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COURT OF APPEALS

STATE OF NEW YORK

CONASON, et al.,

Respondents,

-against-

No. 14

MEGAN HOLDING, LLC, et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
January 13, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

CHIEF JUDGE LIPPMAN: Number 14, Conason v.

Megan Holding.

Counselor, would you like any rebuttal
time?

MR. SHEIKH: Yes, Your Honor, three
minutes, please.

CHIEF JUDGE LIPPMAN: Three minutes for
rebuttal time. Go ahead. You have it.

MR. SHEIKH: May it please this honorable
court and its honorable judges, my name is Umar
Sheikh and together with my co-counsel, Misha Wright,
we're of the firm, Marino Partners LLP, and represent
the appellants, Megan Holding, LLC and Emmanuel Ku.

CHIEF JUDGE LIPPMAN: Counsel, what was
decided in the Housing Court proceeding?

MR. SHEIKH: The Housing Court proceeding,
the only thing that was decided was a warranty of
habitability claim.

CHIEF JUDGE LIPPMAN: But was there a
finding of - - - of - - - that there was considerable
evidence of fraud on your client's part?

MR. SHEIKH: The judge made what we
consider to be dicta, Your Honor, because those
findings were not necessary to the judgment on the

1 warranty of habitability.

2 CHIEF JUDGE LIPPMAN: So if it's only
3 habitability, it's - - - it's not the overcharge
4 issue, and your basic argument is that therefore you
5 should be able to - - - you do contest a fraud, and
6 you should be able to raise it, and the judge's
7 findings in that regard were not relevant to that - -
8 - not not relevant, but were dicta in relation to
9 habitability.

10 MR. SHEIKH: Yes, Your Honor. Our position
11 is that there's no collateral estoppel effect - - -

12 CHIEF JUDGE LIPPMAN: Right.

13 MR. SHEIKH: - - - so that the trial court
14 - - -

15 CHIEF JUDGE LIPPMAN: You should be able to
16 argue that issue now.

17 MR. SHEIKH: Correct, and that - - - and
18 that would be subject to a trial.

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. SHEIKH: Now, interestingly, what does
21 have collateral estoppel effect from the Housing
22 Court action is that the lease - - - there was a
23 finding that there was a lease here, and that was
24 necessary in order to provide the respondents with a
25 warranty of habitability award.

1 CHIEF JUDGE LIPPMAN: What about the
2 piercing the corporate veil, is that - - - is that
3 established through what the Housing Court judge did?

4 MR. SHEIKH: No, not at all, Your Honor.
5 There was no claim in the Housing Court for piercing
6 the corporate veil. That claim was first interposed
7 in the Supreme Court. We have raised a statute of
8 limitations defense to the piercing claim itself, but
9 in addition, our second argument is that the piercing
10 claim could not possibly have been subject to a
11 summary judgment finding, because there were issues
12 of fact on - - - on - - - on both sides. And the
13 trial court here made the determination on a piercing
14 claim based on almost nothing except that the
15 principal was a ninety-nine percent owner of the
16 subject entity.

17 CHIEF JUDGE LIPPMAN: Well, she's looking
18 at what she has in front of her and she's making
19 certain findings. You're saying they're gratuitous,
20 basically?

21 MR. SHEIKH: Well, Your Honor, I think, you
22 know, based - - - based on the conflicting affidavits
23 or the supporting affidavit given by Mr. Ku, you
24 know, he gives support for what the respondents claim
25 is a - - - is enough to pierce the corporate veil.

1 JUDGE RIVERA: Well, he didn't commingle
2 funds from the LLCs?

3 MR. SHEIKH: No. Our position is not - - -

4 JUDGE RIVERA: Never?

5 MR. SHEIKH: No. Our position - - - what
6 Mr. Ku says in his affidavit is that funds are taken
7 from one LLC - - -

8 JUDGE RIVERA: Right.

9 MR. SHEIKH: - - - right - - - back into
10 his personal name. And then he uses them to fund
11 other LLCs. That's not commingling. That's not - -
12 - I am taking rent that is - - -

13 CHIEF JUDGE LIPPMAN: The judge thought it
14 was commingling, didn't she?

15 MR. SHEIKH: I - - - I think that's subject
16 to an expert, Your Honor. And there's no expert
17 determination here.

18 JUDGE PIGOTT: But what expert do you
19 expect to call - - -

20 MR. SHEIKH: The expert we're - - -

21 JUDGE PIGOTT: - - - expect them to call?

22 MR. SHEIKH: It would have to - - - I think
23 the respondents would have to call a forensic
24 accountant to establish any type of commingling.

