

Fernbach, LLC v Calleo
2011 NY Slip Op 31505(U)
May 24, 2011
Sup Ct, Nassau County
Docket Number: 13878/10
Judge: Paul G. Feinman
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

FERNBACH, LLC,

Plaintiffs,

- against -

RUTH CALLEO, GINO CALLEO, PIETRO
CALLEO, and GRAMERCY PARK MEWS
PARTNERSHIP, LLC,

Defendants.

TRIAL/IAS, PART 13
NASSAU COUNTY

INDEX NO. 13878/10

MOTION SUBMISSION
DATE: 3/24/11

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u> X </u>
Memorandum of Law in Support of Motion.....	<u> X </u>
Notice of Cross- Motion and Affidavits.....	<u> X </u>
Memorandum of Law in Support of Cross-Motion.....	<u> X </u>
Affirmations in Opposition.....	<u> X </u>
Memorandum of Law in Support of Opposition.....	<u> X </u>
Reply Affirmation.....	<u> X </u>
Memorandum of Law in Support of Reply.....	<u> X </u>

The plaintiff, Fernbach, LLC, (hereinafter referred to as "Fernbach"), moves for an order pursuant to CPLR §3212 for an order granting plaintiff summary judgment. The plaintiff submits a Memorandum of Law in support of plaintiff's motion. The defendants, Ruth Calleo, (hereinafter referred to as "Ruth"), Gino Calleo, (hereinafter referred to as "Gino"), Pietro Calleo, (hereinafter referred to as "Pietro"), and Gramercy Park Mews Partnership, LLC, (hereinafter referred to as "GP"), cross-move for an order pursuant to CPLR §3212 for summary judgment. The defendants submit a Memorandum of Law in support of the defendants' cross-motion, and in opposition to the motion. The plaintiff submits a reply affirmation and Memorandum of Law in support of the reply, and in opposition to the defendants' cross-motion. The defendants submit a reply affirmation in support of the defendants' cross-motion and a Reply Memorandum of Law in further support of the defendants' cross-motion.

[* 2]

RELIEF REQUESTED

The plaintiff initiated this action to enforce a judgment by plaintiff against Calleo Construction Corp., (hereinafter referred to as "CCC" and the "judgment debtor"), entered on January 15, 2010 in Supreme Court, County of New York, under Index No. 600646/08, the underlying action, in the sum of Five Hundred Ninety-Six Thousand Three Hundred Eighty-Seven and 59/100 Dollars, (\$596,387.59), of which no part has been satisfied. Prior to initiating this action, the plaintiff engaged in judgment enforcement proceedings.

The plaintiff seeks to hold the defendants herein liable as single personality, and/or alter ego of the judgment debtor, and/or for fraudulent conveyances of the judgment debtor's assets.

The plaintiff has asserted six causes of action in the proceedings herein seeking to enforce the judgment. Plaintiff seeks to set aside the alleged fraudulent conveyance of the judgment debtor to the defendants and GP pursuant to New York Debtor and Creditor Law, (DCL) §272, §276, §276-a and §278. The plaintiff alleges, essentially, that the fraudulent transfers left the judgment debtor insolvent, that the fraudulent transactions were made with the intent to hinder, delay and defraud the judgment debtor's creditors, and that the defendants are alter-egos of the judgment debtor as the defendants used the judgment debtor, CCC's, assets and accounts to transact personal business, intermingled personal and judgment debtor funds, used their own credit and bank accounts in place of and in the name of the judgment debtor, paid the judgment debtor's bills indirectly and freely without any formality whatsoever, transferred large sums of money between them, leaving CCC insolvent, under capitalized, and without any assets sufficient to satisfy judgment.

Plaintiff, by way of summary judgment, seeks to hold the defendants liable as alter-egos, thereby piercing the corporate veil, as well as setting aside conveyances made by the judgment debtor.

The defendants cross-move for summary judgment dismissing plaintiff's complaint. The defendants essentially argue that Gino received distributions from GP in his capacity as a fifty percent, (50%), member of GP; Pietro loaned Gino over Three Hundred Fifty Thousand and 00/100 Dollars, (\$350,000.00), and is charging him nine percent, (9%), interest, dealing with Gino at arms length; and Ruth, Gino's second wife, maintains her own pre-marriage savings and inheritance in a separate account and loaned Gino and his company, CCC, money which still hasn't been repaid. The defendants also argue that CCC was a victim of the recent economic downturn. Ruth avers that she has never been actively involved in the operations of her husband's construction companies, CCC or GP, and was never paid a salary from either CCC or GP.

The defendants submit there was no domination and control by the defendants over CCC which would justify holding the defendants jointly and severally liable for the debt owed to plaintiff. The defendants argue that CCC and GP were legally separate and independent entities.

