SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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112 WEST 34TH STREET COMPANY, L.L.C.,

Plaintiff,

- against -

JAVA INDUSTRIES, INC.,
KIDS APPAREL CLUB, INC., and
VICTOR KRAIEM,

Defendants.

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DECISION/ORDER

Index No. 152596/2014
Motion Sequence No. #004

HON. TANYA R. KENNEDY, J.S.C.:

Plaintiff landlord moves, pursuant to CPLR 3212, for summary judgment in its favor against defendants, Java Industries, Inc. ("Java"), Kids Apparel Club, Inc. ("Kids"), and Victor Kraiem ("Kraiem") on its causes of action: (1) to recover from Java rent due from November 1, 2012 through June 30, 2013 (first cause of action); (2) to recover from Kids use and occupancy from November 1, 2012 through January 15, 2013 (second cause of action); (3) to pierce the corporate veil of Kids to render it liable for Java's obligations (third cause of action); and (4) for alter ego liability against Kraiem to render him personally liable for Java's obligations (fourth cause of action); and to dismiss defendants' affirmative defenses. Plaintiff also seeks summary judgment on its claim for an award of attorneys' fees.[1]

The Court heard oral argument on the motion, which is granted in its entirety, based upon the following discussion.

[1] This Court notes that plaintiff, which was dissolved on August 15, 2014, previously assigned its interest to ESRT 112 West 34th Street L.P. ("ESRT"). Defendants previously cross moved to compel substitution of ESRT, which was denied, without any opposition from plaintiff (motion sequence no. 003). The motion court's denial of defendants' prior cross-motion constitutes law of the case which precludes defendants from relitigating their failed standing argument herein (*see 55 Liberty St. Assoc. v Garrick-Aug Assoc. Store Leasing*, 255 AD2d 188 [1st Dept 1998]). In any event, plaintiff may maintain this action (*see* Business Corporation Law §1006; *Greater Bright Light Home Care Servs., Inc., v Jeffries-El*, 151 AD3d 818, 820-821 [2d Dept 2017]).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and Java executed a lease on June 13, 2005 for Java to occupy Room 1200 of 112 West 34th Street, New York, New York ("the Premises"), to commence on September 1, 2005 and expire on August 31, 2012 (*see* Defendants' Statement of Material Facts ¶1; Exhibit A of Gomes Supporting Affidavit). The lease was subsequently modified on July 24, 2006, which would expire on June 30, 2013 (*see* Defendants' Statement of Material Facts, ¶1; Exhibit B of Gomes Supporting Affidavit). Article 2 of the lease provided that the monthly rent for the period of September 2010 until the expiration or earlier termination of the lease term was $7,983.00 per month (*see* Defendants' Statement of Material Facts, ¶3; Exhibit A of Gomes Supporting Affidavit).

Kraiem, who was sole shareholder of both Java and Kids, signed the lease and lease modification on behalf of Java (*see* Defendants' Statement of Material Facts, ¶¶2, 10; Exhibits A, B of Gomes Supporting Affidavit). Java is a domestic clothing manufacturer and Kids is an importer of clothing purchased from overseas (*see* Defendants' Opposing Memorandum Statement of Facts, P. 1).

The first month's rent for Room 1200 of the Premises was paid by check drawn from the account of Trans America Textile Corp., another corporation which Kraiem owned *(see* Defendants' Statement of Material Facts, ¶19; Exhibit E of Gomes Supporting Affidavit). Thereafter, all rent for Room 1200 was paid by check drawn on a checking account which Kids maintained (*see* Defendants Material Statement of Facts, ¶24; Exhibit K of Gomes Supporting Affidavit).

After rent payments ceased on January 1, 2012, plaintiff commenced a summary non-payment proceeding against Java in the Civil Court of the City of New York, County of New York, under Index No. L & T 073216/2012 (the "Proceeding") (*see* Defendants' Statement of Material

Facts, ¶32; Second Amended Complaint ["SAC"] ¶¶31, 35). On October 18, 2012, plaintiff obtained a judgment of possession and a money judgment against Java in the sum of $86,922.16 for unpaid rent from January 1, 2012 through October 1, 2012, and obtained a second money judgment on October 19, 2012 against Java in the sum of $8,444.06 for attorneys' fees, both of which remain unsatisfied (Defendants' Statement of Material Facts, ¶¶33-34; SAC ¶36).

Java was evicted from the Premises on or about January 15, 2013, pursuant to a court issued warrant (*id*, ¶35; Exhibit 12 of Rella Supporting Affirmation). Defendants acknowledge that Java was responsible under the lease as a signatory and that Kids occupied the Premises (*see* Defendants' Opposing Memorandum, P. 1).

Article 6 of the lease provided, in relevant part, that:

> "If [Java] shall at any time default hereunder, and if Landlord shall institute an action or summary proceeding against [Java] based upon such default, then [Java] will reimburse Landlord for the legal expenses and fees thereby incurred by Landlord" (*see* Exhibit A of Gomes Supporting Affidavit).

Article 6 of the lease further provided that if plaintiff entered the Premises on default of Java by summary proceeding or otherwise, Java would pay plaintiff any deficiency between the rent reserved in the lease and the net amount of any rents collected by plaintiff for the remaining term of the lease through such re-letting, and that such deficiency would become due and payable monthly, as it was determined (*id.*). Plaintiff had no obligation to re-let the Premises under Article 6 of the lease (*id.*). Plaintiff did not re-let the Premises prior to the date set as the expiration of the lease term and received no rent payments from Java for fixed rent due under the lease after October 2012 (*see* Defendants' Statement of Material Facts, ¶¶36-37).

Plaintiff maintains that Java was a sham corporation which failed to observe any corporate formalities or own any assets; failed to maintain a bank account; failed to file or pay taxes; and did not conduct any business. According to plaintiff, Java was formed for the sole purpose of entering

a lease for the Premises and to operate as a shield for Kids. Plaintiff also maintains that Kraiem completely dominated and controlled Java; abused Java's corporate form; and caused Java to breach its obligations to pay rent under the lease.

Plaintiff now seeks to recover from Java eight months of base rent from November 1, 2012 (the month after the judgments in the Proceeding) through June 30, 2013, when the Lease expired, for a total of $63,864.00 ($7,983.00 x 8), plus interest from March 1, 2013 (a reasonable intermediate date between November 1, 2012 and June 30, 2013) (first cause of action) (*see* Gomes Supporting Affidavit, ¶¶16-17; SAC ¶¶40, 42; Plaintiff's Supporting Memorandum, Point V, P. 15).

Plaintiff seeks to recover from Kids the fair value of use and occupancy in the aggregate amount of the judgments ($95,366.22), plus the amount of Java's fixed rent from November 1, 2012 to January 15, 2013, when Java was evicted from the premises, which equals $19,957.50 ($7,983.00 x 2.5), totaling $115,323.72 ($95,366.22 + $19,957.50), plus interest on $95,366.22 of such sum from October 19, 2012 (the date which the latter of the judgments was entered), plus interest on $19,957.50 of such sum from December 7, 2012 (a reasonable intermediate date between November 1, 2012 and January 15, 2013) (second cause of action) (*see* Gomes Supporting Affidavit, ¶¶19-20; SAC ¶45; Plaintiff's Supporting Memorandum, Point V, P. 15-16).

Plaintiff also seeks to hold Kids liable for the total amount due from Java in the amount of $159,230.22, i.e., the aggregate amount of the judgments ($95,366.22), plus $63,864.00 (the amount of Java's unpaid rent from November 1, 2012 to June 30, 2013), plus interest on $95,366.22 of such sum from October 19, 2012, plus interest on $63,864.00 of such sum from March 1, 2013 (third cause of action) (*see* Gomes Supporting Affidavit, ¶18; SAC ¶¶46-47; Plaintiff's Supporting Memorandum, Point V, P. 15).

Plaintiff further seeks to hold Kraiem liable for the total amount due from Java in the amount of $159,230.22, i.e., the aggregate amount of the judgments ($95,366.22), plus $63,864.00 (the amount of Java's unpaid rent from November 1, 2012 to June 30, 2013), plus interest on $95,366.22 of such sum from October 19, 2012, plus interest on $63,864.00 of such sum from March 1, 2013 (fourth cause of action) (*see* Gomes Supporting Affidavit, ¶18; SAC ¶¶48-50; Plaintiff's Supporting Memorandum, Point V, P. 15).

Plaintiff also seeks an award of attorneys' fees from the defendants in accordance with Article 6 of the lease.

The evidence plaintiff submits in support of the motion establishes, *inter alia*, that a tenant information form submitted to plaintiff's managing agent identified "Kids Apparel Club" under the heading "Company Name As Per Lease;" listed Kraiem as the primary contact person; and listed Kraiem and his father, Ralph Kraiem ("Ralph"), as authorized persons to sign for billable work hours ("Tenant Form") (*see* Exhibit C of Gomes Supporting Affidavit; Exhibit 6 of Rella Supporting Affirmation; Kraiem 2014 Transcript, P. 49, L. 7-9). Kraiem also forwarded a June 7, 2006 letter to plaintiff on "Kids Apparel Club" letterhead listing the Premises as its business address, indicating that the total cost for build-out work ("Build-Out Work") for Room 1200 was $93,000.00 and requesting reimbursement (*see* Exhibit F of Gomes Supporting Affidavit).

Kraiem forwarded a subsequent letter, dated June 29, 2006, to plaintiff's managing agent on "Kids Apparel Club-Room 850 D/B/A Java Industries Inc," letterhead listing the Premises as its business address regarding "[r]eimbursement to Java Industries" with respect to the Build-Out Work (*see* Exhibit D of Gomes Supporting Affidavit). Plaintiff subsequently reimbursed Kids for the Build-Out Work in July 2006 by checks payable to "Kids Apparel Club d/b/a Java Industries," or "Kids Apparel Club/Java Industries" (see Exhibit I of Gomes Supporting Affidavit).

The evidence also establishes, *inter alia*, that Kids executed a License Agreement on March 26, 2007 and invoiced one of its customers in December 2008, with both documents listing the business address as Room 1200 of the Premises (*see* Exhibits 3 and 4 of Rella Supporting Affirmation).

Additionally, the evidence establishes, *inter alia*, that Clay Drywall, Inc. ("Clay"), the contractor for the Build-Out Work, invoiced "Kids Apparel Club" in June 2006 and that Kids paid such invoice by check from its checking account (*see* Exhibits G and H of Gomes Supporting Affidavit). Clay subsequently executed an affidavit releasing Kids from mechanics' liens related to the Build-Out Work, and referenced the project as "Kids Apparel Club, 112 West 34th Street, Suite #1200 . . ." (*see* Exhibit J to Gomes Supporting Affidavit).

The evidence further establishes, among other things, that Java, which was incorporated on January 4, 2000, failed to pay taxes or file any tax returns from December 31, 2002 through December 31, 2013, and was subsequently dissolved on October 28, 2009, pursuant to the Tax Law (*see* Exhibits 1 and 2 of Rella Supporting Affirmation).

Kraiem appeared for a January 30, 2014 deposition in which he testified, *inter alia*, that his presidency at Java ceased once the business was no longer viable and unprofitable (*see* Exhibit 6 of Rella Supporting Affirmation, Kraiem 2014 Transcript, P. 9, L. 16-24). Kraiem indicated that he was unable to recall a time when Java was profitable (*id.*, P. 14, L. 18-20). Kraiem also indicated that he failed to produce subpoenaed documents, which included Java's certificate of incorporation and bylaws, stockholder certificates, tax returns from 2009 through 2013, and evidence of payment to employees or any other persons, at the deposition because he was unable to locate such documents or because they did not exist after October 28, 2009, once Java ceased to operate (*id.*, PP. 18-31).

Kraiem "speculate[d]" that Kids paid for the Build-Out Work due to Java having insufficient funds and that Java "would have" reimbursed Kids (*id.*, P. 49, L. 25-P. 50, L. 4-9). Kraiem also indicated that Ralph signed the check to pay for the Build-Out Work (*id.*, P. 49, L. 2-9). Although Ralph was not an officer of Kids, Kraiem indicated that Ralph was an authorized signer of Kids' checking account because Ralph was his father whom he trusted with money (*id.*, P. 49, L. 10-24).

Kraiem testified that he did not possess records indicating Kids received any reimbursement (*id.*, P. 50, L. 10-25; P. 51, L. 2- 4). He was unable to recall the time when Java maintained a bank account and was also unable to locate records indicating whether Java paid rent for Room 1200 (*id.*, P. 52, L. 21-24; P. 59, L. 25; P. 60, L. 2-7; P. 62, L. 11-16). Kraiem further maintained that although the Tenant Form (annexed as Exhibit C to Gomes' Supporting Affidavit) identified Kids as the tenant since it occupied the Premises at such time, he neither had knowledge of who filled out such document, nor any recollection of directing anyone to complete same (*id.*, P. 53, L. 7-25; P. 54, L. 2-18).

Kraiem maintained that Java ceased to exist sometime after October 28, 2009 and that he was unaware whether any Java shareholder meeting minutes existed prior to such date (*id.*, P. 25, L. 24-P. 26, L. 16). Kraiem also testified that he was unable to recall whether he issued any shareholder certificates for Java and was unable to locate the existence of any such documents (*id.*, P. 24, L. 6-16).

Kraiem further indicated that Kids moved out of the Premises sometime in November or December 2012 but was unsure of the exact date *(id.*, P. 78, L. 21-25; P. 79, L. 2-5). According to Kraiem, Java and Kids were two separate companies (*id.*, P. 42, L. 4-5). Kraiem also acknowledged that the September 28, 2012 sworn affidavit he submitted in connection with the

Proceeding (annexed herein as Exhibit 2 to Rella Reply Affirmation) wherein he averred that he was Java's principal owner and officer was incorrect because Java no longer existed when he submitted such document (*id.*, P. 34, L. 6-24; P. 35, L. 12-20).

Kraiem also appeared for a February 9, 2016 deposition in which he testified, *inter alia*, that he was not in possession of any of Java's invoices, bank account statements, checkbooks, or cash receipt journals (*see* Exhibit 11 of Rella Supporting Affirmation, 2016 Kraiem Deposition, P. 18, L. 2-12). Kraiem also testified that he did not issue stock certificates since he was sole shareholder (*id.*, P. 20, L. 23-25; P. 21, L. 2-9).

Kraiem maintained that Java relocated its business to Room 1200 of the Premises, where Kids was also located, after Java's Brooklyn warehouse closed due to its need for larger space (*id.*, P. 44, L. 16-25; P. 45, L. 2-8; P. 46, L. 15-20; P. 47, L. 16-18). Kraiem further maintained that Kids paid the rent for Room 1200 for at least three or four years until it vacated the Premises, and that Java also paid the rent for such space (*id.*, P. 70, L. 19-25; P. 71, L. 4-25). However, Kraiem indicated that he did not possess any documents evidencing Java's rent payments (*id.*, P. 71, L. 24-25; P. 72, L. 2-3).

In opposition, defendants maintain that Java and Kids were two separate and distinct businesses which maintained separate bank accounts. Further, defendants maintain that issues of fact exist with respect to piercing the corporate veil as against Kraiem. The documents defendants submit in opposition to the motion, *inter alia*, indicate that Java applied for an employer identification number in January 2000; that Kids applied for the same in January 2002; and that Java received a check, dated December 31, 2008, for earned interest on its lease security deposit (*see* Exhibit C of Zibas Opposing Affirmation). The annexed documents also include, *inter alia*,

a November 28, 2008 shipping invoice and telephone bills (for November 2008, May 2010, and March, June, July and September 2011) addressed to Java at Room 1200 of the Premises (*id.*).

DISCUSSION

"The proponent of 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 . . ." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see Ostrov v Rozbruch,* 91 AD3d 147, 152 [1st Dept 2012]; *Wayburn v Madison Land Ltd. Partnership,* 282 AD2d 301, 302 [1st Dept 2001]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *see Cabrera v Rodriguez,* 72 AD3d 553, 553-554 [1st Dept 2010]; *Kornfeld v NRX Tech.*, 93 AD2d 772, 773 [1st Dept 1983], *affd* 62 NY2d 686 [1984]).

A party seeking to pierce the corporate veil must establish 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]). The concept is equitable in nature, and the decision whether to pierce the corporate veil in each instance will depend on the facts and circumstances (*id.* at 141).

Here, the evidence plaintiff submits in support of the motion demonstrates that Java failed to adhere to corporate formalities; failed to maintain a bank account; file tax returns or pay taxes; and did not own any assets. The evidence also establishes that Java and Kids shared the same corporate officer and office space. Further, the evidence establishes that defendants and other third

parties never specifically distinguished between Java and Kids, and that Kids identified itself as doing business as Java.

It is important to note that the contractor invoiced Kids for the Build-Out Work at the Premises which was paid from a checking account Kids maintained. Although Ralph, Kraiem's father, was not a corporate officer of Kids, Ralph signed the check for the Build-Out Work and was authorized (as per the Tenant Form) to sign for billable hours. While Kraiem testified at his 2016 deposition that Java reimbursed Kids for such payment, there is no evidence of any reimbursement. This Court also notes that Java never paid rent for the Premises. Rather, a company which Kraiem owned paid the first month's rent and Kids paid rent thereafter (*see* Exhibits E and K of Rella Supporting Affirmation). Commingling of funds between two entities is another sign of domination (*see CC Ming (USA) Ltd. Partnership v Champagne Video*, 232 AD2d 202, 202 [1st Dept 1996]).

While defendants maintain that Java was a separate entity, the evidence indicates otherwise. Rather, the evidence establishes that Kids dominated Java and used such domination to cause Java to breach its obligations to pay rent as required under the lease, which is sufficient to pierce the corporate veil (*see BP 399 Park Ave. LLC v Pret 399 Park, Inc.*, 150 AD3d 507, 508 [1st Dept 2017]; *Simplicity Pattern Co. v Miami Tru–Color Off–Set Serv.*, 210 AD2d 24, 25 [1st Dept 1994]).

Principals of a corporation who improperly dominate the corporation are deemed its alter ego and are liable for unpaid rent when they use the corporation to avoid such obligation (*see Ventresca Realty Corp. v Houlihan,* 41 AD3d 707, 709 [2d Dept 2007]; *CC Ming (USA) Ltd. Partnership v Champagne Video*, *supra* at 202). The evidence shows that Kraiem dominated and acted as the alter ego of Java.

The fact that plaintiff had knowledge that Kids paid rent and occupied the Premises fails to raise any issue of fact regarding Kids' and Kraiem's domination of Java. There is no evidence that plaintiff knowingly accepted this arrangement or that the parties bargained for a tenant with no real existence. Defendants' documentary submissions fail to raise any triable issue of fact.

Generally, a claim to pierce the corporate veil is fact laden and unsuited for resolution by summary judgment (*see Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996]). However, the corporate veil should be pierced as a matter of law where the record herein demonstrates that Java did not operate as a separate entity, which was used to evade its obligations under the lease (*see Ventresca Realty Corp. v Houlihan, supra* at 709; *CC Ming (USA) Ltd. Partnership v Champagne Video, supra* at 202; *Fern. Inc. v Adjmi,* 197 AD2d 444, 445 [1st Dept 1993]; *cf 210 E. 86th St. Corp. v Grasso*, 305 AD2d 156 [1st Dept 2003]).

Plaintiff has established its prima facie entitlement to summary judgment and defendants failed to raise any issue of fact. Further, defendants' affirmative defenses, which are conclusory, devoid of any factual allegations, or inapplicable to the case at bar, are without merit, and thus dismissed.

Considering the foregoing, it is

ORDERED that plaintiff's motion for summary judgment in its favor and to dismiss defendants' affirmative defenses is granted in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff on its first cause of action against Java in the sum of $63,864.00, plus interest from March 1, 2013, plus costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff on its second cause of action against Kids in the sum of $115,323.72, plus interest on $95,366.22 of

such sum from October 19, 2012, plus interest on $19,957.50 of such sum from December 7, 2012, plus costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff on its third cause of action against Kids in the sum of $159,230.22, plus interest on $95,366.22 of such sum from October 19, 2012, plus interest on $63,864.00 of such sum from March 1, 2013, plus costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff on its fourth cause of action against Kraiem in the sum of $159,230.22, plus interest on $95,366.22 of such sum from October 19, 2012, plus interest on $63,864.00 of such sum from March 1, 2013, plus costs and disbursements as taxed by the Clerk; and it is further

ORDERED that counsel for plaintiff is directed to file a Note of Issue by January 8, 2020; and it is further

ORDERED that the calculation of damages due plaintiff regarding its claim for attorneys' fees is severed and shall continue, and an assessment is hereby directed on the amount of reasonable attorneys' fees to be awarded to plaintiff; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine reasonable attorneys' fees; and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646–386–3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local

Rules" link), shall assign this matter to an available Special Referee to determine as specified above; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry on defendants' counsel and that counsel for plaintiff shall, after thirty days from service of those papers, submit to the Special Referee Clerk by fax (212–401–9186) or email an Information Sheet (which can be accessed at http://www.nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4318) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee's Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.

This constitutes the Decision and Order of this Court.

Dated: New York, New York
December 19, 2019

ENTER:

Hon. Tanya R. Kennedy

Hon. Tanya R. Kennedy, J.S.C.

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HON. TANYA R. KENNEDY