

<b>331 Madison Avenue Associates, L.P. v MWTK Corp.</b>
2006 NY Slip Op 30007(U)
December 15, 2006
Supreme Court, New York County
Docket Number: 0601085/2005
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECENT.

Index Number : 601085/2005

331 MADISON AVENUE

vs

MWTK

Sequence Number : 001

SUMMARY JUDGMENT

PART 11

INDEX NO. \_\_\_\_\_

MOTION DATE 6/29/08

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion <sup>+ cross motion</sup> to/for Summary Judgment.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

and cross motion are

Upon the foregoing papers, it is ordered that this motion ~~is~~ <sup>and cross motion are</sup> decided in accordance with the attached memorandum, Decision + Order.

**FILED**  
DEC 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: December 15, 2008

[Signature] J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
331 Madison Avenue Associates, L.P.,

Plaintiff,

Index No.601085/05

-against-

MWTK CORP., MATTHEWS & CO., LLP, ROBERT S. MATTHEWS, MARTIN WEINBERG, EDWIN TEADORE and BARRY KITAEFF and "JOHN DOE #-1 through "JANE DOE #10", and the last 10 names being fictitious and unknown to the Plaintiff, the persons or parties intended being the occupants, tenants, persons or entities, if any, having used and occupied the leased premises described in the verified complaint, or who are shareholders, officers or directors of defendant MWTK Corp., or members or partners of defendant Matthews & Co., LLP,

Defendants.

**FILED**  
DEC 22 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

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JOAN A. MADDEN, J.:

Defendants, Matthews & Co., LLP (Matthews & Co.), Robert S. Matthews (RM), Martin Weinberg (MW), Edwin Teadore (ET), and Barry Kitaeff (BK) move for summary judgment dismissing the complaint. Plaintiff 331 Madison Avenue Associates, L.P. cross-moves for summary judgment for the relief sought in the complaint.

This is an action to recover rents and other charges which accrued during defendants' use and occupancy of plaintiff's commercial premises. The individual defendants, RM, MW, ET, and BK are partners of Matthews & Co, a limited partnership accounting firm, and are officers of

defendant MWTK Corp. (MWTK), a corporation that leases property. RM is the sole shareholder and director of MWTK.

On June 29, 1995, plaintiff, owner of premises known as 331 Madison Avenue, New York (the Premises), entered into a lease agreement with MWTK for a 10-year period commencing September 1, 1995 through August 31, 2005 (the Lease). The Lease provided for MWTK to rent the entire eighth floor of the Premises for a monthly payment of \$14,170.96, in addition to extra expenses for electric, operating costs, etc. On the same day, RM, MW, ET, and BK executed an unconditional guarantee of payment of MWTK's obligations under the Lease (the Guarantee). The Guarantee was limited to specified sums and to the first 30 months of the term of the Lease. The record indicates that MWTK sublet the Premises to various individuals and entities, including Matthews & Co pursuant to oral month-to-month agreements and without the written consent of plaintiff as required under Paragraph 11 of the Lease.

On September 14, 2004, plaintiff obtained a judgment in New York Civil Court (Index No. 78416/04) against MWTK, pursuant to a court-ordered written stipulation, for possession of the Premises, and for pre-September 13, 2004 rent arrearages and attorneys' fees in the amount of \$122,129.93, none of which has been paid.

In March 2005, plaintiff commenced the instant action, asserting nine causes of action. The first cause of action against MWTK is for breach of the Lease, and seeks the sum of \$297,038.98 for rent due for the period September 13, 2004 through August 31, 2005. MWTK admits owing said amount, except claims an offset of security in the sum of \$37,700 plus interest from 1995. Plaintiff agrees to give MWTK an offset of the security deposit in the amount of \$37,700, but argues that MWTK is not entitled to credit for accrued interest.

This court finds that MWTK is not entitled to interest on its security deposit. The security deposit was not deposited into an interest bearing account, and there is no provision in the Lease requiring plaintiff landlord to do so.<sup>1</sup> Further, pursuant to paragraph 34 of the Lease, if a tenant defaults in payment of rent under the Lease, the owner “may use, apply or retain the whole or any part of the security ...” Since MWTK admittedly owes \$297,038.98 to plaintiff for rent due, plaintiff’s motion for summary judgment against MWTK for the sum of \$297,038.98, less \$37,700.00, plus statutory interest, is granted.

The second and third causes of action, against Matthews & Co., RM, MW, ET, and BT, are for quantum meruit based on the reasonable value of the use and occupancy by said defendants of the Premises, and unjust enrichment, respectively. Plaintiff seeks use and occupancy from March 11, 2004,<sup>2</sup> which is the date of the last payment received by plaintiff, until October 15, 2004, which is the date that plaintiff received vacant possession of the Premises. Plaintiff asserts that it is entitled to \$189,000 for this period based on the affidavit of its managing agent who states that the fair market use and value of the premises was \$25,000 a month plus \$2,000 a month for electricity.

Defendants argue that the second and third causes of action should be dismissed as against Matthews & Co. and the individual defendants, since they are not in privity with plaintiff. They

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<sup>1</sup> General Obligations Law § 7-103 (2-a), which requires security deposits for rental property be deposited in an interest bearing bank account, does not apply to commercial property like the Premises

<sup>2</sup>The complaint alleges that said defendants occupied and received the benefit of the use of the Premises at plaintiff’s expense from August 2004 until October 15, 2004.

further argue that since Matthews & Co. is a limited partnership, the individual partners are not responsible for the debts of Matthews & Co. Defendants maintain that plaintiff was aware at the time the Lease was executed that MWTK had little or no assets, and that is why plaintiff requested that the individual defendants sign a guarantee.<sup>3</sup> Defendants also assert that they paid MTWK rent until they vacated the Premises in September 2004.

To recover on a theory of quantum meruit, there must be a bona fide dispute as to the existence of a contract or a contract which does not cover the dispute (Joseph Sternberg, Inc. v Walber 36<sup>th</sup> Street Assoc., 187 AD2d 225 [1<sup>st</sup> Dept 1993]). Here, there is no contract between plaintiff and Matthews & Co., only a Lease between MWTK and plaintiff and a guarantee agreement between plaintiff and the individual partners..

Real Property Law (RPL) § 220 authorizes a landlord to pursue an action for use and occupancy of real property “by any person, under an agreement, not made by deed; and a parol lease or other agreement ...” Contrary to defendants’ position, plaintiff may recover reasonable compensation for the use and occupancy of the Premises by Matthews & Co., notwithstanding the absence of privity between plaintiff, as landlord, and Matthews & Co. as subtenant. (19 West 45<sup>th</sup> Street Realty Co. v. Darom Electric Corp., 233 AD2d 184 [1<sup>st</sup> Dept 1996]; Eighteen Associates, LLC v Nanjim Leasing Corp., 257 AD2d 559 [2d Dept 1999]; Ministers, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y. v 198 Broadway, Inc., 152 Misc 2d 936 [Civ Ct, NY County 1991]).

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<sup>3</sup>Defendants attach evidence that MWTK is still an active corporation, and that Matthews & Co. is still an active limited partnership.

The lack of privity does not bar such a claim since the duty to pay use and occupancy is based upon equitable principles “‘imposed by the law for the purpose of bringing about justice without reference to the intention of the parties’” (Rand Products Co. v Mintz, 72 Misc 2d 621 [App Term, 1<sup>st</sup> Dept 1973], quoting 1 Williston, Contracts § 3A, at 13 [3d ed 1961]); see also Eighteen Associates, LLC v Nanjim Leasing Corp., 257 AD2d at 560..

The third cause of action for unjust enrichment is a quasi contract claim which applies in the absence of an express agreement governing the same subject matter (Clark-Fitzpatrick, Inc. v Long Island Rail Road Co., 70 NY2d 382, 388 [1987]). Merely receiving a benefit is insufficient to establish this claim (Wiener v Lazard Freres & Co., 241 AD2d 114 [1<sup>st</sup> Dept 1998]). Rather, liability requires that “under the circumstances ... the enrichment be unjust” (McGrath v Hilding, 41 NY2d 625, 629 [1977]). Unjust enrichment occurs where a defendant enjoys a benefit bestowed by plaintiff, but without adequately compensating plaintiff (Sergeants Benevolent Association Annuity Fund v Renck, 19 AD3d 107, 111 [1<sup>st</sup> Dept 2005]).

Matthews & Co. does not dispute that during the period for which the plaintiff seeks use and occupancy, it subleased and occupied a portion of the Premises, without plaintiff’s written consent in contravention of the subleasing provision of the Lease, and enjoyed a benefit thereby.

Moreover, while defendants, through their attorneys’ affirmation, assert that they paid rent for 2004 through September, the record contains uncontroverted evidence to the contrary, including the a rent ledger from MWTK (exhibit K), and the deposition testimony of RM, who is MWTK’s sole shareholder and officer, indicating that Matthew & Co. paid a total of \$40,000 in rent for the period between January and October 2004, with the last payment made on April 1,

2004.<sup>4</sup> Moreover, the 2004 tax return for Matthews & Co. indicating that it paid \$120,395 in rent for the year (exhibit G) is insufficient to raise a triable issue of fact since it appears that the additional rent was paid after Matthews & Co relocated, and defendants submit no evidence to the contrary.

Thus, plaintiff is entitled to summary judgment as to liability on the second and third causes of action against Matthews & Co, insofar as the uncontroverted record shows that Matthews & Co. occupied a portion of the Premises for at least part of 2004 without paying rent or use and occupancy.

Plaintiff, however, has not met its burden of demonstrating the amount of use and occupancy owed. Although the record indicates that Matthews & Co. sublet only a portion of the Premises, plaintiff seeks use and occupancy for the entire Premises. Moreover, plaintiff's managing agent does not provide any factual basis for his opinion that the Premises is valued at \$25,000 a month, even though the rental amount is only \$14,000 per month. Similarly, plaintiff has not provided a sufficient basis to determine the amount of damages on its unjust enrichment claim. Accordingly, plaintiff is entitled to summary judgment as to liability only on the second cause of action for quantum meruit, and the third cause of action for unjust enrichment against Matthews & Co, and defendants' motion for summary judgment to dismiss these causes of action is denied.

With regard to the individual defendants, there exists an express agreement between plaintiff and the individuals, in the form of the Guarantee. The Guarantee expressly states that

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<sup>4</sup>Plaintiff attaches a copy of a check evidencing that Matthews & Co. received a check in the amount of \$15,000 from MWTK in May 2004. Although plaintiff argues that the check was a refund on rent payments, there is no indication of what the check was for.

“Guarantor shall have no liability hereunder with respect to any defaults by Tenant under the Lease which occur after the last day of the thirtieth (30<sup>th</sup>) month of the term of the Lease.” Inasmuch as the default at issue occurred after the first 30 months of the Lease, this court finds that the individual partners of Matthews & Co. are not individually liable (111-115 Broadway Limited Partnership v. Minter & Gay, 281 AD2d 153 [1<sup>st</sup> Dept 2001][individual partners could not be held liable for rent owed by partnership where they entered into a guarantee agreement which capped their liability]). In any event, there is no evidence that the partnership is insolvent or unable to pay its debts such that the individual partners could be held liable (Helmsley v. Cohen, 56 AD2d 519 [1<sup>st</sup> Dept 1977]). Accordingly, the second and third causes of action are dismissed as against the individual defendants.

The fourth and fifth causes of action seeks an attachment and the imposition of a constructive trust, respectively, of any sums due and owing to MWTK by defendants, based upon defendants’ use and occupancy of the Premises through October 15, 2004.

The claim for attachment is dismissed, as plaintiff has not provided any grounds to attach any debt owed by Matthews & Co. to MWTK for rent.<sup>5</sup> Plaintiff urges that an attachment is proper based on the judgment entered against MWTK in Civil Court of the City of New York for rent due and owing prior to September 13, 2004. However, a New York judgment does not provide a basis for an attachment. Instead, pursuant to CPLR 6202(5) only the judgment of a sister state or a judgment of a foreign country qualifying for recognition under Article 53 serves as

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<sup>5</sup>Pursuant to CPLR 6202, “[a]ny debt or property against which a money judgment may be enforced as provided in section 5201 is subject to attachment.” CPLR 5201 (a) provides, in relevant part, that “[a] money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor ... .” Thus, such a debt would be subject to attachment if a ground for such an attachment were shown.

grounds for an attachment (See Siegel New York Practice, § 314, at 501 (4<sup>th</sup> ed. 2005); Byblos Bank Europe, S.A. v. Syrketi, 12 Misc3d 792, 795 [Sup Ct NY Co. 2006]).

The fifth cause of action for the imposition of a constructive trust is also without merit. Generally, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein (Sharp v Kosmalski, 40 NY2d 119, 121 [1976]; Scivoletti v Marsala, 97 AD2d 401, 402 [2d Dept 1983], affd 61 NY2d 806 [1984]). In deciding whether to establish a constructive trust, it has been held that a court may consider the following four factors: 1) the existence of a confidential or fiduciary relation, 2) a promise, 3) a transfer in reliance thereon, and 4) unjust enrichment. See Fodiman v Zoberg, 182 AD2d 493, 494 (1<sup>st</sup> Dept 1992); Liselli v Liselli, 263 AD2d 468, 469 (2d Dept 1999), lv. to appeal denied, 94 NY2d 751 (1999) citing Teichman by Teichman v Community Hosp. of W. Suffolk, 87 NY2d 514 (1996).

The circumstances of this case do not warrant the imposition of a constructive trust. There is no confidential or fiduciary relationship between plaintiff and any defendants. Moreover, with respect to the claim against MWTK, the facts of this case are not such that would require the intervention of equity since plaintiff's claim for the breach of the Lease is enforceable by a legal remedy. As for the other defendants, there is no allegation of any promise made by them to plaintiff or any transfer made by plaintiff in reliance on such a promise. Accordingly, the sixth cause of action for a constructive trust must be dismissed as to all the defendants.

Accordingly, defendant's motion to dismiss the fourth and fifth causes of action is granted. Plaintiff's cross motion for summary judgment on its fourth and fifth causes of action is denied.

The sixth cause of action is labeled as breach of Lease against MWTK, and breach of implied contract against MWTK's co-defendants. The aspect of this cause of action which alleges breach of the Lease is identical to the first cause of action, and is therefore dismissed. That aspect of the cause of action which seeks damages for breach of an implied contract is likewise dismissed.

Plaintiff claims that the defendants knew or should have known that they were subletting the Premises without plaintiff's written consent, in contravention of the subleasing provision in the Lease. Plaintiff argues that defendants' conduct constitutes a breach of an implied contract between plaintiff and defendants. Defendants maintain that they paid rent to MWTK for nine years, and that plaintiff was aware that Matthews & Co. and the individual defendants occupied the Premises since their names were listed on the building's directory. Thus, it is argued that plaintiff knowingly allowed the defendants to use the Premises for the time that defendants occupied the Premises.

There are two types of implied contracts, i.e., (1) implied in fact, where the parties' conduct, not their words, indicate that there was a meeting of the minds to form a contract (Parsa v State of New York, 64 NY2d 143, 148 [1984]; Jemzura v Jemzura, 36 NY2d 496, 503-504 [1975]); and (2) implied in law, also called quasi contract, an equitable theory, which the law implies from the circumstances, even though the parties never intended to form a contract, in order to avoid unjust enrichment (see Bradkin v Leverton, 26 NY2d 192 [1970]; I.G. Second Generation Partners, L.P. v Duane Reade, 17 AD3d 206 [1<sup>st</sup> Dept 2005]).

Plaintiff always billed MWTK for the rental of the Premises. Plaintiff never billed MWTK's co-defendants, and the co-defendants never made a rental payment to plaintiff, but instead paid their rent to MWTK. There is no evidence that there was a meeting of the minds

between plaintiff and Matthews & Co. or the individual defendants that they intended to form a contract where the said defendants would pay the rent owed under the Lease to plaintiff, other than the limited Guarantee. Therefore, no implied-in-fact contract was created (see Parsa v State of New York, supra).

With regard to an implied-in-law claim, also called quasi contract, inasmuch as this court has already granted plaintiff summary judgment as to liability on its equity claims for unjust enrichment and quantum meruit, this claim is dismissed as duplicative. Accordingly, defendants' motion for summary judgment dismissing the sixth cause of action is granted.

The seventh cause of action is labeled as "alter ego/pierce corporate veil." Plaintiff seeks to pierce the corporate veil in order to make MWTK's co-defendants liable for the monies allegedly owed to plaintiff by MWTK under the Lease. Plaintiff maintains that MWTK was set up as a shell corporation, for the purpose of impermissibly subleasing the Premises to third-party entities, including its shareholders and officers.

Plaintiff claims, upon information and belief, that MWTK deliberately stopped collecting rent payments from Matthews & Co. after the personal guarantee period expired with the intent of defrauding the plaintiff; and otherwise disbursed revenues and accounts receivable to themselves, also with the intent of defrauding plaintiff.

Further, plaintiff contends that Matthews & Co. used MWTK as its alter ego to shield itself from liability for payment of the use and occupancy of the Premises. It is further alleged that MWTK was undercapitalized; failed to observe proper corporate formalities; and permitted Matthews & Co. and the individual defendants to exercise control over MWTK's business operations.

There exists a strong presumption that corporations are legal entities separate from their officers and shareholders (Port Chester Elec. Constr. Co. v Atlas, 40 NY2d 652 [1976]). Where the controlling principal respects the corporate entity, and the corporation pursues its own business, instead of the business of its principal, the corporate veil will not be pierced (id.; Treeline Mineola, LLC v Berg, 21 AD3d 1028 [2d Dept 2005]).

Under New York law, among the important factors which allow the court to pierce the corporate veil include, inter alia, “a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment” (Forum Insurance Co. v Texarkoma Transportation Co., 229 AD2d 341 [1<sup>st</sup> Dept 1996]). Further, with respect to a claim which seeks to pierce the corporate veil on an alter ego theory, the movant must show that “(1) the owner exercised complete domination over the corporation with respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff’s injury” (First Capital Asset Management, Inc. v N.A. Partners, L.P., 300 AD2d 112, 116 [1<sup>st</sup> Dept 2002]; Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]).

Defendants argue that there is no basis for piercing the corporate veil, since MWTK was a separate entity, had separate books, a separate checking account, and a separate tax return. Each individual defendant submits an affidavit stating that the plaintiff was aware, at the time of the execution of the Lease, that MWTK had very little assets, and that is why plaintiff required the individual defendants to personally guarantee the Lease for 30 months. They affirm that Matthews & Co. is a CPA firm which always filed its own tax return, separate and apart from MWTK. They further point out that MWTK paid rent to plaintiff after the Guarantee expired. Finally, defendants

point out that MWTK was a corporation which leased property, performing a distinctly different function than Matthews & Co., which was organized to practice accounting.

It is well established that a business can be incorporated for the legitimate means of avoiding personal liability, even though the corporation is controlled by one shareholder (Treeline Mineola, LLC v Berg, 21 AD3d 1028, supra). Despite plaintiff's claim that MWTK did not produce certain documents, including its corporate books and records, it is clear from RM's deposition that the corporate books and records were provided, and plaintiff fails to point to any specific documents in RSM's/MWTK's possession which were not provided.

Although RM is the sole shareholder and director of MWTK, and all of the partners of Matthews & Co. are officers of MWTK, plaintiff has failed to raise an issue of fact, or to establish sufficient facts from which it might be inferred, that Matthews & Co. was the alter ego of MWTK, or that MWTK was a sham corporation (id.; see also Matter of Total Care Health Industries, Inc. v Department of Social Services, 144 AD2d 678 [2d Dept 1988]). Accordingly, defendants' motion for summary judgment dismissing the seventh cause of action is granted.

Finally, the eighth cause of action for reasonable attorneys' fees pursuant to the provisions of the Lease is granted as to liability as against MWTK, and denied as to MWTK's co-defendants, inasmuch as MWTK's co-defendants have been shown to have no liability under the Lease. Defendants' motion for summary judgment on the ninth cause of action which seeks damages based upon the condition of the Premises when the Premises were vacated is denied, as issues of fact exist regarding whether the Premises were delivered to plaintiff in the appropriate condition pursuant to the Lease.

Accordingly, it is

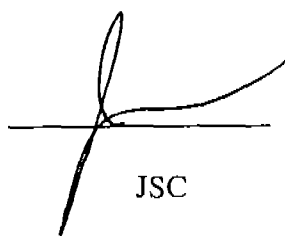
ORDERED that defendants' motion is granted to the extent of granting them summary judgment dismissing (i) the second and third causes of action as against the individual defendants; (ii) the fourth, fifth, sixth, and seventh causes of action as against all of the defendants, and (iii) dismissing the eighth cause of action as against Matthews & Co. and the individual defendants, and is otherwise denied; and it is further

ORDERED that plaintiff's cross motion is granted to the extent of (1) granting summary judgment on the first cause of action as against MWTK Corp. and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant MWTK Corp. in the amount of \$259,338.98, together with statutory interest from February 15, 2005, as calculated by the Clerk, together with costs and disbursements, (2) granting summary judgment as to liability on the second and third causes of action as against Matthews & Co and on the eighth cause of action as against MWTK and is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that a pre-trial conference shall be held on December 21, 2006 at 3:00 pm in Part 11, room 659, 60 Centre Street, New York, NY.

DATED: December 15, 2006

  
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