

Mora v Melting Pot Entertainment, Corp.

2012 NY Slip Op 32766(U)

November 7, 2012

Supreme Court, Suffolk County

Docket Number: 20933-2010

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 07-19-2012
Motion Submit Date: 08-28-2012
Motion Sequence No.: 002 MOTD

FINAL
 NON FINAL

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**JENNIFER MORA a/k/a
JENNIFER MITZEL**

Plaintiff,

-against-

**MELTING POT ENTERTAINMENT, CORP.,
LEE ANDREW MYERS, WISAM DAKWAR,
IDLE HANDS PRODUCTION CORP.,**

Defendants.

_____ X

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Attorney of Defendant Dakwar
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Defendant, Wisam Dakwar (“Dakwar”) moves, by Notice of Motion (motion sequence # 002) for an Order, pursuant to CPLR § 3212, granting Summary Judgment, dismissing the Plaintiff’s complaint against that defendant. Dakwar also moves, pursuant to CPLR § 3216 for an Order precluding the Plaintiff from offering any evidence at the trial of this action based upon the Plaintiff’s failure to comply with the prior orders of this Court regarding discovery. Plaintiff, Jennifer Mizel n/k/a Jennifer Mora (“Mizel”) opposes the Defendant’s motion both on the ground that issues of fact exist concerning Dakwar’s actions and that it has fully complied with all discovery demands except in those areas where the sole information requested is in the hands of the Defendants.

This action arose as a result of a prior lawsuit, in which Mizel sued the current Defendants Lee Andrew Myers (“Myers”), Dakwar, and Melting Pot Entertainment Corp (“Melting Pot”) in connection

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with alleged past due salary and expenses owed following Mizel's termination from employment at Melting Pot Entertainment Corp. That lawsuit resulted in a settlement in the amount of \$62,500 to be paid by the corporate Defendant in monthly installments. Plaintiff has stated that she is still owed \$42,500 from that settlement, which was incorporated in a judgment entered in Mizel's favor against Melting Pot, entered on September 29, 2008. In the current action, Plaintiff sues Melting Pot, Myers, Dakwar and a new Defendant, Idle Hand Production Corp ("Idle Hand"), based upon an alleged violation of the Debtor and Creditor Law, stating that Myers, Dakwar, and Melting Pot fraudulently conveyed a valuable asset of Melting Pot to another entity, Defendant Idle Hand, for little to no consideration. The asset that was allegedly transferred consisted of a movie and video game called "Marked 4 Mary". Based upon the unlawful transfer of this asset, Mizel seeks the monies due her from the 2008 Judgment plus interest; treble damages and attorneys' fees.

In this action, as a result of their failure to appear, this Court granted Mizel Default Judgment against Defendants Melting Pot, Myers and Idle Hand on July 26, 2011 and stated that the amount of Plaintiff's damages would await the outcome of the litigation against the appearing Defendant, Dakwar.

Defendant Dakwar's Summary Judgment motion seeks to dismiss the complaint against him on the ground that he was a silent investor in Melting Pot; had no involvement with nor any ownership interest in Idle Hand; and had no participation whatever in any transfer of any asset to that corporation as alleged in the Plaintiff's Complaint. Since the Plaintiff has filed a Note of Issue and the time for discovery has passed, Defendant Dakwar asserts that no basis has been set forth whatsoever by the Plaintiff to demonstrate that Dakwar participated in any fraudulent conveyance. In addition, Dakwar asserts that he was never the subject of the 2008 Judgment and, therefore, not a "transferor" against whom a judgment had been rendered, a prerequisite for a successful claim under the Article 10 of the Debtor and Creditor law. In support of his motion, Dakwar submits an affidavit in which he argues that: 1) he was never an employee of Melting Pot; 2) during the time Melting Pot was in operation (until its dissolution on July 29, 2009), he never procured any agreements or contracted on behalf of that entity, such being arranged by Plaintiff and/or Defendant Myers; and 3) the business operations of Melting Pot, including leases, hiring, production of film or entertainment projects and the arrangements for marketing and promotional contracts were handled by Myers and Mizel. Dakwar asserts that he had no contact with any third party concerning the Marked 4 Mary project, which he understood was to result in a video game and that although he infused money into Melting Pot as an investor and was a shareholder thereof, he never received any form of compensation from that entity. He states further that not only is he not an owner of the entity to which the asset was assertedly transferred - Idle Hand; but that he never heard

of the entity until Plaintiff commenced the current lawsuit. He was also allegedly not aware of the settlement agreement which was reached by Plaintiff and Myers in the former lawsuit until he was served with papers in this lawsuit.

Plaintiff Mizel submits an affidavit opposing the Summary Judgment motion and setting forth that an issue exists concerning whether Dakwar is responsible for the debts of Melting Pot, one of which is owed to her. In this vein she asserts that Dakwar's own affidavit is self contradictory, stating at one point that he is a shareholder, then a shareholder and director, then only an investor, then involved with Melting Pot's formation, all leaving the issue of his real role in such entity as an issue to be determined at trial. She states further that Dakwar's dominion and control over Melting Pot is based upon her own experience of the daily operations of the business while she was still an officer and director. She opines that the asset Marked 4 Mary was transferred out of Melting Pot for no consideration; that she believes it is a valuable asset and that the corporation - Marked for Mary LLC - has itself obtained a judgment against Defendant Melting Pot for \$275,450.41 in the Northern District of Illinois. With regard to the portion of Dakwar's motion which seeks to preclude Plaintiff from offering evidence concerning damages due to her lack of responses regarding requests for the value of the transferred asset, Mizel argues that such information is really solely within the Defendant Melting Pot and its owners' possession and is, therefore, not a basis for preclusion.

In reply, and in further support of its motion, Defendant Dakwar's counsel argues that Plaintiff has failed to set forth any basis for demonstrating that Dakwar, the individual, is responsible for any debt of the corporation, Melting Pot; and that at the time of the transfer, Dakwar was neither a defendant in an action for money damages nor had any judgment been docketed against him. Thus, he claims that a review of the 2008 judgment demonstrates that it is against Melting Pot and not Dakwar. In addition, he contends that a review of Plaintiff's deposition demonstrates that she had to admit that only she and Myers were listed as employees of Melting Pot in its Employment Agreement and that there is no evidence that such was ever amended. With regard to the value of the allegedly transferred asset, Dakwar's counsel sets forth that the agreement between Marked for Mary, LLC and Melting Pot demonstrates that the asset is owned by Marked for Mary, not by Melting Pot. In addition, he asserts that a review of the federal court judgment against Melting Pot in the lawsuit by Marked for Mary LLC demonstrates that it was for failure to perform its responsibilities under a Production Services Agreement entered into by Myers on behalf of Melting Pot and Marked for Mary LLC. Thus, such judgement has no relation to a failure to forward value received by Melting Pot. Based on all of the above, as well as Mizel's failure to provide proof of such asset value as required in the discovery of this action, Dakwar's

counsel asserts that his client is entitled to both Summary Judgment dismissing Plaintiff's action against Dakwar as well as his requested order of preclusion based on the failure to comply with discovery orders.

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). “[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant” (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). However, once a prima facie entitlement to summary judgment has been made, it is incumbent upon the opponent to reveal his proofs in order to demonstrate that his/her allegations are capable of being established at trial. *Zuckerman, supra*. Thus, mere conclusory allegations, speculation or conjecture are simply not sufficient to resist summary judgment. *Id.*

In general, a party seeking to pierce the corporate veil must demonstrate that “complete domination” was exercised by an individual over a corporation with respect to the transaction attacked”, and 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 & Finance*, 82 NY 2d 135 (1993); *see TNS Holdings v MKI Sec Corp*, 92 NY 2d 335 (1998).

In the case at bar, which is now at the trial stage, Defendant Dakwar made a prima facie showing of entitlement to Summary Judgment through his documentary evidence and affidavits, demonstrating that only Plaintiff herself and Defendant Mizel were ever employees in addition to being shareholders of the corporate Defendant. Further, a review of the Shareholders' Agreement demonstrates further that the same two parties were the sole officers of the corporate Defendant Melting Pot. During her deposition, Plaintiff was simply unable to set forth a basis for the claim in her complaint that Dakwar exercised any domination much less “complete” domination and control over the corporate defendant and ultimate judgment defendant, Melting Pot. In opposition, Plaintiff merely stated that she based her opinion on Dakwar's domination and control over Melting Pot on her daily observations while she was employed there. However, she was unable to contradict the facts set forth by Dakwar that: 1) he was not an employee; 2) he received no compensation whatsoever from the corporation; 3) under the Shareholders Agreement, he was also not an officer of the corporation; and 4) there are no contracts or agreements signed or executed by Dakwar on behalf of Melting Pot. Thus, upon the shifting of the


burden at this late stage in the litigation, Plaintiff was unable to provide the Court with any factual bases, other than conclusory remarks, to demonstrate that Dakwar exercised any control whatsoever over the corporate defendant which was the sole entity against which she obtained a Judgment. Accordingly, Defendant Dakwar is entitled to Summary Judgment dismissing the Complaint against him.

With regard to the other relief requested by Defendant Dakwar under CPLR § 3216, to preclude Plaintiff from offering evidence at trial due to her alleged failure to provide full discovery, such motion is denied. Upon the granting of Summary Judgment in favor of Defendant Dakwar, he is no longer a party to this action. He lacks standing to make application with regard to evidence the Plaintiff may wish to provide this Court in her damages trial which will now proceed against the remaining defaulting Defendants: Melting Pot, Mizel and Idle Hand.

Based on the above, Defendant Dakwar's motion for Summary Judgment dismissing the Complaint against him is granted. Dakwar's motion to preclude Mizel from proceeding to produce proof of her damages at trial against the remaining defaulting Defendants is denied. This constitutes the Decision and Order of the Court.

Plaintiff should be prepared to proceed with her damages trial on the next Court date, scheduled for November 13, 2012, commencing at 2:15 p. m.

Dated: November 7, 2012
Riverhead, New York



EMILY PINES
J. S. C.

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