

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LINDE CORPORATION,	:	CV- 15-00099
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	
	:	
BLACK BEAR HOLDINGS, LLC, BLACK BEAR:	:	
WATERS, LLC, WILLIAM F. EPP, JOHN	:	
DINASO, SR., STEWART E. DIBBLE, and	:	NON-JURY TRIAL
JOSHUA PHILLIPS,	:	
Defendants.	:	SUMMARY JUDGMENT

**OPINION AND ORDER**

There are two motions for summary judgment and a motion for partial summary judgment before the Court. On May 9, 2016, Defendant Joshua Phillips’ filed a motion for summary judgment as to counts 2 and 7 of the complaint against him. On May 18, 2016, Plaintiff Linde Corporation (Linde) filed a motion for summary judgment to prevent re-litigation of its entitlement to payment and for summary judgment against John DiNaso, Sr. Argument was held on August 25, 2016. Trial is September 13 and 22, 2016. After consideration, the Court grants the motions. The summary judgment motions involve whether to pierce the corporate veil and the other motion involves res judicata and collateral estoppel. The Court provides the following in support this decision.

**FACTUAL BACKGROUND.**

In April 2012, plaintiff entered an agreement with Black Bear Holdings LLC (“BBH”) to build a water withdrawal facility. BBH intended to supply water to Marcellus Shale for gas extraction. Linde completed the work in late 2012. Black Bear Waters, LLC, (BBW) operated the water draw facility and generated revenue from the facility. To date, Linde has not been paid in full for its work. The balance due under the contract is \$ 216,074.38.

In 2013, under Lycoming County Docket Number 13 – 01,163, Linde sought a mechanic's lien on the property where the facility was located. On January 13, 2015, Linde obtained a judgment on the mechanic's lien in the amount of \$216,064.38 for labor and materials furnished in construction of the water withdrawal facility. On April 22, 2015, Linde initiated the instant action against the companies and the owners of the companies to obtain judgment. Linde seeks to pierce the corporate veil to obtain judgment personally against the owners of the company.

Linde adduced the following evidence to pierce the corporate veil as to DiNaso. BBH executed the contract for the construction work knowing that it did not have the funds to pay for the work. BBH and BBW comingled funds, specifically paying creditors by whichever company had the funds regardless of which company incurred the debt. BBH and BBW obtained a loan by falsely representing to the bank that the proceeds would pay Linde, knowing that the statement was false at the time it was made. BBH and BBW used the loan proceeds for other purposes, including paying DiNaso's personal expenses. DiNaso owns a 32.5 percent membership interest in BBH and BBW. DiNaso treated BBW and BBH as they were his own personal funds. DiNaso induced Linde to enter the contract by promising to pay from DiNaso's personal funds.

Linde adduced the following evidence to pierce the corporate veil as to Phillips. Phillips was a member of BBH in 2012 and 2013 when BBH entered into the construct contract with Linde at issue in this case. BBH did not observe corporate formalities, failed to file a tax return for 2013, failed to memorialize lease agreements, comingled funds and obligations between BBH and BBW, BBH made false representations that it would use loan proceeds to pay Linde \$175,000 in order to obtain a bank loan for \$1,052, 250. BBH's 2013 financial statement listed a debt to Linde for \$175,994 for work on the water withdrawal facility. Defendant Phillips had a

ten percent ownership in BBH until he sold it back to the company in April 2013. Phillips held a two percent ownership in BBW.

### **DISCUSSION**

The Court will discuss piercing the corporate veil followed by a discussion of re-litigating the amount owed. Preliminarily the court notes the following standards for summary judgment.

Pursuant to Pa. R.C.P. 1035.2, the Court may grant summary judgment at the close of the relevant proceedings if there is no genuine issue of material fact or if an adverse party has failed to produce evidence of facts essential to the cause of action or defense. Keystone Freight Corp. v. Stricker, 31 A.3d 967, 971 (Pa. Super. 2011). A non-moving party to a summary judgment motion cannot rely on its pleadings and answers alone. Pa. R.C.P. 1035.2; 31 A.3d at 971.

When deciding a motion for summary judgment, the Court must view the record in the light most favorable to the non-moving party, with all doubts as to whether a genuine issue of material fact exists being decided in favor of the non-moving party. 31 A.3d at 971.

If a non-moving party fails to produce sufficient evidence on an issue on which the party bears the burden of proof, the moving party is entitled to summary judgment as a matter of law. Keystone, 31 A.3d at 971 (*citing*, Young v. Pa. Dep't of Transp., 744 A.2d 1276, 1277 (Pa. 2000). Pa. R.C.P. No. 1035.3(d) provides that “[s]ummary judgment may be entered against a party who does not respond.” Although it is not mandatory, Rule 1035.3(d) permits the Court to enter summary judgment for failure to respond. *See*, Devine v. Hutt, 2004 PA Super 460, 863 A.2d 1160 (Pa. Super. 2004), *citing*, Thomas v. Elash, 2001 PA Super 214, 781 A.2d 170, 177 (Pa. Super. 2001).

### **PIERCING THE CORPORATE VEIL.**

There is “a strong presumption in Pennsylvania against piercing the corporate veil.” Lumax Industries, Inc. v. Aultman, 543 Pa. 38, 42, 669 A.2d. 893, 895 (Pa. 1995)(citation omitted). The

general rule is “that the corporate entity should be recognized and upheld unless specific, unusual circumstances call for an exception.” Lumax, supra. (quotation cite omitted). With approval, the Pennsylvania Supreme Court cited the following factors set forth by the Commonwealth Court when determining whether to pierce the corporate veil: “undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and use of the corporate form to perpetrate a fraud.” Lumax, supra. (citation omitted.) The “corporate veil may be pierced whenever one in control of a corporation uses that control or corporate assets to further his personal interests.” Lumax, supra, citing Watercolor Group v. Newbauer, 468 Pa. at 117, 360 A.2d 200, 207 (Pa. 1976).

In the present case, the Court concludes that there is no basis to pierce the corporate veil as to Joshua Phillips. The factors and equities weigh against piercing the corporate veil as to Mr. Phillips. Plaintiff has not adduced evidence that Joshua Phillips exercised control over BBH or BBW or was sufficiently linked to perpetrating a fraud on Linde, to undercapitalization or to the intermingling of funds between the BBH, BBW and Mr. DiNaso. Instead, Mr. Phillips was a minority member with only a 10 percent and 2 percent interest in the companies at the time the contract was entered. Further, Mr. Phillips sold his ten percent ownership in BBH back to the company in April 2013.

By contrast, there is sufficient basis to pierce the corporate veil against John DiNaso. Mr. DiNaso failed to respond to the motion for summary judgment against him. Rule 1035.3(d) permits the Court to enter summary judgment for failure to respond. In addition, Mr. DiNaso’s deemed admissions establish that he had control over the company, comingled his personal funds with that of BBH and BBW, and induced Linde to enter the contract by promising to pay Linde from DiNaso’s personal funds.

RE-LITIGATION OF AMOUNTS OWED.

Finally, the Court concludes that defendants are barred from re-litigating the amount owed for labor and materials furnished under the contract. On January 13, 2015, Linde obtained a judgment on the mechanic's lien in the amount of \$216,064.38 under Lycoming County Docket Number 13 – 01,163. The Defendants were either parties or in privity to the parties in that matter. As such, they are estopped from re-litigating the amount owed.

**ORDER**

AND NOW, this **31<sup>st</sup>** day of **August, 2016**, it is ORDERED and DIRECTED as follows.

1. Defendant Joshua Phillips motion for summary judgment is GRANTED. Judgment is entered in favor of Joshua Phillips and against Linde Corporation on counts 2 and 7. The Court notes that there are no remaining counts against Joshua Phillips.
2. Plaintiff Linde's motion for partial summary judgment to prevent re-litigation of the amount owed for labor and materials furnished under the contract is GRANTED. It is ORDERED AND DIRECTED that the amount owed for labor and materials furnished under the contract is \$ 216,064.38.
3. Plaintiff Linde's motion for summary judgment against Defendant John DiNaso, Sr. is GRANTED; Judgment is entered in favor of Linde Corporation and against John DiNaso, Sr. in the amount of \$ 216,074.38 with interest in the amount of \$ 150, 258.52 through May 17, 2016 plus \$108.06 per diem thereafter until Linde is paid and costs.

4. Court notes that plaintiff is not entitled to recover duplication of the \$ 216,074.38 amount.

BY THE COURT,

September 1, 2016

Date

\_\_\_\_\_  
J.

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