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| DeWalters v Zambelli |
| 2018 NY Slip Op 33824(U) |
| July 11, 2018 |
| Supreme Court, Nassau County |
| Docket Number: 602219-17 |
| Judge: Jerome C. Murphy |
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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

EDWARD DeWALTERS,

Plaintiff,

- against -

**JOSEPH ZAMBELLI and EXPERT HOME
INSPECTIONS, INC.,**

Defendants.

TRIAL/IAS PART 14

Index No.: 602219-17

Motion Date: 5/2/18

Sequence No.: 001

MD

DECISION AND ORDER

The following papers were read on this motion:

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| Notice of Motion, Good Faith Affirmation and Exhibits..... | 1 |
| Affirmation in Opposition and Exhibit..... | 2 |
| Reply Affirmation and Exhibit..... | 3 |

PRELIMINARY STATEMENT

Plaintiff brings this application for an Order precluding defendants from presenting evidence and testimony concerning the subject matter of the preliminary conference order and discovery demands that it has failed to comply with; and for such other and further relief as this Court deems just and proper. Defendant has submitted opposition to this application.

BACKGROUND

Plaintiff obtained a judgment against Joseph Zambelli Construction & Restoration Mgt. Corp., which was entered on April 24, 2015. The judgment, in the amount of \$45,756.93 was as a result of a confirmation of an arbitration award that the defendant had performed inadequately with respect to work done on plaintiff's residence. Plaintiff, the judgment creditor, commenced this action against Joseph Zambelli ("Zambelli") and Expert Home Inspections, Inc. ("Expert") on March 15, 2017 (Exh. "B").

The Complaint alleges that a judgment was entered against Zambelli Construction & Restoration Mgt. Corp. on April 24, 2015, in the amount of \$45,756.93. In an attempt to enforce the judgment, plaintiff learned that defendant Joseph Zambelli had undercapitalized the judgment-debtor, and organized a new corporation entitled Expert Home Inspection, Inc. Zambelli is the alter ego of both of these corporations. He is allegedly the sole owner, shareholder, officer, director, and employee of both corporations and exercises complete domination and control over them.

Plaintiff further alleges that the corporations are devices to further Zambelli's personal, as opposed to business, activities, and that neither corporation observes corporate formalities. The Complaint also alleges that the office space, telephones of both corporations are the same as the home of Zambelli. Zambelli does not maintain personal bank accounts, and uses the corporate accounts for his personal and family needs. At ¶ 23 of the Complaint, plaintiff recites 22 specific examples of personal expenses paid for with corporate checks. In addition, Zambelli allegedly uses his personal credit cards to pay for corporate expenses.

A plaintiff alleges that there is a justiciable controversy between the parties and calls for judgment declaring that defendants and the judgment-debtor are alter egos of each other and that the corporate existence of the debtor and Expert should be disregarded, and the aforesaid judgment enforced against Joseph Zambelli; declaring that Joseph Zambelli has exercised complete dominion and control over both corporations to the extent that the corporate existence should be disregarded; that Zambelli has used the corporate existence as a fraudulent device; that Zambelli has used the corporate devices to further his personal, rather than his corporate business; that both corporations are undercapitalized, and their corporate existence should be disregarded; that the formalities of corporate existence were not observed by either corporation; that Joseph Zambelli put in and took out funds of the corporate accounts for personal use; that a new judgment should be entered enforcing the judgment against the judgments herein; and awarding plaintiff costs and disbursements incurred herein.

Plaintiff served a Notice for Discovery and Inspection upon defendants (Exh. "D"), and claims that the responses of defendants were non-responsive, and defendants should be precluded from offering evidence and testimony concerning the subject matter of the preliminary conference order and discovery demands with which they have failed to comply.

Defendants oppose the motion, claiming that plaintiff has offered no proof of the claims

that the corporations were undercapitalized, or that Zambelli exercised complete dominion and control over them. Defendants contend that striking a party's pleading under CPLR § 3126 is a drastic remedy, and is particularly inappropriate where defendants have objected to demands that are overly broad, highly invasive, irrelevant, and not reasonably calculated to lead to admissible evidence. The fact that defendants submitted Supplemental Responses prior to the filing of this motion, shows that the action of defendants were not contumacious or violative of any Court Orders. The Supplemental Responses consist of corporate records with respect to the incorporation of Expert Home Inspections, Inc. Defendants have not provided, and object to the requests for financial records with respect to Zambelli, Zambelli Construction & Restoration Mgt. Corp., and Expert Home Inspections, Inc.

DISCUSSION

With respect to a claim under the doctrine of piercing the corporate veil, allegations to hold a principal of a corporation liable, a simple allegation that an individual dominates a corporation is inadequate, since this could be said about virtually any single-person corporation. The party seeking to pierce the corporate veil must also establish "that the owners, through their domination, abused the privilege of doing business in the Corporate form."¹ Factors to be considered in determining whether or not there has been such abuse include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use."²

In order to pierce a corporate veil, there must be a showing that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.³ In order to determine whether the factors necessary to determine domination and control, the absence of corporate formalities, personal use of corporate funds, shuttling personal funds in and out of a corporation, or the perpetration of fraud by means of the corporate vehicle, and the existence of activity to strip the corporation of assets in anticipation of legal liability,

¹ *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993).

² *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016—1017 (2d Dept. 2007) *see also ABN Amro Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208 [2011]).

³ *Morris v. New York State Dept. Of Taxation and Finance*, 82 N.Y.2d 135 (1993).

plaintiff is entitled to discovery to determine if the requisite factors are sufficiently present to warrant the piercing of the corporate veil.⁴

Striking defendants' Answer is a draconian remedy. Plaintiff is entitled to the material requested in the Notice for Discovery and Inspection, since there is no other way for plaintiff to establish the relevant factors necessary to justify piercing the corporate veil. It is therefore

ORDERED, that defendants are to comply with the July 10, 2017 Notice for Discovery and Inspection within 30 days of service upon counsel for defendants of a copy of this Decision and Order with Notice of Entry.

The certification conference in this case will now be on August 29, 2018 instead of July 30, 2018.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 11, 2018

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED
JUL 16 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE

⁴ *Miranda v. Smyrna Building Corp.*, 180 Misc. 3d 649 (Civil Ct., Richmond Co. 1998)