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All County Paving Corp. v Darren Constr., Inc.
2015 NY Slip Op 51144(U)
Decided on August 4, 2015
Supreme Court, Suffolk County
Emerson, J.
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Decided on August 4, 2015

Supreme Court, Suffolk County

<p>All County Paving Corp., Plaintiff,</p> <p>against</p> <p>Darren Construction, Inc. and MICHAEL FUSCO,</p> <p>Defendants.</p>
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34005-12

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Elizabeth H. Emerson, J.

Upon the following papers numbered 24-25 read on this motion *and cross-motion for summary judgment* ; Notice of Motion and supporting papers 24-31 ; Notice of Cross Motion and supporting papers

32-41 ; Answering Affidavits and supporting papers 42-43 ; Replying Affidavits and supporting papers

44-45 ; it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by the plaintiff for summary judgment in its favor is granted as to the defendant Darren Construction, Inc.; and it is further

ORDERED that the cross motion is otherwise denied; and it is further

ORDERED that the plaintiff is awarded damages against the defendant Darren Construction, Inc., in the principal amount of \$82,275.74 with interest from October 11, 2011; and it is further

ORDERED that the plaintiff's claim for attorney's fees is referred to the trial or other disposition of this matter against the remaining defendant.

The plaintiff has been unable to collect a judgment entered on October 11, 2011, against Darren Construction Services, Ltd. ("Darren Construction Services"), whose sole officer, director, and shareholder was the defendant Michael Fusco. The plaintiff alleges that Fusco caused Darren Construction Services to cease doing business in 2011 and formed the defendant Darren Construction, Inc. ("Darren Construction"), in order to avoid paying the plaintiff and other creditors. The plaintiff commenced this action to hold Fusco personally liable for the judgement by piercing the corporate veil and to hold Darren Construction liable under a fraudulent-conveyance theory. Discovery is now complete, and both sides move for summary judgment.

New York's fraudulent conveyance law permits the recovery of transfers that unfairly diminish a debtor's estate (**In re Trace International Holdings, Inc.**, 301 BR 801, 805). To set aside a transfer as fraudulent under Debtor and Creditor Law § 273 or §273-a, no proof of an intent to defraud is required. Constructive fraud may be shown when the debtor transfers assets without fair consideration and the debtor is or becomes insolvent (Debtor and Creditor Law § 273; **Matter of ECAC of NY, Inc. v Capri 400, Inc.**, 49 AD3d 1006, 1007) or the debtor has a judgment docketed against him that he has failed to satisfy (Debtor and Creditor Law § 273-a; **Dempster v Overview Equities**, 4 AD3d 495, 497). Transfers to controlling shareholders, officers, or directors of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent (**Matter of CIT Group/Commercial Servs. Inc. v 160-09 Jamaica Ave. Ltd.**

Partnership, 25 AD3d 301, 303; *see also*, **American Panel Tec v Hyrise, Inc.**, 31 AD3d 586, 587).

To set aside a transfer as fraudulent under Debtor and Creditor Law § 276, a creditor needs to show actual intent to defraud on the part of the transferor. When actual intent to hinder, delay, or defraud creditors is proven, proof of unfair consideration or insolvency is not required (**Wall Street Assocs. v Grodsky**, 257 AD2d 526, 529; **Miller v Miller** 276 AD2d 758; **In re Sharp Intl. Corp.**, 403 F3d 43, 56 (2nd Cir]). Due to the difficulty of proving actual intent, the pleader is allowed to rely on so-called badges of fraud to support his case, i.e. circumstances so commonly associated with fraudulent transfers that their presence give rise to an inference of intent. Among such circumstances are: a close relationship between the parties to the alleged [*2] fraudulent transaction, a questionable transfer not in the usual course of business, inadequacy of the consideration, the transferor's knowledge of the creditor's claim and the inability to pay it, and the retention of control of the property by the transferor after the conveyance (**Wall Street Assocs. v Grodsky**, *supra* at 529; *see also*, **Dempster v Overview Equities**, *supra* at 498). Other factors include secrecy, haste, or unusualness of the transaction (**In re Sharp Intl. Corp.**, *supra* at 56, *citing* **HBE Leasing Corp. v Frank**, 48 F3d 623, 639) and the timing of the transfer (**Matter of CIT Group/Commercial Servs. Inc.**, *supra* at 303).

The record reflects that Michael Fusco formed Darren Construction on August 22, 2011. A pre-trial conference in the underlying matter was calendared for October 4, 2011. Darren Construction Services failed to appear at the conference, and a default judgment was entered against it in the amount of \$82,275.74 on October 11, 2011. The record also reflects that Michael Fusco is the sole officer, director, and shareholder of Darren Construction and in charge of its day-to-day operations. The business of Darren Construction is the same as that of Darren Construction Services and is conducted at the same location and has the same telephone number. Moreover, when Darren Construction was formed, Darren Construction Services went out of business. Michael Fusco testified at his deposition that he formed Darren Construction to give himself a new start because Darren Construction Services' debts exceeded its income and, due to the poor economy, it was not feasible for Darren Construction Services to continue to do business. Fusco further testified that, in addition to the unpaid judgment that is the subject of this action, Darren Construction Services owed its creditors \$150,000, none of which has been paid.

