Trustees of the N.Y. City Dist. Council of Carpenters Pension Fund v Centurion Cos., Inc.
2016 NY Slip Op 31265(U)
July 6, 2016
Supreme Court, New York County
Docket Number: 162059/2015
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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TRUSTEES OF THE NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS PENSION FUND, WELFARE FUND, ANNUITY FUND, and APPRENTICESHIP, JOURNEYMAN RETRAINING, EDUCATIONAL AND INDUSTRY FUND, TRUSTEES OF THE NEW YORK CITY CARPENTERS RELIEF AND CHARITY FUND, THE NEW YORK CITY AND VICINITY CARPENTERS LABOR-MANAGEMENT CORPORATION, and THE NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS,

Plaintiffs,

- v -

CENTURION COMPANIES, INC.,

Defendant.

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Index No. 162059/2015

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs Trustees of the New York City District Council of Carpenters Pension Welfare, Annuity, and Apprenticeship, Journeyman Retraining, Educational and Industry Funds (the "ERISA Funds"), Trustees of the New York City District Council of Carpenters Charity Fund (the "Charity Fund"), New York City and Vicinity Carpenters Labor-Management Corporation (the "Labor-Management Corporation" and collectively with the ERISA Funds and the Charity Fund, the "Funds"), New York City District Council of Carpenters (the "Union") (collectively, the Union and the Funds will be referred to as "Plaintiffs") bring this action against defendant Centurion Companies, Inc. ("Centurion" or "Defendant") seeking a declaration that Centurion is liable to Plaintiffs for Evo Flooring, LLC's (Evo's) debts and obligations as the successor and/or alter ego of Evo, and awarding judgment in favor of the Funds and against Centurion in the principal amounts of $39,562.38 and $1,085,103.89, and in favor of the Union and against Centurion in the principal amount of $10,209.03.

Defendant now moves for an Order, pursuant to CPLR 3211(a)(7), dismissing Plaintiffs' complaint against Centurion for failure to state a cause of action. Plaintiffs oppose.

In determining whether dismissal is warranted for failure to state a cause of action, the pleading is afforded a liberal construction and plaintiffs are accorded the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The court must "accept the facts alleged as true . . . and determine simply whether the facts alleged fit within any cognizable legal theory." *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D.2d 91 (1st Dept. 2003) (internal citations omitted); CPLR § 3211(a)(7).

The following facts, which are assumed to be true for purposes of this motion, are taken from the complaint. Evo was a party to a collective bargaining agreement ("CBA") with the Union. The CBA required Evo to make specified hourly contributions to the Funds in connection with all work performed in the trade and geographical jurisdiction of the Union. The CBA further required Evo to furnish its books and payroll records when requested by the Funds for the purpose of conducting an audit to ensure compliance with required benefit fund contributions. The CBA authorized the Funds to estimate the total delinquency if an employer refused to submit to an audit.

Plaintiffs conducted an audit of Evo's books and records for the period April 7, 2011 through May 15, 2012. The audit revealed that Evo had failed to remit contributions in the amount of $25,752.40. Pursuant to the CBA, the dispute over Evo's failure to remit the required contributions was submitted to arbitration before Roger E. Maher, the designated impartial Arbitrator. The Arbitrator held a hearing and rendered an arbitration award, in writing, dated December 10, 2012. The Arbitrator found that Evo was in violation of the terms of the CBA and ordered EVo to pay the Funds a sum of $39,562.38.

On January 10, 2013, the Funds commenced an action to confirm the Arbitrator's award. Evo failed to appear in the action and a judgment was entered against Evo on April 24, 2013 in the amount of $39,562.38.

In January 2014, the Plaintiffs requested an audit of Evo's books and records for the period commencing on May 16, 2012. Evo refused to submit to the audit. The Funds calculated Evo's estimated audit findings in the amount of $1,085,103.89.

Additionally, the Union issued a demand for arbitration in relation to thirteen grievances allegedly committed by Evo. Evo failed to appear at the arbitration

hearing in spite of due notice to all parties. On May 10, 2013, the Arbitrator issued three awards ordering Evo to pay wages, benefits, arbitration fees, and attorney's fees. On July 17, 2013, an action was commenced to confirm the arbitrator's awards. Evo failed to appear and on October 25, 2013, a judgment was entered against Evo in the amount of $10,209.03.

With respect to Plaintiffs' claim that Centurion is the alter ego and/or successor of Evo, the complaint alleges that (1) Evo ceased operations and began utilizing Centurion as a conduit to perform work in order to avoid its liabilities to the Funds; (2) the transfer of Evo's operations and assets to Centurion rendered Evo judgment proof; (3) Centurion and Evo had substantially identical management, business purpose, operation, equipment, customers, supervision and/or ownership; (4) the Poppe family managed and/or exercised operational control over both entities; (5) Centurion and Evo operated out of the same premises, 317 Greenridge Road, Franklin Lakes, New Jersey 07417; (6) Centurion and Evo had an identical business purpose: the installation of flooring; (7) there was never an arm's length relationship between Centurion and Evo; (8) Centurion was a continuance of Evo that allowed Evo to escape its obligations to Plaintiffs; (9) Centurion had prior notice of Evo's liability based upon the continuity of ownership, management and employees between the entities.

In order to state a claim for alter-ego liability, a plaintiff is generally required to allege "complete domination of the corporation" and "that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dept. 2014); *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 18 (2015). Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised. *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). Facts relevant to the "complete control" inquiry include:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address, and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated

> corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.
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> *Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 139 (2d Cir. 1991).

"No one factor is controlling, and all need not be present to support a finding of alter ego status." *N.Y. Dist. Council of Carpenters Pension Fund v. Perimeter Interiors, Inc.*, 657 F.Supp.2d 410, 421 (S.D.N.Y. 2009) (citing *C.E.K. Industrial Mechanical Contractors, Inc. v. N.L.R.B.*, 921 F.2d 350, 354 (1st Cir. 1990)).

A claimant can prevail without proving fraud "if the claimant can identify some non-fraudulent 'wrong' attributable to the defendant's complete domination of a subsidiary entity." *Rolls-Royce Motor Cars, Inc. v. Schudroff*, 929 F. Supp. 117, 122 (S.D.N.Y. 1996); *see also Baby Phat Holding*, 123 A.D.3d at 407 ("While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice.").

Courts have noted that "[t]he purpose of the alter ego doctrine in the ERISA context is to prevent an employer from evading its obligations under the labor laws 'through a sham transaction or technical change in operations.'" *Ret. Plan of UNITE HERE Nat. Ret. Fund v. Kombassan Holding A.S.*, 629 F.3d 282, 288 (2d Cir. 2010) (quoting *Newspaper Guild of New York, Local No. 3 of Newspaper Guild, AFL-CIO v. N.L.R.B.*, 261 F.3d 291, 298 (2d Cir. 2001)); *see also Lihli Fashions Corp. v. N.L.R.B.*, 80 F.3d 743, 748 (2d Cir. 1996), *as amended* (May 9, 1996) ("The focus of the alter ego doctrine . . . is on 'the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.'").

Thus, in light of important policy considerations, the test of alter ego status is flexible, allowing courts to weigh the circumstances of the individual case, while assessing the following key factors: "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership." *Truck Drivers Local Union No. 807, I.B.T. v. Reg'l Imp. & Exp. Trucking Co.*, 944 F.2d 1037, 1046 (2d Cir. 1991); *Goodman Piping Products, Inc. v. N.L.R.B.*, 741 F.2d 10, 11 (2d Cir. 1984). If two companies are deemed alter egos of each other, then each is bound by the collective bargaining agreements signed by the other. *See Howard Johnson Co. v. Detroit Local Joint*

Executive Bd., Hotel & Rest. Emp. & Bartenders Int'l Union, AFL-CIO, 417 U.S. 249, 259 n.5 (1974); *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100, 106 (1942); *Truck Drivers*, 944 F.2d at 1046 ("The alter ego doctrine provides an analytical hook to bind a non-signatory to a collective bargaining agreement."). While the alter ego doctrine is primarily applied in situations involving successor companies, "it also applies to situations where the companies are parallel companies." *UNITE HERE*, 629 F.3d at 288.

Plaintiffs' claims are subject to the standard of notice pleading under CPLR section 3013, which provides that

> Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.
>
> CPLR § 3013.

Here, plaintiffs allege that Evo and Centurion are owned, managed, and controlled by the Poppe family, operate out of the same premises, and have the same operations, equipment, customers, and business purpose (the installation of flooring). With respect to the wrongdoing requirement, plaintiffs allege that Evo ceased operations and that its assets and operations were transferred to Centurion to render Evo judgment proof, thereby enabling Evo to escape its liabilities to plaintiffs, including the April 24, 2013 judgment, the estimated audit findings pursuant to the CBA, and the October 25, 2013 judgment. Allegations that "corporate funds were purposefully diverted to make it judgment-proof" or that "a corporation was dissolved without making appropriate reserves for contingent liabilities" satisfy the pleading requirement of wrongdoing. *Baby Phat Holding*, 123 A.D.3d at 407–8 (citing *Grammas v. Lockwood Assoc., LLC*, 95 A.D.3d 1073 (2d Dept. 2012)).

Furthermore, plaintiffs seek relief in the context of protecting contractually defined employee benefits, an area in which a general policy of piercing the corporate veil has been observed. *See, e.g.*, *UNITE HERE*, 629 F.3d at 289 (alter ego liability found in light of the interlocked relationship of the entities and the policy considerations for employing a flexible alter ego test in the ERISA context); *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund v. Vintage Tile & Flooring, Inc.*, 2015 WL 3797273, at *3 (S.D.N.Y. June 18, 2015) (alter ego status sufficiently alleged where two entities employed the same carpenters, operated out of the same premises, shared the same

phone number, had the identical business purpose of the installation of tile and other flooring, and shared common management); *Ferrara v. Smithtown Trucking Co.*, 29 F. Supp. 3d 274, 285 (E.D.N.Y. 2014) (alter ego status sufficiently alleged where companies purportedly operated in concert, even though they were engaged in different lines of business).

Therefore, at this early pre-answer juncture in the litigation, plaintiffs' allegations that the Poppe family exercised complete control over Evo and Centurion, and used such control to commit a wrong causing injury to plaintiffs are sufficient to allege the elements necessary to pierce the corporate veil under the alter ego theory and sustain contract claims against Centurion. *See 2406-12 Amsterdam Associates LLC v. Alianza LLC*, 136 A.D.3d 512 (1st Dept. 2016) (noting that a plaintiff is "not required to plead the elements of alter ego liability with the particularity required by CPLR 3016(b)").

Wherefore, it is hereby

ORDERED that Defendant's motion to dismiss Plaintiffs' complaint is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JULY 6 2016

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EILEEN A. RAKOWER, J.S.C.