

<b>Hearst Mag. v McCaffery</b>
2012 NY Slip Op 32534(U)
August 31, 2012
Sup Ct, NY County
Docket Number: 101303/2011
Judge: Lucy Billings
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: LUCY BILLINGS  
J.S.C.

PART 46

Justice

Index Number : 101303/2011  
**HEARST MAGAZINES**  
vs.  
**MCCAFFERY, WILLIAM A.**  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

motion to/for \_\_\_\_\_

Th

PAPERS NUMBERED

1

2

3

No. \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ and adjudged that:

*The court grants the McCaffery defendants motion to dismiss the action against these defendants and dismisses the entire action, pursuant to the accompanying decision and 8/26/12 stipulation, disposing of the claims against all defendants whom plaintiff has served.*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/31/12

Lucy Billings  
LUCY BILLINGS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

HEARST MAGAZINES, a Division of  
Hearst Communications, Inc.,

Index No. 101303/2011

Plaintiff

- against -

DECISION AND ORDER

WILLIAM A. MCCAFFERY, SHEILA H.  
MCCAFFERY, JERROLD H. GOTTLIEB,  
and WILLIAM M. LANE,

Defendants

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

-----  
APPEARANCES:

For Plaintiff

Bernard D'Orazio Esq.  
100 Lafayette Street, New York, NY 10013

For Defendants William A. McCaffery and Sheila H. McCaffery

Martin S. Rapaport Esq.  
18 East 48th Street, New York, NY 10017

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff, the owner and publisher of magazines, entered a contract with nonparty McCaffery, Gottlieb, Lane LLC (MGL), an advertising firm of which defendant William McCaffery was a member, to place advertisements in plaintiff's publications for MGL's client, nonparty General Cigar Company. MGL thus acted as General Cigar's disclosed agent in MGL's dealings with plaintiff. Under the separate contract between the principal, the client General Cigar, and its agent, the advertising firm MGL, General Cigar paid the amount due to MGL. MGL, however, never paid plaintiff its advertising fees.

Plaintiff now is the assignee of the contract between General Cigar and its advertising agent MGL and of any claim of General Cigar arising from the principal-agency relationship. Plaintiff, standing in General Cigar's shoes, does not claim a breach of that contract, however, and does not sue MGL, which has filed a bankruptcy petition. Plaintiff sues MGL's individual members or managers for breach of a fiduciary duty arising from the principal-agency relationship; conversion of General Cigar's payment to MGL, which plaintiff maintains MGL was to pay over to plaintiff; and unjust enrichment. Plaintiff seeks an accounting regarding defendants' diversion of the funds to be paid to plaintiff. Plaintiff also seeks to pierce the corporate veil so as to bring these claims on plaintiff's own behalf against defendant individuals.

## II. DEFENDANTS' MOTION

Defendants William McCaffery and Sheila McCaffery, MGL's alleged members or managers, move to dismiss the assigned claims and the direct claim. Although Sheila McCaffery attests that she has never been a member or manager of MGL, upon defendants' motion based on the complaint's failure to state a claim, the court may not rely on facts alleged by defendants to defeat the claims unless the evidence demonstrates the absence of any dispute regarding those facts and completely negates the allegations against defendants. C.P.L.R. § 3211(a)(7); Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v.

Martinez, 84 N.Y.2d 83, 87-88 (1994); Yoshiharu Igarashi v. Shohaku Higashi, 289 A.D.2d 128 (1st Dep't 2001). The court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009).

Sheila McCaffery's acknowledgement that she was MGL's employee and her denial that she controlled its finances do not conclusively negate, but simply dispute plaintiff's allegations that she participated in MGL's operation as defendants' own instrumentality, including their failure to remit General Cigar's payment to plaintiff and use of those funds for their own benefit. See, e.g., Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 416 (2001). Co-defendant Gottlieb's answer, moreover, admits that all defendants were members or managers of MGL. Defendants do not present any corporate documents of MGL, for example, establishing that Sheila McCaffery is not a member or manager. C.P.L.R. § 3211(a)(1); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d at 326; Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); McCully v. Jersey Partners, Inc., 60 A.D.3d 562 (1st Dep't 2009); Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495 (1st Dep't 2006). Nor would such records necessarily show that she did not, as an employee and as admitted member William McCaffery's wife, control MGL's finances or

participate in MGL's operation and the diversion of General Cigar's payment for defendants' own purposes. Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 142 (1993).

### III. GENERAL CIGAR'S CLAIMS ASSIGNED TO PLAINTIFF

Dismissal of the assigned claims in any event rests, at minimum, on the basis that General Cigar incurred no damages for plaintiff now to recover. Plaintiff ran the advertisements that General Cigar paid for.

#### A. The Absence of a Breach of Contract Claim

As defendants acknowledge, the complaint does allege that each time MGL transmitted an order to plaintiff to place an advertisement for General Cigar, the order provided that:

The agency [MGL] shall be solely liable for payment of all media insertions if the agency has been paid for those invoices by the advertiser [General Cigar]. Prior to payment to the agency, the advertiser shall be solely liable.

Aff. of Martin S. Rapaport Ex. 1 (Compl.) ¶ 15. The record does not include a copy of any such order, however, nor does any party indicate that MGL signed the order so as to form a promise to pay plaintiff for the advertisements once General Cigar paid MGL for them, as General Cigar did. Yet, even if these orders created a contract by MGL to plaintiff, such a contract does not confer any rights on General Cigar, which plaintiff may claim as General Cigar's assignee. As set forth above, plaintiff does not sue MGL and does not claim a breach of any contract, either the contract between General Cigar and its advertising agent MGL, or any contract by MGL directly to plaintiff.

B. The Absence of Any Injury Based on the Claims Alleged

General Cigar's advertising agent bore a duty to act according to the promised agency, to be loyal to General Cigar in carrying out the agency, and to act consistently with the agency and General Cigar's trust. Matter of Ferrara, 7 N.Y.3d 244, 254 (2006); Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d at 416; Greenapple v. Capital One, N.A., 92 A.D.3d at 549-50; CBS Corp. v. Dumsday, 268 A.D.2d 350, 353 (1st Dep't 2000). While the advertising agent may be liable to its principal for any harm to its principal from the agent's breach of a duty to make payment on the principal's behalf or the agent's use of its principal's funds for the agent's own purposes, a claim by the principal General Cigar, through which plaintiff claims here, suffers from at least two deficiencies. See Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d at 416; Wolff v. Wolff, 67 N.Y.2d 638, 641 (1986); American Baptist Churches of Metro. N.Y. v. Galloway, 271 A.D.2d 92, 99 (1st Dep't 2000).

First, plaintiff fails to present any written agency contract or articulate the specific terms of any oral agency contract, so the precise terms of the promised agency remain undisclosed. Greenapple v. Capital One, N.A., 92 A.D.3d at 549-50. Second, even assuming the agent promised to pay plaintiff on the principal's behalf, the essential elements of a claim for breach of a fiduciary duty include not only that the fiduciary, here the agent, committed misconduct in that capacity, but also that the misconduct caused damages to the party owed the

fiduciary duty, here General Cigar. Burry v. Madison Park Owner LLC, 84 A.D.3d 699, 700 (1st Dep't 2011); Estate of Spitz v. Pokoik, 83 A.D.3d 505, 506 (1st Dep't 2011). Here, the only harm was to plaintiff, not to the principal, General Cigar.

Similarly, if MGL or defendants converted General Cigar's funds and used them to enrich themselves unjustly, they may have breached a promise in the undisclosed contract between MGL and plaintiff or order by MGL to plaintiff, as well as injured plaintiff through the conversion and unjust enrichment. MGL may have even breached the specific terms of its agency contract with General Cigar, but in no event did MGL or defendants act contrary to General Cigar's interests and injure General Cigar, through whom plaintiff claims. Greenapple v. Capital One, N.A., 92 A.D.3d at 550. See Matter of Ferrara, 7 N.Y.3d at 254; Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d at 417; Wolff v. Wolff, 67 N.Y.2d at 641.

Plaintiff attempts to construct an interest on General Cigar's part in maintaining a business relationship with plaintiff. No facts support such a proposition: that General Cigar ever dealt with plaintiff or that plaintiff knew General Cigar any more than as a reader of General Cigar's advertisements. Plaintiff's actual allegations show only that MGL maintained a business relationship with plaintiff and dealt with it to place General Cigar's advertisements.

At best, again assuming the terms of the agency contract promised payment to plaintiff, General Cigar would be entitled to

a return of the agent's commission based on its noncompliance with its prescribed duties. Greenapple v. Capital One, N.A., 92 A.D.3d at 549. Plaintiff specifically excludes the commission from the amount plaintiff seeks, however, claiming \$55,557 after deduction of MGL's 15% commission from General Cigar's higher payment to MGL. In sum, due to the absence of injury to General Cigar, any claim by General Cigar for breach of a fiduciary duty by the advertising agent to its principal, conversion of General Cigar's payment to MGL, or unjust enrichment from this payment fails.

#### IV. PLAINTIFF'S DIRECT CLAIMS

Plaintiff's only claim on its own behalf, against defendant individuals, not MGL, is to pierce MGL's corporate veil based on defendants having looted MGL for their personal gain. The doctrine of piercing the corporate veil applies to limited liability companies (LLCs). Matias v. Mondo Props. LLC, 43 A.D.3d 367, 368 (1st Dep't 2007); Retropolis, Inc. v. 14th St. Dev. LLC, 17 A.D.3d 209, 210 (1st Dep't 2005).

This direct claim, however, does not allege any different substantive basis for relief against the individuals, such as breach of a contract. At best, this claim realleges the same conversion and unjust enrichment by plaintiff directly rather than derivatively as General Cigar's assignee. As for the breach of a fiduciary duty, while the advertising agent may have owed a fiduciary duty to the agent's principal General Cigar, the agent's business dealings with plaintiff at arm's length, for

placement of the advertisements, created no fiduciary relationship with plaintiff. EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 20 (2005); Sonnenschein v. Douglas Elliman-Gibbons & Ives, 96 N.Y.2d 369, 374 (2001); Friedman v. Fife, 262 A.D.2d 167, 168 (1st Dep't 1999). See Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d at 416.

As plaintiff's direct claim against defendants is based on them having looted MGL for their personal gain, the same claim may belong to MGL and be part of its estate in bankruptcy. 11 U.S.C. § 541(a); Cardinal Holdings, Ltd. v. Indotronic Intl. Corp., 73 A.D.3d 960, 962 (2d Dep't 2010); Corman v. LaFountain, 38 A.D.3d 706, 708 (2d Dep't 2007); Andrew Greenberg, Inc. v. Svane, Inc., 36 A.D.3d 1094, 1096 (3d Dep't 2007); St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 697, 703-704 (2d Cir. 1989). A claim to recover corporate assets diverted, converted, or misappropriated by corporate officers or employees for their own enrichment and for which they have not accounted constitutes a wrong to the corporate entity as well as to its creditors. Abrams v. Donati, 66 N.Y.2d 951, 953 (1985); Evangelista v. Slatt, 20 A.D.3d 349, 350 (1st Dep't 2005); Andrew Greenberg, Inc. v. Svane, Inc., 36 A.D.3d at 1097; Albany-Plattsburgh United Corp. v. Bell, 307 A.D.2d 416, 419 (3d Dep't 2003). See Lama Holding Co. v. Smith Barney, 88 N.Y.2d 423, 424 (1996); Wolff v. Wolff, 67 N.Y.2d at 641; Buechner v. Avery, 38 A.D.3d 443 (1st Dep't 2007); American Baptist Churches of Metro. N.Y. v. Galloway, 271 A.D.2d at 99. Unless this claim is

sufficiently particular to plaintiff, as opposed to all MGL's creditors, the bankruptcy trustee must determine whether to institute the claim, and until the trustee abandons it plaintiff lacks standing to maintain it. 11 U.S.C. § 554; Cardinal Holdings, Ltd. v. Indotronic Intl. Corp., 73 A.D.3d at 962; Corman v. LaFountain, 38 A.D.3d at 708; Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d 130, 132 (2d Cir. 1993); St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 698, 701.

A. The Parameters of Plaintiff's Alter Ego Claim

The complaint alleges that defendants operated MGL as their instrumentality or alter ego, rather than as a separate corporate entity, without observing corporate formalities and without adequate capital, to further their personal business or other personal purposes, and siphoned off MGL's assets for their own needs without satisfying its debts. See Shisgal v. Brown, 21 A.D.3d 845, 848-49 (1st Dep't 2005); Albany-Plattsburgh United Corp. v. Bell, 307 A.D.2d at 419, 420 n. Denial of defendants' motion to allow disclosure well might uncover MGL's lack of corporate and financial records and defendant individuals' roles and responsibilities in MGL's operation, such that defendants dominated MGL, perpetrating a wrong against plaintiff regarding the payment for the General Cigar advertisements. C.P.L.R. § 3211(d). Such evidence would support piercing the corporate veil. Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 141; Stewart Tit. Ins. Co. v. Liberty Tit. Agency, LLC, 83 A.D.3d 532, 533 (1st Dep't 2011); Do Gooder Prods., Inc. v.

American Jewish Theatre, Inc., 66 A.D.3d 527, 528 (1st Dep't 2009); Shisgal v. Brown, 21 A.D.3d at 847-48.

Plaintiff's allegations supporting this relief, however, apply to MGL's creditors as a whole. See Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d at 133; St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 697-98. Plaintiff's alter ego claim does not depend on plaintiff's particular dealings with or reliance on defendants in their control of MGL, nor depend on defendants' particular misrepresentations designed to perpetrate a fraud against plaintiff in particular. See St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 697, 701, 706.

Defendants' operation of MGL as their instrumentality or alter ego, rather than as a distinct corporate entity, without corporate formalities and adequate capital, and defendants' siphoning off of MGL's assets, all for their personal purposes, may explain the nonsatisfaction of MGL's debt to plaintiff, but also would explain the nonsatisfaction of any creditor's debt. Shisgal v. Brown, 21 A.D.3d at 848-49; Andrew Greenberg, Inc. v. Svane, Inc., 36 A.D.3d at 1097. See Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 143-44. While plaintiff seeks a specific payment owed to plaintiff, it does not claim defendants' conversion of or unjust enrichment by a particular item of property to be returned to plaintiff or a personal injury distinct from other creditors. See St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 704, 706. Instead, plaintiff claims defendants' looting caused MGL to lose assets, which in

turn caused MGL to default in the payment owed to plaintiff. See id. at 702, 704-705.

Plaintiff's direct claim, if successful, would bring MGL's assets that defendants have siphoned off, such as the funds General Cigar paid to MGL, back into the debtor's estate, for the benefit of all its creditors. Andrew Greenberg, Inc. v. Svane, Inc., 36 A.D.3d at 1097; Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d at 132-33; St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 697, 701. Insofar as plaintiff may maintain the alter ego claim, any creditor of MGL likewise may, regardless of the creditor's specific relationship with MGL or defendants, its alleged alter egos. See Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d at 132; St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 698, 701. If successful, this claim would rectify plaintiff's injury and other creditors' injury similarly. See Andrew Greenberg, Inc. v. Svane, Inc., 36 A.D.3d at 1098; St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 697.

B. Plaintiff's Lack of Standing to Maintain Its Alter Ego Claim

Nevertheless, plaintiff, a single creditor, may not maintain its alter ego claim on its own behalf against defendants, MGL's officers or employees, and obtain plaintiff's own remedy in preference to and to the detriment of other creditors, when plaintiff shares an injury common to all creditors. See St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 698, 701, 704. The remedy for an injustice to creditors caused by defendants is

to allow the bankruptcy trustee to institute the alter ego claim as property of MGL's estate. Id. at 704. The trustee's exclusive standing to institute this claim furthers the bankruptcy proceeding's objective of ensuring similar treatment of similarly situated creditors by maximizing the pool of assets available to satisfy all creditors' debts proportionately: an objective that a continuation of this action based on the alter ego claim would frustrate. Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d at 133; St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 697, 701, 704, 707.

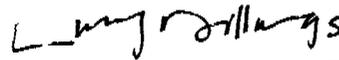
This objective of protecting all creditors extends to common claims against the debtor MGL's alter egos who have misused the LLC's property. St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 701. Therefore plaintiff may not maintain its alter ego claim outside MGL's bankruptcy proceeding, Cardinal Holdings, Ltd. v. Indotronix Intl. Corp., 73 A.D.3d at 962; Corman v. LaFountain, 38 A.D.3d at 708, until the bankruptcy trustee has abandoned the claim. St. Paul Fire & Mar. Ins. Co. v. PepsiCo, Inc., 884 F.2d at 702, 704-705, 707.

#### V. DISPOSITION

For the foregoing reasons, and in the absence of any cross-claims by any defendants, the court grants the McCaffery defendants' motion to dismiss the action against them, without prejudice to a future action by plaintiff against MGL or these defendants consistent with MGL's bankruptcy proceeding. 11 U.S.C. §§ 541(a), 554; C.P.L.R. § 3211(a)(1), (3)-(5), and (7).

Plaintiff acknowledges in its opposition to the McCaffery defendants' motion that plaintiff has never served defendant Lane. Subsequent to the motion, plaintiff and defendant Gottlieb stipulated to discontinuance of the action against him. Therefore the dismissal of the action against the McCaffery defendants disposes of the entire action. This decision constitutes the court's order and judgment dismissing the action.

DATED: August 31, 2012



---

LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.

**UNFILED JUDGMENT**

**This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**