Cadogan Mgt., LLC v Wright
2011 NY Slip Op 34316(U)
October 12, 2011
Supreme Court, New York County
Docket Number: 102496/09
Judge: Doris Ling-Cohan

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X Index No. 102496/09

CADOGAN MANAGEMENT, LLC,

Plaintiff,

- against -

ERIC WRIGHT, BRYAN DINKELACKER, FRED DINKELACKER, IVY WALK, INC., and ENGEL & VOLKERS, GREENWICH,

Defendants.

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Amended DECISION/ORDER

A Amended

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN, J.S.C.:

At the outset, the court notes that Eric Wright is the only remaining defendant in the case. This action was commenced by plaintiff Cadogan Management, LLC ("Cadogan") against defendant Eric Wright ("Wright") based upon claims of fraud, unjust enrichment, conversion and monies had and received.[1] Additionally, plaintiff seeks to pierce the corporate veil in order to hold Wright personally liable for the judgment plaintiff previously obtained against defendant Ivy Walk, Inc. ("Ivy Walk").[2]

After a bench trial in which Richard Collier ("Collier") and Doug Gandino ("Gandino") testified for plaintiff, and Eric Wright testified for himself, the Court makes the following findings of fact and conclusions of law.[3]

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[1] The Court acknowledges the assistance of volunteer law clerk, Kent Han.
[2] By order dated July 8, 2009, judgment was entered against defendant Ivy Walk, after inquest, upon such defendant's default.
[3] Both sides submitted post-trial submissions.

Findings of Fact

The Court credits the testimony of plaintiff's witness, senior advisor at Cadogan, Richard Collier, in its entirety, as he testified clearly and consistently as to the relevant facts and with a sincere demeanor. Doug Gandino, project manager for Ivy Walk and then Cadogan, also testified for plaintiff. The Court credits his testimony based on its consistency and upon his demeanor.

Plaintiff Cadogan is an investment and research firm with offices located in Manhattan. Defendant Ivy Walk, Inc. is a general contractor company. Defendant Eric Wright is Ivy Walk's founder, "100 percent owner," and has been, "at all times," president of Ivy Walk. (Tr. 141:14-18, 295:20 – 296:15). Additionally, of the three main officers, Wright, William Bennett [Ivy Walk's Executive Vice President] and Brian Dinkelacker ("Dinkelacker") [Ivy Walk's CFO], Wright is the only person to have contributed capital to Ivy Walk. (Tr. 296:10-15).

In late 2007, Cadogan decided to remodel the 14th floor of its offices (the "Project"). (Tr. 11:19-23). Cadogan hired Ivy Walk to act as the general contractor for the Project. (Tr. 12:16-21). Richard Collier ("Collier") was the owner's representative. (Tr. 11:24-25, 15:17-18). The parties agreed to the contract price of $1,268,193 for the work. (Ex. 1; Tr. 14:24 – 15:7). The Project was started in February 2008, with a scheduled completion date by May 25, 2008. (Tr. 15:12-26).

Pursuant to the parties' agreement, Ivy Walk was to hire subcontractors to perform the work on the Project. (Ex. 1; Tr. 18:4-5). During the course of the Project, Cadogan paid Ivy Walk pursuant to monthly requisitions, which Ivy Walk submitted to Cadogan. (Tr. 19:23-25). The requisitions included a breakdown of the percentage of work performed by each trade, up to the date of each requisition. (Tr. 20: 21-25, 21:14-19).

Each requisition contained a certification which was signed by either Wright, or an employee of Ivy Walk; Wright personally signed three of the five requisitions: Requisitions 1, 2, and 4. (Exs. 4, 6, 7, 8, and 9). By the terms of the requisition, in signing the certifications before a notary public, Wright certified that: (1) the percentage of work completed listed on the requisition was accurate; and (2) all of the subcontractors had been paid what they were due from the last requisition. (Tr. 117:15-26, 25:3-13; *see e.g.*, Ex. 4).

