

Burberry Ltd. v RTC Fashion Inc.

2012 NY Slip Op 32223(U)

August 17, 2012

Supreme Court, New York County

Docket Number: 110615/2011

Judge: Louis B. York

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SCANNED ON 8/27/2012

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

LOUIS B. YORK
J.S.C.

PRESENT: _____

PART 2

Index Number : 110615/2011
BURBERRY LIMITED
vs
RTC FASHION INC.
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/17/12

Loy J.S.C.
LOUIS B. YORK

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Gottlieb
x 646 FS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 2

BURBERRY LIMITED and BURBERRY USA,
Plaintiffs,

-against-

RTC FASHION INC. d/b/a DESIGNERS
IMPORTS t/a FASHION58.COM and ASHER
HOROWITZ,
Defendants.

INDEX NO. 110615/2011
Motion Sequence 002
DECISION & ORDER

FILED

AUG 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

In this action asserting a fraudulent conveyance, defendant Asher Horowitz (Horowitz) moves, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint as against him.

Factual Background

Burberry Limited and Burberry USA (together as Burberry) are sister companies in the United Kingdom and the United States involved in the design, manufacture, distribution and sale of high-end apparel and accessories. Burberry owns several prominent trademarks, including the Burberry Check and the Equestrian Knight Design.

Horowitz is sole owner and officer of Designers Imports, Inc., d/b/a Designers Imports.com USA, Inc. (Designers), which has operated www.designersimports.com, dealing in designer-branded clothing and accessories. Horowitz registered the domain name for Designers Imports with Godaddy.com, Inc. (Godaddy), on August 11, 2003. Horowitz Affirm.,¹ Ex. A. On or about April 12, 2005, Horowitz and Burberry entered into a settlement agreement, amended on or about May 4, 2005, concerning the sale of counterfeit merchandise through

¹In his affirmation in support, attached to the motion, Horowitz identifies himself as a religious individual, "whose beliefs preclude swearing."

www.designersimports.com infringing on Burberry's trademarks. Designers was registered with New York's Department of State on November 16, 2005. Horowitz Affirm., Ex. B.

On May 22, 2007, plaintiffs commenced an action against Designers for trademark infringement in the United States District Court, Southern District of New York, case number 07 Civ 3997 (the Federal Action). This resulted in a bench trial, and a verdict for plaintiffs. The court entered an amended final judgment on July 29, 2010 that permanently enjoined Designers from infringing on any Burberry trademark, and awarded plaintiffs money damages of \$1,864,875, plus costs and attorneys' fees, totaling \$2,592,070.89.

Defendants RTC Fashion Inc. d/b/a Designers Imports t/a Fashion58.com (RTC) owns and operates www.fashion58.com, a web site which sells designer-branded clothing and accessories. RTC registered with the Department of State on February 3, 2010, and purchased the domain name www.rtcfashion.com from Godaddy days later. On February 10, 2010, www.designersimports.com displayed the message "This website is now being leased and managed by RTCF," presumptively RTC Fashion. On May 4, 2010, Horowitz entered into an agreement with RTC for RTC to use www.designersimports.com for an annual fee of \$500. On June 22, 2010, RTC filed an Assumed Name Certificate with New York's Secretary of State for use of "Designers Imports." Horowitz Affirm., Ex. P.

Plaintiffs commenced the instant action on September 16, 2011, alleging that Horowitz dissipated Designers' assets by depleting its funds and conveying www.designersimports.com to RTC in order to frustrate the enforcement of the judgment in the Federal Action. The complaint asserted causes of action for fraudulent conveyance, pursuant to Article 10 of the New York Debtor and Creditor Law §§ 273, 273-a (first); fraudulent conveyance, pursuant to Debtor and Creditor Law § 274 (second); fraudulent conveyance, pursuant to Debtor and Creditor Law § 275

(third); fraudulent conveyance, pursuant to Debtor and Creditor Law § 276 (fourth); attorneys' fees pursuant to Debtor and Creditor Law § 276-a (fifth); and piercing the corporate veil (sixth). Motion, Ex. A. On or about November 23, 2011, plaintiffs served an amended complaint, which asserted the same causes of action slightly rearranged. Piercing the corporate veil was placed first, then the others succeeded in the same order. *Id.*, Ex. C.

Legal Standard

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 (1st Dept 1994).

Discussion

"[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 (1993). In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, "plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a

wrong or injustice.” *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 (2011) (internal quotation marks and citation omitted). “Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.” *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998); *James v Loran Realty V Corp.*, 85 AD3d 619, 619-620 (1st Dept 2011) (“Here, while plaintiffs may have demonstrated that defendant Palazzolo exercised complete domination and control over Loran V, they have failed to show that Palazzolo’s actions were for the purpose of leaving the corporation judgment proof or that his actions amounted to a wrong against them”). “Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use.” *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 1016-1017 (2d Dept 2007). “No one factor is dispositive.” *Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 (1st Dept 2009).

This is the threshold issue for the instant motion. It will be denied and Horowitz will remain a defendant if the amended complaint alleges facts that indicate that he exercised complete domination and control over Designers in order to frustrate the exercise of the judgment in the Federal Action. The merits of plaintiffs’ overarching claim of a fraudulent conveyance by Designers to RTC will likely be determined by a subsequent dispositive motion and/or trial.

It is undisputed that Horowitz is the sole shareholder, officer and director of Designers, and the sole shareholder, officer and director of RTC. The salient allegations in the amended complaint regarding Horowitz’s domination and control of Designers are:

- He purchased Burberry's merchandise with his personal American Express credit card for sale by Designers. Amended Complaint, ¶ 16.
- He used Designers' American Express business credit card to buy household and personal items. *Id.*, ¶ 17.
- He caused Designers to secure a loan with Provident Bank for \$200,000, on April 22, 2009, during the prosecution of the Federal Action, with a security agreement that encumbered all of Designers' assets. *Id.*, ¶ 18.
- Designers' web site announced that it was leased and managed by RTCF in February 2010. *Id.*, ¶ 25.
- In April 2010, the address for Designers' American Express business credit card was changed to the same address as RTC's. *Id.*, ¶ 26.
- Horowitz licensed the www.designersimports.com to RTC for the nominal annual fee of \$500. *Id.*, ¶ 27.
- Horowitz depleted Designers' bank accounts at Provident Bank, JP Morgan Chase Bank, N.A., and Columbia Bank. *Id.*, ¶ 28.
- Horowitz caused the launching of RTC's web site www.fashion58.com, on May 11, 2010, selling the same merchandise as www.designersimports.com. *Id.*, ¶ 31.
- RTC filed an assumed name certificate with the Department of State in the name of Designers Imports, on June 22, 2010. *Id.*, ¶ 33.

Horowitz argues that the allegations of the amended complaint "are general and fail to rise to the level of particularity required to state a prima facie claim for piercing the corporate veil." Memorandum of Law at 5. He contrasts these perceived deficiencies with courts' findings where defendants were "shuttling their personal funds in and out of the corporations without regard to formality and to suit their immediate convenience [internal quotation marks and citation omitted]" (*Walkovszky v Carlton*, 18 NY2d 414, 420 [1966]), and where "defendants used the companies' money as a personal checking account for their own use and that of friends, relatives and associates, and to pay for expenses such as their mother's plastic surgery, their monthly household bills and parking tickets" (*Shisgal v Brown*, 21 AD3d 845, 849 [1st Dept 2005]).

However, Horowitz himself supplies copies of American Express business credit card statements for a card ending in 41001, billed to Horowitz at "Designers Collection," paid by a bank account in his name, which also funded Designers' payroll, showing purchases of general merchandise at Wal-Mart (on May 1, 2009, for instance). Horowitz Affirm., Ex. U. Additionally, records for another American Express business card, ending in 32004, billed to Horowitz at "Designers Collection," paid by a check on the account of "RTC Fashion Fashion58," show varied transactions with United Talmudical ("Educational Service"), Ed Hardy Dresses, Godaddy, Wal-Mart, FedEx, gas stations, restaurants and other enterprises. *Id.*, Ex. Q. This evidence, provided by Horowitz, is sufficient to support an allegation of the use of corporate funds for personal use at both Designers and RTC, in spite of Horowitz's assertion that "bank records demonstrate that RTC does not pay defendant Horowitz's personal expenses." Memorandum of Law at 7.

Horowitz acknowledges that "Designers, while still listed as an active corporation, is no longer an operating business." *Id.* He further notes that RTC was formed in February 2010 and took on the assumed name Designer Imports in June 2010, during the later days of the Federal Action. *Id.* He contends that separate business addresses, bank accounts and tax returns for Designers and RTC demonstrate their independence, in spite of common ownership. However, Designers' dormancy seems to diminish the importance of its separate physical and financial position from RTC. Horowitz does not identify when Designers ceased operating, but it may well have wound down conveniently as RTC arose, making their purported autonomy more illusion than fact. Indeed, the life cycle of these entities seems to correspond to the progress of the Federal Action.

Horowitz contends that "he has at all times owned in his individual capacity" the web site www.designersimports.com, which he "allowed Designers to use." *Id.* at 9. Then, Designers

would not have been stripped of its “most valuable asset,” as characterized by the amended complaint (Amended Complaint ¶¶ 27, 32), when the web site was licensed to RTC. Plaintiffs offer a different interpretation of the same facts: “Designers used the website owned by Horowitz www.designersimports.com, without adequate consideration and failed to observe any corporate formalities as there was no arms length transaction or agreement between Horowitz and Designers for the use of such website.” The tangle of interrelated transactions among Horowitz, Designers and RTC, instituted by Horowitz, defeats the granting of summary judgment in his favor, dismissing the complaint. He demonstrates little more than separate bank accounts and business addresses for the two companies, while documenting some financial transactions that blur the distinction between business and personal matters. He offers no evidence that the transfers of www.designersimports.com first to Designers and then to RTC were arm’s-length transactions, or conducted with a modicum of formality. Godaddy.com’s invoice for registering www.designersimports.com is addressed to “Asher Horowitz[,] Designers Imports.” The adoption by RTC of the assumed name Designers Imports further serves to blur the distinctions between the companies. Horowitz’s conveniently-timed creation of RTC, licensing of www.designersimports.com to RTC, and taking Designers’ name for RTC together seem intended to maintain continuity in the marketplace while placing obstacles in plaintiffs’ attempts to execute judgment in the Federal Action. Therefore, the first cause of action is sustained.

Horowitz also argues that plaintiffs’ allegation that the licensing of www.designersimports.com to RTC was a fraudulent conveyance is deficient because they fail to indicate the value of the transferred property and the inadequacy of the consideration. *IDC (Queens) Corp. v Illuminating Experiences*, 220 AD2d 337, 337 (1st Dept 1995) (“The action was properly dismissed for failure to plead the alleged fraudulent conveyance with the requisite

particularity [CPLR 3016 (b)]. We note the absence of any specific allegation concerning the value of the transferred property or otherwise showing why the consideration given therefor was inadequate”). Plaintiffs counter that violations of Debtor and Creditor Law §§ 273, 273-a, 274 and 275 do not require pleadings of heightened particularity pursuant to CPLR 3016 (b) because they do not require proof of an actual intent to defraud. *Gateway I Group v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149 (2d Dept 2009) (“plaintiff was not required to plead violations of Debtor and Creditor Law §§ 273, 273-a, 274 and 275 with such heightened particularity pursuant to CPLR 3016 [b]”). The court will be guided by *Gateway*, where the Appellate Division specifically cites Debtor and Creditor Law §§ 273, 273-a, 274 and 275, not *IDC (Queens) Corp. v Illuminating Experiences* (220 AD2d 337, *supra*), which has no references to provisions of the Debtor and Creditor Law.

Horowitz maintains that “Plaintiffs are not creditors of defendant Horowitz and are therefore foreclosed from attacking transactions involving his personal assets.” Memorandum of Law at 12. However, that is the essence of this action, a charge that Horowitz and his business entities, Designers and RTC, are legally indistinguishable, and their obligations are his, notably plaintiffs’ judgment against Designers in the Federal Action. In all, plaintiffs’ allegations are sufficient to meet the liberal pleading standards of CPLR 3211 (a) (7), and Horowitz’s motion shall be denied.

Accordingly, it is

ORDERED that defendant Asher Horowitz’s motion, pursuant to CPLR 3211 (a) (7), to dismiss the complaint as against him is denied; and it is further

ORDERED that defendant Asher Horowitz shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of service of a copy of this order, with

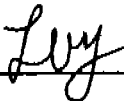
notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room

203, 71 Thomas Street, on ~~Sept 26~~ Oct 3, 2012, at 2:00 A.M./P.M.

DATED: Aug 17, 2012

ENTER:



J.S.C.

LOUIS B. YORK
J.S.C.

FILED

AUG 21 2012

**NEW YORK
COUNTY CLERK'S OFFICE**