

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2007

4 (Argued: May 28, 2008

Decided: November 3, 2008)

5 Docket No. 06-5694-cv

6 -----
7 JANKI BAI SAHU, SHANTI BAI, MUNEE BI, QAMAR SULTAN, FIRDAUS BI,
8 NUSRAT JAHAN, PAPPU SINGH, JAMEELA BI, MEENU RAWAT, BANO BI,
9 MAKSOOD AHMED, BABU LAL, and KAVAL RAM,

10 Plaintiffs-Appellants,

11 - v. -

12 UNION CARBIDE CORPORATION, WARREN ANDERSON,

13 Defendants-Appellees.

14 -----
15 Before: KEARSE, CALABRESI, and SACK, Circuit Judges.

16 Appeal from a judgment of the United States District
17 Court for the Southern District of New York (John F. Keenan,
18 Judge) granting summary judgment in favor of defendants Union
19 Carbide Corporation and Warren Anderson on all the claims of the
20 plaintiffs related to water pollution allegedly caused by the
21 operations at a factory owned and operated by a former Union
22 Carbide subsidiary in Bhopal, India. With respect to the
23 plaintiffs' claims for injunctive relief and their theories of
24 liability other than their attempt to pierce the corporate veil
25 between Union Carbide and its subsidiary, the district court, sua

1 sponte, converted the defendants' motion to dismiss under Federal
2 Rule of Civil Procedure 12(b)(6) to one for summary judgment
3 under Federal Rule of Civil Procedure 56 and granted the motion.
4 We conclude that the district court did not give the plaintiffs
5 sufficient notice to allow them adequately to respond to the
6 converted summary judgment motion.

7 Vacated and Remanded.

8 RICHARD S. LEWIS, Cohen Milstein
9 Hausfeld & Toll, PLLC (Matthew K.
10 Handley, Reena Gambhir, of counsel),
11 Washington, DC, for Plaintiffs-
12 Appellants;

13 Curtis V. Trinko, New York, NY, for
14 Plaintiffs-Appellants;

15 H. Rajan Sharma, Edison, NJ, for
16 Plaintiffs-Appellants;

17
18 Richard Herz, Marco Simons, EarthRights
19 International, Washington, DC, for
20 Plaintiffs-Appellants;

21 Esther Berezofsky, Gerald Williams,
22 Williams Cuker Berezofsky, Cherry Hill,
23 NJ, for Plaintiffs-Appellants;

24 Neal A. DeYoung, Koskoff Koskoff &
25 Bieder, PC, Bridgeport, CT, for Amici
26 Curiae Members of Congress, in support
27 of Plaintiffs-Appellants;

28 WILLIAM A. KROHLEY, Kelley Drye & Warren
29 LLP (William C. Heck, of counsel), New
30 York, NY, for Defendants-Appellees.

31 SACK, Circuit Judge:

32 This appeal requires us to consider, at the threshold,
33 whether we may exercise appellate jurisdiction over both of the
34 district court's orders disposing of the plaintiffs' claims under

1 the circumstances presented even though the plaintiffs' notice of
2 appeal specifies only one order that appears to resolve only one
3 claim. We also consider the circumstances under which a district
4 court may, sua sponte, convert a motion to dismiss under Federal
5 Rule of Civil Procedure 12(b)(6) into a motion for summary
6 judgment under Federal Rule of Civil Procedure 56.

7 We conclude that we have jurisdiction to review all the
8 appellants' claims and that the district court erred in the
9 manner in which it converted the defendants' motion to dismiss
10 into a motion for summary judgment. We therefore vacate the
11 judgment of the district court and remand for further
12 proceedings.

13 **BACKGROUND**

14 On November 8, 2004, the plaintiffs-appellants, who are
15 residents or property owners in Bhopal, India, filed a complaint
16 in the United States District Court for the Southern District of
17 New York (John F. Keenan, Judge) seeking injunctive and monetary
18 relief under New York law for injuries allegedly suffered as a
19 result of water pollution. This pollution, they allege, was
20 caused by the operation of a pesticide plant owned and operated
21 by Union Carbide India Limited ("UCIL"). UCIL was at the time,
22 but is no longer, a subsidiary of defendant-appellee Union
23 Carbide Corporation ("Union Carbide"). The defendant-appellee
24 Warren Anderson was then Chief Executive Officer of Union
25 Carbide. UCIL is not a defendant.

