Doe v Ishaq
2011 NY Slip Op 33543(U)
December 30, 2011
Supreme Court, Nassau County
Docket Number: 024605/09
Judge: Joel K. Asarch
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SCAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

JOHN DOE, A MINOR BY HIS MOTHER AND LEGAL GUARDIAN, JANE DOE AND JOSEPH DOE INDIVIDUALLY,

Plaintiffs,

- against -

SAMI ISHAQ, HILDA ISHAQ and CINDY DELI INC., 400 PARK BLVD. INC., PARK MASSAPEQUA DELI, PARK BLVD. DELI, FFI CATERING INC., MASSAPEQUA PARK DELI, INC., and MASSAPEQUA PARK BLVD. DELI, INC., and ABC CORPORATIONS 1-10,

Defendants.

DECISION AND ORDER

Index No: 024605/09

Motion Sequence No: 004 & 005
Original Return Date: 01-18-11

PRESENT:

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 5 were submitted on this Notice of Motion and Notice of Cross-Motion on February 4, 2011:

	Papers numbered
Notice of Motion and Affirmation in Support - (Seq. 004)	1-2
Affirmation in Opposition	3
Reply Affirmation	4
Amended Notice of Cross-Motion - (Seq. 005)	5
Affirmation in Support	3
Reply Affirmation	X

The motion by the defendant Hilda Ishaq for an Order pursuant to CPLR 2221 granting her reargument of this Court's Decision and Order dated November 29, 2010 and upon reargument, an

Order pursuant to CPLR 3025 and 3211 denying plaintiffs leave to amend their complaint to interpose the sixth, seventh and eighth causes of action (sequence no. 4); and the cross-motion by the plaintiffs for an Order pursuant to CPLR 2221(d), (e) granting them reargument and/or renewal of this Court's Decision and Order dated November 29, 2010 (sequence no. 5) and upon reargument and/or renewal granting them a default judgment against the "defendant corporations" 400 Park Blvd. Inc., Park Massapequa Deli, Park Blvd. Deli, FFI Catering, Inc., Massapequa Park Deli, Inc., Massapequa Park Blvd. Deli, Inc. and ABC Corporations 1-10, are decided as follows:

While this Court correctly found that leave to amend the plaintiff's complaint was unnecessary in view of the fact that defendants have not answered, the defendant Hilda Ishaq and Cindy Deli Inc., d/b/a Massapequa Park Deli, Inc., as was their right, continued to attempt to defeat the proposed amendment by seeking the dismissal of all of the causes of action in the proposed amended complaint pursuant to CPLR 3211. Sage Realty Corp. v Proskauer Rose, LLP, 251 AD2d 35 (1st Dept 1998), citing Shalom v Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, Inc., 138 Misc 2d 799, 801 (Supreme Court Queens County 1998).

In their sixth cause of action, the plaintiffs allege that Hilda Ishaq "disregarded corporate formalities and used said entities as she deemed appropriate without regard to corporate purposes" and that as the "alter ego" of the defendants, she is personally liable to the plaintiffs.

In their seventh cause of action, the plaintiffs allege that Hilda Ishaq "exercised complete dominion and control over" the defendants in order to commit a fraud on the plaintiff. They allege that the corporate defendants ignored all corporate formalities in their formation and operation, specifically with respect to the compensation of their employees and their maintenance of records and that Hilda Ishaq transferred items of value from the corporate defendants to herself and

otherwise used said entities without regard to corporate formalities as she considered corporate defendants' assets her personal line of credit.

In their eighth cause of action, the plaintiffs allege that the defendants engaged in and/or permitted Sami Ishaq to engage in extreme and outrageous sexual misconduct. They allege that "by permitting" Sami Ishaq to engage in such conduct and or "by giving him the opportunity" to do so, defendants intended to cause or disregarded the substantial probability that such actions would cause severe emotional distress to the infant plaintiff.

