Defendant promised to pay the judgment. Even if such a promise is asserted, neither reliance nor a confidential relationship are sufficiently alleged. Accordingly, Plaintiffs fail to state a claim of entitlement to the equitable remedy of constructive trust. It is noted that constructive trust is a remedy that is generally predicated upon an unjust enrichment claim. To the extent that such a claim may be imputed as underlying Plaintiffs' request for a constructive trust, it fails. An unjust enrichment cause of action must be comprised of allegations that the defendant was enriched at the plaintiff's expense and that good conscience and equity demand the return of what is sought to be recovered (***Cty. of Nassau v. Expedia, Inc.***, 120 AD3d 1178, 992 NYS2d 293 [2d Dept. 2014]; ***Wells Fargo Bank, N.A. v. Burke***, 155 AD3d 668, 64 NYS3d 228 [2d Dept. 2017]; ***E.J. Brooks Co. v. Cambridge Sec. Seals***, 31 NY3d 441, 105 NE3d 301 [2018]). Here again, there is insufficient basis stated for such a claim.

Based upon the foregoing, Defendant's motion to dismiss Plaintiffs' complaint is granted for failure to state a cause of action. As to the remaining bases for dismissal asserted by Defendant, documentary evidence, laches, and failure to name a necessary party, dismissal on such grounds is denied as academic.

Dated: June 3, 2024
Riverhead, New York

VINCENT J. MARTORANA, J.S.C.

CHECK ONE: ____ FINAL DISPOSITION ____ NON-FINAL DISPOSITION