SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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JOSEPH RUTIGLIANO, individually, as a shareholder of Absolute Electrical Contracting of NY Inc.,

Petitioner-Plaintiff,

For the Judicial Dissolution of

ABSOLUTE ELECTRICAL CONTRACTING OF NY INC., New York corporation, pursuant to Section 1104-a of the Business Corporation Law

- v -

WILLIAM LOCANTRO, ROBERT ROMANOFF, EDM ELECTRICAL CONTRACTORS, INC., JOHN DOES 1 THROUGH 10, ABC CORPORATIONS 1 THROUGH 10,

Respondents-Defendants.

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INDEX NO.	654118/2015
MOTION DATE	9/10/2019
MOTION SEQ. NO.	008

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326

were read on this motion to DISMISS.

In motion sequence number 008, Defendants William Locantro ("Locantro"), Robert Romanoff ("Romanoff"), EDM Electrical Contractors, Inc. ("EDM"), and EDM Electric, Inc. ("EDM Electric") (collectively, the "Defendants") move to dismiss Counts 15 – 18 of the Second Amended Petition (NYSCEF 295 ["SAP"]), submitted by Plaintiff Joseph Rutigliano ("Plaintiff") individually and as a shareholder derivatively on behalf of Absolute Electrical Contracting of NY, Inc., ("Absolute").

For the reasons set forth below, Defendants' Motion to Dismiss is granted.

FACTUAL BACKGROUND

This case involves a dispute regarding ownership and control of Absolute, a unionized electrical contracting business. Plaintiff alleges that he holds one-third of all outstanding shares of Absolute, but has been effectively "frozen out" of Absolute by his fellow shareholders Locantro and Romanoff. Plaintiff alleges, among other things, that Locantro and Romanoff secretly formed EDM to bid on non-union contracting jobs for which Absolute was not eligible. Plaintiff alleges that Locantro and Romanoff routinely used money and other assets belonging to Absolute to support EDM. Although Defendants allege that EDM discontinued its business in 2015, Plaintiff contends that EDM Electric is a continuation of the very same business.

In his SAP, Plaintiff, on behalf of Absolute, alleges that: (1) EDM and EDM Electric were unfairly enriched at the expense of Absolute ("Count 15"); (2) EDM and EDM Electric wrongfully converted and diverted Absolute's property for improper purposes ("Count 16"); (3) EDM and EDM Electric are liable to Absolute on the basis of alter-ego liability ("Count 17"); and (4) EDM and EDM Electric are liable to Absolute on the basis of successor liability ("Count 18"). Defendants filed this motion pursuant to CPLR §§ 404 and 3211, arguing that Plaintiff's derivative claims (on behalf of Absolute) against EDM and EDM Electric should be dismissed because, *inter alia*, they are barred by the doctrines of *in pari delicto* and voluntary payment.

LEGAL ANALYSIS

On a motion to dismiss, the pleadings must be construed most favorably for Plaintiff. (*See Cohn v. Lionel Corp.*, 21 NY2d 559 [1968]). Plaintiff sufficiently states a claim where the pleading adequately alleges the elements of a cause of action, regardless of whether there is evidentiary support for the claim. (*See Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]). On a motion to dismiss, the Court must accept Plaintiff's allegations as true. (*See*

Bailey v. 800 Grand Concourse Owners, Inc., 199 AD2d 1 [1st Dept 1993]). However, "factual allegations … that consist of bare legal conclusions, or that are inherently incredible …, are not entitled to such consideration." (*Mamoon v. Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016]).

A. Plaintiff's Previously Dismissed Claims Should be Stricken from the SAP

Plaintiff's SAP did not conform with this Court's prior orders which dismissed several causes of action. Counts 1 (in part), 2, 6, 7, 8, 9, 10, 11, 12, 13, and 14 were previously dismissed. (*See* NYSCEF 219 ["Decision and Order on Motion Sequence Number 005"]). Plaintiff acknowledged that the aforementioned claims were previously dismissed and not currently on appeal. *(See* NYSCEF 312 ["Memorandum of Law in Opposition" at p. 4-5]).

Accordingly, Counts 1 (in part), 2, 6, 7, 8, 9, 10, 11, 12, 13, and 14 in the SAP are (again) dismissed.

B. Plaintiff's Unjust Enrichment and Conversion Claims are Barred by *In Pari Delicto* and the Voluntary Payment Doctrine

Plaintiff's unjust enrichment and conversion claims are asserted on behalf of, and in the name of, Absolute. Those claims are subject to the same defenses that would apply if the claims were made directly by Absolute.