1 Prior Litigation

2 The plaintiffs here were members of a putative class
3 that had previously sought to pursue a different lawsuit
4 involving the operation of the same Bhopal plant from which the
5 toxic chemical pollutants at issue here allegedly emanated. That
6 class asserted a variety of claims arising under, inter alia, the
7 Alien Tort Claims Act, 28 U.S.C. § 1350. Bano v. Union Carbide
8 Corp., No. 99 Civ. 11329(JFK), 2000 WL 1225789, at *5, 2000 U.S.
9 Dist. LEXIS 12326, at *14-15 (S.D.N.Y. Aug. 28, 2000). The Bano
10 plaintiffs' allegations centered around a disastrous leak of
11 toxic gas at the plant in 1984. Bano, 2000 WL 1225789, at *1,
12 2000 U.S. Dist LEXIS 12326, at *1-2. The district court
13 dismissed their claims because, it concluded, the plaintiffs
14 lacked standing to bring suit under India's Bhopal Gas Leak
15 (Processing of Claims) Act, and their claims were barred by a
16 settlement agreement between the government of India and Union
17 Carbide. Id. at *14, 2000 U.S. Dist LEXIS 12326, at *42-*43. On
18 appeal, we affirmed this part of the district court's decision,
19 but remanded for further consideration of the plaintiffs' common-
20 law tort claims. Bano v. Union Carbide Corp., 273 F.3d 120, 132-
21 33 (2d Cir. 2001).

22 On remand, the remaining claims were pursued by one
23 Haseena Bi, individually, and three organizations seeking to
24 represent the interests of other persons allegedly injured in the
25 disaster. See Bano v. Union Carbide Corp., No. 99 Civ.
26 11329(JFK), 2003 WL 1344884, at *2, 2003 U.S. Dist LEXIS 4097, at

1 *6-7 (S.D.N.Y. Mar. 18, 2003). The defendants moved to dismiss
2 those claims. See id. at *3, 2003 U.S. Dist LEXIS 4097, at *8.
3 The district court granted the defendants' motion, concluding
4 that 1) the plaintiffs' personal-injury claims were time-barred;
5 2) their property-damage claims were also time-barred; 3) the
6 plaintiff organizations lacked standing to pursue their damages
7 claims; 4) injunctive relief requiring remediation of
8 contaminated soil and groundwater was impracticable; and 5)
9 injunctive relief requesting medical monitoring would be
10 inequitable. See id. at *5-*6, *8-*9, 2003 U.S. Dist LEXIS 4097,
11 at *15-*18, *22-*24, *25-*27.

12 Bi and the organizations appealed. "[W]e affirm[ed]
13 the judgment of the district court except to the extent that it
14 dismissed [the individual plaintiff] Bi's claims for monetary and
15 injunctive relief for alleged injury to her property. As to
16 those claims, we vacate[d] the judgment and remand[ed] for
17 further proceedings, including consideration of whether those
18 claims may be pursued in a class action." Bano v. Union Carbide
19 Corp., 361 F.3d 696, 702 (2d Cir. 2004).

20 On remand, the plaintiffs sought class certification.
21 But the court interpreted their claims to seek the kind of on-
22 site remediation that had previously been rejected. It therefore
23 concluded that it could not "allow [additional class
24 representatives] to intervene in or to certify a class for a
25 claim that [had already been] dismissed." Bano v. Union Carbide
26 Corp., No. 99 Civ. 11329(JFK), 2005 WL 2464589, at *4, 2005 U.S.

1 Dist. LEXIS 22871, at *11 (S.D.N.Y. Oct. 5, 2005). It further
2 decided that "[e]ven if [that] claim remained in the case, the
3 putative class would not be certified because it fails Rule 23's
4 requirements." Id. "Finally," the court concluded, inasmuch as
5 the individual plaintiff, Bi, "owns no property, [the plaintiffs]
6 can bring no viable claim." Id.

7 We affirmed by summary order. Bano v. Union Carbide
8 Corp., 198 F. App'x 32 (2d Cir. 2006).

9 District Court Proceedings

10 This lawsuit was filed by "plaintiffs whose personal
11 injury claims [unlike those in Bano] are not time-barred as they
12 were discovered within the three-year statute of limitations
13 period." Sahu v. Union Carbide Corp., 418 F. Supp. 2d 407, 409
14 n.3 (S.D.N.Y. 2005) ("Sahu I"). The plaintiffs also allege that
15 they "own or have a beneficial interest in property and/or water
16 wells in the affected communities." Compl. 1-2.

17 According to their complaint, the plaintiffs have
18 suffered a variety of ailments caused by "the highly carcinogenic
19 chemicals and toxic pollutants in the drinking water supply
20 emanating from the premises of the former UCIL plant." See,
21 e.g., id. ¶ 41. Although the defendants did not directly own or
22 operate the factory, the plaintiffs contend that the defendants
23 may nonetheless be held liable for the plaintiffs' injuries under
24 any of four theories of relief: 1) that "Union Carbide was a
25 direct participant and joint tortfeasor in the activities and
26 decisions that resulted in the environmental pollution at issue";

1 2) that "Union Carbide conspired with and/or worked in concert
2 with UCIL to cause, exacerbate and/or conceal the pollution
3 problem in Bhopal"; 3) that Union Carbide "exercised sufficient
4 actual control over UCIL, its Indian affiliate, that the latter
5 was merely the general or specific agent . . . of the former"; or
6 4) that UCIL acted as Union Carbide's alter-ego, justifying the
7 piercing of the corporate veil between Union Carbide and UCIL.
8 Id. ¶ 60.

9 As factual support for these claims, the plaintiffs
10 allege that Union Carbide "made the decision to 'backwards-
11 integrate' UCIL from a mere formulation facility for pesticides
12 into a manufacturing plant." Id. ¶ 73. They assert that it did
13 so because the law of India prohibited foreign ownership of more
14 than forty percent of local industries unless the foreign owners
15 helped transfer technology to the local subsidiary. Id. ¶¶ 71-
16 72. In implementing this plan, Union Carbide transferred
17 "improper, inadequate and unproven technology . . . to UCIL for a
18 manufacturing process involving highly toxic and volatile
19 chemical agents." Id. ¶ 78.

20 The plaintiffs also contend that Union Carbide was
21 aware of the danger of water pollution and other environmental
22 damage yet failed to take adequate precautions to prevent it.
23 Prior to the Bhopal plant's catastrophic gas leak in 1984, they
24 say, "Union Carbide did not take any mitigating steps, measures
25 or actions to control, limit or otherwise remediate the problems
26 that would eventually lead, as the Company's own engineers had

1 advised, to a massive environmental pollution problem with the
2 subsurface water supply." Id. ¶ 93. Moreover, to the extent
3 these acts or omissions are attributed to UCIL, Union Carbide
4 "ratified, approved and/or acquiesced in that failure to act
5 subsequently." Id.

6 Finally, the plaintiffs fault Union Carbide's response
7 to the 1984 disaster. They contend that the cleanup effort
8 undertaken by the company was only "a site-based project,
9 undertaken at minimal expense, which would conceal both the
10 seriousness of on-site pollution and the potential risks of off-
11 site contamination, while enabling Union Carbide to recover money
12 from the sale of its remaining assets at UCIL." Id. ¶ 95.

13 In support of their allegations in the complaint, the
14 plaintiffs refer to, paraphrase, and quote from -- but do not
15 include or append -- documents obtained in the course of the Bano
16 litigation and otherwise. See, e.g., id. ¶ 64 (referring to
17 Union Carbide corporate charter and policy manual); id. ¶ 68
18 (referring to Union Carbide internal manuals); id. ¶ 76
19 (referring to 1973 Capital Budget Proposal); id. ¶ 85 (referring
20 to Union Carbide Engineering Department document, dated July 21,
21 1972); id. ¶ 91 (referring to environmental survey conducted by
22 Arthur D. Little, Inc. and India's National Environmental
23 Engineering Research Institute); id. ¶ 109 (referring to report
24 entitled "Presence of Toxic Ingredients in Soil/Water Samples
25 Inside Plant Premises"); id. ¶ 111 (referring to Union Carbide
26 "Business Confidential" document entitled "Response to

1 Allegations of Environmental Contamination Around the Bhopal
2 Plant Site," dated May 22, 1990).

3 By motion dated May 18, 2005, the defendants applied to
4 the district court

5 for an order pursuant to Rules 12(b)(6) and
6 56 of the Federal Rules of Civil Procedure,
7 dismissing the complaint and granting summary
8 judgment, on the grounds: (1) that the
9 documentary evidence referred to or which is
10 integral to the complaint, and thus is part
11 of the complaint, flatly contradicts the
12 conclusory allegations in the complaint that
13 [Union Carbide can be held liable as a joint
14 tortfeasor, or because it conspired or acted
15 in concert with UCIL,] and that all claims
16 against defendants based on those alleged
17 grounds should accordingly be dismissed; (2)
18 that there is no equitable basis for
19 plaintiffs to seek to pierce the veil of
20 UCIL, now Eveready Industries India Ltd.,
21 which operated the Bhopal plant which is the
22 subject of this action, and which is an
23 existing and viable corporation in India, to
24 impose liability on Union Carbide as a former
25 shareholder of UCIL; and (3) that the
26 plaintiffs' claims for injunctive relief and
27 medical monitoring are infeasible and
28 otherwise inappropriate.

29 Notice of Motion, Sahu v. Union Carbide Corp., No. 04-CV-
30 08825(JFK) (S.D.N.Y. dated May 18, 2005; filed Aug. 5, 2005).

31 The defendants included with their motion an affidavit of H.
32 Rajan Sharma, a New Jersey-based lawyer who is among counsel for
33 the plaintiffs in this case. The affidavit had been submitted in
34 the earlier Bano litigation. It included ninety-seven exhibits
35 comprising thousands of pages of documentary evidence. See
36 Affidavit of H. Rajan Sharma in Opposition to Defendants' Motion
37 for Dismissal and/or for Summary Judgment, Bano v. Union Carbide
38 Corp., No. 99 Civ. 11329(JFK) (S.D.N.Y. Sept. 20, 2002) ("Sharma

1 Affidavit"). All the documents referred to in the complaint were
2 attached to the Sharma Affidavit as exhibits. See id.

3 The plaintiffs, in opposition to the defendants'
4 motion, argued that it sought summary judgment only as to the
5 plaintiffs' attempt to pierce the corporate veil between Union
6 Carbide and UCIL, whereas the defendants' motion as to the non-
7 veil-piercing claims could be decided on the pleadings alone.
8 They argued that only the veil-piercing claim was related to
9 facts alleged by the defendants beyond the scope of the
10 plaintiffs' pleadings. See Memorandum of Law in Opposition to
11 Motion To Dismiss and/or for Summary Judgment 2, Sahu v. Union
12 Carbide Corp., No. 04 Civ. 8825(JFK) (S.D.N.Y. dated July 6,
13 2005; filed Aug. 9, 2005) ("Memorandum in Opposition"); see also
14 Statement of Defendants Pursuant to Rule 56.1 of the Civil Rules
15 of This Court, Sahu v. Union Carbide Corp., No. 04 Civ. 8825(JFK)
16 (S.D.N.Y. dated May 17, 2005; filed Aug. 5, 2005); Sahu v. Union
17 Carbide Corp., 475 F.3d 465, 468 (2d Cir. 2007) (per curiam)
18 ("Sahu II") ("In August 2005, defendants moved for summary
19 judgment on the corporate veil-piercing claim and to dismiss the
20 rest of the claims under Rule 12(b)(6) of the Federal Rules of
21 Civil Procedure."). They notified the court, if only by
22 footnote, that "if the Court should decide to convert Points I,
23 II and IV [arguments based on claims other than veil-piercing] to
24 motions for summary judgment, Plaintiffs respectfully reserve
25 their right to submit a motion under Rule 56(f) for additional

1 discovery needed to effectively oppose Points I, II and IV on the
2 merits." Memorandum in Opposition 3 n.3.

3 Without entertaining further motions by the parties,
4 the district court issued an order dated December 1, 2005,
5 dismissing all the claims of the plaintiffs except the veil-
6 piercing claim. See Sahu I, 418 F. Supp. 2d at 416. Before
7 addressing the merits of these claims, the court noted that "both
8 parties [had] submitted [to the court] matters outside the
9 pleadings, which the Court considered, triggering mandatory
10 conversion to summary judgment." Id. at 411. Although the court
11 acknowledged that the plaintiffs, being the non-moving parties,
12 required notice of this conversion, it concluded that the
13 defendants' "submission of exhibits, affidavits, and the like
14 g[ave] the non-moving party notice of possible conversion." Id.
15 at 410. Therefore, "[to] the extent any part of Defendants'
16 motion [was] a Rule 12(b)(6) motion to dismiss, it [was]
17 converted to a Rule 56 motion for summary judgment." Id. at 411.
18 Based on the documents to which the court referred, it granted
19 the defendants' converted motion for summary judgment as to all
20 the claims of the plaintiffs except the veil-piercing claim. Id.
21 at 412-15. It then granted a stay of that order to permit the
22 plaintiffs to engage in additional discovery as to the veil-
23 piercing claim. Id. at 415-16.

24 On December 22, 2005, the plaintiffs filed a notice of
25 appeal. We heard argument on November 15, 2006. The district
26 court had not at that time yet decided the remaining veil-

1 piercing claim. On January 17, 2007, we dismissed the appeal
2 because "the plaintiffs ha[d] failed to show that the denial of
3 the permanent injunctive relief . . . needs immediate review to
4 be effectively challenged" and because we heard the appeal before
5 final judgment had been entered by the district court. Sahu II,
6 475 F.3d at 468.

7 On November 21, 2006, however, after we had heard oral
8 argument but before we filed our Sahu II decision, the district
9 court issued an opinion and order dated November 20, 2006,
10 dismissing the veil-piercing claim and denying the plaintiffs'
11 request for additional time for discovery. Sahu v. Union Carbide
12 Corp., No. 04 Civ. 8825(JFK), 2006 WL 3377577, 2006 U.S. Dist.
13 LEXIS 84475 (S.D.N.Y. Nov. 20, 2006) ("Sahu III"). The court
14 concluded:

15 For the reasons set forth above, defendants'
16 motion for summary judgment dismissing
17 plaintiffs' claims is granted. This case is
18 closed, and the Court directs the Clerk to
19 remove the case from the Court's docket.

20 Id. at *11, 2006 U.S. Dist. LEXIS 84475, at *32.

21 On the day following the entry of that order, November
22 22, 2006, the clerk of the district court entered the final
23 judgment from which appeal is sought:

24 ORDERED, ADJUDGED AND DECREED: That for the
25 reasons stated in the Court's Opinion and
26 Order dated November 20, 2006, defendants'
27 motion for summary judgment dismissing
28 plaintiffs' claims is granted; accordingly
29 the case is closed.

