

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term 2004

4 (Argued June 6, 2005

Decided October 12, 2005)

5
6 Docket No. 04-3237-cv

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9 NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND
10 RETIREMENT FUND, by its Trustees, John Bulgaro, Gary
11 Staring, Brian R. Masterson, Daniel W. Schmidt,
12 Michael S. Scalzo, Sr., Thomas K. Wotring, and J.
13 Dawson Cunningham,

14
15 Plaintiff-Counter-Defendant-Appellant,

16
17 -- v. --

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19 EXPRESS SERVICES, INC., and S & P TRUCKING, LLC,

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21 Defendants-Counter-Claimants-Appellees,

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23 DOREN AVENUE ASSOCIATES, INC.,

24
25 Defendant.

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30 B e f o r e : WALKER, Chief Judge, JACOBS and LEVAL,
31 Circuit Judges.

32 Appeal from a decision of the United States District
33 Court from the Northern District of New York (David N. Hurd,
34 Judge), granting defendants-appellees' motion for summary
35 judgment. Appellant claims that the district court erred
36 (1) in deciding itself, rather than submitting to the
37 arbitrator, whether defendants were "employers" under the
38 Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"),

1 29 U.S.C. § 1381 et seq., and (2) in determining that
2 defendants were not "employers" under the MPPAA.

3 AFFIRMED.

4 VINCENT M. DeBELLA, Paravati,
5 Karl, Green & DeBella, Utica,
6 NY, for Plaintiff-Appellant.

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8 RONALD L. KAHN, Ulmer & Berne
9 LLP, Cleveland, OH (Daniel J.
10 Moore, Harris Beach LLP,
11 Pittsford, NY, on the brief),
12 for Defendants-Appellees.

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15 JOHN M. WALKER, JR., Chief Judge:

16 Plaintiff-appellant New York State Teamsters Conference
17 Pension and Retirement Fund ("the Fund") appeals from a
18 judgment of the United States District Court for the
19 Northern District of New York (David N. Hurd, Judge),
20 granting defendants-appellees' motion for summary judgment.
21 N.Y. State Teamsters Conference Pension & Ret. Fund v. Doren
22 Ave. Assocs., Inc. ("Teamsters"), 321 F. Supp. 2d 435
23 (N.D.N.Y. 2004). The Fund claims that the district court
24 erred when it decided itself, rather than submitting to the
25 arbitrator, the issue of whether defendants were "employers"
26 within the meaning of the Multiemployer Pension Plan
27 Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 et seq.
28 The Fund argues in the alternative that even if the issue
29 was properly before the district court, the court erred in
30 concluding that defendants were not "employers" under the

1 MPPAA.

2 BACKGROUND

3 The Fund is a multiemployer benefit plan governed by
4 the Employee Retirement Income Security Act ("ERISA"), 29
5 U.S.C. § 1001 et seq., as amended by the MPPAA. Howard's
6 Express, Inc. ("Howard's"), which is not a party to this
7 litigation, was an employer participating in the Fund. That
8 participation ended when Howard's entered bankruptcy in
9 March 2003. As a result of the bankruptcy, Howard's was
10 deemed to have completely withdrawn from the plan, pursuant
11 to 29 U.S.C. § 1383, and to be subject, pursuant to 29
12 U.S.C. § 1381, to withdrawal liability in roughly "the
13 amount determined . . . to be the allocable amount of
14 unfunded vested benefits." 29 U.S.C. § 1381(b)(1); see also
15 Park South Hotel Corp. v. N.Y. Hotel Trades Council and
16 Hotel Ass'n of N.Y. City, 851 F.2d 578, 580 (2d Cir. 1988)
17 (defining unfunded vested benefits).

18 In determining Howard's withdrawal liability, which
19 totaled approximately \$12 million, but which Howard's was
20 presumably unable to pay, the Fund decided to pursue
21 defendants-appellees Express Services, LLC ("Express") and S
22 & P Trucking, LLP ("S&P"), as well as defendant Doren Avenue
23 Associates, Inc. ("Doren"), on the theory that they were
24 jointly liable for Howard's withdrawal liability. The Fund

1 came to this conclusion because the owners and managers of
2 these three entities were the same as, immediately related
3 to, or close associates of the owners and managers of
4 Howard's. Specifically, Philip Boncaro, Sr. ("Philip Sr.")
5 and Samuel Boncaro, Jr. ("Samuel Sr.") held all of the
6 voting shares in Howard's and most of the non-voting shares;
7 their sons, Philip Boncaro, Jr. ("Philip Jr.") and Samuel
8 Boncaro, III ("Samuel Jr.") owned 3.4% of the non-voting
9 shares. Teamsters, 321 F. Supp. 2d at 438. Express was
10 owned by all four of the Boncaros, as well as Edward Haddad.
11 Id. at 438-39. S&P was owned by Philip Jr. and Samuel Jr.¹
12 Id. at 439. Howard's, Express, and S&P were, during the
13 relevant period, engaged in related lines of business within
14 the freight transportation industry.²

15 The Fund sent each appellee a letter ("the liability
16 notice") on June 9, 2003, formally notifying them of their
17 liability, as required by 29 U.S.C. §§ 1382(2) and
18 1391(b)(1)(A), and demanding payment commencing August 9,

1 ¹Doren, which was owned by Philip Sr. and Samuel Sr., did
2 not answer the complaint, and the district court granted a
3 default judgment against it. Teamsters, 321 F. Supp. 2d at 437
4 n.1. Doren is not a party to this appeal.

1 ²Prior to filing for bankruptcy, Howard's was a freight
2 carrier in New York. Express was a freight brokerage in New
3 York, which matched loads of freight with carriers for pickup and
4 delivery. Teamsters, 321 F. Supp. 2d at 438. S&P was a cartage
5 company, which picked up and delivered cargo in eastern
6 Pennsylvania. Id. at 439.

1 2003. The letter stated that Express and S&P were
2 "responsible for [Howard's] withdrawal liability" because
3 they were "affiliated with" Howard's. When Express and S&P
4 failed to respond or to make payment, the Fund sent them a
5 second letter ("the default notice"), stating that they were
6 subject to default judgment if they did not cure their
7 failure to pay within sixty days.³

8 Soon after, appellees submitted a timely request for
9 review under 29 U.S.C. § 1399(b)(2), setting forth legal and
10 factual arguments as to why they were not responsible for
11 Howard's withdrawal liability. The Fund did not immediately
12 respond. Instead, believing that appellees were required to
13 make interim liability payments under the MPPAA's "pay-
14 first-question-later" regime, the Fund filed a collection
15 action in federal court in November 2003. See 29 U.S.C. §§
16 1399(c)(2) (requiring employers who receive a liability
17 notice to make interim payments, even if they dispute
18 liability pending review or arbitration); see also id. §
19 1401(d) (providing for interim payments notwithstanding
20 arbitration); Bowers v. Transportacion Maritima, Mexicana,

1 ³The MPPAA defines default as "the failure . . . to make,
2 when due, any payment under this section, if the failure is not
3 cured within 60 days after the employer receives written
4 notification from the plan sponsor of such failure." 29 U.S.C. §
5 1399(c)(5)(A). If an employer fails to pay after receiving a
6 default notice, the plan sponsor may require immediate payment of
7 the outstanding liability. Id. § 1399(c)(5).

1 S.A., 901 F.2d 258, 263 (2d Cir. 1990) (describing the pay-
2 first-question-later regime).

3 In its complaint, the Fund claimed that appellees were
4 "under common control" with Howard's, and thus could be held
5 responsible for its withdrawal liability, under 29 U.S.C. §
6 1301(b). Alternatively, the Fund alleged that appellees
7 were liable as alter egos of Howard's, a claim that the Fund
8 subsequently bolstered by asserting that appellees had
9 engaged in transactions to "evade or avoid withdrawal
10 liability," as defined by 29 U.S.C. § 1392(c).

11 Over the next few months, the parties filed a number of
12 motions and cross-motions, as set forth in the district
13 court's opinion. See Teamsters, 321 F. Supp. 2d at 443-44.
14 In January 2004, Express and S&P filed a timely demand for
15 arbitration. See 29 U.S.C. § 1401. Throughout the
16 district-court proceedings, the Fund maintained that whether
17 or not appellees were employers within the meaning of the
18 MPPAA was a matter for the arbitrator, not the court. See
19 id. at 441, 444. Pending arbitration, the Fund argued,
20 appellees were required to make interim payments under the
21 MPPAA's pay-first-question-later regime. Id. at 440-41. In
22 response to appellees' motion for a preliminary injunction
23 to halt the collection action, the Fund cross-moved for
24 summary judgment, seeking an order directing appellees to

1 make the demanded interim payments pending arbitration. Id.
2 at 437. The Fund's summary judgment motion was made without
3 the benefit of discovery on the merits. Id. at 446.
4 Express and S&P, after some procedural missteps, see id. at
5 443-44, eventually took the position that employer status
6 was a matter for the court, notwithstanding MPPAA's
7 arbitration provisions, id. at 441, and cross-moved for
8 summary judgment on the employer-status issue, id. at 444.

9 The district court agreed with Express and S&P. It
10 concluded first that employer status was a matter for the
11 court, relying primarily on this court's decision in Bowers.
12 Id. at 441-42. It then proceeded to the merits and found
13 that the Fund had failed to raise a triable issue of
14 material fact with respect to either its common-control or
15 its alter-ego claims. Id. at 444-51. It therefore granted
16 appellees' cross-motion for summary judgment and terminated
17 the pending arbitration proceedings. Id. at 451.

18 This appeal followed.

19 DISCUSSION

20 The Fund argues (1) that the district court erred in
21 deciding the employer-status question rather than submitting
22 it to the arbitrator, and (2) that even if the district
23 court correctly assumed jurisdiction over the employer-
24 status question, it erred on the merits. We review the

1 district court's grant of summary judgment de novo,
2 construing evidence in the light most favorable to the non-
3 moving party. E.g., Tenenbaum v. Williams, 193 F.3d 581,
4 593 (2d Cir. 1999). Summary judgment is appropriate where
5 "there is no genuine issue as to any material fact," Fed. R.
6 Civ. P. 56(c), and where, accordingly, "the record taken as
7 a whole could not lead a rational trier of fact to find for
8 the nonmoving party," Matsushita Elec. Indus. Co. v. Zenith
9 Radio Corp., 475 U.S. 574, 587 (1986).

10 I. Employer-Status Determination

11 The primary issue before us is whether the district
12 court erred in deciding itself, rather than submitting to
13 arbitration, the issue of appellees' employer status under
14 the MPPAA. The MPPAA provides that "[a]ny dispute between
15 an employer and the plan sponsor of a multiemployer plan
16 concerning a determination made under sections 1381 through
17 1399 of this title shall be resolved through arbitration."
18 29 U.S.C. § 1401(a). It also requires employers to make
19 interim payments pending arbitration of disputes arising
20 under the enumerated sections. Id. §§ 1399(c)(2), 1401(d).
21 Relying on these provisions, the Fund contends (1) that all
22 disputes over withdrawal liability – even disputes over
23 whether a defendant is an "employer" subject to withdrawal
24 liability – must be arbitrated; and (2) that pending

1 arbitration of the employer-status question, the defendant
2 must pay. Appellees, quoting the district court, assert
3 that subjecting employer-status determinations to
4 arbitration and requiring defendant employers to make
5 interim payments would allow "a maliciously motivated Fund
6 [to] systematically bankrupt entire groups of companies, on
7 no other basis than, for example, a history of not hiring
8 union workers." Teamsters, 321 F. Supp. 2d at 443.

9 Fortunately, the answer to this dispute is clear. In
10 Bowers v. Transportacion Maritima Mexicana, S.A., we held
11 that "[t]he issue whether [an entity] was an 'employer'
12 within the meaning of the MPPAA is properly for the courts,
13 not an arbitrator, to determine." 901 F.2d at 261. In
14 Bowers, the defendant had claimed that it was not an
15 "employer," and thus was not subject to withdrawal
16 liability, because it was not a signatory to the agreement
17 establishing liability to the fund. Id. at 260, 262. We
18 held that the defendant was nevertheless subject to
19 withdrawal liability because the defendant was an
20 "employer," despite being a non-signatory. Id. at 261-62.
21 In doing so, we observed that the MPPAA prescribes
22 arbitration only for disputes "'between an employer and the
23 plan sponsor.'" Id. at 261 (quoting 29 U.S.C.
24 § 1401(a)(1)). Accordingly, we held that employer status is

1 a "threshold legal issue" requiring "judicial resolution,"
2 since an entity that is not an employer cannot, under the
3 MPPAA, be required to arbitrate. Id. at 261; see also Mason
4 & Dixon Tank Lines, Inc. v. Cent. States, Southeast &
5 Southwest Areas Pension Fund, 852 F.2d 156, 167 (6th Cir.
6 1988) ("Since only an 'employer' is required to arbitrate
7 [under § 1401(a)(1)], the district court may address this
8 threshold question before arbitration.").

9 Despite Bowers's clear holding, however, the Fund
10 asserts that employer status is for the arbitrator, citing
11 cases from other circuits that it claims support its
12 position.⁴ We disagree and see no conflict between Bowers
13 and the decisions of other courts. Accordingly, we take
14 this opportunity to clarify the proper forum for employer-
15 status determinations under the MPPAA.

16 As the district court pointed out, see Teamsters, 321
17 F. Supp. 2d at 442, a number of courts have drawn a
18 distinction between disputes over (1) whether the defendant

1 ⁴The Fund also unconvincingly argues that Bowers is
2 distinguishable and therefore inapplicable. Bowers, of course,
3 concerned different facts: The defendant in Bowers asserted that
4 it was not an employer under the MPPAA because it was not a
5 signatory to an agreement with a multiemployer benefit plan, 901
6 F.2d at 260, 262, whereas Express and S&P claim they are not
7 employers because they are not alter egos of, or under common
8 control with, Howard's. These factual distinctions, however, do
9 not alter the nature of the dispute, which concerns the
10 appropriate forum for employer-status determinations. The legal
11 rule that Bowers announced therefore applies here.

1 was ever an employer obligated under the MPPAA to make
2 payments to the plaintiff pension fund, and (2) whether the
3 defendant ceased to have that obligation before the payments
4 in question became due. Courts addressing this distinction
5 have uniformly held that the former question is for the
6 court, while the latter is for the arbitrator. See, e.g.,
7 Galgay v. Beaverbrook Coal Co., 105 F.3d 137, 141 (3d Cir.
8 1997); Rheem Mfg. Co. v. Cent. States Southeast & Southwest
9 Areas Pension Fund, 63 F.3d 703, 705-06 & n.3 (8th Cir.
10 1995); Doherty v. Teamsters Pension Trust Fund of Phila. &
11 Vicinity, 16 F.3d 1386, 1390 (3d Cir. 1994); Teamsters Joint
12 Council No. 83 v. Centra, Inc., 947 F.2d 115, 122 (4th Cir.
13 1991); Mason & Dixon Tank Lines, 852 F.2d at 167.

14 The Seventh Circuit has aptly framed the difference
15 between the two types of inquiries:

16 [T]he question of whether one remains an
17 employer as of a withdrawal date is not
18 identical to the question of whether one ever
19 became an employer for MPPAA purposes. The
20 former question is an arbitrator's issue because
21 its resolution hinges upon applying the MPPAA
22 provisions concerning employer withdrawals
23 specifically assigned by Congress to the
24 arbitrator's purview. The latter question is
25 one for a court because its resolution decides
26 the arbitrator's authority over a dispute, but
27 it is not the question truly at contest here.
28 The factual controversy here turns more upon
29 [defendant's] continued employer status, and not
30 upon its "employer" status per se. This
31 continued employer status issue is proper for
32 arbitrator determination.
33

1 Banner Indus., Inc. v. Cent. States, Southeast & Southwest
2 Areas Pension Fund, 875 F.2d 1285, 1291 (7th Cir. 1989)
3 (internal citations omitted; emphasis in original). We find
4 this reasoning persuasive and therefore adopt the
5 distinction between determinations of employer status per
6 se, which are for the court, and determinations of continued
7 employer status, which are for the arbitrator. Thus, we
8 read Bowers, which holds that employer-status determinations
9 are for the court, as limited to cases involving disputes
10 over employer status per se, i.e., disputes as to whether
11 the company was ever an employer obligated to make payments
12 to the plaintiff fund.⁵

13 Having clarified Bowers's scope, we easily conclude
14 that it applies in this case. First, Express and S&P deny
15 that they ever became employers for MPPAA purposes; they
16 challenge the Fund's assertion that they were ever alter
17 egos of, or under common control with, Howard's. These
18 questions concern employer status per se. See, e.g.,

1 ⁵The defendant in Bowers tried to argue that it had never
2 become an employer because it had never signed the agreement
3 providing for pension benefits. Bowers, 901 F.2d at 261-62. In
4 other words, the defendant raised a per-se employer status
5 argument. The court rejected the argument, finding that the
6 defendant, although a non-signatory, had nevertheless become an
7 employer for MPPAA purposes by, inter alia, making payments that
8 went to longshoremen's pension benefits. Id. We thus do no
9 violence to Bowers by reading it as limited to per-se employer
10 status disputes, since that case itself concerned such a dispute.

1 Doherty, 16 F.3d at 1390 (“[W]hether an individual has ever
2 had control of a contributing company as an alter ego is a
3 question for the courts to decide.” (first emphasis in
4 original; second emphasis added)). Since there is no
5 dispute that appellees have never conceded that they were
6 previously employers under the statute, both Bowers and our
7 decision today require that the court, not the arbitrator,
8 resolve that question.

9 In addition, arbitration would be inappropriate in this
10 case because the parties’ dispute does not fall under any of
11 the provisions enumerated in § 1401(a).⁶ See 29 U.S.C. §

1 ⁶The Fund has alleged that appellees engaged in transactions
2 to “evade or avoid withdrawal liability,” pursuant to 29 U.S.C. §
3 1392(c),” which is an enumerated provision. Section 1401(a)
4 requires that such allegations be arbitrated when the defendant
5 is an “employer.” Indeed, evade-and-avoid allegations are often
6 at the root of disputes over continued-employer status. See,
7 e.g., Flying Tiger Line v. Teamsters Pension Trust Fund of Phila.
8 & Vicinity, 830 F.2d 1241, 1247 (3d Cir. 1987); Teamsters Joint
9 Council No. 83, 947 F.2d at 123; Banner Indus., 875 F.2d at 1292-
10 93. Here, however, where defendants’ status is unclear, any
11 dispute over evade-or-avoid allegations falls outside of
12 § 1401(a)’s scope, even though it concerns an enumerated
13 provision. Thus, appellees cannot be required to arbitrate the
14 Fund’s evade-or-avoid allegations.

15 We note that a fund that believes a non-employer entity has
16 engaged in a transaction to evade-or-avoid liability, perhaps in
17 conjunction with an employer, is not without recourse. Although
18 a non-employer such as Express or S&P cannot be required to
19 arbitrate evade-or-avoid claims under § 1401(a), or to make
20 interim payments, see 29 U.S.C. § 1399(c)(2) (applying only to
21 employers), it can be sued for engaging in evade-or-avoid
22 transactions, see IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d
23 1049, 1056 (2d Cir. 1993) (finding basis for such suits in 29
24 U.S.C. §§ 1392 and 1451); see also Bd. of Trs., Sheet Metal
25 Workers’ Nat’l Pension Fund v. Ill. Range, Inc., 186 F.R.D. 498,

1 1401(a) (imposing arbitration requirement only for disputes
2 between employers and funds under sections 1381 through
3 1399). At issue in this case are the Fund's allegations
4 that appellees are under common control with, and are alter
5 egos of, Howard's. See Teamsters, 321 F. Supp. 2d at 444.
6 Common-control liability is established in § 1301, which
7 does not fall within § 1401(a)'s enumerated range, while
8 alter-ego liability does not arise from any particular
9 statutory provision at all, but rather from a general
10 federal policy of piercing the corporate veil when necessary
11 to protect employee benefits. See Bd. of Trs. of Teamsters
12 Local 863 Pension Fund v. Foodtown, Inc., 296 F.3d 164, 169
13 (3d Cir. 2002); Lumpkin v. Envirodyne Indus., Inc., 933 F.2d
14 449, 460-61 (7th Cir. 1991). Thus, § 1401(a) cannot apply
15 for the additional reason that this case does not involve a
16 dispute over a determination under one of the provisions
17 enumerated in that section.

18 In sum, the district court did not err when it refused
19 to submit the employer-status question in this case to the

1 502 (N.D. Ill. 1999); Connors v. Marontha Coal Co., 670 F. Supp.
2 45, 46-47 (D.D.C. 1987). The district court was therefore
3 mistaken when it stated that an evade-or-avoid lawsuit is "more
4 properly [brought] against . . . an admitted 'employer.'" Teamsters,
5 321 F. Supp. 2d at 446. The Fund, however, never
6 raised an independent evade-or-avoid claim, instead alleging
7 evade-or-avoid conduct by appellees only in support of its alter-
8 ego claim. See id. Herrman is therefore inapplicable.

1 arbitrator. Because the parties disputed whether Express
2 and S&P had ever become employers under the MPPAA and
3 because their dispute did not fall under provisions
4 enumerated in § 1401(a), the arbitration requirement of that
5 provision did not apply.

6 II. The Merits

7 The Fund argues in the alternative that, even if
8 employer status was a question for the district court, the
9 district court erred on the merits. It asks us to remand
10 the case to the district court, requesting in particular the
11 opportunity to conduct further discovery. We decline the
12 invitation.

13 The Fund committed two serious procedural errors.
14 First, because it failed to conduct discovery on the merits
15 before responding to the appellees' cross-motion for summary
16 judgment, the Fund was unable to dispute effectively the
17 appellees' statement of uncontested facts submitted in
18 support of their motion. As we have previously observed, a
19 party's failure to seek discovery under Rule 56(f) before
20 responding to a summary judgment motion is "itself
21 sufficient grounds to reject a claim that the opportunity
22 for discovery was inadequate." Williams v. R.H. Donnelley,
23 Corp., 368 F.3d 123, 126 n.1 (2d Cir. 2004) (quoting
24 Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir.

1 1994)). The Fund essentially wagered that it would not need
2 to present evidence demonstrating the existence of a genuine
3 issue of material fact on the merits. See Teamsters, 321 F.
4 Supp. 2d at 440; cf. Lundeen v. Cordner, 356 F.2d 169, 171
5 (8th Cir. 1966) (per curiam) (non-movant who had numerous
6 opportunities to conduct discovery but did not do so could
7 have foreseen "that her failure to present any concrete
8 facts might cause her to suffer a summary judgment"). We
9 see no reason to remand the case because the Fund
10 misunderstood the rule of law on which it relied and lost
11 its bet. See United States v. Antioch Found., 822 F.2d 693,
12 697 (7th Cir. 1987) (refusing to remand where appellant had
13 "failed to take advantage of the opportunities it had to
14 conduct discovery").

15 The second procedural error committed by the Fund was
16 its failure to comply with the local rules governing summary
17 judgment submissions in the Northern District of New York.
18 Specifically, the Fund did not follow Local Rule 7.1(a)(3).
19 That rule requires (1) that the nonmoving party in summary
20 judgment proceedings "submit a mirror response to the moving
21 party's statement of material facts, containing either an
22 admission or denial of each allegation set forth by the
23 moving party," Teamsters, 321 F. Supp. 2d at 438, and (2)
24 that "[e]ach denial . . . set forth a specific citation to

1 the record where the factual issue arises,” Local Rule
2 7.1(a)(3). With respect to appellees’ cross-motion for
3 summary judgment on the merits, the Fund was the nonmoving
4 party. In its Rule 7.1(a)(3) response, the Fund offered
5 mostly conclusory denials of appellees’ factual assertions
6 and failed to include any record citations. Teamsters, 321
7 F. Supp. 2d at 438. The district court, applying Rule
8 7.1(a)(3) strictly, reasonably deemed appellees’ statement
9 of facts to be admitted as to the common-control claim.

10 We have previously recognized that district courts have
11 the authority to institute local rules governing summary
12 judgment submissions, see Amnesty Am. v. Town of W.
13 Hartford, 288 F.3d 467, 471 (2d Cir. 2002); see also
14 Moore’s Federal Practice § 56.10[5] (3d ed. 2005)
15 (discussing the practice generally), and have affirmed
16 summary judgment rulings that enforce such rules, see, e.g.,
17 Millus v. D’Angelo, 224 F.3d 137, 138 (2d Cir. 2000). Rules
18 governing summary judgment practice are essential tools for
19 district courts, permitting them to efficiently decide
20 summary judgment motions by relieving them of the onerous
21 task of “hunt[ing] through voluminous records without
22 guidance from the parties.” Holtz v. Rockefeller & Co., 258
23 F.3d 62, 74 (2d Cir. 2001); see also Bordelon v. Chi. Sch.
24 Reform Bd. of Trs., 233 F.3d 524, 527 (7th Cir. 2000)

1 (noting that a similar rule serves to “assist the court by
2 organizing the evidence, identifying undisputed facts, and
3 demonstrating precisely how each side proposed to prove a
4 disputed fact with admissible evidence” (internal quotation
5 marks omitted)); 11 Moore’s Federal Practice § 56.10[5]
6 (noting that rules like Rule 7.1(a)(3) are enforced in part
7 “to facilitate decision on summary judgment motions”).

8 Reliance on a party’s statement of undisputed facts may
9 not be warranted where those facts are unsupported by the
10 record. See, e.g., Holtz, 258 F.3d at 73-74 (refusing to
11 rely solely on party’s undisputed statement of facts where
12 the cited materials did not support the factual assertions).
13 But such concerns are not present here. The Rule 7.1(a)(3)
14 statement submitted by appellees was fully supported by the
15 accompanying affidavits. Furthermore, the district court’s
16 strict application of Rule 7.1(a)(3) did not prejudice the
17 Fund as to its alter-ego claim (which, as we will explain,
18 is the only claim seriously pursued on appeal); with respect
19 to that claim, the district court declined to rely solely on
20 the parties’ Rule 7.1(a)(3) statements, and instead
21 “scour[ed] . . . the record” independently. Teamsters, 321
22 F. Supp. 2d at 439.

23 We highlight these procedural failings because they
24 explain the paucity of evidence presented to the district

1 court. Whether or not full discovery might have produced a
2 different record, the district court did not err in granting
3 appellees' motion for summary judgment on the sparse record
4 before it. As the district court's methodical analysis
5 demonstrated, under the relevant Treasury regulations,
6 appellees were not under common control with Howard's. Id.
7 at 445. The Fund does not dispute this conclusion on
8 appeal, and only half-heartedly renews its common-control
9 claim by raising a constructive-ownership argument for the
10 first time in its reply brief. We need not consider an
11 argument raised for the first time in a reply brief, see
12 Fed. R. App. P. 28(a); Booking v. Gen. Star Mgmt. Co., 254
13 F.3d 414, 418 (2d Cir. 2001), and, in any event, the Fund's
14 constructive-ownership argument is without merit. The Fund
15 relies on 26 U.S.C. § 1563(e)(1), which defines constructive
16 ownership as, inter alia, "an option to acquire stock."
17 Because Samuel Sr. and Philip Sr. had a right of first
18 refusal as to Express and S&P, the Fund asserts that they
19 were constructive owners of those entities. A right of
20 first refusal, however, is not the same thing as a stock
21 option, but is contingent upon a condition that may never
22 occur. The holder of a stock option, however, may exercise
23 that option at will. See, e.g., Fru-Con Constr. Corp. v.
24 KFX, Inc., 153 F.3d 1150, 1157-58 (10th Cir. 1998); Pincus

1 v. Pabst Brewing Co., 893 F.2d 1544, 1549 (7th Cir. 1990);
2 St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner &
3 Smith Inc., 562 F.2d 1040, 1046 (8th Cir. 1977). Because
4 § 1563(e) (1) makes no reference to rights of first refusal,
5 the Fund's argument fails.

6 Just as unconvincing are the Fund's alter-ego claims.
7 Our inquiry on alter ego status "focuses on commonality of
8 (i) management, (ii) business purpose, (iii) operations,
9 (iv) equipment, (v) customers, and (vi) supervision and
10 ownership." Newspaper Guild of N.Y. v. NLRB, 261 F.3d 291,
11 294 (2d Cir. 2001); see also Local One Amalgamated
12 Lithographers of Am. v. Stearns & Beale, Inc., 812 F.2d 763,
13 772 (2d Cir. 1987).

14 We agree with the district court that the eighteen
15 allegations raised by the Fund in its memorandum of law
16 below, and recited verbatim in its appellate brief, are
17 insufficient to demonstrate the existence of a triable issue
18 of material fact on the alter-ego question. See id. at 447-
19 51. Nothing in the record, for instance, suggests that
20 appellees shared the same customer base or equipment as
21 Howard's. Nor does the Fund dispute appellees' assertion
22 that they and Howard's were engaged in different, though
23 related, lines of business within the freight transportation
24 industry. Appellees' involvement in different lines of

1 business from Howard's, and from each other, see Teamsters,
2 321 F. Supp. 2d at 438-39, weighs against finding a shared
3 business purpose, even if management personnel overlapped.
4 See Newspaper Guild of N.Y., 261 F.3d at 301-02 (finding
5 that two subsidiary business of single newspaper did not
6 share same business purpose, even though they had the same
7 management, because the businesses had different strategic
8 and financial goals); Stardyne, Inc., 41 F.3d at 151 ("The
9 main focus of the [alter-ego] inquiry is to determine
10 whether the two employers are the same business in the same
11 market."). Nor are the Fund's allegations of a common
12 mailing address and shared management sufficient by
13 themselves to raise a triable issue of fact; where entities
14 are engaged in different lines of business, which serve
15 different business purposes, common space and shared
16 management cannot alone create alter-ego status. See Lihli
17 Fashions Corp., 80 F.3d at 749. In the end, the Fund has
18 failed to persuade us that it has a viable claim for alter-
19 ego liability. Summary judgment for appellees was therefore
20 proper.

21 We have carefully considered all of the Fund's
22 remaining contentions and find them to be without merit.

23 CONCLUSION

24 For the foregoing reasons, the judgment of the district
25 court is AFFIRMED.