SHORT FORM ORDER

INDEX NO. 20988-2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-29-16
ADJ. DATE 1-31-17
Mot. Seq. # 001 - MD

STANLEY REIFER and SUSAN REIFER, Plaintiff(s), - against - BILL HAYES DESIGN & BUILD, LTD., and WILLIAM HAYES, Defendant(s).	**Twomey, Latham, Shea, Kelley, Dubin & Quartararo, LLP** Attorneys for Plaintiff 33 West Second Street Post Office Box 9398 Riverhead, New York 11901 **Long Tuminello, LLP** Attorneys for Defendants 120 Fourth Avenue Bay Shore, New York 11706

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant, dated October 31, 2016, and supporting papers; (2) Memorandum of Law in Opposition by the plaintiff, dated January 6, 2017, and supporting papers; (3) Reply Affirmation by the defendant, dated January 25, 2017, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the defendants' motion (001), which seeks an order dismissing the plaintiffs' complaint pursuant to CPLR 3211(a)(1) and (a)(5), and granting summary judgment in favor of defendants pursuant to CPLR 3212, is hereby denied; and it is further

ORDERED that counsel for the plaintiffs shall promptly serve a copy of this Order upon counsel for the defendants via First Class Mail, and shall promptly thereafter fil ethe affidavit of such service withe the Suffolk County Clerk.

Plaintiffs allege that on or about July 13, 2002, plaintiffs and defendant, Bill Hayes Design & Build, Ltd. ("Bill Hayes Design"), entered into a written Construction Contract ("Contract") under which Bill Hayes Design would construct a new home and accessory structures at plaintiffs' property, located at 5

Paumonok Road, Bridgehampton, New York. According to the plaintiffs, the job was never completed and the partial work that had been done was performed in a substandard and unworkmanlike manner. As a result, claims and counterclaims between the plaintiffs and Bill Hayes Design ensued.

In accordance with the mandatory arbitration provisions of the Contract, the parties' dispute was submitted to arbitration; however, William Hayes filed a petition pursuant to CPLR 7510 seeking an order staying arbitration against himself, personally, on the grounds that he was not a signatory to the arbitration agreement. Mr. Hayes' petition was granted on the record on January 17, 2006 by Hon. Ralph F. Costello. Accordingly, the arbitration hearing proceeded only against Bill Hayes Design as the claimant and Stanley Reifer and Susan Reifer as the counterclaimants. Pursuant to the arbitrators' March 11, 2008 Arbitration Award, Bill Hayes Design's claim was denied in its entirety, whereas the Reifers' counterclaim for breach of contract against Bill Hayes Design was granted and the Reifers were awarded $752,027.00. Under the Award, failure by Bill Hayes Design to pay the Reifers within 30 days would result in accrual of interest at the rate of 9% per annum on any unpaid amounts.

When Bill Hayes Design failed to timely pay, the Reifers entered a Judgment in the amount of $799,176.03 against it on November 5, 2008 in the Office of the Suffolk County Clerk. After unsuccessful attempts to collect on the Judgment, this action was commenced. In his motion, defendant William Hayes contends that the prior arbitration Award document conclusively establishes that he committed no fraud and that, therefore, dismissal of the action under CPLR 3211(a)(1) is warranted. Mr. Hayes also contends that dismissal is warranted under CPLR 3211(a)(5) because the principles of res judicata preclude plaintiffs from re-litigating claims against him that were resolved in the arbitration proceeding. Although Mr. Hayes' petition to stay plaintiffs' claims against him in the arbitration was granted, he now asserts that plaintiffs' claims to pierce the corporate veil as against him personally in this action, were concluded by in the prior arbitration proceeding and Award.

Generally, on a CPLR 3211 motion to dismiss, the court will accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Nonnon v City of New York*, 9 NY3d 825, 842 NYS2d 756 [2007]). CPLR 3211(a)(1) states, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence." A motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (see *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Thompsen v Baier*, 84 AD3d 1062, 923 NYS2d 607 [2d Dept 2011]; *Rietschel v Maimonides Medical Center*, 83 AD3d 810, 921 NYS2d 290 [2d Dept 2011]).

In other words, the documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim (*Palmetto Partners, L.P., v AJW Qualified Partners, LLC*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]; *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520, 907 NYS2d 498 [2d Dept 2010]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 921 NYS2d 108

[2d Dept 2011]; *Granada Condominium III Assn.,v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]). If the court does not find the submissions "documentary," the motion must be denied (*Fontanetta v John Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]).

A party may also move for dismissal pursuant to CPLR 3211(a)(5) on the ground that "the cause of action may not be maintained because of . . . res judicata." The doctrine of res judicata provides that with respect to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action (see *Johansen v Gillen Living Trust*, 63 AD3d 1006, 882 NYS2d 202 [2d Dept 2009]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 414 NYS2d 308 [1979]; *see Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 863 NYS2d 615 [2008]; *Sandhu v Mercy Med. Ctr.*, 54 AD3d 928, 864 NYS2d 124 [2d Dept 2008]); *Barbieri v Bridge Funding*, 5 AD3d 414, 772 NYS2d 610 [2d Dept 2004]).

The doctrine of res judicata operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding, as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding (see *Blue Sky, LLC v Jerry's Self Storage, LLC*, 145 AD3d 945, 44 NYS3d 173 [2d Dept 2016]; *Bayer v City of New York*, 115 AD3d 897, 983 NYS2d 61 [2d Dept 2014]; *Sandhu v Mercy Medical Center*, 54 AD3d 928, 864 NYS2d 124 [2d Dept 2008]; *Luscher v Arrua*, 21 AD3d 1005, 801 NYS2d 379 [2d Dept 2005]; *Koether v Generalow*, 213 AD2d 379, 380, 623 NYS2d 328 [2d Dept 1995]).

The party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in the instant action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue (see *Luscher v Arrua*, 21 AD3d 1005, 801 NYS2d 379 [2d Dept 2005]; see also *Matter of New York Site Dev. Corp. v New York State Dept. Of Envtl. Conservation*, 217 AD2d 699, 630 NYS2d 335 [2d Dept 1995]). It is well settled that the doctrines of collateral estoppel and res judicata are applicable to issues resolved by arbitration (see *Clemens v Apple*, 65 NY2d 746, 492 NYS2d 20 [1985]; *American Ins. Co. v Messinger*, 43 NY2d 184, 401 NYS2d 36 [1977]; *Compton v D'Amore*, 101 AD2d 800, 475 NYS2d 463 [2d Dept 1984]; *Kilduff v Donna Oil Corp.*, 74 AD2d 562, 424 NYS2d 282 [2d Dept 1980]). Contrary to defendant's contentions, the plaintiffs' piercing the corporate veil claims against William Hayes are not dismissible under CPLR 3211 or 3212.

The plaintiffs' current complaint seeks to pierce the corporate veil of Bill Hayes Design based upon evidence acquired by plaintiffs in their effort to collect upon the November 5, 2008 Judgment. In this regard, after entry of the Judgment, plaintiffs secured the deposition testimony of Laraine Hayes, Esq., the wife of defendant William Hayes and General Counsel to Bill Hayes Design. Through Ms. Hayes's post-judgment testimony, plaintiffs learned that approximately 30 days after the entry of the Judgment, Bill Hayes Design closed its operations and then filed a certificate of dissolution with the New York Secretary of State on December 8, 2008. The dissolution took place without a vote of any shareholders or directors of Bill Hayes Design. Furthermore, Ms. Hayes could not recall Bill Hayes Design ever conducting any shareholder meetings or having any voting sessions on any corporate resolutions from the time Bill Hayes Design was formed up to the date of its dissolution. Ms. Hayes also testified that from 2002 through 2009, Bill Hayes Design possessed no assets. In addition, there were occasions in which she made personal loans

to Bill Hayes Design without any written agreement, without consideration and without any expectation of repayment.

Based upon their post-judgment discovery, plaintiffs, they allege that William Hayes exercised complete domination and control over Bill Hayes Design, failed to adequately capitalize the corporation, and did not possess sufficient assets or insurance coverage required to perform its obligations under the parties' Contract. The complaint further contends that after the plaintiffs obtained their Judgment against Bill Hayes Design, William Hayes diverted whatever assets the corporation may have had and dissolved the corporation before the plaintiffs could obtain any satisfaction of the November 5, 2008 Judgment. In addition, plaintiffs allege that William Hayes's complete domination and control over Bill Hayes Design was exercised to avoid satisfying the November 5, 2008 Judgment. Based upon William Hayes's actions, the plaintiffs ask the Court to pierce the corporate veil of Bill Hayes Design and to hold William Hayes, as its sole shareholder, personally liable for the outstanding Judgment debt owed by Bill Hayes Design to the plaintiffs.

The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners (see *Morris v State Dept. of Taxation and Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]). Generally, a plaintiff seeking to pierce the corporate veil must show 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 plaintiff's injury (see *Conason v Megan Holding, LLC*, 25 NY3d 1, 6 NYS3d 206 [2015]; *Pae v Chul Yoon*, 41 AD3d 681, 838 NYS2d 172 [2d Dept 2007]; *Morris v State Dep't of Taxation and Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]). While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required (see *Morris v State Dep't of Taxation and Fin.*, supra).

It is well established in New York that the party seeking to pierce the corporate veil must show that the individual defendant owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (see *Conason v Megan Holding, LLC*, 25 NY3d 1, 6 NYS3d 206 [2015]; *Conason v Megan Holding, LLC*, 25 NY3d 1, 6 NYS3d 206 [2015]; *James v Loran Realty V Corp.*, 20 NY3d 918, 956 NYS2d 482 [2012]; *Morris v State Dept. of Taxation and Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]). In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, the plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice (see *East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 919 NYS2d 496 [2011]; *Morris v State Dept. of Taxation and Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]). Here, accepting the facts alleged in the complaint as true, according plaintiffs the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory, defendant is not entitled to dismissal of the complaint (see *Nonnon v City of New York*, 9 NY3d 825, 842 NYS2d 756 [2007]).

The parties' prior arbitration proceeding was essentially based upon breach of contract claims between the parties to the home construction Contract. In fact, William Hayes, as a non-party to the contract, successfully filed a petition to stay arbitration as against himself, since he was a non-party to the Contract. The current action, however, focuses on Mr. Hayes's alleged self-dealing and undercapitalization of the corporate judgment debtor, Bill Hayes Design, after the Judgment was entered. Accordingly, the differences which exist between the issues raised in the prior arbitration proceeding and those raised now, namely, the differences in the kind of relief sought, in the kind of facts to be proved, and in the kind of law to be applied, outweigh any similarities to such an extent as to render the doctrine of res judicata inapplicable (see *Coliseum Tower Assocs. v County of Nassau*, 217 AD2d 387, 392, 637 NYS2d 972 [2d Dept 1996; *RENP Corp. v Embassy Holding Co.*, 229 AD2d 381, 644 NYS2d 567 [2d Dept 1996]).

Inasmuch as plaintiffs' claims are predicated upon the actions of William Hayes after the arbitration proceeding and after the Judgment was entered against Bill Hayes Design, such claims and actions were not -- in fact, could not have been -- previously litigated in the arbitration proceeding. Therefore, the doctrine of res judicata does not apply. Indeed, the principles of res judicata do not apply where, as here, at the time of the earlier action the plaintiffs were not aware of the facts giving rise to the second action, to wit, Mr. Hayes' non-adherence to the proper corporate form and his alleged efforts to dissipate the assets of Bill Hayes Design after the Judgment was entered against it (see *Gad v Gelb*, 237 AD2d 250, 655 NYS2d 399 [2d Dept 1997]).

Likewise, summary judgment should not be granted in favor of a defendant on claims of piercing the corporate veil where, as here, questions of fact exist as to whether such defendant completely controlled and dominated the corporation in furtherance of "a scheme to denude the [corporation] of its assets in order to render it unable to honor its obligations, [thereby] resulting in a loss to plaintiff[s]" (*Rebh v Rotterdam Ventures*, 252 AD2d 609, 611, 675 NYS2d 234 [3d Dept 1998]; see also *British Ins. Co. of Cayman v Lancer Ins. Co.*, 304 AD2d 698, 757 NYS2d 760 [2d Dept 2003]).

Based upon the foregoing, the defendant's application for dismissal pursuant to CPLR 3211(a)(1) and (a)(5), and summary judgment pursuant to CPLR 3212, is hereby denied.

Dated: March 8, 2018

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION