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

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NWCC, LLC,

Plaintiff,

- v -

HIGHLAND CLO MANAGEMENT, LLC, HIGHLAND CAPITAL MANAGEMENT, L.P., ACIS CLO 2014-3 LTD, HIGHLAND CLO 2014-3R LTD, HIGHLAND CLO 2014-3R LLC, HIGHLAND HCF ADVISOR, LTD., AS TRUSTEE FOR HIGHLAND CLO TRUST, HIGHLAND CLO MANAGEMENT HOLDINGS, L.P, HIGHLAND CLO MANAGEMENT GP, LLC, HIGHLAND HCF ADVISOR, LTD.

Defendants.

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INDEX NO. 654195/2018

MOTION DATE N/A, 11/25/2020

MOTION SEQ. NOS. 006, 008

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 136, 137, 142, 143, 144, 145
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159
were read on this motion for LEAVE TO AMEND.

This case stems from a dispute over a financing facility. On August 20, 2019, this Court granted Plaintiff NWCC, LLC ("NWCC") summary judgment against all Defendants in this case, including Defendant ACIS CLO 2014-3 Ltd. ("ACIS 2014-3"), on NWCC's claims for breach of contract and account stated (NYSCEF 44) (the "Decision and Order"). That seemed to dispose of the case (*id.*).

However, in January 2020, ACIS 2014-3 argued that it should not be bound by the prior decision because it "was *never* served, *never* appeared, and *never* filed an answer in this action" (NYSCEF 80 ¶3 [Kwon Affirmation in Response to Cole Schotz P.C.'s Motion to Withdraw as

Counsel] [emphasis in original]). In short, ACIS 2014-3 argued that its purported counsel, who filed an answer in this case on behalf of all Defendants (ACIS 2014-3 included), never actually represented ACIS 2014-3 and that ACIS 2014-3 was never served. (The prior counsel confirmed that it was not authorized to respond to the Complaint on behalf of ACIS 2014-3 and did so inadvertently (*see* NYSCEF 53 ¶3 [Shanahan Aff. in Support of Motion to Withdraw and for Other Related Relief]). The Court took counsel at its word and, to avoid prejudicing an unrepresented party, entered an order on March 16, 2020, modifying the Decision and Order to remove ACIS 2014-3 and to permit NWCC to seek leave to amend the complaint (NYSCEF 104; *see* NYSCEF 125).

The parties thereafter filed separate follow-on motions. NWCC sought to file a motion for leave to amend the Complaint on April 16 (the deadline set by the Court in the Decision and Order), but was unable to do so because the Court temporarily prohibited the filing of motions during the initial throes of the COVID-19 pandemic. On May 4, the first day new motions were permitted, ACIS 2014-3 filed a motion to dismiss the original complaint for lack of service, lack of personal jurisdiction, and failure to state a viable claim for relief (Motion Sequence No. 006). NWCC then filed the motion for leave to amend (Motion Seq. No. 008) that it sought to file months before. In view of the circumstances, ACIS 2014-3's suggestion that NWCC's motion for leave to amend was untimely is meritless.

For the reasons set forth below, the Court grants ACIS 2014-3's motion to dismiss the original complaint for failure to allege sufficient facts to support the exercise of personal jurisdiction and, in the alternative, failure to state a viable claim for relief. For similar reasons, the Court denies NWCC's motion for leave to amend the complaint because the proposed additional allegations, while more detailed, do not remedy the defects on the original complaint.

DISCUSSION

I. MOTION TO DISMISS

The claims against ACIS 2014-3 in the initial Complaint, such as they are, must be dismissed for lack of personal jurisdiction under CPLR 302 [a]. "[A]s the party seeking to assert jurisdiction, the burden belongs to plaintiff to present sufficient facts to demonstrate jurisdiction" (*Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]). NWCC fails to meet that burden in the initial Complaint as against ACIS 2014-3. In the Complaint's few fleeting references to ACIS 2014-3, it alleges that the entity is a non-domiciliary "registered in the Cayman Islands" (Compl. ¶7 [NYSCEF 115]), but offers no facts to suggest that ACIS 2014-3 engaged in any purposeful activities in this forum. Tellingly, NWCC's defenses to the jurisdictional arguments raised in the motion to dismiss rely entirely on the Proposed Amended Complaint (*e.g.*, NYSCEF 136 at 6-7 ["NWCC's recently-filed proposed Amended Complaint explains, in great detail, how ACIS 2014-3 transacted business in New York State in an attempt obtain money from NWCC to finance ACIS 2014-3's loan portfolio"]), a tacit acknowledgement that the allegations against ACIS 2014-3 in the initial Complaint, standing alone, do not pass muster.[1]

Even if the Complaint had asserted a sufficient basis for exercising personal jurisdiction over ACIS 2014-3, the Complaint still fails to state a viable claim for relief against ACIS 2014-3.

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[1] ACIS 2014-3 also seeks, in the alternative, to dismiss the Complaint for NWCC's failure to serve ACIS 2014-3 in accordance with CPLR 311. But NWCC reasonably believed that it *had* served ACIS 2014-3 with the Complaint, and that ACIS 2014-3 had answered. Therefore, were lack of service the only defect in the Complaint as to ACIS 2014-3, the Court could invoke CPLR 306-b to extend the time for service (*id.* ["If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."]).

The two causes of action in the Complaint arise out of a series of contracts – the Master Agreement, the Conforming Transaction Master Confirmation, and the Conforming Transaction Supplement – to which ACIS 2014-3 is not a party. Nor does NWCC advance, in the initial Complaint, a theory of contract liability extending to ACIS 2014-3 as a non-party or non-signatory. Therefore, ACIS 2014-3's motion to dismiss is granted (*see Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965-66 [2d Dept 2019] ["One cannot be held liable under a contract to which he or she is not a party . . . . Here, the documentary evidence . . . fatally undermines the plaintiff's contention that the individual defendants should be held personally liable in connection with a contract to which they were not parties"]; *Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 627 [1st Dept 2017] ["[W]hile 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"]).

The Court denies the branch of ACIS 2014-3's motion seeking sanctions against NWCC due to supposedly "frivolous litigation conduct". The decision whether to award such sanctions lies within the Court's discretion (22 NYCRR § 130-1.1 [a]). In the Court's view, while NWCC's initial Complaint must be dismissed, the record does not support ACIS 2014-3's broadsides against NWCC, in which NWCC is accused of "frivolously pursuing [a] strike suit" (NYSCEF 129 at 22).

II. MOTION FOR LEAVE TO AMEND

To correct the defects in the Complaint, NWCC's proposed amended complaint (the "PAC") seeks to bind ACIS 2014-3 to the relevant contracts by alleging that the entity was, in reality, merely the alter ego of the Highland entities. But while the PAC provides more detail

about ACIS 2014-3 than the initial Complaint did, these proposed amendments still fall short. Considering the merits of the amendments, as the Court must do, the PAC fails to allege sufficient facts to support the exercise of personal jurisdiction or to state a viable claim for relief as against ACIS 2014-3.

Under CPLR 3025 [b], leave to amend "shall be freely given" provided that the movant satisfies its burden of showing that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]). Contrary to NWCC's assertion (*see* NYSCEF 141 at 3-4), ACIS 2014-3's arguments attacking the sufficiency of the allegations underlying the PAC are relevant to deciding whether leave to amend should be granted. Indeed, "in determining whether to grant leave to amend the court *must* examine the underlying merits of the causes of action asserted therein, since to do otherwise would constitute a waste of judicial resources" (*Glenn Partition, Inc. v Trs. of Columbia Univ. in N.Y.*, 169 AD2d 488, 489 [1st Dept 1991] [emphasis added]). Accordingly, "[a] proposed amendment that cannot survive a motion to dismiss should not be permitted" (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001]; *see also, e.g., Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017] [affirming denial of leave to amend because proposed counterclaims were "insufficient to state a cognizable claim"]).

The "sole purpose" of the PAC is "making new and more specific factual allegations against" ACIS 2014-3 (PAC ¶1 [NYSCEF 151] [redline showing proposed changes]). These new allegations unveil an alter-ego theory of liability against ACIS 2014-3, which was not a party to the financing agreement at the crux of this case. According to the PAC, "Highland CLO Management, LLC – the Highland entity that signed the Master Agreement – and the ACIS CLO

2014-3 Ltd. entity . . . , while nominally distinct from one another, were in reality one and the same" (*id.* ¶34). And "[b]ecause Defendant ACIS CLO 2014-3 Ltd. was the alter ego of the Highland CLO Management, LLC [entity] . . . ACIS CLO 2014-3 Ltd. is bound by the Master Agreement as if it were a signatory to the Master Agreement" (*id.* ¶62).

In support of its alter-ego claim, NWCC alleges, among other things, that ACIS 2014-3 was part of a CLO portfolio managed by Acis Capital Management, L.P. ("ACM"), which in turn "is 100% owned by Highland senior management" (*id.* ¶37; *see id.* ¶39). ACM "was also an indirect investor in – *i.e.*, an owner of – [ACIS 2014-3]" (*id.* ¶37). Highland CLO Management allegedly "exercised complete domination and control" over ACIS 2014-3, and used ACIS 2014-3 "as a repository for [Highland's] assets" (*id.* ¶¶40-41). Further, the PAC alleges that Highland CLO Management exploited the ACIS 2014-3 alter ego to make itself "judgment proof" from its creditors, parking assets in ACIS 2014-3 while refusing to pay money it owes NWCC under this Court's prior summary judgment order (*id.* ¶¶42-44).

"To make out a cause of action for liability on the theory of piercing the corporate veil because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene" (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]; *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141-142 [1993] ["While complete domination of the corporation is the key to piercing the corporate veil . . . such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required"]; *East Hampton Union Free School Dist. v*

Sandpebble Builders, Inc., 16 NY3d 775, 776 [2011] [affirming denial of leave to amend because "plaintiff failed to allege any facts indicating that [the alleged alter ego] engaged in acts amounting to an abuse or perversion of the corporate form"]).

For these purposes, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil" (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016], affd, 31 NY3d 1002 [2018] [hereinafter, "*Skanska*"]; *Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, 173 AD3d 568, 569 [1st Dept 2019] [noting that "alleged breach of contract . . . does not constitute a wrong warranting piercing the corporate veil"]; *see Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013] [same]; *see also Highland CDO Opportunity Master Fund, L.P. v Citibank, N.A.*, 270 F Supp 3d 716, 732 [SD NY 2017] ["[I]t is well-established that an ordinary breach of contract, without evidence of fraud or corporate misconduct, is not sufficient to pierce the corporate veil."]).

NWCC's motion for leave to amend the Complaint is denied as futile because the PAC fails to set forth a viable basis for alter-ego liability against ACIS 2014-3, which is essential to NWCC's claims against it. To begin with, the PAC does not adequately allege NWCC's direct ownership and control over ACIS 2014-3. Rather, the alter-ego theory assumes, without support, that the ownership and control that Highland exercised over *ACM* also extended to ACIS 2014-3. The PAC lumps together ACIS 2014-3 with ACM, and surmises that these "Acis entities . . . were simply the alter egos of" the Highland entities (PAC ¶39). But the shared "Acis" moniker masks an important distinction. While NWCC alleges that "Highland senior management" owned, wholly and directly, ACM, that entity is only "an indirect investor in – *i.e.*, an owner of –

ACIS CLO 2014-3" (*id.* ¶37). The PAC does not allege the extent of ACM's ownership of ACIS 2014-3, nor does it allege who, or what, owns the rest of ACIS 2014-3. Springboarding off the assumption that "Acis" is a unitary whole, NWCC goes on to allege, in conclusory fashion, that "[b]ecause ACIS CLO 2014-3 Ltd. was merely the alter ego of Highland CLO Management, LLC, Highland CLO Management, LLC exercised complete domination and control of ACIS CLO 2014-3 Ltd." (*id.* ¶40). Without supporting factual allegations, however, that legal conclusion is insufficient to impose alter-ego liability.

Even assuming that Highland CLO Management completely dominated ACIS 2014-3, the PAC fails to allege "a wrongful or unjust act" that would warrant piercing the corporate veil. As noted, alleging that Highland CLO Management used ACIS 2014-3 to breach a contract is simply not enough, as a matter of law, to impose alter-ego liability (*e.g.*, *Skanska*, 146 AD3d at 12). Nor does NWCC claim that ACIS 2014-3, a special-purpose investment entity (PAC ¶37), was formed for an illegal purpose or engaged in illegitimate business (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 81 AD3d 237, 245 [1st Dept 2011] [dismissing veil-piercing theory where "defendants were formed for legal purposes and engaged in legitimate business"], affd as mod, 17 NY3d 208 [2011]). And the vague allegations that ACIS 2014-3 is being used to render Highland CLO Management "judgment proof" (PAC ¶¶42-44) are also unavailing. To the extent ACIS 2014-3 is "a repository to store assets that were, in reality, managed and controlled by Highland CLO Management, LLC" (*id.* ¶¶42, 44), NWCC – a sophisticated commercial entity – knew about that structure from the outset of the transaction and chose to contract only with Highland CLO Management (*see* PAC ¶¶3, 28, 39; s*ee Skanska*, 146 AD3d at 12-13 [dismissing veil-piercing claim where "plaintiff, a sophisticated party, admits that it knowingly entered into

the CM Agreement with B2 Owner" and "cannot now claim that it was tricked into contracting with B2 owner only and thus should be allowed to assert claims against Forest City."]).[2]

The alter-ego theory is indispensable to NWCC's claims against ACIS 2014-3, providing the alleged basis for both personal jurisdiction as well as the underlying contract liability (*e.g.*, PAC ¶37 ["[ACIS 2014-3] was, at all times relevant to this Amended Complaint, used to carry on Highland CLO Management, LLC's business . . . ."]). The PAC's failure to plead facts sufficient to allege alter-ego liability therefore doubly dooms the case against ACIS 2014-3, as a threshold failure to allege personal jurisdiction and also as a failure to state a cause of action.

Finally, as in the other motion, ACIS 2014-3 once again seeks sanctions against NWCC, this time in the form of a cross-motion, for what ACIS 2014-3 perceives as frivolous conduct. For the same reasons noted above, the cross-motion is denied.

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Accordingly, it is

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[2] To be sure, in some cases, "[a]llegations that corporate funds were purposefully diverted to make it judgment proof . . . are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter-ego theory" (*Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407-08 [1st Dept 2014]). But this is not one of those cases. The PAC does not allege that Highland CLO Management purposefully funneled assets to ACIS 2014-3 to frustrate NWCC's enforcement of a judgment (akin to a fraudulent conveyance claim). Instead, NWCC infers nefarious intent from the structure of the entities – the very structure that, as noted, NWCC bargained for in the transaction (*see, e.g.*, PAC ¶3 ["The purpose of the transaction memorialized in the Master Agreement was for NWCC to provide money, through [entities collectively defined as "Highland"], as part of a 'reset' . . . of the debt of another Defendant in this suit, ACIS CLO 2014-3 Ltd."]).

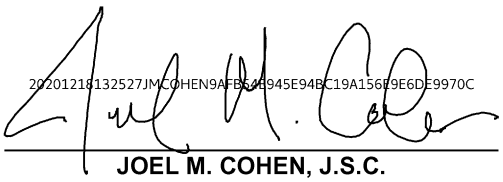
ORDERED that the branch of ACIS 2014-3's motion to dismiss (Motion Seq. No. 6) seeking to dismiss the Complaint is **GRANTED**, and the Complaint is hereby dismissed as to Defendant ACIS 2014-3, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED that the branch of ACIS 2014-3's motion to dismiss (Motion Seq. No. 6) seeking the imposition of sanctions is **DENIED**; it is further

ORDERED that NWCC's motion for leave to amend the Complaint (Motion Seq. No. 8) is **DENIED**; and it is further

ORDERED that ACIS 2014-3's cross-motion for sanctions (Motion Seq. No. 8) is **DENIED**.

This constitutes the decision and order of the Court.



12/18/2020
DATE

JOEL M. COHEN, J.S.C.

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