SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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AMANDA DIAZ-PASCALL and ALON PASCALL,

Plaintiffs,

- v -

JOHN PEREIRA, IRGANG GROUP, INC.,MARK IRGANG, and JAY IRGANG,

Defendants.

----------X

INDEX NO. 157504/2013

MOTION DATE 03/26/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 187, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

ORDER

Upon the foregoing documents, it is

ORDERED that the caption is amended sua sponte to name Mark Irgang as a party defendant; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x
AMANDA DIAZ-PASCALL and ALON PASCALL,

Index No. 157504/2013

Plaintiffs,

- against -

JOHN S. PEREIRA, IRGANG GROUP, INC., MARK IRGANG, JAY IRGANG and ACACIA, INC. a/k/a and d/b/a BASIC HOUSING, INC.,

Defendants.
----------x

and it is further

ORDERED that counsel for defendants Irgang Group, Inc., Mark Irgang and Jay Irgang shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the caption as amended; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motion of defendants Irgang Group, Inc., Mark Irgang and Jay Irgang for summary judgment or for an order of

preclusion is granted to the extent of granting summary judgment, and the complaint and the cross claims are dismissed against them, and the balance of the motion is otherwise denied; and it is

ORDERED that the cross motion of defendant Acacia, Inc. a/k/a and d/b/a Basic Housing, Inc. for summary judgment is granted, and the complaint and cross claims are dismissed against it; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Irgang Group, Inc., Mark Irgang, Jay Irgang and Acacia, Inc. a/k/a and d/b/a Basic Housing, Inc. dismissing the claims and cross claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon an appropriate bill of costs; and it is further

ORDERED that the complaint against defendant John S. Pereira is dismissed as abandoned, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiffs' cross motion for leave to serve and file an amended complaint is denied.

DECISION

Defendants Irgang Group, Inc. (IG), Mark Irgang (Mark) and Jay Irgang (Jay) (collectively, Irgang) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claims asserted against them, or in the alternative, for an order precluding plaintiffs Amanda Diaz-Pascall (Amanda) and Alon

Pascall (Alon) (together, plaintiffs) and defendant Acacia, Inc. a/k/a and d/b/a Basic Housing, Inc. (Acacia or Basic) from introducing any evidence at the time of trial for their failure to produce court-ordered discovery.[1] Acacia partially opposes the application and also cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claims asserted against it. Plaintiffs oppose the motion and cross motion and cross-move, pursuant to CPLR 3025, for leave to file an amended complaint.

Background

This personal injury action arises out of an incident that occurred on October 21, 2011, when Amanda allegedly tripped and fell on an obstruction on the stairs leading to her apartment at 77 East 125th Street, New York, New York (the Building) (NYSCEF Doc No. 131, affirmation of Irgang's counsel, exhibit 2 [complaint], ¶ 18; NYSCEF Doc No. 171, affirmation of plaintiffs' counsel, exhibit C, ¶ 1 [b]). Alon brings a derivative claim.

At her deposition, Amanda testified that she, Alon and their two children lived in apartment 3B at the Building, which she described as a homeless shelter facility consisting of several apartments in a walk-up building (NYSCEF Doc No. 139, affirmation

[1] As an initial matter, it appears that Mark's name was inadvertently omitted from the amended caption after the consolidation of the actions against Irgang and Acacia (NY St Cts Elec Filing [NYSCEF] Doc No. 135, affirmation of Irgang's counsel, exhibit 6 at 2).

of Irgang's counsel, exhibit 10 [Amanda 4/15/14 tr] at 10, 15-17). Amanda explained that the edge of each step on the stairway leading to the upper floors was covered in a burgundy rubber tile (id. at 21). She first noticed the condition approximately one month after she had moved into the Building (NYSCEF Doc No. 140, affirmation of Irgang's counsel, exhibit 11 [Amanda 4/27/16 tr] at 28), and complained to her caseworker, Lydia Torres (Torres), about the raised tiles between the second and third floors shortly thereafter (id. at 55-56; NYSCEF Doc No. 139 at 40). The condition was not fixed prior to the accident (NYSCEF Doc No. 140 at 56).

On the day of the accident, she was walking up the stairs to the apartment with her family when her right foot "somehow caught the tile that was lifted" (NYSCEF Doc No. 139 at 30). Amanda testified that Basic operated the shelter facility (id. at 30) and employed Torres and a manager, "Eric" (id. at 54). A maintenance person also came each day to remove trash from the Building and to sweep and mop (id. at 43-44). She once saw the same unnamed maintenance person speaking to "Eric" at her caseworker's office, but she did not know if they were employed by the same entity (id. at 55-56). Amanda stated that she did not know who owned the Building (id. at 42).

Alon testified that he had just opened the door leading to the apartment when he heard Amanda shout out (NYSCEF Doc No. 141, affirmation of Irgang's counsel, exhibit 12 [Alon 4/15/14 tr] at

16). When he turned around, he saw Amanda on the floor leaning against the wall in the hallway (id. at 16-17). Amanda told him "she tripped over a tile" (id. at 34). Alon stated that "the tile is always up like that" (id. at 34). He was aware that an upstairs neighbor and another neighbor's daughter had tripped on the stairs (id. at 36-37; NYSCEF Doc No. 142, affirmation of Irgang's counsel, exhibit 142 [Alon 4/27/2016 tr] at 18 and 21-22). Alon also testified that he had complained verbally to Torres about the condition, but he could not recall when the complaint was made or if had lodged more than one complaint (NYSCEF Doc No. 141 at 35-36). Alon stated that his neighbor had also complained numerous times (id. at 37).

Mark testified that he was the president of IG (NYSCEF Doc No. 138, affirmation of Irgang's counsel, exhibit 9 [Mark 4/15/14 tr] at 21), and a manager and member of 77-79 East 125th Street, LLC (77-79 Street LLC), the entity that owned the Building (id. at 9). In 2011, IG managed 26 commercial and residential properties owned by the limited liability companies he and his father, Jay, had established (id. at 7-10). In 2010, 77-79 Street LLC entered into a written agreement with Acacia, which at that time was known as Basic, whereby 77-7 9 Street LLC made furnished residential apartments at the Building available to Acacia for use as homeless shelter for which Acacia paid 77-79 Street LLC a nightly occupancy fee per apartment (id. at 11 and 14). Neither 77-79 Street LLC

nor IG had any direct communications with the residents or their caseworkers (id. at 16). As for maintenance at the Building, Mark testified that "Basics [sic] is responsible for inside the apartments. We're responsible for the hallways and the area outside the building" (id. at 17). Hallway maintenance included mopping and trash removal (id.). Mark explained that 77-79 Street LLC employed a janitor and paid his or her wages, that the janitor was selected and "controlled by Basics [sic]," and that Mark had no contact with the janitor (id. at 18 and 20). He testified that Edwin Morales (Morales) of Acacia would call him "if there was a problem in the part of the building that I was responsible for" (id. at 19). Mark expressed that neither he nor any maintenance people he hired conducted regular inspections of the Building (id. at 22). Mark also testified that he could not recall any recent maintenance performed on the tiles on the steps prior the accident because the tiles "had been installed recently," and could not recall any repairs to those tiles after the accident (id. at 26).

Morales testified that at the time of the accident, he was employed by Acacia as a housing manager or as the director of operations (NYSCEF Doc No. 143, exhibit 14 [Morales tr] at 9-10). His responsibilities in both positions included conducting periodic inspections of the shelter facilities operated by Acacia (id. at 13). He explained the process for reporting resident complaints about conditions at a facility. Morales testified that

a resident would lodge a complaint with his or her caseworker, the caseworker would forward the complaint to the maintenance department where Morales worked, and the complaint would be recorded on a work order (id. at 27). Morales testified that he would then contact the landlord of the facility "to let them know that they had to do something structural and they was [sic] responsible for it" (id. at 21).

As to the Building, Acacia "rent[s] out" facilities owned by "Irgang" (id. at 20), but Acacia did not contract with Irgang to provide maintenance or perform repairs at the Building (id. at 22 and 34). Morales testified that in 2011, Irgang hired people to sweep and mop the Building (id. at 59), and that he called Irgang when structural repairs were needed in the apartments (id. at 19-22). Morales testified that he could not recall having received a complaint about the stairway or hallway at the Building from a caseworker or resident, nor could he recall an issue with the rubber-coated steps or stairs at the Building (id. at 26-29 and 47). He also testified that he never saw a raised rubber tile on the steps during his inspections (id. at 46).

The parties to the memorandum of understanding (MOU) dated May 1, 2010 are "77-79 E. 125th St. LLC" and "Basics Housing Inc. (BHI)," and the document appears on "Basic Housing" letterhead (NYSCEF Doc No. 122, Mark aff I, exhibit 3 at 1). Although the MOU does not define 77-79 Street LLC as the Building's owner, it

states that 77-79 Street LLC "has control over and is legally entitled to make available certain portions of the Premises known as 77-79 E. 125th St." available to Basic to house families designated as eligible by DHS for placement in exchange for an occupancy fee (id. at 1-2). Paragraph 6 of the MOU provides that 77-79 Street LLC shall keep the Building "internally and externally to comply with all relevant municipal, State and federal codes and other legal requirements" (id. at 2). Additionally, Paragraph 7 reads:

> "77-79 E. 125th St. LLC shall keep the Premises, both internally and externally, excepting only the apartments, in a clean and orderly state to conform to relevant municipal codes and the requirements of the Agreement. This shall include, but not be limited to rubbish removal, cleaning of sidewalks and other external areas which are not the responsibility of the municipality. It shall be the responsibility of BHI to cause the apartments to be kept in a clean and orderly fashion"

(id. at 2). Finally, paragraph 9 states, in relevant part, that "no landlord/tenant relationship is established between them" (id.).

Plaintiffs commenced an action in New York County against defendant John S. Pereira (Pereira) and Irgang alleging that each owned or managed the Building.[2] Plaintiffs commenced a separate

[2] According to a document recorded in the Office of the City Register, Pereira is the court-appointed Chapter 11 bankruptcy trustee for several corporations, including 77 East 125th Street

action in Bronx County against Acacia alleging that Acacia owned or managed the Building. Irgang and Acacia have interposed answers to the complaints, and the two actions were subsequently consolidated. Pereira has neither answered or otherwise appeared.

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (id., citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of

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Realty LLC, the prior owner of the Building, and 79 East 125th Street Realty LLC, the owner of the premises adjacent to the Building (NYSCEF Doc No. 179, affirmation of plaintiffs' counsel, exhibit G at 5 and 9).

the sufficiency of the opposing papers" (Vega, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

A. Irgang's Motion for Summary Judgment

Irgang argues that it is not liable to plaintiffs because it did not own the Building and it was not contractually obligated to maintain it. In addition, Irgang contends that the claims against Mark and Jay should be dismissed because they are shielded by the protections afforded to the owners of a corporation. Submitted in support of the motion are two affidavits from Mark, who attests that IG maintained all corporate formalities and that IG never waived the protections afforded to a corporation's owners (NYSCEF Doc No. 119, Mark aff I, ¶¶ 4-6; NYSCEF Doc No. 123, Mark aff II, ¶¶ 5-7). Mark states that the Building is owned by 77-79 E. 125th, LLC (77-79 LLC), and that 77-79 LLC executed the MOU whereby 77-79 LLC agreed that it was responsible for Building maintenance (NYSCEF Doc No. 119, ¶¶ 9-10, NYSCEF Doc No. 123, ¶¶ 10-12). Mark also states that IG "was not responsible for anything" under the MOU (NYSCEF Doc No. 119, ¶ 11, NYSCEF Doc No. 123, ¶ 13). Irgang argues that Mark's testimony and averments also show that IG was never notified of a dangerous condition on the step prior to the accident. As for the request for alternative relief, Irgang contends that plaintiffs and Acacia should be precluded from

introducing any evidence because they have not met their discovery obligations.

Plaintiffs oppose the motion and argue that Mark and Jay are seeking to defraud them and avoid legal liability because the entity Mark claimed owned the Building, 77-79 Street LLC, does not exist, as searches for "77-79 E. 125th St. LLC, LLC," "77-79 E. 125TH Street LLC, "77 east 125 street," and "77 east 125 street realty llc" on the public website maintained by the New York State Department of State (DOS) yielded negative results (NYSCEF Doc No. 177, affirmation of plaintiffs' counsel, exhibit E at 1, 3, 4, and 6). Plaintiffs contend that Mark and Jay actually owned and operated the Building in their individual capacities because 77-79 Street LLC was not properly formed in accordance with Limited Liability Law § 209, and that 77-79 Street LLC was their alter ego. Plaintiffs argue that Mark and Jay "have a history of playing the corporate shell game" (NYSCEF Doc No. 172, affirmation of plaintiffs' counsel, ¶ 16), as evidenced in a settlement agreement entered in the United States Bankruptcy Court for the Southern District of New York in 2008 (NYSCEF Doc No. 180, affirmation of plaintiffs' counsel, exhibit H at 1). Plaintiffs claim that Pereira had sued Mark, Jay, and several limited liability companies that Mark and Jay allegedly owned and controlled, claiming that they had fraudulently stripped the bankrupt entities, which Mark and Jay also purportedly owned and controlled, of their assets

(NYSCEF Doc No. 172, affirmation of plaintiffs' counsel, ¶ 16). The claims were settled for $15 million (NYSCEF Doc No. 180 at 18). Plaintiffs submit that this "business model continues" (NYSCEF Doc No. 172, affirmation of plaintiffs' counsel, ¶ 17), and refer to Mark's admissions that he and Jay own the Building through a limited liability company and that IG manages it for them.

Additionally, plaintiffs submit that Irgang was aware of the raised tile on which plaintiff fell because both plaintiffs and their neighbor, Ronettea Cooper (Cooper), had complained to Acacia about the condition. Cooper testified that "everybody in the building kept on complaining to management" about the raised tiles on the stairs but "they never did nothing [sic] to fix it" (NYSCEF Doc No. 184, affirmation of plaintiffs' counsel, exhibit M [Cooper tr] at 19).

In reply, Irgang emphasizes that 77-79 LLC is the owner (NYSCEF Doc No. 190, Mark aff in opposition, ¶ 5), and that DOS' website shows that the entity was formed in 2004 (NYSCEF Doc No. 191, Mark aff in opposition, exhibit 1 at 1). Mark avers that paragraph 7 (c) in the settlement agreement listed 77-79 LLC as the owner of the Building and the adjacent property at 79 East 125th Street (NYSCEF Doc No. 190, ¶ 7). In addition, Mark states that 77-79 Street LLC was not owned by or related to 77 East 125th Street Realty LLC, one of the bankrupt entities named in the

settlement agreement, and that 77 East 125th Street Realty LLC or Pereira sold the Building to 77-79 LLC (*id.*, ¶ 11; NYSCEF Doc No. 24 at 23-24). Furthermore, 77-79 LLC has never hidden its ownership of the Building (*id.*, ¶ 12), as shown in its payments of the real estate taxes assessed against the Building (NYSCEF Doc No. 197, Mark aff in opposition, exhibit 7). Irgang also asserts that "[a]t times, the corporate entity, 77-79 E. 125th LLC, is apparently referenced, misspelled or misstated as '77-79 East 125th Street, LLC,' and/or '77-79 E. 125th St. LLC." (NYSCEF Doc No. 198, affirmation of plaintiff's counsel at 3).

Generally, "[a] landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (Basso v Miller, 40 NY2d 233, 241 [1976] [internal quotation marks and citation omitted]). Moreover, "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (Gibbs v Port Auth. of N.Y., 17 AD3d 252, 254 [1st Dept 2005], citing Balsam v Delma Eng'g Corp., 139 AD2d 292, 296 [1st Dept 1988], *lv denied* 73 NY2d 783 [1988]). Hence, those without a possessory interest or control over the property may be not held liable to those injured on that property (see Lopez v Allied Amusement Shows, Inc., 83 AD3d 519, 519 [1st Dept 2011]).

The court finds that Irgang has met its burden on summary judgment.

First, the documentary and testimonial evidence establishes that IG, Mark and Jay did not own the subject Building, and that the owner, 77-79 LLC, was contractually obligated to maintain the public areas. Second, to impose liability upon a managing agent, the managing agent must exercise "complete and exclusive control of the demised space" (Howard v Alexandra Rest., 84 AD3d 498, 499 [1st Dept 2011] [collecting cases]). In this instance, Irgang has come forward evidence showing that IG did not exercise such exclusive use and control or entirely displace 77-79 LLC's responsibility to maintain the Building (see generally Espinal v Melville Snow Contrs., 98 NY2d 136, 140 [2002] [discussing the three occasions where a contractor assumed a duty of care to third persons]).

Next, Mark and Jay have demonstrated that they cannot be held personally liable (see Hakim v 65 Eighth Ave., LLC, 42 AD3d 374, 375 [1st Dept 2007] [concluding that there was no basis for imposing personal liability upon the principal of the managing agent for "mere nonfeasance"]), as "[t]he law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability" (Walkovszky v Carlton, 18 NY2d 414, 417 [1966]). Plaintiffs have not raised a triable issue of fact based on an alter ego theory of liability, discussed

infra. Thus, that part of Irgang's motion for summary judgment dismissing the complaint and the cross claims against IG, Mark and Jay shall be granted. In view of the foregoing, the court need to consider the alternative request for a preclusion order.

B. Acacia's Cross Motion for Summary Judgment

Acacia posits that it is entitled to summary judgment as the evidence demonstrates that it was not negligent because it had no duty to manage or maintain the Building's common areas. Acacia also opposes Irgang's motion for a preclusion order because the majority of Irgang's discovery demands were directed to plaintiffs.

Plaintiffs argue that Acacia possessed a common-law duty to maintain the Building as an agent of the owner or the IG because Acacia's employees were tasked with forwarding resident complaints about maintenance issues to the owner or IG.

The court finds that Acacia has also demonstrated its entitlement to summary judgment. Pursuant to the terms of the MOU, Acacia was not responsible for maintaining the public areas of the Building. Thus, Acacia could not have breached a contractual duty under the MOU. While tenants or lessees of property are subject to a common-law duty keep the demised premises in reasonably safe condition (see Williams v Esor Realty Co., 117 AD3d 480, 480 [1st Dept 2014]), as noted above, the public areas of the Building did not form part of the demised premises. Since

Acacia had no right to control those areas, which included the area where the accident occurred, it did not owe plaintiffs a duty of reasonable care (see Hoberman v Kids "R" Us, 187 AD2d 187, 190 [1st Dept 1993]).

Additionally, plaintiffs fail to come forward with any evidence to support an agency theory of liability. Generally, an agent may bind a principal by way of actual authority, implied actual authority, or apparent authority. With regards to actual authority, "the scope of an agent's actual authority is determined by the intention of the principal or, at least, by the manifestation of that intention to the agent" (Wen Kroy Realty Co. v Public Natl. Bank & Trust Co., 260 NY 84, 89 [1932]). Implied actual authority depends upon a principal's verbal or other actions to the agent "which reasonably give an appearance of authority to conduct the transaction" (see Greene v Hellman, 51 NY2d 197, 204 [1980]). Apparent authority turns on the "words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (Hallock v State of New York, 64 NY2d 224, 231 [1984]). Nevertheless, an "alleged agent cannot, by his own acts, imbue himself with such authority" (Wood v William Carter Co., 273 AD2d 7, 7 [1st Dept 2000] [collecting cases]). Testimony that Acacia received complaints about the Building from its residents

fails to establish that Acacia acted as the agent for 77-79 LLC or Irgang, or that Acacia assumed a duty of care.

The cases plaintiffs cite are inapposite. The plaintiff in Skerritt v Jarrett Constr. Co. (224 AD2d 299 [1st Dept 1996]) slipped on sawdust that had been left in the stairwell by a contractor retained by a second-floor tenant (id. at 300). While the landlord was responsible under the tenant's lease to maintain the common areas, such as the stairway, the Court denied the summary judgment motion filed by the tenant and the contractor because the tenant and its contractor had created the allegedly dangerous condition (id.). In McNelis v Doubleday Sports (191 AD2d 619 [2d Dept 1993]), the Court denied the defendant tenant's motion for summary judgment because the tenant in possession of a leased premises may be liable for injuries sustained thereon (id. at 619). Here, plaintiffs produced no evidence showing that Acacia created the condition that caused Amanda to fall or that Acacia exclusively possessed the public areas at the Building. As discussed earlier, the public areas did not form part of the demised premises under the MOU. Consequently, Acacia's cross motion for summary judgment dismissing the complaint and the cross claims asserted against it is granted.

C. Plaintiffs' Cross Motion to Amend the Complaint

Plaintiffs cross-move for leave to serve an amended summons and complaint to allege that IG, Mark and Jay doing business as

77-79 E. 125th LLC, also known as 77-79 East 125th and 77-79 E. 125th Street, LLC, are alter egos and instrumentalities of each other, and to pierce the corporate veil and hold IG, Mark and Jay doing business as 77-79 E. 125th LLC, also known as 77-79 East 125th and 77-79 E. 125th Street, LLC, liable (NYSCEF Doc No. 182, affirmation of plaintiffs' counsel, exhibit J, ¶ 48). Irgang argues that the statute of limitations has run on the claim and that plaintiffs delayed moving for the amendment for four years after they learned the identity of the Building's owner. The identity of the owner, 77-79 LLC, was always a matter of public record. Moreover, in its seventh affirmative defense, Irgang pleaded that plaintiffs had failed to join a necessary party (NYSCEF Doc No. 132, affirmation of Irgang's counsel, exhibit 3, ¶ 16). In response, plaintiffs claim that Mark intentionally or mistakenly gave false testimony when he stated that the Building was owned by 77-79 Street LLC. Because plaintiffs have now determined that 77-79 LLC exists, they state that they "have or will file suit" against 77-79 LLC and that the claims relate back to those against the defendants in the present action (NYSCEF Doc No. 233, reply affirmation of plaintiffs' counsel, ¶ 7).

It is well settled that a motion for leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is "palpably insufficient or patently devoid of merit" (see JPMorgan Chase Bank,

N.A. v Low Cost Bearings NY Inc., 107 AD3d 643, 644 [1st Dept 2013], quoting MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010]). The court must examine the sufficiency of the merits of the proposed amendment and is not required to accept plaintiff's allegations as true (see Bag Bag v Alcobi, 129 AD3d 649, 649 [1st Dept 2015]). The party moving to amend the pleadings need not prove the facts (see Daniels v 7Empire-Orr, Inc., 151 AD2d 370, 371 [1st Dept 1989]), but must tender an affidavit of merit or an offer of evidence similar to that used to support a motion for summary judgment (see Matthews v City of New York, 138 AD3d 507, 508 [1st Dept 2016]). The party opposing the motion bears a heavy burden of showing prejudice (see McGhee v Odell, 96 AD3d 449, 450 [1st Dept 2012]) or demonstrating that the facts as alleged are unreliable or insufficient to support the motion (see Peach Parking Corp. v 346 W. 40th St., LLC, 42 AD3d 82, 86 [1st Dept 2007], citing *Daniels*, 151 AD3d at 371]).

Alter ego liability is "[a]kin to piercing the corporate veil to 'prevent fraud or achieve equity'" (TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 [1998], quoting *International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 NY 285, 292 [1948]). A plaintiff pursuing this theory must allege "'complete domination of the corporation . . . in respect to the transaction attacked' and 'that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" (Baby

Phat Holding Co., LLC v Kellwood Co., 123 AD3d 405, 407 [1st Dept 2014], quoting Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]). The issue of control may be determined by the following factors:

> "[D]isregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity"

(Tap Holdings, LLC v Orix Fin. Corp., 109 AD3d 167, 174 [1st Dept 2013], quoting TNS Holdings v MKI Sec. Corp., 243 AD2d 297, 300 [1st Dept 1997], rev on other grounds 92 NY2d 335 [1998]). Evidence of domination alone, though, is insufficient "without an additional showing that it led to inequity, fraud, malfeasance" (*TNS Holdings*, 92 NY2d at 339). The plaintiff must demonstrate that the defendant took steps to render the corporation judgment proof or insolvent so as "'to perpetrate a wrong or injustice against'" it (James v Loran Realty v Corp., 20 NY3d 918, 919 [2012], quoting Matter of Morris, 82 NY2d at 142), or that the defendant treated the business as "a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends" (Walkovszky v Carlton, 18 NY2d 414, 418 [1966]).

A review of the proposed amended complaint (NYSCEF Doc No. 182, affirmation of plaintiffs' counsel, exhibit J) reveals that it is filled with wholly conclusory allegations unsupported by specific facts sufficient to infer that IG, Mark or Jay dominated or controlled 77-79 LLC such that they operated as a single enterprise (see Shisgal v Brown, 21 AD3d 845, 849 [1st Dept 2005]), and that IG, Mark or Jay abused the corporate form so as to perpetrate a wrong or injustice upon plaintiffs (see Tap Holdings, LLC, 109 AD3d at 175). Rather, plaintiffs merely recite the elements necessary to pierce the corporate veil "upon information and belief," which is plainly insufficient (501 Fifth Ave Co. LLC v Alvona, LLC., 110 AD3d 494, 494 [1st Dept 2013] [internal quotation marks omitted]). Moreover, Mark's allegedly misleading testimony tock place in April 2014, and, presumably, plaintiffs would have determined at that time, or shortly thereafter, that the entity Mark had identified as the Building's owner did not exist. Nevertheless, plaintiffs waited an additional four years before seeking to assert an alter ego theory of liability. Thus, plaintiffs' motion for leave to amend the complaint shall be denied.

D. The Action Against Pereira

CPLR 3215 (c) provides that the court may dismiss a complaint as abandoned where a default has occurred, and the plaintiff has not taken proceedings to enter a judgment within one year of the

default. Pereira has not answered the complaint, and plaintiffs never moved for a default judgment against him. Thus, the complaint against Pereira is dismissed as abandoned (see Pantovic v YL Realty, Inc., 117 AD3d 538, 539 [1st Dept 2014]).

E. Amending the Caption

The court shall amend the caption to correct the error in its order consolidating this action to reflect Mark's inclusion as a named defendant.

10/16/2019
DATE

DEBRA A. JAMES, J.S.C.

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