1 Judgment, Sahu v. Union Carbide Corp., No. 04 Civ. 8825 (JFK)
2 (S.D.N.Y. Nov. 22, 2006). The district court's decisions as to
3 all the claims of the plaintiffs were thus then ripe for appeal.

4 Also prior to the filing of our 2007 decision in Sahu
5 II, on December 15, 2006, the plaintiffs filed a notice of appeal
6 in the district court stating their intention to seek review of
7 "the Opinion and Order of U.S. District Judge John F. Keenan of
8 the Southern District of New York entered in this action on the
9 21st day of November, 2006." Notice of Appeal, Sahu v. Union
10 Carbide Corp., No. 04 Civ. 8825 (JFK) (S.D.N.Y. Dec. 15, 2006).
11 The plaintiffs did not refer specifically to the document that
12 purported to be the final judgment.

13 The notice was then filed in this Court, as was a
14 corresponding "Civil Appeal Pre-Argument Statement (Form C)."
15 These documents both stated that the plaintiffs appealed from the
16 November 21, 2006, order of the district court dismissing the
17 veil-piercing claim and denying the plaintiffs' request for
18 additional time for discovery rather than the order awarding
19 final judgment filed November 22, 2006. In the Form C, but not
20 the notice of appeal, the plaintiffs also referred to the appeal
21 from the December 1, 2001, district court order granting summary
22 judgment on the non-veil-piercing claims, and noted that that
23 appeal -- which would result in our decision in Sahu II a month
24 or two later -- was then pending in this Court. See Appellants'
25 Post-Argument Letter Brief dated June 11, 2008, Ex. 2.

1 **DISCUSSION**

2 I. Appellate Jurisdiction

3 We must first determine which of the plaintiffs' claims
4 we have jurisdiction to consider. The issue arises because, as
5 noted, the November 21, 2006, order of the district court
6 addressed only the veil-piercing claim. According to the notice
7 of appeal filed on December 15, 2006, instituting the present
8 appeal, it is this November 21, 2006, order from which this
9 appeal has been taken. The plaintiffs' non-veil-piercing claims
10 had earlier been dismissed pursuant to the district court's order
11 filed December 1, 2005. And that order had already, separately,
12 been appealed to us by notice of appeal filed December 22, 2005,
13 ultimately resulting in our decision in Sahu II, and the
14 subsequent mandate that ended that appeal. As of December 15,
15 2006, the date the notice of appeal in this case, specifically
16 referring to the district court's order regarding the veil-
17 piercing claims, was filed, the other appeal concerning the
18 district court's order dismissing the other claims had been
19 argued and was sub judice in this Court. The question is whether
20 the December 15, 2006, notice of appeal effects an appeal not
21 only from the November 21, 2006, district court order (regarding
22 the veil-piercing claim) to which the notice explicitly refers,
23 but also from the December 1, 2005, district court order
24 (regarding the non-veil-piercing claims), which the notice does
25 not explicitly mention, and which we held unripe for review on
26 January 17, 2007, in Sahu II.

1 A notice of appeal must "designate the judgment, order,
2 or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B).
3 But we "construe notices of appeal liberally, taking the parties'
4 intentions into account." Shrader v. CSX Transp., Inc., 70 F.3d
5 255, 256 (2d Cir. 1995). We have also observed, however, that
6 our appellate jurisdiction "depends on whether the intent to
7 appeal from [a] decision is clear on the face of, or can be
8 inferred from, the notices of appeal." New Phone Co. v. City of
9 New York, 498 F.3d 127, 131 (2d Cir. 2007).

10 In the unusual circumstances presented here, we think
11 the plaintiffs' intent to appeal from both orders can be inferred
12 from the notice of appeal. When the district court filed the
13 November 21, 2006, order, the plaintiffs found themselves in a
14 peculiar situation. They had already filed a notice of appeal
15 with respect to the December 1, 2005, district-court order
16 dismissing the non-veil-piercing claims. That appeal was before
17 us and had already been argued.

18 As the last date by which a timely appeal from the
19 November 21 order had to be filed drew near, the plaintiffs could
20 not know either what the outcome of the then-pending appeal would
21 be or when we would decide it. They identified in their new
22 notice of appeal the order dismissing the veil-piercing claims --
23 the only claims not yet subject to an appeal -- rather than the
24 final judgment dismissing all the claims. In their "Form C" Pre-
25 Argument Statement, filed in this Court simultaneously with the
26 notice of appeal, they did refer specifically to the appeal of

1 the non-veil-piercing claims which was then pending. Together,
2 the documents were "functional[ly] equivalent" to a notice of
3 appeal from the final judgment filed one day later. See Torres
4 v. Oakland Scavenger Co., 487 U.S. 312, 316-17 (1988) (commenting
5 that "if a litigant files papers in a fashion that is technically
6 at variance with the letter of a procedural rule, a court may
7 nonetheless find that the litigant has complied with the rule if
8 the litigant's action is the functional equivalent of what the
9 rule requires," but holding that a notice of appeal that did not
10 name a party as an appellant was not the functional equivalent of
11 a notice of appeal filed by that party).