25 JUDGE PIGOTT: Isn't it a legal question?

1 MR. SHEIKH: Whether there's commingling?

2 JUDGE PIGOTT: I agree with you it's facts,
3 but I mean, other than that, you got a corporation
4 and you got activity, I - - - what do you need an
5 accountant for?

6 MR. SHEIKH: Well, I think, you know,
7 because - - - I think it goes beyond that, Your
8 Honor. The issue is - - - what - - - if - - - in
9 order to establish commingling, the first step, like
10 you're saying, is to establish the facts that there
11 was commingling. The respondents haven't done that.
12 What they've shown is that there are a lot of
13 transfers, you know, regard - - - you know, around
14 all of these corporations. But they've never
15 established - - -

16 JUDGE RIVERA: Well, there's no dispute you
17 have complete - - - your client has complete control
18 and dominion over all the corporations, correct?

19 MR. SHEIKH: He's the ninety-nine per - - -

20 JUDGE RIVERA: There's no dispute that he
21 does indeed use funds from one LLC for paying off
22 bills and for the use and benefit of another LLC. Is
23 that correct?

24 MR. SHEIKH: That is disputed, Your Honor.

25 JUDGE RIVERA: All right, so - - - that's

1 disputed?

2 MR. SHEIKH: That is disputed.

3 JUDGE RIVERA: I thought you just said he
4 took one from one LLC, gave - - - put - - - put it in
5 his own account, and then used it to pay off another
6 LLC. How's is that not what I just described?

7 MR. SHEIKH: From a taxation point of view,
8 once he takes it from the LLC, he's taking a
9 withdrawal from one LLC, and then he's making a
10 contribution. Once he takes the money out of one
11 LLC, it's not that LLC's funds anymore. He's created
12 a taxable event - - -

13 JUDGE RIVERA: Is it not possible the
14 judge, as a matter of law, could disagree with that
15 particular characterization and conclude that that's
16 commingling?

17 MR. SHEIKH: Well, I'm sure the judge
18 could. But that's what we dispute.

19 JUDGE RIVERA: Is there not a lack of
20 corporate formalities when you do that with the
21 funds?

22 MR. SHEIKH: I don't think so. And that
23 was never established. It was never established
24 whether these - - - these transactions were or
25 without corporate formalities.

1 JUDGE ABDUS-SALAAM: Well, counsel, going
2 back to when your - - - your client held - - - he was
3 a ninety-nine percent owner of this LLC, right? He
4 had a ninety-nine percent share of the ownership?
5 Was that during the time of the transactions involved
6 here, the 2009 to 2011? Was he the ninety-nine
7 percent owner at that point?

8 MR. SHEIKH: At that point in time, either
9 ninety-nine percent or a hundred percent.

10 JUDGE ABDUS-SALAAM: Okay.

11 MR. SHEIKH: I don't remember from the
12 record, Your Honor. But - - - but certainly - - -

13 JUDGE ABDUS-SALAAM: But you - - - you have
14 an argument - - -

15 MR. SHEIKH: - - - at least ninety-nine.

16 JUDGE ABDUS-SALAAM: - - - that he - - - he
17 was not in dominion and control of this corporation
18 at the time of the actual transactions. And is that
19 based on - - - what is that based on?

20 MR. SHEIKH: I don't think our argument is
21 that he didn't have dominion and control during the
22 time. The argument is that the - - - the
23 transactions that the respondents point to as
24 evidence of commingling and piercing occur well after
25 the events complained of. So this is not commingling

1 or fraud taking place in 2003. The commingling - - -
2 if it is - - - is based on bank statements from 2011
3 forward.

4 JUDGE ABDUS-SALAAM: So you're saying for
5 these taxable events that you were talking about, he
6 wasn't doing that back in 2003, 2005, 2009. He just
7 decided to do that in 2011 or - - -

8 MR. SHEIKH: There's no - - -

9 JUDGE ABDUS-SALAAM: - - - or beyond?

10 MR. SHEIKH: There's no evidence in this
11 record of that, Your Honor, that he was - - - what -
12 - - what - - - there was - - - this record does not
13 include any bank statements from 2003 or any evidence
14 of financial transactions from 2003.

