RPH Hotels 51st St. Owner, LLC v Icon Parking Holdings, LLC
2023 NY Slip Op 31370(U)
April 25, 2023
Supreme Court, New York County
Docket Number: Index No. 654030/2021
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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RPH HOTELS 51ST STREET OWNER, LLC,RPH HOTELS 48TH STREET OWNER, LLC,MTS NY PROPCO, L.P., MTS NY LESSEE, L.P.,

Plaintiff,

- v -

ICON PARKING HOLDINGS, LLC,HJ PARKING LLC,ZENITH PARKING LLC,CIRCLE PARKING LLC,JOHN DOES 1-20

Defendant.

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INDEX NO. 654030/2021

MOTION DATE 04/18/2023

MOTION SEQ. NO. 002 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 90, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 119, 120, 122, 153, 154, 155

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 156, 157, 158, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 159, 160, 161, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201

were read on this motion to/for JUDGMENT - SUMMARY.

Motion Sequence Numbers 002, 005 and 006 are consolidated for disposition. Plaintiffs RPH Hotels 51st Street Owner LLC and RPH Hotels 48th Street Owner LLC's motion (MS002) for summary judgment against defendants Icon Parking Holdings LLC, HJ Parking LLC and Zenith Parking LLC is granted in part. Plaintiff RPH 48th Street Owner LLC's motion (MS005) for summary judgment against defendants Icon Parking Holdings, LLC and Zenith Parking LLC is granted in part. Plaintiffs MTS NY Propco, L.P. and MTS NY Lessee L.P.'s motion (MS006)

for summary judgment against defendants Icon Parking Holdings, LLC and Circle Parking LLC is granted in part.

Background

This consolidated action arises out of three parking garages operated by defendants who entered into leases with plaintiffs (landlords). Defendant Icon Parking Holdings, LLC ("Icon") is the parent company for each of the garage LLCs (referred to hereinafter as "HJ," "Zenith" and "Circle"). In each circumstance, the garages stopped paying rent in 2020 and plaintiffs commenced lawsuits (and later obtained judgments) based on the unpaid rent. The instant action, a consolidation of three separate actions, concerns whether plaintiffs can seek recovery against the parent company Icon.

Plaintiffs claim that they discovered that each of the garage LLCs had no liquidity in their respective bank accounts and that Icon was conducting daily sweeps of the various accounts. These sweeps involved transferring the money from the garage LLC's accounts to an account held by Icon. They argue that this Court should pierce the corporate veil and permit them to recover against Icon because Icon did not respect corporate formalities in how it ran the garage LLCs.

Plaintiffs claim that the CEO of Icon, John Smith, admitted that he was the one who directed the garages to stop paying rent in April and May 2020 and that it was Icon who decided to eventually vacate those garages in 2021. Mr. Smith claimed at his deposition that Icon manages the garages (NYSCEF Doc. No. 54 at 30). He explained that involves "paying rent, providing lender credits, providing insurance, whether it's Workers' Comp, whether its damage insurance. Paying bills. Providing customer service. And providing technology resources, et cetera" (*id*. at 30-31).

Plaintiffs insist that Icon and HJ have the same address as well as overlapping officers, directors, and personnel. They stress that the garages did not have any of their own officers or directors and were simply an arm of Icon. Moreover, Icon filed consolidated tax returns for each of the garage LLCs; the entities did not even file their own taxes.

With respect to the daily sweeps, Mr. Smith explained that Icon utilizes a centralized cash management system which provides services for "collection, management and disbursement of funds used in the operation of the parking garage entities" (*id*. at 50). Plaintiffs point out that Mr. Smith admitted that Icon paid expenses and payroll for HJ and Zenith from Icon's account (*id*. at 52). Plaintiffs stress that Icon used 'excess"[1] cash (monies left over after expenses were paid) to pay Icon's overhead.

Plaintiffs insist that although the cash sweeps were Icon's common practice prior to when the garage LLCs stopped paying rent, the practice continued thereafter. They maintain that the practice even continued through the time that plaintiffs obtained judgments. In fact, with respect to HJ, plaintiffs insist that the daily sweeps occurred even after a restraining notice was served reflecting a judgment against this entity.

In sum, plaintiffs argue that every factor highlighted shows that the corporate veil should be pierced and that defendants did not treat each garage LLC as a separate entity. Rather, Icon swept the money on a daily basis from all of its garages; then Icon paid whatever bills it chose to pay, on behalf of whatever entity it chose, from this general account. Plaintiffs emphasize that the commingling of funds combined with the fact that the garage LLCs are unable to pay the judgments should permit them to seek recovery against Icon.

[1] The word "excess" is in quotes because, during the time in question, money was only left over to pay overhead and salaries because Icon did not pay the individual garages' rent.

Defendants do not dispute that they used a cash management system or that there were daily sweeps of the garage LLCs' accounts. Instead, they contend that Icon was simply acting as a management company for each garage. Defendants contend that Icon provided an array of management services and that the daily collection of revenue from each of the garages was a legitimate business practice. They stress that they had used this system for years and that plaintiffs are taking an extremely narrow view of this financial structure. Defendants argue that summary judgment is not appropriate because this cash management system was not a fraudulent scheme, which defendants claim is a requirement under Delaware law to pierce a corporate veil. They insist that the garage LLCs were not sham entities.

Defendants argue that complete separation of a parent company and its subsidiaries is not necessary and that the garage LLCs have their own leases, licenses, as well as merchant identification numbers. Defendants argue that a subsidiary need not have different officers or directors in order to take advantage of the corporate form. Defendants claim the financial structure was not designed to commit fraud and that there were no distributions to the ownership of Icon. They observe that the COVID-19 pandemic wreaked havoc on businesses throughout Manhattan and, particularly, parking garages which saw their revenues drop dramatically. Defendants insist they were entitled to pay certain bills and simply did not have enough money to pay rent.

Defendants also contend that the instant motion is premature as they have the right to depose plaintiffs and probe their knowledge about defendants' business practices. They argue it is critical to explore whether plaintiffs, sophisticated landlords, knew about the cash management system used by defendants.

In reply, plaintiffs argue that defendants offer numerous irrelevant assertions, including that the garage LLCs were not formed for an illegitimate purpose, that COVID-19 is to blame or that cash management system is not inherently wrong. They point out that none of the garage LLCs had their own officers, executives, directors, a board, or their own management teams. Plaintiffs insist that Icon's executives managed the day-to-day activities of each garage and that Icon controlled each garage's finances.

Plaintiffs point out that the daily sweeps continued after each garage had stopped paying rent, after each breach of lease lawsuit had started and until the bank accounts were frozen. They claim that millions (in total among all three garage LLCs) were transferred after April 2020. Plaintiffs emphasize that Icon commingled the revenue from each of the garages in its own bank account along with other garages that are not parties to this lawsuit. They even point out that the revenue was used to pay rent for Icon's offices (but not rent for the garages).

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

Veil Piercing

"As an initial matter, the law of the state where a corporation is chartered applies to veil-piercing" (*Sutton 58 Assocs. LLC v Pilevsky*, 189 AD3d 726, 729, 137 NYS3d 359 [1st Dept 2020]). There is no dispute here that defendant Icon is a Delaware entity and so that jurisdiction's law regarding veil piercing must apply.

"[H]owever, the standard is not materially different under Delaware law, which has been interpreted as providing that no single factor could justify a decision to disregard the corporate entity, [rather,] some combination of them [i]s required, and [ ] an overall element of injustice or unfairness must always be present, as well. Under Delaware law, the standard may be restated as: whether the two entities operated as a single economic entity such that it would be inequitable for [a c]ourt to uphold a legal distinction between them" (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174-75, 970 NYS2d 178 [1st Dept 2013]).

There is no doubt, as defendants argue, that claims relying on a corporate veil piercing theory are typically not decided on a motion for summary judgment as such claims often rely on

an analysis of contested facts (*e.g., Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342, 645 NYS2d 786 [1st Dept 1996]). Here, however, the facts are largely uncontested. What remains in dispute is how to interpret those facts.

The Court finds that the record on these motions provides overwhelming evidence to support plaintiffs' veil piercing theory and permit plaintiffs to recover on a breach of contract theory against Icon. The fact is that the depositions of Mr. Smith and Mr. Stiefel (Icon's general counsel) makes clear that Icon did not respect the corporate form. The record shows that Icon dominated and controlled these entities by conducting daily sweeps of the garages' bank accounts into Icon's account, thereby rendering each garage LLC insolvent. And there is no indication that any monies were returned to the garage LLCs. It seems that Icon simply kept the money to pay off other bills, sometimes for other garages and sometimes for Icon's own expenses. Although this practice may have started prior to the pandemic, this practice continued during a time period after Icon stopped paying rent for the garage LLCs and when, eventually, plaintiffs commenced lawsuits to recover the unpaid rent.

Although defendants insist that Icon merely served as a management company for the garages, defendants did not attach a management agreement or anything to show that it acted as an actual management company. There is not even a claim that Icon kept separate accounts for each garage entity and paid the expenses of that garage from that particular garage's revenue. Instead, the financial statements demonstrate, and defendants admit, that the bank accounts of the parking garages were emptied each day (*see* NYSCEF Doc. No. 50) and kept by Icon to spend as it deemed appropriate. The garages did not procure their own insurance and Icon leadership made all the key decisions, including that these entities would stop paying rent during the pandemic. The garages did not even have their own corporate officers (*e.g.*, NYSCEF Doc. No.

133 at 9 [Stiefel deposition admitting that Zenith did not have any corporate officers]). Taken together, these factors support plaintiffs' breach of contract claims under a veil piercing theory. Clearly, Icon had complete domination and control over the garage entities and acted as a single economic entity.

The Court rejects defendants' claim that because this financial structure was used for a long time, it cannot form the basis of plaintiffs' claims. That argument misses the point—as defendants point out, the pandemic caused many businesses to suffer financial hardship. Here, the garages stopped paying rent but, critically, they were open and generating some revenue. That revenue was then swept to the parent company's account where it was commingled with other garage revenues to pay whatever bills Icon wanted to pay and ignore whatever bills Icon decided not to pay. Mr. Smith acknowledged that the money in the account "could be used to provide administrative services that the support center provides to all garages and pay[] all indirect overhead" (NYSCEF Doc. No. 134 at 128).

This is another key point—there is no evidence that the funds from each garage were separated once swept to Icon. Instead, Mr. Smith admitted there were used to make payments for all garages under Icon's control, and for Icon's expenses. This admission exposes the lack of merit regarding Icon's claim that it was merely providing management services (without a formal agreement). The Court is not aware of a single situation where a management company responsible for multiple clients used funds generated from multiple clients to pay other clients' bills. That suggests that Icon was utilizing the garages as, essentially, a single entity with different locations rather than separate corporate entities.

Defendants' claim about intent is simply too narrow a view of veil piercing jurisprudence. The original intent is not irrevocably established when a practice is created.

There is no question that this set up rendered the garage LLCs as judgment proof and unable to pay plaintiffs' judgments while Icon reaped the benefits of each entities' revenue. The Court recognizes defendants' claim that these sweeps would not have made a difference because the revenues earned during the pandemic were not close to the monthly rent payments. But that is not the point—the issue is not that the garage LLCs paid various bills during this time period. The issue is that they transferred all the money they earned to Icon.

Defendants are correct that entities facing financial difficulties must often make hard choices about which bills to pay when their expenses exceed their revenue. That is not what happened here—here, Icon took the money, comingled it, and made its own assessment of which bills (apparently among all the garages) to pay on behalf of all of its subsidiaries. As noted above, a key factor in considering whether to pierce the corporate veil is whether the acts were inequitable. Here, defendants set up a system whereby they rendered each garage LLC as insolvent each day while the parent company held the money in its account and decided which bills were paid and which were not. The garages continued to generate thousands of dollars in revenue while not paying anything in rent only to claim to plaintiffs that they had no assets.

Defendants' reliance on *Park Armory LLC v Icon Parking Sys. LLC* (203 AD3d 442, 160 NYS3d 600 (Mem) [1st Dept 2022]) for the proposition that their cash management system is permissible as a matter of law is without merit. In that case, the Appellate Division, First Department dismissed a veil piercing claim because the plaintiff failed to adequately plead such a theory. The First Department noted that "allegations that the Icon defendants, as parent companies, controlled and performed PAM's executive operations, alone, are insufficient to raise an inference of abuse of the corporate form" (*id.*). Here, plaintiff alleged and proved (and Icon admitted) not only that Icon controlled and performed the garage LLC's operations, but plaintiff

also established (and Icon also admitted) that Icon swept money from each garage into a bank account thereby rendering each garage as insolvent and unable to pay plaintiffs' judgments as its unpaid rent balance continued to accrue. That satisfies plaintiffs' burden on this motion.

The totality of the circumstances before this Court demonstrates a classic example where veil piercing is appropriate. Plaintiffs obtained judgments against the garages only to find that the garages' parent company had siphoned the money away from the garages on a daily basis, leaving the garages with nothing to satisfy these judgments. These transfers, as will be discussed in greater detail below, were not made with adequate consideration.

Plaintiffs' Debtor Creditor Law Claims

In each pleading, plaintiffs also brought claims relating to the Debtor Creditor Law.[2] These including claims under section 273 for fraudulent conveyances and actual fraudulent conveyances, actual fraudulent conveyance under section 274, fraudulent conveyance under section 276 and fraudulent conveyance under section 276-a.

Debtor Creditor Law § 273(a)(2) provides that:

> "(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due."

There is no dispute here that Icon's cash sweeps rendered each of the garage LLCs insolvent and that there was no valid consideration for each transfer. In other words, the garage

[2] Plaintiffs did not seek summary judgment on their unjust enrichment claims.

LLCs did not get any leftover money back from Icon and there was nothing submitted to show that there was a formal management agreement. Instead, Icon took the money and deposited it into its own general account (*see e.g.*, NYSCEF Doc. Nos. 130 and 131 [Zenith's and Icon's bank statements]).

The claim under section 273(a)(1) requires an:

"actual intent to hinder, delay or defraud any creditor of the debtor. . .

(b) In determining actual intent under paragraph one of subdivision (a) of this section, consideration may be given, among other factors, to whether:
(1) the transfer or obligation was to an insider;
(2) the debtor retained possession or control of the property transferred after the transfer;
(3) the transfer or obligation was disclosed or concealed;
(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) the transfer was of substantially all the debtor's assets;
(6) the debtor absconded;
(7) the debtor removed or concealed assets;
(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor" (Debtor Creditor Law § 273[b]).

Many, many of these factors are satisfied here. The transfers were made to Icon, after suits were commenced against the garage LLCs, the transfers rendered the parking garages as nearly or totally insolvent, and there was no consideration for these transfers. In other words, as stated above, the badges of fraud here show actual intent to insulate these garage entities. After all, there is no question that defendants were well aware they had decided to stop paying rent while continuing to keep the garages open. Mr. Smith admitted at his deposition that he made the call to stop paying rent (NYSCEF Doc. No. 134 at 69).

For the reasons stated above, the request for summary judgment on the claims under Debtor Creditor Law § 274 to void the transfers is granted. As are the claims under Debtor Creditor Law § 276 which provide remedies in connection with fraudulent transfers. Defendants correctly pointed out though, that this provision simply provides remedies.

However, the Court denies the request for legal fees under Debtor Creditor Law § 276-a. This relatively new statute provides for legal fees "in limited circumstances. That relief will be available to a judgment creditor who recovers judgment avoiding a transfer, without regard to whether actual intent or constructive intent is established, (i) where the underlying claim was based on a statute that provided for an award of attorney's fees to the prevailing party and (ii) such party has waived attorney's fees or been awarded them by court order or agreement" (James Gadsden and Alan Kolod, 2020 Supplementary Practice Commentaries, Debtor Creditor Law § 276-a). Here, plaintiffs did not point to a statute that provides for an award of legal fees. However, the Court does find that plaintiffs are entitled to legal fees under the terms of the leases.

Discovery

The Court rejects defendants' claim that discovery is required. What plaintiffs knew about the financial strategy, and when they knew it, is not a basis to deny the motion and it is not relevant. That plaintiffs might have known about the cash management system does not insulate defendants from liability. Plus, defendants did not submit any evidence that they ever told plaintiffs that these garage entities, their tenants, had no money at the end of every day after Icon swept away the revenue and therefore the tenants were judgment proof. Moreover, as plaintiffs point out, defendants did not demand any depositions until after the instant motions were filed—

nothing on this record shows that defendants served notices of depositions or even informally requested the deposition of plaintiffs.

Summary

"[H]istorically, incorporation is designed to *limit liability* of owners of the corporation" (*State v Easton*, 169 Misc 2d 282, 289, 647 NYS2d 904 [Sup Ct, Albany County 1995] [emphasis in original]). The tradeoff, of course, is that the corporate form must be respected and entities must be treated as separate corporations. That did not happen on this record. Defendants want it both ways. They want the ability to funnel all of the revenue generated by each of Icon's subsidiaries directly into Icon's account while simultaneously claiming that plaintiffs are limited to satisfying their judgments against these insolvent entities. Of course, it was Icon that caused these entities to be insolvent and it did so while not paying rent and with the knowledge that lawsuits against them were pending for the unpaid rent.

In April 2020, in the middle of a once-in-a-century pandemic, defendants obviously realized that it was unlikely that they would be able to continue to fully pay the rent. That presented them with difficult choices. They could have closed the garages and sought to surrender the properties or, conversely, keep them operating with the realization that they would likely not be able to generate enough revenue. Defendants chose the latter option. However, they also chose to continue the practice of taking all of the revenue from the garage LLCs and depositing that money into Icon's account. This all occurred when defendants clearly knew they were not paying the rent and even after plaintiffs commenced lawsuits for the unpaid rent. Defendants cannot send the money that was formerly in the garages' accounts to Icon, money that would be used to at least partially satisfy plaintiffs' judgments, without any justification for

these transfers. Simply arguing that this is how defendants ran their business is not a sufficient excuse.

If there ever is a time to pierce the corporate veil, this is it. From the admitted facts, it is abundantly clear that Icon ignored the fact that each garage was a separate corporate entity. Because it ran its business as if it was one corporation with several locations, it is only fair that it be treated as such now.

Having found that plaintiffs are entitled to summary judgment, the Court observes that that plaintiffs have asked for varying forms of relief. For instance, plaintiffs seek recovery of the fraudulent transfers from the garage LLCs, an avoidance of the fraudulent transfers as well as the imposition of a constructive trust and an attachment. Rather than guess as to the exact nature of the ultimate relief, the Court directs plaintiff to submit a proposed order in accordance with this decision.

Accordingly, it is hereby

ORDERED that plaintiffs RPH Hotels 51st Street Owner LLC and RPH Hotels 48th Street Owner LLC's motion (MS002) for summary judgment against defendants Icon Parking Holdings LLC, HJ Parking LLC and Zenith Parking LLC is granted in all respects except for the claim for legal fees under Debtor Creditor Law § 276-a; and it is further

ORDERED Plaintiff RPH 48th Street Owner LLC's motion (MS005) for summary judgment against defendants Icon Parking Holdings, LLC and Zenith Parking LLC is granted in all respects except for the claim for legal fees under Debtor Creditor Law § 276-a; and it is further

ORDERED that plaintiffs MTS NY Propco, L.P. and MTS NY Lessee L.P.'s motion (MS006) for summary judgment against defendants Icon Parking Holdings, LLC and Circle

Parking LLC is granted in all respects except for the claim for legal fees under Debtor Creditor Law § 276-a; and it is further

ORDERED that plaintiffs are entitled to recover reasonable legal fees under the terms of the leases and they shall make a separate application for such fees on or before May 23, 2023; and it is further

ORDERED that plaintiffs shall submit a proposed order in accordance with this decision on or before May 23, 2023.

4/25/2023
DATE

ARLENE P. BLUTH, J.S.C.

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