

**Commissioners of the State Ins. Fund v Capcon
Constr. Indus. Corp.**

2025 NY Slip Op 32359(U)

July 2, 2025

Supreme Court, New York County

Docket Number: Index No. 452680/2024

Judge: Arthur F. Engoron

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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:	<u>HON. ARTHUR F. ENGORON</u>	PART	37
	<i>Justice</i>		
	-----X	INDEX NO.	<u>452680/2024</u>
	THE COMMISSIONERS OF THE STATE INSURANCE FUND,	MOTION DATE	<u>02/18/2025</u>
	Plaintiff,	MOTION SEQ. NO.	<u>002</u>

- v -

CAPCON CONSTRUCTION INDUSTRIES CORP.,
CAPCON CONSTRUCTION SUPPLY CORP., JAB
MASONRY CORP., AGRA MASONRY INC., AGRA
INDUSTRIES USA CORP, A & A MASONRY CORP.,
ALEXANDER SHVARTSBERG, DARREN CAPUTO,
MARYANN FURMAN,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 60, 63,

were read on this motion to DISMISS.

Upon the foregoing documents, and for the reasons stated hereinbelow, defendants' motion, pursuant to CPLR 3211, to dismiss the complaint is denied.

Background

On March 3, 2015, defendant A & A Masonry Corp. ("A&A") applied to plaintiff, New York State Insurance Fund ("SIF"), for workers' compensation insurance coverage and employer's liability insurance. NYSCEF Doc. No. 41. Defendant Alexander Shvartsberg ("Shvartsberg"), signed the application, identifying himself as A&A's President. *Id.* On March 6, 2015, SIF issued a worker's compensation and liability insurance policy to A&A (the "A&A Policy"). NYSCEF Doc. No. 1.

On January 15, 2016, defendant Agra Masonry Inc. ("Masonry") was incorporated, with defendant Maryann Furman ("Furman") listed as the sole shareholder and President, and Shvartsberg as Manager. NYSCEF Doc. Nos. 24, 43. In an unrelated action, Furman stated that Masonry's principal place of business is located at 2626 East 14th Street, Brooklyn, New York 11235. NYSCEF Doc. No. 44.

On January 4, 2018, SIF cancelled the A&A Policy for non-payment. NYSCEF Doc. No. 1.

On March 6, 2018, Masonry applied for workers' compensation and employer's liability insurance from SIF (the "Masonry Application"). NYSCEF Doc. No. 42. Furman signed the

application, identifying herself as Masonry's President. Id. On March 8, 2018, SIF issued a workers compensation and liability insurance policy to Masonry (the "Masonry Policy"). NYSCEF Doc. No. 52.

On November 29, 2018, SIF commenced an action against A&A in New York Supreme Court, New York County, captioned Comms. of the State Ins. Fund v A & A Masonry Corp., Index No. 452235/2018, seeking to recover unpaid insurance premiums from March 6, 2015 to January 4, 2018 (the "A&A Action"). NYSCEF Doc. No. 1.

On October 3, 2019, SIF sent Masonry a notice of cancellation, effective October 19, 2019. NYSCEF Doc. No. 54.

On October 9, 2019, the Masonry Policy was reinstated after Masonry paid \$6,286.47. Id.

In a letter dated October 14, 2019, Masonry informed its clients that it was going to merge with defendant Capcon Construction Industries Corp. ("Capcon Industries"). NYSCEF Doc. No. 46.

On February 21, 2019, SIF obtained a judgment in the A&A Action against A&A for \$333,301.65, plus interest. NYSCEF Doc. No. 1.

In March 2020, SIF audited the Masonry Policy and demanded \$3,000,000 in unpaid premiums. NYSCEF Doc. No. 40 at 84 fn 9. Masonry ceased paying premiums thereafter. Id.

On June 30, 2020, defendant Agra Industries USA Corp. ("Industries") was incorporated at 2626 East 14th Street, Brooklyn, New York 11235, once again with Furman as President. NYSCEF Doc. No. 53.

In June 2020, Shvartsberg was a Project Manager and Supervisor for Masonry at various projects in Brooklyn. NYSCEF Doc. Nos. 55, 56. Shvartsberg was also a "part of" Industries at the time. NYSCEF Doc. No. 55. Contracts and jobs were allegedly diverted from Masonry to Industries, which used equipment rented to Masonry. NYSCEF Doc. No. 45 ¶ 33.