15 JUDGE RIVERA: Counsel, your white light is
16 on. Could you address the statute of limitations
17 issue, please?

18 MR. SHEIKH: Yes, Your Honor. I think the
19 statute of limitations issue is very clear. The
20 statute is clear and unambiguous. There's - - -

21 CHIEF JUDGE LIPPMAN: But there are
22 precedent to statute - - - precedents to statute of
23 limitations issue is clear?

24 JUDGE READ: In partic - - - well, Thornton
25 and Cintron, didn't we in those cases at least

1 implicitly decide against you on this issue?

2 MR. SHEIKH: I don't think so, Your Honor.

3 In - - -

4 JUDGE READ: Explain why not.

5 MR. SHEIKH: Well, in both of those cases,
6 Thornton, Grimm, Cintron, the statute of limitations
7 in, at least in this context, was not at issue.

8 JUDGE READ: Well, I understand that. But
9 didn't we implicitly have to decide against you on
10 this - - - to make the decisions we did in those
11 cases? I think Judge Smith even said something about
12 that in his dissent, did he not?

13 MR. SHEIKH: No, I - - - I disagree, Your
14 Honor. I think this case can be separate from - - -
15 and I see my time has expired. May I answer your
16 question?

17 CHIEF JUDGE LIPPMAN: Separate how?
18 Explain how this case is distinguishable from those
19 cases?

20 MR. SHEIKH: Thornton and Grimm and those
21 line of cases all dealt with damages. It all dealt
22 with how do we determine the - - - the rents, when
23 the base date has been tainted by fraud. Here, we
24 don't get to the base date, because the claim is
25 time-barred. So there's - - - there's not - - -

1 we're not talking about a damages calculation. We're
2 talking about a liability determination.

3 JUDGE PIGOTT: What's the four - - - what's
4 the statute of limitations?

5 MR. SHEIKH: Four years.

6 JUDGE PIGOTT: And - - - and that's based
7 on what statute?

8 MR. SHEIKH: That's based on 213(a), Your
9 Honor, the CPLR.

10 JUDGE PIGOTT: So you're saying be - - -
11 because they filed in September of 2013, they're too
12 late. Their - - - their time expired in April of
13 that year?

14 MR. SHEIKH: Well, the - - - just to
15 correct the dates, the - - - the statute 213(a)
16 provides its own accrual period, making it one of the
17 most clear statute of limitations - - - I - - - if
18 not the clearest statute of limitations that the
19 legislature has ever written. The accrual period
20 starts from the first overcharge alleged, which
21 there's no dispute is November 2003. Four years
22 after that, their acc - - - their statute of
23 limitations expired October 31st, 2007.

24 CHIEF JUDGE LIPPMAN: Counsel, aren't you -
25 - - you're reading that statute in a vacuum when you

1 don't look at how it's been interpreted by the court?

2 MR. SHEIKH: No, Your Honor, I think - - -
3 because I don't think the court has addressed this
4 question yet.

5 JUDGE PIGOTT: Didn't - - - I'm going to
6 repeat what Judge Read said. Judge Smith took
7 umbrage at the majority in - - - in those two cases,
8 saying, you know, the statute is as clear as it can
9 be, and you people keep putting in fraud and, you
10 know, all of these adjectives, as if somehow that
11 abrogates the statute, and it doesn't.

12 But what the majority, it seemed to me, was
13 saying, was that when you got fraud on the front-end,
14 how do we know when the overcharge starts, because
15 you were - - - or not necessarily you, but the - - -
16 the defendant is - - - is defrauding the - - - the
17 plaintiff, and in that way, the court, because we
18 don't know what - - - you know, where to measure.

19 MR. SHEIKH: That's certainly true, but,
20 Your Honor, the distinction in both of those cases is
21 that the rent registration statements were not timely
22 filed or were tainted. Here we have rent
23 registration statements that were filed. There was
24 nothing here preventing the respondents from timely
25 filing their claim.

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 MR. SHEIKH: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: You'll have your
4 rebuttal. Let's hear from your adversary.

5 MR. FISHMAN: May it please the court - - -
6 excuse me - - - my name is James Fishman for the
7 respondents in this case. With me is - - -

8 CHIEF JUDGE LIPPMAN: Counsel, start with
9 the statute of limitations.

10 MR. FISHMAN: Well, Your Honor, I - - - I
11 think the thing that runs through all of these cases,
12 Thornton - - -

13 CHIEF JUDGE LIPPMAN: I know our
14 precedents.

15 MR. FISHMAN: - - - and Grimm, Cintron - -
16 -

17 CHIEF JUDGE LIPPMAN: Explain how this case
18 fits in to those cases.

19 MR. FISHMAN: Well, I think you have to - -
20 - one thing that counsel said is that what - - - what
21 - - - all those cases deal with damages. They don't;
22 they deal with fraud. And fraud is the key issue
23 that runs like a thread through all of these cases.

24 JUDGE READ: Well, it is true - - -

25 MR. FISHMAN: It's landlord misconduct.

1 JUDGE READ: He does have a point, doesn't
2 he, that we didn't explicitly decide the statute of
3 limitations question that's present in this case in
4 those cases.

5 MR. FISHMAN: Well, in Grimm, the - - - the
6 ruling was - - -

7 JUDGE READ: What about Cintron?

8 MR. FISHMAN: I'm sorry?

9 JUDGE READ: What about Cintron?

10 MR. FISHMAN: Cintron is even clearer. In
11 Cintron - - - I - - - I know Your Honor was with the
12 majority in Cintron, where - - - where you could not
13 have a clearer example of landlord misconduct to
14 ignore rent reduction orders for sixteen years.
15 Here, we have proved fraud. We have fraud that was
16 established. We don't have an indicia of fraud like
17 you had in Grimm.

18 JUDGE ABDUS-SALAAM: Counsel, go - - -

19 MR. FISHMAN: We have fraud that was found
20 by a judge.

21 JUDGE ABDUS-SALAAM: Counsel, comment - - -
22 please explain your - - - your position is that the
23 civil court found fraud - - -

24 MR. FISHMAN: Yes.

25 JUDGE ABDUS-SALAAM: - - - and that

1 defendant was - - - or collaterally estopped - - -

2 MR. FISHMAN: Right.

3 JUDGE ABDUS-SALAAM: - - - from challenging
4 that. And he says, no, we weren't collaterally
5 estopped, because the fraud finding was dicta. Why
6 is that - - -

7 MR. FISHMAN: Well, Judge Schneider - - -

8 JUDGE ABDUS-SALAAM: - - - why is that - -
9 -

10 MR. FISHMAN: - - - found that Emmanuel Ku
11 was unbelievable in all regards.

12 CHIEF JUDGE LIPPMAN: Yeah, but she did
13 deal with the habitability.

14 MR. FISHMAN: Yes.

15 CHIEF JUDGE LIPPMAN: It was the basis of
16 that decision, right?

17 MR. FISHMAN: Well, that was the only thing
18 she awarded relief on.

19 CHIEF JUDGE LIPPMAN: How about the
20 overcharge issue?

21 MR. FISHMAN: I understand. And that was
22 the only thing she actually awarded relief on.

23 CHIEF JUDGE LIPPMAN: So what weight do we
24 give to her "findings" on this issue?

25 MR. FISHMAN: I think you have to give

1 substantial weight, because she heard - - - took
2 testimony not only from Mr. Ku directly; she took
3 testimony from three or four other witnesses that we
4 presented that all proved that this fictitious tenant
5 never existed.

6 JUDGE PIGOTT: Okay, but let's assume - - -
7 let's assume you've got an auto accident and you say
8 - - - and the two charges against the defendant are
9 they were speeding and he ran a red light. And the
10 jury comes back and says, we found that he ran a red
11 light. I'm - - - in further proceedings, can you say
12 well, you're collaterally estopped from asserting
13 that you were - - - that - - - that you were
14 speeding?

15 MR. FISHMAN: I don't think that's a - - -
16 a correct analogy, Your Honor, with all respect,
17 because first of all, Judge Schneider had the
18 opportunity to view all of this, and - - -

19 JUDGE PIGOTT: Whatever - - - what - - -
20 but whatever the court chose to do, the only thing
21 she said was, I don't believe you on your - - - on
22 your habitability and that's where I'm going to rule.
23 I am not going to rule on anything else and didn't.
24 So how come - - -

25 MR. FISHMAN: I think you also have to look

1 at why the landlord didn't have the opportunity to
2 present evidence before the Housing Court. The
3 landlord chose not to litigate. He put up his hands
4 and said, I'm not - - - I'm not going to testify; I
5 give up; I'm not going to do anything further. And
6 then he puts in post-trial memo.

7 And the Abady case, which both Judge Kenney
8 and the Appellate Division relied on, said a default
9 judgment under those circumstances is subject to
10 collateral estoppel effect. Now the other issue is
11 this - - -

12 JUDGE PIGOTT: Judgment, judgment. The
13 judgment was on habitability.

14 MR. FISHMAN: I understand.

15 JUDGE PIGOTT: He can not litigate
16 habitability.

17 MR. FISHMAN: Okay. Judge, the other point
18 is this, even without collateral estoppel, there was
19 nothing to stop this landlord from putting in
20 evidence before Judge Kenney in the Supreme Court
21 saying, oh, no, Suzuki Oki exists, and here's proof
22 of it. Oh, no, I did - - - I did all these
23 improvements; here's my receipts. They did nothing.
24 If you look at this record, their response to our
25 summary judgment motion was practically nothing. Mr.

1 Ku sat on his hands - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but the bottom
3 line is that the rent overcharge was dismissed
4 without prejudice.

5 MR. FISHMAN: Exactly. And then it was
6 refiled in the Supreme Court - - -

7 CHIEF JUDGE LIPPMAN: Yeah.

8 MR. FISHMAN: - - - within the time period
9 allowed by the - - -

10 CHIEF JUDGE LIPPMAN: But - - - but how
11 does that impact on these different findings that - -
12 - or whatever you want to call it, that the judge - -
13 -

14 MR. FISHMAN: I think these findings are -
15 - - certainly, even if it's not collateral estoppel,
16 and I submit that it is - - -

17 CHIEF JUDGE LIPPMAN: What if it's - - -
18 what if we agree that it's dicta?

19 MR. FISHMAN: Well, even if it's dicta,
20 it's evidence before Judge Kenney. And Judge Kenney
21 was free to view it for whatever purposes on a
22 summary judgment motion, because it certainly is
23 relevant. It certainly is an identity of parties - -
24 -

25 JUDGE PIGOTT: It's collateral stoppel,

1 isn't it? I mean, it - - - going back to my auto - -
2 - my auto accident thing. You're saying, he was free
3 to say that jury was wrong, and if the jury didn't
4 address it, he could just say, based on that
5 evidence, I'm not letting it in. I - - - I don't
6 know that you could lose your license because a jury
7 - - -

8 MR. FISHMAN: Well - - -

9 JUDGE PIGOTT: - - - didn't make a finding.

10 MR. FISHMAN: - - - certainly the court
11 heard the testimony, heard the evidence - - -

12 JUDGE PIGOTT: One court did.

13 MR. FISHMAN: I'm sorry?

14 JUDGE PIGOTT: One court did.

15 MR. FISHMAN: Yes. And but what I'm saying
16 though is that Mr. - - - Megan and Mr. Ku were
17 certainly free to come before Judge Kenney in the
18 Supreme Court, and say - - -

19 JUDGE PIGOTT: How can you do that?

20 MR. FISHMAN: - - - wait a minute; those
21 things didn't happen. Here's why.

22 JUDGE PIGOTT: I get your point. But what
23 you're saying is that this guy is such a rotten guy,
24 don't - - - don't give him his day in court, because
25 he's just a rotten guy. He - - - nobody believed

1 him, so you - - - you - - - Supreme Court or the
2 Court of Appeals in the State of New York, you can
3 just say, we don't like you - - -

4 MR. FISHMAN: But he had his day in court,
5 Judge.

6 JUDGE PIGOTT: - - - and we're going to
7 rule against you.

8 MR. FISHMAN: He had his day in court and
9 he chose not to use it. He voluntarily chose not to
10 use it.

11 JUDGE PIGOTT: He's the petitioner.

12 MR. FISHMAN: That's the problem here.

13 JUDGE PIGOTT: He was the petitioner. Your
14 counterclaims went forward. And you - - - and you
15 succeeded on one and not on the other.

16 MR. FISHMAN: Well, Judge - - -

17 JUDGE ABDUS-SALAAM: Are you saying, Mr.
18 Fishman, that he had a fair and - - - full and fair
19 opportunity to litigate - - -

20 MR. FISHMAN: Absolutely.

21 JUDGE ABDUS-SALAAM: - - - the issue of
22 fraud?

23 MR. FISHMAN: He had four lawyers in that
24 case.

25 JUDGE PIGOTT: Yeah, but you had everybody

1 there and the judge dismissed it.

2 MR. FISHMAN: Well - - -

3 JUDGE PIGOTT: So why are we supposed to be
4 bound by it?

5 MR. FISHMAN: Well, I think, Judge, that
6 because he had a full and fair opportunity and
7 because - - -

8 JUDGE PIGOTT: But it was your burden. It
9 was your burden and you didn't meet it - - -

10 MR. FISHMAN: Well - - -

11 JUDGE PIGOTT: - - - because the judge said
12 - - -

13 MR. FISHMAN: Well - - -

14 JUDGE PIGOTT: - - - I'm not - - -

15 MR. FISHMAN: - - - because there was a
16 document that wasn't submitted, which was submitted
17 in Supreme Court. Had that document - - -

18 JUDGE PIGOTT: Whatever reason - - -

19 MR. FISHMAN: - - - been submitted, I
20 suspect this never would have come before this court.
21 However, the issue is, again, they had every
22 opportunity in response to the Supreme Court action
23 to come forward with facts in response to a summary
24 judgment motion. Their obligation is to lay bare
25 their proof. They didn't do it. They didn't come

1 forward with anything. We - - -

2 CHIEF JUDGE LIPPMAN: And they should be
3 precluded from doing it now?

4 MR. FISHMAN: Absolutely. Because they had
5 the - - - they had two chances to do it. They had a
6 chance to do it in Housing Court and they chose not
7 to. And then in Supreme Court, they put in a three-
8 page affidavit for Mr. Ku which said nothing about
9 Suzuki Oki, about the fictitious repairs, about the
10 fictitious rents, about not providing the rent
11 stabilization rider.

12 He was silent. That's the opportunity. If
13 he doesn't - - - if he wants to avoid collateral
14 estoppel, give the court some facts to - - - to rely
15 on to say, okay, you're right. We're not going to
16 rely on Judge Schneider, but give us something.
17 There was nothing there. It's empty.

18 JUDGE ABDUS-SALAAM: Counsel, in the veil-
19 piercing issue - - -

20 MR. FISHMAN: Yes.

21 JUDGE ABDUS-SALAAM: - - - your position
22 here is that Mr. Ku was, you know - - - he - - - he
23 dominated this corporation - - -

24 MR. FISHMAN: Yes.

25 JUDGE ABDUS-SALAAM: - - - and let's assume

1 for the purposes of this discussion that it was
2 during the relevant time period that these
3 transactions were going on. What if there were other
4 persons involved in the LLC and maybe there had been
5 some shifting of responsibilities over time, how
6 would we decide a veil-piercing issue, you know, a
7 question on - - - on facts like that? Not when you
8 have a hundred percent owner, but - - -

9 MR. FISHMAN: Well, I'm not sure - - -

10 JUDGE ABDUS-SALAAM: - - - a ninety-nine
11 percent owner.

12 MR. FISHMAN: - - - I can answer that,
13 because that's not what happened here. But clearly,
14 Mr. Ku was either ninety-nine or hundred percent the
15 owner, and one - - - one specific thing that - - -
16 that counsel for appellants has always tried to
17 ignore, but it's really the smoking gun document
18 here, and I ask the court to refer to page 242 of the
19 record, which is the application that Mr. Ku
20 submitted personally for a loan from the New York
21 Community Bank, and this was in August of '09, which
22 is only four months after he filed a nonpayment
23 proceeding against my clients in the Housing Court.

24 And on page 242 of the record, there's a
25 section for a schedule readily marketable secured - -

1 - I'm sorry; I'm reading the wrong page. It's 244.
2 There's a column for assets, and under the column
3 "solely owned", meaning by the applicant, he lists
4 seventeen different properties, which are actually
5 all LLCs. And he says, those are worth sixty-six
6 million dollars.

7 JUDGE PIGOTT: But that's true. He owns
8 them all.

9 MR. FISHMAN: Well, the LLCs do, actually.

10 JUDGE PIGOTT: Well, that - - - you see,
11 you're fighting over whether or not you can list that
12 as - - - as a - - - something you can list on a
13 credit statement.

14 MR. FISHMAN: Well - - -

15 JUDGE PIGOTT: Now, maybe - - - maybe
16 you're right, maybe you're wrong, but the bank is the
17 one that gets to decide that. It's - - - it's sort
18 of like when you talk about the taxes.

19 MR. FISHMAN: But it's disregarding the
20 corporate forum, Judge.

21 JUDGE PIGOTT: Because of the fraud, the
22 IRS - - - the IRS has got a claim - - -

23 MR. FISHMAN: Right.

24 JUDGE PIGOTT: - - - but that doesn't mean
25 that whatever happens with the corporations, you can

1 crash the - - - the corporate veil's been very tough
2 to crack.

3 MR. FISHMAN: The standard is disregarding
4 the corporate forum and causing harm. And this is a
5 - - - as clear an example of disregarding the
6 corporate forum I can think of to say I personally
7 own all these buildings.

8 JUDGE PIGOTT: But that - - - that's
9 something for the bank to complain about.

10 MR. FISHMAN: Well, it may be, but this is
11 how he runs his business generally.

12 JUDGE PIGOTT: But if - - - if somebody
13 owns twelve taxis - - - you know, we - - - you know,
14 the whole black and white taxi stuff - - - and they
15 want to list them for the next time they want to
16 borrow some money from the bank, you can't say, oh,
17 ho, now all of these taxis are responsible for my
18 accident when I got run down by the taxi. We're
19 going to say you can't do that, because you - - - you
20 know, that's not sufficient to - - - to - - - to
21 pierce the corporate veil, is it?

22 MR. FISHMAN: Well, I think, you know, you
23 have to look at the whole host of things that were -
24 - - that were listed in our brief - - -

25 JUDGE PIGOTT: Right, and you did - - - and

1 you got a summary judgment - - -

2 MR. FISHMAN: - - - and that we did.

3 JUDGE PIGOTT: - - - that's what - - -

4 MR. FISHMAN: I understand. But he didn't
5 produce anything in response. Again, he's - - - he
6 had a one paragraph - - -

7 JUDGE PIGOTT: But you have to establish
8 your entitlement to a judgment as a matter of law - -
9 -

10 MR. FISHMAN: Yes.

11 JUDGE PIGOTT: - - - before they have to
12 come up - - -

13 MR. FISHMAN: It's a legal issue, Your
14 Honor.

15 JUDGE PIGOTT: And you believe you - - -
16 you believe you established your - - - your
17 entitlement?

18 MR. FISHMAN: Yes, I do, Judge, and I think
19 it's a legal issue, which the judge was entitled to
20 rule on, based upon what was presented to her - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel, we
22 understand your argument.

23 MR. FISHMAN: Okay.

24 CHIEF JUDGE LIPPMAN: Let's hear rebuttal
25 from the other side.

1 MR. FISHMAN: Thank you.

2 CHIEF JUDGE LIPPMAN: Thank you, counselor.

3 Counselor?

4 JUDGE PIGOTT: Your clients were pretty

5 quiet.

6 MR. SHEIKH: Your Honor, I think with
7 regard to that financial statement, I think you hit
8 the nail on the head. You know, that's a document
9 that's submitted to the bank, and really the only one
10 that can complain whether that document is being used
11 to further fraud is the bank.

12 CHIEF JUDGE LIPPMAN: Yeah, but can - - -
13 who - - -

14 JUDGE PIGOTT: Did he make that argument?
15 Pardon me.

16 CHIEF JUDGE LIPPMAN: No, I was just going
17 to say the same thing.

18 JUDGE RIVERA: Yeah.

19 MR. SHEIKH: I'm sorry.

20 JUDGE PIGOTT: I made that argument. Did
21 he?

22 MR. SHEIKH: No, and - - - and exactly. I
23 think - - - I think it's for the bank to complain
24 about that.

25 JUDGE PIGOTT: But I'm not sure I heard

1 that in - - - in his affidavits - - - in opposition
2 to their motion.

3 MR. SHEIKH: No, that was not in Mr. Ku's
4 affidavit.

5 JUDGE PIGOTT: You can't rely on me.

6 MR. SHEIKH: But I mean I will say this,
7 the - - -

8 CHIEF JUDGE LIPPMAN: Why didn't you
9 contest these - - - these issues - - -

10 MR. SHEIKH: The piercing the co - - -

11 CHIEF JUDGE LIPPMAN: - - - before the
12 court?

13 MR. SHEIKH: The piercing the corporate
14 veil issue was contested. In - - - in that three-
15 page affidavit from Mr. Ku, he explains all of the
16 issues that the respondents say are the basis for
17 piercing the corporate veil.

18 One of the things that they say is that all
19 these corporations share the same addresses over the
20 years. And he says, absolutely, because I have a
21 management company that is used to run all of these
22 companies, and so it's a central place for all these
23 companies to, you know - - - for the rents to come in
24 and for us to process everything, and that's - - -
25 that's why there's the same address.

1 Do they have the same phone number? The
2 management company uses one phone number. The LLCs
3 don't have their own phone number, because they're
4 single-purpose entity LLCs. There would be no point
5 for any of these LLCs to have a phone number, because
6 nobody calls them. All right? They call the
7 management company that runs the building for them.

8 But I think - - - and - - - and in that
9 affidavit he spells out - - - he - - - and he talks
10 exact - - - also about the - - - about the
11 transactions, where he says, look, this is not
12 commingling, right? And I think that, you know,
13 based on this record - - -

14 JUDGE RIVERA: But again - - - but the
15 judge could have rejected that as a matter of law.

16 MR. SHEIKH: Well, I think it's an issue of
17 fact, right? Whether there's - - -

18 JUDGE RIVERA: Not - - - not if you - - -
19 not if your client agrees that this is how he used
20 the funds and he characterizes it as something else.

21 MR. SHEIKH: I think commingling to me,
22 Your Honor, is something like - - - so rent comes in
23 for Megan Holding, right? It's - - - it's Megan
24 Holding's rent, right? And then Megan Holding starts
25 paying bills for Guru Holding, right? Now that's

1 clearly Megan's money and it's used - - - being used
2 to pay Guru Holding's bills, you know, I think that
3 may be commingling.

4 JUDGE ABDUS-SALAAM: You're saying what
5 happens here with your client is that Megan Holding
6 gets money, contributes it - - - contributes that
7 money to Guru Holding, so Guru Holding can pay its
8 own bills.

9 MR. SHEIKH: No, it - - -

10 JUDGE ABDUS-SALAAM: Is that - - - is that
11 what you're saying now?

12 MR. SHEIKH: - - - it doesn't go directly
13 from Megan to Guru. It goes from Megan, right, and -
14 - -

15 JUDGE ABDUS-SALAAM: To the management
16 company?

17 MR. SHEIKH: Not to the management company.
18 To Mr. Ku. He takes the distribution. Right? So
19 I'm saying now, once he takes the distribution,
20 that's his money.

21 JUDGE ABDUS-SALAAM: And then he
22 contributes it to - - -

23 MR. SHEIKH: And then he contributes to
24 Guru Holding.

25 JUDGE ABDUS-SALAAM: Guru.

1 JUDGE RIVERA: And what - - - what does
2 that mean, he contributes? What is that?

3 MR. SHEIKH: It - - - he's investing money
4 into that LLC. So you can imagine some of these
5 buildings have more tenants than others. Some of
6 them are big buildings; some of them are small. Some
7 of them are cash-rich entities. Some of them are - -
8 - are completely - - - you know, from a cash point of
9 view, they may be - - -

10 JUDGE RIVERA: It sounds - - - it sounds
11 like he controls the entire Monopoly board.

12 MR. SHEIKH: Well - - -

13 JUDGE RIVERA: And he's just moving pieces
14 around.

15 MR. SHEIKH: Exactly. But to make the
16 distinction that it's not commingling. I see, Your
17 Honors, my time has expired.

18 CHIEF JUDGE LIPPMAN: That's okay. Finish
19 your answer to Judge Rivera's question.

20 MR. SHEIKH: But that - - - that would be
21 the difference between commingling. But then there's
22 the second issue is that even if he's doing that, how
23 is that defrauding the respondents here? What would
24 be defrauding the respondents - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. SHEIKH: - - - is if he's - - - if he's
2 taking the money and leaving the LLC without
3 sufficient - - -

4 CHIEF JUDGE LIPPMAN: Okay, thank you both.
5 Appreciate it.

6 MR. SHEIKH: Thank you, Your Honors.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Conason v. Megan Holding, LLC, No. 14, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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