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Considerations on Dual-Shops Following ‘Navillus’

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On September 20, 2017, a group of construction union trusts that operate in the New York City metropolitan area successfully obtained a $76 million award from a midtown construction firm and a major real estate developer after a three-year court battle. In a decision with potentially widespread implications for the city’s construction and development firms, the United States District Court Southern District of New York found that a construction company subject to multiple collective bargaining agreements (CBAs) fraudulently established an alter ego company in an attempt to divert work away from several major city construction unions in violation of the “work preservation clauses” contained in the related CBAs. [1]

The scale of the *Navillus* court’s verdict is considered one of the largest of its type in the United States and is a strong warning to New York construction and development firms seeking to avoid union requirements. In this article, we provide an overview of double-breasted operations and discuss the implications of *Moore v. Navillus Tile, Inc*.

Double-Breasted Operations

In New York City and elsewhere in the US, many contractors engage construction workers pursuant to a CBA negotiated with the workers’ unions. These CBAs often require that the employer (and its progeny) utilize union workers for all specified work covered by the agreement in the specified geographic area; those employers are required among other things to pay union scale wages and make contributions to jointly administered pension and welfare funds. Specific projects can be all union, open shop (mix of union and nonunion trades) or nonunion.

Nonunion workers generally receive lower wages and fewer benefits than union workers for the same services. Therefore, contractors may have a financial incentive to use nonunion labor when possible. Additionally, developers may have a preference whether or not to mix union and nonunion trades on the jobsite to promote efficiencies – some developers believe that mixing union and nonunion trades in an open shop atmosphere can lead to disputes and lack of coordination between the trades that can be detrimental to efficiencies and timelines. As a result, some employers subject to CBAs operate “double-breasted” operations in which the unionized employer creates a second, separate firm with a nonunion workforce. We note that in *Navillus*, the defendants claimed that nonunion help was significantly less effective than union (seventeen percent or so), and therefore, the discrepancy in wages and benefits was somewhat justified. The court, however, dismissed the defendant’s argument in its application to mitigate damages.

Double-breasted operations do not violate the National Labor Relations Act (NLRA) *per se*. However, if improperly managed, double-breasted operations may violate certain protections set forth in those statutes as well as CBA contractual provision that prohibit employers from using nonunion labor for covered work in a unionized employers' CBA. They may also violate the Labor Management Relations Act of 1947 (LMRA) and the Employee Retirement Income Security Act of 1974 (ERISA), which provide federal remedies for certain violations of CBAs to parties to covered CBAs and participants and beneficiaries of covered benefit funds, respectively.

The determination of whether two distinct divisions or companies comprise a double-breasted operation is generally determined based upon the following tests (i) single employer or (ii) alter ego. [2] For the purposes of this article, our discussion focuses on the alter ego doctrine, because the *Navillus* court relied on the alter ego doctrine to determine that two contractors were subject to the union shop's CBA even while operating parallel companies.

Typically, the single employer test is used when commonly controlled entities run parallel operations, and the alter ego test is predominant when a new nonunion entity replaces the union shop. The single employer test has two parts which includes the finding of a single employer and a single bargaining unit. Factors that determine whether two entities or division are a single employer include (i) centralized control of labor relations; (ii) interrelation of operations; (iii) common management; and (iv) common ownership or financial control. The factors used to find a single bargaining unit include: (i) bargaining history; (ii) functional integration of operations; (iii) differences in types of work and skills of employees; (iv) extent of centralization of management and supervision, particularly with regard to labor relations, (v) hiring, discipline and control of day-to-day operations; (vi) and extent of interchange and contact between the two groups. [3]

While similar to the single employer doctrine, the alter ego doctrine does not require the finding on a single bargaining unit. The alter ego doctrine is primarily applied in situations involving successor companies, where the successor is merely a disguised continuance of the old employer. [4] As described below, the alter ego doctrine for purposes of finding two entities to be subject to a CBA is more akin to a standard "pierce the corporate veil" test for corporations. In *Navillus*, the court found that the nonunion operations "borrowed" management, finances, employees, operations and equipment so heavily from the predecessor (and continuing) union shop that the nonunion businesses were indeed alter egos of the union shop established for the purpose to avoid the constraints of the union shop's CBA obligations. Note that under both doctrines, direct or indirect common ownership or control between the union and nonunion operations is essential but not alone dispositive.

The Alter Ego Doctrine

The alter ego provides "an analytical hook to bind a non-signatory to a collective bargaining agreement." [5] The test to determine alter ego status is "flexible" and dependent upon the "circumstances of the individual case." [6] Generally, the "hallmarks of the alter ego doctrine include whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership." [7] A finding of alter ego status does not require all of these factors to be present nor is a single factor dispositive. [8] Further, although a company's intent to evade union obligations is a factor in determining alter ego status, it is not a necessary factor.

The alter ego doctrine was developed in the context of the NLRA, but it also applies to claims brought under

ERISA. [9] In the ERISA context, the purpose of the alter ego doctrine is to prevent an employer from evading its funding obligation under the labor laws 'through a sham transaction or technical change in operations.' [10] In order to protect employee benefits, courts observe "a general federal policy of piercing the corporate veil when necessary." [11] In *Navillus*, the court applied the alter ego doctrine despite the fact that the controlling persons continued to operate a union contractor in parallel to the new, non –union businesses. [12] Accordingly, two companies can be found to be alter egos where both companies "exist simultaneously." [13] The key factors of the alter-ego doctrine break down as follows:

1. Ownership

In determining common ownership, courts consider whether one entity holds interest in the other entity and whether the entities are under common ownership by a third entity, either directly or indirectly. Common ownership can also be inferred where businesses are held by close family members [14] or friends [15].

Although common ownership is typically the least important factor in challenging a double-breasted operation, it is thoroughly discussed in *Navillus*. To be clear, while common ownership/financial control is a requirement for the finding of a single employer or alter ego, common ownership/financial control alone will not suffice. The *Navillus* court distinguished the facts of its case from prior cases where the only alter ego factor present was a family connection between the two entities. [16]

In *Navillus*, two brothers founded a union company and later incorporated a second, nonunion company. In addition to being related, both brothers formally owned both the union and nonunion companies through part of a construction project at issue and only disaggregated their ownership in order to undercut the alter ego claims made against them by backdating contracts to appear that the separation occurred months earlier.

2. Management

The common management factor is broadly interpreted by the National Labor Relations Board (NLRB) and courts to include a wide range of personnel, including company directors. Courts consider the following questions in determining its presence: whether one entity exercises control over the other entity's day-to-day operations; whether the same individuals serve as officers, directors and key managers for the entities; and whether the same individuals serve in lower management positions, such as regional managers, plant managers, supervisors, etc.

The *Navillus* court distinguished the facts of its case from those in cases where no common management was found. [17] In *United Union of Roofers, Waterproofers, Allied Workers, Local No. 210, AFL–CIO v. A.W. Farrell & Son, Inc.* , the court found that the manager of the union company provided "limited business advice and operational support" during the nonunion company's "early stages" and that this was insufficient to establish substantially identical management. [18]

In the present case, the management team for the nonunion company's construction project was comprised almost entirely of people who had worked for the union company or were doing so immediately prior to working on the project. The nonunion company's bid was prepared by a project manager employed by the union company. Additionally, an individual, who was a former engineer for the union company led the contract negotiations for the nonunion company, which the president and CEO of the union company participated in and served as the final

decision maker. Further, there were employees who worked on the nonunion company's project while still employed by the union company. Most importantly, the court focused on (i) the participation and actions of the the controlling brother who purportedly remained with the union company while negotiating contracts, fixing problems, appearing at job sites, financing, and securing property and equipment for the nonunion businesses; (ii) the union company's provision of visas for workers for the nonunion operations, sharing of management and provision of union insurance to persons on the nonunion companies' payroll; and (iii) the nonunion company's leveraging of union company's track record to win contracts, and secure insurance and bonds.

The court also discerns its facts from those in *Local 812 GIPA v. Canada Dry Bottling Co. of New York* which held that "the mere transfer of low and middle managers does not establish" common management. [19] The court rejected this argument, because the relevant "low and middle managers" included *all* of the individuals responsible for negotiating the nonunion construction contract and overseeing its day-to-day operations. [20]

3. Supervision

Common supervision is another factor considered in a finding of alter ego status. The *Navillus* defendants only cited one case in its rebuttal that there was no common supervision. In *Amalgamated Lithographers*, the court concluded that three "isolated facts" were insufficient to establish alter ego status against a backdrop of other contrary evidence: (1) that the owner of one company had once signed a litter identifying her as "President" of the other; (2) that said owner had check-signing authority at the other company for two years; and (3) that she had once declared (inside the two companies' shared office) that she was "in charge here." [21]

The *Navillus* court distinguished the *Amalgamated Lithographers* facts from those in its case, because the President and CEO of the union company was a co-owner of the nonunion company during the period of contract negotiations over a nonunion company's contract and was the point-person who communicated on behalf of the nonunion company when issues regarding the project arose. In its verdict, the court also noted that the president of the nonunion company was rarely copied on emails in which problems regarding the nonunion company project were discussed and resolved.

4. Business Purpose

"In the ordinary case, two entities have the same 'business purpose' if they deal in the same product or service." [22] As such, companies have been found to share substantially identical business purposes where both companies, for example, are "involved in the heating, air conditioning and ventilation industry," [23] or perform "masonry construction." [24]

Minor distinctions in the work performed are not dispositive. For example, differentiating among entities by pointing out that one entity performs union work and the other entity does not perform union work will not defeat a finding of common business purpose. Likewise, that one entity performs a type of job or project that its alleged alter ego does not is insufficient to uncouple companies with an otherwise common business purpose. The NLRB and the courts have found that entities that do the same work "a large percentage of the time, even if not exclusively" to have a common business purpose. [25]

However, courts have found companies to have "completely different" business purposes where, for example,

one company manufactures clothing and another markets and sells clothing [26] or where the companies "were engaged in different, though related, lines of business within the freight transportation industry." [27]

Although the union and nonunion company in *Navillus* operated the same line of business on the project at issue (serving as a concrete foundation and superstructure subcontractor), the court added that aside from the nonunion construction project at issue, the union and nonunion company operated different lines of businesses and as a result, ceased being alter egos.

5. Customers

Sharing of clients and customers is indicative of an alter ego relationship. For example, the NLRB and courts have found alter ego status based in part on: common vendors and at least one long-time customer in common; [28] two companies servicing substantially the same customers; [29] companies sharing twenty percent of the same customers; [30] and sharing of "at least some of the same customers." [31]

However, in *Navillus*, the court concluded that this factor is not "terribly relevant to the alter ego analysis," [32] reasoning that contractors on major construction projects in New York City all deal with a common set of customers – with some projects (including all publicly funded projects) being unionized and an increasing number of projects (including most private residential high rise construction projects) being nonunionized. Similarly, the same developers appear to operate in both spheres and developers are the ultimate source of business for both general and subcontractors.

6. Operations

The common operations factor is generally a significant factor in challenging a double-breasted operation. The NLRB and courts pay greater scrutiny to two entities when they share the same administrative staff, office space, bank and payroll accounts, marketing and advertising materials and file joint taxes.

However, the *Navillus* court gave little weight to the fact that the nonunion company leased office space from the union company for six months and the union and nonunion companies used the same accountants, attorneys, and insurance brokers in determining alter ego status. More relevant was the fact that the union president and CEO was contacted regarding issues on the nonunion company project and the union and nonunion companies used adjoining storage yards that were jointly owned by both companies' presidents.

Nonetheless, the court concluded that the nonunion company had largely independent operations, because they maintained separate offices, telephones, computer systems, books and records, insurance policies, bank accounts, human resources, payroll systems, and professional services. The companies further filed their own taxes and did not comingle funds.

7. Equipment

Companies may also be found to be alter egos when they share equipment, tools, supplies or other resources in connection with their operations

In *Navillus*, the nonunion company purchased equipment from the union company. However, the court held that there was no evidence of shared equipment, because the items were paid for at fair market value and were not for purposes of the nonunion company project at issue. As such, the court weighed this factor against its finding of alter ego status. That said, for one particular contract, the Court focused on the fact that the nonunion operation need a tower crane to complete a project. Since the nonunion business could not afford the crane and did not have sufficient assets to finance it, an equipment rental company owned by the union side purchased the required crane then rented it to the nonunion shop to finish the project. The equipment provided never had a tower crane in its inventory prior and only acquired the crane after the nonunion company told the developer that it was "buying" the crane.

8. Anti-Union Animus

Although a company's intent to evade union obligations is a factor in determining alter ego status, it is not a necessary factor.

The court in *Navillus* held that there was no evidence that the president and CEO of the union Company or the union company harbored anti-union animus. Here, the controllers kept a union shop for those jobs that required union labor. The court noted that it may have been the developer's animus to an open shop that drove the union contractor to form a nonunion operation in the first place to win work.

Conclusion

Despite the court's finding of a lack of shared operations, equipment or anti-union Animus, it held that the factors, overall, weighted in favor of concluding that the nonunion companies were alter egos of the union company during the nonunion company project.

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[1] Findings of Fact & Conclusions of Law, *Moore v. Navillus Tile, Inc*, .No. 14-CV-8326, at *56 (S.D.N.Y. Sept. 20, 2017), ECF 301.

[2] 10 Emp. Coord. Labor Relations § 30:231 (Thomson Reuters. 2017).

[3] *S. Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Eng'rs. AFL-CIO* , No. 75-1097, 425 U.S. 800, 802 (1976).

[4] Findings of Fact & Conclusions of Law, *Moore.*, No. 14-CV-8326, at *57 (S.D.N.Y. Sept. 20, 2017), ECF 301 (quoting *Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp.* , 139 F.3d 304, 307 (1st Cir. 1998).

[5] *Truck Drivers Local Union No. 807, I.B.T. v. Reg'l Imp. & Exp. Trucking Co.* , 944 F.2d 1037, 1046 (2d Cir. 1991).

[6] *Ret Plan of UNITE HERE Nat'l Ret. Fund v. Kombassan Holding A.S.* , 629 F.3d 282, 288 (2d. Cir. 2010).

[7] *Lihli Fashions Corp. v. N.L.R.B.* , 80 F.3d 743, 748 (2d Cir. 1996), *as amended* (May 9, 1996) (quoting *Truck Drivers*, 944 F.2d at 1046.

[8] *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. A&M Heating, Air Conditioning, Ventilation & Sheet Metal, Inc.* , 314 F. Supp. 2d 332, 347 (S.D.N.Y. 2004).

[9] *Kombassan* , 629 F.3d at 288 (quoting *Goodman Piping Prods., Inc. v. N.L.R.B.*, 741 F.2d 10, 11 (2d Cir. 1984))

[10] *Id.* (quoting *Newspaper Guild of N.Y., Local No. 3 of the Newspaper Guild, AFL-CIO v. N.L.R.B.* , 261 F.3d 291, 298 (2d Cir. 2001)).

[11] *Id.* (quoting *N.Y. State Teamsters Conference Pension & Ret. Fund v. Express Servs., Inc.* , 426 F.3d 640, 647 (2d Cir. 2005)).

[12] Findings of Fact & Conclusions of Law, *Moore.*, No. 14-CV-8326, at *57 (S.D.N.Y. Sept. 20, 2017), ECF 301 (quoting *Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp* ., 139 F.3d at 307).

[13] *Kombassan* , 629 F.3d at 288.

[14] *See, e.g.* , *Goodman Piping Prods., Inc.*, 741 F.2d at 11.

[15] *Trs. of Mosaic & Terrazzo Welfare, Pension, Annuity & Vacation Funds v. High Performance Floors, Inc.* , 233 F. Supp. 3d 329, 337 (E.D.N.Y. 2017).

[16] *See, e.g.* , *Trs. of Empire State Carpenters Annuity, Apprenticeship, Labor-Mgmt. Co-op., Pension & Welfare Funds v. JJJ Concrete Corp.* , No. 13-CV-4363, 2015 WL 790085, at *9 (E.D.N.Y. Feb 25, 2015);*United Union of Roofers, Waterproofers, Allied Workers*, *Local No. 210, AFL–CIO v. A.W. Farrell & Son, Inc.*, No. 07-CV-224, 2012 WL 4092598 (W.D.N.Y. Sept. 10, 2012).

[17] Findings of Fact & Conclusions of Law, *Moore.*, No. 14-CV-8326, at *62 (S.D.N.Y. Sept. 20, 2017), ECF 301.

[18] No. 07-CV-224, 2012 WL 4092598, at *14.

[19] Nos. 98 Civ. 3791 & 98 Civ. 6774, 2000 WL 1886616, at *4 (S.D.N.Y. Dec. 29, 2000).

[20] Findings of Fact & Conclusions of Law, *Moore.*, No. 14-CV-8326, at *63 (S.D.N.Y. Sept. 20, 2017), ECF 301.

[21] *Digital Graphics, Ltd. V. Amalgamated Lithographers of Am., Local 1,* No. 96 Civ. 5844, 1997 WL 458738, at *9 (S.D.N.Y. Aug. 12, 1997).

[22] *Newspaper Guild of N.Y., Local No. 3* , 261 F.3d at 299.

[23] *A & M Heating* , 314 F. Supp. 2d at 338.

[24] *Mason Tenders Dist. Council Welfare Fund v. ITRI Brick & Concrete Corp.* , No. 96 Civ. 6754, 1997 WL 678164, at *15 (S.D.N.Y. Oct. 31, 1997).

[25] *Trs. of Mosaic & Terrazzo Welfare, Pension, Annuity & Vacation Fund* , 233 F. Supp. 3d at 338.

[26] *Lihli Fashions Corp.* , 80 F.3d at 749.

[27] *N.Y. State Teamsters Conference Pension & Ret. Fund* , 426 F.3d at 650.

[28] *Castaldi v. River Ave. Contracting Corp.* , No. 14-CV-5435, 2015 WL 3929691, at *4 (S.D.N.Y. June 22, 2015).

[29] *Jacobson v. Metro. Switchboard Co.* , No. 05-CV-2224, 2007 WL 1774911, at *6 (E.D.N.Y. June 18, 2007).

[30] *Plumbers, Pipefitters & Apprentices Local Union No. 112 Pension, Health & Educ. & Apprenticeship Plans ex rel. Fish v. Mauro's Plumbing, Heating & Fire Suppression, Inc.* , 84 F. Supp. 2d 344, 348 (N.D.N.Y. 2000).

[31] *Bourgal v. Robco Contracting Enterprises, Ltd.* , 969 F. Supp. 854, 863 (E.D.N.Y. 1997), *aff'd*, 182 F.3d 898 (2d Cir. 1999).

[32] Findings of Fact & Conclusions of Law, *Moore.*, No. 14-CV-8326, at *66 (S.D.N.Y. Sept. 20, 2017), ECF 301.

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