Cornwall Mgt. Ltd v Kambolin
2015 NY Slip Op 30740(U)
April 29, 2015
Supreme Court, New York County
Docket Number: 653675/13
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

CORNWALL MANAGEMENT LTD and OLEG SOLOVIEV,	:	
Plaintiffs,	:	Index No. 653675/13
-against-	:	DECISION AND ORDER
PETER KAMBOLIN, OLEG BATRATCHENKO, ABRAHAM BENNUN, THOR UNITED CORP. (a/k/a CONSOLIDATED OPTIMAL CORP.), ATLANT CAPITAL HOLDINGS, LLC, THOR REAL ESTATE MASTER FUND, LTD and NORTH 3rd DEVELOPMENT, LLC,	:	Motion Sequence No. 004
Defendants.	:	

ANIL C. SINGH, J.:

Background

The facts are as alleged in the complaint.

In 2007, after meeting Oleg Batratchenko (Mr. Batratchenko) and Peter Kambolin (Mr. Kambolin), the plaintiffs – and many others – loaned millions of dollars to Thor United Corp. (Thor United) in connection with the development of real estate in Williamsburg, Brooklyn (Williamsburg Property). At the request of Mr. Batratchenko, those funds were remitted to Thor United (which was created, owned and dominated by Mr. Batratchenko) through one of the many Thor affiliates, Thor United Corp. of Nevis Island (Thor Nevis).

Messrs. Batratchenko, Kambolin, and Abraham Bennun (Mr. Bennun) (Alter Ego Conspirators), who operate through various entities with interrelated ownership, management, and control, later informed plaintiffs that they had lost the property after the 2008 recession and

had no ability to repay plaintiffs' loans. Plaintiffs ultimately sued Thor United, Mr. Batratchenko's company, and obtained judgments totaling $3.4 million (the Judgments), which Judgments remain unsatisfied.

Between 2006 and 2009, Thor Real Estate Master Fund (Thor Real Estate), Thor United's wholly-owned subsidiary, which was also created and dominated by Mr. Batratchenko, loaned tens of millions of dollars raised by Thor United from investors, including plaintiffs, for development of the Williamsburg Property to defendant Atlant Capital Holdings, LLC (Atlant). Atlant acquired the Williamsburg Property in 2008 through its wholly-owned subsidiary, Williamsburg Terrace LLC. In other words, Atlant indirectly owned a very valuable asset (the Williamsburg Property) and owed substantial sums to a subsidiary of Thor United known as Thor Real Estate, which sums were to be repaid from the fully developed Williamsburg Property.

In 2010, as the plaintiffs' loans were coming due, the defendants were concerned about potentially defaulting. They knew that a default would jeopardize their planned sale of the Williamsburg Property and so they – and particularly Mr. Batratchenko – induced the plaintiffs to refrain from suing by assuring them, in writing, that when the property was sold, they would be repaid (2010 Repayment Agreement), and by extending the due date for one of the loans. Mr. Batratchenko, while encouraging the plaintiffs to sign the 2010 Repayment Agreement, intentionally failed to inform them that defendants were simultaneously preparing to sell the property.

On November 8, 2010, after the 2010 Repayment Agreement was signed, Atlant sold the Williamsburg Property to SL Green. The plaintiffs – and other investors – were advised that as a result of the sale, their loans would remain unpaid. Unbeknownst to the plaintiffs,

simultaneously with Atlant's sale of the Williamsburg Property to SL Green, North 3rd Development (N3D), an entity nominally owned by Mr. Bennun, but actually owned, dominated and controlled by all of the individual defendants, including Mr. Batratchenko, reacquired a portion of the Williamsburg Property, as was the plan all along.

