



COMMERCIAL DIVISION UPDATE

Piercing the Corporate Veil Claims and Discovery

Expert Analysis

Under New York law, a corporation exists as a separate legal entity independent of its owners and therefore the owners are not normally liable for the debts of the corporation. Indeed, “it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners.”¹

However, courts will intervene in limited circumstances to “pierce the corporate veil” and thereby hold the owner of a corporation responsible for an obligation of the corporation.² New York courts are generally hesitant to pierce the corporate veil and plaintiffs “bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences.”³

Two recent opinions by Justice Carolyn E. Demarest of the Kings County Commercial Division indicate that, despite the history of New York courts’ disfavor of claims seeking to pierce the corporate veil, they may be reluctant to grant motions to dismiss such claims at the pleading stage before plaintiffs have the opportunity to seek discovery.

In *USA United Holdings Inc. v. Tse-Peo Inc.*,⁴ plaintiff USA United Holdings Inc., operator of a bus company that provides service to the New York City public school



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system, filed suit in Kings County Supreme Court asserting causes of action for breach of contract, indemnification, breach of fiduciary duty and conversion against defendants United Tse-Peo, LLC, and its entity

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affiliates, arising from defendants’ provision of accounting and tax filing services to plaintiff.

The plaintiff also sought to impose personal liability on Robert Casserra, the president and owner of the entity defendants, on a theory of piercing the corporate veil. The plaintiff had entered a contract with defendant United Tse-Peo, whereby defendant agreed to calculate, collect and

submit employment taxes on behalf of plaintiff. The plaintiff alleged that, among other wrongdoing, defendant United Tse-Peo, LLC failed to submit taxes to the IRS and New York State Department of Taxation timely, thereby causing plaintiff to owe penalties and interest to the federal and state governments and resulting in tax liens being placed on plaintiff. The plaintiff further alleged that United Tse-Peo and the other entity defendants “are controlled by Casserra, who is an officer and owner of all of them” and “they all operate at the same location, and all share employees, officers, owners, and bank accounts.”

The defendants moved to dismiss the complaint, arguing in part that Casserra could not be held liable to plaintiff because only United Tse-Peo had a contractual obligation to provide accounting and tax filing services to plaintiff. Justice Demarest denied defendants’ motion to dismiss in its entirety, allowing plaintiff to proceed with its claims seeking to impose personal liability on Casserra.

The court first explained that plaintiff’s claim seeking to pierce the corporate veil was entitled to deference at the pleading stage:

Veil piercing is a fact-laden claim that is not well suited for resolution upon a motion to dismiss. Before dismissal can be granted, a plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil. A complaint which seeks to pierce the corporate

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veil should be upheld unless it can be said that it is totally devoid of solid nonconclusory allegations.⁵

In the instant case, the court found that the complaint was “not so totally devoid of such allegations so as to warrant its dismissal at this early pre-answer stage of the action and prior to affording plaintiff an opportunity to engage in discovery.”

To the contrary, the complaint included allegations that the corporate defendants were “not only successors and assigns of each other, but are all the same company,” and had been used “interchangeably” by Casserra to unjustly enrich the defendants at the expense of the plaintiff.

In *Trofen Steel & Constr. Inc. v. Rybak*,⁶ plaintiff Trofen Steel & Constr. Inc., a subcontractor, fled suit in Kings County Supreme Court asserting seven causes of action arising from an alleged failure to pay money owed to plaintiff by defendant Rybak Corp., a general contractor.

In addition to claims against the general contractor, the plaintiff also asserted causes of action against Sergey Rybak, the owner of Rybak Corp., seeking in part pierce the corporate veil and hold the owner personally liable.

The defendant general contractor had entered into a subcontract with the plaintiff for the completion of structural steel work at a property located in Brooklyn. The plaintiff alleged it completed the steel work but the general contractor failed to pay \$135,619 owed to the plaintiff.

The plaintiff further alleged the owner of the general contractor had “exercised complete domination and control over [the general contractor]” and “abused the privilege of doing business in the corporate form” by “deliberately undercapitalizing [the general contractor] and otherwise intermingling the assets of [the general contractor] with his own assets.”

The defendant owner moved for dismissal of the causes of action in the complaint asserted against him personally, arguing in part that the plaintiff’s conclusory alle-

gations failed to state a cause of action for piercing the corporate veil. In further support of his motion, the defendant owner submitted two purported waivers, dated April 3 and June 5, 2008, which allegedly acknowledged the receipt of payments by the plaintiff and waived all liens and claims against the defendants.

In response, the plaintiff submitted an affidavit by its president, Felix Loja, stating that Loja had “no recollection” of signing the purported waivers and questioning their validity.

Justice Demarest granted the defendant’s motion to dismiss as to the veil piercing claim, but also granted an application by the plaintiff for leave to replead that claim. As an initial matter, the court held that the plaintiff’s third cause of action, which “solely seeks to pierce the corporate veil,” was defective because New York does not recognize a separate cause of action to pierce the corporate veil.

Moreover, although Justice Demarest again emphasized that claims seeking to impose personal liability on the owner of a corporation under a theory of piercing the corporate veil should survive the pleading stage unless totally unsupported by non-conclusory allegations, the court held that the allegations in the complaint failed to meet even that standard. The court explained that “[a]ll of the allegations in the complaint, with respect to [the defendant owner], are conclusory and the complaint is devoid of any specific claims that [he] abused the corporate form.” The complaint’s “numerous bald allegations, on information and belief” were not sufficient.

Nonetheless, the court granted plaintiff’s request for leave to file an amended complaint repleading the plaintiff’s theory for piercing the corporate veil. The court’s decision relied on the purported waivers submitted by the defendant owner, which plaintiff alleged were “potentially forged.” Although the court considered the evidence in support of this allegation to be

“ambiguous,” the court noted that leave to amend pleadings should be freely given, and concluded that, if proven, these allegations of forgery “could persuade the court to impose [the general contractor’s] obligations on [its owner].”

Conclusion

These recent decisions suggest that if a plaintiff asserting a claim against the owner of a corporation on a theory of piercing the corporate veil can set forth some non-conclusory factual allegations in support of that theory, then New York courts may be inclined to deny a motion to dismiss and allow that plaintiff an opportunity for discovery.

Whether the plaintiff can substantiate those allegations with evidence and ultimately obtain a judgment against the owner of the corporation is, of course, a different question.



1. *Morris v. N.Y. State Dep’t of Taxation and Fin.*, 82 N.Y.2d 135, 140, 623 N.E.2d 1157, 1160, 603 N.Y.S.2d 807, 810 (1993).
2. See *Morris*, 82 N.Y.2d at 141-42, 623 N.E.2d at 1161, 603 N.Y.S.2d at 811.
3. *TNS Holdings Inc. v. MKI Sec. Corp.*, 92 N.Y.2d 335, 339, 703 N.E.2d 749, 751, 680 N.Y.S.2d 891, 893 (1998); see also *William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600 (2d Cir. 1989) (“It is well settled that New York courts are reluctant to disregard the corporate entity”).
4. *USA United Holdings Inc. v. Tse-Peo Inc.*, 26 Misc. 3d 1114(A), 886 N.Y.S.2d 69 (Table), 2009 N.Y. Misc. LEXIS 948, 2009 WL 1099462 (Kings Co. Apr. 23, 2009) (Demarest, J.).
5. *Id.* at *10 (internal citations and quotation marks omitted); see also *Holme v. Global Minerals and Metals Corp.*, 22 Misc. 3d 1123(A), 880 N.Y.S.2d 873 (Table), 2009 N.Y. Misc. LEXIS 354, at *7, 2009 WL 387034, at *7 (N.Y. Co. Jan. 12, 2009) (Lowe, J.) (“The theory of piercing the corporate veil involves a fact laden inquiry, which is unsuited for resolution on a pre-answer, prediscovery motion to dismiss”), *aff’d*, 63 A.D.3d 417, 879 N.Y.S.2d 453 (1st Dep’t 2009).
6. *Trofen Steel & Constr. Inc. v. Rybak*, 26 Misc. 3d 1223(A), 2010 N.Y. Misc. LEXIS 283, 2010 WL 549236 (Kings Co. Feb. 8, 2010) (Demarest, J.).