

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

ROBERT SANDLER,	:	December Term 2007
	:	
Plaintiff,	:	
	:	
v.	:	No. 5045
	:	
ROBERT NUNEZ, BRYN MAWR TRUST	:	
COMPANY, PHILLIP ANDREWS and LAMONT	:	COMMERCE PROGRAM
DAVIS,	:	
	:	
Defendants.	:	1971 EDA 2009
	:	
v.	:	
	:	
F.I.V.A. CORP. and ADMINISTRATIVE	:	
INVESTMENTS MANAGEMENT, LLC.,	:	
	:	
Additional Defendants.	:	
	:	

**OPINION**

Plaintiff Robert Sandler (hereinafter “Sandler”) appeals from this court’s order dated May 20, 2009. In December 2007, Sandler instituted suit against defendant Robert Nunez (hereinafter “Nunez”) alleging breach of contract, fraud and unjust enrichment for failing to properly perform renovations on two buildings purchased by Sandler. Nunez is the sole corporate officer of F.I.V.A. Corp., a New York Corporation. Sandler also sued defendant Bryn Mawr Trust Company, the bank that loaned Sandler the money to purchase the properties. Bryn Mawr Trust Company joined F.I.V.A Corporation as a defendant. Defendant Bryn Mawr Trust Company has been dismissed as a party.<sup>1</sup>

After discovery, on February 10, 2009, the court granted Sandler’s motion to amend his complaint on February 10, 2009. Sandler filed an amended complaint on February 17, 2009 alleging facts to pierce F.I.V.A.’s corporate veil. The amended complaint avers that:

1. Defendant Nunez is trading under the name F.I.V.A. Corp.
2. F.I.V.A. Corp. is believed to be undercapitalized to carry on its business.

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<sup>1</sup> Sandler also sued Phillip Andrew and Lamont Davis. Sander discontinued the action against these defendants. Additional defendant Administrative Investment Management, LLC was also dismissed as a defendant.

3. F.I.V.A. Corp. is believed to have been undercapitalized to carry on its business.
4. Nunez controls F.I.V.A. Corp. as its sole shareholder.
5. Nunez is believed to substantially intermingle the assets and affairs of F.I.V.A. Corp with his own.
6. Nunez is believed to disregard corporate formalities in respect to the F.I.V.A. Corp.
7. Nunez is believed to be using a corporate form to further injustice.
8. Nunez is believed to be using F.I.V.A. Corp. to commit criminal acts under the Real Estate Licensing Laws of the Commonwealth.

On February 17, 2009, defendant Nunez filed a motion for summary judgment. Instead of filing an answer to the motion for summary judgment, Sandler filed preliminary objections on February 19, 2009. Despite requests by Nunez's counsel to Sandler to withdraw the objections, Sandler ignored the requests. As such, defendant Nunez responded to the preliminary objections on March 11, 2009. On March 13, 2009, the court overruled the Preliminary Objections and ordered Sandler to answer the motion for summary judgment as required under the Case Management Order<sup>2</sup> and pursuant to Pa. R. Civ. P. 1035.2. Thereafter, Sandler filed his answer to the motion for summary judgment on May 4, 2009. Sandler's response to the motion for summary judgment failed to respond to the factual averments paragraph by paragraph as required by the rules and on May 10, 2009, the court granted summary judgment. This timely appeal followed.

Allegations of fact contained in a motion must be substantively and appropriately responded to except for limited circumstances in which the factually true responsive answer is unknown. This rule is particularly important in summary judgment motions where the exact issue presented is whether any question of fact for resolution exists in the case. To avoid

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<sup>2</sup> The pre-trial motion deadline in the Case Management Order was February 17, 2009.

summary judgment motions being decided upon lawyer articulations rather than facts of record the summary judgment rule specifically states: “the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion...”<sup>3</sup> The response must identify issues of fact arising from evidence of record controverting evidence presented in support of the motion or challenge the credibility of one or more witnesses testifying in support of the motion. In the alternative, the response must identify evidence of record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.<sup>4</sup>

Philadelphia Local Rule 10.35.2(a)(4) provides:

...The response to the motion shall be divided into paragraphs, numbered consecutively, corresponding to the numbered paragraphs of the motion for summary judgment. The response shall state whether each of the allegation is admitted or denied. No general denial is acceptable. The factual reasons for the denial or dispute must be specifically states and the “record” ...supporting the denial or dispute must be attached as an exhibit. A response may also include additional allegations demonstrating any genuine issue of material fact, in which event the responding party must reference and attach a copy of the “record”...which demonstrates the existence of a genuine issue of material fact.

In the case at bar, Sandler failed to respond to any of the numbered paragraphs of Nunez’s Motion for Summary Judgment. Accordingly, Sandler admitted the following facts:

1. Robert Nunez is the chief executive officer of F.I.V.A. Corp., a New York corporation registered to do business in Pennsylvania.
2. F.I.V.A. Corp. files its own corporate tax returns and maintains corporate minutes.
3. Robert Nunez files his own personal tax returns based on income received as an officer of F.I.V.A. (hereinafter “F.I.V.A.”).

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<sup>3</sup> Pa. R. Civ. P. 1035.3; Phila. L. R. 1035.2 (a)(4).

<sup>4</sup> Pa. R. Civ. P. 1035.3.

4. Plaintiff Robert Sandler sought to purchase two investment properties in Philadelphia, Pennsylvania in 2006 based on his projected income.
5. Robert Nunez, in his capacity as an officer of F.I.V.A. advised Plaintiff of two empty properties in North Philadelphia that might meet Plaintiff's criteria.
6. After a thorough inspection of the two properties with his real estate agent and cousin, Herbert Drucker, Plaintiff decided to buy the properties at Sheriff's sale.
7. Plaintiff then applied to Bryn Mawr Trust Bank for loans to pay the renovation and agreed that the Bank would pay F.I.V.A. for the construction work.
8. Plaintiff was given F.I.V.A. contracts for the renovation work but claims that he never signed them.
9. None of the F.I.V.A. contracts were signed by Robert Nunez.
10. Throughout the transactions and construction, Robert Nunez held himself out to Mr. Sandler and the public as an officer of F.I.V.A.
12. All checks paid to F.I.V.A. for the construction work were made out to F.I.V.A. Corp.
13. All renovations contracts offered to Plaintiff contained the name of F.I.V.A. Corp.
14. All payments of contractors for work at the Plaintiff's properties were on F.I.V.A. checks.
15. All of his e-mails identified Mr. Nunez as an officer of F.I.V.A.
16. All of Plaintiff's claims against Robert Nunez arise out F.I.V.A.'s renovation work at the two North Philadelphia properties.

After reviewing the parties' submission and as well as taking into consideration the admission of the foregoing facts by Sandler it was clear that no genuine issues of material facts existed. As such summary judgment was granted.

Based on the foregoing, this court's order dated May 20, 2009 should be affirmed.

**BY THE COURT,**

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**MARK I. BERNSTEIN, J.**

Date: September 22, 2009