

**D'Mel & Assoc. v Athco, Inc.**

2012 NY Slip Op 32375(U)

September 10, 2012

Sup Ct, NY County

Docket Number: 602486/2009

Judge: Richard F. Braun

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

PRESENT: **HON. RICHARD F. BRAUN**  
J.S.C.

**FILED** PART 23  
Justice

Index Number : 602486/2009  
D'MEL & ASSOCIATES  
vs.  
ATHCO, INC., et al.  
SEQUENCE NUMBER : 009  
SUMMARY JUDGMENT

SEP 13 2012

COUNTY CLERK'S OFFICE  
NEW YORK

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/10/12  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 8, were read on this motion <sup>old case no 1012</sup> for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1, 2, 3, 4  
~~Notice of Case Motion~~  
Answering Affidavits — Exhibits No(s) 5, 6  
Replying Affidavits No(s) 7, 8

Upon the foregoing papers, it is ordered that this motion is denied and the ~~cross motion~~ is granted to the extent of awarding plaintiff summary judgment against defendant Athco, Inc. and Athco Supports Inc. on the first, third, fourth, and sixth causes of action, and against defendant Athco Supports, Inc. on the eighth cause of action, in the amounts of \$96,401.42, plus interest from February 26, 2009 to \$42,455.28, plus interest from June 18, 2009, plus a total of \$100 costs on the motion to plaintiff against these defendants, and it is further

ORDERED that the Clerk shall enter judgment accordingly, and the remaining claims are severed and shall continue.

This constitutes the decision and order of the Court. See separate Opinion.

Dated: New York, New York September 7, 2012

ENTRE J.S.C.

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

- 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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

-----X  
D'MEL & ASSOCIATES,

Index No. 602486/2009

Plaintiff,

**OPINION**

-against-

ATHCO, INC., ATHCO IMPORTS INC., LIBERTY APPAREL  
COMPANY INC., STUART GOLDMAN, MICHAEL  
GOLDMAN, HAGAI LANIADO and "JOHN DOES" 1-10,

Defendants.

-----X

**RICHARD F. BRAUN, J.:**

This is an action sounding in breach of contract, unjust enrichment, an account stated, successor liability, and fraudulent conveyance, for commissions on garment orders brokered by plaintiff D'Mel Associates (D'Mel). Plaintiff brokered \$4,822,571 in orders from Walmart that were filled by defendant Athco, Inc. ("Athco), for which plaintiff is claiming \$96,451.42 in commissions. However, Athco was forced out of business by Athco's secured creditor Wells Fargo Trade Capital Services, Inc. (Wells Fargo), who seized Athco's accounts receivable, and plaintiff was not paid the commissions. Additional open orders of \$2,122,764 that plaintiff had procured but that had not yet been filled were assigned, on consent of Wells Fargo, to defendant Athco Imports Inc. ("Athco Imports") to fill, on which an additional commission of \$42,455.28 is claimed due to plaintiff. Plaintiff alleges that the transfer of the open orders to Athco Imports, which was later folded into defendant Liberty Apparel Company Inc. ("Liberty Apparel"), was made without adequate consideration in order to impair plaintiff's ability to collect its commissions.

Defendants move for summary judgment dismissing the ninth and tenth causes of action. The ninth cause of action seeks to impose liability on Athco's majority shareholder, defendant Stuart

Goldman, for Athco's obligation to plaintiff based upon the fraudulent conveyance of Athco's assets. The tenth cause of action seeks to impose liability on defendant Michael Goldman, who is Athco Imports' sole shareholder and Stuart Goldman's son, based upon Athco Imports' role as transferee of the fraudulent conveyance and upon Michael Goldman's transfer of his shares in Athco Imports to Liberty Apparel, without fair consideration. Defendants contend that neither Stuart nor Michael Goldman are liable to plaintiff under fraudulent conveyance law because neither was a transferee or beneficiary of a fraudulent conveyance. Defendants contend that any claim to set aside the transfer of orders should be directed against the transferee, and that insofar as Michael Goldman was not a debtor of D'Mel, the transfer of his shares in Athco Import to Liberty Apparel cannot be fraudulent as to plaintiff.<sup>1</sup> Furthermore, defendants claim that, even were the transfers set aside and the assets returned to Athco, D'Mel's claim would be subordinate to Wells Fargo's secured and unsatisfied claim, so there can be no claim of damage from the transfer.

