IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LABORERS' PENSION FUND and LABORERS' WELFARE FUND OF THE HEALTH AND WELFARE DEPARTMENT OF THE CONSTRUCTION AND GENERAL LABORERS' DISTRICT COUNCIL OF CHICAGO AND VICINITY, and JAMES S. JORGENSEN, Administrator of the Funds,	)	
Plaintiffs,	)	**Case No. 05 C 7108**
v.	)	
	)	**Judge FILIP**
SCIORTINO BROTHERS INC., a dissolved Illinois Corporation, and PHILIP S. SCIORTINO, individually,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS PHILIP S. SCIORTINO AS A DEFENDANT

INTRODUCTION

In their First Amended Complaint, the Laborers' Pension Fund, *et al.* (the "Funds") allege that Phillip S. Sciortino ("Sciortino") is liable for benefit contributions and wages owed by Sciortino Brothers, Inc. (the "Company") under the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). The Funds have alleged valid well pled causes of action against Sciortino. Consequently, the Funds respectfully request that the Court deny the Defendant's Motion to Dismiss Sciortino as a Defendant ("Motion to Dismiss").

STANDARD OF REVIEW

Defendant Sciortino's Motion to Dismiss is completely devoid of any Federal Rule of Civil Procedure or any language indicating pursuant to what Federal Rule the Defendant is seeking relief. Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that a motion shall "...state with particularity the grounds therefore, and shall set forth the relief or order sought." Fed. R. Civ. P. 7. The standard for particularity has been determined to mean "reasonable specification." *Rosa Guardiola Martinez, et al. v. James L. Trainor*, 556 F.2d 818, 820 (7th Cir. 1977)(Defendant's Motion denied when Defendant "failed to state even one ground for granting the motion and thus failed the minimal standard of 'reasonable specification'."); *Talano v. Northwestern Medical Faculty Foundation, Inc.*, 273 F.3d 757, 760 (7th Cir. 2001). While Defendant's lack of specification is not so severe as to warrant a representation that it fails to state even one ground for granting his Motion to Dismiss and must fail pursuant to Rule 7(b)(1), the Motion's vagueness does require Plaintiffs' counsel to speculate as to the appropriate standard of review.

Plaintiffs can only assume that Defendant has moved to Dismiss Sciortino as a Defendant for failure to state a claim against Sciortino upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Under the liberal notice pleading standard, "a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), plaintiffs allegations must be taken as true and must be viewed, along with all reasonable inferences to be drawn

therefrom, in the light most favorable to the Plaintiff." *Masonry Institute of Cook County Welfare Fund, et al. v. Duane Andrist, et al.*, 1988 U.S. Dist. LEXIS 3406, *3 (N.D. Ill. April 18, 1988), *quoting Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 605-606 (7th Cir. 1987); *Chicago Dist. Council Carpenters Pension Fund v. Ceiling Wall Systems, Inc.*, 915 F. Supp. 939, 942 (N.D. Ill. 1996), *quoting Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S.Ct. 99, 101-02 (1957).

ARGUMENT

The Funds Have Viable Claims Against Mr. Sciortino, Individually, For Failure To Pay Employee Benefit Contributions And Union Dues

In their First Amended Complaint, the Funds allege that Sciortino conducted business on behalf of Sciortino Brothers, Inc., during periods of the Company's dissolution and as a result, is jointly and severally liable for debts incurred during periods of the Company's dissolution. See Plaintiffs' First Amended Complaint ¶¶ 5-27. In his Motion to Dismiss, Defendant Sciortino does dispute the above stated allegations. Instead, he asserts that while Sciortino may have run the Company during periods of its dissolution, the Company was later reinstated and consequently, Sciortino cannot be held individually liable for the Company's debts. See Defendant's Motion to Dismiss, ¶¶ 2-6.

Defendant reaches his conclusion by relying on Section 12.45(d) of the Illinois Business Corporation Act, 805 ILCS 5/12.45(d), for the proposition that upon reinstatement of a previously dissolved Corporation an *individual's* actions on behalf of the dissolved Corporation will be ratified. Defendant's Motion to Dismiss, ¶¶ 4-6. Defendant's conclusions, however, are wholly inapposite to the clear, well-established Illinois case law regarding this matter and Sections 12.45(d) and 8.65(a)(3) of the Illinois Business Corporations Act.

In his Motion to Dismiss, Defendant does properly cite 12.45(d) of the Illinois Business Corporations Act for the proposition that "upon reinstatement of the Corporation, the *Corporation* (emphasis added) shall stand revived with such powers, duties and obligations as if it had not been dissolved." See Defendant's Motion to Dismiss, ¶¶ 6; 805 ILCS 5/12.45(d). This provision of 12.45 is frequently referred to as the relation back provision. However, Defendant fails to cite any statute or case law which provides for the ratification of the actions of an *individual* acting on behalf of a previously dissolved corporation. The reason for this critical exclusion is clear, the Illinois Code and interpreting Illinois case law explicitly reject this proposition. *See generally,* 805 ILCS 5/8.65(a)(3); 805 ILCS 5/12.45(d); *Hong Kong Electro-Chemical Works, Ltd. v. Garry Less*, et al., 2006 U.S. Distr. LEXIS 29714 (N.D. Ill. April 25, 2006); *Chicago Tile Institute Welfare Plan v. Tile Surfaces, Inc.*, 222 Ill. App. 3d 413 (N.D. Ill. 2004); *Laborers' Pension Fund, et al. v. Alexander McDaniel*, et al., 2003 U.S. Dist. LEXIS 23119 (N.D. Ill. December 22, 2003); *Gonnella Baking Co. v. Clara's Pasta di Casa, Ltd.,* 337 Ill. App. 3d 385 (1st Dist. 2003); *Cardem v. Marketron International*, 322 Ill. App. 3d 131 (2nd Dist. 2001); *and Department of Revenue v. Semenek,* 194 Ill. App. 3d 616 (1st Dist. 1990).

Section 8.65 of the Illinois Business Corporation Act, 805 ILCS 5/8.65(a)(3), provides that "the directors of a corporation that carries on business after the filing by the Secretary of State of Articles of dissolution...shall be jointly and severally liable to the creditors of such corporation for all debts and liabilities incurred in so carrying on its business." Illinois case law has examined 12.45(d) and 8.65(a)(3) together and has well established that the relation back provision of 12.45(d) does not relieve an officer of

personal liability for debts incurred by the business during its dissolution. *Hong Kong* , 2006 U.S. Distr. LEXIS 29714 at *6; *Cardem*, 322 Ill. App. 3d at 136. "[S]ection 12.45(d) does not transform individual liability into corporate liability or create a legal fiction contrary to the true nature of events." *Chicago Tile Institute,* 222 Ill. App. 3d at 420; *Semenek,* 194 Ill. App. 3d at 618-20.

The Illinois Courts have also determined that an officer or employee of a previously dissolved Corporation is not per se liable for debts incurred on behalf of the Corporation during periods of its dissolution. In order to hold an individual liable for debts assumed on behalf of a dissolved corporation, there must be evidence that the officer knew, or because of his/her position, should have known of the corporation's dissolution. *Laborers'*, 2003 U.S. Dist. LEXIS 23119 at *8; *Gonnella,* 337 Ill. App. 3d at 386. It is presumed that a corporation's President should know of a Company's dissolution. *Hong Kong*, 2006 U.S. Dist. LEXIS 29714 at *12.

In the case at hand, the Funds have alleged sufficient facts in their First Amended Complaint to establish that Sciortino operated the Company during periods of its dissolution and accordingly, is jointly and severally liable for debts incurred during those periods of dissolution, including benefit contributions and dues. Sciortino is and was at all times relevant, President of the Company. Plaintiffs First Amended Complaint ¶ 6. The Company was involuntarily dissolved by the Illinois Secretary of State for the following periods of time: May 7, 2003 through February 13, 2004; December 1, 2004 through March 3, 2005; and December 1, 2005 through April 20, 2006. Plaintiffs First Amended Complaint ¶ 5 and Defendant's Motion to Dismiss ¶ 5, attachment. Sciortino

was President of the Company and conducted business on behalf of the Company during these periods of dissolution. Plaintiffs First Amended Complaint ¶ 6.

Furthermore, any arguments by Sciortino that while he did run the Company during periods of its dissolution he never had knowledge of the Company's dissolution and cannot be held liable, must fail. In addition to the presumption that as the Company's President Sciortino *should have known* of the Company's dissolution, by the Defendant's own admission, he had *actual knowledge* of the Company's dissolution. "Although there were several times that the Corporation was involuntarily dissolved by action of the Illinois Secretary of State, in each instance appropriate action was taken on behalf of the Corporation to reinstate the Corporation and place it in goodstanding with the Illinois Secretary of State." Defendant's Motion to Dismiss ¶ 4. As Registered Agent and President of the Company, Sciortino would have received notice of the Company's dissolution from the Illinois Secretary of State. In addition, as evidenced by the Certificate of Goodstanding attached to Defendant's Motion to Dismiss, Sciortino had to be aware that the Company was dissolved, as the Company's only officer and registered agent Sciortino must have filed or arranged for the filing of appropriate paperwork in order to have the Company reinstated on at least *three* separate occasions. Plaintiffs First Amended Complaint ¶ 5 and Defendant's Motion to Dismiss ¶ 5.

The Fund's First Amended Complaint sets out more than enough facts to proceed against Sciortino, jointly and severally, for unpaid benefit contributions and dues incurred while he carried on business as Sciortino Brothers, Inc., during periods of the Company's dissolution. Therefore, Counts I, II, III, and IV against Sciortino, joint and severally, should be allowed.

CONCLUSION

For the above reasons, the Funds respectfully request that this Court deny Defendant's Motion to Dismiss Phillip S. Sciortino as a Defendant.

August 2, 2006

Respectfully submitted,

By: /s/ Christina Krivanek

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CERTIFICATE OF SERVICE

The undersigned certifies that she caused copies of the foregoing Response to Motion to Dismiss to be served upon the following persons, via this Courts' Electronic Delivery System and U.S. Mail, this 2nd day of August 2006.

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/s/ Christina Krivanek