

**Billy Martin's Western Wear L.A., Inc. v Wyler Team  
International Corp.**

2005 NY Slip Op 30338(U)

May 3, 2005

Supreme Court, New York County

Docket Number: 603278/03

Judge: Richard B. Lowe

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SCANNED ON 5/6/2005  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, JR. Justice

PART 52

Billy Martins Western  
Wear

INDEX NO. 603278/03

MOTION DATE 12/22/04

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

Wyle Team International

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

**FILED**  
MAY - 6 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION**

HON. RICHARD B. LOWE, JR.

Dated: 5/3/05

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 56

-----X  
BILLY MARTIN'S WESTERN WEAR L.A., INC.,

Plaintiff,

-against-

Index No.: 603278/03

WYLER TEAM INTERNATIONAL  
CORPORATION, WILLIAM M. TSAI and  
JOHN DOES 1-10,

Defendants.

-----X  
WYLER TEAM INTERNATIONAL  
CORPORATION,

Third-Party Plaintiff,

-against-

DOUGLAS NEWTON,

Third-Party Defendant.  
-----X

**RICHARD B. LOWE, III, J.:**

This is a dispute over the alleged breach of a trademark license agreement entered into between Billy Martin's Western Wear L.A., Inc. (BMW) and Wyler Team International Corporation (WTIC) on or about January 8, 2003.

Defendants WTIC and William M. Tsai (Tsai) move for the following relief: (1) summary judgment dismissing the amended complaint; (2) summary judgment on liability in favor of WTIC on its first counterclaim and scheduling a hearing on damages; (3) an order compelling plaintiff to immediately produce any and all documents pertaining to communications and lawsuits between plaintiff and Jilluann Martin; and (4) an order granting a default judgment in favor of WTIC on its third-party complaint against Douglas Newton and

[\* 3 ]  
scheduling a hearing on damages.

Plaintiff BMWW cross-moves for summary judgment against WTIC and dismissing defendants' affirmative defenses, counterclaims and the third-party complaint. BMWW also requests an order, pursuant to CPLR 305(c), 2001 and 3025(b), amending the caption of this action to reflect "the current corporate owner of the interest being adjudicated herein."

### FACTUAL ALLEGATIONS

Third-party defendant Douglas Newton was a sports agent who managed the business affairs of Alfred "Billy" Martin, who played for and managed several major league baseball franchises, most notably the New York Yankees. In 1978, Newton and Billy Martin formed a company that owned and operated retail stores selling western-oriented goods and services. In 1982, Newton purchased from Billy Martin the latter's interest in the various western wear companies. The 1982 agreement permitted Newton to use the name "Billy Martin" and his photograph or likeness "to identify, sell and publicize merchandise sold by the existing Billy Martin's Western Wear ... as well as any franchised stores or branches subsequently opened." Flicker Affirm., Exh. B. The 1982 agreement provided that Newton could open new stores using the trade name "Billy Martin's Western Wear," provided that he obtained Billy Martin's approval of the location and owner of the franchise or branch store and paid him one-half of the stores' net income.

Billy Martin died on December 25, 1989. His widow, Jilluann Martin, was appointed executrix of his estate (the Estate). In July 1994, Newton entered into an agreement with Jilluann Martin, in her individual capacity and as executrix of the Estate. The 1994 agreement provides that Newton has made all of the payments required under the 1982 agreement, and that there

[\* 4 ]

remains the sum of \$32,500 payable through the year 1998. The 1994 agreement amends the 1982 agreement in the following respects: (1) Newton's payment of \$10,000 to Jilluann Martin and \$10,000 to the Estate would relieve him of any further payments called for under the 1982 agreement; (2) Newton's company was granted a license to open a branch store using the trade name "Billy Martin's Western Wear" in Los Angeles provided he pay Jilluann Martin and the Estate a license fee in the amount of \$7,500; (3) the same \$7,500 license fee would be paid to Jilluann Martin and the Estate for each additional "Billy Martin's" retail store Newton and/or his companies wished to open; and (4) Newton would no longer need the approval of Jilluann Martin or the Estate as to the location of new branch stores. Paragraph 8 of the 1994 agreement provides that "[n]othing contained therein shall be construed as a license to Newton or any other party to utilize the name 'Billy Martin' except to identify Billy Martin's Western Wear stores and to identify, sell and publicize merchandise sold at Billy Martin's Western Wear stores." Flicker Affirm., Exh. C.

In 1999, Newton and his companies entered into an additional agreement with Jilluann Martin. The 1999 agreement indicated that, although two new retail stores had opened, Jilluann Martin had not been paid the \$15,000 due. In exchange for the payment of \$50,000, Newton and his companies were to be relieved of the obligation to make any further payments under the 1982 and 1994 agreements, would be able to open an unlimited number of stores without payment to, or the required approval of, Jilluann Martin. The 1999 agreement further provides that Newton and/or his companies would be granted, inter alia:

an exclusive license to identify Billy Martin's Western Wear stores and to identify, label, sell at retail or otherwise, market and publicize western lifestyle goods and services as well as proprietary products of the same nature developed

[\* 5 ]

by Newton and/or the Companies to be sold at Billy Martin Western Wear Stores or elsewhere and to use the name 'Billy Martin', 'Billy Martin's' and/or 'Billy Martin's.com' for those purposes.

Flicker Affirm., Exh. D.

Newton and his companies ran into financial difficulties and failed to pay the \$50,000 due under the 1999 agreement. In May 2000, Jilluann Martin, in exchange for additional consideration, agreed to extend the time by which Newton and/or his companies had to pay the \$50,000, first to September 30th, then to December 31st, and ultimately to December 31, 2001.

Flicker Affirm., Exh. E. Despite these extensions of time, Newton and his companies failed to make the payments due under the 1999 and 2000 agreements. In April 2002, Jilluann Martin filed suit against Newton and his companies alleging breach of contract in the Supreme Court of the State of New York, County of Monroe. In July 2002, Newton, both individually and on behalf of his companies, signed confessions of judgment in the total amount of \$59,002. The confessions required him to make four payments of the amount owed, with the entire balance due no later than October 1, 2002.

In November 2002, Newton began negotiating a trademark licensing agreement between one of his companies, BMWW, and WTIC, a clothing manufacturer, relating to a "Billy Martin's USA" line of western-inspired clothing and accessories. On November 30, 2002, Newton sent a letter to WTIC's attorney enclosing the 1982, 1994 and 1999 agreements, but not the 2000 agreement. The letter discloses the existence of a trademark for BILLY MARTIN registered to Billy Martin Productions, Inc., a company owned by Jilluann Martin, for clothing in the IC 025 category<sup>1</sup>, namely T-shirts. Newton further states in the letter that his trademark attorney

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<sup>1</sup>IC refers to "International Class," and the IC 025 category is for high-end apparel.

[\* 6 ]  
believed it would be beneficial to receive something from Jilluann Martin in connection with her ownership of the T-shirt trademark in the IC 025 category.

BMW and WTIC executed a letter of intent on December 6, 2002, noting that the parties were desirous of entering into a licensing arrangement whereby WTIC would license from BMW certain registered, pending and common law trademarks relating to the "Billy Martin's USA" line of western-inspired clothing and accessories, which the parties defined as the "Billy Martin's Concept," for use in the wholesale and retail marketing and sales of certain Billy Martin's Concept product lines. The trademarks were described as: (1) BILLY MARTIN'S USA mark that is contained in USPTO trademark application serial number 78/131,331, for use in connection with IC 035 (retail boutique services); and (2) BILLY MARTIN'S USA mark that is contained in USPTO trademark application serial number 78/189,596, for use in connection with IC 014 (jewelry), 018 (leather goods), 020 (furniture), 025 (high end apparel), and 035 (retail boutique services). The Letter of Intent further recognized that the USPTO had initially refused trademark registration of the first application on the ground that the mark too closely resembled the existing BILLY MARTIN trademark registered by the company owned by Jilluann Martin.

On or about January 8, 2003, plaintiff BMW and WTIC executed a formal trademark license agreement (the TLA), which is the subject of this action. In the TLA, BMW warranted that it

is the sole and exclusive licensee of all right, title and interest in and to the trade name and trademarks "Billy Martin," "Billy Martin's," and/or "Bilbymartin.com," for western lifestyle goods and services as more specifically set forth in Exhibit A attached hereto (the "Licensed Marks"), for use in connection with the manufacture and sale of the "Billy Martin's USA" line of western-inspired clothing and related accessories of the same nature (the "Billy Martin's Concept"), which rights are derived from the October 28, 1999 agreement by and between

[\* 7 ]  
[plaintiff], Jilluann Martin and the Estate of Jilluann Martin [sic], a copy of which is attached hereto as Exhibit B hereto; ...

Flicker Affirm., Exh. I (emphasis added). The TLA was to continue for an initial term of 30 months, unless terminated. Paragraph 7(b) of the TLA provided that, during the first 18 months of the initial term, BMWW was to receive a "guaranteed advance against Royalties" in the amount of \$150,000 to be paid according to the following schedule:

\$25,000 --due upon execution of the Letter of Intent;  
\$35,000 --due upon execution of the TLA;  
\$15,000 --due upon the earlier of plaintiff's approval of WTIC's initial licensed products or March 1, 2003, whichever is sooner;  
\$37,500 --due on June 1, 2003, except that if either party discovers a problem with the pending trademark applications, then upon BMWW providing proof of its receipt of Certificates of Registration for all of the pending applications; and  
\$37,500 --due upon BMWW providing proof of its receipt of Certificates of Registration for all of the pending applications.

It is undisputed that WTIC paid the first three payments totaling \$75,000. An additional guaranteed advance against royalties in the amount of \$150,000 was due on the eighteenth-month anniversary of the TLA. Exhibit A to the TLA listed the two pending trademark applications identified in the Letter of Intent.

Exhibit C to the TLA provides that WTIC would attempt to obtain a consent and agreement from Jilluann Martin and her company, Billy Martin Productions, Inc., that she will not grant any license to a third party for any merchandise or apparel other than related to Billy Martin's career in baseball, and that only BMWW or its assigns shall be entitled to manufacture western style clothing and related merchandise exclusively.

Between April 23 and 27, 2003, a series of e-mail exchanges occurred between Newton and Robert Pearl, Esq., the attorney for Jilluann Martin and the Estate. In these e-mails, Newton

[\* 8 ]

acknowledged that he still owed \$36,000 plus interest under the 1999 agreement, but did not have the money to pay without the WTIC deal. Newton further advised Pearl that WTIC was requesting that Jilluann Martin acknowledge in writing that she will not use her trademark to sell clothing or license others to sell clothing. Pearl responded by saying that the only thing Jilluann Martin would sign is a letter confirming Newton's exclusive rights to use the name Billy Martin in connection with western style goods and services. Pearl further stated that there was no further room for delay, and that he planned to start enforcement proceedings on the confessions of judgment. In May 2003, Jilluann Martin entered judgment against Newton and his companies. In July 2003, Jilluann Martin began to execute on the judgments, and seized some of the assets of Newton and/or his companies, although the amount recovered from this asset seizure was small.

Defendants allege that, sometime in May 2003, Carolyn Palmieri, a member of In Focus Design L.L.C., which was assisting WTIC with the development of the Billy Martin clothing line, received a telephone call from Pearl. In this conversation, Pearl is alleged to have claimed that neither BMW nor any of Newton's companies had a license to use Billy Martin's name for the manufacture and sale of a wholesale clothing line, and offered to sell those rights to Palmieri's company.

On or about May 12, 2003, the USPTO issued a non-final approval of the first trademark application (serial number 78/131,331) subject to publication for opposition. The mark was registered to BMW on September 19, 2003. However, on June 7, 2003, the USPTO issued a non-final denial of BMW's second trademark application (serial number 78/189, 596) for the trademark "BILLY MARTIN'S" citing the likelihood of confusion over the mark owned by Jilluann Martin. In December 2003, the USPTO issued a final denial of this trademark

application.

By letter dated June 20, 2003, WTIC's attorney served formal notice that BMWW was in breach of material provisions of the TLA and announced its intention to terminate the TLA if the breaches remained unremedied for 30 days. The letter states that a paramount concern of WTIC was

BMWW's material breach of its warranty that it "is the sole and exclusive owner of all right, title and interest, or has the sole and exclusive license to use and license others to use and sublicense" the trade names and trademarks "Billy Martin" and "Billy Martin" and "Billy Martin's".

Flicker Affirm., Exh. L. As a result of this and other alleged breaches, WTIC stated that the \$37,500 payment due on June 1, 2003 would not be paid at that time. On July 21, 2003, WTIC purported to terminate the TLA on the ground that the breaches identified in the June 20, 2003 letter had not been remedied.

BMWW commenced this action on October 20, 2003 against WTIC and William M. Tsai, who allegedly controls WTIC through his son, Arthur Tsai. The amended complaint alleges three causes of action against WTIC: (1) breach of the TLA; (2) declaratory judgment that the TLA between BMWW and WTIC is valid and enforceable, and for a declaration that the remaining \$225,000 guaranteed advances against royalties must be paid in accordance with paragraph 7(b) of the TLA; and (3) breach of the implied covenant of good faith and fair dealing. The third cause of action asserts a claim against Tsai for tortious interference with the TLA. BMWW alleges that Tsai instructed his son, Arthur Tsai, to terminate the TLA without any legal justification and in response to an article published in or about May 2003 in Women's Wear Daily, which publicized the TLA. Tsai allegedly "believed that publicity concerning the

[\* 10 ]

Agreement could damage his relationships with extant business partners, including but not limited to Haggar Clothing Co.” Amended Complaint ¶ 72.

WTIC asserted four counterclaims against BMWW. The first counterclaim asserts that BMWW materially breached the TLA because it does not have a license to use the trademarks in connection with the manufacture and wholesale sale of western-inspired clothing. In addition, WTIC commenced a third-party action against Newton, BMWW’s President, CEO and majority or sole shareholder. The third-party complaint purports to state the following claims against Newton: (1) false misrepresentation that BMWW had a license for the use of the trademarks for the manufacture and wholesale sale of western-inspired clothing; (2) false representation to WTIC that BMWW had a license for the use of the trademark “Billy Martin;” and (3) piercing the corporate veil of WTIC.

#### DISCUSSION

A contract is to be interpreted so as to give effect to the intention of the parties expressed in the unequivocal language employed. Breed v Insurance Co. of North America, 46 NY2d 351, 355 (1978). Contracts must be enforced in accordance with the plain meaning of their terms (Greenfield v Philles Records, Inc., 98 NY2d 562, 569 [2002]), and courts should avoid interpretations that would leave a contractual clause meaningless (Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Associates, 63 NY2d 396, 403 [1984]). Where the intent of the parties can be determined from the face of the instrument, interpretation is a matter of law and the case is ripe for summary judgment. W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 (1990).

According to the terms of the TLA, WTIC was entitled to terminate that agreement upon

[\* 11 ]

BMW's breach of any of its material provisions, if the default continued unremedied for thirty days after receipt of written notice from WTIC. The undisputed documentary and testimonial evidence is that BMW breached two material provisions of the TLA.

First, BMW breached its warranty that there were no pending or threatened claims, actions, suits or other proceedings against BMW or Newton which, if adversely determined, would affect BMW's ability to perform under the TLA. Newton failed to disclose the existence of the 2000 agreement with Jilluann Martin and the Estate, his default under the 1999 and 2000 agreements, and the fact that he had been sued by Jilluann Martin and the Estate for breach of these agreements. Indeed, at the time the TLA was executed, Newton had defaulted on the payments required by the confessions of judgment that he signed to resolve that litigation, resulting in the entry of a judgment against him in May 2003.

Second, BMW warranted in the TLA that it was the exclusive licensee of the trade name "Billy Martin" for the manufacture and sale of the "Billy Martin's USA" line of western-inspired clothing and related accessories. However, at the time the TLA was signed, Newton had not paid Jilluann Martin or the Estate for that license. BMW argues that its ownership of this license was not dependent upon the 1999 agreement, because such a license had already been given to Newton under the 1982 agreement and because of his common law trademark rights. This argument requires the Court to ignore the plain language of the TLA, which clearly states that BMW's exclusive license "derives from the October 28, 1999 agreement" with Jilluann Martin and the Estate. Moreover, the 1982 agreement only gave Newton the right to use the "Billy Martin" name to identify, sell and publicize merchandise for the Billy Martin Western Wear retail stores. Nothing in the 1982 agreement gives BMW or Newton the right to use the

“Billy Martin” name to identify, sell and publicize a wholesale clothing line that was to be designed and manufactured for sale in other stores. Newton’s present claim that the 1999 agreement “was entered into solely and exclusively to expand upon [his] ability to open up new stores” (Newton 10/29/04 Aff. ¶ 26) is directly contrary to the letter he wrote on November 30, 2002 to WTIC’s attorney. In that letter, Newton advised that he sought the 1999 agreement for two additional reasons, one of which was to give him “an exclusive license to ... label, sell at retail or otherwise, market and publicize western lifestyle goods and services ... to be sold at Billy Martin Western Wear stores or elsewhere and to use the name ‘Billy Martin,’ ‘Billy Martin’s’, and/or ‘BillyMartin.com’.” Flicker Affirm., Exh. H (emphasis added).

BMW argues that Jilluann Martin never expressly rescinded the 1999 agreement, that Pearl acknowledged Newton’s exclusive license in the April 7, 2003 e-mail, and that Newton paid his debt to her in full in August 2004. WTIC, on the other hand, has presented evidence that Jilluann Martin sued Newton and two of his companies for breach of the 1999 agreement resulting in a money judgment that was not satisfied until well after WTIC terminated the TLA. There is also evidence that Jilluann Martin’s attorney repudiated BMW’s license in May 2003 and attempted to sell a license to use Billy Martin’s name for the manufacture and sale of a wholesale clothing line to Carolyn Palmieri, a member of In Focus Design L.L.C.. The issue is whether BMW was in material breach of the TLA as of July 2003, when WTIC terminated the TLA, not eighteen months later. As of January 2003, Jilluann Martin could have elected to terminate the 1999 agreement based on Newton’s continuing default. Had WTIC gone forward with the TLA, knowing that BMW’s purported license to use Billy Martin’s name for a wholesale clothing line was in doubt, it could have exposed itself to costly lawsuits and the loss

of its entire investment.

The TLA provides in clear and explicit language that the \$37,500 advance royalty payment due BMWW on June 1, 2003 could be withheld if WTIC discovered a problem with either of the two pending trademark applications. Inasmuch as WTIC discovered a major problem concerning BMWW's license of the trademarks from Jilluann Martin and the Estate, WTIC's obligations to make that payment became dependent upon BMWW 's furnishing "evidence of Licensor's receipt of the Certificates of Registration for all of the Pending Applications." Flicker Affirm., Exh. I. The undisputed evidence is that only the first trademark application was approved by the USPTO, and that in December 2003, the USPTO issued a final denial of this trademark application. In addition, WTIC's termination of the TLA on July 21, 2003 for cause discharged WTIC from any further obligations to make advance royalty payments.

The undisputed evidence presented on these motions is that WTIC properly terminated the TLA due to material breaches by BMWW, thus relieving WTIC from any further obligations to perform. Accordingly, defendants are entitled to summary judgment dismissing each of the claims of the amended complaint. Likewise, defendants have established their right to summary judgment on liability on their first counterclaim against BMWW for damages from BMWW 's breach of its warranty that it was, in January of 2003, the sole and exclusive licensee of the name Billy Martin in connection with the manufacture and wholesale sale of western-inspired clothing.

Defendants move to compel BMWW to produce any and all documents relating to communications and lawsuits with Jilluann Martin. BMWW's objection that this request is "incomprehensible," "calls for the production of irrelevant evidence," and "designed merely to harass plaintiff" (Flicker Affirm., Exh. R) is patently frivolous. BMWW is directed to produce

these documents forthwith, but in no event later than ten (10) days from service of a copy of this order with notice of entry.

WTIC moves for a default judgment on its third-party complaint against Newton which purports to allege claims against him for fraud and piercing the corporate veil of BMW. WTIC's affidavit of service alleges that the third-party summons and complaint was served on Newton by substituted service pursuant to CPLR 308(2) and 313 by leaving a copy with Michelle Plawski, alleged to be the salesperson in charge of his Los Angeles store, on December 29, 2003 and by mailing an additional copy to Newton at his Los Angeles store on December 30, 2003. Newton denies that he ever received a copy of the third-party complaint either from "Michelle," whom he claims is a part-time sale clerk, or via the mail.

"A process server's affidavit is prima facie evidence of proper service sufficient to withstand a naked denial of receipt of service." Nazarian v Monaco Imports, Ltd., 255 AD2d 265, 266 (1st Dept 1998); see also Aames Capital Corp. v Ford, 294 AD2d 134 (1<sup>st</sup> Dept 2002). Newton does not deny that he employs a person named Michelle in his store, or that, in the normal course of business, important mail sent to the store comes to his attention. Accordingly, Newton has failed to raise a triable issue of fact regarding service of the third-party complaint. However, there is a "strong public policy favoring the determination of actions on their merits." Heskel's West 38th Street Corp. v Gotham Const. Co. LLC, \_\_\_ AD3d \_\_\_, 787 NYS2d 285, 287 (1st Dept 2005), quoting Damselle Ltd. v 500-512 Seventh Ave. Assocs., 184 AD2d 367 (1<sup>st</sup> Dept 1992). While this policy may give way when a defendant's failure to timely answer the complaint causes prejudice to the plaintiff (Heskel's West 38<sup>th</sup> Street Corp., *supra*), here, defendants have not suffered any prejudice from Newton's failure to file a formal answer to the

third-party complaint. Newton has obviously been prosecuting BMW's claims against WTIC, which included sitting for a two-day deposition, and has a meritorious defense to at least one count of the third-party complaint.

That portion of plaintiff's cross motion seeking to dismiss the third-party complaint for failure to state a claim is granted, in part, and denied in part. Corporate officers and directors may be held individually liable for fraud if they personally participated in or had actual knowledge of the fraud. Polonetsky v Better Homes Depot, 97 NY2d 46, 55 (2001); Marine Midland Bank v John E. Russo Produce Co., Inc., 50 NY2d 31, 44 (1980). The elements of fraud include a misrepresentation, known by the defendant to be false and made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance and damages. Small v Lorillard Tobacco Co., Inc., 94 NY2d 43, 57 (2004). Inasmuch as the third-party complaint alleges that Newton personally made false misrepresentations to WTIC about his license to use the certain trademarks for the manufacture of western-inspired clothing, in order to induce WTIC to enter into the TLA and pay advance royalties, a fraud claim is properly stated.

However, Count III of the third-party complaint, which purports to pierce the corporate veil of BMW to hold Newton personally liable for any damages sustained by reason of BMW's default must be dismissed. New York courts, respecting the principle of independent corporate existence, will not lightly disregard the corporate form. Port Chester Elec. Constr. Co. v Atlas, 40 NY2d 652, 656 (1976). "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." Matter of Morris v State Dept. of Taxation and Finance, 82 NY2d

[\* 16 ]

135, 141 (1993). The third-party complaint merely alleges that “Newton, as the majority shareholder and/or sole shareholder of [BMW], exercised complete dominion and control, over plaintiff” (Answer to Complaint, Counterclaim and Third Party Complaint ¶ 21), and is totally devoid of factual allegations of self-dealing, commingling of funds, lack of corporate formalities or other veil-piercing indicia. Hartej Corp. v Pepsico World Trading Co., Inc., 255 AD2d 233, 233 (1st Dept. 1998); International Credit Brokerage Co., Inc. v Agapov, 249 AD2d 77 (1<sup>st</sup> Dept 1998).

Plaintiff cross-moves to amend the caption of this action to reflect that Billy Martin’s USA, Inc. now owns, by an assignment dated January 15, 2004, all of the rights and liabilities of BMW and is, accordingly, the real party in interest. Defendants oppose this relief, arguing that Newton has not provided any documents to establish or explain the details of this alleged reorganization. This aspect of the motion is denied, therefore, without prejudice to renewal upon the submission of a copy of the assignment and further details concerning the reorganization.

#### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

**ORDERED** that defendants are entitled to summary judgment dismissing the amended complaint; WTIC is entitled to summary judgment on liability in its favor on its first counterclaim against BMW; defendants’ motion to compel discovery is granted and plaintiff is directed to produce any and all documents relating to communications and lawsuits with Jilluann Martin within ten (10) days from service of a copy of this order with notice of entry; and WTIC’s motion for a default judgment on its third-party complaint against Douglas Newton is denied; and it is further

**ORDERED** that plaintiff's cross motion is granted to the extend of dismissing Count III of the third-party complaint against Douglas Newton, and is denied in all other respects; and it is further

**ORDERED** that Douglas Newton shall serve and file an answer to the remaining counts of the third-party complaint within ten (10) days after service of a copy of this order with notice of entry.

Dated: May 3, 2005

ENTER:



J.S.C.

HON. RICHARD B. LOWE, III

**FILED**  
MAY - 6 2005  
NEW YORK  
COUNTY CLERK'S OFFICE