12 We conclude that the dismissals of all of the claims of
13 the plaintiffs are now before us.

14 II. Conversion of Motion To Dismiss to
15 Motion for Summary Judgment

16 The district court's December 1, 2005, order dismissed
17 all the claims of the plaintiffs other than the one seeking to
18 pierce the corporate veil between Union Carbide and UCIL. The
19 court did so after converting the defendants' motion to dismiss
20 under Federal Rule of Civil Procedure 12(b)(6) into a Rule 56
21 motion for summary judgment. See Sahu I, 418 F. Supp. 2d at 411
22 ("To the extent any part of Defendants' motion is a Rule 12(b)(6)
23 motion to dismiss, it is converted to a Rule 56 motion for
24 summary judgment.").¹ Although we find it a close question, we

¹ The district court's statement as to this issue reads:

A Court "shall" convert a motion to dismiss
into one for summary judgment when "matters
outside the pleadings are presented to and

1 agree with the plaintiffs that the district court provided
2 inadequate notice of conversion prior to granting the motion and
3 that its action was therefore in error -- or at least premature.

4 When a district court converts a motion to dismiss into
5 one for summary judgment, "[a]ll parties must be given a
6 reasonable opportunity to present all the material that is
7 pertinent to the motion." Fed. R. Civ. P. 12(d). Ordinarily,

not excluded by the court," Fed. R. Civ. P. 12(c), and where the non-movant "should reasonably have recognized the possibility that such a conversion would occur." Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004) (internal quotations omitted). Notice of conversion can be inferred from the circumstances. Kennedy v. Empire Blue Cross & Blue Shield, 989 F.2d 588, 592 (2d Cir. 1993). The moving party's submission of exhibits, affidavits, and the like gives the non-moving party notice of possible conversion. National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories, Division of/and American Home Products Corp., 850 F.2d 904, 911 (2d Cir. 1988); In re G. & A. Books, Inc., 770 F.2d 288, 295 (2d Cir. 1985); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366 (3d ed. 1998); see also Morelli v. Cedel, 141 F.3d 39, 45 (2d Cir. 1998).

In connection with Defendant's motion, both parties submitted matters outside the pleadings, which the Court considered, triggering mandatory conversion to summary judgment. Plaintiffs are on notice of a possible conversion as evidenced by the submission of extrinsic materials, and the fact that Plaintiffs' opposition to Defendants' motion is titled: "Memorandum of Law in Opposition to Motion to Dismiss and/or for Summary Judgment"

Sahu I, 418 F. Supp. 2d at 410-11.

1 this means that a district court "must give notice to the parties
2 before converting a motion to dismiss pursuant to Rule 12(b)(6)
3 into one for summary judgment and considering matters outside the
4 pleading." Gurary v. Winehouse, 190 F.3d 37, 43 (2d Cir. 1999)
5 (citing Kopec v. Coughlin, 922 F.2d 152, 154-55 (2d Cir. 1991))
6 (emphasis supplied). Underlying the notice requirement is "the
7 principle that parties are entitled to a reasonable opportunity
8 to present material pertinent to a summary judgment motion." Id.

9 Compliance with these requirements is
10 not an end in itself. The district court's
11 conversion of a Rule 12(b)(6) motion into one
12 for summary judgment is governed by
13 principles of substance rather than form.
14 The essential inquiry is whether the
15 appellant should reasonably have recognized
16 the possibility that the motion might be
17 converted into one for summary judgment or
18 was taken by surprise and deprived of a
19 reasonable opportunity to meet facts outside
20 the pleadings. Resolution of this issue will
21 necessarily depend largely on the facts and
22 circumstances of each case.

23 In re G. & A. Books, Inc., 770 F.2d 288, 295 (2d Cir. 1985),
24 cert. denied, 475 U.S. 1015 (1986).

25 The district court did not explicitly notify the
26 parties before converting the Rule 12(b)(6) motion into a motion
27 for summary judgment. That was unnecessary, in the court's view,
28 because the plaintiffs were "on notice of a possible conversion":
29 "[B]oth parties submitted matters outside the pleadings" and the
30 plaintiffs entitled their opposition to the defendants' motion to
31 dismiss "Memorandum of Law in Opposition to Motion to Dismiss
32 and/or for Summary Judgment" Sahu I, 418 F. Supp. 2d at
33 411. In light of the particular complexities of this litigation,

1 we disagree with the district court's conclusion that the
2 plaintiffs received sufficient notice.

3 We have held that "[a] party cannot complain of lack of
4 a reasonable opportunity to present all material relevant to a
5 motion for summary judgment when both parties have filed
6 exhibits, affidavits, counter-affidavits, depositions, etc. in
7 support of and in opposition to a motion to dismiss." G. & A.
8 Books, 770 F.2d at 295. "Even where only the party moving to
9 dismiss has submitted extrinsic material such as depositions or
10 affidavits, the opposing party may be deemed to have had adequate
11 notice that the motion to dismiss would be converted." Id.

12 But the only arguably extrinsic submissions by the
13 plaintiffs were references in their complaint to, or quotations
14 from, documents that appear to have been, in large part, in the
15 record of the earlier Bano litigation. Such limited references
16 are insufficient to incorporate documents or exhibits into the
17 complaint. See Sira v. Morton, 380 F.3d 57, 67 (2d Cir. 2004)
18 (concluding that "[l]imited quotation from or reference to
19 documents that may constitute relevant evidence in a case is not
20 enough to incorporate those documents, wholesale, into the
21 complaint" and that plaintiff's "paraphrasing of certain events
22 occurring during parts of the disciplinary hearing and his single
23 quotation of one excerpt" is insufficient to incorporate the
24 hearing transcripts into the complaint).

25 To be sure, "[e]ven where a document is not
26 incorporated by reference, the court may nevertheless consider it

1 where the complaint relies heavily upon its terms and effect,
2 which renders the document integral to the complaint." Chambers
3 v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (citation
4 and internal quotation marks omitted) (concluding that referenced
5 contracts were "integral" to complaint that put at issue whether
6 those contracts authorized sale of certain artistic
7 performances).

8 But the contents of the documents referred to or quoted
9 in the complaint here do not appear to have been necessary to the
10 "short and plain statement of the claim showing that [the
11 plaintiffs were] entitled to relief," Fed. R. Civ. P. 8(a)(2),
12 see also, e.g., Boykin v. Keycorp, 521 F.3d 202, 213 (2d Cir.
13 2008), required in a complaint. They seem to have been used by
14 the plaintiffs largely for the purpose of indicating that
15 evidence existed to support the complaint's assertions. In light
16 of subsequent Supreme Court authority, we think this material is
17 best viewed as tending to establish that the complaint's factual
18 assertions are "plausible," see Bell Atl. Corp. v. Twombly, 127
19 S. Ct. 1955, 1966-67 (2007), and therefore sufficient to survive
20 a motion to dismiss under Rule 12(b)(6). They are not extrinsic
21 evidence incorporated into the complaint, and they were not meant
22 to counter a possible future motion for summary judgment brought
23 by the defendants under Rule 56. We therefore do not think that
24 the cited documents were "integral to the complaint."²

² For these reasons, the district court could not have dismissed the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6); conversion to summary

1 But even if the full contents of these documents had
2 been contained in the complaint, or if they had properly been
3 treated as though they had been, we have difficulty understanding
4 why the plaintiffs were not entitled to further notice prior to
5 the court turning the motion to dismiss into a motion for summary
6 judgment. The parties' memoranda and exhibits were considered
7 simultaneously by the district court on what had appeared (other
8 than on the veil-piercing issue) to be, until their submission in
9 August 2005, a motion to dismiss for failure to state a claim.
10 See Docket Entries 9-15, Sahu v. Union Carbide Corp., No. 04 Civ.
11 8825(JFK) (S.D.N.Y. filed Aug. 5, 2005 and Aug. 9, 2005).
12 Following these submissions and prior to the issuance of the
13 district court's December 1, 2005, order converting the
14 defendants' motion and granting summary judgment, the court held
15 no hearings or oral argument; it entertained no additional
16 motions. Instead, it converted the Rule 12(b)(6) motion based on
17 the allegations contained in the complaint to one for summary
18 judgment based on the documentary evidence supplied by the
19 defendants -- including the Sharma Affidavit and its ninety-seven
20 exhibits from the earlier Bano litigation. The court
21 simultaneously granted the converted motion.

22 While the defendants' submissions -- including the
23 defendants' memorandum of law in support of their motion to
24 dismiss, which discussed much of this evidence at length -- gave

judgment was necessary. Indeed, the defendants do not argue that
the district court could have dismissed the plaintiffs' claims
without considering the documents referenced by the complaint.

1 the plaintiffs notice that the defendants wanted the motion
2 changed to one for summary judgment, and gave the district court
3 the opportunity to consider the extrinsic evidence they submitted
4 before ruling, the plaintiffs could not have known whether the
5 court would in fact consider them, or would convert the motion
6 into one for summary judgment in order to do so. These
7 submissions do not seem to us to be the equivalent of a motion to
8 convert, or to supply notice thereof. The plaintiffs' memorandum
9 of law in opposition to the defendants' motion to dismiss argued
10 that the court was not required to consider matters outside the
11 pleadings. They requested the opportunity to seek further
12 discovery if the court deemed it necessary to consider extrinsic
13 material. See Memorandum in Opposition 2-5 & n.3. It was, in
14 sum, unclear, prior its issuance of the December 1, 2005, order,
15 whether the district court would accept the defendants'
16 invitation to consider the extrinsic evidence and then turn the
17 motion into one for summary judgment. Indeed, the defendants had
18 argued in part that the court did not need not do so in order to
19 rule in their favor on the non-veil-piercing claims.

20 We think that the title of the defendants' memorandum
21 in support of its motion as a motion to dismiss or for summary
22 judgment similarly failed to provide the plaintiffs with adequate
23 notice. A motion called a motion for summary judgment, whether
24 or not stated as alternatively for dismissal, ordinarily will
25 place a plaintiff on notice that the district court is being
26 asked to look beyond the pleadings to the evidence in order to

1 decide the motion. In this case, however, where the plaintiffs
2 had filed a multi-count complaint and the supporting memoranda
3 and evidence can fairly be read to seek only dismissal under Rule
4 12(b)(6) on some counts and summary judgment on others, the
5 motion papers provided insufficient notice. The plaintiffs
6 should have been made aware that all counts could or would be
7 decided under the summary judgment standard in order to give them
8 the opportunity to oppose the motion with evidence and a focused
9 argument.

10 The absence of any additional proceedings related to
11 the defendants' motion prior to the district court's December 1,
12 2005, order distinguishes this case from our decision in G. & A.
13 Books, relied upon by the defendants. There, the district court
14 converted a motion to dismiss into a motion for summary judgment
15 only after a hearing at which the non-moving plaintiffs had
16 commented on extrinsic evidence provided by both them and the
17 defendants, and only after the plaintiffs had requested and
18 received an extension of time to submit additional materials.
19 See G. & A. Books, 770 F.2d at 295; see also Condon v. Local
20 2944, United Steelworkers, 683 F.2d 590, 593-94 (1st Cir. 1982)
21 (upholding the district court's decision to resolve a motion to
22 dismiss by considering it as a motion for summary judgment where
23 the plaintiff had been given "ample opportunity to provide the
24 court with any relevant information outside the pleadings to
25 raise a genuine factual issue, which he expressly represented
26 that he was prepared to do").

1 As we emphasized in First Financial Insurance Co. v.
2 Allstate Interior Demolition Corp., 193 F.3d 109 (2d Cir. 1999),

3 "care should, of course, be taken by the
4 district court to determine that the party
5 against whom summary judgment is rendered has
6 had a full and fair opportunity to meet the
7 proposition that there is no genuine issue of
8 material fact to be tried, and that the party
9 for whom summary judgment is rendered is
10 entitled thereto as a matter of law."

11 Id. at 115 (quoting Ramsey v. Coughlin, 94 F.3d 71, 73-74 (2d
12 Cir. 1996)). Once the court decided to consider extrinsic
13 evidence to decide a motion for summary judgment rather than
14 limit itself to the pleadings as it would on a motion to dismiss,
15 we think that the plaintiffs should have been given "a reasonable
16 opportunity to meet facts outside the pleadings." G. & A. Books,
17 770 F.2d at 295.

18 As noted, we view this as a close case. But we think
19 there is a reasonable likelihood that, in light of the peculiarly
20 difficult procedural history of this and related litigation, the
21 plaintiffs were not aware that they were in danger of an adverse
22 grant of summary judgment based on the submissions prior to the
23 district court's order converting the motion and then deciding
24 it. We conclude that further notice was required and that
25 consequently it is appropriate to remand for what would appear to
26 be relatively limited further proceedings in connection with
27 consideration of summary judgment.

28 For the foregoing reasons, the district court's
29 judgment, insofar as it is based on the December 1, 2005, grant
30 of summary judgment in favor of the defendants on all non-veil-

1 piercing claims, will be vacated and the cause remanded for
2 further proceedings. And because the court's dismissal of the
3 veil-piercing claim relies, in part, on its dismissal of the non-
4 veila-piercing claims, we must vacate the judgment, and remand
5 the cause, in their entirety. See Sahu III, 2006 WL 3377577, at
6 *9, 2006 U.S. Dist. LEXIS 84475, at *27 (S.D.N.Y. Nov. 21, 2006)
7 ("The evidence on the record contradicts such allegations [that
8 Union Carbide dominated UCIL for the purpose of avoiding its
9 obligations to the plaintiffs]. The Court discussed this
10 evidence in detail in its previous decision under the umbrella of
11 plaintiffs' other two theories of liability.").

12 **CONCLUSION**

13 For the foregoing reasons, the judgment of the district
14 court is vacated and the cause remanded to the district court for
15 further proceedings.