

Kolodny v Byrne

2016 NY Slip Op 32542(U)

December 7, 2016

Supreme Court, Suffolk County

Docket Number: 11-28718

Judge: Jr., Andrew G. Tarantino

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WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 6-29-16 (009)
ADJ. DATE 7-12-16
Mot. Seq. # 009 - MotD

-----X
ERIK KOLODNY,

Plaintiff,

- against -

BRENDAN B. BYRNE, AMY BETH BYRNE
(a/k/a AMY BETH STERN), EPIPHANY
CAPITAL MANAGEMENT LLC (formally
known as EPIPHANY TRADING LLC),
EPIPHANY SOLUTIONS INC., ANONYMOUS
CAPITAL LLC, FRANK MCDONALD,
MASSETO LLC, ELECTRONIC
TRANSACTION CLEARING, INC., EMPIRE
TRADING SERVICES, LLC, BRYAN LIBARDI,
PENSION FINANCIAL SERVICES, INC. and
EMPIRE EXECUTIONS, LLC,

Defendants.
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Upon the following papers numbered 1 to 100 read on this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 86 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 87 - 88; 89 - 98 ; Replying Affidavits and supporting papers 99 - 100 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiff for summary judgment in his favor on the issue of liability piercing the corporate veil of the defaulting defendant Epiphany Capital Management LLC is granted as to defendant Brendan P. Byrne, and denied as to defendant Amy Beth Byrne.

Plaintiff Erik Kolodny commenced this action to recover money that he deposited into the named corporate entities pursuant to a written agreement, and for money he allegedly earned from successful stock

trading under that agreement. Plaintiff alleges that he entered into a trader consulting agreement with defendants Epiphany Capital Management LLC (formerly known as Epiphany Trading LLC), Epiphany Solutions Inc., and Anonymous Capital LLC, and that he became a customer and day trader entitled to access to defendants' website, computer programs and capital accounts. Plaintiff alleges that he deposited \$30,000.00 into an escrow account pursuant to the agreement, began trading, and, as a result of his success, was entitled to commissions. He alleges that when earned commissions were not paid, he terminated the agreement and demanded the return of his deposit and earned commissions. Plaintiff initially alleged causes of actions for breach of contract, fraud and conversion.

On October 11, 2012, this court (LaSalle, J.) dismissed the second cause of action alleging fraud, finding the complaint was "not pleaded with particularity, as there were no allegations concerning specific misrepresentations and when they were made." Defendants Empire Trading Services LLC, Empire Executions LLC and Anonymous Capital, LLC did not join issue. Defendants Brendan P. Byrne, Amy Beth Byrne, Frank McDonald, Epiphany Capital Management and Epiphany Solutions answered and joined issue. On March 14, 2014, this court (Tarantino, J.), pursuant to 22 NYCRR 202.27, entered a default judgment against Brendan Byrne, Amy Byrne, Epiphany Capital Management, Epiphany Solutions, Frank McDonald and Bryan Libardi and the non-appearing defendants and an inquest was scheduled. On June 3, 2014, the default judgment against defendants Brendan Byrne and Amy Byrne was vacated and their counsel was relieved. The default judgment against defendant Epiphany Capital Management was not vacated. The claims against defendants Frank McDonald, Masseto LLC, Electronic Transaction Clearing, Inc., and Bryan Libardi have been discontinued.

Plaintiff now moves for summary judgment in his favor to pierce the corporate veil of the defaulting defendant Epiphany Capital Management LLC against defendants Brendan Byrne and Amy Byrne. In support of the motion plaintiff submits, among other things, the pleadings; his own affidavit; the deposition transcripts of Brendan Byrne; the trader consulting agreement; various checks and bank records; various correspondences; various debt card records; an affidavit of Amy Byrne; and tax records of Bright Red Marketing & Promotions, LLC. In opposition, defendant Brendan Byrne submits his own affidavit; audit trails; his own deposition transcript and the deposition transcript of plaintiff; and various e-mails. Defendant Amy Bryne submits an affirmation of counsel.

Plaintiff avers that Epiphany Capital Management (hereinafter Epiphany Capital), as an alter ego of Brendan and Amy Byrne, operated a ponzi scheme. Pursuant to the trader consulting agreement, independent contractors, like plaintiff, deposited money with Epiphany Capital as a guarantee against potential stock trader losses, the right to use Epiphany's website and computer programs and the right to trade with Epiphany's capital. Plaintiff avers that the deposited money and the profits belonged to the independent contractors. Plaintiff avers that defendant Brendan Byrne siphoned off Epiphany Capital's assets, converting them to his personal use to finance a lavish lifestyle, including purchasing personal property, paying personal expenses and purchasing interests in other companies. On May 15, 2007, plaintiff executed a trader consulting agreement with Epiphany Trading LLC. In September of 2010, the company was investigated by the SEC and plaintiff avers that he spent \$24,508.01 on attorney fees and that Brendan Byrne agreed to reimburse him for those fees. On November 1, 2010, plaintiff avers that Epiphany Capital replaced Epiphany Trading and his deposit and trading profits were transferred to the new entity. On August

27, 2011, plaintiff terminated the trader consulting agreement and demanded return of his capital, including credit for attorney fees incurred.

In that defendant Epiphany Capital has defaulted, it is deemed to have admitted all the factual allegations in the complaint and all reasonable inferences that flow from them (*Rokina Opt. Co. v Camera King*, 63 NY2d 728, 480 NYS2d 197 [1984]). Therefore, as a matter of law, plaintiff has established that, with regard to Epiphany Capital, that he entered into a trader consulting agreement with it, that he tendered \$30,000.00 pursuant to the agreement, and that he was entitled to his trading profits.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Thus, "[o]n a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and should be denied where there is any significant doubt whether a material issue of fact exists or if there is even arguably such an issue" (*see Bulger v Tri-Town Agency*, 148 AD2d 44, 47, 543 NYS2d 217 [3d Dept 1989]).

A plaintiff seeking to pierce the corporate veil must show that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]; *Seuter v Lieberman*, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil (*see Matter of Morris v New York State Dept. of Taxation and Fin.*, *supra*; *Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821, 545 NYS2d 333 [2d Dept 1989]). It is well established that a business can lawfully be incorporated for the very purpose of enabling its proprietor to avoid personal liability (*Seuter v Lieberman*, *supra*). Absent a showing that "control and domination was used to commit wrong, fraud, or the breach of a legal duty, or a dishonest and unjust act" New York will not allow a piercing of the corporate veil (*see Electronic Switching Indus., Inc. v Faradyne Elec. Corp.*, 833 F2d 418, 424 [2d Cir 1987]). Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (*see Millennium Const. v Loupolover*, 44 AD3d 1016, 845 NYS2d 110 [2d Dept 2007]; *Shisgal v Brown*, 21 AD3d 845, 801 NYS2d 581 [1st Dept 2005]). In addition, the decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" (*Weinstein v Willow Lake Corp.*, 262 AD2d 634, 635, 692 NYS2d 667 [2d Dept 1999]). "Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (*First Bank of Americas v Motor Car Funding*, 257 AD2d 287, 294, 690 NYS2d 17 [1st Dept 1999]; *see also Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 825 NYS2d 274 [2d Dept 2006]). A plaintiff's attempt to pierce the corporate veil is not a separate cause of action and a plaintiff may seek a

judgment against the corporation, and to pierce the corporate veil, all in one action (*Rosen v Kessler*, 51 AD3d 761, 856 NYS2d 861 [2d Dept 2008]; *Hart v Jassem*, 43 AD3d 997, 843 NYS2d 121 [2d Dept 2007]; *Fiber Consultants, Inc. v Fiber Optek Interconnected Corp.*, 15 AD3d 528, 792 NYS2d 89 [2d Dept 2005]; *Samsung Am. v Yugoslav- Korean Consulting & Tradind Co.*, 248 AD2d 290, 670 NYS2d 466 [1st Dept 1998]).

Here, plaintiff has established Brendan Byrne failed to adhere to corporate formalities, inadequately capitalized the subject business operation, commingled assets, and used corporate funds for personal use. More specifically, plaintiff has established that defendant Brendan Byrne exercised complete dominion and control over Epiphany Capital Management LLC. The documentary evidence reveals that Epiphany's bank account was controlled by Brendan Byrne and used for personal expenses including travel, food, car payments, insurance, cable, shopping and a share in an airplane. When questioned at his deposition Brendan Byrne repeated answered that he did not know or did not recall the nature of the business expense of dozens of debit card transactions. Epiphany was formed in Delaware and had one member, Brendan Byrne. While Brendan testified that the company had four members, including plaintiff. Brendan Byrne has not produced, pursuant to plaintiff's demands, a record of the capital contribution of each member, distributions of profits, and tax documents indicating that corporate formalities were not followed. Brendan Byrne has also failed to produce any stock certificates, operating agreements or rules that were established. He testified that new members were voted in, however, no annual meetings were held, no corporate officers were designated, and no records were maintained by any member. The documentary evidence also establishes that defendant Brendan Bryne commingled corporate funds with his own personal funds and wrongfully transferred money paid in and traders' profits in order to pay his personal expenses.

In opposition, defendant Brendan Bryne argues the allegations of commingling is "greatly exaggerated and overstated" and that plaintiff "grossly inflated" the amounts in question. Defendant Brendan Byrne contends that plaintiff has not established a breach of contract against him individually, or an action for conversion. Defendant Amy Bryne contends that as she was not a party to the contract and, therefore, that she cannot be held liable for its breach. Defendant Brendan Byrne also maintains that plaintiff was reimbursed for his trader guarantee of \$30,000.00 and disputes legal fees of \$24,580.01. However, he does not dispute plaintiff's right to gain net trader profits, in essence, acknowledging damages owed to plaintiffs. Accordingly, plaintiff's motion to pierce the corporate veil as to defendant Brendan Byrne on the issue of liability is granted. Damages shall be determined at the previously scheduled inquest of defendant Epiphany Capital.

Finally, as to defendant Amy Byrne, plaintiff has not established a prima facie case that she exercised dominion and control over Epiphany. She was not a shareholder or member of the company, and she is not listed as an authorized signer on Epiphany's bank account. On March 27, 2011, she received \$10,878.75 allegedly for marketing services through her company Bright Red Marketing & Promotions, LLC. Bright Red's corporate tax returns for 2011, however, only show gross receipts of \$1,963.00. Brendan Byrne testified that Amy Byrne was paid \$15,000.00 for marketing services on a monthly basis, but was only paid for one month. The transfer of \$15,000.00 to defendant Amy Byrne is indicative of defendant Brendan Byrne's alleged siphoning of corporate assets for personal gain. Despite the \$15,000.00 transfer to Amy Byrne, insufficient evidence exists to pierce the corporate veil as to her

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as there is no evidence demonstrating she exercised dominion or control over the company (*Matter of Morris v New York State Dept. of Taxation & Fin., supra*). Accordingly, plaintiff's motion to pierce the corporate veil as to defendant Amy Byrne is denied.

Dated: DEC 7 2016



A.J.S.C.
ANDREW G. TARANTINO JR.

FINAL DISPOSITION NON-FINAL DISPOSITION