Those defendants have established that the plaintiff's sixth and seventh causes of action seeking to pierce the corporate veil vis-v-vis Hilda Ishaq failed to state a claim. Plaintiff attempts to pierce the corporate veil do not constitute separate causes of action. Hart v Jassem, 43 AD3d 997 (2nd Dept 2007).

In any event, "[i]t is well settled that '[t]hose seeking to pierce a corporate veil . . . bear a heavy burden of showing that the corporation was dominated as to the transaction attached and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.' " Sheridan Broadcasting Corp. v Small, 19 AD3d 331, 332 (1st Dept 2005), quoting TNS Holdings v MKI Securities. Corp., 92 NY2d 335, 339 (2998). "Piercing the corporate veil generally '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.' " Sheridan Broadcasting Corp. v Small, supra, at p. 332, quoting Matter of Morris v New York State Dept. of Taxiation & Finance, 82 NY2d 135, 141 (1993). Furthermore, " 'evidence of domination alone did not suffice without an additional showing that it led to inequity, fraud or malfeasance.' " Sheridan Broadcasting Corp.

v Small, supra, at p. 332, quoting TNS Holdings v MKI Securities Corp, supra, at p. 339.

A plaintiff seeking to pierce the corporate veil must allege " 'particularized statements detailing fraud or other corporate misconduct,' [which] would warrant piercing the corporate veil." Sheridan Broadcasting Corp. v Small, supra, at p. 332, citing Sheinberg v 177 E. 77, 248 AD2d 176, 177 (1st Dept 1998), lv dism. 92 NY2d 844 (1998). " '[A]n inference of abuse does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business.' " TNS Holdings v MKI Securities Corp., supra at p. 339-340, quoting TNS Holdings v MKI Securities Corp., supra, at p. 339-340. A plaintiff must allege facts that would establish that the individual defendant, through his 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 (citations omitted)." Matter of Morris v New York State Dept. of Taxation & Fin., supra at p. 142.

The plaintiffs have not alleged facts which would establish that Hilda Ishaq, through her domination of Cindy Deli, "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the [infant plaintiff] such that a court in equity [should] intervene (citations omitted)." Matter of Morris v New York State Dept. of Taxation & Finance, supra at p. 142. The allegations necessary to impose liability for the Deli on the individual defendant Hilda Ishaq are absent. Reargument is granted and upon reargument, the plaintiff is denied leave to amend her complaint to interpose the sixth and seventh causes of action.

"To sufficiently plead an intentional tort that will neutralize the Workers' Compensation Law exclusivity, there must be alleged an intentional or deliberate act by the employer directed at causing harm to the particular employee." Acevedo v Consolidated Edison of New York, Inc., 189 AD2d 497, 500-501 (1st Dept 1993) lv dism., 82 NY2d 748 (1993), citing Mylroie v GAF Corp., 81 AD2d

994 (3rd Dept 1981) aff'd, 55 NY2d 893 (1982). " 'In order to constitute an intentional tort, the conduct must be engaged in with the desire to bring about the consequences of the act. A mere knowledge and appreciation of a risk is not the same as the intent to cause injury . . .. A result is intended if the act is done with the purpose of accomplishing such a result **or with knowledge that to a substantial certainty such a result will ensue**.' " Acevedo v Consolidated Edison of New York, Inc., supra, at p. 501, citing Finch v Swingly, 42 AD2d 1035 (4th Dept 1974).