On January 20, 2021, SIF cancelled the reinstated Masonry Policy for non-payment. NYSCEF Doc. No. 1.

On October 27, 2021, SIF commenced an action against Masonry in New York Supreme Court, New York County, captioned Comms. of the State Ins. Fund v Agra Masonry Inc., Index No. 453540/2021, seeking recovery of unpaid insurance premiums from March 8, 2018 to January 20, 2021 (the "Masonry Action"). NYSCEF Doc. No. 1.

On January 12, 2022, SIF obtained a judgment against Masonry in the Masonry Action in the amount of \$5,398,564.69 (the "Masonry Judgement"). NYSCEF Doc. No. 40 ¶ 28.

On January 19, 2023, Masonry deposited a \$588,669.19 check from the United States Treasury into its JPMorgan Chase bank account. NYSCEF Doc. No. 57. On January 23, 2023, Masonry issued a check of \$101,288.00 to Shvartsberg. Id.

On May 19, 2023, in the verified complaint of an unrelated action, Shvartsberg swore to his role as an “Authorized Officer” of Industries. NYSCEF Doc. No. 48.

By July 31, 2024, Masonry’s JPMorgan Chase bank account was closed with a balance of \$0.00. NYSCEF Doc. No. 57 at 43.

On September 27, 2024, SIF commenced the instant action by filing a verified complaint against defendants, A&A, Capcon Construction Industries Corp., Capcon Construction Supply Corp., Darren Caputo, Furman, JAB Masonry Corp, Masonry, Industries, and Shvartsberg, seeking \$15,521,316.45 in damages, and asserting six causes of action: (1) alter ego liability for the Masonry Judgement; (2) successor liability of defendants A&A, Industries, Furman, and Shvartsberg for the Masonry Judgement; (3) pursuant to Debtor Creditor Law (“DCL”) § 273, plaintiff’s entitlement to all assets transferred from Masonry and A&A to Shvartsberg, Furman, and Industries; (4) pursuant to DCL § 274, plaintiff’s entitlement to all assets transferred from Masonry to Industries; (5) pursuant to DCL § 276-a, attorney’s fees; and (6) pursuant to Workers’ Compensation Law (“WCL”) § 96(2), treble damages for insurance fraud. NYSCEF Doc. No. 1.

Defendants Masonry and Furman now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss plaintiff’s complaint. NYSCEF Doc. No. 20.

In support of their motion, defendants argue, inter alia, that: plaintiff’s “conclusory allegations of insolvency and inadequate capitalization are insufficient” to satisfy the requirements of DCL §§ 273 and 274; plaintiff fails to allege a specific misrepresentation on the Masonry Application; plaintiff fails to sufficiently allege that defendant Shvartsberg was in direct or indirect control of Masonry; establishing alter-ego liability requires fraud in addition to domination; and that undifferentiated roles of individual defendants is conclusory group pleading. NYSCEF Doc. No. 21.

In opposition, plaintiff argues, inter alia, that: defendants violated WCL §§ 93 and 96 by failing to disclose Shvartsberg’s role on the Masonry Application; defendants’ transfer of assets places the burden of proof on the transferees to rebut the presumption of insolvency and fraudulent transfer; and that preferential transfers of assets to shareholders and officers of insolvent corporations by definition are not made in good faith. NYSCEF Doc. No. 40.

On May 7, 2025, plaintiff discontinued without prejudice the action as against defendants Capcon Construction Industries Corp., Capcon Construction Supply Corp., JAB Masonry Corp, and Darren Caputo, only. NYSCEF Doc. No. 63

Discussion

Dismissal pursuant to CPLR 3211(a)(1) is warranted where “documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Leon v Martinez, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211(a)(7) is warranted when, “afford[ing] the pleadings a liberal construction, tak[ing] the allegations of the complaint as true and provid[ing] plaintiff the benefit of every possible inference,” the complaint fails to assert

facts that would make out a cause of action. EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005).

Alter Ego Liability

“Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory.” Baby Phat Holding Co., LLC v Kellwood Co., 123 AD3d 405, 407-408 (1st Dept 2014).

