RGB Mgt. Corp. v D2D Bridgemarket LLC
2020 NY Slip Op 33026(U)
September 15, 2020
Supreme Court, New York County
Docket Number: 650059/2020
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

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RBG MANAGEMENT CORP.,

Plaintiff,

- v -

D2D BRIDGEMARKET LLC, JOSEPH DUSHEY, DAVID DUSHEY and BRIDGEMARKET INVESTOR LLC,

Defendants.

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INDEX NO. 650059/2020

MOTION DATE 9/03/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS.

Upon review of the papers and after hearing oral argument, motion by Defendants D2D Bridgemarket LLC ("D2D"), Joseph Dushey ("Joseph"), David Dushey ("David"), and Bridgemarket Investor LLC ("Investor") (collectively, "Defendants") to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), is denied for the reasons stated herein.

BACKGROUND

The instant action—along with its its older, companion case, *D2D Holdings LLC v Bridgemarket Assoc., L.P.*, No. 160344/2017 (the "Landlord-Tenant Litigation")—involves a dispute over rights to a retail space at 405 East 59th Street, which is located directly under the 59th Street Bridge in Manhattan ("the Premises"). The City of New York is the fee owner of the Premises, and non-party Bridgemarket Associates L.P. ("Bridgemarket") has a ground lease to the Premises. In March of 1998, Bridgemarket entered into a lease ("the Original Lease") of the Premises with the supermarket chain Atlantic & Pacific Tea Company Inc. ("A&P"), and this lease was subsequently amended on two occasions. Around 2015, A&P filed for bankruptcy, and A&P's leasehold rights to the Premises were put up for sale as part of the bankruptcy proceedings.

In sum and substance, in the Landlord-Tenant Litigation—which was originally brought by D2D seeking a *Yellowstone* injunction—it is alleged that Bridgemarket's principal Sheldon Gordon ("Sheldon") approached Defendant Joseph Dushey ("Joseph") and suggested that Joseph attempt to purchase the A&P's leasehold rights to the Premises, with the understanding that, upon a successful bid, the Original Lease would be amended in a mutually beneficial manner.

(NYSCEF Doc. No. 23 [Joseph EBT] at 71:15-73:17.)[1] It is further alleged that Joseph formed D2D for the purpose of attempting to purchase said leasehold rights. On December 15, 2015, the Bankruptcy Court approved D2D's bid, and D2D entered into a lease sale agreement (the "LSA") with A&P, purchasing the leasehold rights for $4,000,000. However, thereafter, issues arose with obtaining a commercial tenant to occupy the Premises, and D2D and Bridgemarket, in sum and substance, have each accused one another of failing to renegotiate the Original Lease in good faith. Indeed, the central issues underlying the Landlord-Tenant Litigation concern whether the parties breached certain agreements to modify the Original Lease and / or whether the Original Lease was effectively modified. Eventually, D2D voluntarily surrendered its leasehold rights to Bridgemarket, and Bridgemarket accepted said surrender pursuant to a stipulation that was so-ordered by this Court on September 13, 2018—with the parties reserving their rights to pursue monetary damages. (NYSCEF Doc. No. 15 [So-Ordered Surrender].)

While this surrender appeared to narrow the issues to a dispute over monetary damages based on theories of contract—with the landlord-tenant relationship between the parties being terminated by reason of D2D's surrender—D2D later sought to amend its complaint to add a cause of action for "a mandatory injunction directing Defendants to comply with the LOI, Side Letter and Rent Reduction Agreement, and upon such compliance, restore Tenant to possession of the Premises for the balance of the lease term." (*D2D Holdings LLC v Bridgemarket Assoc*., L.P., 2019 N.Y. Slip Op. 32368[U], 7 [N.Y. Sup Ct, NY County August 7, 2019] [the "August 2019 Decision"].) As this Court would explain in its August 2019 Decision—denying such leave to amend—the "elephant-sized problem" with that attempt to amend was that D2D had "incontrovertibly surrendered possession of the premises pursuant to the so-ordered Surrender Stipulation" of September 13, 2018. (Id.) At the time, this Court's decision would have appeared unremarkable, involving a fairly straightforward application of the law and rejecting the parties' attempts to re-expand the Landlord-Tenant Litigation.

The Court, however, mentions its August 2019 decision because according to RBG Management Corp. ("RBG") it was not until November 2019—when its Vice President apparently came across said decision—that it learned that D2D had surrendered the Premises roughly one year earlier. Who RBG was and why it might be interested in such a decision was unknown to this Court and Bridgemarket at the time, but would soon become apparent.

RBG is a corporation "formed in New York County" which operates fifteen Morton Williams supermarkets in New York City. Unbeknownst to this Court, Bridgemarket, and apparently even D2D's own litigation counsel, on March 22, 2016, D2D entered into a "Limited Restrictive Use Agreement" with RBG wherein, in sum and substance, the parties agreed that for 30 years after said date, "D2D shall not sublease all or any portion of the Leased Premises to any retailer or establishment, which devotes more than 30% of the total leasable floor area of its demised premises within the Leased Premises to the sale of groceries, produce, dairy products, fresh fish or fresh meat for off-premises consumption (the 'Limited Restrictive Use Covenant')." (NYSCEF Doc. No. 13 ["Limited Restrictive Use Agreement"] at 1.) As consideration for such restriction, RBG paid D2D $2.2 million.

[1] This deposition of Joseph was taken in *D2D Holdings LLC v Bridgemarket Assoc.,* L.P., No. 160344/2017 (the "Landlord-Tenant Litigation") on March 14, 2019.

It was further set forth in the Limited Restrictive Use Agreement that in the event of a default by D2D—where equitable relief was unavailable to RBG—D2D would be required to pay back the $2.2 million with 10% interest per annum as "Refunded Consideration" to RBG. Pursuant to the Limited Restrictive Use Agreement, Joseph and David (together, "the Dusheys") signed a personal guaranty for the Refunded Consideration. This guaranty was annexed to the Limited Restrictive Use Agreement as exhibit C.

In addition, it was further agreed that in the "Event of Default under this Agreement caused by an intentional or willful breach of the Limited Restrictive Use Covenant by D2D or its Affiliate[,]" then D2D would be liable to RBG for "Liquidated Damages" as calculated under the agreement. In sum and substance, the Liquidated Damages would be $6 million at the effective date of the agreement, and then be reduced by $200,000 per annum thereafter. A second guaranty of the Liquidated Damages (along with the Refunded Consideration)—annexed to the Limited Restrictive Use Agreement as exhibit D—was signed on behalf of an entity named Bridgemarket Investor LLC ("Investor").

In addition, it was set forth in the Dusheys' guaranty that said guaranty would "terminate upon D2D's execution of a sublease for the Leased Premises with a subtenant having a net worth (determined in accordance with generally accepted accounting principles) of not less than $10,000,000." (NYSCEF 13 [Dushey Guaranty] ¶ 2.) However, no such termination provision was included in the Investor guaranty.

After the parties executed this Limited Restrictive Use Agreement on March 22, 2016—and RBG timely paid the $2.2 million as consideration—there apparently was not much interaction between the parties for roughly three years. However, according to RBG's Vice President Abraham Kaner, in early November 2019, RBG "heard a 'rumor' in the 'marketplace' that the supermarket chain know[n] as Trader Joe's was interested in obtaining a lease of space at the Bridgemarket premises." (NYSCEF Doc. No. 21 [Kaner Aff.] ¶ 13.) Kaner states that he then emailed Joseph to inquire about the rumor and received the following response from Joseph on November 1, 2019: "I am sorry for not getting back to you sooner, I have just been busy. Trader Joe's is a rumor. There is nothing signed on the space and it's currently vacant." (Id.)

As Kaner points out, Joseph made no mention of the fact that D2D had previously surrendered the Premises to Bridgemarket more than one year earlier—and Kaner asserts that he was unaware of this fact. Nonetheless, Kaner had RBG's attorneys send a letter, dated November 7, 2019, to D2D "to remind D2D of its obligations under the Agreement." (Id.) A copy of said letter was also sent to Bridgemarket, as well Trader Joes and Whole Foods. (Id.)

Bridgemarket received RBG's November 7, 2019 letter as discovery was finishing up in the Landlord-Tenant Litigation. Bridgemarket was surprised to receive such a letter, as—according to Bridgemarket's counsel—it had previously asked for any such documents as part of discovery requests during the Landlord-Tenant Litigation. Indeed, the Limited Restrictive Use Covenant, would—according to Bridgemarket—arguably undercut D2D's argument that Bridgemarket frustrated D2D's ability to obtain a subtenant, as D2D clearly limited its pool of potential tenants. (*See generally* Landlord Tenant Litigation NYSCEF Doc. No. 193 [December 3, 2019 Letter].)

In response, D2D's litigation counsel—the same in both the instant litigation and the Landlord-Tenant Litigation—responded that he "only became aware of the [Limited] Restrictive Use Agreement" one day before Bridgemarket's counsel called him about it. (*See generally* Landlord Tenant Litigation NYSCEF Doc. No. 195 [December 5, 2019 Letter].) D2D's counsel asserted:

> "[M]y clients have advised me that they did not believe the Restrictive Use Agreement was relevant when identifying documents for production. They believed -- as they still do -- that not only was the Restrictive Use Agreement not covered by Landlord's vague and overbroad demands, but also, that the Restrictive Use Agreement was not relevant to their claim that or to Landlord's defenses to such claims."

(Id.) Nonetheless, D2D's counsel apparently conceded that that the Limited Restrictive Use Agreement was discoverable, and agreed to additional discovery on this issue, including an additional deposition of Joseph.

Meanwhile, according to Kaner, RBG received a letter from counsel to "the contract vendee for the ground lease" to the Premises, responding to RBG's November 7, 2019 letter. This letter asserted that RBG had sent copies "to prospective subtenants with the intent to hinder leasing of the Premises and create a lack of confidence in our client's ability to enter subleases after closing." (NYSCEF Doc. No. 21 [Kaner Aff.] ¶ 13.) According to Kaner, this letter continued:

> "You are no doubt aware that D2D surrendered its lease on or about June 30, 2018. D2D has nothing to sublease to anyone. The surrender of the Premises back to Bridgemarket Associates, L.P. ("Landlord") was accepted and "so-ordered" by the Supreme Court.
>
> Your [letter] already tainted negotiations with our client's prospective tenant and could effectively interfere with execution of a lucrative long-term lease."

(Id.) Indeed, as Kaner explains, just a few days before receiving this letter, he had "learned, from a news/tracking service, of Justice Kalish's August 2019 (unpublished) opinion in the Prior Action." (Id.)

As such, at Kaner's direction, on November 22, 2019, RBG's counsel sent a letter to D2D's litigation counsel asserting that D2D had "anticipatorily repudiated its obligations" under the Limited Use Agreement," and stating that RBG intended to sue D2D for damages, including the Refunded Consideration, Liquidated Damages, with the Dusheys to be held liable for the latter pursuant to the veil-piercing doctrine.

True to its word, RBG commenced the instant action by filing a complaint, early this year, which in sum and substance alleges the same theories of recovery as put forward in the November 22, 2019 letter. The complaint asserts two causes of action: the first for the "Refunded Consideration" as against D2D, as well as the Dusheys and Investor, pursuant to their respective guaranties; and, the second for the "Liquidated Damages," in the amount of $5.6

million, as against D2D, Investor pursuant to its guaranty, and the Dusheys pursuant to the veil-piercing doctrine. D2D now moves, pursuant to CPLR 3211 (a) (1) and (7), to wholly dismiss the complaint, or at the very least limit the extent of liability and damages. The Court will discuss each of D2D's arguments in turn.

DISCUSSION

I. Standard of Review

When considering a CPLR 3211 (a)(7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011] [internal quotations omitted].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009] [internal quotations omitted].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

When considering a CPLR 3211 (a)(1) motion to dismiss, where a defense is founded upon documentary evidence, dismissal "is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law." (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626-27 [1st Dept 2017] [internal citations omitted].) "In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence." (*Id.* at 626-27 [internal citations and quotations omitted].) Notwithstanding the high standard a document must meet to establish a basis for dismissal, there is no bright-line rule for the types of documents that will qualify as documentary evidence, and emails and letter correspondence have been held to qualify as such. (*See Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]; *Sheffield v Pucci*, 63 Misc 3d 1216(A), at *9 [Sup Ct, NY County 2019].)

II. Arguments and Analysis

A. That D2D Did Not Breach the Limited Use Agreement as a Matter of Law

Defendants first argue that the complaint should be dismissed in its entirety because they did not violate the Limited Restrictive Use Agreement. Defendants would appear to be referencing the portion of paragraph 1 of the Limited Restrictive Use Agreement, which states:

> "Commencing upon the Effective Date and through the period expiring on the Termination Date (as defined below) or the earlier termination of this Agreement in accordance with the provisions hereof, D2D shall not sublease all or any portion of the Leased Premises to any retailer or establishment, which devotes more than 30% of the total leasable floor area of its demised premises within the Leased Premises to the sale of groceries, produce, dairy products, fresh fish or fresh meat for off-premises consumption (the 'Limited Restrictive Use Covenant')."

Defendants argue that, as RBG "admits in its Complaint, D2D surrendered possession [of] the Premises to the Landlord effective June 30, 2018." (NYSCEF Doc. No. 12 [Affirm in Supp] ¶ 15.) As such, Defendants argue that there can be no anticipatory breach and "if and when" the Premises are sub-leased in a manner that arguably violates the Limited Restrictive Use Agreement, "any such leasing and/or subleasing will be by Landlord [non-party Bridgemarket], and not by D2D." (Id. ¶ 16.)

This argument fails. The Court finds that RBG has alleged sufficient facts to establish that when D2D surrendered its leasehold interests to Bridgemarket—allegedly without disclosing the existence of the Limited Restrictive Use Agreement—it "divest[ed] itself of the ability to act in accordance with the terms of the contract." (*Gardiner Intern., Inc. v J.W. Townsend & Assoc., Inc.*, 13 AD3d 246, 247 [1st Dept 2004].) These allegations are sufficient to sustain RBG's claim that D2D repudiated the Limited Restrictive Use Agreement. (*Computer Possibilities Unlimited, Inc. v Mobil Oil Corp.*, 301 AD2d 70, 77 [1st Dept 2002] ["[I]t has long been the law that a party repudiates a contract where that party, before the time of performance arrives, puts it out of his power to keep his contract."].)

B. That D2D Did Not "Intentionally" Breach the Limited Restrictive Use Agreement

Defendants next argue that, even if the Court does allow the action to proceed, it should nonetheless dismiss RBG's claim for $5.6 million in Liquidated Damages because, as a matter of law, D2D did not "intentionally" breach the Limited Restrictive Use Agreement. To this point, Defendants assert that "paragraph 4 (c) of the Agreement expressly provides that a leasing by Landlord shall not be deemed an intentional breach of the Agreement by D2D." (Id. ¶ 18.)

The problem here is that paragraph 4 (c) does not "expressly" say this. In fact, it would appear that Defendants actually intended to refer to paragraph 4 (b)—not 4 (c). That provision states as follows:

> "For the avoidance of doubt, in the event (x)(l) D2D's failure to cure any default by D2D under the Lease results in Landlord's termination of the Lease, and (2) Landlord thereafter leases the Leased Premises to a tenant whose use violates the Limited Restrictive Use Covenant, or (y)(1) D2D's failure to cure any default by D2D under any financing secured by D2D's interest in the Lease results in the holder of such financing (a "Mortgage") foreclosing or otherwise acquiring D2D's interest in the Lease, and (2) such Mortgagee thereafter subleases the Leased Premises to a subtenant whose use violates the

> Limited Restrictive Use Covenant, then either such event shall be deemed to be an Event of Default by D2D hereunder, but shall not be deemed an Intentional LRUC Breach."

(NYSCEF Doc. No. 13 [Limited Restrictive Use Agreement] ¶ 4 [b].) Nowhere in the above provision is there an *express* mention of a situation where D2D voluntarily surrenders its leasehold interests and Bridgemarket accepts such surrender. The effect of D2D's surrender and the termination of the lease is not otherwise at issue on the instant motion. As such, this Court finds that Defendants have failed to establish, as a matter of law, that paragraph 4 (b) precludes a finding that there was an intentional breach, as based on RBG's factual allegations.

C. That the Complaint Should Be Dismissed as Against the Dusheys as Guarantors

Next, Defendants argue that the complaint should be dismissed as against the Dusheys as guarantors pursuant to the paragraph 2 of Dusheys' guaranty, which states:

> ". . . Guarantor's liability for the Guaranteed Obligations shall terminate upon D2D's execution of a sublease for the Leased Premises with a subtenant having a net worth (determined in accordance with generally accepted accounting principles) of not less than $10,000,000."

In support of applying this provision, Defendants submit an apparent cover letter, dated October 31, 2016, from an Associate General Counsel to non-party Michaels Companies, Inc. ("Michaels").[2] This cover letter seems to suggest that a draft of a proposed sublease between Michaels and D2D may have existed at that time. The problem here, however, is that the attached cover letter is **not an executed sublease** of the premises. In fact, the cover letter suggests that various parties to the proposed agreement have not yet countersigned it—i.e. that the sublease agreement had not yet been executed.

Moreover, even if such an executed sublease were to be submitted, Defendants have failed to establish as, a matter of law, that Michaels had a net worth of $10 million.

For all these reasons, the Court denies this branch of Defendants' motion.

D. That the Veil-Piercing Claims Against the Dusheys Should Be Dismissed

Lastly, Defendants argue that the veil-piercing claims against the Dusheys should be dismissed—i.e. that D2D's corporate veil should not be pierced—because RBG has failed to allege sufficient facts to sustain such claims.

> "The 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

[2] A document titled "2018: The Michaels Companies, Inc. Annual Report" is annexed to the cover letter. Clearly, the annexation of the 2018 Annual Report to the cover letter is an editorial choice by Defendants' counsel as said report did not exist at the time of the cover letter's apparent drafting in October 2016.

> legal to incorporate for the express purpose of limiting the liability of the corporate owners.
>
> The doctrine of piercing the corporate veil is typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation. The concept is equitable in nature and assumes that the corporation itself is liable for the obligation sought to be imposed. Thus, an 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 and Fin.*, 82 NY2d 135, 140-41 [1993] [internal citations omitted].)

"The party seeking to pierce the corporate veil bears the heavy burden of 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." (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016] [internal quotation marks omitted], *affd*, 31 NY3d 1002 [2018]; *see also Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012] ["New York law disfavors disregard of the corporate form.].) "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998].)

> "In determining the question of control, courts have considered factors such as the disregard 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 ... [n]o one factor is dispositive."

(*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013].)

Although the determination of whether to pierce the corporate veil is often said to be a "fact laden inquiry," nonspecific or conclusory allegations without reference to particularized factual assertions are insufficient to sustain claims based on alter ego liability. (*See Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 49 [2018]; *2001 Real Estate Space Catalyst, Inc. v Stone Land Capital, Inc.*, 2019 N.Y. Slip Op. 30155[U], at 8 [Sup Ct, NY County 2019] [Crane, J.].)

Here, RBG points to Joseph's deposition testimony in the Landlord-Tenant Litigation as evidence that Joseph and David placed the $2.2 million payment "into some different account, for their own personal benefits - and not into the D2D account." RBG argues that this shows that Joseph and David treated D2D as a mere conduit for their own personal use. In addition, they

point to Joseph's aforementioned email, where he omitted that D2D had surrendered its leasehold interests as evidence that the Dusheys used their domination of D2D to commit a fraud or wrong.

The Court finds that RBG has made sufficient factual allegations for the veil-piercing claims to proceed at this very early stage of the litigation. In so allowing these claims to proceed, the Court also relies on knowledge learned from the Landlord-Tenant Litigation. The Court cannot ignore the obvious: That, as D2D's counsel's asserts, "my clients" did not believe that they needed to disclose the Limited Restrictive Use Agreement to Bridgemarket during discovery. In addition, as to the domination element, throughout the instant case and the Landlord-Tenant Litigation there has never been any mention of any individual other than Joseph and David being involved in D2D.

To this point, the Court is mindful that it did dismiss the veil-piercing claims against another Dushey family-run entity Jenel Management Corp. in the Landlord-Tenant Litigation. However, the Court there did not analyze whether there were sufficient allegations of domination. Rather, the Court dismissed those veil-piercing claims because as the Court explained, "[a]t most, the 3PC alleges that Jenel dominated and controlled Tenant and therefore Jenel should be held liable for Tenant's breaches of contract with Landlord." (*D2D Holdings LLC v Bridgemarket Assoc*., L.P., 2019 N.Y. Slip Op. 32368[U], 7 [N.Y. Sup Ct, NY County August 7, 2019] [the "August 2019 Decision"].) That is to say, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil." (Id., quoting *Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016], affd, 31 NY3d 1002 [2018].) Here, however, the allegations of wrong abound; and, at the time of the Court's August 2019 decision, neither the Court, nor Bridgemarket, nor even D2D's own litigation counsel was aware of D2D's failure to disclose the Limited Restrictive Use Agreement during discovery. (*See generally ED & F Man Sugar Inc., etc. v ZZY Distributors, Inc.*, 181 AD3d 463 [1st Dept 2020].)

For all these reasons, the Court finds that Defendants have failed to establish entitlement to dismissal of the veil-piercing claims against the Dusheys.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Defendants D2D Bridgemarket LLC ("D2D"), Joseph Dushey ("Joseph"), David Dushey ("David"), and Bridgemarket Investor LLC ("Investor") (collectively, "Defendants") to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), is denied; and it is further

ORDERED that Defendants shall serve their answer within twenty (20) days of this decision and order being served with notice of entry; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference in this matter on December 8, 2020 at 9:45 AM, which will be held by remote means via Skype for Business or Microsoft Teams, with a link to the conference to be sent via a subsequent NYSCEF Court Notice.

The foregoing constitutes the decision and order of the Court.

9/15/2020
DATE

ROBERT DAVID KALISH, 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