SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

GOLDBERG & CONNOLLY,

Petitioner,

-against-

XAVIER CONSTRUCTION CO., INC., and FRANK XAVIER ACOCELLA,

Respondents.

MOTION SEQ. NO.: 002, 003
MOTION DATE: 6/21/11

INDEX NO.: 6663/10

The following papers having been read on the motion (numbered 1-6):

Notice of Motion to Reargue Seq. No. 002.....1
Memorandum of Law.....2
Affirmation in Opposition to Reargue.....3
Affirmation in Further Support of Motion to Reargue.....4
Memorandum of Law.....5
Notice of Motion Seq. No. 003.....6

Motion by petitioner, Goldberg & Connolly, for an Order pursuant to CPLR § 2221 (d) granting reargument of a petition for a judgment directing respondents, Xavier Construction Co., Inc. ("Xavier Construction") and Frank Xavier Acocella, to turn over funds, pursuant to CPLR §5225 (b), sufficient to pay judgment awarded in its favor against Xavier Contracting, LLC. ("Xavier Contracting"); and upon reargument, granting the petition ordering Xavier Construction to turn over funds sufficient to pay such judgment.

Motion by respondents' counsel for an Order of this Court permitting counsel to withdraw from further representation of petitioner pursuant to CPLR §321 (b)(2).

On March 9, 2009, petitioners were awarded a judgment against Xavier Contracting in an underlying breach of contract action for its failure to pay for legal services rendered on its behalf. Petitioner alleged in the underlying petition that: respondent, Xavier Construction, is the successor corporation of Xavier Contracting and is therefore liable for payment of the judgment; Xavier Contracting's assets were fraudulently conveyed to Xavier Construction and/or Frank Acocella, the primary and

sole shareholder and manager of the respondent entities, to avoid liability and payment of the judgment; and that Frank Acocella has secreted, dissipated and commingled the assets of Xavier Contracting and expended them for his own use.

This Court denied the petition in its decision dated December 17, 2010, and petitioner moved to reargue on the basis that this Court misapprehended and/overlooked controlling law applicable to successor liability.

As to the respondents' motion to be relieved as counsel, such has been rendered moot by the Notice of Substitution, dated May 5, 2011, where substituted counsel has appeared and submitted opposition to the instant motion.

The facts are the same as determined in the December 17, 2010 decision of this Court. In May, 2006, petitioner commenced the underlying action by filing a summons and complaint against Xavier Contracting, an active New York corporation managed by Frank Acocella ("Acocella"). On or about December 8, 2006, Xavier Construction filed its Certificate of Incorporation with the State of New York, which named Frank Acocella as its Chairman and/or Chief Executive Officer. Both entities were/are in the construction business.

In 2009, petitioner recovered a judgment for payment due under breach of contract action under the caption, Goldberg & Connolly v. Xavier Contracting, LLC, Index No. 008713/06. Xavier Contracting, which is still an active corporation but not actively engaged in business, is insolvent at this time and was insolvent at all times during the pendency of the underlying action and petition, and the pendency of the instant motion. According to its principal, Acocella, Xavier Contracting has several judgments against it which includes two in favor of the New York State Department of Labor, and there is a pending claim against it by the City of New York in the amount of $1,123,189.73.

Additionally, there are account receivables for monies due and owing Xavier Contracting for various construction projects; however, Acocella contends that because of the outstanding claims against it by the Department of Labor which exceed the amount of those receivables, the entity will not receive those funds.

The petitioner alleges that the Court relied on the theories of piercing the corporate veil and fraudulent transfer to deny its petition, instead of the law of successor liability. Petitioner contends that because the subject corporate entities have similar names, use the same addresses, offices, telephone numbers, and filed joint tax returns and combined balanced sheets, and that Frank Acocella has controlling interests in both entities, Xavier

Construction is a mere continuation of Xavier Contracting and/ the two entities merged. Petitioner argued, in its petition, that Xavier Construction was created for the purpose of frustrating the petitioner's ability to collect on the judgment.

The granting of a motion for reargument is within the sound discretion of the court which decided the prior motion, provided the movant shows that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (see *Schneider v. Solowey*, 141 AD2d 813 [2nd Dept 1988]).

In reviewing the theory of piercing the corporate veil under the facts and circumstances of this case, 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 (see *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135[1993]). Additionally, a party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*see Old Republic Natl. Tit. Ins. Co. v Moskowitz,* 297 AD2d 724, 725 [2nd De pt 2002]; *Hyland Meat Co. v Tsagarakis*, 202 AD2d 552 [2nd Dept 1994]).

In this case, the petitioner has, in essence, accused the respondents of creating a corporate entity to circumvent a liability for a judgment. The theories on which petitioner relies are nothing more than its attempt to pierce the corporate veil by alleging facts to evince that Xavier Construction is a mere continuation and defacto merger of Xavier Contracting. As such, the corporate successor theory is actually a way of piercing Xavier Construction's corporate veil. This is further supported by petitioner's reference to Acocella as the named principal of both entities. Petitioner has, in sum, alleged that Xavier Construction is dominated by Acocella and it is therefore an "alter ego" of Xavier Contracting, a requirement for the corporate veil to be pierced (see *Matter of Goldman v Chapman* 44 A.D3d 938 [2nd Dept 2007]).

The Court does agree with petitioner's recitation of the relevant law. A corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such

obligations." (*see Semenetz v. Sherling & Walden, Inc.*, 7 NY3d 194[2006], *Nationwide Mut. Fire Ins. Co. v. Long Island Air Conditioning, Inc*, 78 AD3d 801 [2nd Dept 2010]). This doctrine is also applicable in breach of contract actions (see *Fitzgerald v. Fahnestock & Co.*, 286 AD2d 573 [1st Dept 2001]).

As nothing has been submitted wherein the successor, Xavier Construction, expressly assumed the debts and liabilities of Xavier Contracting, this Court must determine whether there was indeed a defacto merger. The hallmarks of a de facto merger, warranting successor liability for a predecessor corporation's liability, are the continuity of ownership, cessation of ordinary business and dissolution of the predecessor corporation as soon as possible, assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation, and a continuity of the management, personnel, physical location, assets, and general business operation (see [*Damianos Realty Group, LLC v Fracchia,* 35 AD3d 344 [2nd Dept 2006]). These factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor (see *AT & S Transp., LLC v. Odyssey Logistics & Technology Corp.* 22 AD3d 750 [2nd Dept 2005]).

Continuity of ownership, generally exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets. In other words, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each (see *In re New York City Asbestos Litigation,* 15 AD3d 254 [1st Dept 2005]). Generally because continuity of ownership is "the essence of a merger," it is a necessary element of any de facto merger finding, although not sufficient to warrant such a finding in and of itself. In addition, such continuity is evidenced by the same management, personnel, assets and physical location (see *AT & S Transp., LLC v. Odyssey Logistics & Technology*, supra).

Here, the management is clearly the same in both entities, but there is no evidence that Xavier Construction owned what formerly belonged to Xavier Contracting in terms of assets or personnel nor is there evidence of any intent to own Xavier Contracting or its assets. The petitioner, in its Memorandum of Law, refers to *Sweatland v Park Corp.*, 181 AD2d 243 (4th Dept 1992) to support its claim that Xavier Construction is a successor corporation as it has the same phone number, serves the same clients, and operates the

same business in the market place. However a careful reading of this case, also indicates that while factors such as shareholder and management continuity will be evidence that a de facto merger has occurred, those factors alone should not be determinative *(see Sweatland v Park Corp.,* supra).

Further, according to *Sweatland*, the court is to make, on a case-by- case basis, an analysis of the weight and impact of a multitude of factors that relate to the corporate creation, succession, dissolution, and successorship. Here, the petition is devoid of any specific facts; it is replete with conclusory allegations. The same analysis applies in the theory of piercing the corporate veil as it also, in a given instance, depends on particular facts and circumstances (*Damianos Realty Group, LLC v Fracchia*, supra at 344).

Another case, relied upon by petitioner, *Burgos v Pulse Combustion,* 227 AD2d 295[1st Dept 1996], is also distinguishable from the one at bar. There, the Court denied defendant's motion for summary judgment dismissing the complaint where plaintiff's evidence supported successor liability in that it showed that the successor entity purchased almost all of the predecessor corporation's fixed assets and intangibles; that the predecessor corporation apparently ceased to exist soon after the sale; that successor corporation assumed a name nearly identical to that of the predecessor corporation; at least one officer from the predecessor corporation was retained by successor corporation; and that the same products were manufactured pursuant to the purchase agreement.

In the instant matter, no evidence has been submitted and the petition is supported only by the conclusory statements of petitioner. The only facts that can be gleaned from its petition and instant motion is that the subject corporate entities have similar names, possibly operate at the same location, and are ostensibly run by the same principal. Petitioner argues in substance that all it is required is to allege the requisites CPLR §5225(b) which should be sufficient for this Court to grant his motion; "[petitioner] plead all the requirements to prove that Xavier Construction is the successor corporation to Xavier Contracting pursuant to a mere continuation theory".

Again, CPLR §5225 (b) permits a special proceeding to be brought against, and recovery to be had from, "a transferee of money or other personal property from the judgment debtor" if it can be demonstrated that the debtor is entitled to the property (see, *Federal Deposit Ins. Corp. v Heilbrun* , 167 AD2d 294 [1st Dept 1990]). The petitioner has not demonstrated such entitlement.

The petitioner feels that it was error for this Court to determine the merits of the petition under the theory of fraudulent transfer. The petitioner should be reminded that in his Notice of Petition, annexed to his motion as part of Exhibit "3", it specifically sought an Order directing Xavier Construction to turn over funds sufficient to pay the outstanding judgment on the grounds, inter alia, that "Xavier Contracting's assets were fraudulently conveyed to either Xavier Construction and/or Frank Acocella to escape judgment".

In a review of the Court's wording in its December 17, 2010 decision; "...the petitioner has not established that the judgment debtor's assets were actually transferred to another party or transferred without fair consideration...", this requirement is inclusive of the doctrine of corporate succession. The petitioner is grappling with semantics to ostensibly bring the same arguments to the fore and as such, the Court is also reminded that the respondent had moved for sanctions in the previous application before this Court. Petitioner is hereby warned that its conduct is bordering on frivolous, and this Court is putting it on notice to refrain from similar conduct(see N.Y .Ct. Rules,§ 130-1.1 (c), *Levy v. Carol Management Corp.*, 260 AD2d 27[1st Dept1999]). Regardless of how petitioner chooses to couch his arguments, the facts alleged in its petition are insufficient to establish that it is entitled to any assets respondent may possess.

Accordingly, the petitioner's Motion to Reargue is **moot**.

This constitutes the Order of the Court.

Dated: September 30, 2011

J.S.C.