

Facts Sufficient to Obtain Summary Judgment on a Veil Piercing Claim

By Leo K. Barnes Jr.



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Whether during law school studying New York practice and procedure, or as a first year associate tasked with drafting opposition to a summary judgment motion, aspiring or practicing lawyers learn the oft-recited summary judgment standard – that the same is a drastic remedy and reserved for those rare instances when there is no genuine issue of fact sufficient to warrant a trial.

Equally challenging is a plaintiff's effort to hold a business owner personally liable for a corporate debt. The law permits incorporation of a business for the very purpose of escaping personal liability. *Bartle v. Homeowners Co-op.*, 309 N.Y. 103 (1955). Generally, the owners of a corporation are not personally liable for the corporation's debts, as it is a separate legal entity existing independently of its owners or shareholders. *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993). However, in certain circumstances, New York courts will apply the doctrine of piercing the corporate veil, an exception to the general rule, to impose personal liability on the owners for the corporate debt. *Id.*, at 140-141.

The party seeking to pierce the corporate veil must show that the 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 inter-

vene and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury. See, *Morris*, 82 N.Y.2d at 141-142. Alternatively, "the corporate veil will be pierced to achieve equity, even absent fraud, '[w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily trans-

acts the dominator's business instead of its own and can be called the other's alter ego." See *Island Seafood Co. v. Golub Corp.*, 303 A.D.2d 892, 893 (3rd Dep't 2003), quoting *Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 827 (3rd Dep't 1995).

But the burden of establishing that piercing is warranted is a tall one as veil piercing is a "highly disfavored" remedy (see *Triemer v. Bobsan Corp.*, 70 F.Supp.2d 375, 377 (S.D.N.Y.1999) dismissing veil-piercing claim and noting that "disregard of the corporate form is highly disfavored under New York law"). Indeed, the Second Department regularly affirms trial court dismissals when plaintiffs fail to meet the "heavy" burden required to establish piercing. *Carp v. Dunn*, 53 A.D. 467 (2nd Dep't 2008).

In this light, mindful that summary judgment is a "drastic" remedy and that piercing the corporate veil is "highly disfavored" remedy, those instances where a plaintiff successfully pierces the corporate veil on summary judgment are exceedingly rare.

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But a petitioner succeeded in doing so last month in Richmond County. In *Agai v. Diontech Consulting, Inc.*, 40 Misc. 3d 1229(A) (Richmond County Sup. Ct. 2013), the petitioner Jacob Agai moved for summary judgment against all respondents, including Stylianos Antoniou and Sokrates Antoniou (the Antoniou brothers), seeking to pierce the corporate veil of Diontech Consulting Inc. in order to enforce a judgment rendered against Diontech upon the shareholders personally. The Antoniou brothers opposed the motion.

The court granted petitioner's motion and held that "[t]he weight of evidence supports plaintiff's claim that Diontech was a sham entity which never kept accurate records or minutes of meetings, did not observe any traditional corporate formalities, and diverted funds for the principals' own personal gains." *Id.*, at 3. In reaching that conclusion, the court first relied on the damning deposition testimony that the Antoniou brothers failed to adhere to any corporate formalities. Specifically, the court noted:

- both brothers testified that they were unaware of any books or records concerning the operation of the corporation;
- neither brother could produce any documents of the corporation's separate existence (i.e.

board meeting minutes, pay stubs, or bank statements);

- there was evidence that the brothers used corporate accounts for personal expenses, commingled corporate and personal assets, and maintained the corporation as a sham entity for the purpose of avoiding creditors and legal liability;
- Sokrates Antoniou testified he was never given a formal title in the corporation, nor did he ever carry out any of the official duties of a corporate officer, despite the fact that he was listed as the president and Stylianos as the secretary of the corporation on a business credit application;
- both brothers testified that they had no knowledge as to what became of any of corporate assets including computers, office furniture, and company vehicles, despite receiving compensation for their work in settling company affairs;
- their accountant testified that he refused to prepare corporate tax returns due to the corporation's failure to provide appropriate paperwork or to account for certain unspecified disbursements; and
- their accountant further testified from his review of the bank records, the respondents routinely took significant amounts

of money from the bank account but failed to pay it back to the corporation.

In addition, the court found that the evidence made clear the Diontech was used to unlawfully avoid creditors and to injure the plaintiff personally. Specifically, the court noted that:

- throughout the course of working with the plaintiff, the three principals of Diontech repeatedly used payments made by the plaintiff and materials purchased for plaintiff's projects for other jobs which they were involved in at the time; and
- both Antoniou brothers continued receiving payments from a supposedly insolvent Diontech despite the fact that other laborers and subcontractors remained unpaid.

Simply, the evidence was so overwhelming that the court pierced despite viewing the evidence in the light most favorable to the Antoniou brothers and affording them the benefit of all reasonable inferences. It is a valuable lesson for both sides of a caption.

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