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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK

PRE 0601368/2002 PART 2

SHISGAL, PERSIA PAM, ET AL.
vs
BROWN, ERIC, ET AL.

SEQ 4

DISMISS

:X NO. _____

TION DATE _____

TION SEQ. NO. _____

)TION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance
with accompanying memorandum decision.

FILED
DEC 17 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/13/04

Lcy
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

LOUIS B. YORK

Check if

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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PESIA PAM SHISGAL, BASYA SHISGAL, ROBERT WALSH, AL MACKENZIE, DAVID MARINO, JOEL KRAUT, ERIC SCHWAB, SOSI ERMARKAYAN, HERMAN LIM, JOEY VIOLA, MELANINE BAINNSON, PAMELA FANELLI, STUART FLAKS, SUSAN SACHS, STEVEN SACHS and ALAN PUTTERMAN,

Plaintiffs,

Index No.

-against-

601368/02

ERIC BROWN, IAN BROWN, BRICLA MANAGEMENT CORP., UNITED CAR RENTAL, INC. and SMART PARKING, INC.,

Defendants.

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LOUIS B. YORK, J. :

Defendants move to dismiss the first, second, fourth and fifth causes of action in the consolidated and amended complaint.

Defendants United Car Rental, Inc. (United) and Bricla Management Corp. (Bricla) were New York corporations, dissolved in 2001 for nonpayment of the franchise tax. Defendant Smart Parking, Inc. (Smart) is a Delaware corporation. The companies are engaged in the business of owning and opening parking garages. Defendants Eric and Ian Brown (the Browns) are controlling shareholders in these companies.

Plaintiffs allege that during 1998 and 1999, plaintiffs together lent United and Bricla more than $1 million. They allege that United and Bricla defaulted on the loans. According to plaintiffs, the Browns misrepresented that United and Bricla owned certain parking garages which were controlled by the Browns, that the garages were profitable enterprises, and that

plaintiffs would have "first call of the assets" of the garages. Plaintiffs contend that the Browns concealed the fact that the garages were owned by Smart, that Smart was in a difficult financial position, and that the Browns disregarded corporate entities in managing the companies' business. Plaintiffs also contend that the Browns concealed an agreement between Smart and a nonparty, Lone Star Securities LLP (Lone Star). According to the agreement, Lone Star provided funding for Smart's expansion in exchange for $20 million in promissory notes executed by Smart. Smart made some improvident investments, as a result of which, by 1988, Smart reached a negative $9 million net worth, and its financial condition continued to deteriorate. In December of 1999, Smart defaulted on its obligations to Lone Star, and Lone Star exercised its contractual right to take over control, and removed the Browns as officers and directors of the company.

In 2000, a group of relatives of the Browns filed an involuntary bankruptcy petition against Smart. In re Smart Parking, US Bankruptcy Court SD NY, Case No. 00-B-113111. Those petitioners contended that the Browns purchased 13 garages from them through United, in exchange for some cash and a promissory note in the amount of $766,666 delivered to each petitioner. Petitioners alleged that United had defaulted on the notes. The Browns, United and affiliated corporation, Lochada Consulting Corp., joined in the proceeding. Smart opposed the petition. The Bankruptcy Court dismissed the petition, holding that the petitioners had failed to meet the burden to establish prima facie that their claims were not subject to a bona fide dispute. The Bankruptcy Court found, among other things, that there were bona fide disputes as to whether the notes from United represented claims against Smart, and whether or not Smart is the alter ego of United.

The present action was originally commenced as two separate actions. In the first action, Index No. 601368/02, plaintiffs were Pesia Pam Shisgal, Basya Shisgal and Robert Walsh. The remaining plaintiffs herein (other than Steven Sachs, who was added in the consolidated complaint) were the plaintiffs in the second action, Index no. 602443/02. This court directed that the action be consolidated by order dated April 7, 2004.

The consolidated complaint asserts five causes of action: (1) against all defendants under the doctrine of piercing the corporate veil; (2) against all defendants for violation of the Fraudulent Conveyance Act; (3) against the Browns as personal guarantors of the alleged loans made to plaintiffs MacKenzie, Marino and Kraut; (4) against all defendants for alleged fraud; and (5) against all defendants for violation of Section 12 (a) (2) of the Securities Act of 1933.

Defendants move to dismiss all but the third cause of action in the consolidated complaint. They first argue that the cause of action for fraud should be dismissed because it fails to meet the pleading requirements of CPLR 3016(b).

In order to establish a prima facie case of fraud, plaintiffs must demonstrate the misrepresentation of a material fact, scienter, justifiable reliance and injury or damages. P. Chimento Co. Inc. v Banco Popular de Puerto Rico, 208 AD2d 385 (1st Dept 1994). A duty to disclose for purposes of fraudulent non-disclosure may arise out of a fiduciary or confidential relationship, or as a result of one party's superior knowledge that is not available to the other party. Callahan v Callahan, 127 AD2d 298 (3rd Dept 1987).

Defendants argue that where there are multiple defendants in a complaint, the allegations of fraud must be specific as to each defendant. They submit the deposition testimony of many of the plaintiffs, who testified that they had never spoken to the Browns about the alleged loans.

The consolidated complaint states that the alleged representations were "express or implicit." Defendants argue that the complaint fails to state what express representations were made, and by whom and to whom, and what implicit representations were made, by and to whom and how they were made.

Defendants assert that plaintiffs failed to claim justifiable reliance on the alleged misrepresentations. They submit deposition testimony of plaintiffs in which plaintiffs admit that they did not ask to see any financial statements or documents relating to Bricla, United or any other company, did not ask to speak to the Browns in connection with the loans, and never consulted with attorneys or investment advisors in connection with the loans.

Defendants contend that plaintiffs allege that defendants, their officers and agents failed to disclose certain information to plaintiffs. According to defendants, failure to disclose information cannot constitute actionable fraud in the absence of a confidential or fiduciary relationship between the parties. Defendants claim that plaintiffs failed to plead such a relationship

In opposition to this motion, plaintiffs argue that the motion is procedurally deficient. They argue that they cannot be expected to plead the facts of fraud in detail where the details are often in the defendants' exclusive knowledge.

Plaintiffs allege in the consolidated complaint that defendants, their officers and agents made representations, express or implicit, that Bricla and United owned the property ostensibly belonging to them, and that the loans were to be used for working capital or to purchase additional garages. Plaintiffs allege that defendants failed to disclose that Smart owned the garages and had an agreement with Lone Star, and that Smart's financial situation had become a

"disaster," requiring it and the Browns to seek funds from any possible source. The Browns allegedly had a fiduciary obligation to plaintiffs to maintain the assets of the aforesaid corporations for the benefit of plaintiffs-creditors.

As revealed by the deposition testimony, plaintiffs concede that the Browns had not spoken to them about the loans. Several plaintiffs contend that they relied on the representations of Bruce Putterman in making their loans. Puttermann was counsel to the Browns, and he is not mentioned in the fraud claim. The allegations of fraud are not specific as to defendants who allegedly made the misrepresentations, although the misrepresentations are clearly alleged. Moreover, plaintiffs allege fraudulent non-disclosure, and a duty to disclose information based on a fiduciary relationship. The legal relationship of creditor and debtor does not create a fiduciary relationship. See Wiener v Lazard Freres & Co., 241 AD2d 116 (1st Dept 1998). In the absence of alleging specific defendants, or special circumstances indicating a fiduciary relationship, plaintiffs have not made out a cause of action in fraud or failure to disclose.

Plaintiffs bring a cause of action for violation of Sections 273, 274, 275 and 276 of the Debtor-Creditor Act. Under Section 273, a transfer or conveyance is fraudulent if the debtor was insolvent, or rendered insolvent by the transfer or conveyance. Under Section 274-275, a transfer is fraudulent if made without fair consideration. Under Section 276, a transfer is fraudulent if made with the actual intent to hinder, delay, or defraud creditors.

Defendants contend that this cause of action is insufficiently pleaded, alleging unnamed non-party corporations as debtors, and unnamed non-party individuals as beneficiaries of the transfers.

Defendants also argue that there is insufficient proof that Bricla and United were rendered

insolvent by the alleged transfers. The alleged transfers took place over a period of approximately 20 months from August 1998 to March 2000, prior to the dissolution of Bricla and United. According to defendants, even if dissolution were an indicia of insolvency, such an event, occurring years after the challenged transfers, can have no probative value as to the insolvency of the corporations at the time of such transfers.

As for violation of Section 276, defendants aver that there was an insufficient allegation of actual fraud in the complaint.

In opposition, plaintiffs argue that defendants violated the Debtor-Creditor Act, that the alleged misappropriations were not made in good faith and were illegal regardless of actual intent of fraud, and the misappropriations had rendered the aforesaid corporations insolvent.

According to the complaint, the Browns diverted and used the assets of Bricla, United, Smart and their affiliated corporations for their personal benefit and the benefit of their relatives, friends and associates. As a result of such diversions, Bricla and United have become insolvent, as shown by their dissolution. It is alleged that the diversions were not made in good faith and for fair consideration, and that the diversions were also made with the intent to hinder, delay and defraud creditors, including plaintiffs.

The court finds that the cause of action is insufficient with respect to alleging actual fraud. The allegation is simply conclusory, as is the claim that there was a lack of fair consideration. Plaintiffs have not shown how each transfer rendered Bricla and United insolvent, and it is apparent that each transfer did not render the aforesaid corporations insolvent. Plaintiffs have not made out a cause of action for fraudulent conveyance.

Defendants seek dismissal of the cause of action for violation of the Securities Act of

1933. Defendants claim that the allegation that defendants used the mails or other instruments of interstate commerce to induce plaintiffs to make loans is contradicted by the deposition testimony of plaintiffs. Defendants contend that as to all but three of the plaintiffs, MacKenzie, Marino and Kraut, the loan transactions did not amount to securities, as defined by the Act. Defendants also argue that the cause of action must be dismissed by reason of the statute of limitations.

Plaintiffs do not discuss the Securities Act at all in their opposition papers. By not responding to defendants' arguments for dismissal, plaintiffs apparently accepts them as valid. See Firth v State, 287 AD2d 771 (3rd Dept 2001), affd 98 NY2d 365 (2002). Accordingly, the court shall dismiss the fifth cause of action.

Defendant seeks dismissal of the claim for piercing the corporate veil, in which plaintiffs allege that Smart, as the corporate parent of the various parking garages, is liable for the debts of all its other affiliated corporations, and that the Browns are owners of Smart.

The concept of piercing the corporate veil is a limitation on accepted principles that the corporation exists independently of its owner as a separate legal entity, that owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting liability of companies. Morris v New York State Dept of Taxation and Finance, 82 NY2d 135 (1993). Piercing the corporate veil requires a showing that the controlling party exercised complete dominion over the corporation and used that power to commit fraud or other dishonest acts which resulted in injury to the complainant. See Matter of Glenn, (Redford) 233 AD2d 248 (1st Dept 1996).

Plaintiffs rely on the Bankruptcy court decision for this claim. Defendants argue that the

Bankruptcy decision had nothing to do with Bricla and United, but rather with the commingling of funds among Smart and its garage affiliates, and that there was no mention of the Browns making any transfers for their own personal use.

Defendants assert that the Browns must be alleged to have dominated Bricla or United for fraudulent purposes before the corporate veil can be pierced. Defendants contend that plaintiffs have failed to make out a case for fraud or fraudulent conveyance. Finally, defendants argue that the doctrine of piercing the corporate veil seeks to impose liability on the owners of a corporation for the debts of the corporation. The debtors are Bricla and United. According to defendants, Smart is not the owner or parent of either corporation and cannot be held liable for their actions, thus, the Browns, as owners of Smart, cannot be held responsible.

In opposing the motion, plaintiffs rely upon the deposition testimony of Eric Brown. They argue that his testimony, regarding the relationship between Bricla and his other corporations, establishes the case for piercing the corporate veil. They insist that the Browns used the money loaned to Bricla for personal reasons (e.g. for the benefit of relatives). Plaintiffs also refer to this court's decision denying plaintiffs' motion for attachment. In that decision, the court stated that Bricla was a shell company and that it appeared that the Browns disregarded corporate formalities and did not keep records of transfers of funds between Bricla and other companies. Plaintiffs state that the Browns disregarded corporate formalities and stripped corporate assets to render United and Bricla judgment proof.

The court was not conclusive in its decision that Bricla and United could be pierced to reach the personal assets of the Browns. Moreover, the Bankruptcy Court mentioned commingling of funds with respect to Smart and United, but there was no ultimate decision as to

piercing the corporate veil because the Bankruptcy Court found that there was a dispute as to whether Smart was an alter ego of United.

Plaintiffs have not made out a cause of action for fraud or fraudulent conveyance in their complaint and therefore there is insufficient basis for upholding these allegations reason for ~~piercing the corporate veil of Smart~~.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the first, second, fourth and fifth causes of action are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

DATED: 12/13/04

ENTER:

J.S.C.