Verdi v Sabatelli
2019 NY Slip Op 33184(U)
October 10, 2019
Supreme Court, Suffolk County
Docket Number: 015228/2013
Judge: James Hudson
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Supreme Court of the County of Suffolk
State of New York - Part XLVI
Memorandum Decision after Trial

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

x----------x

JAMES VERDI,

Plaintiff,

-against-

JOSEPH SABATELLI and
GOTHAM TRANSPORTATION,

Defendants.

x----------x

INDEX NO.:015228/2013

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The matter *sub judice* is an action sounding in breach of contract arising from a dispute over an alleged loan between a financial advisor and a Corporation. Plaintiff, Mr. James Verdi (hereinafter referred to as Verdi) and the Defendants Mr. Joseph Sabatelli and Gotham Transportation (hereinafter referred to as Sabatelli/Gotham), submitted to a nonjury trial before the Court to resolve their dispute.

Plaintiff, being self-represented, called himself as a witness. Mr. Verdi testified that he was approached by a business associate, Mr. Matthew Berger, a partner at the Longano & Berger CPA firm. Both Mr. Sabatelli and Gotham were represented by Longano & Berger. Mr. Berger informed the Plaintiff that Sabatelli/Gotham were experiencing a cashflow issue and needed a short-term loan of $50,000.00. A conference call between Mr. Verdi, Mr. Berger, and the Defendants concluded that a loan of $50,000.00 at 16 (sixteen) % interest for a short period of time would suffice to attend to Defendants' request with the indication that such a loan might be needed on more than one occasion (Transcript 9/8/2016, pp.11-12).

On September 28th, 2011 the Plaintiff made a successful wire transfer from his personal bank account, in the amount of $50,000.00, to Gotham Transportation (Transcript at pp.11-17) (Plaintiffs' Exhibits 1 & 2). Defendants repaid the initial loan of $50,000.00 on October 11th, 2011 *via* a check made by Gotham Transportation (Plaintiffs' Exhibit 3).

On October 28th, 2011 Mr. Berger and the Defendants contacted Plaintiff once again. This time they requested a loan for $55,000.00 (Transcript 9/8/2016, pp.17-20). Mr. Verdi testified that he successfully deposited the $55,000.00 into Mr. Sabatelli's personal non-business banking account (Plaintiff's Exhibit 4). The Defendants repaid this loan on November 8th, 2011 *via* a check made by Gotham Transportation (Transcript 9/8/2016, pp.18) (Plaintiffs' Exhibit 5).

Mr. Verdi testified that on November 17th, 2011 both Mr. Berger and the Defendants approached him for a third loan in the amount of $50,000.00 (Transcript 9/8/2016, pp.20-26). Plaintiff was informed that the loan would need to be completed as soon as possible to prevent Gotham's payroll account from being short of funds. Mr. Verdi withdrew $50,000.00 from his personal account on November 17th, 2011 (Plaintiffs' Exhibit 6). He testified that Gotham Transportation's bank account acknowledged a deposit of $50,000.00 (Plaintiffs' Exhibit 6). Capital One Bank's records for the Gotham account confirms that a $50,000.00 deposit transaction occurred on the same day as Verdi's bank account withdrawal.

On cross-examination, Verdi testified about his Bachelor's Degree and employment as a financial advisor. This portion of the Plaintiff's testimony established that he was a sophisticated business person.

Verdi acknowledged the existence of three loans, the first of which was issued to and repaid by Gotham Transportation. The second loan was issued to Sabatelli's personal banking account for business obligations and later repaid by Gotham Transportation (Transcript 9/8/2016, pp.51-56). The third and final loan was made to Gotham Transportation as indicated by the writing on the back of the deposit slip "to Gotham" (Defendants' Exhibit C). Verdi testified at a prior deposition that the writing "to Gotham" on the back of the deposit slip was Verdi's own handwriting (Defendants' Exhibit D). The Plaintiff also admits that he never had phone or physical contact with the Defendants aside from an exchange regarding the first loan.

Mr. Berger then testified for the plaintiff. Mr. Berger served as a partner for the CPA firm Longango & Berger and represented the defendants as clients for at least five years. Mr. Berger indicated that he was aware of Defendants' cash flow problems and reached out to his contacts in search of a loan for the Defendants (Transcript 9/8/2016, pp.86-88). Mr.

Berger indicated that the Defendants were present *via* telephone to discuss the loans from Mr. Verdi and was not sure if the loans were made to Gotham Transportation or Mr. Sabatelli personally.

