Eco Smart Holdings, Ltd. v Maston
2016 NY Slip Op 32778(U)
April 11, 2016
Supreme Court, Nassau County
Docket Number: 600273-15
Judge: Timothy S. Driscoll
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ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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ECO SMART HOLDINGS, LTD., ALMOST HOME SUITES, LLC, and CHRISTOPHER THOMPSON,

Plaintiffs,

-against-

HERMAN MASTON, QUICKLINK CAPITAL, LLC, METROPOLITAN FINANCIAL HOLDINGS LTD., also or formerly known as METROPOLITAN BANCORP LTD., GOLDIE DICKEY, RICHARD GUETZHOW, JOHN DOES 1-5,

Defendants.

----------x

TRIAL/IAS PART: 12
NASSAU COUNTY

Index No: 600273-15
Motion Seq. Nos. 2 and 4
Submission Date: 3/16/16

Papers Read on these Motions:

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Correspondence dated May 29, 2015.....x
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This matter is before the court on 1) the motion filed by Plaintiffs Eco Smart Holdings, Ltd. ("Eco Smart"), Almost Home Suites, LLC ("Almost Home") and Christopher Thompson ("Thompson") ("Plaintiffs") on May 15, 2015, and 2) the motion filed by Defendants Herman Maston ("Maston") and Quicklink Capital, LLC ("Quicklink") ("Maston Defendants") on February 8, 2016, both of which were submitted on March 16, 2016, following oral argument before the Court. For the reasons set forth below, the Court 1) grants the motion by the Maston Defendants to dismiss the Second Amended Complaint as asserted against them; and 2) denies

Plaintiffs' motion as moot.

BACKGROUND

A. Relief Sought

The Maston Defendants move for an Order dismissing the Second Amended Complaint. Plaintiffs oppose the motion.

Plaintiffs move for an Order permitting discovery in aid of the pending motion, or allowing discovery while the motion is being heard and adjudicated. The Maston Defendants oppose Plaintiffs' motion.

B. The Parties' History

On April 20, 2015, the Maston Defendants filed a motion in which they sought dismissal of the Amended Complaint ("Prior Motion to Dismiss"). In its prior Order ("Prior Order") dated July 24, 2015, the Court directed that the Prior Motion to Dismiss (motion sequence number 1) and Plaintiffs' motion to permit discovery (motion sequence number 2) would be the subject of oral argument. In its Prior Order, the Court outlined numerous issues regarding the sufficiency of the Amended Complaint that the Court would address at the oral argument. On January 8, 2016, subsequent to the issuance of the Prior Order, Plaintiffs filed their Second Amended Complaint. Defendants then moved to dismiss the Second Amended Complaint. In light of the filing of the Second Amended Complaint, the Maston Defendants withdrew their Prior Motion to Dismiss and filed the motion that is the subject of this decision, which is directed to the Second Amended Complaint.

As noted in the Prior Order, the Amended Complaint described this action as follows:

> This matter involves an advance fee fraud. In such a scheme, the victim is promised a substantial benefit such as a loan in exchange for an upfront fee. The victim pays the fee and the culprit provides nothing, as was its intention all along, concealing the deception through false or misleading explanations.
>
> In this scheme credulous business and individuals would purchase letters of credit supposedly used to secure financing or funding for transactions or projects involving large stated amounts. The consumer or company would be told he could secure and negotiate multi-million dollar instruments by paying 1-3% of its stated value. Once the victim attempted to obtain the funds, on his own or through defendants, he would find unexpected problems, and the various participants in the scheme would profess

> surprise, proffer excuses, point fingers at one another, and provide nothing of value. The complaint involves two related advance fee frauds with the two plaintiffs as victims. (because a central part of the fraud involved worthless letters of credit, the fraud is sometimes referred to as the bogus letter of credit scheme).

As also noted in the Prior Order, the Amended Complaint asserted nine (9) causes of action: 1) by Thompson and Almost Home for fraud and conspiracy to commit fraud in or about February 2012 in connection with a transaction, allegedly an "advance fee scheme to misappropriate money for non-existent loans" (Am. Comp. at p. 4), in which Thompson forwarded at least $155,000 to Defendants but no funding was provided and the monies were never returned despite repeated requests, 2) by Eco Smart for fraud and conspiracy to commit fraud based on the allegation that Defendants convinced Eco Smart to pay a total of $110,000 for worthless letters of credit and instruments provided by Metropolitan that would be used to secure funding, 3) a violation of the Deceptive Practices Act, New York General Business Law § 349(a) based on the allegation that Defendants' sale and marketing of a fraudulent and worthless letter of credit is a transaction covered by that statute, 4) a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 5) a request for punitive damages, 6) negligence and negligent communication of information, 7) breach of contract based on the allegation that Plaintiffs entered into a contract with Defendants, or were a third party beneficiary of an agreement, that provided for the issuance of a letter of credit that was expected to be honored, 8) a request that the Court pierce the corporate veil and hold the individual defendants responsible for the conduct of the corporate defendants based on the allegations that the individual defendants have insufficient assets to pay the judgment, assets have been concealed or fraudulently transferred, the proper corporate form has been ignored and the corporate entity has been used as an instrument of fraud, illegal conduct and deception, and 9) a request for an injunction.

In the Prior Order, the Court directed that the oral argument would address the following issues: 1) whether the first and second causes of action in the Amended Complaint pleaded the requisite elements of fraud with sufficient particularity including, specifically, a) whether Plaintiffs had adequately alleged a misrepresentation or omission on the part of Maston or Quicklink; b) whether Plaintiffs had adequately delineated who made the alleged misstatements;

and c) whether Plaintiffs had pleaded sufficient allegations to demonstrate that Maston or Quicklink gave advice, or made representations, that they knew to be false at the time they were made; 2) whether the fraud claims were duplicative of the breach of contract claims; 3) whether the first and second causes of action, which included claims for conspiracy, alleged a viable tort to support the conspiracy claims; 4) whether the allegedly deceptive practices that formed the basis of the third cause of action, alleging a violation of General Business Law § 349, were sufficiently consumer oriented to support that cause of action; 5) whether Plaintiffs, in the fourth cause of action, had adequately pled a Racketeer Influence and Corrupt Organizations ("RICO") claim, including whether Plaintiffs had adequately alleged the required predicate conduct and had adequately alleged the particular conduct that Defendants engaged in; 6) whether the fifth cause of action, which was a cause of action for punitive damages, could proceed as an independent cause of action; 7) whether the sixth cause of action, alleging negligence, adequately alleged the existence and scope of the duty allegedly owed by Defendants to Plaintiffs; 8) whether the seventh cause of action, alleging breach of contract and "Third Party Beneficiary," provided adequate specifics regarding the contract allegedly entered into by the parties; 9) whether the eighth cause of action, in which Plaintiffs sought to pierce the corporate veil, provided sufficient allegations that the corporate owners exercised complete domination and control of the corporations, and that domination and control was used to commit a fraud or wrong against Plaintiffs which resulted in Plaintiffs' injury; 10) whether the ninth cause of action, for injunctive relief, adequately alleged the required elements to support an award of injunctive relief, specifically a probability of success, danger of irreparable injury in the absence of an injunction and a balance of the equities in Plaintiffs' favor; and 11) whether discovery should proceed, or be stayed, pending a ruling on the motions.

On March 16, 2016, the Court conducted oral argument. The oral argument addressed the issues raised in the Prior Order as they relate to the sufficiency of the Second Amended Complaint.

The Second Amended Complaint alleges that Plaintiff Eco Smart is a company located in Ireland. Plaintiff Thompson, a resident of Minnesota, created Plaintiff Almost Home. Defendant Metropolitan Capital & Financial is an entity located in Oklahoma of which

Defendant Goldie Dickey ("Dickey") is the president or owner. Defendant Metropolitan Financial Holdings, Ltd. ("Metropolitan") is allegedly a related company which asserted that it is located in New Zealand but which is not licensed by any New Zealand authority, and which has "little or no funds or assets" (Sec. Am. Comp. at p. 2). Plaintiffs allege that Defendant Quicklink is a company located in Freeport, New York that Defendant Maston owns, controls and/or operates. Plaintiffs allege that Quicklink, whose website describes it as a "wholesale direct broker" (Second Am. Comp. at p. 4) frequently partners with Defendants Richard Guetzhow ("Guetzhow") and Metropolitan in the sale of letters of credit and "spurious loan opportunities" like the one alleged by Plaintiffs (Sec. Am. Comp. at p. 3). Plaintiffs allege that Defendant Guetzhow has avoided service of the complaint on him.