The defendants contend that the record does not reflect that there was a transfer of any assets from Darren Construction Services to Fusco or Darren Construction. The defendants contend that the lease for the premises used by Darren Construction Services

was a month-to-month lease that included the furniture and telephone number, which were owned by the landlord. The defendants contend that, in August 2011, Darren Construction Services's tenancy ended and Darren Construction's tenancy began without the transfer of any lease, equipment, furniture, fixtures, telephone numbers, or other assets.

"Good will" has been defined as the "advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement, which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices (**Spaulding v Benenati**, 57 NY2d 418, 424 n 3). Black's Law Dictionary defines it as, inter alia, "every positive advantage that has been acquired by a proprietor in carrying on his business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business (**Id.**, quoting Black's Law Dictionary [5th ed at 625]). The chief elements of good will are continuity of place, continuity of name, and [*3]reputation (**Id.** at 423; **Dawson v White & Case**, 88 NY2d 666, 670).^{[FN1](#)}

The court finds that, while Fusco may not have transferred any "hard" assets from Darren Construction Services to Darren Construction, he transferred the good will of the business, which is a saleable asset (**Lehman v Pointkowski**, 203 AD2d 257, 259). The record reflects that Darren Construction took over the business of Darren Construction Services at the same location, with the same telephone number, and with the same proprietor as before and that Darren Construction Services did not receive any consideration therefor. The record also reflects that, at the time of the transfer, Darren Construction Services was insolvent and a defendant in the underlying action. Moreover, the judgment in that action remains unsatisfied. Accordingly, the court finds that the transfer was made without fair consideration in violation of both § 273 and § 273-a of the Debtor and Creditor Law.

The court also finds that the transfer was made with actual intent to defraud in violation of Debtor and Creditor Law § 276. The timing of the transfer, which was not in the ordinary course of Darren Construction Services' business; the inadequacy of the consideration; and the retention of control over both business by Michael Fusco all give rise to an inference of intent to defraud, which the defendants have failed to rebut. Fusco's deposition testimony reveals that, contrary to his contentions, the transfer was made to avoid paying the plaintiff and Darren Construction Services' other creditors. The fact that Darren Construction Services may have had a defense to the underlying action is of no moment.

Its remedy, if any, is a motion in the underlying action to vacate its default (*see*, CPLR 5015 [a] [1]).

In view of the foregoing, the court finds that the plaintiff is entitled to judgment as a matter of law against Darren Construction. Accordingly, the motion is denied, and the cross motion is granted, as to the defendant Darren Construction.

In order to hold Michael Fusco personally liable it is necessary to pierce the corporate veil. ^[FN2] Generally, piercing the corporate veil requires a showing that the owner (1) exercised complete domination over the corporation with respect to the transaction attacked and (2) that such domination was used to commit a fraud or wrong against the plaintiff which [*4] resulted in the plaintiff's injury (**Matter of Morris v New York State Dept. of Taxation & Fin.**, 82 NY2d 135, 141). 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 (**D'Mel & Assocs. v Athco, Inc.**, 105 AD3d 451, 452). The mere claim that the corporation was completely dominated by the owner, or conclusory assertions that the corporation acted as his alter ego, without more, will not suffice to support the equitable relief of piercing the corporate veil (**Damianos Realty Group, LLC v Fracchia**, 35 AD3d 344). Veil-piercing is a fact-laden claim that is not well suited for summary-judgment resolution (**Id.**).

In support of summary judgment, the plaintiff has failed to proffer any evidence of the above-enumerated factors, which are relevant even in a fraudulent conveyance case (**D'Mel & Assocs.**, *supra*). The plaintiff's conclusory assertions that Michael Fusco exercised complete dominion and control over both Darren Construction Services and Darren Construction and that he abused the privilege of doing business in the corporate form are insufficient to establish the plaintiff's entitlement to judgment as a matter of law. The failure to make a prima facie showing requires denial of the cross motion regardless of the sufficiency of the opposing papers (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853). Moreover, the evidence submitted by the plaintiff in its reply papers that Fusco used Darren Construction Services to pay personal expenses may not be considered for the purpose of showing prima facie entitlement to summary judgment (**Batista v Santiago**, 25 AD3d 326).

The defendants, relying on the plaintiff's lack of evidence, contend that the plaintiff cannot

establish a valid basis for piercing the corporation veil. As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (*see*, **Corrigan v Spring Lake Building Corp.**, 23 AD3d 604, 605). The defendants' reliance on deficiencies in the plaintiff's proof is insufficient to establish Fusco's entitlement to judgment as a matter of law. The failure to make a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (**Winegrad v New York Univ. Med. Ctr.**, *supra*).

In view of the foregoing, the motion and cross motion are both denied as to the defendant Michael Fusco.

[*5]Dated: August 4, 2015

J.S.C.

Footnotes

Footnote 1: The distinction between professional and commercial businesses is irrelevant for purposes of defining good will and isolating the individual elements that may be included in the term (**Dawson v White & Case**, *supra* at 423 n 2).

Footnote 2: A corporate officer who participates in a tort may be held individually liable regardless of whether the corporate veil is pierced (**D'Mel & Assocs. v Athco, Inc.**, 105 AD3d 451, 452). However, in the specific context of fraudulent conveyances (as opposed to torts generally), Fusco, who was not a transferee of the conveyance, cannot be held liable without piercing the corporate veil unless he benefitted from the conveyance (**Id.**). Since there is no evidence in the record that Fusco personally benefitted from the conveyance, it is necessary to pierce the corporate veil.

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