| **Esrail v Pour** |
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| 2011 NY Slip Op 32204(U) |
| July 27, 2011 |
| Supreme Court, Nassau County |
| Docket Number: 020835-10 |
| Judge: Timothy S. Driscoll |
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**SUPREME COURT-STATE OF NEW YORK**
**SHORT FORM ORDER**
**Present:**

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

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**JOSEPH ESRAIL and MASTER HOLDINGS, INC.,**

**Plaintiffs,**

**- against -**

**DAVID E. POUR, ESQ. A/K/A DAVIT ESHAGH POUR,**
**DAVID E. POUR & ASSOCIATES, LLP,**
**ROMINA POUR,**
**MOUSSA YEROUSHALMI a/k/a MIKE YEROUSH,**
**A1 UNIVERSAL CONSTRUCTION REALTY, LLC,**
**FARZANEH YERSOUSHALMI,**
**ROKA PROPERTIES CORP. and**
**ROBERT KAHEN,**

**Defendants.**

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**TRIAL/IAS PART: 20**
**NASSAU COUNTY**

**Index No: 020835-10**
**Motion Seq. Nos: 1 and 2**
**Submission Date: 6/9/11**

**Papers Read on these motions:**

**Notice of Motion, Affidavit in Support and Exhibits.....x**
**Memorandum of Law in Support.....x**
**Notice of Cross Motion, Affirmation in Support/Opposition,**
**Affidavit and Exhibits.....x**
**Affirmation in Opposition.....x**
**Memorandum of Law in Opposition.....x**
**Reply Affirmation in Support and Exhibits.....x**
**Reply Memorandum of Law in Support.....x**

This matter is before the court on 1) the motion filed by Defendants Roka Properties Corp. ("Roka") and Robert Kahen ("Kahen") on February 8, 2011, and 2) the cross motion filed by Plaintiffs Joseph Esrail ("Esrail") and Master Holding, Inc. ("Master Holding") (collectively "Plaintiffs") on March 22, 2011, both of which were submitted on June 9, 2011. For the reasons set forth below, the Court 1) grants the motion of Defendants Roka and Kahen and dismisses the

seventh cause of action in the Complaint against them; and 2) denies Plaintiffs' cross motion.

BACKGROUND

A. Relief Sought

Defendants Roka and Kahen move for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Complaint against them.

Plaintiffs oppose the motion and cross move for an Order, pursuant to CPLR § 602, consolidating the above-captioned action ("Instant Action") with a related matter titled *Roka Properties Corp. v. Master Holding, Inc. and Joseph Esrail et al.*, Nassau County Index Number 21782-10, currently pending before the Honorable Ute W. Lally ("Foreclosure Action"). Roka and Kahen oppose Plaintiffs' motion.

B. The Parties' History

On November 22, 2010, Defendant Roka, as mortgagee, commenced the Foreclosure Action against Master Holdings and Esrail ("Mortgagors"), to foreclose a mortgage ("Mortgage") on property ("Property") located at 3 Harbor Park Drive, Port Washington, New York,[1] executed by Master Holdings on January 5, 2007. Esrail, as principal of Master Holdings, personally guaranteed the Mortgage. Master Holdings also executed and delivered a promissory note in the amount of $1,200,000.00 in favor of Roka.

The complaint in the Foreclosure Action (Ex. C to Soleymanzadeh Aff. in Supp./Opp.) alleges that Master Holdings defaulted under the Mortgage. The Mortgagors served an Answer with Affirmative Defenses and Counterclaims in the Foreclosure Action (*id.*) in which they asserted affirmative defenses including unclean hands, laches and estoppel. The motion for summary judgment of foreclosure filed by the plaintiffs in the Foreclosure Action is pending before Justice Lally.

In the Instant Action, commenced on November 5, 2010, Plaintiffs allege, *inter alia*, that, under the influence and direction of Defendant David E. Pour, Esq. ("David Pour"), Plaintiffs agreed to participate in the purchase of the Property in reliance on David Pour's representations that the Property was a "good deal" (Compl. at ¶ 27) and Plaintiffs would quickly realize a

[1] The Complaint in the Instant Action describes the Property as being located at 3 **Harbour** Park Drive.

substantial profit from the investment (*id.* at ¶ 29). Plaintiffs further allege that they agreed to the loan that is the subject of the Foreclosure Action "under the influence and direction" of David Pour (*id.* at ¶ 48).

The Complaint in the Instant Action asserts seven causes of action: breach of fiduciary duty, negligence and undue influence against David Pour, (first, second, third causes of action); misrepresentation and fraud against David Pour and Defendant A1 Universal Construction Realty, LLC ("A1 Universal") (fourth and fifth causes of action); and unjust enrichment against Defendants Romina Pour, the wife of David Pour, and Farzaneh Yersouchalmi, the wife of Defendant Moussa Yersouchalmi, the controlling officer, director, shareholder of defendant A1 Universal (sixth cause of action).

The seventh cause of action, which seeks to pierce the corporate veil, is asserted against Roka and A1 Universal. Plaintiffs allege that Kahen, the "alter ego" of Roka (Compl. at ¶ 124), used Roka "simply and for no other reason than as a tax and credit shelter (*id.* at ¶ 125)." Plaintiffs allege that, as a result, "all causes of action asserted against Roka are hereby imputed on and asserted against Defendants [sic] Robert Kahen" (*id.* at ¶ 124).

B. <u>The Parties' Positions</u>

Roka and Kahen submit, *inter alia*, that 1) the only claim asserted against them, a cause of action to pierce the corporate veil, is not a valid independent claim; 2) Plaintiffs' failure to state a viable independent claim against Roka necessarily implies that there are no causes of action to impute to Kahen; 3) any allegations regarding Roka or Kahen are either false, conclusory or otherwise insufficient to support claims against Roka or Kahen, as demonstrated, *e.g.*, by documentation refuting Plaintiffs' allegation that David Pour is a controlling officer, director and shareholder of Roka; 4) Plaintiffs have not alleged any specific misrepresentations or wrongdoing related to Roka, or alleged other improper conduct by Roka or Kahen; and 5) even assuming, *arguendo*, that the alleged misrepresentations were made, Plaintiffs disclaimed reliance on those misrepresentations pursuant to specific applicable language in the loan documents they executed, including language in paragraph 18.3 of the Mortgage (Ex. E to Kahen Aff. in Opp./Supp.) that "[n]o party is relying upon any oral agreement or other understanding not expressly set forth in the Loan Documents."

Esrail affirms, *inter alia*, that 1) David Pour never disclosed his familial and legal relationship to Roka; and 2) David Pour prepared the loan and Mortgage documents on behalf of Roka. Plaintiffs submit that "Pour and ... Roka have colluded with each other and are attempting to acquire the [P]roperty for themselves in the amount of Plaintiff's alleged loan of $1.2 mm through the foreclosure process" (Soleymanzadeh Aff. in Supp./Opp. at ¶31). Plaintiffs argue that the Court should deny Defendants' motion to dismiss on the grounds that discovery may reveal further details about the Defendants' relationship and provide Plaintiffs with grounds to amend the Complaint to include additional information in support of their claims against Roka and Kahen.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B . . Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 66 A.D.3d at 126, citing *Matter*

*of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton,* 66 A.D.3d at 126, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton,* 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

A separate cause of action to pierce the corporate veil does not exist independent from the claims asserted against the corporation. *9 East 38th Street Associates, L.P. v. George Feher Associates, Inc.*, 226 A.D.2d 167, 168 (1st Dept. 1996. Rather, it is an assertion of facts and circumstances which will persuade the court to hold the owners liable for a corporation's obligations. *Old Republic Nat. Title Ins. Co. v. Moskowitz*, 297 A.D.2d 724, 725 (2d Dept. 2002), quoting *Matter of Morris v. N.Y.S. Dept. Of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993).

C. Application of these Principles to the Instant Action

Viewing the Complaint liberally and in the light most favorable to Plaintiffs, the Court concludes that the allegations are insufficient to sustain the sole cause of action against Kahen and Roka, based on piercing the corporate veil. Plaintiffs have not alleged wrongful conduct by Roka, or facts supporting personal liability of Kahen for Roka's conduct, assuming that it were wrongful. Moreover, the Court denies Plaintiffs' application to hold Defendants' motion in abeyance pending further disclosure that might reveal, *inter alia*, conversations between Defendants David Pour and Roka based on the Court's conclusion that the sole cause of action against Roka and Kahen for piercing the corporate veil is not a viable independent cause of action.

In light of the Court's dismissal of the Instant Action against Defendants Roka and

Kahen, the Court denies Plaintiffs' motion to consolidate.

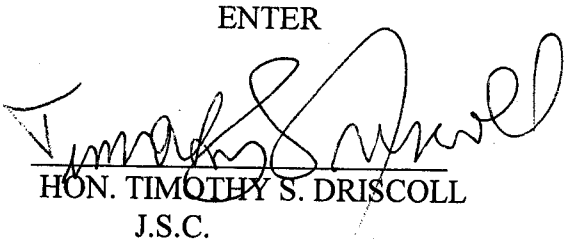
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for Plaintiffs and counsel for the remaining Defendants to appear before the Court for a Preliminary Conference on September 7, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
July 27, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 03 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE