

STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

COSTANZO PANETTA,

Plaintiff,

v.

MICHAEL DANA,

Defendant.

DECISION AND ORDER

Index #2005/13714

Defendant Michael Dana ("Dana") has moved pursuant to CPLR § 3211(7) for a judgment dismissing plaintiff's first cause of action for failure to state a cause of action. This action was commenced on December 9, 2005 via summons and complaint wherein plaintiff only alleges one cause of action to pierce the corporate veil of LAD Construction, Inc. for the purpose of holding defendant liable for a judgment previously granted against the corporation. Plaintiff opposes the motion with an Affidavit of Costanzo Panetta, a Memorandum of Law, and Exhibits, including the previous motion papers on the Panetta v. LAD Construction, Inc. case that was heard by this court in September 2005. Defendant submitted a Reply Affidavit in opposition to plaintiff's papers.

Plaintiff hired L.A.D. Construction, Inc. ("L.A.D.") to build a home for plaintiff in Spencerport, New York, and they memorialized their agreement in a contract signed by plaintiff and L.A.D. in September 2002. Defendant Michael Dana signed the

contract on behalf of L.A.D. Construction, Inc. However, defendant alleges that he is only a project manager/agent of the corporation and that at no time did he ever act as an officer, director and/or owner of L.A.D. Instead, defendant alleges that his wife Lisette Dana was the sole owner, officer, and director of said corporation, and submits a certificate of dissolution filed in Delaware and corporate tax returns in support of his contention. See Exhibit C. Defendant alleges that he presented plaintiff with a request for an interim draw for work, labor and services performed, and that said request was approved by both the plaintiff and an inspector from plaintiff's bank. Defendant alleges that, contrary to plaintiff's allegations, defendant received the interim draw of \$40,450 in accordance with said request. See Exhibit D. Defendant alleges that plaintiff without just cause terminated the contract and refused to allow LAD to complete the work pursuant to the contract, and further alleges that, contrary to plaintiff's assertions, a "stop work order" was placed on the premises by the Town of Ogden because there was not a valid permit on file, a permit which defendant alleges plaintiff was obligated to obtain, and therefore further construction on the house ceased.

Plaintiff alleges that the \$40,450 was taken by defendant without its permission one day before the "stop work order" was issued, but asserts that the stop order was due to defendant's

and LAD's negligent, improper, faulty, illegal, careless, and unworkmanlike performance in building the home. Plaintiff asserts that LAD has not completed the \$40,450 worth of work and therefore LAD has been unjustly enriched.

Plaintiff also alleges that defendant Michael Dana is the owner, operator, sole employee, sole shareholder, and manager of LAD, and that Dana has full knowledge and control of the operation of LAD. Furthermore, plaintiff alleges that Dana controlled the LAD corporation and used the corporate shield to perpetrate a wrongful and unjust act toward plaintiff. In addition, plaintiff alleges that LAD was undercapitalized and is unable to pay a judgment debt, that Dana disregarded corporate formalities, that LAD monies were used to pay the debts of Dana personally, and that Dana was the only officer and only employee of LAD. Also, plaintiff alleges that he never dealt with Lisette Dana, the wife of Michael Dana, in any relationship regarding this contract, and that the complete control of the operation of LAD fell to Michael Dana, including the ability to sign contracts, to remove monies, to bill, to hire labor, to work and to control the everyday operation of LAD.

In September, 2005, plaintiff moved in a prior action for summary judgment against LAD corporation. Although the corporation initially participated in that matter, including attending depositions, the corporation did not respond to the

plaintiff's summary judgment motion. On September 16, 2005, the court signed an Order and Judgment against L.A.D. Construction, Inc. in favor of plaintiff for \$40,450. As the judgment remains unpaid, plaintiff now seeks in this separate action to pierce the corporate veil of L.A.D. and hold Michael Dana personally liable.

Analysis

Defendant moves pursuant to CPLR § 3211(a)(7) to dismiss plaintiff's only cause of action for failure to state a claim based on the doctrine of piercing the corporate veil. In determining a motion to dismiss for failure to state a cause of action, a court will liberally construe the complaint, CPLR § 3026; Doria v Masucci, 230 A.D.2d 764, 765 (2d Dept. 1996), and will give the plaintiff "the benefit of every possible favorable inference." Shanley v. Welch, 6 A.D.3d 1065 (4th Dept. 2005); 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002). In addition, the court will accept as true all facts that are alleged in the complaint and in any submissions in opposition to the motion to dismiss. 511 West 232nd Owners Corp., 98 N.Y.2d at 152; Gibraltar Steel Corporation v. Gibraltar Metal Processing, 19 A.D.3d 1141, 1142 (4th Dept. 2005). The motion to dismiss for failure to state a cause of action "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" " 511 West 232nd Owners Corp., 98 N.Y.2d at

152 (quoting Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 54 (2001)); Shanley, 6 A.D.3d at 1065. If the court determines "that Plaintiffs are entitled to relief on any reasonable view of the facts stated," the court's inquiry is complete, and the complaint is deemed legally sufficient. Campaign for Fiscal Equity, Inc. v. State of New York, 86 N.Y.2d 307, 318 (1995).

In order to pierce the corporate veil, there must be 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." Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141 (1993) (citations omitted); Matter of Alpha Bytes Computer Corporation v. Slaton, 307 A.D.2d 725, 726 (4th Dept. 2003). New York law allows the corporate veil to be pierced to achieve equity, even in the absence of fraud, "[w]hen 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." Matter of Island Seafood Company, Inc. v. Golub Corp., 303 A.D.2d 892, 893 (3d Dept. 2003), quoting Austin Powder Co. v. McCollough, 216 A.D.2d 825, 827 (3d Dept. 1995). Furthermore, a plaintiff is "not required to plead or prove actual fraud in order to pierce the corporate defendant's

corporate veil, but [must plead] only that the individual defendant's control of the corporate defendant was used to perpetrate a wrongful or unjust act toward the plaintiff." Rotella v. Derner, 283 A.D.2d 1026, 1027 (4th Dept. 2001), quoting Lederer v. King, 214 A.D.2d 354 (1st Dept. 1995). Other factors considered when the pleadings are otherwise sufficient to pierce the corporate veil include failure to follow corporate formalities, personal use of corporate funds, and undercapitalization. Matter of Alpha Bytes Computer Corporation v. Slaton, 307 A.D.2d 725, 726 (4th Dept. 2003); Rotella v. Derner, 283 A.D.2d 1026, 1027 (4th Dept. 2001); Shisgal v. Brown, 801 N.Y.S.2d 581, 584 (1st Dept. 2005). Finally, the wrongdoing alleged must be of a special kind under New York law: it must be alleged that the defendant who would be liable, "through his domination, misused the corporate form for his personal ends so as to commit a wrong or injustice on . . . [the plaintiff]." Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 142-43. In other words, the coincidence of domination and wrongdoing is not alone enough. Instead, they must be linked such that it is alleged that the defendant to be held liable used his domination of the corporation to defraud or otherwise to wrong plaintiff with respect to the very transaction causing plaintiff damage. Matter of Guptill Holding Corp. v. State of New York, 33 A.D.2d 362, 365 (3d Dept. 1970) ("use of such control to

commit the wrong complained of"), id. 33 A.D.2d at 365 ("this is not the type of case where this control was used to commit a wrong").

Defendant insists that liability cannot be fixed on defendant for two fundamental reasons, first because he is not a shareholder, owner, officer, director, or anything other than an employee-agent, and second because, even if he dominated the corporation, he did not use his domination to commit a wrong toward plaintiff causing any damage. Each contention is taken in turn.

While the Second Department in Old Republic National Title Insurance Co. v. Moskowitz, 297 A.D.2d 724 (2d Dept. 2002), held that there was no basis to pierce the corporate veil simply by reason that the individual defendant was the corporate owner's spouse and she was neither an owner, director, nor a shareholder in the corporation, it was evident in that case that her only connection to the corporation (she had no connection to transaction at issue) was that she was married to the corporate owner. New York courts have recognized the doctrine of equitable ownership "under which an individual who exercises sufficient control over the corporation may be deemed an 'equitable owner,' notwithstanding the fact that the individual is not a shareholder of the corporation." Freeman v. Complex Computing Company, Inc., 119 F.3d 1044 (2d Cir. 1997). See Gilder v. Corinth Constr.

Corp., 235 A.D.2d 619 (3d Dept 1997); Lally v. Catskill Airways, Inc., 198 A.D.2d 643 (3d Dept. 1993). Accordingly defendant's reliance on Old Republic National Title Insurance Co. v. Moskowitz, supra, is unavailing. In any event the complaint alleges that defendant "is the owner, operator, sole employee, sole shareholder and manager of LAD," ¶2, and the court must take that allegation as true unless irrefutable documentary proof is submitted to the contrary. Here, defendant's submission of the Delaware dissolution certificate signed by his wife together with the tax returns is not the kind of evidence which is irrefutable.

Defendant's better argument is that he did not dominate the corporation for the purpose of defrauding or otherwise committing a wrong toward plaintiff when LAD took the interim draw. Defendant maintains that the contract permitted LAD to take an interim draw when approved by plaintiff and the bank's inspector, which each occurred,¹ and that no matter how the corporation happened to be dominated, that sequence of events was not at all set in motion because of such domination; the interim draw would have occurred even if all corporate formalities were observed.²

¹ Plaintiff disputes that he authorized the draw.

² In New York, veil piercing is rare, because plaintiff "is presumed to have voluntarily and knowingly entered into an agreement with a corporate entity, and is expected to suffer the consequences of limited liability associated with the business form." 1 William Mead Fletcher, et al., Fletcher Cyclopedia of the Law of Private Corporations §41.85. See Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 140

In this, defendant may well turn out after discovery to be correct, but this is a CPLR 3211(a)(7) motion, and the court is limited to the allegations of the complaint. The complaint accuses defendant of "us[ing] the corporate shield to perpetrate a wrongful and unjust act towards the plaintiff," asserts that LAD was undercapitalized and is unable to pay a judgment debt[,][t]hat Michael Dana disregarded corporate formalities[,]. . . [and that] LAD monies were used to pay debts of Michael Dana personally." ¶¶18-20. This is enough to withstand a 3211 motion. Defendant's reliance on F & M Precise Metals, Inc. v. Goodman, 4 Misc.3d 1023(A), 798 N.Y.S.2d 344 (Table) (Sup. Ct. Nassau Co. 2004) is misplaced because that case turned on the court's view that there were "no factual allegations to support the second requirement of wrongdoing other than a mere failure of the new business venture." Here such allegations, though cryptic, are present, and while they might not be sufficient to withstand a summary judgment motion post-discovery, Trustco Bank New York v. S/N Precision, 234 A.D.2d 665, 668 (3d Dept. 1996), they survive this motion.

Although defendant's motion does not address it, the commencement of a separate action from the one in which the

("perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners"). As defendant contends, the corporate form may not be disregarded merely because it cannot pay the debt. Riedel v. Steger Material Handling Co., Inc., 254 A.D.2d 819 (4th Dept. 1998).

corporation was held liable is unusual. "[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation." Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 141. No separately pleaded cause of action or complaint was necessary here if the basis of veil piercing was otherwise established in the prior action. Inasmuch as this circumstance was not addressed by defendant, the court's decision is as it is.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 31, 2006
 Rochester, New York