Cargill Soluciones Empresariales, S.A. De C.V., SOFOM, E.N.R. v Desarrolladora Farallon S. de R.L. de C.V.
2017 NY Slip Op 31650(U)
July 21, 2017
Supreme Court, New York County
Docket Number: 651607/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651607/2014
CARGILL SOLUCIONES
vs.
DESARROLLADORA
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 5/3/17
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 96-106
Answering Affidavits — Exhibits _____ | No(s). 129-135
Replying Affidavits _____ | No(s). 155-164

Upon the foregoing papers, it is ordered that this ~~motion is~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

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

Dated: 7/21/17

_____, J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.

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: PART 54

----------X

CARGILL SOLUCIONES EMPRESARIALES, S.A. DE C.V., SOFORM, E.N.R.,

Index No.: 651607/2014

DECISION & ORDER

Plaintiff,

-against-

DESARROLLADORA FARALLON S. DE R.L. DE C.V. and JUAN DIAZ RIVERA,

Defendants.

----------X

DESARROLLADORA FARALLON S. DE R.L. DE C.V.,

Third-Party Plaintiff,

-against-

MEXVALO S. DE R.L. DE C.V. and FARALLON/HVi DEVELOPMENT, LLC,

Third-Party Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 006 and 007 are consolidated for disposition.

Defendant/third-party plaintiff Desarrolladora Farallon S. de R.L. de C.V. (Farallon) and defendant Juan Diaz Rivera move, pursuant to CPLR 3212, for summary judgment against plaintiff Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, E.N.R. (Cargill SOFOM or SOFOM) and third-party defendant Mexvalo S. de R.L. de C.V. (Mexvalo), a SOFOM affiliate. Seq. 006.[1] SOFOM and Mexvalo oppose. SOFOM separately moves (1) for partial summary judgment against defendants; and (2) for leave to file a proposed Second Amended Complaint

[1] The other third-party defendant, Farallon/HVi Development, LLC (FHD), was never served. The entity was "cancelled due to a failure to pay Delaware franchise tax." *See* Dkt. 97 at 9. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

(the PSAC). Seq. 007. Defendants oppose. For the reasons that follow, the motions are granted in part and denied in part.

I. Factual Background & Procedural History

This action is part of sprawling, multi-forum litigation concerning a luxury resort in Cabo San Lucas, Mexico (the Resort). As explained herein, there have been several lawsuits in this court, a case in federal court, litigation in Mexico, and an international arbitration. What remains of this case is a dispute between two major investors in the Resort, SOFOM and Farallon, the latter being an entity controlled by Rivera. SOFOM acquired the rights to the Resort's major debt from the lender and has brought this action to collect, alleging that Farallon has engaged in malfeasance which triggers its liability under a "bad boy" guaranty of the Resort's debt.

The parties agree to the following facts:[2]

> On or about October 6, 2005, Farallon, as Owner, entered into an Operating Agreement with a Capella subsidiary, WPHG Mexico Operating, L.L.C., as Operator, to manage and operate the [Resort]. On or about May 17, 2006, Farallon, [SOFOM's affilliate Mexvalo], and a division of Banco J.P. Morgan, S.A. ("J.P. Morgan Mexico") entered into the Trust Agreement (i.e., the Contrato de Fideicomiso Irrevocable Número F/00352, dated May 17, 2006), thereby forming the Trust (i.e., Trust No. F/00353), with Farallon and Mexvalo as the settlors and beneficiaries and J.P. Morgan Mexico as the Trustee. Simultaneous with the execution of the Trust Agreement, on or about May 17, 2006, Farallon, Mexvalo and [defunct, third-party defendant FHD] entered into the CP Project Trust Governance Agreement (the "TGA"), documenting the interests and roles of the various parties, with Farallon's contribution of the land on which the Resort would be built, valued at $18.5 million, giving it a 55.22% interest in the Trust, and Mexvalo's contribution of $15 million in cash giving it a 44.78% interest in the Trust.
>
> To finance the construction of the Resort, the Trust, through its Trustee, obtained a $65 million loan (the "Construction Loan") from WestLB AG, New York Branch ("WestLB"), as Lender, under a Construction Loan Agreement dated February 9, 2007. WestLB was subsequently placed in receivership by German banking authorities and, as part of their sale and liquidation, its assets, including

[2] *See* Dkt. 95 (joint statement of material undisputed facts).

the Construction Loan Agreement, were placed in a new entity called Portigon AG ("Portigon"). With the benefit of the funds obtained under the Construction Loan Agreement and with additional funds from other parties, the Resort was completed and opened in July 2009. The Loan Agreement incorporated and included a Non-Recourse Carve Out Guaranty (the "Guaranty"), dated February 9, 2007, which committed Farallon, Mexvalo and FHD, to pay all amounts due under the Construction Loan Agreement to the extent that the Borrower did not or could not.

On or about January 7, 2011, WestLB served a default notice on the Trust and the Guarantors, declaring a default on the Construction Loan due to non-payment, and thereafter commenced a foreclosure action in Mexico. On or about January 21, 2013, a Mexican Appellate Court issued a foreclosure judgment in favor of WestLB in an amount in excess of $52 million. Pursuant to the Capella Pedregal Loan Purchase and Sale Agreement dated February 13, 2014 (the "Loan Purchase Agreement"), Cargill SOFOM paid $54 million and provided broad indemnity to Portigon, and in return acquired all of Portigon's rights and interests as Lender under the Construction Loan Agreement. By the terms of the Loan Purchase Agreement, Cargill SOFOM became the sole Lender and administrative Agent under the Construction Loan. Thereafter, Cargill SOFOM replaced Portigon in the Mexican foreclosure action.

In 2008, the Trust created a subsidiary, Hoteles del Cabo, S. de R.L. de C.V. ("Hoteles"), to facilitate the Resort's future operations and return income to the Trust in a tax efficient manner. As a result, the bank accounts in which Resort revenues were deposited were in the name of Hoteles, and controlled by Hoteles and the Resort's manager. Hoteles was created to lease the Resort from the Trust, since the Trust's receipt of Resort revenues as rental income from Hoteles would create tax efficiencies. Although Farallon and Diaz Rivera later granted to the Resort's Manager, Capella, limited access to some of the Hoteles bank accounts in which Resort revenues were deposited, **in or about January 2013 Diaz Rivera ordered Capella to direct revenues of the Resort to a Hoteles account to which Capella had no access (the "Banorte Account"). In total, Diaz Rivera directed approximately US$15 million of Resort revenues to the Banorte Account in 2013-14.**

Prior to transferring the land for construction of the Resort to the Trust, Farallon obtained certain "concessions" (as described under Mexican law), including concessions which allowed (a) access to a portion of beach immediately adjacent to the planned Resort's pool and beach club ("Beach Concessions"), and (b) access to a well, desalinization plant and wastewater facility that would service the planned Resort ("Well Concessions"). Pursuant to Section 7.16 of the Construction Loan Agreement, the Trust warranted that it had or would take all actions necessary to establish and protect the Lender's rights to the Security. "Security" is defined in the Loan Agreement to include all Real Property, which is

> itself defined to include real property and improvements, including rights and privileges pertaining thereto. The Project Documents, as defined in the Construction Loan Agreement, that were provided to the Lender stated that the Beach Concessions and Well Concessions would be transferred to the Trust from Farallon. Pursuant to Sections 7.21.2 and 7.21.3 of the Construction Loan Agreement, the Trust warranted that it either had performed or would perform all of its obligations under the Project Documents, including obtaining the Beach Concessions and Well Concessions from Farallon.

Dkt. 95 at 1-5 (paragraph numbering and some paragraph breaks omitted; emphasis added); *see Cargill Soluciones Empresariales, S.A. v WPHG Mexico Operating, L.L.C.*, 2015 WL 1941364, at *1 (Sup Ct, NY County 2015) (*WPHG*) (explaining parties' relationship in action by SOFOM against Resort's operator); *see also id.* n.2 (noting pendency of this action and that Farallon is controlled by Rivera).

On May 23, 2014, SOFOM commenced this action and filed its original complaint. On July 24, 2015, SOFOM filed its first amended complaint, which asserts four causes of action against both Farallon and Rivera: (1) breach of the Loan Agreement; (2) breach of the Guaranty; (3) conversion; and (4) an accounting. *See* Dkt. 46 (the FAC). The second cause of action asserted against Rivera under the Guaranty is based on SOFOM's seeking to pierce Farallon's corporate veil. By order dated February 2, 2016, the court granted defendants' motion to dismiss the FAC's first and fourth causes of action, and denied their motion to dismiss the second and third causes of action. *See* Dkt. 69. On January 5, 2017, the Appellate Division affirmed. *See Cargill Soluciones Empresariales, S.A. de C.V., SOFOM, ENR v Desarrolladora Farallon S. de R.L. de C.V.*, 146 AD3d 439 (1st Dept 2017).[3]

[3] That same day, the Appellate Division also affirmed the court's dismissal of another action in which, *inter alia*, Farallon sought to assert Mexican law tort claims against SOFOM. *See* Dkt. 150. An action involving similar allegations (i.e., that SOFOM breached the parties' supposed joint venture agreement and violated Mexican law) was dismissed by a federal district court, and that dismissal was affirmed by the Second Circuit. *See Desarrolladora Farallon S. De R.L. De*

Defendants filed an answer to the FAC on February 22, 2016. *See* Dkt. 75. On June 22, 2016, Farallon filed a third-party complaint, which seeks contribution from Mexvalo and FHD under the Guaranty. *See* Dkt. 85 (the TPC). Mexvalo filed an answer to the TPC on August 19, 2016. *See* Dkt. 87. As noted earlier, FHD was never served because it is an inactive Delaware LLC.[4]

At this juncture, there is no question that Rivera converted about $15 million from the Resort for approximately 18 months before returning it. The only dispute is what damages, if any, are recoverable on this conversion claim. There also is no question that Farallon breached the Guaranty by failing to transfer the Beach and Well Concessions. Defendants dispute the existence of damages on these claims.

At an international arbitration, the parties' principal disputes, including the malfeasance that forms the basis of SOFOM's claim that Farallon breached the Guaranty, were adjudicated in Mexvalo's (i.e., SOFOM's)[5] favor. Thus, there are no questions of fact as to Farallon's liability. The arbitrators issued their final award in a decision dated August 15, 2016, which is nearly 100 pages in length. *See* Dkt. 115 (the Arbitration Award). They held that Farallon was not "legally justified in taking control of the Resort." *See id.* at 53; *see also id.* at 77 (noting "Farallon's willful misconduct, bad faith, and breaches of the TGA in seizing control of the Resort and Hoteles."). The Arbitration Award was confirmed by another Justice of this court. *See Mexvalo, S. de R.L. de C.V. v Desarrolladora Farallon S. de R.L. de C.V.*, Index No. 654716/2016, Dkt. 88

C.V. v Cargill, Inc., 2015 WL 7871040 (SDNY 2015), *aff'd sub nom. Desarrolladora Farallon S. de R.L. de C.V. v Cargill Fin. Servs. Int'l, Inc.*, 666 FApp'x 17 (2d Cir 2016).

[4] *See Matthew v Laudamiel*, 2012 WL 605589, at *21 (Del Ch 2012) ("After the certificate of cancellation has been filed, suits generally may not be brought by or against an LLC").

[5] SOFOM and Mexvalo are Cargill affiliates.

(Sup Ct, NY County Feb. 23, 2017) (Ramos, J.) (entering judgment of approximately $7.1 million in favor of Mexvalo against Farallon). Farallon's breach of the Guaranty, therefore, is res judicata.

With respect to Farallon's third-party claim for contribution, as explained herein, Farallon, as a joint and several guarantor, has no right to seek contribution from a co-guarantor (Mexvalo) that did not contribute to its breach. There is no question of fact that Mexvalo did not cause Farallon's breach because Mexvalo did not cause Farallon to fail to fulfill its obligation to transfer the Beach and Well Concessions. That was Farallon's sole decision. To the extent Farallon seeks to justify its breach based on alleged malfeasance by SOFOM and Mexvalo (e.g., breach of the parties' alleged joint venture agreement), all such claims have been rejected by every court to have considered them (including, as noted, the Appellate Division and the Second Circuit). Simply put, Farallon and Rivera are solely at fault. That said, as explained further herein, there is no basis to pierce Farallon's corporate veil to hold Rivera personally liable for Farallon's breach of the Guaranty (though Rivera is personally liable for his conversion of the $15 million).

After completion of discovery, a summary judgment schedule was set in an order dated September 22, 2016, which also extended the parties' deadline for filing a note of issue pending the outcome of SOFOM's motion for leave to amend. *See* Dkt. 88. The parties filed their respective summary judgment motions on November 17, 2016. SOFOM's motion includes a request for leave to file the PSAC. *See* Dkt. 119 (PSAC) & Dkt. 120 (redline).

The PSAC, which adds new factual allegations based on discovery, seeks to assert new causes of action for: (1) specific performance of the Guaranty against Farallon and Rivera;[6] (2) tortious interference with contract against Jonathan A. Bernstein, Adina G. Storch, Rachel E. Davidson, and White Lilly, LLC (collectively, the White Lilly Parties) and Rivera, who are allegedly funding Farallon's litigation, virtually all of which has proven to be without merit, for the purpose of extracting a payoff or procuring favorable buy-out terms; (3) abuse of process against defendants and the White Lilly Parties based on the forgoing allegations; (4) malicious prosecution, against defendants and the White Lilly Parties, also based on those same allegations; (5) violation of Judiciary Law § 488 against Bernstein and Storch, who are attorneys, for their alleged acquisition of an interest in Farallon's claims; and (6) violation of Judiciary Law § 489 against defendants and the White Lilly Parties because the interest in Farallon's litigation given to the White Lilly Parties supposedly amounts to champerty.

The court reserved on the motions after oral argument. *See* Dkt. 165 (4/20/17 Tr.).

II. Summary Judgment Motions

A. Legal Standard

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing

[6] Had such a claim been pleaded in the FAC, the court would have granted summary judgment on it. Specific performance on the Beach and Well Concessions claims is an essential remedy that SOFOM has long been entitled to. That said, summary judgment must wait until issue is joined on this claim. *See Chun v N. Am. Mortg. Co.*, 285 AD2d 42, 45 (1st Dept 2001).

requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Conversion of the $15 Million

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id.* at 50 (internal citations omitted); *see Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 (2d Dept 2010) ("In order to establish a cause of action to recover damages for conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question ... to the exclusion of the

plaintiff's rights.") (quotation marks omitted). "Where the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner." *Republic of Haiti v Duvalier*, 211 AD2d 379, 384 (1st Dept 1995). "The funds of a specific, named bank account are sufficiently identifiable." *Id.*; *see Manufacturers Hanover Trust Co. v Chem. Bank*, 160 AD2d 113, 124 (1st Dept 1990) (same).

There is no question of fact that Rivera converted the $15 million for approximately 18 months. "Farallon has admitted that Diaz Rivera directed approximately US$15 million of Resort revenues to the Banorte [A]ccount in 2013 and 2014, [] a practice that was finally ended when Cargill SOFOM obtained the Cash Management Order in the SNDA Action on July 8, 2014, directing Capella to give Cargill SOFOM control over the Resort's cash and finances." Dkt. 128 at 25, citing Dkt. 95 at 4 ("Although Farallon and Diaz Rivera later granted to the Resort's Manager, Capella, limited access to some of the Hoteles bank accounts in which Resort revenues were deposited, in or about January 2013 Diaz Rivera ordered Capella to direct revenues of the Resort to [the Banorte Account,] to which Capella had no access.") This is a textbook example of conversion.

While SOFOM does not seek summary judgment on damages, the court rejects defendants' argument that the conversion claim should be dismissed for lack of damages. While the $15 million was eventually returned, SOFOM lost the right to use that money for approximately 18 months. That money could have been placed in an interest-bearing account, and certainly could have been used for other business purposes. Regardless, even if no actual damages were suffered, damages are not an element of a conversion claim. On the contrary, once a conversion of money is established, the plaintiff is entitled to statutory pre-judgment

interest. CPLR 5001(a) ("Interest shall be recovered upon a sum awarded ... because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property."); *see Hunt v Hunt*, 13 AD3d 1041, 1043 (3d Dept 2004) (prejudgment interest under CPLR 5001 should be awarded on conversion claim); *see also Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 (1st Dept 2000) (same; holding that "even if plaintiff's action had been equitable, the IAS court's award of prejudgment interest would nonetheless have been proper in light of the circumstance that defendants wrongly withheld plaintiff's money."). Summary judgment on liability, therefore, is granted to SOFOM on its conversion claim against Farallon and Rivera. At a minimum, SOFOM will be awarded pre-judgment interest on the converted amount for the approximately 18 months it was in the Banorte Account.

C. Breach of the Guaranty

There is no question of fact that Farallon breached the Guaranty by failing to transfer the Beach and Well Concessions. Farallon does not deny that it had an express contractual obligation to do so, nor does it deny that it failed to fulfill that obligation. *See* Dkt. 95 at 5 ("The Project Documents, as defined in the Construction Loan Agreement, that were provided to the Lender stated that the Beach Concessions and Well Concessions would be transferred to the Trust from Farallon."). Farallon's contention that it should not be liable for damages resulting from its breach is unavailing. Section 2.02 of the Guaranty provides that the failure by a Guarantor (such as Farallon) to perform a Recourse Obligation (such as failure to transfer the Beach and Well Concessions) triggers that Guarantor's bad boy liability. Dkt. 112 at 4; *see Cargill*, 146 AD3d at 440 (upon occurrence of Recourse Obligations, such as "(1) [Farallon's failure to] deliver any earnings, revenues, rents, or other income from the premises; (2) the

occurrence of any fraud, tortious conduct, or material misrepresentation; and (3) any failure by the borrower to procure or maintain unencumbered marketable title," Farallon is liable for "the payment and repayment of all amounts due under the Construction Loan Agreement" and must "indemnify and hold harmless the lender [now SOFOM] for all costs and expenses arising by reason of default by any guarantor."); *see also* Dkt. 128 at 11-12 ("Farallon and Diaz Rivera intentionally prevented the Trust from fulfilling its obligations to the Lender under the Construction Loan Agreement with respect to the Beach Concessions and Well Concessions, encumbered marketable title to the Resort and caused Cargill SOFOM to incur significant costs in an effort to obtain new permits from local authorities to access the adjacent beach and to drill new wells and develop a new desalinization plant and discharge facility.").

The Arbitration Award's findings of Farallon's breach of the TGA and its willful misconduct also triggers Farallon's liability under the Guaranty. It is well settled that that these sorts of bad boy guaranty breaches, which clearly caused harm to the Resort (e.g., having to spend money digging other wells, losing access to the $15 million, incurring attorneys' fees defending Farallon's meritless litigation), give rise to a claim for damages. *See Nexbank, SSB v Soffer*, 2015 WL 458287 (Sup Ct, NY County 2015), *aff'd* 144 AD3d 457 (1st Dept 2016). While SOFOM only seeks summary judgment on liability, Farallon's contention that SOFOM's claim should be dismissed for lack of damages is without merit. *Cargill*, 146 AD3d at 441 ("since the [G]uaranty expressly provides that [Farallon] will be liable for any expenses, including legal fees, incurred in its enforcement, Cargill SOFOM may **seek a judgment as to liability** without presenting defendants with an invoice detailing those costs.") (emphasis added); *see id.* at 442 ("We reject defendant's argument that the motion court should have limited Cargill

SOFOM's potential enforcement fees to the fees incurred in this action, since the complaint seeks such fees only in connection with the breach of the [G]uaranty alleged therein. The motion court can determine the scope of the indemnification provision at such time as Cargill SOFOM takes affirmative steps to recover its enforcement fees in related actions."); *see also* Dkt. 154 at 11, 12 ("SOFOM seeks only those damages here that were not already awarded in the ICC Arbitration."; "SOFOM will submit evidence of the damages it suffered as a result, including the fees it incurred trying to obtain replacement concessions, when so ordered by the Court.").

D. Veil Piercing

While Rivera is personally liable on the conversion claim, he could not, absent veil piercing, be liable for Farallon's breach of the Guaranty. Rivera contends that he is entitled to summary judgment on SOFOM's veil piercing claim because no reasonable finder of fact could conclude that Rivera abused Farallon's corporate form for the purpose of harming SOFOM. Rivera is correct.

SOFOM, tellingly, devotes little more than one of the 35 pages in its moving brief to the argument that Farallon's corporate veil should be pierced to hold Rivera personally liable for Farallon's breach of the Guaranty. *See* Dkt. 128 at 27. Since Farallon is incorporated in Mexico, Mexican law applies. *Flame S.A. v Worldlink Int'l (Holding) Ltd.*, 107 AD3d 436, 438 (1st Dept 2013) (The question of whether defendants' corporate veils should be pierced will be determined by the laws of each defendant's state of incorporation."). The parties, however, only cite New York's veil piercing law, which the court, therefore, will apply.[7]

[7] *See MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 531 (1st Dept 2015) ("Since the parties cite a plethora of Delaware cases but no Indiana law directly on point or to the contrary ..., we will apply Delaware law on this point."); *Krumme v WestPoint Stevens*

Under New York law, "[t]he 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 the liability of the corporate owners." *Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 140 (1993). "In order to pierce the corporate veil, a plaintiff must show [1] that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and [2] that such domination was used to commit a fraud or wrong causing injury to the plaintiff." *Fantazia Int'l Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 (1st Dept 2009). In other words, the plaintiff must show *both* an abuse of the corporate form (the domination prong) *and* that such abuse was committed for the purpose of defrauding plaintiff (the fraud prong). *TNS Holdings, Inc. v MKI Secs. Corp.*, 92 NY2d 335, 339 (1998) ("Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance."); *see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 (1st Dept 2012); *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 (1st Dept 2006) ("The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil").

Corporate form abuse is to be determined on a case-by-case basis by analyzing the presence of certain well established factors, such as adherence (or lack thereof) to corporate formalities, inadequate capitalization, and domination and control over the company by the

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Inc., 238 F3d 133, 138 (2d Cir 2000) ("The parties' briefs assume that New York law controls, and such "implied consent ... is sufficient to establish choice of law.") (citation omitted).

person to whom personal liability is sought to be imputed. *See Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 (1st Dept 2013). Here, these factors arguably militate in favor of alter ego liability.[8] Nonetheless, the court will not devote much attention to the domination prong because the record is devoid of any evidence upon which a reasonable finder of fact could conclude that Rivera abused Farallon's corporate form ***for the purpose*** of harming SOFOM.[9]

After defendants argued in their opposition brief that SOFOM had not addressed the fraud prong, in reply, SOFOM responded that Rivera's conversion of the $15 million is sufficient wrongdoing to justify veil piercing. *See* Dkt. 154 at 15. This wrongdoing, however, has nothing to do with the legitimacy of Farallon's corporate form. *See Bd. of Managers of 325 Fifth Ave. Condo. v Cont'l Residential Holdings LLC*, 149 AD3d 472, 475 (1st Dept 2017) ("[t]he party seeking to pierce the corporate veil must establish that the *owners*, **through their domination**, abused ... the corporate form to perpetrate a wrong or injustice against that party such that a court

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[8] *See* Dkt. 128 at 28 ("As sole administrator, Diaz Rivera exercises unilateral control over Farallon's revenues and bank accounts, as well as its legal relationships, including decisions to litigate. Both he and Farallon failed to follow normal and customary corporate procedures with regard to Farallon. Farallon never had a board of directors meeting, nor did Diaz Rivera ever hold regular meetings of Farallon's owners. Farallon failed to respect corporate procedures for the appointment of officers, to hold required meetings for Farallon partners, or to prepare and keep corporate records. Diaz Rivera commingled his personal monies with Farallon's monies, including funds he obtained from Farallon-controlled Banorte bank accounts to which Resort revenues had been improperly remitted at Diaz Rivera's direction. He continued to exercise unilateral control over Farallon even though he owned only 10 percent of the company.") (internal citations omitted). It should be noted that some of these corporate formality complaints are less compelling in the alternative entity context. *See NetJets Aviation, Inc. v LHC Commc'ns, LLC*, 537 F3d 168, 178 (2d Cir 2008) ("In the alter-ego analysis of an LLC, somewhat less emphasis is placed on whether the LLC observed internal formalities because fewer such formalities are legally required."). The court does not profess to know the formalities applicable to closely-held Mexican corporate entities (the parties did not brief the issue).

[9] In *WPHG*, the court dismissed SOFOM's veil piercing claims, which were proffered to establish jurisdiction under the mere department doctrine and noted that, while not relevant to alter ego jurisdiction, the failure to plead the fraud prong is fatal to a veil piercing claim. *See id.*, 2015 WL 1941364, at *7 n.6.

in equity will intervene." (italics in original; bold added for emphasis), quoting *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 (2011). Rivera converting money from the Resort on behalf of Farallon is certainly a serious wrong, but it was not a wrong committed by abusing Farallon's corporate form. To be sure, as discussed, Rivera is personally liable for the conversion. However, since the conversion is not a wrong with a nexus to the abuse of Farallon's corporate veil, such conversion does not justify piercing it.

To the extent SOFOM contends that Farallon's misconduct that gives rise to its liability under the Guaranty amounts to sufficient proof of the fraud prong, SOFOM is wrong. It is well settled that the fraud prong must be established with proof distinct from the underlying breach of contract. *See Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 (1st Dept 2016) ("a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil."), quoting *Bonacasa Realty Co. v Salvatore*, 109 AD3d 946, 947 (1st Dept 2013).[10] In other words, the fraud prong cannot be satisfied merely by establishing the contractual breach that SOFOM seeks to personally impute to Rivera.

Finally, the fact that SOFOM successfully defeated defendants' prior motion to dismiss the veil piercing claim is of no moment. In affirming the court's denial of that motion, the Appellate Division wrote that "the allegations of an absence of corporate formalities, inadequate capitalization, and the commingling of corporate and personal funds, as well as the allegations that Diaz Rivera directed Farallon to take various actions that harmed Cargill SOFOM, including

[10] This also is the rule other jurisdictions, such as Delaware. *See EBG Holdings LLC v Vredezicht's Gravenhage 109 B.V.*, 2008 WL 4057745, at *12 (Del Ch 2008) ("the requisite element of fraud under the alter ego theory must come from an inequitable use of the corporate form itself as a sham, and not from the underlying claim"). Were it not for this rule, the fraud prong would be meaningless, as most veil piercing claims are tethered to a predicate contractual breach.

failing to transfer property rights, siphoning resort revenues, and incurring unnecessary taxes, are sufficient to withstand this pre-answer motion to dismiss the complaint, based on alter ego liability, as against Diaz Rivera." *Cargill*, 146 AD3d at 441. Leaving aside the fact that the fraud prong of the veil piercing standard was not extensively addressed, the standards for surviving a motion to dismiss and summary judgment are quite different. *See RXR WWP Owner LLC v WWP Sponsor, LLC*, 145 AD3d 494, 496 (1st Dept 2016) ("Our earlier holding, on a motion to dismiss ... ... does not constitute 'law of the case' barring [defendant] from moving for summary judgment, which is subject to a different standard of review."). Since SOFOM was required to lay bare its proof [*see Genger v Genger*, 123 AD3d 445, 447 (1st Dept 2014)] of the fraud prong, and failed to proffer any such evidence, the veil piercing claim against Rivera is dismissed.

E. Contribution from Mexvalo

Farallon avers that "[i]f the Court does allow Cargill SOFOM to go forward on its breach of Guaranty claim [which it does], Co-Guarantor Mexvalo should be liable for a third of any such recovery." *See* Dkt. 97 at 28. Farallon is wrong.

Under New York law, a defendant who "seeks to enforce the guaranty against ... a co-guarantor of the same obligation ... may only recover against [that co-guarantor], in his capacity as co-guarantor of the same obligation, by means of a cause of action for contribution." *Panish v Rudolph*, 282 AD2d 233 (1st Dept 2001) (internal citation omitted). "[T]o state such a cause of action it [is] essential for [the defendant] to allege that she had paid **in excess of her own proportionate share of the common liability**." *Id.* (emphasis added), citing *Beltrone v Gen. Schuyler & Co.*, 229 AD2d 857, 858 (3d Dept 1996); *see also Mediclaim, Inc. v Groothuis*, 38

AD3d 730, 731 (2d Dept 2007) ("Only a co-guarantor who has paid more than his or her proportionate share of the common liability is entitled to contribution from the other co-guarantors.").

Here, there is no evidence in the record to support a claim that Mexvalo contributed to Farallon's breach. On the contrary, the Arbitration Decision makes clear that all of the fault lies with Farallon. Simply put, Mexvalo did not cause Farallon to refuse to transfer the Beach and Well Concessions or engage in any of the other malfeasance found by the arbitrators. To the extent Farallon justifies its actions based on SOFOM's and Mexvalo's supposed wrongdoing (e.g., breach of the parties' joint venture agreement and Mexican law), Farallon's allegations were rejected by the arbitrators and, as discussed, every trial and appellate court to consider them. Hence, there is no basis for Farallon to assert a contribution claim against Mexvalo because Mexvalo bears no responsibility for Farallon's wrongdoing. Moreover, even if contribution from Mexvalo was appropriate, Farallon may not seek contribution from its co-guarantor where, as here, it has not made any payments under the Guaranty, let alone its proportionate share thereof. *See Guedj v Dana*, 302 AD2d 268 (1st Dept 2003).

III. SOFOM's Motion for Leave to Amend

"Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay or if the proposed amendment is palpably improper or insufficient as a matter of law." *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (quotations marks and internal citation omitted).

SOFOM is granted leave to assert a claim for specific performance of the Guaranty against Farallon (but not against Rivera due to the court's veil piercing ruling). "The elements of

a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law." *EMF Gen. Contracting Corp. v Bisbee*, 6 AD3d 45, 51 (1st Dept 2004). "[T]he equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique." *Id.* at 52. Here, as discussed, Farallon was contractually obligated to transfer the Beach and Well Concessions, but did not do so. A specific performance claim is the appropriate means of obtaining such bargained-for real estate. Farallon, moreover, may be judgment proof, and thus absent specific performance, SOFOM may have no enforceable remedy at law. SOFOM's clear entitlement to this relief precludes a claim of prejudice or surprise.[11]

SOFOM, however, is denied leave to assert claims under Judiciary Law §§ 488 and 489 because champerty is an affirmative defense, not an affirmative cause of action. *See Coopers & Lybrand v Levitt*, 52 AD2d 493, 497 (1st Dept 1976) (§ 489 does not create a private claim for damages."). The same rationale applies to § 488, which also does not purport to create a private

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[11] While defendants complain of SOFOM's purported delay in seeking leave to amend, it is well settled that delay, absent prejudice, is not a basis to deny leave to amend. *See Pomerance v McGrath*, 124 AD3d 481, 482 (1st Dept 2015), citing *Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 (1983) ("Mere lateness is not a barrier to the amendment. It must be lateness coupled with **significant prejudice** to the other side"); *see Murray v City of New York*, 51 AD3d 502, 503 (1st Dept 2008), citing *Barbour v Hosp. for Special Surgery*, 169 AD2d 385, 386 (1st Dept 1991) (prejudice means "some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add"). Defendants have not demonstrated that any such prejudice exists here. *See Loomis v Civetta Corinno Const. Corp.*, 54 NY2d 18, 23 (1981) ("Prejudice, of course, is not found in the **mere exposure of the defendant to greater liability**. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position") (emphasis added); *see Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 (2014) (same); *Koch v Acker, Merrall & Condit Co.*, 114 AD3d 596, 597 (1st Dept 2014) (same).

right of action. Contrary to SOFOM's suggestion, nothing stated by the Court of Appeals in *Justinian Capital SPC v WestLB AG*, 28 NY3d 160 (2016)[12] suggests otherwise, nor has SOFOM cited any New York appellate case purporting to abrogate *Coopers*, which is binding First Department precedent.

SOFOM also is denied leave to amend to assert tortious interference with contract, abuse of process, and malicious prosecution claims against the White Lilly Parties based on the supposed wrongful nature of the White Lilly Parties' funding of defendants' litigation. The White Lilly Parties are accused of providing funding to defendants in this case and the discussed related litigation in exchange for a cut of Farallon's recovery (including, apparently, any pay-offs or beneficial buy-out terms). SOFOM cites no authority for the proposition that one who provides litigation funding for a baseless lawsuit may personally face liability, whether under a tortious interference, abuse of process, or malicious prosecution cause of action. While SOFOM urges the court to hold the White Lilly Parties to account for their encouragement of the meritless litigation brought by Rivera and Farallon, the court is mindful of the chilling effect such a holding would have on the legitimate business of litigation funding.[13] To be sure, while

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[12] Indeed, as defendants correctly observe, in a decision ultimately affirmed by the Court of Appeals, this court cited a law review article that stated that "[i]t is doubtful that the tort of champerty is available as a separate cause of action in **any** state." *Justinian Capital SPC v WestLB AG*, 43 Misc3d 598, 599 n.1 (Sup Ct, NY County 2014) (emphasis added).

[13] *See Heer v N. Moore St. Developers, L.L.C.*, 140 AD3d 675, 676 (1st Dept 2016) ("litigation loans obtained by law firms and secured by their accounts receivable are permitted."), citing *Hamilton Capital VII, LLC, I v Khorrami, LLP*, 48 Misc3d 1223(A) (Sup Ct, NY County 2015) ("Providing law firms access to investment capital where the investors are effectively betting on the success of the firm promotes the sound public policy of making justice accessible to all, regardless of wealth. Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case."). While defendants do not appear to be destitute by any means, their wealth surely pales in comparison to Cargill, one of the largest privately held companies in the United States.

litigation finance abuses are not unheard of,[14] and merit serious attention given the proliferation of the litigation funding industry, such public policy concerns are best left to the Legislature.[15]

The same concerns, however, do not exist with holding Rivera and Farallon to account. They, clearly, have embarked on a scorched-earth litigation rampage based on rather flimsy arguments that have all been rejected, including many at the pleadings stage. On this motion for leave to amend, SOFOM has plausibly alleged a vexatious collateral motive behind defendants' litigation strategy that served the purpose of driving up SOFOM's litigation costs in an effort to force a settlement and frustrate SOFOM from enforcing its contractual rights.

Nonetheless, a malicious prosecution or abuse of process claim cannot be properly pleaded without alleging that the predicate meritless lawsuit was actually frivolous. To state a claim for malicious prosecution, the plaintiff must plead "each of the following elements: '(1) the commencement or continuation of a ... proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) **the absence of probable cause for the ... proceeding** and (4) actual malice.'" *Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 (1st Dept 2015) (emphasis added), quoting *Broughton v State*, 37 NY2d 451, 457 (1975); *see Engel v CBS, Inc.*, 93 NY2d 195, 204 (1999) ("prov[ing] an entire lack of probable cause in the prior proceeding … is no easy feat."). Likewise, an "[a]buse of process [claim] has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do

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[14] *See* Alison Frankel & Jessica Dye, *New Breed of Investor Profits by Financing Surgeries for Desperate Women Patients*, REUTERS (Aug. 15, 2015), *available at* http://www.reuters.com/investigates/special-report/usa-litigation-mesh/.

[15] *See* Kevin LaCroix, *District Court Adopts First-of-its-Kind Litigation Funding Disclosure Requirement*, THE D&O DIARY (Jan. 26, 2017), *available at* http://www.dandodiary.com/2017/01/articles/litigation-financing-2/district-court-adopts-first-kind-litigation-funding-disclosure-requirement/.

harm **without excuse or justification**, and (3) use of the process in a perverted manner to obtain a collateral objective." *Curiano v Suozzi*, 63 NY2d 113, 116 (1984); *see Tray Wrap, Inc. v Pac. Tomato Growers, Ltd.*, 61 AD3d 545, 546 (1st Dept 2009). While pleading malice or an intent to do harm is necessary to state a claim, a non-frivolous claim brought with ill intent does not give rise to liability. *See Curiano*, 63 NY2d at 117 ("A malicious motive alone ... does not give rise to a cause of action for abuse of process.")

Even if the court assumes a vexatious motive behind defendants' litigation strategy, SOFOM's proposed malicious prosecution and abuse of process claims are, nonetheless, devoid of merit. SOFOM does not explain why defendants' claims in the other actions were frivolous, as opposed to merely lacking in merit. While defendants' claims were dismissed, defendants were not sanctioned for asserting frivolous claims. Absent any meaningful analysis, there is no basis to conclude that the PSAC states a claim for malicious prosecution or abuse of process.[16]

Finally, SOFOM's proposed tortious interference with contract claim is predicated on malicious prosecution and abuse of process, and therefore fails due to those predicate claims

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[16] The decisions by the federal courts and the arbitrators do not appear to suggest that defendants' arguments were frivolous. Likewise, the court does not find the arguments proffered by defendants on these motions to be frivolous. *See In re Kover*, 134 AD3d 64, 74 (1st Dept 2015) ("22 NYCRR 130-1.1(c) sets forth three categories of 'frivolous conduct': '(1) [conduct which] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law'; '(2) [conduct which] is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another'; or "(3) [conduct which] asserts material factual statements that are false.'"). Indeed, while both sides have proffered certain rather weak arguments (e.g., SOFOM's proposed champerty claim), the court does not find any of them frivolous. Nor is SOFOM's accusation of dilatory conduct compelling because it is unclear how defendants have delayed the ultimate resolution of the global litigation. The length of the proceedings in Mexico, while protracted, and the three-year timespan of this litigation, do not appear to be particularly unusual. And, while the appalling and unjustified nature of Rivera's conduct is undeniable, his litigation tactics cannot be said to be so far outside the norms of aggressive prosecution as to be frivolously dilatory.

lacking merit. *See Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 (1996) ("Tortious interference with contract requires … defendant's intentional procurement of the third-party's breach of the contract **without justification**") (emphasis added). Accordingly, it is

ORDERED that (1) SOFOM is granted summary judgment on liability only against Farallon on the FAC's second cause of action for breach of the Guaranty and against both Farallon and Rivera on the FAC's third cause of action for conversion; (2) Rivera is granted summary judgment on SOFOM's veil piercing claim and, therefore, on the portion of the second cause of action asserted against Rivera, which is dismissed with prejudice; (3) Mexvalo is granted summary judgment on Farallon's claim in the TPC for contribution, which is dismissed with prejudice; (4) SOFOM is granted leave to file a second amended complaint only to add a cause of action against Farallon for specific performance of the Guaranty, which is to be filed within one week of the entry of this order on NYSCEF; and (5) the parties' motions are otherwise denied; and it is further

ORDERED that Farallon shall file an answer to SOFOM's second amended complaint within 20 days of its filing on NYSCEF; and it is further

ORDERED that the caption in this action shall no longer include the third-party action; and it is further

ORDERED that a telephone conference will be held on August 16, 2017 at 3:30 pm to discuss SOFOM moving for summary judgment on its specific performance claim and the scheduling of an inquest on the claims on which SOFOM was granted summary judgment.

Dated: July 21, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

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