Immediately after the sale and partial buy-back, the defendants dissolved Atlant and shifted Atlant's indebtedness to yet another entity, North 3rd Funding, LLC (N3F), a shell entity owned and managed by N3D, which had been created solely to inherit this indebtedness. In other words, defendants changed the obligor on the loan owed to Thor Real Estate from Atlant (which owned a very valuable asset – the Williamsburg Property) to N3F, a newly created shell with no ability to repay the loan. The indebtedness owed to Thor Real Estate was never repaid and there are now numerous judgments against its parent, Thor United (which Thor entities, again, were owned partially by Mr. Batratchenko). While seemingly complex, at its core, defendants' scheme was rather simple: they raised millions of dollars, then turned around and loaned that money to Atlant to develop the property. Atlant, in turn, sold off a piece of the property but kept a piece for itself (albeit through a newly-created entity) and moved its indebtedness to another newly-created shell which could never – and would never – repay that loan.

Defendants cashed out when N3D sold its reacquired portion of the Williamsburg Property for $51.3 million. Although defendants profited, and their New York institutional lender was seemingly repaid, defendants did not repay numerous individual investors – including the plaintiffs – millions of dollars, and their scheme successfully ensured that the sale's proceeds were not reachable. Mr. Batratchenko and Mr. Kambolin needed the involvement of N3D and Mr. Bennun to facilitate this sham transaction because Mr. Batratchenko and Mr. Kambolin had

agreed in writing (with their institutional lenders in connection with the 2010 sale), that they would have no further pecuniary interest in the property or its proceeds post-sale. Notwithstanding that warranty, both Mr. Batratchenko and Mr. Kambolin were paid handsomely after the sale. A 2012 audio recording of Mr. Batratchenko makes clear that each of the individual defendants shared in the sale proceeds. The recording contains the remark that the plaintiffs' "conduct in Russia wasn't sportsmanlike" because they sued for repayment in Russia. That recording also reveals the primary role that Mr. Batratchenko played in choosing which investors would be repaid, and which would not. Finally, as compensation for his involvement in their scheme, Mr. Kambolin and Mr. Batratchenko allowed Mr. Bennun to retain personal control of (and hence to profit from) a portion of the Williamsburg Property.

Thor United (now known as Consolidated Optimal Corp.), N3D, Atlant, Thor Real Estate, non-party Williamsburg Terrace and various other Thor entities all share the same offices - 551 Fifth Avenue. Mr. Batratchenko has held himself out as an owner, founder and/or employee of Thor Real Estate and Thor United, and his former-wife, Tatiana Smirnova, was held herself out as, along with Mr. Kambolin and Mr. Bennun, an owner of Atlant. Funds belonging to Atlant, Thor United, Mr. Kambolin, Thor Real Estate and Williamsburg Terrace were commingled. In fact, Atlant's General Ledger shows considerable sums flowing to/from Atlant, Thor United, Thor Real Estate, Mr. Batratchenko's former wife and various other Thor-related entities.

In sum, the Amended Complaint alleges that each of the interconnected individual defendants – but particularly Mr. Batratchenko – "treated each other, and their respective entities

as effectively interchangeable in their dealings with the plaintiffs and their schemes to defraud plaintiffs out of their rightful entitlements."

Prior Decision

Previously, the other Alter Ego Conspirators, Mr. Kambolin and Mr. Bennun, moved to dismiss the Amended Complaint on some of the same grounds argued here. The court denied those motions to dismiss the suit on judgment claim, and granted the motions to dismiss the fraudulent conveyance claim. Specifically, the court held that:

> The plaintiffs have provided enough facts, construed in favor of the plaintiff, to show that Mr. Bennun and the other individual defendants may have dominated the corporations at issue, including Thor United, Thor Real Estate, Atlant, N3D, N3F. Plaintiffs have also alleged, with specificity, how they believe defendants used their domination and control to propagate a fraud and benefit themselves at the expense of creditors such as the plaintiffs.
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> Plaintiffs also claim to have an audio recording where Mr. Batratchenko acknowledges that the individual defendants "were playing favorites," deciding amongst themselves which investors would be repaid. If the allegations prove true, it is possible Mr. Batratchenko, Mr. Kambolin, and Mr. Bennun conspired to defraud the unsecured creditors of Thor United by separating the Williamsburg Property from the unsecured liabilities owed to plaintiffs and other creditors, and thereby enabling themselves to personally profit from the development of the property. The court finds plaintiffs' allegations of common ownership among the companies, common office space, undercapitalization of N3F, and co-mingling of corporate funds are sufficient to "raise factual questions not determinable on a pre-answer motion to dismiss." *Kralic v Helmsley*, 294 AD2d 234, 236 (1st Dept 1992).

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The

court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Service of Process

Mr. Batratchenko claims that he was untimely served. He is incorrect.

It warrants mentioning that Mr. Batratchenko filed two answers before making the instant motion. The Amended Complaint was filed on March 13, 2014. Mr. Batratchenko was then personally served, as he acknowledges, on May 14, 2014, well within the 120-day period prescribed by CPLR 306-b. Service of the Amended Summons and Complaint was timely.

Mr. Batratchenko's argument that he was not timely served with the original summons and complaint fails because Mr. Batratchenko was not a party to that pleading, and therefore was

not required to be served with that process. *See* CPLR 306-b (service is to be "made upon a defendant within the time provided in this section").

Mr. Batratchenko's motion to dismiss for untimely service should be denied.

Jurisdiction

Mr. Batratchenko claims that plaintiffs do not plead any allegations supporting long-arm jurisdiction under CPLR 302 (a). This is also incorrect.

Jurisdiction is established under CPLR 302 (a) as a result of Mr. Batratchenko or his agents having: (1) transacted any business within the state, (2) committed a tortious act within the state, (3) committed a tortious act without the state causing injury within the state, or (4) owned, used or possessed any real property within the state. CPLR 302 (a) "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities – or the activities of his agent(s) – here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988). Here, jurisdiction lies pursuant to each subsection of CPLR § 302 (a).

As noted above, the acts of Mr. Batratchenko's alleged alter egos or co-conspirators are attributable to him and sufficient to establish jurisdiction. *See e.g. New Media Holding Company LLC v Kagalovsky*, 97 AD3d 463, 464-65 (1st Dept 2012) (jurisdiction properly established over foreign defendant based upon the acts of defendant's alter egos and co-conspirators in the commission of a tort in New York). *Accord, Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428-29 (1st Dept 2013) (jurisdiction proper over a foreign defendant based on allegations that the defendant was part of a conspiracy involving the commission of tortious acts in

New York) (affirming order of Melvin L. Schweitzer, J.); *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 98-100 (1st Dept 2002) (jurisdiction properly established over foreign defendants due to their alleged participation in a conspiracy, at least part of which took place in New York).

Mr. Batratchenko's and his co-conspirators' scheme to defraud plaintiffs included the following New York contacts:

A New York City based real estate development project;

Mr. Batratchenko's co-conspirators and alter egos were located and/or maintained offices in New York;

Mr. Batratchenko's co-conspirators and alter egos conducted business in New York, including the transactions at issue;

Much of the instant project's financing was provided by a bank in New York and secured by the New York property;

Numerous ownership transfers of the subject property – and the attendant debt – occurred in New York;

Mr. Batratchenko induced plaintiffs to loan the funds for this New York project;

Mr. Batratchenko profited mightily from this New York project, at the expense of those unpaid investors and lenders;

Mr. Batratchenko laundered his profits through his alter egos and co-conspirators in New York;

As part of the transaction and scheme, Mr. Batratchenko allowed ownership of portions of the New York project to be retained by one of his co-conspirators;

Mr. Batratchenko signed the forbearance agreement relating to the New York project;

Mr. Batratchenko provided a personal guarantee of plaintiffs' loan for the New York project, and later disavowed that guarantee;

Mr. Batratchenko founded Thor United, a New York corporation, and remains an officer and director of that entity;

Mr. Batratchenko founded and still operates defendant Thor Real Estate, a BVI corporation with its principal place of business in New York and another of his alter egos;

The corporate defendants operate out of the same New York address.

First, jurisdiction under CPLR 302 (a) (1) is established because Mr. Batratchenko (both directly and through his agents/co-conspirators) allegedly transacted business within the state, including the transactions at issue in this action. *See Kreutter*, 71 NY2d at 463 (establishing jurisdiction over foreign defendants under CPLR 302 (a) (1) based on their transaction of business in New York through an agent).

Second, jurisdiction under CPLR 302 (a) (2) is also established because Mr. Batratchenko and his co-conspirators allegedly committed tortious acts in the state, namely by perpetrating the fraud detailed in the Amended Complaint. *See New Media*, 97 AD3d at 464-65 (trial court "properly exercised long-arm jurisdiction under CPLR 302 (a) (2) since defendants-appellants are alleged co-conspirators in the commission of a tort in New York State through an agent").

Third, jurisdiction under CPLR 302 (a) (3) is also established because Mr. Batratchenko and his cohorts allegedly caused injury to be sustained within the state. *Bank Brussels Lambert v Fiddler Gonzalez & Rodriguez*, 171 F3d 779, 792-93 (2d Cir. 1999); *Urfirer v SB Builders, LLC*, 95 AD3d 1616, 1618-1619 (3d Dept 2012). Two examples of alleged New York injuries occurred when Atlant, Thor United's indirect debtor, was stripped of its only asset – the Williamsburg Property – and when the debt owed to Thor United was wiped out here. *See Urfirer*, 95 AD3d at 1616-19 ("Where, as here, commercial non-physical losses are alleged, the

situs of the injury is not where the losses are sustained, but where the critical events associated with the dispute took place.") (internal quotation marks and citations omitted). Furthermore, as detailed in the Amended Complaint, Mr. Batratchenko has allegedly engaged in a "persistent course of conduct" in New York such that personal jurisdiction is proper under CPLR 302 (a) (3) (i).

Finally, jurisdiction under CPLR 302 (a) (4) is also established because Mr. Batratchenko and his agents allegedly owned, used and/or possessed real property (either directly or through their various corporate shells) within the state. *See Kalichman v Beverly Holding Co.*, 130 AD2d 327, 330 (3d Dept 1987) (in an action on bond debts related to Bronx property, jurisdiction existed under CPLR 302 (a) (4) based on defendants' ownership of the property and on their interest and activity in regard to it).

Alter Ego

Plaintiffs' Suit on Judgment cause of action pursuant to the alter ego and veil piercing doctrines seeks to hold Mr. Batratchenko liable for the Judgments entered against his company, Thor United. Initially, "as a general rule, a court will pierce the corporate veil or disregard the corporate form whenever necessary to prevent fraud or to achieve equity." *Hyland Meat v Tsagarakis*, 202 AD2d 552 (2d Dept 1994). As the court noted, veil-piercing is appropriate where the plaintiff demonstrates (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. Here, there the Amended Complaint details a gross wrongful act as a result of Mr. Batratchenko's and the alter ego conspirators' complete domination of the corporate defendants with respect to the

transactions at issue, and that such domination was used to perpetrate fraud and to enrich defendants at the expense of their investors, including the plaintiffs.

Moreover, as veil piercing claims are inherently fact driven, they are not typically susceptible to attack on a pre-answer motion to dismiss. "The issues raised with respect to a piercing of the corporate veil . . . raise factual questions not determinable on a pre-answer motion to dismiss." *Kralic v Helmsley*, 294 AD2d 234, 236 (1st Dept 2002). *See also Labgold v Soma Hudson Blue*, 2011 NY Misc LEXIS 3956, at *7, 2011 NY Slip Op 32179(U) (Sup Ct NY Co Aug. 9, 2011 ("The theory of piercing the corporate veil involves a fact intensive inquiry that is not well suited for determination prior to disco very"). In fact, New York courts are even typically reluctant to dispose of veil piercing claims on summary judgment. *See e.g. Ledy v Wilson*, 38 AD3d 214, 215 (1st Dept 2007) (evidence submitted that the corporate plaintiffs and the LLCs shared common officers, directors and offices, resulted in a "fact-laden claim to pierce the corporate veil [that] is particularly unsuited for resolution on summary judgment") (internal citation omitted).

Mr. Batratchenko seeks to dismiss the alter ego/veil piercing cause of action on two grounds: (1) he claims that he cannot be held liable for the act of Atlant or N3D because he claims not to be an owner or shareholder of either entity, and (2) he claims that the Amended Complaint contains no allegations sufficient to allege a claim for veil piercing. Mr. Batratchenko is wrong on both fronts – the first because New York applies the doctrine of "equitable ownership" to veil pierce against non-owners and non-shareholders, and the second because this court has already addressed this issue on two prior motions and confirmed that the veil piercing

cause of action is properly pled. And if the claim was properly pled against Mr. Batratchenko's cohorts, clearly it was sufficiently pled against him, as a ringleader of the scheme.

New York courts recognize and apply the doctrine of equitable ownership to veil pierce against non-owners/non-shareholders of companies:

> New York courts have recognized for veil-piercing purposes the doctrine of equitable ownership, under which an individual who exercises sufficient control over the corporation may be deemed an "equitable owner," notwithstanding the fact that the individual is not a shareholder of the corporation. *See e.g. Guilder v Corinth Constr. Corp.*, 235 AD2d 619, 651 NYS2d 706, 707 (3d Dept 1997) ("Even if the [principals] were not [the corporation]'s legal owners, it is apparent that they dominated and controlled the corporation to such an extent that they may be considered its equitable owners.")

Freeman v Complex Computing Co., Inc., 119 F3d 1044, 1051 (2d Cir. 1997).

The court in *Freeman* held that although individual defendant Glazier was not an employee, officer, director, or shareholder of corporate entity C3, his control and dominion over C3 warranted piercing the corporate veil to impose personal liability upon him. *Id.* Similarly, in *Guilder*, quoted in *Freeman*, although the individual defendants were not shareholders of the corporate entity, the court recognized that their non-ownership did not prevent veil piercing. 651 NYS2d at 707. *See also Market place LaGuardia Ltd. Partnership v Harkey Enterprises, Inc.*, 07-cv-1003 (CBA), 2008 WL 905188, at *2 (EDNY Mar. 31, 2008) ("The mere fact that Harkey does not have an ownership interest in HEI does not preclude Marketplace's claim for alter ego liability."); *DER Travel Serv ices, Inc. v Dream Tours & Adventure, Inc.*, 99 CIV. 2231 (HBP), 2005 WL 2848939, at *9 (SDNY Oct. 28, 2005) ("For veil-piercing purposes, New York courts recognize the doctrine of equitable ownership, under which an individual who exercises sufficient control over a corporation may be deemed an 'equitable owner,' even if the individual

is not actually a shareholder of the corporation."); *Lally v Catskill Airways, Inc.*, 198 AD2d 643, 644-45 (3d Dept 1993) ("Although Peach maintains that he had no ownership interest in Catskill, the evidence . . . suggests that he exercised considerable authority over Catskill after entering into the agreement with Low, to the point of completely disregarding the corporate form and acting as though Catskill's assets were his alone to manage and distribute. This raises a question as to whether he was, in reality, the equitable owner of Catskill.").

Mr. Batratchenko completely ignores this well-settled doctrine of New York law, and his cited cases do not stand for any contrary proposition. *See East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775 (2011) (does not address piercing the corporate veil with respect to a non-owner or non-shareholder, and does not say that veil piercing is limited to shareholders/owners only); *D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451 (1st Dept 2013) (same). Accordingly, even if Mr. Batratchenko were not an owner or director of all or some of the corporate defendants, a claim to be determined in the course of discovery, he can still be held liable for their misdeeds under veil piercing and/or alter ego theories.

In deciding two prior motions to dismiss on some of the same grounds, the court has already determined that the alter ego/veil piercing claim is properly and sufficiently alleged. Specifically, this court has already found that:

> The plaintiffs have provided enough facts, construed in favor of the plaintiff, to show that Mr. Bennun and the other individual defendants may have dominated the corporations at issue, including Thor United, Thor Real Estate, Atlant, N3D, N3F. Plaintiffs have also alleged, with specificity, how they believe defendants used their domination and control to propagate a fraud and benefit themselves at the expense of creditors such as the plaintiffs.
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> * * *

> Plaintiffs also claim to have an audio recording where Mr. Batratchenko acknowledges that the individual defendants "were playing favorites," deciding amongst themselves which investors would be repaid. If the allegations prove true, it is possible Mr. Batratchenko, Mr. Kambolin, and Mr. Bennun conspired to defraud the unsecured creditors of Thor United by separating the Williamsburg Property from the unsecured liabilities owed to plaintiffs and other creditors, and thereby enabling themselves to personally profit from the development of the property. The court finds plaintiffs' allegations of common ownership among the companies, common office space, undercapitalization of N3F, and co-mingling of corporate funds are sufficient to "raise factual questions not determinable on a pre-answer motion to dismiss." *Kralic v Helmsley*, 294 AD2d 234, 236 (1st Dept 1992).
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> The cause of action is properly pled.

Fraud

While Mr. Batratchenko also claims that there is no fraud or wrong alleged, a reading of the Amended Complaint details at length the alleged fraud. And the court seemingly agreed: "Plaintiffs also have alleged, with specificity, how they believe defendants used their domination and control to propagate a fraud and benefit themselves at the expense of creditors such as the plaintiffs. . . . If the allegations prove true, it is possible that Mr. Batratchenko, Mr. Kambolin, and Mr. Bennun conspired to defraud the unsecured creditors of Thor United by separating the Williamsburg Property from the unsecured liabilities owed to plaintiffs and other creditors, and thereby enabling themselves to personally profit from the development of the property." (*Id.*)

These findings were based upon 15 pages of underlying factual allegations in the Amended Complaint, including discrete sections entitled "The Transactions Through Which Defendants Fraudulently Sought to Ensure the Plaintiffs Would Not be Able to Collect on Their Loans," "Defendants Profit From the Re-Purchased Portion While Depriving Plaintiffs and Their Other Creditors of the Ability to Collect Against Those Profits," and "Batratchenko, Kambolin

and Bennun Acted as Alter Egos of Each Other in Connection with the Transactions and Entities at Issue." As detailed above, and without the benefit of any discovery, plaintiffs have sufficiently alleged, among other things, Mr. Batratchenko's: domination and control of the other defendants; his use of the other defendants for his own purposes and to protect himself from liability to third parties such as plaintiffs; the interrelated nature and actions of the controlled business entities; the disregard of corporate formalities; his scheme to obtain a loan from plaintiffs and then avoid repayment; the complex transactions he perpetrated to transfer ownership of the subject real estate while stripping away the debt; the profits he enjoyed while avoiding repayment of creditors such as plaintiffs; and his statements on audio tape confirming his involvement and control. In fact, the Amended Complaint alleges that Mr. Batratchenko was involved in the scheme from its inception (when he solicited plaintiffs' funds) to its completion (when he was caught on audiotape deciding who would and who would not be repaid).

The plaintiffs have sufficiently alleged a claim for suit on judgment pursuant to alter ego and veil piercing theories.

Res Judicata or Collateral Estoppel

Mr. Batratchenko also claims that the instant action is barred because plaintiffs previously sued Mr. Batratchenko in Russia and he was found not to be personally liable for the debt. However, once again Mr. Batratchenko ignores controlling legal principles and case law, which establish that these causes of action are distinct and that neither res judicata nor collateral estoppel applies.

The case of *First Capital Asset Mgmt., Inc. v N.A. Partners, L.P.*, 260 AD2d 179 (1st Dept 1999), *lv. to appeal denied*, 93 NY2d 817 (1999) is directly on point and dispositive.

There, petitioner had commenced a prior action against corporate and individual defendants for payment under a stock purchase agreement. 260 AD2d at 180. The complaint was dismissed as to the controlling individual of the judgment debtors, because he was not personally liable for the purchase price under the agreement, and judgment was only entered against the corporate entities, which were empty shells. *Id.* Petitioner commenced a subsequent proceeding against the previously dismissed individual to enforce the judgment, alleging that he was the alter ego of the judgment debtors. *Id.* at 181. The Supreme Court dismissed the petition, holding that it was barred by res judicata. *Id.* The Appellate Division, First Department, vacated this aspect of the Supreme Court's decision, explaining that the petition in the enforcement action:

> sought to enforce the judgment in the prior action against [the principal] based on allegations that [the judgment debtors] were his alter egos. The dismissal of the complaint as against [the principal] in the prior action was based on the finding that he was not personally liable for the purchase price under the terms of the stock purchase agreement, and did not preclude a subsequent proceeding to enforce the judgment against [the principal] based on allegations that would support piercing the corporate veil of the judgment debtors (*see Rebh v Rotterdam Ventures, Inc.*, 252 AD2d 609, 675 NYS2d 234; *RENP Corp. v Embassy Holding Co.*, 229 AD2d 381, 382, 644 NYS2d 567; *Dannasch v Bifulco*, 184 AD2d 415, 585 NYS2d 360), inasmuch as "the necessary elements of proof and evidence required to sustain recovery vary materially."

260 AD2d at 181.

Similarly, in *REBH v Rotterdam Ventures Inc.*, 252 AD2d 609 (3d Dept 1998), plaintiffs had commenced a prior action against a parent company and its subsidiary for breaches of contract. Judgment was entered against the subsidiary, but the parent company was found not to be liable on the contract, and the case against it was dismissed. *Id.* at 609-10. Plaintiffs subsequently commenced an enforcement action against the parent company to pierce the corporate veil and collect on the subsidiary's debt. *Id.* at 609. The Appellate Division held that

the "Supreme Court properly rejected defendant's assertion that the present [enforcement] action is barred by collateral estoppel or res judicata." *Id.* at 610. Although the defendant in the enforcement action had been named in the initial suit and the claim against it dismissed, the Appellate Division held that because piercing the corporate veil had not been "actually determined in the prior proceeding, the doctrine of collateral estoppel does not prevent [its] consideration at this juncture." *Id.* The court further explained that "inasmuch as the claims presently before us have their origins in different factual occurrences (the earlier suit involved proof of the circumstances surrounding the execution, performance and breach of the employment contract and lease, whereas this case centers on wholly unrelated transactions between [the subsidiary and the parent]), seek different kinds of relief and require the application of a different body of law, res judicata does not mandate their dismissal." *Id.*

These cases address the precise situation here. Mr. Batratchenko's dismissal in the Russian action was based on a finding that he was not individually and directly liable for payment on the loan. The issues of alter ego and veil piercing were not part of the court's determination. Contrary to Mr. Batratchenko's assertions, neither res judicata nor collateral estoppel precludes the claims in this action to enforce plaintiffs' judgment against Mr. Batratchenko based on allegations that the judgment debtor was his alter ego, since the claims and elements of proof in this action vary materially from the claims determined in Russia. *See First Capital*, 260 AD2d 179 (judgment enforcement action based on theory that previously dismissed defendant was judgment debtor's alter ego was not barred by res judicata); *REBH*, 252 AD2d 609 (doctrines of res judicata and collateral estoppel did not preclude plaintiff's action to enforce judgment, where plaintiff sought to pierce the corporate veil to hold the previously

dismissed parent company liable); *RENP Corp. v EMB Corp.*, 229 AD2d 381 (2d Dept 1996) (veil piercing claim in subsequent judgment enforcement action not barred by doctrines of res judicata or collateral estoppel); *Romag Fasteners, Inc. v Bauer*, 11 CIV. 3181 PAC, 2011 WL 5513380, at *7 (SDNY Nov. 9, 2011 (same, applying New York law, noting that "parties regularly seek to enforce judgments awarded in one proceeding via a corporate veil-piercing theory in a subsequent proceeding"); *Careccia v Macrae*, No. 05CV1628ARR, 2005 WL 1711156 (EDNY July 29, 2005) (same).

Because the alter ego claims were not part of the court's determination in the Russian action, res judicata and collateral estoppel do not bar in this enforcement action plaintiffs' claims that Mr. Batratchenko is the alter ego of the judgment debtors.

ORDERED that Mr. Batratchenko's motion to dismiss is denied.

Dated: April 29, 2015

ENTER:

J.S.C.