The eighth cause of action sounding in intentional inflicting of emotional distress has been adequately pled against the individual defendant Hilda Ishaq. The plaintiffs have alleged that Hilda Ishaq "permitted" and "gave [Sami] the opportunity," to sexually abuse the plaintiff, and that she "knew of" and "was aware of" Sami's behavior. See, Randall v Tod-Nik Audiology, Inc., 270 AD2d 38 (1st Dept 2000) (possible grounds to impute employee's conduct to corporation in view of his high-level position; "The exclusivity provisions of the Workers' Compensation Law does not apply to bar an action by an employee to recover for an intentional tort, committed, instigated **or authorized** by the employee's employer); Elson v Consolidated Edison Co. of New York, Inc., 226 AD2d 288 (1st Dept 1996) (intentional tort by defendants adequately pled); Spoon v American Agriculturalist, Inc., 120 AD2d 857 (3rd Dept 1986). (issue of fact as to whether employer was aware of employee's sexual harassment of the plaintiff and yet failed to take corrective action; evidence that employer was fully aware of employee's offensive behavior yet expressly refused to remedy the situation); but see, Orzechowski v Warner-Lambert Co., 92 AD2d 110 (2nd Dept. 1993) (allegations that defendants "consciously, willfully, knowingly and intentionally ignored the hazards" they created insufficient to survive summary judgment).

As for the refusal to enter a default against the defendant corporations 400 Park Blvd. Inc.,

Park Massapequa Deli, Park Blvd. Deli, FFI Catering, Inc., Massapequa Park Deli, Inc., Massapequa Park Blvd. Deli, Inc. and ABC Corporations 1-10 (with the exception of Cindy Deli.), in seeking a default judgment, the plaintiffs have not submitted evidence of verification of the complaint by a party or an affidavit attesting to the facts (CPLR 3215[f]) nor have they submitted proof establishing its compliance with CPLR 3215 (4) (i) in support of their motion. While the plaintiffs maintain that this Court overlooked evidence thereof, that evidence was only submitted in reply, which fails to establish entitlement to relief. See, Rubens v Find, 23 AD3d 636 (2nd Dept 2005); Matter of TIG Ins. Co. v Pellegrini, 258 AD2d 638 (2nd Dept 1999). Reargument accordingly does not lie. Nor does this Court find renewal lies. The documents are not new nor has a plausible excuse for the failure to submit them in the first place been offered.

Accordingly, after due deliberation, it is

ORDERED, that the motion by the defendant Hilda Ishaq for an Order pursuant to CPLR 2221 granting her reargument of this Court's Decision and Order dated November 29, 2010, and upon reargument, an Order pursuant to CPLR 3025 and 3211 denying plaintiffs leave to amend their complaint to interpose the sixth, seventh and eighth causes of action is **granted** and upon reargument, the plaintiffs are **denied** leave to amend their complaint with respect to the proposed sixth and seventh causes of action; and it is further

ORDERED, that the cross-motion by the plaintiffs for an Order pursuant to CPLR 2221(d), (e) granting them reargument and/or renewal of this Court's Decision and Order dated November 29, 2010, and upon reargument and/or renewal granting them a default judgment against the "defendant corporations" 400 Park Blvd. Inc., Park Massapequa Deli, Park Blvd. Deli, FFI Catering, Inc., Massapequa Park Deli, Inc., Massapequa Park Blvd. Deli, Inc. and ABC Corporations 1-10 is

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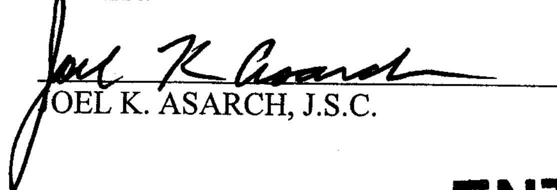
denied; and it is further

ORDERED, that a compliance conference shall be held before the undersigned at the courthouse located at 100 Supreme Court Drive, Mineola, New York 11501 **on February 6, 2012 at 9:30 a.m..** Counsel for all parties shall attend.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 30, 2011

ENTER:



JOEL K. ASARCH, J.S.C.

Copies mailed to:

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Attorneys for Plaintiffs

Fields & Levy, LLP
Attorneys for Defendants Hilda Ishaq and Cindy Deli, Inc.

Sandra M. Ishaq, Esq.
Attorney for Defendant Sami Ishaq

ENTERED
JAN 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE