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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART 2
Justice

Index Number : 110957/2009
COLUMBUS SPONSORSHIP, LLC
vs.
MILLENIA PARTNERS, LLC
SEQUENCE NUMBER : 006
PARTIAL SUMMARY JUDGMENT

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
OCT 26 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/22/12

LOUIS B. YORK, J.S.C.

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

[* 2]

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

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COLUMBUS SPONSORSHIP, LLC,

Plaintiff, Index No. 110957/09

-against-

MILLENIA PARTNERS, LLC, et al.,

Defendants.

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A/R RETAIL, LLC,

Plaintiff, Index No. 113412/09

-against-

MILLENIA PARTNERS, LLC, d/b/a MILLENIA FINE ART COLLECTION, et. al,

Defendants.

----------x

YORK, J.:

Defendant Alan Ginsburg ("Ginsburg") moves, pursuant to CPLR 3212(e), for partial summary judgment dismissing various causes of action against him as an individual.

BACKGROUND

Columbia Sponsorship LLC ("CS"), is an entity that controls the common spaces in the Time Warner Center building in Manhattan ("TWC"). A/R Retail, LLC ("A/R") leases retail

stores in the TWC. On June 30, 2004, defendant Millenia Partners, LLC ("Partners" or "tenant") signed an Art Exhibition Agreement (the "AEA") with CS, giving Partners the right to display fine art in public spaces in TWC in exchange for 10% of gross sales. The term of the AEA was three years. Ginsburg, the sole member of Partners, also rented a residential apartment in the TWC. Millenia Gallery LLC ("Gallery") operated the Millenia Gallery in Orlando, Florida, which exhibited modern and contemporary art owned by Partners and/or consigned to Gallery.

Prior to the expiration of the term of the AEA, on December 7, 2006 the parties entered into the Amended and Restated Art Exhibit Agreement ("ARAEA") for the term of 10 years. Partners agreed to pay plaintiff an annual fee of $150,000, in two equal installments of $75,000, on February 1 and August 1 of each year. Tenant also leased a retail store from A/R to serve as a sales office. A personal guarantee in the name of Alan Ginsburg was executed simultaneously with the lease. Ginsburg's signature on the agreement and the guaranty was notarized by his secretary.

No installment payments were paid to CS since February 1, 2009. Tenant also failed to pay rent to A/R, and on July 30, 2009 was served with a five-day notice of default. On September 16, 2009 A/R obtained a judgment of possession of the premises in summary proceedings in the New York Civil Court.

On July 31, 2009, CS filed a complaint against Partners assigned the index number 110957/09 ("Action No. 1"). On September 10, 2009 Partners served an answer in which it admitted that it was in default on the ARAEA. Opposing CS's motion for summary judgment, Ginsburg submitted an affidavit, sworn to on October 31, 2009 in which he asserted that he learned about the agreements only after he was served with the complaint in Action No. 1, and that his signature on the agreements was forged by his employee, Jeffrey Hall ("Hall"). Ginsburg

requested leave to amend his answer to assert forgery as defense, which was granted. A/R commenced an action with an index number of 113412/09 ("Action No. 2) seeking damages against Partners for breach of lease and against Ginsburg for breach of personal guaranty. The two actions were joined for discovery and trial.

On November 23, 2010, CS and A/R moved for leave to amend their respective complaints to assert causes of action for piercing the corporate veil and alter ego liability against Ginsburg and entities controlled by him. In addition to Millenia Gallery LLC, these entities include Millenia Fine Art Collection, Millenia Fine Arts, Noram LLC and Noram-AHG, LLC. Justice Marcy S. Friedman granted the motion, having determined that the common ownership of corporations, their location at the same address, payments by Gallery on Partners' behalf, the use by Jeffrey Hall of the Noram e-mail letterhead, taken together more than adequately support plaintiffs' allegations of their alter ego causes of action.

Ginsburg now moves to dismiss the causes of action for piercing the corporate veil and alter ego liability (second cause of action in Action No. 1 and fourth cause of action in Action No. 2) and for breach of personal guaranty (third cause of action in Action No.2).

PIERCING CORPORATE VEIL/ALTER EGO LIABILITY

Parties' Positions

Defendant Ginsburg claims that the substantive law of Florida governs the plaintiffs' efforts to pierce the corporate veil of Florida LLCs, while conceding that the substantive law of New York and Florida is the same (Def. Memo p.10, note 2). He further asserts that plaintiffs failed to introduce any evidence that Ginsburg's domination over his companies was part and parcel of a fraudulent scheme directed at plaintiffs, serving as a proximate cause of their losses

(Def. Memo p.3). A breach of contract is not a fraud, and an allegedly dominating principal does not become personally liable for his corporation's breach of contract. Ginsburg's attorneys chose not to address the domination and control elements of the veil-piercing claim in their memorandum of law, since in their opinion plaintiffs' inability to prove fraud is dispositive of the matter. (Def. Reply Memo p. 2, note 2).

Plaintiffs argue that the previous court ruling in this case, allowing them to amend the complaint to include the veil-piercing/alter ego claims, determined that the New York law applies. In addition, the original AEA agreement and all subsequent agreements contain choice of law provisions requiring the application of New York law. Finally, Ginsburg recognizes that the New York and Florida law is the same.

Plaintiffs adduce additional evidence that tends to show to what extent Ginsburg dominated various entities of which he is the sole member. Partners has never had a single employee, Ginsburg transferred his personal art to Partners, the funding for Gallery and Partners came from Ginsburg or his other companies, the employees if Gallery and Partners were paid by other companies under Ginsburg's control. They cite Ginsburg's testimony at his deposition concerning paying the Gallery and Partners' bills: "I worked away at paying those and I really don't know what account they were paid out of. I don't know if I transferred my personal funds into a Gallery checking account so Gallery wrote the checks, or whether some other entity that I'm involved with actually paid the bill" (Ginsburg Tr. P. 26.). As to the element of fraud, plaintiffs contend that they only need to demonstrate that Ginsburg used his dominance and control to perpetrate a wrong. The wrong consisted of Ginsburg hiding behind the shell companies to sell art in TWC without paying a penny in rent. (Pl. Memo, P. 14).

Discussion

The parties no longer dispute whether the New York or Florida law applies to the veil-piercing claim, having agreed that the substantive law of the two states is the same in this respect. The issue to be resolved under the New York law is whether a party that requests piercing the corporate veil needs to demonstrate that the domination of a company by its shareholders or members and the disregard for the corporate formalities were a means to perpetrate fraud. If this is indeed the requirement, did plaintiff come up with evidence to substantiate this claim?

> "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene."

Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141-42, 603 N.Y.S.2d 807 [1993] (internal quotations omitted).

Under New York law, piercing the corporate veil does not require the showing of fraud – it is sufficient that the disregard of corporate formalities led to an unjust outcome. In the real estate context, an injustice may occur when an individual owner who dominates a corporation leaves an empty shell which is not capable of paying the rent due. 29/35 Realty Assoc. v 35th St. New York Yarn Ctr., Inc., 181 AD2d 540, 581 N.Y.S.2d 43 [1st Dept 1992] (landlord stated claim for piercing corporate veil of tenant and guarantor, and assigning personal liability to owner, by alleging that tenant and guarantor were mere instrumentalities, agents and alter egos of owner, that unjust and inequitable loss would result if corporate forms were not disregarded,

and owner allegedly used corporations for purely personal ends to escape liability for the rent due plaintiff). Ventresca Realty Corp. v Houlihan, 41 AD3d 707, 838 N.Y.S.2d 609 [2d Dept 2007] (plaintiff, after obtaining judgment against corporation for unpaid rent and related damages, was entitled to pierce corporate veil and hold individual defendants personally liable for debt—corporation was mere "dummy" or "shell" entity created solely for purpose of signing lease; individual defendants completely dominated and controlled corporation, and abused corporate form to commit wrong against plaintiff in vacating premises and causing breach of lease). *See, also*, Fern, Inc. v Adjmi, 197 AD2d 444, 445, 602 N.Y.S.2d 615 [1st Dept 1993].

In the present case testimonies by Ginsburg, (Ginsburg Tr. PP. 23-24), Alan Wilson (Wilson Tr. PP. 32-34) and Gene Harris (Harris Tr. PP. 158-159) clearly establish that Gallery and Partners were thinly capitalized, have millions of dollars in debt with few or no assets. Ginsburg himself admitted that he comingled finances of his companies. There is also evidence that despite awareness of Partners' financial difficulties, Ginsburg authorized continued occupancy in the TWC without intending to pay any rent (Ginsburg Tr. P. 109). Plaintiffs have raised numerous material issues of fact to withstand the dismissal of the cause of action for piercing corporate veil/alter ego.

GINSBURG'S PERSONAL GUARANTY OF THE LEASE

Parties' positions

In a sworn affidavit dated October 30, 2009 Alan Ginsburg asserted that he was first made aware of the existence of lease agreements between Millenia Partners on the one hand and CS and A/R on the other, along with his personal guaranty of a lease with A/R, only in September 2009. Jeffrey Hall, who managed day-to-day business of the Gallery, had a serious

automobile accident on September 22, 2009. After a "repo" man contacted Ginsburg concerning repossession of three vehicles leased to the Gallery, he was shown three leases in the name of Millenia Gallery, LLC and in his own name, as guarantor, on which his signatures were forged. The subsequent investigation revealed that Hall had deposited art sales proceeds in his personal bank accounts, used art as collateral for personal loans and signed agreement on behalf of Partners and Gallery which were not authorized. Ginsburg further stated that Hall forged his signature to the AREAE, as well as on the lease with A/R and the personal guaranty which is part of it. He contended that Hall directed attorneys to file an answer in the Action No. 1 which effectively conceded the enforceability of the AREAE, while Partners had not approved and would never have approved it.

In his depositions Ginsburg denied ever seeing the guaranty on the lease with A/R. Hall, for his part, admitted that he forged Ginsburg's signature and expressed his belief that Ginsburg had never seen the document until the start of court cases (Hall Tr. P. 255). Based on these two testimonies, defendant Ginsburg moved to dismiss A/R's third cause of action against Ginsburg as an individual.

Plaintiff A/R does not concede that there was a forgery of Ginsburg's signature on any of the documents. In addition, it counters that even if such forgery occurred, based upon the "two innocent parties" doctrine, the party which hired the rogue agent, must bear the consequences of this agent's misconduct (Kingsley Aff., ¶25-26). "Ginsburg hired Hall, his close and trusted friend, to run Millenia. Indeed, Ginsburg did so despite Hall's lack of education and experience with art, and ignored other warning signs and even other dishonest acts by Hall. Thus, it is not only required by law, but is completely equitable for Ginsburg to bear the risk of loss, and it

would be highly inequitable for the innocent Landlord, which is not accused of any wrongdoing, to suffer the loss." (Pl. Memo PP. 16-17).

A/R also points to the evidence that, in its opinion, establishes that Ginsburg has ratified the agreements. In February 2009 Ginsburg wrote a memo addressed to Hall, in which he wrote: "Time Warner Building – New York City – At your option, we can either close the New York facility and return the entire art product to the Orlando location or, we can maintain the New York facility… In addition, we will immediately discuss with Steve Ross or his building manager our requirement to be released from our permanent store lease and to [sic] a rental payment equal to 10% of all of our sales in the common spaces. There will be no guarantee of $150,000 per year."

Ginsburg never rescinded the agreements, continued to accept the benefits of the agreements by allowing Partners to remain in the possession of the retail store and common areas for an additional seven months, until they were evicted. In the same period Partners sold tens of thousands of dollars worth of art (Pl. Memo, P. 18).

Plaintiff A/R also cites an e-mail from Alan Wilson, a manager at the Millenia companies, dated August 19, 2009 that refers to the terms of the AREAE and the A/R lease, in particular the 2/1/09 semi-annual payment of $75,000 to CS and of rents and expenses of $69,008 to A/R.

A/R further argues that even if Ginsburg was unaware of the agreements, he should have known about their existence, since he was the sole member of his companies, put his agent and friend, Hall in charge of everyday operations and relied on him, was aware that Partners operated in TWC after the AEA expired but never bothered to learn the full terms of the agreements under which it was operating, was aware Partners obtained a retail store in TWC but never asked to see

the lease, his company, the Gallery, paid $700,000 out of its bank accounts for the rent due to CS and A/R. Plaintiff A/R argues that if a party ratified any part of transaction, it ratified the whole transaction, in this case the personal guaranty.

Finally, A/R contends that Hall had apparent authority to bind Ginsburg and his companies.

Discussion

Defendants submitted uncontroverted evidence that Hall signed the agreement in the name of Ginsburg. (Hall Tr. PP.57-58). Though plaintiffs do not accept that forgery took place, they do not proffer any evidence showing that the signature on documents was indeed that of Ginsburg himself. Instead, they contest the defense of forgery on another ground – that it was an established practice in Ginsburg's dealings with Hall that Hall signed documents in Ginsburg's name either at his request or with his knowledge. Accordingly, they request that defendants produce documents in which Hall allegedly signed Ginsburg's name and which were not subsequently repudiated by Ginsburg. Hall named such documents in his testimony (Hall Tr. PP. 33-36).

Under the criminal law, to establish that the document was forged "it is necessary that the actual maker or drawer be someone other than the ostensible maker or drawer and that the actual maker or drawer not have the authority to act for the ostensible maker or drawer." People v Levitan, 49 NY2d 87, 90-91, 424 N.Y.S.2d 179 [1980]. Hall was criminally charged with forging Ginsburg's signature on the car leases, but not in the case of the real estate transactions which are the subject of the present two actions. Even if Hall has signed Ginsburg's name in his place on the lease agreement, he may have had authority to do so. Plaintiffs tendered evidence sufficient to raise this issue, and further discovery is necessary to determine whether it was

indeed the case. This in itself is a ground to deny Ginsburg's motion for partial summary judgment.

The concept of apparent authority, by contrast, is not applicable to the present case. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. In such circumstances, the third party's reasonable reliance upon the appearance of authority binds the principal." Std. Funding Corp. v Lewitt, 89 NY2d 546, 551, 656 N.Y.S.2d 188 [1997] (internal quotation omitted). Jeffrey Hall signed Alan Ginsburg's name on the contracts, not his own. The counterparty to the transaction did not mistakenly believe that the agent had authority to bind the principal. The landlords believed that Ginsburg made the agreements, both on behalf of Partners and himself.

Plaintiff A/R raised material issues of fact concerning Ginsburg's ratification of the lease agreements on behalf of his companies. Ginsburg objects that at most this evidence points to ratification of the lease by Partners, but has no bearing on his individual liability on those leases (Def. Reply Memo, PP. 16-17). While Hall testified that he informed Ginsburg about the AREAE and the A/R lease, there is not a single piece of evidence that Ginsburg was aware of a personal guaranty ostensibly signed by him in connection with the Lease. Thus, he cannot be held bound by an allegedly forged guaranty based on the theory of ratification.

The concept of "two innocent parties" is an equitable device to choose which of the two parties victimized by the fraud of the third party has to bear the loss. It is widely used in cases where accountants divert funds for their own use, or attorneys abscond with money intended for their clients. In this case the fraud perpetrated by Hall is an allegedly unauthorized signing of the lease and personal guaranty, not an appropriation of money meant for rent. At issue is the

validity of the lease agreement and obligation to pay rent under it. Either Millenia Partners, and if the corporate veil is pierced, other entities related to Ginsburg and Ginsburg himself are liable for unpaid rent, or they can be absolved of this liability. There were no financial losses sustained by "two innocent parties", and the concept is not relevant in the present circumstances.

CONCLUSION

For the foregoing reasons it is

ORDERED that defendant Ginsburg's motion for summary judgment dismissing the causes of action for piercing the corporate veil/alter ego and for personal guaranty on the lease is denied.

Dated: 10/22/12

ENTER:

FILED
OCT 26 2012
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J.S.C.

LOUIS B. YORK
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