In the Second Amended Complaint, Plaintiffs assert the following six (6) causes of action: [1]

First Cause of Action

Plaintiffs Thompson and Almost Home assert this cause of action for fraud and conspiracy to commit fraud based on the allegation that in or about February 2012, Defendant Guetzhow "partnered or conspired with Maston and Metropolitan in this advance fee scheme to misappropriate money for nonexistent loans" (Sec. Am. Comp. at p. 5). Plaintiffs Thompson and Almost Home allege that, based on the statements, promises and representations of Guetzkow and his co-defendants, Plaintiff provided at least $155,000 to Defendants, and that Plaintiffs were advised that these funds were fully refundable. In support of this cause of action, Plaintiffs provide details regarding documents provided and statements made by Guetzhow, Metropolitan, Maston and Defendant Goldie Dickey ("Dickey") between 2012 and 2014 that form the basis for the fraud and conspiracy claim.

Second Cause of Action

Plaintiff Eco Smart asserts this cause of action for fraud and conspiracy to commit fraud based on the allegation that "[t]he Metropolitan and Quicklink defendants convinced plaintiff Eco Smart to pay a total of $110,000 for worthless letters of credit and related instruments" (Sec.

[1] Both the first and second causes of action are designated "Count Two" (*see* Sec. Am. Comp. at pp. 5 and 12).

Am. Comp. at p. 13). The allegations in support of this cause of action include actions allegedly taken by Quicklink and Maston between September and December 2011 (*see* Sec. Am. Comp. at ¶ 17). These allegations include: 1) "Solicitation for the fraud, communicating with plaintiff on multiple occasions between September, 2011 and December, 2011, telling plaintiff that the financing had been or would be approved;" 2) "Getting a kickback or success commission for referring plaintiff to Metropolitan and helping them defraud plaintiff;" 3) "Helping Metropolitan to provide bogus explanations such as that funding was forthcoming;" 4) "Establishment of fraudulent entity stylized as a bank;" and 5) "Falsely stating that Metropolitan was a bank which provided financing instead of disclosing their fraudulent nature."

Third Cause of Action

Plaintiffs allege that Defendants' conduct constitutes a violation of New York General Business Law ("GBL") § 349. Plaintiffs further allege that Defendants' acts, and the alleged continuing fraud, present a danger to the citizens of New York, including those the statute is designed to protect. This cause of action also alleges that Defendants' "deceptions and participation in a fraudulent scheme violates the deceptive practice acts and laws in other states including the states where the defendants are located" (Sec. Am. Comp. at p. 16).

Fourth Cause of Action

This cause of action alleges a violation of Federal and State RICO Statutes. This cause of action includes the allegations that 1) "[a]t various times and places enumerated in the complaint, defendants used wire and television communication to defraud plaintiff" (Sec. Am. Comp. at p. 17); and 2) "Defendants engaged in a "pattern of racketeering activity" by committing at least two acts of racketeering activity after the effective date of RICO and also within ten years of each individual act" (*id.*). This cause of action also alleges that Defendants violated New York Penal Law Article 460 "and related state laws regarding fraud and other wrongdoing" (Sec. Am. Comp. at p. 19).

Fifth Cause of Action

In this cause of action, Plaintiffs seek to hold the individual defendants responsible for the conduct alleged in the Second Amended Complaint. In support of this cause of action, Plaintiffs allege that 1) the corporate defendants have insufficient assets to pay the amount of any

judgment; 2) assets have been concealed or fraudulently transferred; and 3) the proper corporate form has been ignored and, instead, the entity has been used "as an instrument of fraud, illegal conduct and deception" (Sec. Am. Comp. at p. 19).

Sixth Cause of Action

Plaintiffs seek an injunction in the sixth cause of action. In support of this cause of action, Plaintiffs allege *inter alia* that 1) "Defendants have and continue to solicit new victims, made false statements, and commit other frauds and illegal acts which can and should be enjoined;" and 2) Maston and his company "operate a fraudulent enterprise within this jurisdiction which continues to seek new victims and should be restrained and enjoined" (Sec. Am. Comp. at p. 20). Plaintiffs seek a preliminary and permanent injunction "preventing or enjoin [sic] the commission of further fraudulent and illegal acts" (Sec. Am. Comp. at p. 20).

B. The Parties' Positions

The Maston Defendants submit that dismissal of the Second Amended Complaint is appropriate because Plaintiffs' claims for fraud fail to plead the requisite elements of fraud with sufficient particularity. With respect to the first cause of action, the Maston Defendants submit that the additional information provided in the Second Amended Complaint, including the emails allegedly sent by Maston on December 10, 2013, January 13, 2014 and February 3, 2014 (Sec. Am. Comp. at pp. 10-12), fails to remedy the deficiencies of the initial Amended Complaint. The Maston Defendants submit that 1) the December 10, 2013 email does not demonstrate that Maston made or intended to make a misrepresentation, and does not provide any facts from which to infer that Maston knew, at the time he wrote this email, that a letter of intent to fund would be worthless; 2) the January 13, 2014 email contains no facts from which to infer that Maston knowingly represented the status of Plaintiffs' funding, and there is nothing on the face of this email to reflect that Maston knew that funding would not be forthcoming; and 3) the February 3, 2014 includes no allegations from which scienter can be inferred. The Maston Defendants submit that the Second Amended Complaint's pleading of scienter as it pertains to these emails "consists exclusively of conclusory statements" (Ds' Memo. of Law in Supp. at p. 8). Similarly, Plaintiffs' allegation regarding a wire transfer to the Maston Defendants on or about May 29, 2012 fails to plead scienter with the requisite specificity as Plaintiffs plead no

facts to support a finding that the Maston Defendants accepted an initial payment and helped to arrange Metropolitan's participation with any intent to deceive, or with knowledge of a fraud. The Maston Defendants contend, further, that the Second Amended Complaint's allegations regarding emails written by Plaintiffs and codefendants, some of which were sent or copied to Maston, are insufficient to show Plaintiffs' justifiable reliance on alleged misstatements or misstatements made by the Maston Defendants. The Maston Defendants submit that Maston's receipt of an email does not demonstrate that the Maston Defendants knew of any fraud, or that the Maston Defendants made a material misstatement or omission. The Maston Defendants also contend that some of the allegations "improperly lump all of the Defendants together and fail to delineate specific allegations against each Defendant" (Ds' Memo. of Law in Supp. at p. 10).

Similarly, with respect to the second cause of action, the Maston Defendants contend that there are insufficient allegations from which to infer scienter. The Maston Defendant submit *inter alia* that 1) the allegation based on advising Plaintiff that the transaction had been approved does not demonstrate fraud because Plaintiffs fail to allege that Maston or Quicklink gave advice that was false and known to be false by the Maston Defendants; 2) Plaintiffs plead no facts to support a finding that the Maston Defendatns accepted an initial payment and helped to arrange Metropolitan's participation with any intent to deceive; 3) the allegation regarding the receipt of funds on October 11, 2011 does not include any alleged facts to support scienter; and 4) the other allegations are conclusory and lacking in adequate specificity.

The Maston Defendants submit, further, that 1) the Court should dismiss Plaintiffs' conspiracy claims, both because New York does not recognize conspiracy as an independent cause of action, and because Plaintiffs have failed to properly allege a cognizable derivative tort to support a conspiracy claim; 2) the allegation that Guetzhow partnered or conspired with Maston and Metropolitan (Sec. Am. Comp. at p. 5) fails to state a claim for conspiracy because Plaintiffs do not allege any agreement between the Maston Defendants and Metropolitan or Guetzhow, or any overt action taken in furtherance of that agreement; 3) Plaintiffs fail to adequately plead a violation of GBL § 349 because Plaintiffs fail to allege any consumer-oriented act with harm to the public at large, as evidenced by the fact that the Defendants' actions relate solely to their purported agreement with Plaintiffs, and do not affect the public at large;

4) Plaintiffs have failed to plead any of the required elements of a civil RICO claim as evidenced by Plaintiffs' failure to a) explicitly identify any predicate conduct by Maston or Quicklink; b) allege or describe any actual enterprise, except in a conclusory fashion; or c) state, with the required specificity, two or more predicate acts engaged in by Maston or Quicklink; 5) Plaintiffs fail to adequately plead the elements of a cause of action for piercing the corporate veil as evidenced, *e.g.*, by Plaintiffs' allegation that Maston is the owner and/or president of Quicklink and supervised its activities (Sec. Am. Comp. at ¶ 19) which is wholly insufficient to demonstrate that the owners exercised complete domination and control of the corporation with respect to the transaction at issue; and 6) the sixth cause of action, seeking an injunction, fails to establish the required elements to warrant injunctive relief.

Plaintiffs oppose the motion submitting that 1) in light of the denial of a motion to dismiss in a separate case involving Metropolitan, the Court should deny the instant motion to dismiss; 2) Plaintiffs have adequately alleged facts supporting their fraud-related claims; 3) there is adequate evidence of mail and wire fraud, and of predicate acts, to support Plaintiffs' RICO claims; 5) Plaintiffs' GBL § 349 claim is viable and Plaintiffs have sufficiently demonstrated that the conduct at issue is sufficiently consumer-oriented to warrant application of this statute; and 6) the Second Amended Complaint provides adequate specificity regarding Defendants' allegedly improper conduct.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

B. Fraud

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008).

C. RICO

To bring a RICO claim, a plaintiff must allege 1) that the defendant; 2) through the commission of two or more acts; 3) constituting a pattern; 4) of racketeering activity; 5) directly or indirectly conducted or participated in; 6) an enterprise; 7) the activities of which affect interstate or foreign commerce. *Turner v. New York Rosbruch/Harnik, Inc.*, 84 F. Supp. 3d 161, 170 (E.D.N.Y. 2015), quoting *Crawford & Sons, Ltd. Profit Sharing Plan v. Besser*, 216 F.R.D. 228, 233 (E.D.N.Y. 2003), citing 18 U.S.C. §§ 1962(a) - (c) and *De Falco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001). The failure of any one element is fatal to a RICO claim. *Turner v. New York Rosbruch/Harnik, Inc.*, 84 F. Supp. 3d at 170, quoting *In re Integrated Res. Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1144 (S.D.N.Y. 1993).

The RICO statute defines racketeering to include mail and wire fraud. *Turner v. New York Rosbruch/Harnik, Inc.*, 84 F. Supp. 3d at 170, citing 18 U.S.C. § 1961(1)(B). Where the RICO claim alleges mail or wire fraud, a plaintiff must provide that 1) defendants participated in a scheme to defraud; 2) defendants acted with knowledge that the use of the mails or wires would follow in the ordinary course of business; and 3) the mailing or the use of wires was for the purpose of executing the scheme or fraud alleged. *Turner v. New York Rosbruch/Harnik, Inc.*, 84 F. Supp. 3d at 170, quoting *USA Certified Merchants, LLC*, 262 F. Supp. 2d 319, 333 (S.D.N.Y. 2003), citing *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 455 (S.D.N.Y. 1998). A plaintiff

must prove that the defendant knowingly participated in the scheme and that the misrepresentations were material. Like allegations of fraud, allegations of predicate mail and wire fraud acts should state the contents of the communications, who was involved, where and when they took place, and explain why they were fraudulent. *Turner v. New York Rosbruch/Harnik, Inc.*, 84 F. Supp. 3d at 170, quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993), citing *Official Publications, Inc. v. Kable News Co., Inc.*, 692 F. Supp. 239, 245 (S.D.N.Y. 1988), *aff'd in part, rev'd in part on other grounds*, 884 F.2d 664 (2d Cir. 1989).

D. GBL § 349

To successfully assert a claim under GBL § 349 or 350, a party must allege that its adversary has engaged in consumer-oriented conduct that is materially misleading, and that the party suffered injury as a result of the allegedly deceptive act or practice. *Yellow Book Sales and Distribution Co., Inc. v. Hillside Van Lines*, 98 A.D.3d 663, 663-34 (2d Dept. 2012). GBL Article 22-A, entitled "Consumer Protection from Deceptive Acts and Practices," which includes GBL §§ 349 and 350, is addressed to practices that have a broad impact on consumers at large. Accordingly, private contractual disputes which are unique to the parties do not fall within the ambit of the statute. *Yellow Book Sales and Distribution Co., Inc. v. Hillside Van Lines*, 98 A.D.3d at 634.

E. Conspiracy

Although New York does not recognize civil conspiracy to commit a tort as an independent cause of action, *Levin v. Kitsis*, 82 A.D.3d 1051, 1052 (2d Dept. 2011), quoting *Dickinson v. Igoni*, 76 A.D.3d 943, 945 (2d Dept. 2010) and citing *Alexander & Alexander of N.Y. v. Fritzen*, 68 N.Y.2d 968, 969 (1986), a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme. *Levin v. Kitsis*, 82 A.D.3d at 1052, quoting *Litras v. Litras*, 254 A.D.2d 395, 396 (2d Dept. 1998).

F. Injunctive Relief

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving

papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002).

G. Personal Liability for Corporate Obligations

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton v. Sandpebble*, 66 A.D.3d at 126, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton v. Sandpebble,* 66 A.D.3d at 126, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton v. Sandpebble,* 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

H. Application of these Principles to the Instant Action

The Court issued its Prior Order, and conducted oral argument, in light of its serious concerns regarding the viability of the initial Amended Complaint. The Court concludes that the Second Amended Complaint, which Plaintiffs filed following the issuance of the Prior Order in an effort to salvage their claims, does not remedy the numerous defects in the initial Amended Complaint. The Court grants the motion by the Maston Defendants, and dismisses the Second Amended Complaint as asserted against the Maston Defendants. Preliminarily, the Court notes that both the initial Amended Complaint and Second Amended Complaint are drafted in a manner that is confusing and difficult to follow, and contain numerous conclusory assertions unsupported by clearly pleaded facts. This is of concern because it raises issues regarding whether Defendants are clearly put on notice of the allegedly improper conduct in which they engaged. The Second Amended Complaint also contains extraneous information, specifically Plaintiffs' reference to an allegedly related matter in Federal Court involving Defendant Metropolitan (Sec. Am. Comp. at p. 5, ¶ 8) that, although purportedly included because it relates to venue and jurisdiction, does not bear on the sufficiency of the complaint. The Court has, however, thoroughly reviewed the Second Amended Complaint and, applying the applicable dismissal standard, concludes that dismissal of the Second Amended Complaint as asserted against the Maston Defendants is appropriate.

The Court grants the motion and dismisses the Second Amended Complaint as asserted against the Maston Defendants based on its conclusion that 1) Plaintiffs' claims for fraud fail to plead the requisite elements of fraud with sufficient particularity; 2) the documentation and statements set forth in the Second Amended Complaint in support of the fraud claims do not demonstrate that the Maston Defendants made or intended to make a misrepresentation; 3) the conspiracy claims are insufficient, both because New York does not recognize conspiracy as an independent cause of action, and because Plaintiffs have failed to properly allege a cognizable derivative tort to support a conspiracy claim; 4) the cause of action based on a violation of GBL § 349 is not viable because Plaintiffs fail to adequately allege any consumer-oriented act with harm to the public at large as the allegations support the conclusion that Defendants' actions relate solely to their purported agreement with Plaintiffs; 5) Plaintiffs' RICO claims are not viable

because Plaintiffs have failed to plead the required elements of a civil RICO claim with adequate specificity; 6) even assuming *arguendo* the viability of Plaintiffs' substantive claims, Plaintiffs have failed to adequately plead the elements of a cause of action for piercing the corporate veil; and 7) the cause of action for injunctive relief is legally insufficient because Plaintiffs have failed to allege the required elements to warrant injunctive relief.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

April 11, 2016

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

APR 20 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE