IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

VEPCO PARK, INC.	:	
	:	
Plaintiff,	:	
	:	C.A. No. 14C-09-018 RBY
v.	:	In and For Kent County
	:	
CUSTOM AIR SERVICES, INC., et al.,	:	
	:	
	:	
Defendants.	:	

Submitted: January 21, 2016
Decided: February 25, 2016

Upon Consideration of Defendants' Motion for Summary Judgment
As to Defendants Robin F. Thompson and Diane W. Thompson, Granted;
As to Defendant Absolute HVACR, Inc., Partial Summary Judgment, Granted

OPINION

Craig T. Eliassen, Esquire, Schmittinger & Rodriguez, Dover, Delaware for Plaintiff.

Stephen A. Spence, Esquire, Phillips, Goldman & Spence, Wilmington, Delaware for Defendants.

Young, J.

SUMMARY

Vepco Park, Inc. ("Plaintiff") filed an action against Defendants Custom Air Services, Inc. ("Custom"), Absolute HVACR, Inc. ("Absolute"), Robin F. Thompson and Diane W. Thompson for rent due on a commercial lease. Defendants filed a motion for summary judgment. Because the parties agree that a claim against the individuals does not exist, Defendants' motion for summary judgment as to Defendants Robin and Diane Thompson is **GRANTED**. Because the applicable statute of limitations bars certain rent claims, Defendants' motion for partial summary judgment as to Defendant Absolute is **GRANTED**. Finally, the Court lacks jurisdiction over the claim against Defendant Custom.

FACTS AND PROCEDURE

Plaintiff executed a commercial landlord-tenant lease with Absolute ("the Absolute lease") for five years beginning in 2007. The lease was signed by Robin F. Thompson as owner of Absolute, a Delaware corporation. Plaintiff executed a second commercial landlord-tenant lease with Custom for one year starting in 2009. The lease was signed by Diane W. Thompson as owner of Custom, a Delaware Corporation.

Robin and Diane Thompson are a married couple who owned and operated Absolute and Custom as affiliated but distinct enterprises. Absolute and Custom have maintained separate corporate formalities, including distinct taxpayer identification numbers, businesses, bank accounts, and owners. When Absolute was unable to pay rent following the economic downturn, Custom sent rent checks to Plaintiff on behalf of Absolute for a period of roughly one year, from 2010 to 2011.

Absolute gave timely notice to Plaintiff and its lease terminated on August 31, 2012.

Plaintiff filed suit on September 12, 2014 against Defendants in their corporate and individual capacities to recover the rent due on the Absolute lease. Defendants filed a motion for complete summary judgment as to Defendants Custom, and Robin and Diane Thompson. Absolute does not dispute that an uncertain amount of back rent is due, but asserts that the three year statute of limitations constrains Plaintiff's recovery to rent due from September 12, 2011 to August 31, 2012. Therefore, Defendants request partial summary judgment precluding recovery of any rent due prior to September 12, 2011, three years prior to Plaintiff's fling.

Plaintiff originally asserted that Robin and Diane Thompson were personally liable for the rent due under the Absolute lease. However, Plaintiff has since stated that it does not oppose entry of summary judgment in favor of Robin and Diane Thompson in their individual capacity. Still, Plaintiff seeks to hold both Custom and Absolute liable under the Absolute lease based on a "merger of obligations" theory of liability.

STANDARD OF REVIEW

Summary judgment is appropriate where the record exhibits no genuine issue of material fact so that the movant is entitled to judgment as a matter of law.[1] "Summary judgment may not be granted if the record indicates that a material fact

[1] *Tedesco v. Harris*, 2006 WL 1817086 (Del. Super. June 15, 2006).

is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances."[2] The court should consider the record in the light most favorable to the non-moving party.[3]

DISCUSSION

Plaintiff concedes that summary judgment is appropriate as to Defendants Robin and Diane Thompson. Therefore, Defendants' motion as to the two individual Defendants is granted. The remaining issues pertain to Plaintiff's recovery of outstanding rent due under the Absolute lease. Plaintiff seeks to recover from either or both Absolute and Custom. Custom asserts that it cannot be liable for Absolute's lease obligations. Defendants collectively argue that no Defendant can be liable for rent accrued before September 12, 2011.

The statute of limitations bars recovery for rent due before September 12, 2011

A dispute remains as to whether the statute of limitations bars recovery of rent due prior to September 12, 2011. Whether an action is barred by a statute of limitations is a question of law for the Court.[4]

Defendants argue that a three year statute of limitations applies to Plaintiff's rent recovery action under 10 Del. C. §8106. Plaintiff does not dispute this point. Defendant further argues that the statute runs with regard to installment payments

[2] *Id.*

[3] *Id.*

[4] *Parker v. Gadow*, 893 A.2d 964, 966 (Del. 2006).

from the time each installment becomes due. Here, Defendants explain, lease payments constitute installment payments for purposes of the statute of limitations. Thus, because the rent payments became due monthly under the lease until it expired on August 31, 2012, and because the Plaintiff filed suit on September 12, 2014, Plaintiff may not recover rent due from more than three years prior to the filing date. Therefore, Defendants argue that Plaintiff is constrained to recovering rent, if at all, from the period between September 12, 2011 and August 31, 2012.

Plaintiff argues that it was barred from bringing an action for rent due until the lease expired on August 31, 2012. Therefore, Plaintiff claims that it may still recover all rent outstanding on the Absolute lease, despite the statute of limitations.

Under Delaware law, an action on an installment contract accrues when each installment becomes due, unless acceleration is available.[5] The Absolute lease does not include an acceleration clause. A commonly referenced treatise on commercial leases states that a lessor may choose between "suing for rent installments as they come due, suing for several accrued installments, or suing for the entire amount at the end of the lease term."[6] Although that treatise rule *permits* Plaintiff to wait to sue for the entire amount at the end of Absolute's lease term, Delaware law is to the contrary. As described in *Worrell v. Farmers Bank*, the Plaintiff's action on each installment of rent under the lease accrued when it became due.[7] Thus, Plaintiff's

[5] *Worrel v. Farmers Bank of the State of Delaware*, 430 A.2d 469, 476 (Del. 1981).

[6] 49 *Am. Jur.* 2d Landlord and Tenant §642.

[7] *Worrel*, 430 A.2d at 476.

recovery is limited to only that rent due within the three year limitations period.

Hence, the motion of Defendants to foreclose Plaintiff's claims of rent accruing prior to September 12, 2011 is **GRANTED**.

The Court lacks jurisdiction over the equitable claim against Custom

A second dispute remains as to whether Custom can be held liable for Absolute's rent as a single entity owned and operated by the Thompsons. The primary analysis of this question in Delaware appears to come from *Ecommerce v. MWA Intelligence, Inc.*[8] That Chancery Court case held that "alter ego" or "instrumentality" liability, to attribute the actions of one corporation to another, requires:

> a showing of total domination or control, or a showing that the corporations are so closely intertwined that they do not merit treatment as separate entities.[9]

That showing may exist where two corporations fail to adhere to separate corporate formalities, or where a separate corporate existence "constitutes a fraud or public wrong, or [is] in contravention of law."[10] The *Ecommerce* Court noted that "common central management alone" is insufficient to disregard separate corporate existence.[11] Cases from other jurisdictions have indicated less strident criteria.[12]

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[8] 2013 WL 5621678 (Del. Ch. Oct. 4, 2013).

[9] *Id.* at *28.

[10] *Id.*

[11] *Id.*

[12] *Rohmer Associates v. Rohmer*, 36 A.D. 3d 990 (NY 3rd Dept. 2007); *Jackson v.*

General Electric Company, 514 P.2d 1170, 1173 (AK 1973).

Because of factors referenced by Plaintiff, the non-moving party, including overlapping management and employees, and acceptance of the other's obligations, this issue presents questions of fact, not appropriate to summary judgment determination, on the presence or absence of separate corporate identity.

That being the case, the question arises as to jurisdiction for that factual determination: Superior Court or Chancery Court. Under Delaware law, only the Chancery Court may preside over an action to pierce the corporate veil.[13] "Piercing the corporate veil" and "alter ego theory" are used interchangeably throughout Delaware precedent.[14] Appropriate jurisdiction for an action "depends on the substance of what the asserted claims seek."[15]

[13] *State ex rel. Higgins v. SourceGas, LLC*, 2012 WL 1721783, at *5 (Del. Super. May 15, 2012); *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del. Ch. Dec. 23, 2008); *Fountain v. Colonial Chevrolet Co.*, 1988 WL 40019, at *10 (Del. Super. April 13, 1988).

[14] *Winner Acceptance Corp.*, 2008 WL 5352063 at n. 32.

[15] *Id.* at *5.

Here, Plaintiff seeks to hold Custom liable for the rent debt of Absolute based on an alter-ego theory. Plaintiff's claim requires the Court to determine whether to disregard the separate corporate identities of Custom and Absolute. This analysis is done under the heading of piercing the corporate veil, and includes a fact intensive assessment of numerous factors.[16] Thus, Plaintiff's cause of action against Custom is an equitable claim which can be heard only in Chancery Court. Therefore, this Court is without jurisdiction to decide Plaintiff's claim.[17]

CONCLUSION

For the foregoing reasons, the Defendants' Motion for Summary Judgment is **GRANTED** as to Defendants Robin F. Thompson and Diane W. Thompson, and Defendants' Motion for Partial Summary Judgment is **GRANTED** as to Defendant Absolute. As to Defendant Custom's status as an "alter ego," that matter must be pursued in Chancery Court.

SO ORDERED.

/s/ Robert B. Young
J.

RBY/dsc
Via File & ServeXpress
oc: Prothonotary
cc: Counsel
File

[16] *Id.*

[17] *See Fountain*, at *10.