Here, plaintiff has presented evidence that, after the Masonry Judgment was issued, Masonry received \$588,669.19 from the US Treasury and promptly issued a \$101,288.00 check to Shvartsberg. Affording the pleadings a liberal construction, Furman and Shvartsberg, as Masonry’s alter egos, conducted a series of transactions that rendered Masonry insolvent within two years following the Masonry Judgment. The documentary evidence indicates Furman, as President, and Shvartsberg, as Founder and Manager, exercised direct or indirect control over the transactions that rendered Masonry insolvent. Thus, the motion to dismiss plaintiff’s first cause of action should be denied.

Successor Liability

It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor. There is an exception to this rule, however, for cases in which there has been a consolidation or merger of seller and purchaser. A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a “de facto” merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation. ... a de facto merger finding does not necessarily require the presence of each of these factors ...

In re New York City Asbestos Litig., 15 AD3d 254, 255-56 (1st Dept 2005).

In the case at bar: Furman was President and sole shareholder of both Masonry and Industries; Shvartsberg was a Manager of Masonry and an Officer of Industries; Masonry allegedly ceased conducting business by October 2019, after which it allegedly transferred assets (leases, equipment, contracts revenues, employees) to alleged successor, Industries; Industries and Masonry share the same principal place of business; and Industries assumed ownership and operation of rental equipment originally leased to Masonry.

Thus, at this point, plaintiff has sufficiently pled that Industries could be liable for the Masonry Judgment as the successor of Masonry. Therefore, the motion to dismiss the plaintiff's second cause of action should be denied.

DCL § 273

A transfer by a debtor "is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation [...] with actual intent to hinder, delay or defraud any creditor of the debtor." DCL § 273(a)(1).

Here, despite the Masonry Judgment of January 2022, when Masonry obtained \$588,669.19 from the U.S. Treasury, Masonry promptly issued a \$101,288.00 check to Shvartsberg, just one of a myriad of transactions causing the former U.S. Treasury funds to escape the Masonry Judgment and, allegedly defrauding SIF and rendering Masonry insolvent. Accordingly, plaintiff has pled a voidable transfer pursuant to DCL § 273(a)(1), and the motion to dismiss plaintiff's third cause of action should be denied.

DCL § 274

A transfer made by a debtor is

voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

DCL § 274(a)

Further,

A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

DCL § 274(b)

Here, plaintiff has alleged that its \$5,398,564,69 judgment against Masonry essentially rendered Masonry insolvent; that one year later, when Masonry received the U.S. Treasury check, Masonry promptly issued a check to Shvartsberg; and that Masonry had previously diverted jobs and contracts to Industries. At this stage, it is unclear if the check to Shvartsberg was issued for his allegedly insider role in Masonry or Industries, but if the check was issued for projects

relating to Industries, then a question of reasonably equivalent value and antecedent debts exists. Accordingly, the motion to dismiss the fourth cause of action should be denied.

Attorney's Fees Pursuant to DCL § 276-a

DCL § 276-a provides that where an award pursuant to DCL has been granted, the presiding court "shall fix the reasonable attorney's fees of the creditor, ... as an additional amount required to satisfy the creditor's claim."

Here, as the plaintiff has sufficiently pled the prior DCL causes of action, defendant's motion to dismiss the fifth cause of action, for attorney's fees, should be denied.

Insurance Fraud WCL §§ 96(2) and 93

"Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b).

Pursuant to WCL § 96(1), any "person who knowingly ... conceals any material fact, or engages in any other fraudulent scheme or device for the purpose of obtaining, maintaining or renewing insurance in the state insurance fund ... shall be guilty of a class E felony." Violations of WCL § 96(1) entitle SIF to treble damages, "or five thousand dollars, whichever is greater." WCL § 96(2).

Here, plaintiff has provided documentary evidence and pled with sufficient particularity that Shvartsberg's role at Masonry was omitted on the Masonry Application's question six for the purpose of obtaining insurance, as Shvartsberg was barred from obtaining policies from the SIF Fund due to the A&A judgment under WCL § 93. Thus, defendant's motion to dismiss the sixth cause of action should be denied.

The Court has considered movant's other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Thus, the motion to dismiss the complaint is hereby denied.


HON. ARTHUR F. ENGORON

7/2/2025
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE