SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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LONG ISLAND LIGHTING COMPANY doing business as LIPA,

Plaintiff,

-against-

CHESTNUT STATION, INC. and THOMAS CATANESE,

Defendants.

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TRIAL/IAS PART: 16
NASSAU COUNTY

Index No: 020515-09
Motion Seq. No: 2
Submission Date: 5/30/11

Papers Read on this Motion:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits.....x
Affidavit in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Reply Affirmation and Attachment.....x

This matter is before the court on the motion by Defendant Thomas Catanese ("Catanese") filed on April 27, 2012 and submitted on May 30, 2012. The Court also held oral argument on the motion on June 4, 2012. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Catanese moves for an Order granting summary judgment in favor of Catanese and dismissing the cause of action against him.

Plaintiff Long Island Lighting Company doing business as LIPA ("Plaintiff" or "LIPA") opposes the motion.

B. The Parties' History

The parties' history is set forth in detail in a prior decision of the Court dated July 15, 2010 ("Prior Decision") (Ex. B to Duffy Aff. in Supp.) which addressed a prior motion filed by Plaintiff ("Prior Motion"). In the Prior Decision, the Court 1) granted Plaintiff's motion for a default judgment against Defendant Chestnut Station, Inc. ("CSI") on the fourth cause of action in the Complaint in the sum of $118,677.33, plus costs and attorney's fees to be determined at an inquest; 2) denied Plaintiff's motion for a declaratory judgment; and 3) denied, without prejudice, Plaintiff's motion for a default judgment against Defendant Thomas Catanese on the theory of successor liability. The Prior Decision is incorporated by reference as if set forth in full herein.

As noted in the Prior Decision, CSI is a New York corporation that became inactive on or about July 29, 2009 due to dissolution by proclamation of the New York Department of State. Catanese was and continues to be President of SCI. Catanese, in his capacity as President of CSI, made a submission to Plaintiff to build-out and lease property to Plaintiff at 2-30 Beach 102nd Street, Far Rockaway Beach, New York ("Premises"). The parties thereafter entered into the Lease which, as required by law, was approved by the New York State Attorney General and the New York State Department of Audit and Control. Plaintiff made payments to CSI but CSI failed to complete the work.

The Complaint contains five (5) causes of action. In the fifth cause of action, Plaintiff seeks judgment against Catanese under the theory of Successor Liability so that, in the event that CSI's financial condition renders it unable to satisfy any judgment or injunctive relief granted to Plaintiff, Catanese is held liable, as principal of CSI, for any judgment obtained by Plaintiff against CSI. As noted, the Court granted Plaintiff judgment against CSI in the Prior Decision.

In support of the Prior Motion, Counsel provided documentation from the New York Department of State, Division of Corporations website reflecting that CSI's current status was "Inactive - Dissolution by Proclamation/Annulment of Authority (Jul 29, 2009)." In the Prior Decision, the Court denied, without prejudice, Plaintiff's motion for a default judgment against Defendant Catanese on the basis that the Court had insufficient information regarding the

circumstances of the dissolution of CSI to warrant the imposition of personal liability against Defendant Catanese.

In support of the motion *sub judice*, Catanese affirms that he is an owner of 50% of the shares of stock of CSI. CSI is the owner of two parcels of real property located in Queens County: 1) property in Rockaway, New York which contains the Premises that is the subject of this action, and 2) vacant land known as Block 16178, Lot 65. CSI has over $500,000 in equity in these properties. CSI is a real estate development business that leases office space primarily to medical professionals. Its business has continued uninterrupted for over ten (10) years, and is ongoing.

Catanese avers, further, that CSI was dissolved by proclamation on or about July 29, 2009 due to non-payment of franchise taxes. Catanese affirms that he was not aware that the Department of State dissolved CSI in 2009, and did not learn of the dissolution until 2011 when he discussed this litigation with his attorney. CSI's business is ongoing and no attempt has been made to wind up its affairs. In addition, all of CSI's real property is held in the same manner as when CSI first acquired its property.

Catanese affirms that it is the intention of CSI's shareholders to bring the franchise taxes up to date and follow the necessary procedures to have CSI reinstated by the Department of State. Catanese notes that the Lease involved in this action expressly states that the owners shall not be subject to personal liability, and affirms that he never acted in his personal capacity in negotiating and executing documents related to this action, but rather acted, at all times, as President of CSI.

Counsel for Catanese provides deeds for the properties owned by CSI, as attested to by Catanese (Ex. D to Duffy Aff. in Supp.). Counsel notes that both properties are titled in CSI's name, as they have been since they were acquired.

In opposition, counsel for Plaintiff ("Plaintiff's Counsel") affirms that Catanese testified at his deposition (Ex. A to Bohn Aff. in Opp.) that the other 50% of the shares of CSI are owned by Alphonse Catanese ("Alphonse"), the brother of Catanese, who is the Vice President of CSI. Plaintiff's Counsel provides a printout dated May 18, 2012 from the New York State Department of State, Division of Corporations (*id.* at Ex. C) which reflects that CSI's entity status is still "Inactive - Dissolution by Proclamation/Annulment of Authority (July 29, 2009)." Plaintiff's

Counsel affirms that, notwithstanding Catanese's claims that efforts are being made to reinstate CSI, Plaintiff is unaware of any steps that have been taken to reactivate CSI.

Plaintiff's Counsel affirms, further, that CSI never appeared in this action and, pursuant to the Prior Decision, a default judgment ("Judgment") in the amount of $157,863.39 was entered against CSI (Ex. D to Bohn Aff. in Opp.). Catanese appeared in his individual capacity, but not on behalf of CSI, and interposed a Verified Answer (Ex. C to Duffy Aff. in Supp.). Plaintiff's Counsel affirms that Plaintiff has learned that Catanese and Alphonse are "embroiled" (Bohn Aff. in Supp. at ¶ 9) in business-related litigation in New York State Supreme Court, Queens County ("Queens Action") and Catanese testified at his deposition that the Queens Action was filed 4 or 5 years ago and involves "business between my brother and I" (Tr. at p. 40). Catanese also testified that he and his brother are not involved in any business together other than CSI (*id.*).

The complaint in the Queens Action (Ex. E to Bohn Aff. in Opp.) reflects that the plaintiffs in the Queens Action are Alphonse Catanese and CSI and the defendant in the Queens Action is Catanese. The allegations in the Queens Action include the plaintiffs' claims that 1) defendant Catanese has been maintaining the books and records of CSI to the exclusion of Alphonse; 2) defendant, in breach of his fiduciary duties, has been wrongfully using CSI's assets for his own personal gain and advantage; and 3) since 2004, defendant has wrongfully diverted and converted the rental income received from the stores located at the Premises for his personal benefit and use.

Following the commencement of the Queens Action, the plaintiffs obtained a preliminary injunction in the Queens Action dated April 24, 2009 (Ex. F to Bohn Aff. in Opp.) which enjoined Catanese from selling or otherwise transferring any of the plaintiffs' property. Following "years of stalled litigation" (*id.* at ¶ 12), the plaintiffs obtained an order of default against Catanese in the Queens Action on May 17, 2012 (*id.* at Ex. G).

Plaintiff's Counsel affirms that Catanese has refused to provide information regarding the Queens Action, and Catanese falsely testified that CSI was not a party in the Queens Action (Tr. at p. 39). In addition, Catanese testified at his deposition that he is not in possession of relevant documentation, including the "black book" which contains copies of the shares, and CSI's tax returns, which Catanese testified are in Alphonse's possession (*id.* at pp. 37-38). Plaintiff's

Counsel affirms that Plaintiff intends to enforce the Judgment against CSI and is taking steps to that end, which has included contacting plaintiffs' counsel in the Queens Action and conducting searches related to CSI's properties.

C. The Parties' Positions

Catanese submits that the Court should dismiss the action against Catanese in light of the fact that Plaintiff has not exhausted its remedies with respect to the Judgment, and has not demonstrated that it is impossible or futile to satisfy the Judgment against CSI. Moreover, to succeed on a claim for successor liability, the law requires a distribution of the corporation's assets to the shareholders sought to be held liable, which has not occurred here. Finally, Catanese argues that the terms of the Lease, specifically paragraph 34 titled "Limited Liability," specifically provide that the shareholders of CSI would not be held personally liable in the event of any default, and Plaintiff has not alleged any other theory of personal liability as to Catanese.

Plaintiff opposes Catanese's motion, submitting that Catanese is not entitled to summary judgment dismissing the Complaint because the Judgment remains outstanding and CSI remains dissolved. Notwithstanding Catanese's assertions that CSI intends to bring its franchise taxes up to date and seek reinstatement, CSI remains dissolved as confirmed by the May 18, 2012 documentation from the Department of State. Plaintiff submits, moreover, that CSI has not taken active steps to seek reinstatement in light of the Queens Action, whose allegations regarding Catanese's improper conduct further support the denial of Catanese's motion. Moreover, Catanese has refused to provided information regarding the Queens Action, and testified falsely that the Queens Action did not involve CSI. Plaintiff argues that "Catanese's shell game should not be permitted to continue and certainly does not entitle him to summary judgment in this matter" (P's Memo. of Law in Opp. at p. 6), and submits that Plaintiff should be permitted to pursue its claim against Catanese "to protect the integrity of its Judgment" (*id.* at p. 8).

In reply, Catanese submits that, in light of the fact that Plaintiff obtained the Judgment nearly two years ago and has not taken any enforcement measures or supplemental proceedings regarding the Judgment, there is no evidence that it would be futile for Plaintiff to enforce the Judgment against CSI. Catanese argues, further, that the Queens Action is irrelevant to the matter before the Court because it has no bearing on Plaintiff's ability to enforce the Judgment

against CSI, or Plaintiff's right to a judgment against Catanese. Catanese also argues that he is entitled to judgment dismissing the Complaint against him because Plaintiff has not alleged that there has been a distribution of CSI's assets to Catanese, and Catanese has demonstrated that the two properties owned by CSI remain in the same ownership status as when they were acquired.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Liability for Corporate Debts

Until dissolution is complete, title to the corporate assets remains in the corporation. *Rodgers v. Logan*, 121 A.D.2d 250, 253 (1st Dept. 1986), citing Business Corporation Law § 1006(a)(1). After dissolution, the shareholders to whom are distributed the remaining assets of the corporation are said to hold the assets which they received, in trust for the benefit of creditors. *Id.*, quoting *Plastic Contact Lens Co. v. Frontier of the Northeast*, 324 F. Supp. 213, 220 (W.D.N.Y. 1969), *aff'd*, 441 F.2d 67 (2d Cir. 1971), *cert. den.*, 404 U.S. 881 (1971) (internal citation omitted). As a result, the shareholders remain jointly and severally liable to existing creditors of the corporation. *Id.*

As noted in the Prior Decision, in an action by a creditor to satisfy or enforce a corporate liability, a creditor must ordinarily exhaust his remedies at law by obtaining a judgment against the corporation and by the return of an execution unsatisfied. *Rodgers,* 121 A.D.2d at 253. Where, however, it is impossible or futile to obtain such judgment, the creditor may maintain an action directly against the directors or shareholders, even though no judgment has been obtained. *Id.*

C. Application of these Principles to the Instant Action

The Court denies the motion to dismiss. Although Plaintiff has not yet exhausted its efforts to satisfy the Judgment, the record demonstrates that it may be impossible or futile for Plaintiff to satisfy the Judgment. Indeed, while Catanese has affirmed that it is CSI's intention to seek reinstatement as a corporation, CSI remains dissolved since 2009. Moreover, there is evidence suggesting that Catanese will not cooperate with Plaintiff in enforcing its Judgment, including Catanese's false deposition testimony that CSI was not a party in the Queens Action. Catanese was asked during that deposition whether CSI is a party to the Queens Action and replied "No" (Tr. at p. 39). In addition, he was asked whether the Queens Action concerned the Premises, and responded "Not really, no. Just business related" (*id.* at p. 40). A review of the complaint in the Queens Action, however, reveals that the plaintiffs in that action allege that Catanese is continuing to convert rental income from the Premises for his own personal gain (*See* Ex. E to Bohn Aff. in Opp. at ¶ 33). In addition, the plaintiffs in the Queens Action allege that "[g]iven the [manner] in which Defendant has mismanaged [CSI] and wrongfully used [CSI's] funds to pay for [Catanese's] personal bills and debts, there is a likelihood that any creditor of [CSI] will be able to succeed in piercing [CSI's] corporate veil" (*id.* at ¶ 38).

The Court is mindful that Plaintiff has provided some, although not extensive, detail regarding its efforts to satisfy the Judgment. The import of those efforts shall be considered at trial by Special Referee Frank Schellace, who is presiding over the bench trial in this matter on a hear-and-determine basis on consent of the parties. The parties and counsel are reminded that, as per the Order of the Special Referee, trial shall commence on July 10, 2012.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 5, 2012

HON. TIMOTHY S. DRISCOLL

J.S.C.