UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

---

In re

STARKWEATHER FREIGHT LINES, INC. Case No. 99-10307 K

Debtor

---

JOHN K. RING III, as Trustee of
STARKWEATHER FREIGHT LINES, INC.

Plaintiff

-vs- AP No 99-1351 K

TRANSPORTATION RESOURCE
MANAGEMENT, INC.
SFL MANAGEMENT, INC. a/k/a
STARKWEATHER FREIGHT LINES, INC.
MICHAEL P. McCABE, SR.
MICHAEL P. McCABE, JR.

Defendants

---

Lawrence C. Brown, Esq.
360 Dingens Street
Buffalo, New York 14206

Attorney for Trustee/Plaintiff

Mark S. Wallach, Esq.
169 Delaware Avenue
Buffalo, New York 14202

Attorney for Michael P. McCabe, Sr.

William E. Lawson, Esq.
730 Convention Tower, 43 Court Street
Buffalo, New York 14202

Attorney for Michael P. McCabe, Jr.

The motion for Summary Judgment brought by defendant, Michael P. McCabe, Jr., is denied.

The parties have thoroughly briefed the doctrine of "piercing the corporate veil." The Court finds that the Trustee is entitled to go to trial on that doctrine for the reasons set forth by the Trustee in his various submissions. (Of course, the Trustee's allegations of fact are not adopted by the Court, but rather the Court must not only view the undisputed facts in the light most favorable to the Trustee, but must treat the disputed matters as if they will be resolved in the Trustee's favor at trial. "On summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the Motion." *United States v. Diebold, Inc.*, 369 U.S. 654 (1962), *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568 (2nd Cir. 1993).)

As importantly, the Court encourages the parties, in the interest of justice,[1] to explore the ramifications of the last two sentences of page 14 of the Trustee's "Supplemental Memorandum in Response to the Summary Judgment Motion to Dismiss Defendant Michael P. McCabe, Jr." There the Trustee states that his allegations are "more than sufficient to withstand the present motion as Junior, at the least, has been shown to have actively participated in the

[1] It would be better that this be considered prior to trial, rather than after trial in the form of a Rule 15(b) motion by the Trustee.

consummation of a fraudulent conveyance to his wholly controlled SFL and TRM. As such, he is at least personally subject to a direct claim, regardless of veil piercing analysis."

There can be no doubt about the fact that veil-piercing analysis is only a subset of the jurisprudence addressing the liability of individuals for acts of their corporations. The very existence of the doctrine presupposes that what is at hand is a debt justly owing only by a corporation, but that the corporation cannot afford to pay it (or is otherwise unavailable to the plaintiff). Thus, the bulk of veil-piercing jurisprudence addresses contract debts of a corporation that has become insolvent. Clearly, rigid veil-piercing standards must be brought to bear when a party who freely chose to contract with a corporation seeks to reach the corporation's principals because the corporation has failed financially. Negligence by a corporation also will not expose an innocent owner, usually, absent a basis to pierce the veil.

But resort to veil piercing analysis is not required where the principals have engaged in intentional tort or where the principals have caused the corporation to engage in intentional tort. Thus, although

> "[a] director or officer of a corporation does not incur personal liability for its torts merely by reason of his official character . . . if a director or officer commits, or participates in the commission of, a tort, whether or not it is also by or for the corporation, he is liable to third persons injured thereby. A contrary rule would enable a director or officer of a corporation to perpetrate flagrant injuries and escape liability behind the shield of his vicarious character, even though the corporation might be insolvent or irresponsible. . . . That a corporate officer was acting for the corporation or within the scope of his employment when he participated in the company's commission of a tort does not affect his liability for the tort. . . ." [14A N.Y. Jur.2d, Business Relationships § 763 (1996) (case citations omitted).]

"An officer or agent of a corporation is personally liable for his acts which constitute a conversion of the property of the third person. It is no answer to such liability that the act was done while the officer or agent was acting for the corporation. . . . The officers and agents who assist in obtaining property from the true owner and in converting it and the proceeds thereof to the use of the corporation are joint tortfeasors, and each is personally liable therefor." [14a N. Y. Jur.2d, Business Relationships § 764 (1996) (case citations omitted.)]

It is, thus, for both reasons that the motion is denied: (1) for the reasons set forth by the Trustee in his submissions regarding the standard for piercing of the veil (assuming arguendo that he succeeds at trial in proving his allegations of fact), and (2) because of the implications of the Trustee's argument as quoted above, which implications are well-known to the Court, though not extensively briefed by the parties.

This adversary proceeding is restored to the calendar at 11:30 a.m. on January 23, 2002, for further scheduling.

Dated: Buffalo, New York
January 15, 2002

/s/Michael J. Kaplan

U.S.B.J.