Plaintiff D'Mel cross-moves for summary judgment on its first, third, fourth, sixth, seventh, ninth, and tenth causes of action. The first and third causes of action are for breach of contract and account stated against Athco on the first order of goods. The fourth and sixth cause of action are for breach of contract and account stated against Athco Imports on the second order. The seventh cause of action seeks to impose successor liability against defendants Athco Imports and Liberty Apparel. The eighth cause of action seeks to impose liability against defendants Athco Imports and Liberty Apparel based upon fraudulent conveyance.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto

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<sup>1</sup> While the complaint alleges that the shares were transferred to Hagai Laniado, the entity that he controlled, defendant Liberty Apparel, acquired the shares, and the claim against Laniado individually was apparently discontinued, although he was not deleted from the caption of this action.

as a matter of law, pursuant to CPLR 3212 (b) (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1<sup>st</sup> Dept 2011]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226 [1<sup>st</sup> Dept 2006]).

Defendants do not oppose the grant of summary judgment on the first and third causes of action, and plaintiff has made a prima facie showing of entitlement to summary judgment on its claim for breach of contract in that plaintiff has established the existence of a valid contract with Athco, plaintiff's performance of the contract, defendant Athco's material breach of the contract, and resulting damages, which Stuart Goldman admitted in his deposition (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1<sup>st</sup> Dept 2010]; *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1<sup>st</sup> Dept 2007]). Likewise, plaintiff has shown its entitlement to summary judgment on the account stated claim against Athco, as plaintiff provided statements of account to defendant Athco who did not object, which Stuart Goldman admitted in his deposition (*see Bartning v Bartning*, 16 AD3d 249, 250 [1<sup>st</sup> Dept 2005]; *cf. Abbott, Duncan & Wiener v Ragusa*, 214 AD2d 412, 413 [1<sup>st</sup> Dept 1995] [summary judgment was denied on an account stated cause of action where the defendant had disputed the amount billed]). Further, plaintiff has made a prima facie showing against defendant Athco Imports on plaintiff's fourth cause of action for breach of contract and sixth cause of action for an account stated on the "second" order in that the orders that plaintiff procured were filled by Athco Imports, which assumed the obligation to pay the commissions, and there was no objection to plaintiff's invoices, which remain due.

As to the seventh cause of action for corporate successor liability (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983]; *Matter of New York City Asbestos Litig.*, 15 AD3d 254, 255-256 [1<sup>st</sup> Dept 2005]; *Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 [1<sup>st</sup> Dept 2001]), issues of fact exist precluding summary judgment to plaintiff. It is alleged by plaintiff that Athco Imports and Liberty Apparel were a mere continuation of Athco's business and that the transfers were entered into to fraudulently avoid Athco's obligations to plaintiff. There is some evidence to suggest a continuity of ownership between Athco and Athco Imports, including Michael Goldman's seemingly illusory role as sole shareholder of the latter entity, which was ultimately folded into Liberty Apparel without consideration to Michael Goldman, as well as Stuart Goldman's continued involvement, albeit as a salaried employee, with Athco Imports. On the other hand, Stuart Goldman's role as a salaried employee may not create a continuity of ownership (*cf. Worldcom Network Servs. v Polar Communications Corp.*, 278 AD2d 182-183 [1<sup>st</sup> Dept 2000] [where the three persons who formed the alleged corporate successor were once employees of the liable company]), and Liberty Apparel clearly included different owners (*see Matter of New York City Asbestos Litig.*, 15 AD3d at 256). Further, Stuart Goldman denies that there was a merger. Thus, issues of fact exist as to successor liability (*see Kaur v American Transit Ins. Co.*, 19 NY3d 827 [2012]; *Burgos v Pulse Combustion*, 227 AD2d 295, 295-296 [1<sup>st</sup> Dept 1996]).

On the eighth cause of action, for fraudulent conveyance based on Debtor and Creditor Law §§ 273 and 276, plaintiff has come forward with clear and convincing evidence (*see Symbax, Inc. v Bingaman*, 219 AD2d 552, 553 [1<sup>st</sup> Dept 1995]) that the transfer of the open orders to Athco Imports was made when Athco was insolvent and for inadequate consideration, as well as with actual intent to hinder, delay, or defraud creditors (*see Matter of CIT Group/Commercial Servs., Inc. v.*

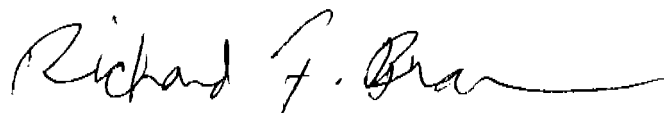
*160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302, 303 [1<sup>st</sup> Dept 2006]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528-529 [1<sup>st</sup> Dept 1999]). Defendants have failed to raise issues of fact to the contrary. However, defendant Liberty Apparel was not shown to be a transferee of the fraudulent conveyance.

As to the ninth and tenth causes of action, on which both sides move for summary judgment, “a creditor's remedy for the transfer of its debtor's assets, where undertaken prior to a judgment on the debt, is still to obtain a nullification of the conveyance (*see*, [Debtor and Creditor Law] § 279).... [The statute] did not, either explicitly or implicitly, create a creditor's remedy for money damages against parties who ... were neither transferees of the assets nor beneficiaries of the conveyance ...” (*Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]). But here the ninth and tenth causes of action seek to pierce the corporate veil of the corporate entities involved in the allegedly fraudulent conveyance, and recover from the individuals who indirectly benefitted from that transfer, rather than sounding strictly in fraudulent conveyance against the individual defendants who facilitated the transfer (*see Solow v Domestic Stone Erectors, Inc.*, 229 AD2d 312, 313 [1<sup>st</sup> Dept 1996]; *cf. Federal Deposit Ins. Corp. v Porco*, 75 NY2d at 842 [“the statute still cannot fairly be read as creating a remedy against nontransferees who ... are not alleged to have dominion or control over those assets or to have benefitted in any way from the conveyance.”]; *Peckar & Abramson, P.C v. Lyford Holdings, Ltd.*, 2011 WL 5892803; 2011 NY Slip Op 33008[U] [Sup Ct. NY County 2011] [“the Amended Complaint is devoid of any allegations that Frydman completely dominated and controlled these other defendants in furtherance of a wrongful act against P&A which would provide a basis for piercing the corporate veil.”]; *see generally Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141 [1993]; *Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652,

656-657 [1976]). Further, the record shows that Wells Fargo waived any claim to the open orders transferred from Athco. Consequently, defendants' assertion that Wells Fargo, as a secured creditor, would have priority on any monies recouped based upon the alleged fraudulent conveyance, and thus that would preclude any claim by plaintiff that it was damaged, should be rejected. Issues of fact exist regarding plaintiff's attempt to pierce the corporate veil as to the individual defendants' complete dominion and control of the corporations and the use of that complete dominion and control to injure plaintiff, and whether Michael Goldman benefitted from the transfer. While there may be badges of fraud, those merely allow an inference of fraud (*see Atsco Ltd. v Swanson*, 29 AD3d 465, 465-466 [1<sup>st</sup> Dept 2006]; *Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [2<sup>nd</sup> Dept 1997]). Further, there is a question as to whether Stuart Goldman's salary as an employee was commensurate with his duties or was merely a device to obtain the value of the open orders without taking an ownership interest in the transferee corporation. Thus, no party has established entitlement to summary judgment with respect to the ninth and tenth causes of action.

Accordingly, by separate decision and order, dated September 7, 2012, the motion was denied and the cross motion granted to the extent of awarding plaintiff D'Mel summary judgment against defendant Athco. on the first and third causes of action in the amount of \$96,451.42, with interest from February 26, 2009, and on the fourth, sixth and eighth causes of action against Athco Imports, in the amount of \$42,455.28, with interest from June 18, 2009. Plaintiff was also awarded a total of \$100 motion costs against those defendants, pursuant to CPLR 8106 and 8202. The remaining claims were severed and shall continue.

Dated: New York, New York  
September 10, 2012



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RICHARD F. BRAUN, J.S.C.