When Cadogan issued checks to Ivy Walk for payment, it relied on the veracity of Wright's certifications that all monies previously owed had been paid to subcontractors. (Tr. 21:18 – 22:5, 24:5-25, 27:19-23). However, the testimony and other evidence reveal that the subcontractors were not paid in accordance with the certification made by Wright. (Exs. 4, 13; Tr. 225:7 – 226:23). The Project was delayed, soon after its commencement, because of a failure to pay subcontractors. (Tr. 222:3-14). This failure to pay subcontractors was confirmed by internal Ivy Walk documents and emails. For example, Ivy Walk's bookkeeper, Jillian Kritz, sent an e-mail dated April 22, 2008 listing all of the subcontractors who, at such time, were still owed money, some of which had yet to be paid at all. (Ex. 13). In response to such email, on April 23, 2008, almost two weeks after Ivy Walk Requisition 1 was certified, Ivy Walk's Project Manager, Doug Gandino ("Gandino"), wrote to William Bennett, Ivy Walk's Executive Vice President:

> "I got 350K from Cadogan Friday and I need my subs paid stop screwing around and release money and use the money where is should by used." [sic]

(Exs. 4, 13). Gandino testified that neither Wright, nor anyone from Ivy Walk, was paying the subcontractors as required. Gandino also testified that Wright had directed Gandino to lie to Collier and Cadogan about why the Project had stalled and why subcontractors were not reporting to work. (Tr. 225:7 – 226:23).

The admissible evidence established that the money Cadogan paid to Ivy Walk was, instead, used to fund other projects, including at least $100,000 to a real estate brokerage franchise owned by Wright, called Engel & Volkers, and various amounts to other construction projects, during the period Ivy Walk was still employed on the Project. The money was also used by employees of Ivy Walk, and their families, including Wright's wife, Trista Stern, for personal items. This misuse of funds is supported by Wright's own admission and/or bank statements. (Exs. 23, 40-52, 65-109; Tr. 207:22 – 215:6, 221:21 – 222:14).

On June 25, 2008, Collier emailed Wright asking him to provide "full transparency" to Cadogan, in order to determine whether allegations that subcontractors were not being paid were true, and to remain fully informed for the rest of the Project. Collier requested: 1) a full accounting of what had been paid to subcontractors; 2) copies of checks issued in accordance to Requisition 3's certification, and from thereafter, "full transparency." (Ex. 16; Tr. 30:4 – 32:4). In an internal email conversation between Wright and Dinkelacker about Collier's request for transparency, Dinkelacker suggests they "get the check before [they] even think about what transparency really means," and that they "cut them, show him, and we hold what we can." (Ex. 17A). Instead of providing Cadogan with "full transparency," Wright merely replied to Collier that he had "no problem with the conditions [Collier] set down," and cut the checks, copies of which were shown to Collier, but such checks were never distributed to the subcontractors. (Ex. 16; Tr. 160:10-23).

On August 5, 2008, Dinkelacker sent Wright an email with a "financial snapshot" showing amounts paid to sub-contractors, three columns of which were labeled "Claimed Paid TD," "Real Paid TD," and "DIFF," with a "TOTAL DIFF" of $349,948.25. (Ex. 20). Dinkelacker explains, in the email, that "this is what [Cadogan] will be expecting to see because

it is based upon the requisitions and payment schedules [Ivy Walk] submitted. Also enclosed is a current real breakdown of where each sub stands with real payments. 350K difference." (Ex. 20).

At no point during the trial did Wright produce any proof of payments to the subcontractors, nor did he produce any other financial records, despite being served with both a discovery request by plaintiff and a judicial subpoena. (Exs. 123, 126; Tr. 289:3 – 292:8). Wright admitted that the computer server containing all of Ivy Walk's records had been in his possession, at his home, at all times during the litigation of this case. (Tr. 302:13-22). Although Wright explained that the password, he "suspects," had been changed by his former CFO, Simon Kessel, he also admitted that other than asking his accountant to "see if he could get it open," Wright did nothing to try and access the server; including asking Simon Kessel. (Tr. 331:3 – 332:24). Wright's credibility was undermined by his utter failure to produce a shred of evidence to support his claims.

