SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 160980/2017

THE BURLINGTON INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

VARTEL NY CONSTRUCTION CORP. and CONSTANTINOS ANTONOPOULOS,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for DEFAULT JUDGMENT.

Upon the foregoing documents, it is ordered that **the motion is denied with leave to renew upon proper papers.**

FACTUAL AND PROCEDURAL BACKGROUND:

In this action to collect on a judgment, plaintiff The Burlington Insurance Company moves, pursuant to CPLR 3215, for a default judgment against defendants Vartel NY Construction Corp. ("VNY") and Constantinos Antonopoulos ("Antonopoulos") (collectively "defendants") pursuant to CPLR 3215 (a). After a review of the motion papers and the relevant statutes and case law the application, which is unopposed, is **denied with leave to renew upon proper papers.**

Plaintiff is a property and casualty insurer. In or about 2008, plaintiff issued to Vartel Construction Corp. ("VCC"), whose principal and sole shareholder was Antonopoulos, a commercial general liability policy which was in effect from October 17, 2008 until October 17,

2009, and which developed an earned premium of $174,475.35 which was not paid by VCC despite due demand. Doc. 7. at par. 6.

Plaintiff subsequently commenced an action against VCC in the Supreme Court, Kings County under Index Number 17269/10 ("the Kings County action") seeking to collect the earned premium due. Doc. 7 at par. 7. On May 22, 2014, a judgment was entered in favor of plaintiff and against VCC in the Kings County action in the amount of $246,536.78, which represented the earned premium of $174,475.35 owed plus costs, disbursements and interest from October 17, 2009 ("the judgment"). Doc. 9. To date, plaintiff has not been able to collect on the judgment.

On December 12, 2017, plaintiff commenced the captioned action against Vartel NY Construction Corp. ("VNY") which, it alleged, was liable to pay the judgment since it was the successor corporation to VCC. Doc. 6 at par. 12. Plaintiff further alleged that the transfer of money, property, and contracts from VCC to VNY without consideration constituted fraudulent conveyances pursuant to Debtor and Creditor Law ("DCL") sections 273, 275 and 276. Doc. 6 at pars. 14, 16. Plaintiff also claimed that Antonopoulos, the sole shareholder, officer and director of VCC and VNY, was the alter ego of the said entities and was thus personally liable for paying the judgment since he commingled the assets of VCC and VNY and fraudulently transferred the assets of VCC to VNY for his personal benefit and to avoid paying the judgment. Doc. 6 at pars. 10, 18-22.

On April 20, 2018, plaintiff filed the instant motion for a default judgment against VNY and Antonopoulos. Doc. 6. In support of the motion, plaintiff submits the summons and complaint (Doc. 6); affidavits of service of the summons and complaint on VNY and Antonopoulos (Docs. 3-4, 15, 18); an attorney affirmation attesting to the fact that defendants failed to answer or

otherwise appear in this matter (Doc. 8); an affidavit of merit by Paul Peruzzi, its Premium Audit and Accounts Receivable Manager, attesting, inter alia, to the fact that Antonopoulos fraudulently transferred the assets of VCC to VNY in order to continue the business operations of VCC and evade liability for the judgment (Doc. 7 at par. 9); the judgment (Doc. 9), documents generated by the New York Department of State ("DOS") reflecting that VCC was dissolved on June 29, 2016, that VNY is an active corporation, that VCC and VNY were both listed at 25 Elm Street, Suite 401, Brooklyn, New York, and that Antonopoulos was listed as Chief Executive Officer of both entities (Docs. 10-11); work permits issued by the New York City Department of Buildings reflecting that permits were issued to Antonopoulos, on behalf of VCC and VNY, for work at the same location (Docs. 12-13); proof of additional service of the summons and complaint on the defendants pursuant to CPLR 3215(g) (Docs. 17, 19); and a non-military affidavit (Doc. 20).

LEGAL CONCLUSIONS:

CPLR 3215(a) provides that a plaintiff may seek a default judgment against a defendant who has failed to appear, plead, or proceed to trial. An application for a default judgment must include: (1) proof of service of the summons and complaint; (2) proof of the facts constituting the claim; and (3) proof of the default. CPLR 3215(f); *Gantt v North Shore-LIJ Health Sys.*, 140 AD3d 418 (1st Dept 2016). Proof of the facts constituting the claim cannot be established "without a complaint verified by someone or an affidavit executed by a party with personal knowledge of the merits of the claim." *Beltre v Babu*, 32 AD3d 722, 723 (1st Dept 2006). Here, plaintiff has provided proof of proper service of the summons and complaint on VNY and Antonopoulos, as

well as proof of additional service of those documents on the defendants. However, since plaintiff has failed to establish the facts constituting the claim, this Court is constrained to deny the motion.

Although plaintiff claims that VCC transferred its assets to VNY, it has not established that VNY bears successor liability for the judgment as a successor corporation to VCC. A corporation which acquires the assets of another corporation is liable for its predecessor's tort liability if "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction was entered into fraudulently to escape such obligations." *Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 (1983). **This applies to breach of contract actions as well. *Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158 (1st Dept 2005) (citation omitted).** Here, plaintiff does not assert that VNY undertook any merger, consolidation, or purchase of VCC. Nor is there any indication in the motion papers that VNY expressly or impliedly assumed VCC's liability. **In the absence of such proof**, this Court must look to plaintiff's contention that the transaction was fraudulent to prove VNY is liable for VCC's debt.

Plaintiff asserts in its unverified complaint that the transfers of various assets by VCC to VNY in exchange for no consideration constituted fraudulent conveyances pursuant to DCL sections 273 (a), 275 and 276. DCL section 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Section 275 provides that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as

they mature, is fraudulent as to both present and future creditors." Section 276 provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

This Court determines that plaintiff's allegation of a violation of DCL section 276 is not set forth with sufficient particularity. *See* CPLR 3016 [b]; *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 (1st Dept 2015); *Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 38-39 (2000). Additionally, the alleged violations of DCL sections 273 and 275 contain only legal conclusions and with little or insufficient proof of specific factual allegations. *See RTN Networks*, 126 AD3d at 478; *Between The Bread Realty Corp. v Salans Hertzfeld Heilbronn Christy & Viener*, 290 AD2d 380, 381 (2002), *lv denied* 98 NY2d 603 (2002).

The conclusory claims set forth in Peluzzi's affidavit do not remedy these defects. "Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists." *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 (2003) (citation omitted). However, even by this relaxed standard, plaintiff has not shown that VNY is liable for satisfying the judgment entered against VCC. Specifically, although Peruzzi avers that it is "undisputed" that VCC transferred assets including accounts, equipment, materials, and contracts to VNY "without fair consideration" (Doc. 7, at par. 11), no proof of such transfers is included in the motion. Similarly, despite Peruzzi's representation that it is "undisputed" that VNY used the same employees, vendors, and subcontractors as VCC, this claim is not borne out by the motion papers. Doc. 7, at par. 13. Given these omissions, this Court

finds that plaintiff has failed to set forth the facts constituting plaintiff's claims against VNY. However, this Court denies the motion with leave to renew, should plaintiff be able to submit additional supporting documentation or facts, or reasons why they cannot. to support the claims of fraudulent transfer and/or successor liability.

Plaintiff further claims that Antonopoulos was the alter ego of VCC and VNY and is personally responsible for paying the judgment since he was the officer, director and sole shareholder of those entities, he commingled the assets of VCC and VNY, and fraudulently transferred the assets of VCC to VNY for his personal benefit and to prevent plaintiff from collecting on the judgment. 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" (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required" (*Id.* at 141-142 [internal citations omitted]). Thus, "[t]hose seeking to pierce a corporate veil of course bear 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 v. MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

Justus v Miller, 47 Misc 3d 1210 (A), 1210A, 2015 NY Slip Op 50546 (U), *3 (Sup Ct, Nassau County 2015).

Piercing the corporate veil is typically "a fact-laden claim that is not well suited for summary judgment resolution." *First Capital Asset Mgt. v N.A. Partners*, 300 AD2d 112, 117 (1st Dept 2002) (citation omitted). Although plaintiff is not moving for summary judgment, its motion

for a default is analogous insofar as it seeks to impose liability against defendants based solely on the facts set forth in its motion papers. Since the proffered facts upon which plaintiff seeks to pierce the corporate veil are utterly conclusory, this Court, in its discretion (*see generally Wax v 716 Realty*, 151 AD3d 902, 903 [2d Dept 2017]), finds that plaintiff failed to set forth the facts constituting its claim of Antonopoulos' alter ego liability.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiff's motion for a default judgment is denied, with leave to renew upon proper papers within 30 days of entry of this order, upon penalty of dismissal; and it is further

ORDERED that this constitutes the decision and order of the court.

9/27/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE