

Pappas v Gucciardo

2012 NY Slip Op 30273(U)

January 31, 2012

Supreme Court, Queens County

Docket Number: 9105/2011

Judge: Sidney F. Strauss

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA Part 11
Justice

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GEORGE PAPPAS and PROACTIVE DEALER
SERVICES, INC.,

Index No.: 9105/2011

Plaintiffs,

Motion Date: 12/14/11

-against-

Cal. Nos.: 21 & 22

Seq. Nos.: 2 & 3

THOMAS GUCCIARDO, JENNIFER
GUCCIARDO, AND KEYSTONE EQUITY
GROUP, INC., d/b/a KEYSTONE AUTO
SALES,

Defendants.

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The following papers numbered 1 to 11 were read on the motion by plaintiff George Pappas and plaintiff Proactive Dealer Services, Inc. for summary judgment against defendant Jennifer Gucciardo, as well as the motion by defendant Jennifer Gucciardo for summary judgment dismissing the complaint against her.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 3
Opposition Affidavits - Exhibits	4 - 5
Reply Affidavits	6
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Opposition Affidavit.....	10
Reply Affidavit.....	11

Upon the foregoing papers it is ordered that plaintiff's motion is granted. The Clerk of the Court is directed to enter judgment against defendant Jennifer Gucciardo in the amount of \$177,192 plus interest at the legal rate from December1, 2009 and the usual costs.

Defendant Keystone Equity Group d/b/a Keystone Auto Sales operated a business at 161-30 88th Street, Howard Beach, New York which involved the purchase and sale of used automobiles. Defendant Jennifer Gucciardo (JG) owned Keystone, and her husband, defendant Thomas Gucciardo (TG), served as the general manager. Defendant JG did some bookkeeping work for the company, and Keystone paid her a salary and also made the mortgage payments on her home. Defendant TG, who worked full time for the company, received a salary of \$12,000-\$15,000 per year, while JG, a nurse who worked for the company on occasion, received a \$70,000 salary in the last two years of the company's operation. According to the plaintiffs, defendant TG has been convicted of federal securities crimes and owes \$2,342,141.03 in restitution. On August 11, 2011 defendant TG was also found guilty in The County Court of the State of New York, County of Suffolk of, inter alia, grand larceny in the second degree in connection with Keystone's business. Defendant JG was not indicted, and she swears that her husband alone operated Keystone: "It was Thomas Gucciarado who signed checks, purchased vehicles, sold vehicles and did all related work for Keystone. *** I know nothing of the business dealings of my husband in connection with Keystone."

Keystone financed its purchase of vehicles with funds advanced by plaintiff Proactive Dealer Services, Inc., a corporation headquartered at 35-35 Steinway Street, Long Island City, New York. Keystone agreed to repay Proactive as it sold each individual automobile. At first, Keystone promptly paid the loans back with interest. However, beginning in or about December, 2009, Keystone did not have a balance in its bank account to cover the checks, or the debtor would stop payment on the checks.

On or about December 17, 2009, TG filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York, listing a claim by Proactive in the sum of \$170,000. Plaintiff George Pappas, the president and owner of Proactive, filed a claim in the amount of \$227,192, a sum which included an unauthorized withdrawal allegedly made by TG from Proactive's account with TD Bank, and the claim was allegedly deemed "admitted." The Honorable Joel B. Rosenthal, the bankruptcy judge, issued an order granting a default judgment dated March 14, 2011 providing, inter alia, that the debt owed to Proactive would not be discharged.

On or about April 13, 2011, the plaintiffs began this action to recover \$177,192, the sum allegedly advanced by Proactive to finance Keystone's purchase of automobiles. On September 15, 2011, this court granted the plaintiffs a default judgment against defendant TG and defendant Keystone in the amount of \$177,192 plus interest and costs. Proactive has also begun another action in The New York State Supreme Court, County of Queens, seeking to recover \$50,000 which TG allegedly withdrew from

Proactive's bank account without permission. (*Proactive Dealer Services, Inc. v. TD Bank*, Index No 3053/10.)

The US Corporation Income Tax Return (Form 1120) filed by Keystone Equity Group, Inc. for 2009 lists as an asset "loans to shareholders" in the amount of \$274,480. Defendant JG, the only shareholder of Keystone Equity Group, Inc., has not repaid the loan made to her.

Although an individual may form a corporation to limit his personal liability, equity will "pierce the corporate veil" to permit the assertion of claims against individuals who control the corporation where necessary to prevent fraud or injustice. (*See, Matter of Morris v. New York State Dept. of Taxation and Finance.*, 82 NY2d 135; *Damianos Realty Group, LLC v. Fracchia*, 35 AD.3d 344.) "The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation ***." (*Morris v. New York State Dept. of Taxation and Finance, supra*, 141.)

"[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; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners ***." (*Morris v. New York State Dept. of Taxation and Finance, supra*, 141; *see, Sugar Foods De Mexico v. Scientific Scents, LLC*, 79 AD3d 1551.) "Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use ***." (*Millennium Const., LLC v. Loupolover* 44 AD3d 1016, 1016-1017; *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 AD3d 122, , *affd.* 16 NY3d 775.)

"Generally, piercing the corporate veil requires a showing that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury ***." (*Damianos Realty Group, LLC v. Fracchia; Matter of Morris v. New York State Dept. of Taxation & Fin., supra.*)

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) The plaintiffs herein successfully carried that burden. The

plaintiffs submitted proof that defendant JG was the only owner of Keystone and that she exercised complete dominion and control over the company. Indicia of domination such as (1) inadequate capitalization of the corporation, (2) the use of corporate funds for personal rather than corporate purposes, and (3) transactions with the corporation that did not occur at arms length (*see, Shisgal v. Brown*, 21 AD3d 845; *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.* 933 F2d 131 [C.A.2]) may be inferred from the record. The plaintiffs also submitted proof that defendant JG, the sole owner of Keystone, was ultimately responsible alone for the wrong of the corporation's failure to pay the debts owed to Proactive. (*See, Pae v. Chul Yoon*, 41 AD3d 681; *Galin Partnership v. Flynn*, 295 AD2d 473.) The plaintiffs' proof also permits the inference that defendant JG used Keystone to make fraudulent conveyances to herself (*see, e.g.*, Debtor and Creditor Law §274) such as mortgage payments and purported "loans," a circumstance which warrants the piercing of the corporate veil. (*See, NPR, LLC v. Met Fin Management, Inc.*, 63 AD3d 1128.)

The burden on this motion shifted to defendant JG to produce evidence showing that there is an issue of fact which must be tried. (*See, Alvarez v. Prospect Hospital, supra.*) She failed to carry this burden. Defendant JG alleges that only her husband, defendant TG, dominated Keystone and committed the wrongs against the plaintiffs. However, as the sole owner of Keystone, she ultimately had control of the business and ultimately had responsibility for the manner in which she permitted the corporation to be used. There are no triable issues with respect to either domination or wrongdoing. (*See, Williams v. Lovell Safety Management Co., LLC* 71 AD3d 671.)

Accordingly, defendant Jennifer Gucciardo's motion for summary judgment dismissing the complaint as against her, is denied.

Dated: January 31, 2012

SIDNEY F. STRAUSS, J.S.C.