With the Project still incomplete on September 19, 2008, almost 4 months after the Project's expected completion date, Cadogan terminated Ivy Walk. (Ex. 11). As a result of Ivy Walk's failure to pay the subcontractors in full and the numerous delays, Cadogan spent approximately $130,000 over the contract price, hired a new project manager to finish the project, bonded liens filed against the property by unpaid subcontractors, and paid rent for space that was unusable during the months the Project was delayed past the initial scheduled completion date. (Tr. 50:19 – 51:18).

Conclusions of Law

As stated above, plaintiff asserts causes of action for fraud, unjust enrichment, conversion and monies had and received.

Preliminarily, the court notes that pursuant to the terms of each requisition and NY Lien Law, Ivy Walk both explicitly agreed, and was legally required, to use the money Cadogan paid

to Ivy Walk to first pay off the Project's subcontractors, before retaining any balance. (Ex. 4) *See* NY Lien Law §§ 70,[4] 71(2),[5] and 79-a.[6]

Fraud

"The elements of a claim of fraud are: (1) misrepresentation or a material omission of fact which was false and known to be false by the defendant; (2) the misrepresentation was made for the purpose of inducing the other party to rely upon it; (3) justifiable reliance of the other party on the misrepresentation or material omission; and (4) injury." *Peach Parking Corp. v. 346 West 40th Street, LLC*, 42 AD3d 82, 86 (1st Dept 2007). Moreover, "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." *American Exp. Travel Related Services Co., Inc. v. North Atlantic Resources, Inc.*, 261 AD2d 310, 311 (1st Dept 1999) (affirming IAS Court's ruling that, regardless of whether corporate veil is pierced, corporate officers can be individually liable for fraud and negligent misrepresentation they participate in); *see also Buxton Mfg. Co. Inc. v. Valiant Moving & Storage, Inc.*, 239 AD2d 452 (2d Dept 1997) (affirming trial court's decision not to dismiss a claim that the vice president of a government contractor may be personally liable for fraud because he submitted a progress payment certification to the Department of

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[4] NY Lien Law § 70 provides, in relevant part, as follows: "The funds described in this section received by... a contractor under or in connection with a contract for an improvement of real property..., and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter."

[5] NY Lien Law § 71(2) provides, in relevant part, as follows: "The trust assets of which a contractor... is trustee shall be held and applied for the following expenditures arising out of the improvement of real property... and incurred in the performance of his contract...: (a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen..."

[6] NY Lien Law § 79-a provides, in relevant part, as follows: "Any trustee of a trust arising under this article, and any officer, director or agent of such trustee, who applies or consents to the application of trust funds received by the trustee as money... for any purpose other than the purposes of that trust, as defined in section seventy-one, is guilty of larceny and punishable as provided in the penal law if... such funds were received by the trustee as contractor..., as such terms are used in article three-a of this chapter, and the trustee fails to pay, within thirty-one days of the time it is due, any trust claim arising at any time..."

Agriculture representing that he had paid all subcontractors when, in fact, no payment was made). "[P]laintiff must show misrepresentations that are misstatements of material fact or promises with a present, but undisclosed, intent not to perform, not merely promissory statements regarding future acts." *See Mora v. RBG, Inc.*, 17 AD3d 849, 852 (3d Dept 2005) (holding that contractor corporation's president could be held individually liable for fraud if the president personally furnished change orders which included amounts that he knew were above the contractor's actual cost).

At trial, plaintiff introduced into evidence, without objection, AIA requisition certifications signed by Wright, certifying that subcontractors had been paid in accordance with previous certificates. (Exs. 4, 6, & 8). Internal company e-mails between Wright and various employees, including CFO Brian Dinkelacker, project manager Doug Gandino, and bookkeeper Jillian Kritz, were also introduced detailing conversations about subcontractors not being paid, two sets of records reflecting actual amounts paid and amounts "claimed" to Cadogan, and how to continue receiving funds from Cadogan without paying the subcontractors, i.e., "cut them, show them, hold what we can." (Ex. 13, 17A, 20). In contrast, Wright failed to produce, or try to produce, any evidence showing payments made to subcontractors, such as, financial records, bank statements or copies of actual cashed checks, despite a discovery request made by plaintiff and the service of a judicial subpoena, and notwithstanding defendant testifying that Ivy Walk's servers containing its financial records were under his direct and physical control; as such, this court draws an adverse inference against Wright for the failure to produce relevant records to dispute plaintiff's claims. *See Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 18 AD3d 286 (1st Dept 2005) (holding that "an adverse inference may be drawn from plaintiffs' failure to produce their own account statements," which were within their own control). Cadogan also justifiably relied on the misrepresentations made by Wright, including the signed certifications

submitted by Wright, certifying that all subcontractors had been paid, and, following questions raised about those payments, Cadogan justifiably relied on the copies of checks delivered to Cadogan by Ivy Walk, as proof that Ivy Walk had paid the subcontractors, when it actually had not.

The proof adduced at trial also established that plaintiff sustained injury due to the misrepresentations made by Wright and plaintiff's justifiable reliance on such misrepresentations. While Wright, in his summation, attempted to disprove that plaintiff sustained any injury, such attempt was futile, and inconsistent with the competent submitted evidence and credited testimony.[7] While Wright argued that it was not his actions, but plaintiff's refusing to pay Ivy Walk funds for Requisition 5, that led to Ivy Walk's inability to pay the subcontractors, and to the subcontractors' subsequent refusal to work, plaintiff established that subcontractors had not been paid, as agreed, as early as March 2008, months before Requisition 5 was made; Wright has not provided any evidence to the contrary.

Wright also argued that Cadogan actually owes Ivy Walk money and, therefore, there could not have been any fraud. While this has not been proven by Wright, even if it were true

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[7] Defendant Wright disputes plaintiff's allegations and relies on Exs. 5 (copies of 5 checks issued to Ivy Walk by Cadogan), 9 (Ivy Walk Requisition 5), and 29 (summary of total payments made by Cadogan for the Project). See Wright Summation, p. 1. Directing the court's attention towards page 1 of Ex. 29, Wright explained that Requisition 5 was never actually paid to Ivy Walk; instead, the funds were issued directly to the subcontractors owed. *Id.* Wright then suggested that the reason subcontractors were not working was because Ivy Walk was not paid by Cadogan in accordance with Requisition 5, and as a result, Ivy Walk could not pay the subcontractors. *Id.* Wright then further suggested that Ivy Walk was wrongfully terminated because Cadogan somehow caused the subcontractors to cease working. *Id.*

Wright also asserted that Ivy Walk was due the remaining unpaid contract amount, and the amount in Requisition 5, when it was terminated from the Project, totaling $438.822.55. *Id.* Further, he asserts that only $227,714.22 of the payments Cadogan included in Exhibit 29 are payments made to subcontractors, and the rest should not be included when calculating costs. *Id*; *see also* Ex. 29. Including the amount Cadogan paid to the subcontractors in lieu of satisfying Requisition 5, $105,524.82, Wright calculates that Cadogan paid a total of $333,239.04, $105,583.51 less than what it owed Ivy Walk. Therefore, Wright concludes, because Cadogan owes Ivy Walk more money than it should be able to claim in costs, there was no "fraudulent conveyance." (The Court notes that there is no claim of fraudulent conveyance in the summons and complaint, nor in the trial, and will assume defendant meant "fraud.").

that Cadogan owes Ivy Walk money, such would not change the fact that Ivy Walk, at Wright's direction, failed to pay the subcontractors, which caused them to cease work on the Project and the Project to go unfinished, well past the specified date of completion. The admissible evidence established that Wright misled Cadogan about paying the subcontractors in order to continue receiving funds which were improperly spent on other projects.

As for the actual monetary amount suffered by plaintiff, as detailed below, this Court agrees with plaintiff's calculations. While Wright is correct in pointing out that not all payments on Cadogan's summary of payments (Ex. 29) were payments to subcontractors, he was mistaken in considering those other payments as irrelevant to the determination of damages; the money not paid to subcontractors were all payments which were necessary to complete a project left incomplete because of the fraudulent acts of Wright.

Upon reviewing the trial evidence, testimony, and post-trial submissions of both parties, this Court determines that plaintiff has established its claim of fraud against defendant Eric Wright.

Unjust Enrichment[8]

"The essential inquiry in any action for unjust enrichment[...] is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered." *See Paramount Film Distrib. Corp. v. State*, 30 NY2d 415, 421 (1972). A claim for unjust enrichment requires that (1) the defendant benefited, (2) at the plaintiff's expense, and (3) under principles of equity and good conscience, the defendant should not be permitted to retain that benefit. *See Georgia Malone & Co., Inc. v. Rieder*, 926 NYS2d 494 (1st Dept 2011). Where a

[8] **The court notes that plaintiff's claim against Eric Wright for unjust enrichment is a valid claim as there was no contract between the two. Thus, plaintiff can bring this quasi-contract cause of action. Additionally, though there is a split of authority in New York as to whether privity is required to bring a cause of action for unjust enrichment, the 1st Department has ruled that it is not. *See Cox v. Microsoft Corp.*, 8 AD3d 39, 778 NYS2d 147 (1st Dept 2004).**

defendant obtains money from a plaintiff "through the medium of oppression, imposition, extortion, or deceit, or by commission of a trespass, such money may be recovered back, for the *law* implies a promise from a wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention." *Miller v. Schloss*, 218 NY 400, 408 (1916), cited by *Parsa v. State*, 64 NY2d 143, 148 (1984).

Plaintiff has submitted uncontested evidence, such as of photocopies of checks given to and cashed by Ivy Walk, establishing that it provided money to Ivy Walk. (Ex. 5). Further, other admissible evidence, such as signed requisition forms, credit card statements. The testimony from Doug Gandino, and admissions from Eric Wright, establish that Wright personally benefited from the receipt of the money paid to Ivy Walk for the purpose of completing the Project. (Exs. 4, 6-9, 23, 40-52, 65-109; Tr. 207:22 – 215:6, 221:21 – 222:14). It is evident from Ivy Walk's internal e-mails and the testimony of Doug Gandino and Eric Wright that although the money given to Ivy Walk by plaintiff was for the purpose of paying subcontractors, Wright disregarded this purpose and used such funds for his own personal benefit to the detriment of plaintiff, despite the NY Lien Law §§70, 71(2), and 79-a, and the requisition forms certified by Eric Wright. (Exs. 4, 6-9, 13-21, 23, 40-52, 65-109; Tr; 207:22 – 215:6, 221:21 – 222:14). Also, Richard Collier testified that plaintiff relied on assurances by Ivy Walk, specifically made by Wright, that subcontractors were being paid, and that the Project was moving forward, before issuing checks to Ivy Walk. (Tr. 24:5-25). Upon the submitted evidence, the court cannot, in "equity and good conscience," allow Wright to keep the monies he obtained through his deceit and therefore this Court decides in favor of plaintiff on its claim for unjust enrichment. *See Miller v. Schloss*, 218 NY 400, 408; *see also Parsa v. State*, 64 NY2d 143, 148; *Paramount Film Distrib. Corp. v. State*, 30 NY2d 415, 421.

Monies Had and Received

As plaintiff's cause of action for monies had and received is duplicative of its cause of action for unjust enrichment – both causes of action share the same elements – and as the Court has already decided in plaintiff's favor as to the unjust enrichment claim, the Court need not address this claim in detail. *See Parsa v. State*, 64 NY2d 143, 148 (1984); *see also In re Estate of Witbeck*, 245 AD2d 848, 850 (3d Dept 1997).

Conversion

Conversion is an unauthorized assumption and exercise of ownership rights over the property of another in defiance of the owner's rights. *See Peters Griffin Woodward, Inc. v. WCSC, Inc.*, 88 AD2d 883 (1st Dept 1982). Money can be the subject of such a claim, but must be specifically identifiable and segregated. *Id.*

> "Where one intrusts his property to another for a particular purpose, it is received in fiduciary capacity, and when turned into money that is also received in the same capacity. It [sic] does not belong to the agent, and he can lawfully exercise no power or authority over it except for the benefit of his principal, and only as authorized by him. If the agent uses it for his own purposes, or fails to pay it over upon a seasonable [sic] demand, it is a conversion of that which does not belong to him."

Britton v. Ferrin, 171 N.Y. 235, 242-43 (1902)

Here, the admissible evidence has shown that plaintiff transferred funds of a specific amount to Ivy Walk for the purpose of paying subcontractors so that the project could be completed and, as payment to Ivy Walk. (Exs. 1, 4; Tr. 12:16-21, 14:24 – 15:7, 18:4-5, 19:23-25, 20:21-25, 21:14-19; *see* NY Lien Law §§ 70, 71(2), and 79-a). As such funds were paid to Ivy Walk in connection with the improvement of real property, NY Lien Law § 70 required that the funds shall automatically "constitute assets of a trust," with Wright as the trustee. *Id.* According to § 70, the trust would remain in place, with all funds paid to Wright for this project also becoming assets of a trust, until the contract ended, through completion or termination, or all

subcontractors' claims had been satisfied. *See* NY Lien Law §§ 70-71. Any remaining funds in the trust would vest, as agreed upon; in this case, the remaining funds were Cadogan's payments to Ivy Walk, pursuant to the parties' agreement. *Id.* However, the evidence and testimony establish that, despite the NY Lien Law, and notwithstanding that each requisition included a signed certification guaranteeing to Cadogan that all the subcontractors had been paid, Wright did not in fact pay the subcontractors as promised and in accordance with the specific purpose for which the funds were transferred to Ivy Walk. (Exs. 4, 13; Tr. 225:7 – 226:23). Instead, as defendant himself admitted, Wright took such funds, entrusted to him by Cadogan, and used them on other projects, and for his and his wife's personal use. (Exs. 23, 40-52, 65-109; Tr. 207:22 – 215:6, 221:21 – 222:14). As plaintiff has sustained its burden on this cause of action, this Court decides in favor of plaintiff on its claim for conversion.

Piercing the Corporate Veil [9]

"The concept of piercing the corporate veil is a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting liability of the corporate owners." *Morris v. State Dep't of Taxation & Fin.*, 82 NY2d 135, 140 (1993) (internal citations omitted). "Generally,... piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to

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[9] The Court notes that although Plaintiff did not raise this claim in its Summons and Complaint, nor did it move to amend its Complaint in light of the evidence introduced at trial, the Court can *sua sponte* make the appropriate determination. *See Ansonia Associates v. Ansonia Residents Association*, 78 AD2d 211 (1st Dept 1980) (stating that "the Supreme Court is a court of general jurisdiction empowered to grant the relief to which plaintiff entitled even though it differs from the relief sought"). The Court additionally notes that not only does Plaintiff raise this claim in its Pre-trial Memorandum of Law and its Findings of Fact and Conclusions of Law, the claim was discussed during the trial, and thus defendant is not prejudiced. See Plaintiff's Pre-trial Memorandum of Law, pp. 10-12; Plaintiff's Findings of Fact and Conclusions of Law, pp. 19-21; *see e.g.*, Tr. 274:3-10.

commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Id.* In determining domination, factors to be considered include: 1) a failure to adhere to corporate formalities; 2) inadequate capitalization; 3) use of corporate funds for personal purposes; 4) overlap in ownership and directorship; and 5) common use of office space and equipment. *See Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 AD2d 341 (1st Dept 1996).

Throughout the discovery process and the trial, plaintiff had requested, and the court had ordered, that Wright produce Ivy Walk's business/financial records, which could be evidence of the legitimacy of the Ivy Walk corporation. However, as explained previously, Wright has ignored discovery requests/orders and a judicial subpoena, and has neither produced, nor has he established his efforts to produce, such records. Also, as explained previously, when a party refuses, with no valid excuse, to disclose records that are in his direct control, the court may draw an adverse inference against him. *See Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 18 AD3d 286 (1st Dept 2005).

Wright admitted that he was the founder, "100% owner," and, "at all times," the president of Ivy Walk. (Tr. 141:14-18; 295:20 – 296:15). He also admitted that all of the corporations he owns, Ivy Walk, 103 Kettle Creek, 70 11 o'clock Road, and 25H Realty Corporation, are run out of the Ivy Walk offices, and are "just one big conglomeration." (Tr. 286:16 – 287:3). Additionally, he admitted that, of the three main officers, President Wright, EVP William Bennett, and CFO Brian Dinkelacker, Wright is the only person to ever contribute any capital to Ivy Walk. (Tr. 296:10-15). Furthermore, there is ample evidence showing, and Wright has openly admitted to, the use of corporate funds for personal purposes; Wright even opened a corporate credit card for his wife to use, in the name of the corporate entity, Ivy Walk. (Exs. 40-52, 65-109; Tr. 207:22 – 215:6).

It is evident that, as founder, "100% owner," and president of Ivy Walk, Eric Wright had complete domination over Ivy Walk and of Ivy Walk's inappropriate actions against Plaintiff. Additionally, the admissible evidence has established each of the *Texarcoma* factors in Wright's relationship to and with Ivy Walk, making him an alter ego of the corporation, and evidencing an abuse of the corporate form. Therefore, plaintiff has established a sufficient basis to pierce the corporate veil and to hold defendant Wright personally liable for the previous judgment against Ivy Walk. Further, because Wright is an alter ego of Ivy Walk, he is collaterally estopped from contesting the default judgment against Ivy Walk as he had every opportunity to defend Ivy Walk in that case, and could reasonably have expected to be held personally liable for Ivy Walk's obligations in the future. *See Curiale v. Ardra Ins. Co. Ltd.*, 202 AD2d 252 (1st Dept 1994); *see also Sterling Doubleday Enterprises L.P. v. Marro*, 238 AD2d 502 (2d Dept 1997).

Damages

While plaintiff has established a basis to pierce the corporate veil, and thus defendant Wright would be responsible for the previously entered judgment against Ivy Walk (in the amount of $185,221.00), less the $25,000 settlement amount plus interest to date, as such amount is duplicative to, and less than, the amount established is owed by Wright at the within trial, the court awards the higher amount.

Plaintiff has established an entitlement to damages in the amount of $130,847.04 for the monies it was required to spend over and above the contract price. Additionally, plaintiff is entitled to damages for the amount it was required to pay for rent due to Wright's fraud, in the amount of $55,227.33. The damages award, however, is reduced by the amount plaintiff and

defendant Brian Dinkelacker settled upon, $25,000. Thus, the total amount of damages awarded to plaintiff against defendant Wright is $161,074.78, plus costs and interest from July 22, 2008.[10]

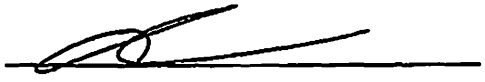
Plaintiff's request for punitive damages and sanctions is denied. Punitive damages "may only be awarded[, at the court's discretion,] for exceptional misconduct which transgresses mere negligence, as when the wrongdoer has acted 'maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness' or has engaged in 'outrageous or oppressive intentional misconduct' or with 'reckless or wanton disregard of safety or rights.' " *Sharapata v. Islip*, 56 NY2d 332 (1982) [internal citations omitted]. Defendant's actions did not rise to the level to be entitled to an award of punitive damages. Nor were Defendant's arguments sufficiently meritless to be considered frivolous conduct. *See* 22 NYCRR § 130-1.1.

Based upon the above, it is

ORDERED that upon proof of service of a copy of this order/Decision with notice of entry, the Clerk of the Court is directed to enter judgment in favor of plaintiff Cadogan and against defendant Eric Wright in the sum of $161,074.78, with interest from July 22, 2008, costs and disbursements, to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant Wright with notice of entry.

DATED: Oct 12, 2011



Doris Ling-Cohan, J.S.C.

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[10] By order dated 6/23/11, the Court requested submissions as to interest date. The Court notes that defendant Wright failed to submit any papers indicating a proposed date for the accrual of interest, while plaintiff proposed July 22, 2008, the date of Cadogan's last payment to Wright.