On cross-examination, Mr. Berger testified that he had previously served as an accountant for both Mr. Sabatelli personally and Gotham Transportation (Transcript 9/8/2016, pp.96). Mr. Berger's CPA license is now expired and he no longer represents the Defendants. Mr. Berger also testified that he was aware of the Defendants' financing needs and sought alternative short-term funding for them. Mr. Berger indicated that several conference calls were held regarding the details of the loans made from the Plaintiff to the Defendants. Mr. Berger concluded his testimony by noting that the only in person meeting was during an attempt to collect repayment for the final $50,000.00 loan.

After the Plaintiff had rested, the Defendants called Mr. Joseph Sabatelli as its witness. He stated, *inter alia*, that he is the owner and CEO of Gotham Transportation Corporation. Gotham Transport maintained its banking accounts with Capital One Bank. He indicated that Mr. Berger served as an account to both Mr. Sabatelli and Gotham Transportation Corporation. Mr. Berger was relieved of his position as accountant in 2011 after failing to file corporate tax returns.

Mr. Sabatelli testified that he had asked Mr. Berger only to find short term funding for Gotham Transportation's payroll and never for himself personally (Transcript at pp.113-117). He went on to say that Mr. Berger handled the taking of the loans and that he never had any prior contact with Mr. Verdi aside from when Verdi attempted to collect on the third loan that he (Sabatelli) was unaware of. Mr. Sabatelli acknowledged that a $50,000.00 deposit was made into Gotham's payroll account on November 17th, 2011 (Plaintiffs' Exhibit 7). There is no indication that the deposit was made by Mr. Verdi and that it was to be repaid.

On cross-examination Mr. Sabatelli elaborated that his statement: "I needed a loan" made at a pre-trial deposition was in reference to Gotham Transportation's requirements and not his own (Transcript 9/8/2016, pp.120-127), (Plaintiffs' Exhibit 9). He also testified that there were two prior loans, the first of which was made to and repaid by Gotham Transportation. The second loan was made to Sabatelli personally, then transferred to and repaid by Gotham Transportation. He emphasized that it was not commonplace to comingle funds and that it was a one-time occurrence. Mr. Sabatelli concluded his testimony by acknowledging that he was unsure of where the November 17th, 2011 $50,000.00 deposit originated from and had no loan agreement with Plaintiff (Transcript 9/8/2016, pp.130-133). The Defense called no further witnesses.

In a nonjury trial, it falls to the court to determine the veracity of the proof. We begin with a review of the testimony. This is a sobering responsibility in that, traditionally, determination of the credibility of a witness is viewed as the province of the trial judge (***Morales v Inzerra***, 98 AD3d 484, 485, 949, NYS2d 433, 436, [2d Dept 2012]; ***Tornheim v Blue & White Food Prods. Corp.***, 88 Ad3d 867, 868, 931 NYS2d 340, 341 [2d Dept 2011]).

Justice Ralph Gazzillo best summed up this aspect of the nonjury trial when he stated:

> "As to the quality of any given witness, the flavor of the testimony, its quirks, the witness' bearing, mannerisms, tone and overall deportment cannot be fully captured by the cold record; the fact-finder, of course, enjoys a unique perspective for all of this, and the ability to absorb any such subtleties and nuances" (***J & K Parris Constr. Inc. v Roe Ave., Assoc., Ltd.***, 46 Misc 3d 1227[A], 2015 NY Slip Op 50864 [U], 18 NYS3d 579 [Sup Ct, Suffolk County 2015]).

After reviewing all the testimony and observing the demeanor of the witnesses, the Court finds Mr. Verdi and Mr. Berger to be equally credible.

Mr. Verdi argues that he is entitled to $50,000.00 plus interest as repayment for the third loan. It is contended that there was a meeting of the minds, creating an oral agreement and binding the Defendants without being barred by the Statute of Frauds. Plaintiff also contends that the Defendant, Joseph Sabatelli, should be held personally liable for the outstanding debt. Holding Sabatelli personally liable would pierce the corporate veil, evading protections provided by the principal Gotham Transportation Corporation.

By contrast, the Defendants argue that no oral agreement existed. They do acknowledge, however, receiving a $50,000.00 deposit into their banking account within proximity of the alleged agreement date. (Transcript 9/8/2016, pp.119). For the most part the Court found Mr. Sabatelli to be a credible witness. There is an exception to this. Taking the evidence and testimony into consideration, the Court believes that the Defendants' position of $50,000.00 appearing in the Gotham bank account for no logical reason is so irrational as to be unworthy of belief. Instead, the Court logically concludes that the $50,000.00 was deposited into the Defendants' banking account for the sole purpose of a loan agreement as testified to by Mr. Verdi. The validity and enforceability of this agreement is to be discussed.

Defendants argue that the agreement between the Parties is invalid because an oral agreement would be barred under the Statute of Frauds (G.O.L. §5-701(a). The Defendants are correct in citing to 5-701(a). In doing so, however, they overlook subsection (a)(1) which reads:

> "a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> 1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime."

Pursuant to the Statute of Frauds, an agreement not reduced to writing is void if, by its terms, it cannot be performed within one year of its making (*see* General Obligations Law § 5-701 [a] [1]; ***D & N Boening v Kirsch Beverages***, 63 NY2d 449, 454 [1984]; ***Stillman v Kalikow***, 22 AD3d 660 [2005]; ***Miranco Contr., Inc. v Perel***, 29 AD3d 873 [2006]); ***Micena v. Katz,*** 68 A.D.3d 826, 827, 890 N.Y.S.2d 619 [2009]).

While the agreement in this case is a spoken one, it does not meet the threshold necessary for the Court to find the agreement invalid. Based on the testimony provided by the Parties during trial, there was no indication that the agreement could, "by its terms" not be performed within one year. Both Parties harmoniously recognized that no specific dates had been set and that two prior loans had been successfully fulfilled within a short period of creation. (Transcript 9/8/2016, pp.12-27).

Only those agreements which, by their terms, "have absolutely no possibility in fact and law of full performance within one year" will fall within the Statute of Frauds (***D & N Boening v Kirsch Beverages***, 63 NY2d at 454). In the case of ***Micena v. Katz***, *supra* at 827 the Court stated:

> "Here, according deference to the Supreme Court's credibility assessments, the determination that the parties orally entered into a series of valid personal loan agreements that the defendant Ralph T. Costagliola breached by failing to repay was warranted by the facts. Moreover, contrary to Costagliola's contention, the loans were not void under the statute of frauds (*see* General Obligations Law § 5-701 [a] [1]), because there was no evidence demonstrating that the loans had" 'absolutely no possibility in fact and law' "of being repaid within a year" (***Micena v Katz***, 68

> AD3d 826, 827, 890 NYS2d 619 [2009], quoting D & N Boening v Kirsch Beverages, 63 NY2d 449, 454, 472 NE2d 992, 483 NYS2d 164 [1984]; *see* ***Cron v Hargro Fabrics***, 91 NY2d 362, 366-367, 694 NE2d 56, 670 NYS2d 973 [1998]; ***JNG Constr., Ltd. v Roussopoulos***, 135 AD3d 709, 710, 22 NYS3d 567 [2016]; ***Stillman v Kalikow***, 22 AD3d 660, 662, 802 NYS2d 714 [2005]; ***Morrone v. Costagliola***, 151 A.D.3d 1055, 1056, 58 N.Y.S.3d 468, 469 (2017)."

Based on the forgoing, the fair preponderance of the credible evidence establishes that the agreement between the Parties, notwithstanding the absence of a written instrument, constitutes a valid contract. The Court also finds that Defendants breached their contractual obligation with the Plaintiff by failing to comply with a substantial element of the agreement, namely: failing to repay the loaned amount with interest.

Acknowledging the existence and breach of the agreement, the Court is left to determine whether individual liability should attach. Defendants argue that Mr. Sabatelli should not be held personally liable because he did not intend to be personally bound.

> "Where there is a disclosed principal-agent relationship and the contract relates to a matter of the agency, the agent will not be personally bound unless there is clear and explicit evidence of the agent's intention to be personally bound" ***(Leonard Holzer Assocs. v. Orta***, 250 A.D.2d 737, 737-38, 672 N.Y.S.2d 915, 916 [2nd Dept. 1998]; citing ***Savoy Record Co. v Cardinal Export Corp***., 15 NY2d 1, ***4; Palisades Off. Group v Kwilecki***, 233 AD2d 490]).

Plaintiff's testimony indicated that he was aware of the principal-agent relationship between Gotham Transportation and Sabatelli. Evidence and testimony provided by both Parties indicate that Sabatelli did not objectively intend to be personally liable for Gotham's responsibilities. The Court concludes that Sabatelli acted as an agent on behalf of Gotham. Moreover, Plaintiff acknowledged this relationship by directing the deposit slip for the last loan: "To Gotham" instead of to Mr. Sabatelli (Defendants' Exhibit C).

Plaintiff also seeks to hold Sabatelli personally liable for the obligations incurred by Gotham Transportation Corporation under the doctrine of Piercing the Corporate Veil.

> "The general rule...is that a corporation exists independently of its owners, who are not personally liable for its obligations, and

> that individuals may incorporate for the express purpose of limiting their liability" (***Vivir of L I, Inc. v. Ehrenkranz***, 145 A.D.3d 834, 835, 43 N.Y.S.3d 435, 437-38 (2nd Dept. 2016); quoting ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 126, 884 NYS2d 94 [2009], *affd* 16 NY3d 775, 944 NE2d 1135, 919 NYS2d 496 [2011], citing ***Bartle v Home Owners Coop.***, 309 NY 103, 106, 127 NE2d 832 [1955]).

"The law permits the incorporation of a business for the very purpose of escaping personal liability" (***Bd. of Managers of 325 Fifth Ave. Condo. v. Cont'l Residential Holdings LLC***, 149 A.D.3d 472, 475, 52 N.Y.S.3d 44, 47 (1st Dept. 2017).

> "The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation (*see* ***Matter of Morris v New York State Dept. of Taxation & Fin.***, 82 NY2d 135, 140-141 [1993]). A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff (***Id.***); *see* ***Love v Rebecca Dev., Inc.***, 56 AD3d 733 [2008]; ***Millennium Constr., LLC v Loupolover***, 44 AD3d 1016 [2007])" ***(E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.***, 66 A.D.3d 122, 126, 884 N.Y.S.2d 94 [2nd Dept. 2009], *aff'd,* 16 N.Y.3d 775, 944 N.E.2d 1135 [2011]).

Just as in ***E. Hampton Union Free Sch. Dist.***, there is sufficient evidence and testimony to show that Sabatelli held complete domination and control over the corporation at the time Gotham breached its contractual obligation with Verdi. The complaint alleges that Sabatelli abused the power of Gotham Corporation as his "alter ego." This claim alone, however, is insufficient to satisfy the threshold set by the doctrine of piercing the corporate veil.

Factors to be considered in determining whether the owner has "abused the privilege of doing business in the corporate form" include whether there was a "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate

funds for personal use" (***E. Hampton Union Free Sch. Dist. v. Sandpebble Builders, Inc.***, *supra* at 126-127 citing ***Millennium Constr., LLC v Loupolover***, *supra* at 1016-1017; *see* ***Gateway I Group, Inc. v Park Ave. Physicians, P.C.***, 62 AD3d 141, 877 NYS2d 95 [2009]; ***AHA Sales, Inc. v Creative Bath Prods., Inc.***, 58 AD3d 6, 24, 867 NYS2d 169 [2008]).

Plaintiff has the burden of proving that the Defendants abused the corporate privilege. Plaintiff claims that Gotham transportation served as an alter ego for Sabatelli and "hangs its hat" on the commingling of funds and points to a prior loan where Sabatelli had deposited a check for Gotham into his own personal banking account before transferring the funds into Gotham's payroll account. The Court acknowledges that while the previous isolated incident of commingling funds displays a lapse in proper business management, it does not justify piercing the sanctity of the corporate veil. The Court does find that Joseph Sabatelli exercised complete domination and control of the Corporation in regard to the transaction bringing rise to the suit. That dominion, however, was not used to commit a fraud or wrong against the Plaintiff. Plaintiff fails meet his burden necessary to for the Court to disregard the corporate entity and hold Mr. Sabatelli individually liable.

Therefore, the Court finds that the Plaintiff has proven, by a fair preponderance of the evidence, that he contracted with the Corporate Defendant for a loan of $50,000.00 on November 17th, 2011. The loan, as established by the prior course of dealings between the parties, was to be repaid in no more than two weeks. Payment was not made as per the terms of the agreement and the default date was December 1st, 2011. The Court shall enter judgment in favor of the Plaintiff and against Gotham Transportation with interest as of December 1st, 2011.

The Plaintiff's claims against Mr. Sabatelli personally shall be dismissed.

Settle judgment.

This Memorandum is also the Order of the Court.

DATED: OCTOBER 10th , 2019
RIVERHEAD, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court