The doctrine of *in pari delicto* "mandates that the courts will not intercede to resolve a dispute between two wrongdoers." (*See Kirschner v. KPMG LLP*, 15 NY3d 446, 464 [2010]). "While a claim of *in pari delicto* sometimes requires factual development and is therefore not amenable to dismissal at the pleading stage, the doctrine can apply on a motion to dismiss in an appropriate case, such as where its application is plain on the face of the pleadings." (*See New Greenwich Litig. Tr., LLC v. Citco Fund Services (Europe) B.V.*, 145 AD3d 16, 24 [1st Dept 2016] [internal citations and quotation marks omitted]).

Here, Plaintiff's claim is that the individual defendants caused Absolute to undertake actions that were against its own (and Plaintiff's) interest. Specifically, Plaintiff alleges that Locantro and Romanoff, as officers of Absolute, used Absolute's assets to benefit EDM. (*See* SAP at ¶¶ 60-61). Corporations are not natural persons; corporations act solely through the instrumentality of their officers. (*Kirschner*, 15 NY3d at 465). Thus, the actions of Locantro and Romanoff are imputed to Absolute, and Plaintiff has alleged that Absolute (*i.e.*, the plaintiff unjust enrichment and conversion) wrongfully shared its assets with EDM.

The Court of Appeals' decision in *Kirschner* precludes Plaintiff's claim on behalf of Absolute against allegedly complicit outside parties such as EDM. (*Kirschner*, 15 NY3d at 464 – 477). Plaintiff, stepping into the shoes of Absolute, cannot bring these claims against EDM and EDM Electric for engaging in the activity in which Absolute, through Locantro and Romanoff, knowingly took part.

For similar reasons, Plaintiff's claims for unjust enrichment and conversion are dismissed on the independent ground that the voluntary payment doctrine "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of mutual fact or law." (*Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 [2003]). Plaintiff, stepping into the shoes of Absolute, cannot bring these claims against EDM and EDM Electric when Absolute, through Locantro and Romanoff, voluntarily paid EDM with full knowledge of the facts.[1]

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[1] Plaintiff's derivative claim for unjust enrichment is dismissed on the alternative ground that it is duplicative of his derivative claim for conversion. "An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." (*Corsello v. Verizon New York, Inc.*, 18 NY3d 777, 790 [2012]). Plaintiff's unjust enrichment claim is predicated on the same facts as his conversion claim – namely, that Defendants were enriched at Absolute's expense by wrongfully converting or diverting Absolute's assets for their benefit.

If Plaintiff has a viable derivative claim, it is against Locantro and Romanoff for breaching duties owed *to* Absolute. (see Counts 4 and 5). EDM owes no such duties to Absolute. A derivative claim against EDM would have to be asserted as an independent claim of aiding and abetting the individual defendants' breaches of fiduciary duties or potentially by adding EDM as a defendant *to the derivative claims against the individual defendants* on the ground that EDM is liable for the acts of Locantro and Romanoff. The Court gave Plaintiff an opportunity to plead such a claim but it has not done so.

C. Plaintiff Fails to State Causes of Actions for Counts 17 and 18

"Alter-Ego Liability" (Count 17) is not an independent cause of action. (*See 9 East 38th Street Associates, L.P. v. George Feher Associates, Inc.*, 226 AD2d 167, 168 [1st Dept 1996]). "[A]n attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners." (*Matter of Morris v. New York State Dept. of Taxation & Finance*, 82 NY2d 135, 141 [1993]; *see also Rose v. Croman*, 2015 WL 1958814 at *4 [Sup Ct NY Cty 2015] [dismissing cause of action for alter ego because New York does not recognize a separate cause of action to pierce the corporate veil]).

The same is true for "successor liability" (Count 18). (*See City of Syracuse v. Loomis Armored US, LLC*, 900 FSupp2d 274, 290 [NDNY 2012] ["successor liability is not a separate cause of action but merely a theory for imposing liability on a defendant based on the predecessor's conduct."]).

Accordingly, Counts 17 and 18 are dismissed.

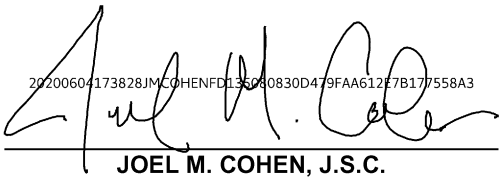
The Court has reviewed Plaintiff's remaining arguments and finds them to be without merit.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that Defendants' Motion to Dismiss is **granted** as to Counts 1 (in part), 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18 asserted by Plaintiff in the Second Amended Petition, and those claims are dismissed; it is further

This constitutes the Decision and Order of the Court.



6/4/2020
DATE

JOEL M. COHEN, J.S.C.

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