BACKGROUND

The following matters, upon the record herein, are not disputed:

CCC maintained its principal place of business at 1235 Broadway, also known as 900 Broadway, New York, New York. Gino is a one hundred percent, (100%), shareholder of CCC. Gino and Pietro are fifty percent, (50%), shareholders of GP. Gino resides at 2 Prince Path, Old Westbury, New York, and Pietro, his brother, resides at 3 Prince Path, Old Westbury, New York. Ruth, (Gino's second wife), paid a bill to another counsel to negotiate the construction contract in the underlying action, in the amount of Fourteen Thousand Seven Hundred Twenty and 00/100 Dollars, (\$14,720.00), and a bill to another legal counsel in connection with the defense of the underlying action, from the joint personal checking account of Ruth and Gino.

The plaintiff provides that the documentation annexed to plaintiff's motion provides that CCC deposited monies into Ruth's account, Ruth made payments to CCC from her personal joint checking account with Gino, Gino made direct deposits of checks made payable to CCC to his personal joint checking account with Ruth, that CCC used a One Million Five Hundred Fifty Thousand and 00/100 Dollars, (\$1,550,000.00), credit line with GP to qualify for a payment and performance bond in connection with the underlying construction contract, and CCC made payments to the Wilshire State Bank in repayment of the One Million Five Hundred Fifty Thousand and 00/100 Dollars, (\$1,550,000.00), loan owed by GP.

The plaintiff sets forth various other transactions including, but not limited to, two transfers to Gino from CCC, a Ten Thousand and 00/100 Dollars, (\$10,000.00), and Thirty-Three Thousand and 00/100 Dollars, (\$33,000.00), payments made after the commencement of the underlying action; three payments to GP from CCC totaling Forty-Six Thousand Eight Hundred Fifty-Four and 45/100 Dollars, (\$46,854.45), GP payments to Gino which Gino deposited into his personal joint checking account with Ruth, a check issued by GP to CCC on September 12, 2007 for Two Hundred Seventeen Thousand Six Hundred Sixty and 00/100 Dollars, (\$217,660.00), a payment by Ruth to Gino in the amount of Fifty-Two Thousand Seven Hundred Fifty and 00/100 Dollars, (\$52,750.00), total, a payment by GP to Pietro for Seven Hundred Seventy-Five Thousand and 00/100 Dollars, (\$775,000.00), on December 21, 2007, and a payment from Pietro to Gino for Two Hundred Thousand and 00/100 Dollars, (\$200,000.00), and Three Hundred Thousand and 00/100 Dollars, (\$300,000.00).

The plaintiff sets forth that by October of 2009, CCC was stripped of all its cash assets, whereby in March 8, 2008, when the underlying action was commenced, CCC had One Million Eight Hundred Three Thousand Twenty-Five and 55/100 Dollars, (\$1,803,025.55). Plaintiff provides that by October of 2009, CCC's bank account was closed.

APPLICABLE LAW

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sullivan v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*,

[* 4]

200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). In reviewing a motion for summary judgment, the court evaluates the evidence in the most favorable light to the party opposing the motion. (*Sullivan v. Twentieth Century Fox Film Corp.*, *supra*).

According to DCL §271:

1. A person is insolvent when the present fair salable value of his assets is less than the amount of that will be required to pay his probable liability on his existing debtors as they become absolute and matured.

According to DCL §273:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration.

According to DCL §272, which provides, in relevant part that “fair consideration” is given for property, or obligation:

When in exchange for such property, or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied.

Pursuant to DCL §276:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors.

A corollary of the traditional “veil-piercing” process holds the corporate shareholders, or other corporations, responsible for corporate obligations. (*Winchester Global Trust Company Limited v. Donovan*, 22 Misc3d 1119(A)). That corollary is that “all defendants, individuals and corporations should be treated as a single personality by reason of domination and control by the individual over the corporations to transfer assets from the debtor corporations to other corporations so as to inhibit or prevent the honoring of the obligation”. (*Id.*, citing *Solow v. Domestic Stone Erectors, Inc.*, 269 AD2d 199). “Whether or not the court will elect to pierce the corporate veil is fact-dependent and there is no hard and fast rule. (*Id.*)

Generally, factors considered in determining whether a corporation is dominated by others include whether the corporation is a mere instrumentality, agent or alter-ego of others, whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or the absence of separate paraphernalia that are part of the corporate form.

[* 5]

(*Island Seafood Company Inc. v. Golub Corporation*, 303 AD2d 892; and *John John LLC v. Exit 63 Development, LLC*, 35 AD3d 540). The Court in *Old Republic National Title Insurance Company v. Moskowitz*, 297 AD2d 724, found that there was no basis for plaintiff to pierce the corporate veil as and against the wife of one of the principals in corporation when the wife was not an owner, director or shareholder in corporation. "When a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego, the corporate form may be disregarded to achieve an equitable result. (*Austin Powder Co. v. McCullough*, 216 AD2d 825). Factual issues existed to determine whether the decision to wind down the judgment debtor's business was based on a legitimate business judgment or was designed to achieve a fraudulent purpose of preventing the plaintiff from satisfying their judgment. (*Solow v. Domestic Stone Erectors, Inc.*, 269 AD2d 199). "Should the latter be provided, plaintiffs will have established the requisite grounds for treating all four defendants as a single personality for the purpose of enforcing the judgment." (*Id.*) Fact issues existed in *Constitution Realty, LLC v. Oltarsh*, 309 AD2d 714, as to whether personal property was transferred fraudulently to avoid judgment by creditor, and whether piercing the corporate veil was warranted, precluding summary judgment in an action brought by creditor to enforce judgment.

DISCUSSION

The plaintiff submits that the defendants essentially used their own credit and bank accounts in place of and in the name of the judgment creditor, CCC, and paid CCC's bills freely, routinely, without any formality, with the intent to defraud CCC's creditors, leaving CCC insolvent, under capitalized and without assets to satisfy the judgment.

The defendants contend that CCC and GP did not share office space, that 900 Broadway was a mailing address as GP had its own building at 220 Park Avenue South, New York, New York. The defendants submit that a Twelve Thousand Five Hundred and 00/100 Dollars, (\$12,500.00), check deposited into Gino's account was reimbursement for one half of a Twenty-Five Thousand and 00/100 Dollars, (\$25,000.00), payment made by Gino in a failed attempt to purchase a development site which would have benefitted CCC. Additionally, Gino, as a fifty percent, (50%), member of GP was entitled to receive fifty percent, (50%), of any net proceeds of GP's refinance or credit lines, and in his capacity as a fifty percent, (50%), member of GP, used the subject credit line as a source of funds for CCC, in good faith.

The defendants contend that certain withdrawals identified by plaintiff as fraudulent conveyances were withdrawals to pay mechanics against other projects, in good faith, that the source of the funds were from owner's other projects, and attach checks including notations of other projects and "loans" and "reimbursement". The defendants provide that the loan proceeds and reimbursements were properly accounted for and charged, as well as payments received and made for ongoing construction projects, and the two entities, GP and CCC, maintained separate bank accounts and accounting.

Ruth submits that certain payments made from her, separate money from Gino, were loans for other projects, such as failed attempts to obtain a major development site at 50th Street and Second Avenue, New York, New York. Ruth, who is not an officer, director or employee of CCC or GP, and Gino and Pietro, assert that they have not lost, hidden or fraudulently conveyed, or intentionally acted to defraud CCC's creditors.

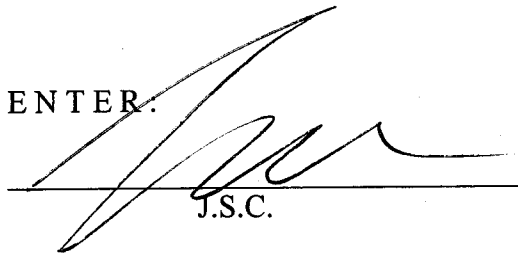
As already provided, the court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sullivan v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665). In reviewing a motion for summary judgment, the court evaluates the evidence in the most favorable light to the party opposing the motion. (*Sullivan v. Twentieth Century Fox Film Corp.*, *supra*). Here, several issues of fact exist to warrant denial of the summary judgment motions at bar, including whether the transfers identified by the plaintiff were legitimate transfers, or a ruse to fraudulently prevent the plaintiff from satisfying it's judgment.

Accordingly, the motion and cross-motion are denied. As per the parties' request, at a conference in this matter, should the motion and cross-motion be denied, the matter shall be placed on the Calendar Control Part for trial.

Accordingly, subject to the approval of the Justice there presiding, and **provided a note of issue has been filed at least ten (10) days prior thereto**, this matter shall appear on the calendar of CCP for the **20th day of July, 2011 at 9:30 a.m., for a trial in this matter.**

A copy of this order shall be served on the Calendar Clerk and accompany the notice of issue when filed. **The failure to file a note of issue or appear as directed may be deemed an abandonment of the claims giving rise to the trial.**

Notwithstanding anything to the contrary, attorney for plaintiff shall serve a copy of this order, with notice of entry, on counsel for the **defendants by regular and certified mail.**

ENTER.


J.S.C.

Dated: May 24, 2011

cc: Law Offices of Henry E. Rakowski
D'Agostino, Levine, Landesman, & Lederman, LLP

ENTERED
MAY 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE