Benchimol v Plumeri
2012 NY Slip Op 33449(U)
June 29, 2012
Supreme Court, New York County
Docket Number: 114308/2010
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN **PART** 12

Justice

Index Number : 114308/2010
BENCHIMOL, DANIEL C
vs.
PLUMERI, JAY M
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

The following papers, numbered 1 to ____ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

CC 8/15/2012 at 2[15] pm

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

Dated: JUN 29 2012

[signature]
J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/JUDG.** ☐ **SETTLE ORDER /JUDG.**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
---X
DANIEL C. BENCHIMOL,
Plaintiff,

against

JAY M. PLUMERI and THE SUPERMAN GROUP, INC.,
Defendants.
---X

Index Number 114308/2010E
Mot. Seq. No. 001

DECISION AND ORDER

For the Plaintiff:
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E-filed papers considered in review of this motion to dismiss and cross motion to amend:

Papers	**E-filing Document Numbers:**
Notice of Motion, Affidavit, Affirmation	14, 12, 13
Memorandum,	11
Notice of Cross Motion, Affirmation, Exhibits	15, 16
Memorandum of Law	17
Replying Affidavit, Affirmation	23, 24
Affirmation, Affidavit in Opposition	25, 26
Reply Affirmation in Further Support	27
Transcript of Oral Argument	32

PAUL G. FEINMAN, J.:

The motion and cross-motion are consolidated for purposes of this decision.

Defendants move pursuant to CPLR 3211(a)(7) to dismiss the complaint as against Jay M. Plumeri individually, and pursuant to CPLR 3103(a) for a protective order pertaining to certain discovery requests. Plaintiff cross-moves pursuant to CPLR 3025(b) for permission to file an amended verified complaint, and pursuant to CPLR 3214 to compel defendants to produce requested items of discovery. For the reasons which follow, the motion and the cross motion are each granted in part and denied in part.

[* 3]

BACKGROUND

This is a claim for a brokerage fee allegedly owed to plaintiff by defendants Jay M. Plumeri and The Superman Group, of which Plumeri is the sole owner and shareholder (Doc. 16 at 7 *et seq.*, Cross Mot. ex. A, Compl. ¶ 1). According to the complaint, plaintiff is a licensed real estate broker and a restauranteur (Doc. 16 at 7 *et seq.,* Cross Mot. ex. A, Compl. ¶ 1). He and non-party Brian J. Sakonchick, another real estate broker, together acted as brokers pursuant to a written brokerage agreement between Sakonchick and The Superman Group, to find a new tenant for Plumeri's restaurant premises and release The Superman Group and Plumeri from their commercial lease (Doc. 16 at 7 *et seq.*, Cross Mot. ex. A, Compl. ¶¶ 1, 2).[1] The two men "successfully performed their contractual obligations by finding a new tenant who signed on September 30, 2010, an agreement that will result in the release of Superman Group and Plumeri from the lease" (Doc. 16 at 7 *et seq.*, Cross Mot. ex. A, Compl. ¶ 2). Defendants allegedly refused to pay the commission owed (Doc. 16 at 7 *et seq.*, Cross Mot. ex. A, Compl. ¶ 21).

Sakonchick assigned his rights in October 2010 to plaintiff to collect damages pursuant to Uniform Commercial Code § 2-210 (2) and plaintiff then began settlement negotiations with "Defendants" (Doc. 16 at 7 *et seq.*, Cross Mot. ex. A ¶¶ 22-23).[2] A settlement offer was apparently made, but plaintiff decided to "cease settlement negotiations . . . and pursue his legal remedies" (Doc. 16 at 7 *et seq.*, Cross Mot. ex. A, Compl. ¶¶ 23, 25).

Defendants move to dismiss the complaint as against Jay M. Plumeri arguing that the brokerage agreement was not signed by him personally but rather on behalf of The Superman

[1]The "Exclusive Representation Agreement," dated October 3, 2009, is found as part of defendants' moving papers (Doc. 12 at 16 *et seq.*, Plumeri Affid. in Supp. ex. A).

[2]The Assignment and Assumption Agreement between Sakonchick as assignor, and plaintiff Benchimol as assignee, dated October 11, 2010, is found as part of defendants' moving papers (Doc. 12 at 19 *et seq.*, Plumeri Affid. in Supp. ex. A).

Group, that the complaint is "frivolous" as against Plumeri and the complaint's allegations intended to show that piercing the corporate veil is proper are woefully insufficient, and that the complaint cannot establish any claim against him and should be dismissed pursuant to CPLR 3211 (a) (7). Defendants also seek a protective order concerning certain discovery demands pursuant to CPLR 3103 (a).

Plaintiff cross-moves for permission to file an amended verified complaint to add a verification and new claims of fraudulent conveyance, to correct the amount claimed to be owed, and to assert new factual allegations. He also seeks to compel defendants to produce requested items of discovery.

For the court's convenience and the sake of clarity, the branch of the cross motion seeking permission to amend the complaint is addressed first along with defendants' motion to dismiss the complaint as against Plumeri, and thereafter the branches of the motion and cross motion pertaining to discovery.

CROSS MOTION TO AMEND

Plaintiff seeks to amend his complaint to add a verification and new claims of fraudulent conveyance, to correct the amount claimed to be owed, and to assert new factual allegations.

Pursuant to CPLR 3025(b), "leave to amend the pleadings shall be freely given, absent prejudice or surprise resulting from the delay" (*see McCaskey, Davies & Assoc., Inc., v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983]). In the context of a motion to amend, prejudice means "the loss of a special right, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment" (*Seaman Corp. v Binghamton Savings Bank*, 243 AD2d 1027, 1028 [3rd Dept 1997]).

The standard applied on a motion to amend a pleading is "much less exacting" than that applied on a motion seeking summary judgment (*James v R. & G. Hacking Corp.*, 39 AD3d 385, 386 [1st Dept. 2007]; *lv denied* 9 NY3d 814 [2007]). In a motion to amend, to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009], citing *Megaris Furs v Gimbel Bros., Inc.*, 172 AD2d 209 [1st Dept 1991]). If the court finds that the application to amend a pleading clearly lacks merit, it may properly deny leave to amend (*Eighth Ave. Garage Corp., supra,* 60 AD3d at 405).

The proposed amended verified complaint seeks to pierce the corporate veil and alleges breach of contract, three claims under the Debtor & Creditor Law (Conveyance by insolvent [§ 273], conveyance by person in business [§ 274], and conveyance made with intent to defraud [§ 276]), and unjust enrichment; (Doc. 16 at 66 *et seq.*, Cross Mot. ex. I, Prop. Am. Ver. Compl.). Defendants' argument in opposition primarily addresses the theory of piercing the corporate veil; they contend that in addition to the complaint being "frivolous" against Plumeri, they argue that plaintiff fails to proffer sufficient allegations to establish veil-piercing as an appropriate theory.

1. PIERCING THE CORPORATE VEIL

The general rule "is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126 [2d Dept 2009]). The concept of piercing the corporate veil is an exception to this rule and in certain circumstances will impose personal liability on an owner or owners for the corporation's obligations (*id.*).

In general, "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 commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Morris v State Dept of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Complete domination of the corporation is "the key" to piercing the corporate veil, in particular when the owner uses the corporation as a mere device to further his or her personal business rather than that of the corporation, but there must also be "some showing" of a wrongful or unjust act toward plaintiff (*id.* at 141-142).

One seeking to pierce the corporate veil "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). That party must establish that the owner, through his or her 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 State Dept of Taxation & Fin.*, *supra* 82 NY2d at 141-142). Thus, in *Fisher v Zaks*, 48 AD3d 251 (1st Dept 2008), defendants won dismissal of the complaint on summary judgment where the plaintiff, who had sought to pierce the corporate veil by alleging that the defendant-owners had exercised complete domination of the corporation with respect to an alleged transfer of corporate assets to plaintiff's detriment, failed to raise an issue of material fact requiring a trial after the defendants refuted the claim that they transferred assets to themselves or family members or to a new corporation, and there were no proof of insolvency or improper conveyances.

There are several indicia of a situation warranting veil-piercing, including the absence of corporate formalities, such as the keeping of corporate records that are part of the corporate

existence, inadequate capitalization, and evidence of funds transferred in and out of the corporation for personal rather than corporate purposes (*Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005], quotation and citation omitted). For instance, in *Symbax, Inc. v Bingaman*, 219 AD2d 552, 554 (1st Dept 1995), following a nonjury trial of the plaintiffs' attempt to collect on a promissory note from a corporation and its successor corporation, it was held that piercing the corporate veil was not supported by sufficient evidence, as there was no showing of complete corporate domination used to defraud, the corporate formalities were observed, there separate bank accounts maintained for each corporation's collectibles and debt, and there was no showing that personal assets were commingled.

Here, the proposed amended verified complaint includes several paragraphs' worth of allegations concerning instances of defendants' failure to follow proper corporate formalities, including failing to file biennial statements as required by Business Corporations Law § 408, or pay state taxes, carry Worker's Compensation Insurance as required by law, or sufficiently capitalize the corporation (Doc. 16 at 66 *et seq.*, Cross Mot. ex. I, Prop. Am. Ver. Compl. ¶¶ 33-39). The proposed amended verified complaint alleges that after plaintiff and Sakonchick found a buyer for the lease, and "[i]mmediately prior to the closing, Plaintiff notified Plumeri that the total commission due at closing under the terms of the Brokerage Agreement was $29,700." (Doc. 16 at 66 *et seq.,* Cross Mot. ex. I, Prop. Am. Ver. Compl. ¶¶ 18, 22, 25). However, after the closing Plumeri then allegedly "stripped Superman Group of its sole remaining assets – the $125,000 in key money [received as payment from the new lease owner for the goodwill and equipment related to Plumeri's restaurant] – by causing Superman Group to fraudulently convey the funds to Plumeri and/or to other persons or entities, without fair consideration thereof" (Doc.

16 at 66 *et seq.*, Cross Mot. ex. I, Prop. Am. Ver. Compl. ¶¶ 23, 24).[3]

The totality of the allegations contained in the proposed amended complaint sufficiently plead that there was an abuse of the corporate form and that the domination of the corporation by Plumeri caused a wrong to be perpetrated against the plaintiff (*see Grammas v Lockwood Assoc., LLC*, ___ AD3d ___, 2012 NY Slip Op 3808 [2d Dept 2012] [holding it was proper to pierce the corporate veil where complaint alleged fraud and breach of liability as against the limited liability company formed for the purpose of purchasing and developing real property and which was dissolved by the individual defendant shortly after closing title on the property without reserving funds for the purposes of contingent liability]). Therefore, the amended verified complaint can proceed on the theory of piercing the corporate veil.

2. OTHER CAUSES OF ACTION

Turning to the sufficiency of the other claims in the proposed amended verified complaint, there is no dispute that a breach of contract claim has been sufficiently alleged. Because there is a valid and enforceable written agreement, the veracity of which is not in question, the fifth cause of action sounding in unjust enrichment must be dismissed, as unjust enrichment is an equitable remedy creating an obligation in the absence of an agreement (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 388 [1987]; see *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561 [2005]).

The third, fourth, and fifth proposed causes of action pertain to the allegations that the corporation funds, consisting at the very least of the "key money" it received as part of the transfer of the restaurant and lease to the new owner, were improperly disposed of resulting in

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[3]In the Statement of Facts contained in plaintiff's memorandum of law, his attorney asserts that Plumeri told plaintiff, "Sue me," after removing all assets from The Superman Group (Doc. 17, Pl. Memo of Law p. 4). This allegation is not contained in an affidavit form.

the corporation's failure to pay plaintiff's brokerage fee.

To plead a claim of fraudulent conveyance by an insolvent as well as by a person in business which in undercapitalized (Debtor & Creditor Law §§ 273, 274), a plaintiff must allege that the conveyance was made without fair consideration and either rendered the conveying party insolvent, or that the property remaining after the conveyance is insufficient to pay the conveying party's probable liabilities on existing debts as they became mature (*Fromer v Yogel*, 50 F Supp2d 227, 246 [SDNY 1999]). Thus, where a defendant rendered two judgment debtor corporations insolvent at a time when the plaintiff was a creditor, this was fraudulent as a matter of law under Debtor & Creditor Law §§ 273 and 274 (*see Crete Concrete Corp. v Josephs*, 66 Misc 2d 837, 841 [Sup Ct Rockland County 1971], *mod on other grounds* 39 AD2d 543 [2d Dept 1972], *lv denied* 31 NY2d 644 [1972]; see *Church E. Gates & Co. v B.N. Builders, Inc.*, 238 AD 163, 165 [1st Dept 1933] [holding that the voluntary conveyance of property without consideration at a time when the owner was indebted to numerous creditors is "presumptively fraudulent"]).

A claim of conveyance with intent to defraud (Debtor & Creditor Law § 276) is established when it is shown that the conveyance was made with "actual intent" to defraud present or future creditors. It is sufficiently alleged where the complaint sets forth in detail allegations of an overall fraudulent scheme, with the fraudulent intent fairly inferred from such details (*Marine Midland Bank v Zurich Ins. Co.*, 263 AD2d 382, 382-383 [1st Dept 1999]). Actual intent to defraud must be alleged and proved (*Spear v Spear*, 101 Misc 2d 341 [Sup Ct NY County 1974]). Because the difficulty of alleging and proving actual intent to hinder or defraud a creditor, the plaintiff/creditor may rely on "badges of fraud," defined as "circumstances so commonly associated with fraudulent transfers that their presence gives rise to

an inference of intent" (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). Such circumstances include a close relationship between the parties to the alleged fraudulent transaction, a questionable transfer not in the usual course of business, inadequacy of the consideration, the transferor's knowledge of the creditor's claim and the inability to pay it, and retention and control of the property by the transferor after the conveyance (*id.*).

The proposed amended verified complaint sufficiently alleges the claims of fraudulent conveyance by an insolvent and fraudulent conveyance by a person in business (Debtor & Creditor §§ 273, 274), and the branch of defendants' motion seeking to dismiss the second and third causes of action is denied. However, the complaint does not sufficiently allege the elements of fraud that underlie a claim of a conveyance made with intent to defraud (Debtor & Creditor § 276). To state a claim for fraud, the plaintiff must allege "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance . . . and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). There is no allegation that the contract was signed with an intent not to pay. Therefore, the fourth cause of action is insufficiently alleged and must be dismissed.

According, the branch of the cross motion seeking permission to amend the complaint is granted to the extent held herein, and plaintiff shall file and serve a second amended complaint in compliance with this Order within 20 days of the date of entry of this order.

MOTION TO DISMISS THE COMPLAINT

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414

[2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). When presented with a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must determine whether the complaint states a cause of action. "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY.2d 144, 151-152 [2002]).

Based on the discussion above, defendants' motion to dismiss is granted to the extent that the fourth and fifth causes of action of the amended verified complaint are dismissed, and is otherwise denied.

MOTION FOR PROTECTIVE ORDER AND CROSS MOTION TO COMPEL

Article 31 of the CPLR governs discovery. In general, there shall be "full disclosure of all matter material and necessary" to prosecute or defend an action (CPLR 3101[a]). The scope of discovery is "generous, broad, and is to be construed liberally" (*Mann ex rel. Akst v Cooper Tire Co,* 33 AD3d 24, 29 [1st Dept 2006]; *lv denied* 7 NY3d 718 [2006], *rearg denied* 8 NY3d 956 [2007]). The words "material and necessary" have been interpreted to "require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co*, 21 NY2d 403, 406 [1968]). Full disclosure permits disclosure between all parties in the litigation regardless of the burden of proof (*Lombardo v Pecora*, 23 AD2d 460 [2d Dept 1965]). If a party claims exemption or immunity of particular records, he or she has the burden of justifying it (*Zimmerman v Nassau Hospital*, 76 AD2d 921 [2d Dept 1980]). This burden is imposed because full disclosure is favored as a matter of public

[* 12]

policy (*Koump v Smith*, 25 NY2d 287, 294 [1969]).

At issue is the January 11, 2011 notice by plaintiff to defendants for disclosure and inspection of documents, listing 17 categories of documents (Doc. 12 pp. 29 *et seq.*, Plumeri Aff. in Supp. ex. C [Pl. D&I]; also Doc. 16, at 109 *et seq.*, Cross Mot. ex. J). Defendants thereafter served their response dated February 7, 2011, which consisted of general objections to the requests, copies of relevant documents in response to items 1, 15, 16, and 17 and, for the other items, objections that the requests seek "irrelevant information."

Defendants move for a protective order pursuant to CPLR 3122. They object to producing documents responsive to items number 6-14 (Doc. 12 pp. 29 *et seq.*, Plumeri Aff. in Supp. ex. C [Pl. D&I]; also Doc. 16, at 114 *et seq.*, Cross Mot. ex. K). In sum, they argue that the demands are unduly burdensome and overbroad, irrelevant to the breach of contract or unjust enrichment causes of action, and are confidential and private in nature. As to items 12-14, which seek copies of Plumeri's tax returns and personal banking records and statements from 2004 to the present, defendants also contend that the documents and information demanded are "highly confidential and private in nature,"(Doc. 11, Def. Memo of Law pp. 11-14, citing *Slate v Slate*, 267 AD2d 839, 840-841 (3d Dept 1999).

Plaintiff cross-moves for an order to compel production pursuant to CPLR 3124. He argues that the requests for corporate business records, and tax returns and banking records and statements for both the corporation and Plumeri, as well as financial documents showing The Superman Group's level of capitalization, are all "directly relevant" to his "veil-piercing claims" (Doc. 17, Pl. Memo of Law, pp. 17, 20 *et seq.*).

Pursuant to CPLR 3122, within 20 days of service of a notice seeking production of documents and things as provided by CPLR 3120, the party to whom the notice is directed shall

serve a response which "shall state with reasonable particularity the reasons for each objection" (CPLR 3122 (a) (1). As an initial matter, it does not appear that defendants' February 7, 2011 response to plaintiff's January 11, 2011 notice was timely served, although plaintiff has not cross-moved to compel on this basis. Ordinarily where a defendant fails to timely seek a protective order pursuant to CPLR 3122, unless the demand is palpably improper, the court is prevented from inquiring into the propriety of the discovery requests (*Zurich Ins. Co. v State Farm Mutual Automobile Ins. Co.*, 137 AD2d 401, 401 [1st Dept. 1988]). However, a court in its discretion may also relieve a party from its default under CPLR 3122 (*see Matter of Handel v Handel*, 26 NY2d 853, 855 [1970]).

Plaintiff points out that defendants' attorney did not provide an affirmation of a good faith effort to resolve the disclosure dispute, and is thus in violation of Uniform Court Rule 202.7 (a) (2) which requires that the maker of a motion relating to discovery provide an affirmation that the movant has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised in the motion (Doc. 16, Ellison Affirm. in Opp. & Supp. of Cross Mot. ¶ 15). According to the Uniform Rules, this affirmation is to describe when and where the consultation took place, the issues discussed, and any resolutions reached (Uniform Court Rule 202.7 [a]). It has been held that where a party fails to comply with Rule 202.7, its motion shall not be granted on that basis alone. See *Molyneaux v City of N.Y.*, 64 AD3d 406, 407 (1st Dept 2009) (holding it improper to grant plaintiff's motion to strike the answer for noncompliance where the plaintiff had not complied with Uniform Rule 202.7); see also *Sixty-Six Crosby Assocs. v Berger & Kramer, LLP*, 256 AD2d 26 (1st Dept 1998); *Cerreta v New Jersey Trans. Corp.*, 251 AD2d 190, 191 (1st Dept 1998). Based on well-established precedent,

accordingly, defendants' motion for a protective order is thus denied.[4] Plaintiff's request for costs (Doc. 27, Pl. Reply Affirm. ¶ 26), is denied.

Turning to plaintiff's cross motion to compel, defendants' contention that plaintiff is embarking on a "fishing expedition" lacks merit. When a plaintiff demonstrates that the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form and ultimately caused an injury to the plaintiff, further disclosure to assist in proving the claim is permissible (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126-127 [2d Dept 2009]). The amended verified complaint alleges that the fee for the transaction brokered by plaintiff and non-party Sakonchick was communicated to The Superman Group's sole owner shortly before the closing at which the corporate defendant received $125,000 in key money as part of the agreement, and that Plumeri then exercised complete dominion over the transaction by assuming personal control of that money and diverting funds that should have gone to pay plaintiff for his work, into his personal control or that of other entities. This is sufficient to persuade a court in equity to intervene on the alleged basis that "the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d at 126).

CPLR 3103 (a) provides that the court may upon motion or its own initiative, make a protective order that limits or denies or otherwise regulates the use of any disclosure device, the

[4] At oral argument on February 29, 2012, it was suggested that defendants' motion might have been made as a result of a compliance conference with the court (Doc. 32, Tr. 15-16). However, the stipulation dated September 14, 2011 indicates that at that compliance conference, defendants had signaled their intent to move to dismiss (Doc. 8, Stip. of 09/14/2011). There is no indication that defendants' motion grew out of a court directive which could have obviated the need for an affirmation of good faith intention.

purpose of which is "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to the person or the courts." Defendants argue that plaintiff's demands are burdensome and overbroad and seek irrelevant or confidential information (Doc. 11, Def. Memo of Law pp. 11-14). Examination of plaintiff's request shows that items 6 through 8 are not limited by any time frame but ask for "any corporate resolutions," "any corporate minutes or other records," and "all other business records" of Superman Group (Doc. 12 pp. 29 *et seq.*, Plumeri Aff. in Supp. ex. C [Pl. D&I). While the solution to overbroad demands is generally to strike the demand at issue (*Craig v New York Tel. Co.*, 123 AD2d 580, 581 [1st Dept. 1986]), in this instance the court uses its discretion to specify that the subject of items 6, 7, 9, 10, 11, 12, and 13 are those documents dated between 2004 and the January 31, 2011. Item 8, seeking copies of "all other business records of Superman Group," and item 14, seeking copies of "all other personal financial documents of Plumeri from 2004 to the present," are both stricken as being overbroad, potentially burdensome, and vague.

Defendants most specifically object to the production of Plumeri's personal tax returns and banking records, the subjects of items 12 and 13, on the basis that these are confidential and private. Plaintiff argues that from the documents he has already received, there is evidence of "significant ATM withdrawals of funds" from the corporation's bank account, suggesting that Plumeri used the company's funds for personal reasons (Doc. 17, Pl. Memo of Law p. 22). Plaintiff seeks Plumeri's bank records to determine whether the corporation's funds were deposited into his personal account, and seeks the accounting and tax records of both the company and Plumeri to show inadequate capitalization and asset commingling (Doc. 17, Pl. Memo of Law p. 22). Plaintiff acknowledges the sensitive and private nature of these documents (Doc. 17, Pl. Memo of Law pp. 25-26). His attorney suggests that because of the

nature of the documents, sensitive information could be redacted such as account numbers, and the parties could enter into a confidentiality agreement (Doc. 27, Pl. Reply Affirm. ¶ 23).

Because the corporate veil-piercing theory has not been dismissed, plaintiff has an established need for these personal financial documents from Plumeri. The parties should enter into a confidentiality agreement, but otherwise, defendants are directed to produce the documents requested in items 13 and 14, omitting account numbers.

CONCLUSION

Accordingly, it is

ORDERED that the branch of the defendants' motion to dismiss pursuant to CPLR 3211 (a) (7) is granted to the extent that the fourth and fifth causes of action of the amended verified complaint are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of the defendants' motion seeking a protective order pursuant to CPLR 3103 (a) is denied; and it is further

ORDERED that the branch of the plaintiff's cross motion seeking to amend the complaint pursuant to CPLR 3025 (b) is granted to the extent indicated in this decision, and the proposed amended verified complaint included in the exhibits is deemed filed and served nunc pro tunc, and plaintiff shall upload a copy of the amended complaint under its own document number in the NSYCEF system; and it is further

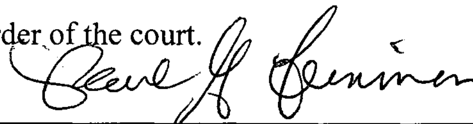
ORDERED that the branch of the plaintiff's cross motion seeking to compel production pursuant to CPLR 3124 is granted to the extent set forth above, and defendants are to produce all items within 30 days of the date of entry of this decision and order; and it is further

[* 17]

ORDERED that pursuant to the so ordered compliance conference stipulation dated November 2, 2011, the depositions of "all parties" are to be conducted within 30 days of the date of entry of this decision and order;[5] and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 212, 60 Centre Street, on August 15, 2012, at 2:15 PM.

This constitutes the decision and order of the court.



Dated: June 29, 2012
New York, New York

J.S.C.

[5]See Doc. 29.