

Print By Premier LLC v Emigrant Bancorp, Inc.

2012 NY Slip Op 31795(U)

July 3, 2012

Sup Ct, New York County

Docket Number: 110533/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN
Justice

PART 36

Index Number : 110533/2011
PRINT BY PREMIER LLC.
vs.
EMIGRANT BANCORP, INC.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1, 2, 3
Answering Affidavits — Exhibits _____ | No(s) _____
Replying Affidavits _____ | No(s) 7, 8
Note of Cross-Motion, Affr Exhs _____ | No(s) 4, 5, 6

Upon the foregoing papers, it is ordered that this motion ~~to~~ + cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/3/12

[Signature], J.S.C.

DORIS LING-COHAN

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

PRINT BY PREMIER LLC,

Plaintiff,

-against-

EMIGRANT BANCORP, INC.,

Defendant.

INDEX NO. 110533/11

MOTION SEQ. NO. 001

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion and cross-motion for summary judgment are decided as detailed below.

In this action based upon alleged unpaid bills for printing services by plaintiff Print By Premier LLC ("Print by Premier" or "plaintiff"), both sides move for summary judgment claiming that there are no triable issues of fact. The issue presented by the within motions is whether defendant Emigrant Bancorp, Inc. ("Bancorp"), a Delaware corporation, is an appropriate defendant in this case, since non-party Emigrant Savings Bank ("Savings Bank"), a New York corporation, is named on the bills, as to the party to the contract. It is not disputed that Savings Bank is a wholly owned subsidiary of defendant Bancorp.

Plaintiff claims that it provided printing services to Savings Bank for which it was never paid. Plaintiff requests \$41,492.84 in unpaid bills, costs and disbursements for these printing services. Defendant Bancorp claims that it never ordered any printing services from plaintiff, never paid plaintiff for the services, and was never in privity of contract with plaintiff. Defendant bolsters its argument by pointing to the fact that none of the documentary evidence proffered by plaintiff names defendant Bancorp. In fact, all of the bills name Savings Bank as the entity that ordered the printing services and agreed to pay for such services.

Plaintiff claims that, in good faith and after due diligence, it believed Bancorp to be the appropriate defendant. Plaintiff does not dispute that the transactions at issue were, in fact, with Savings Bank and not Bancorp. Instead, plaintiff argues that because at least one of the officers of the two corporations overlap, and Savings Bank is a wholly owned subsidiary of Bancorp, Bancorp is an appropriate defendant. Plaintiff further claims that Savings Bank had the apparent authority to put in orders on behalf of Bancorp.

It is well settled that, in New York, a parent corporation generally cannot be held liable for the debts of its wholly owned subsidiary, nor can it be bound by the contracts of that subsidiary. *Horsehead Indus., Inc. v Metallgesellschaft AG.*, 239 AD2d 171, 171-172 (1st Dept 1997). There are two circumstances under which a parent will be held liable as a party to its subsidiary's contract: (1) if the parent manifests an intent to be bound by the contract; or (2) if the elements of piercing the corporate veil are present. *Id.* at 172. Here, as explained below, neither circumstance exists.

As to the first circumstance, the Appellate Division, First Department, in *Horsehead*, stated that manifesting an intent to be bound can be inferred from the parent's participation in the negotiations of a contract. *Id.*; see also *Matter of Sharro Holding, Inc. v Yuan*, 91 AD2d 613 (2d Dept 1982); *Centennial Energy Holdings, Inc. v Colorado Energy Management, LLC*, 32 Misc. 3d 1215(A) (Sup Ct, New York County 2011). Here, there is no indication in the within submissions that Bancorp participated or was in any way involved with the negotiations of the contract between plaintiff and Savings Bank.

Further, as to the second circumstance, it has been held that piercing the corporate veil may be appropriate and the parent may be held liable for the debts of its subsidiary, where the subsidiary is a mere "dummy" corporation, that is completely controlled and dominated by the parent. See *Horsehead Indus., Inc. v Metallgesellschaft AG.*, 239 AD2d at 172. However, "evidence of domination alone does not suffice, without an additional showing that it led to inequity, fraud, or malfeasance". *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 (1st Dept 2005) (emphasis supplied)(internal citations

and quotations omitted); *see also Simplicity Pattern Co., Inc. v Miami Tru-Color Off-Set Serv., Inc.*, 210 AD2d 24 (1st Dept 1994). Here, there has been no showing, and plaintiff does not allege, that Savings Bank was a mere “dummy” corporation, and that there was inequity, fraud or malfeasance involved in the transactions which form the basis of this lawsuit.

While Savings Bank and Bancorp have at least one officer in common, this, without more, is insufficient to satisfy the high standard for piercing the corporate veil, as it does not show that Savings Bank was an “alter-ego” of Bancorp or completely dominated by Bancorp. *See UBS Securities, LLC v. Highland Capital Mgmt., L.P.*, 93 AD3d 489, 490 (1st Dept 2012)(holding alter ego theory is supported when defendant limited partnership and affiliate have common officer and operate as a single economic entity). Moreover, ownership of all the stock in a subsidiary and identity of some directors, without complete domination, is not enough to justify piercing the corporate veil. *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 (1980); *see also Simplicity Pattern Co., Inc. v Miami Tru-Color Off-Set Serv.*, 210 AD2d 24 (1st Dept 1994).

Additionally, even if having common officers was indicative of domination, plaintiff has not shown *any evidence*, or even alleged, the existence of an inequity, fraud, or malfeasance on the part of Savings Bank or Bancorp. *Sheridan Broadcasting Corp, Inc.*, 19 AD3d at 332. Moreover, plaintiff has not asserted any basis which would prevent it from recovering in an action against Savings Bank, the party that plaintiff contracted with. *Id.*

Plaintiff’s apparent authority argument is also without merit. Savings Bank did not have apparent authority to bind Bancorp to this contract because neither plaintiff, nor Bancorp believed that they were dealing with one another. *See Hallock v State*, 64 NY2d 224, 231 (1984) (holding that “[e]ssential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction...[t]he agent cannot by his own acts imbue himself with apparent authority.”). Here, there

has been no allegation by plaintiff that it was even aware of Bancorp's existence at the time the contract was made. Further, there is no evidence that Bancorp communicated with plaintiff prior to this lawsuit. Thus, there is no basis to hold Bancorp liable based on apparent authority, as a matter of law.

Since Bancorp was not a party to the within contract and it cannot be held liable under the legal theories asserted by plaintiff, as a matter of law, and, as no triable issues of fact have been raised, Bancorp's cross-motion for summary judgment to dismiss is granted. Consequently, plaintiff's motion for summary judgment is denied. The court notes that all of the documentary proof supplied indicates a business relationship between plaintiff and Savings Bank, and not Bancorp.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied in its entirety; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted; and it is further

ORDERED that plaintiff's complaint is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment of dismissal accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order, with a notice of entry, on plaintiff.

FILED

JUL 10 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: _____

7/3/12

DORIS LING-COHAN, J.S.C.