

**Weil, Gotshal & Manges LLP v Fashion Boutique of  
Short Hills, Inc.**

2006 NY Slip Op 30078(U)

March 21, 2006

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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

PRESENT: ~~RICHARD B. LOWE III~~

PART 56

Index Number : 100630/2003

WEIL GOTSHAL & MANGES LLP

vs  
FASHION BOUTIQUE

Sequence Number : 012

DISMISS

C

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

MOTION DATE \_\_\_\_\_

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

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

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

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

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

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

PAPERS NUMBERED


Cross-Motion: ~~Yes~~  No (see sequence Number 013)

Upon the foregoing papers, It is ordered that this motion

Motion denied. See minutes of  
March 10, 2006.

**FILED**  
MAR 23 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/10/06

  
RICHARD B. LOWE III s.c.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 56

-----X  
WEIL, GOTSHAL & MANGES LLP,

Plaintiff,

Index No. 100630/2003

-against-

FASHION BOUTIQUE OF SHORT HILLS, INC.,  
ANNETTE C. FISCHER, and RANDI FISCHER,

**DECISION  
AND ORDER**

Defendants.

-----X  
FASHION BOUTIQUE OF SHORT HILLS, INC.,

Counterclaim-Plaintiff,

-against-

WEIL, GOTSHAL & MANGES LLP,  
HELENE D. JAFFE and ROBERT G. SUGARMAN,

Counterclaim-Defendants.

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

Motion sequence numbers 012 and 013 are consolidated for disposition.

In motion sequence 012, counterclaim-defendant Weil, Gotshal & Manges LLP (Weil Gotshal), Helene D. Jaffe (Jaffe), and Robert G. Sugarman (Sugarman) moves for summary judgment against counterclaim-plaintiffs Fashion Boutique of Short Hills, Inc. (Fashion Boutique), Annette C. Fischer, and Randi Fischer (the Fischers) to dismiss the counterclaim for legal malpractice. The court, during oral argument held on March 10, 2006, denied the motion.

In motion sequence 013, Fashion Boutique moves the court to add a counterclaim against counterclaim-defendants Weil Gotshal, Jaffe, and Sugarman, for an alleged violation of § 487 of the Judiciary Law for intending to commit a deceit on the court. As well, defendants Annette C.

**FILED**

MAR 23 2006  
COUNTY CLERK'S OFFICE  
NEW YORK

Fischer and Randi Fischer (the "Fischers") move for summary judgment to dismiss the cause of action for piercing the corporate veil against the Fischers.

### **BACKGROUND**

The underlying dispute and facts have been discussed extensively in previous decisions of the court entered December 9, 2003, and dated July 24, 2005 and November 9, 2005, as well as in a decision by the First Department (*see Weil, Gotshal & Manges LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD2d 267 [2004]). Accordingly, the court will not reiterate the background of this protracted litigation here, except to the extent necessary to resolve this motion.

#### ***I. Motion to Amend the Answer and Counterclaim***

Weil Gotshal brings this action against defendants Fashion Boutique and the Fischers, owners of Fashion Boutique, for their failure to pay attorneys fees associated with its 1993 to 2000 representation of Fashion Boutique against non-party Fendi USA for alleged violations of the Lanham Act (*see Fashion Boutique of Short Hills, Inc. v Fendi USA, Inc.*, US Dist Ct, SD NY, Cederbaum, J., 91 Civ 4544). In turn, Fashion Boutique brings counterclaims against Weil Gotshal, and its partners Jaffe and Sugarman, for legal malpractice when it failed to inform Fashion Boutique of its representation of non-party Prada USA (Prada), which, at that time, had purchased a controlling interest in Fendi.

Fashion Boutique alleges that Weil Gotshal failed to abide by its own conflict clearance procedures in handling new matters prior to commencing representation of Prada. For instance, on December 7, 1999, Weil Gotshal submitted New Matter Sheets for non-party Prada to Weil Gotshal's Conflicts Department for clearance but failed to prepare adequately a list of "related

[\* 4 ]

entities” for purposes of conflict clearance. Furthermore, when these sheets were distributed to the partners, Jaffe testified in 2004 that she never saw the sheets because she purportedly did not read the New Matter Sheets during the 1999 time period (*see* Grobman Aff, Ex. D at 363-64 [Jaffe Dep.]). However, during a deposition of Jaffe held on November 19, 2005, Jaffe admitted that she “*could have*” seen the conflict clearance sheets when they first came out in 1999 (*see id.* at 414-15 [emphasis added]). Accordingly, Fashion Boutique argues, Jaffe knew about the conflict of interest and should have alerted Fashion Boutique of the problem; because she did not relate this matter to the Fischers, she and the other attorneys at Weil Gotshal purposely hid information regarding representation from the court.

In another instance of Weil Gotshal’s alleged failure to abide by its conflicts clearance procedures, in April 2000, Weil Gotshal created a New Business Review Committee which required that, before undertaking work, proposed new matters for existing clients be approved by two committee members (*see id.*, Ex. EE). Fashion Boutique alleges that Weil Gotshal failed to gain approval of a new matter related to Prada until after litigation was commenced. Had Weil Gotshal timely submitted the new matter and the New Business Review Committee done its job, Weil Gotshal would have known about the conflicts of interest and would have given notice to Fashion Boutique.

Fashion Boutique alleges that these underlying facts contradict the affidavit submitted by Sugarman in August 2000 testifying that “had Ms. Jaffe and I known of our representation of Prada in December 1999, or at any time before we found out about it, we certainly would have immediately disclosed it to the Fischers” (*see* Grobman Aff, Ex. II). The counterclaim-plaintiff argues that, based upon Jaffe’s November 19, 2005 deposition, where she concedes that she “could have” seen the conflict clearance sheets and would have known of Weil Gotshal’s

\* 5 ]  
representation of Prada, Weil Gotshal knew about the alleged conflict of interest as far back as 1999 when it represented Fashion Boutique, and, at the same time, representing Prada. Accordingly, Fashion Boutique argues, based on this affidavit and the failure to abide by its conflicts clearance procedures, Weil Gotshal committed a deceit upon the court.

## ***II. Piercing the Corporate Veil***

The Fischers signed a written retainer agreement with Weil Gotshal whereby Annette Fischer specifically retained Weil Gotshal to represent Fashion Boutique (*see* Feldberg Supp Aff, Ex. 50). However, Weil Gotshal never was retained to represent either Annette Fischer or Randi Fischer individually (*see* Grobman Supp Aff, Ex. 10 at 12). Nor were the Fischers requested to be held personally liable (*see id.*, Ex. D at 396-97).

On January 14, 2003, this action was commenced by Weil Gotshal against Fashion Boutique and the Fischers for unpaid legal services. Jaffe wrote to the Fischers regarding the commencement of this action and offering to withdraw the litigation “as part of an overall resolution of the claims” between the parties (*see id.*, Ex. 9). During the course of discovery, the Fischers produced few corporate documents, and produced no corporate bylaws. Further, Fashion Boutique did not produce any employment agreements or corporate records reflecting shares of stock. The Fischers did loan money to Fashion Boutique, but, at the same time, used corporate funds to pay for expensive trips to Italy. Weil Gotshal never deposed Annette Fischer; however, in deposing Randi Fischer, it was conceded that the Fischers would remain responsible for bills issued by Weil Gotshal for the work performed for Fashion Boutique. In addition, Fashion Boutique’s landlord, business attorneys, accountant, and others have not been paid by Fashion Boutique or by the Fischers for moneys owed and due to these parties.

[\* 6 ]

Based on this evidence, the Fischers move for summary judgment to dismiss the cause of action for piercing the corporate veil.

## DISCUSSION

Counterclaim-plaintiff Fashion Boutique moves the court to supplement its Answer and Counterclaim to add an additional counterclaim for an alleged violation of § 487 of the Judiciary Law. The Fischers also move for summary judgment to dismiss the claim of piercing the corporate veil. The court discusses each application in turn.

### *I. Judiciary Law § 487*

Fashion Boutique argues that because Jaffe *could have* seen these conflict clearance sheets when they first came out in 1999, the affidavit signed by Sugarman in August 2000 was a deceit to the court because Weil Gotshal actually knew of the conflicts. The counterclaim-plaintiff argues that, based upon the evidence, Weil Gotshal fraudulently concealed the conflict from Fashion Boutique since at least October 1999 when it failed to abide by its conflict clearance procedures and failed, in turn, to apprise the court and Fashion Boutique of the alleged conflicts of interest. Accordingly, the counterclaim-plaintiff moves to amend its Answer and Counterclaim to add a violation of § 487 of the Judiciary Law.

#### A. Motion to Amend

CPLR 3025 (b) provides that a “party may amend his pleading, or supplement it . . . at any time by leave of court or by stipulation of the parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” Nonetheless the party seeking leave to amend must “demonstrate the merit of the proposed pleading” (*see Peretich v City of New York*, 234 AD2d 410 [1st Dept 1999]). That is, “the proponent must allege legally

sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading” (*Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). Thereafter, the court must test the “pleading’s merit,” and must sustain the amended pleading “unless the alleged insufficiency or lack of merit is clear and free from doubt” (*id.*, citing *East Asiatic Co. v Corash*, 34 AD2d 432, 436 [1st Dept 1970]). Thus, in opposing the motion to amend, the non-movant “must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient” (*id.*, citing *Brennan v City of New York*, 99 AD2d 445, 446 [1st Dept 1984]).

B. Statute of Limitations

There is an issue as to whether the cause of action for violation of Judiciary Law § 487 comes within a three-year statute of limitations period or a six year statute of limitations period. The counterclaim-plaintiff argues that there is a six year statute of limitations period, pursuant to *New York City Transit Auth. v Morris J. Eisen, P. C.* (203 AD2d 146 [1st Dept 1994]). There, the First Department found that, because Judiciary Law § 487 is analogous to an action in fraud, there is a six year statute of limitations period (*id.*). Weil Gotshal avers that since the Legislature amended CPLR 214 (6) in 1996, providing that “an action to recover damages for malpractice, other than medical, dental or podiatric malpractice, regardless of whether the underlying theory is based in contract or tort” has a statute of limitations of three years, there is now a three year statute of limitations period for any alleged violations of Judiciary Law § 487. The court agrees with the Weil Gotshal.

Fashion Boutique argues that, had the three year statute of limitations applied, then the First Department would have applied it in its *New York City Transit Auth. v Morris J. Eisen, P.C.* decision (276 AD2d 78, 85 [1st Dept 2000]). Instead, Fashion Boutique argues, because the

court did not do so and applied the six year statute of limitations in that case, the same time frame should govern the matter at hand. The court finds Fashion Boutique's argument flawed. The decision Fashion Boutique cites is but the continuation of a case where the First Department, in a previous decision, dealt with the statute of limitations issue (*see Morris J. Eisen, P. C.*, 203 AD2d 146), prior to the amendment of CPLR 214 (6). As that decision was the law of that particular case, the First Department was being consistent in its later decisions (*id.*; *Morris J. Eisen, P.C.*, 276 AD2d at 85). Here, because this action falls under the current iteration of CPLR 214 (6), Weil Gotshal, as a partnership of legal professionals, comes under the shorter three year statute of limitations period.

Furthermore, the Legislature's amendment of CPLR 214 (6) was to specifically provide "professionals such as architects, attorneys, accountants and engineers . . . a sense of repose approximating that of their colleagues in the medical profession" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C214:6 [1996]). As the purpose of the amendment is to give members of the legal profession the same benefit as those granted to the medical profession, the court accords the same to Weil Gotshal. Finally, the underlying theory in this case is based on the contractual relationship between the parties and the alleged conflicts of interest Weil Gotshal had in its representation of Fashion Boutique, which squarely falls within the rubric of CPLR 214 (6). Accordingly, the statute of limitations period that applies here is three years (*see Lefkowitz v Appelbaum*, 258 AD2d 563 [2d Dept 1999]; *accord Ruffolo v Garbarini & Scher, P.C.*, 239 AD2d 8 [1st Dept 1998]; *In re Kliment*, 3 AD3d 143 [1st Dept 2004]).

The counterclaim-plaintiffs do not dispute that the potential claim under Judiciary Law § 487 arose against Weil Gotshal no later than September 8, 2000, when the Fischers sought to use

the claimed conflict of interest to oppose Weil Gotshal's second motion to withdraw as counsel in the federal action (*see* Feldberg Supp Aff, Ex. 31). As such, this counterclaim should have been brought by September 8, 2003. Technically, this motion to amend is stale and ought not be considered.

Nonetheless, the court finds that Fashion Boutique has timely made this motion to amend. Pursuant to CPLR 203 (f), a claim in the amended pleading relates back to the time of the filing of the original pleading unless the original pleading did not give "notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." Here, counterclaim-plaintiff's Answer and Counterclaims was filed on March 14, 2003 (*see* Feldberg Aff, Ex. B). Because the Answer and Counterclaims was within the requisite three years, the amendment is not outside the statute of limitations as the proposed counterclaim relates back to the time of the filing. In addition, the proposed amendment is based upon the same transactions and occurrences underlying Fashion Boutique's Answer and Counterclaims against Weil Gotshal. Here, there is no prejudice or surprise to Weil Gotshal because Weil Gotshal will not incur "a change in position or is hindered in the preparation of its case" or will be "prevented from taking some measure in support of its position" (*see Valdes v Marbrose Realty Inc.*, 289 AD2d 28, 29 [1st Dept 2001]). Weil Gotshal had knowledge that it was subject to such a claim, especially since Fashion Boutique's Answer and Counterclaims is based upon about what Weil Gotshal did and did not do as counsel for the counterclaim-plaintiff. Accordingly, the amendment is timely and is not prejudicial to Weil Gotshal.

C. Prima Facie Case

Even while Fashion Boutique's proposed counterclaim has a statute of limitations period of three years and may relate back to the filing of the original pleading, the court finds that the

counterclaim-plaintiff has not pleaded a violation of Judiciary Law § 487 with legal sufficiency to warrant the amendment.

As indicated above, in a motion to amend, “the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading” (*Daniels*, 151 AD2d at 371). Judiciary Law § 487 provides that an attorney is guilty of a misdemeanor where he or she “is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party.” In a cause of action for violating Judiciary Law § 487, the movant must allege that the law firm “knowingly withheld crucial information from” the court (*see Schindler v Issler & Schrage, P.C.*, 262 AD2d 226, 229 [1st Dept 1999]). Basically equivalent to a cause of action in fraud and fraudulent inducement (*see Briarpatch Ltd., L.P. v Frankfurt, Garbus, Klein & Selz, P.C.*, 13 AD3d 296, 297 [1st Dept 2004]), here the movant must aver a misrepresentation of a material fact, falsity, knowledge, intent to deceive, reliance and damages, with the requisite particularity pursuant to CPLR 3016 (b) (*see Bank Leumi Trust Co. v D'Eвори Intl.*, 163 AD2d 26, 31-32 [1st Dept 1990]). While it is only required that “the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of” (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977]), conclusory allegations or mere suspicion of fraud are *wholly* insufficient (*Bank Leumi Trust Co.*, 163 AD2d at 32, citing *Glassman v Catli*, 111 AD2d 744 [2d Dept 1985] [emphasis added]).

Fashion Boutique argues that because Weil Gotshal failed to abide by its own internal conflicts procedures as it relates to Fashion Boutique, and because Jaffe “could have seen” a conflict between Weil Gotshal’s representation of Prada and its representation of Fashion Boutique (*see Grobman Aff, Ex. D at 414-15 [Jaffe Dep.]*), Weil Gotshal had intentionally

engaged in a deceit upon the court for “knowingly” withholding “crucial information” (*Schindler*, 262 AD2d at 229). The court disagrees. For one, that Jaffe “could have seen” these conflict clearance sheets does not, in itself, provide any indication that there was any “intent to deceive” the court on the part of Weil Gotshal (*see Grobman Aff*, Ex. D at 414-15; *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]). Indeed, the court is at a loss as to how the counterclaim-plaintiff links Jaffe’s November 19, 2005 remark, *made over six years after* the conflict clearance sheets were first produced, to Sugarman’s affidavit, made *in August 2000*, testifying that “had Ms. Jaffe and I known of our representation of Prada in December 1999, or at any time before we found out about it, we certainly would have immediately disclosed it to the Fischers” (*see Grobman Aff*, Ex II). If anything, the connection Fashion Boutique proposes to make is but a “mere suspicion of fraud” (*Bank Leumi Trust Co.*, 163 AD2d at 32), wholly insufficient to make out a viable cause of action under Judiciary Law § 487.

Similarly, the court questions how there is an affirmative misrepresentation where Weil Gotshal failed to abide by its conflicts clearance process as it relates to Fashion Boutique, Prada, or Fendi. Here, the fact that Weil Gotshal may have not utilized its conflicts process correctly does not in and of itself demonstrate an affirmative misrepresentation to the court (*see Gonzalez v Gordon*, 233 AD2d 191 [1st Dept 1996]; *see also Pellegrino v File*, 291 AD2d 60 [1st Dept 2002]). Indeed, Fashion Boutique has failed to provide sufficient facts detailing how Weil Gotshal failed to speak, and further, how Weil Gotshal actually had knowledge at that time that would have given rise to a duty to speak (*see Schindler*, 262 AD2d at 229, citing *Donovan v Aeolian Co.*, 270 NY 267, 271 [1936]). That the allegation is but an assertion that Weil Gotshal deliberately disregarded its own conflicts clearance process in order to commit a deceit upon the

court is wholly conclusory and is wholly insufficient to make out a prima facie case for violation of Judiciary Law § 487.

Because the movant has failed to allege legally sufficient facts to establish a prima facie cause of action for violation of Judiciary Law § 487, the court denies Fashion Boutique's motion to amend.

## ***II. Piercing the Corporate Veil***

The Fischers move for summary judgment to dismiss the cause of action for piercing the corporate veil of Fashion Boutique, arguing that because Weil Gotshal cannot demonstrate how the corporate form was used to commit a fraud or any wrongdoing against the firm, Weil Gotshal cannot pierce the corporate veil to reach the Fischers.

### **A. Summary Judgment Standard**

In a motion for summary judgment "supported by affidavit," the motion "shall recite all the material facts and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit" (CPLR 3212 [b]). The court will grant the motion "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (*id.*). Since summary judgment deprives a party of its day in court, it may be "granted without a trial only if no genuine, triable issue of fact is presented" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). The party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

B. Piercing the Corporate Veil

It is well settled that those seeking to pierce a corporate veil “bear a heavy burden,” (*TNS Holdings Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]), in 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 New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Though total domination “is the key” to piercing the corporate veil, evidence of control alone does not suffice “without an additional showing that it led to inequity, fraud or malfeasance” (*TNS Holdings Inc.*, 92 NY2d at 339). Plaintiff must allege, with the requisite “particularized statements detailing fraud or other corporate misconduct,” facts that would warrant piercing the corporate veil (*Sheinberg v. 177 E. 77*, 248 AD2d 176, 177 [1st Dept 1998], *lv dismissed in part & denied in part* 92 NY2d 844 [1998]). After all, a court will not lightly disregard the corporate form (*see Rapid Transit Subway Const. Co. v City of New York*, 259 NY 472, 487-88 [1932]), unless the plaintiff demonstrates not only complete control, but also the use of that authority to commit fraudulent acts or misconduct against others.

C. Procedural Defects

Weil Gotshal makes a number of procedural defect arguments in opposition to Fashion Boutique’s motion to dismiss. First, Weil Gotshal argues that this motion is but a “successive attack” against it, arguing that the Fischers had brought a previous motion for summary judgment. The court disagrees. If a motion is “based on matters that could have been but were not raised in an earlier summary judgment motion,” the court will deny the motion (*see Phoenix Four v Albertini*, 245 AD2d 166, 167 [1st Dept 1997], citing *Levitz v Robbins Music Corp.*, 17 AD2d 801 [1st Dept 1962]). After all, parties “will not be permitted to make successive

fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment” (*id.*). However, the court, in its prior decision dated July 14, 2005 as to the Fischer’s prior motion for summary judgment, noted that a determination as to the “alter ego theory” would “not be ripe for summary judgment adjudication until discovery is concluded” (*see* Decision at 2). Accordingly, the court withheld judgment as to the “alter ego theory” until after discovery was completed. Here, this is a second motion for summary judgment “based on evidence obtained . . . through discovery after disposition of the earlier motion” (*see Lex Tenants Corp. v Gramercy N. Assocs.*, 288 AD2d 48, 49 [1st Dept 2001]). As such, because the court formerly reserved judgment and because this motion is based on evidence obtained, it is now ripe for summary judgment disposition.

Secondly, Weil Gotshal avers that because one of the Fischers has not been deposed, Weil Gotshal has been unable to discover facts uniquely within her knowledge to oppose this motion to dismiss. Indeed, there is no dispute that Annette Fischer has not been deposed because she has been ill. Generally, it is well settled that “where a party is unable to effectively oppose a motion for summary judgment because the evidence needed is within the exclusive knowledge of the moving party, the court may deny the motion, without prejudice, or refrain from ruling on the motion pending further disclosure” (*see Classic Moments Co. v Akata*, 176 AD2d 567 [1st Dept 1997]). Here, while it is true that Annette Fischer may have information uniquely within her knowledge, whether or not Annette Fischer is deposed does not change the fact this motion is untimely, or that there are material facts warranting a denial of summary judgment.

Weil Gotshal argues that because the Fischers filed this motion outside the court-ordered time period, the Fischers are prohibited from filing this motion. There is no dispute that, pursuant to the preliminary conference order, all motions for summary judgment must be made within sixty days of the filing of the note of issue. Here, Weil Gotshal filed its note of issue on November 4, 2005. Accordingly, any motion for summary judgment needed to be filed on or before January 3, 2006. Here, the Fischers argue that because this is a cross-motion, CPLR 2215 allows cross motions to be served within “three days prior to the time at which the motion is noticed to be heard.” The court does not find this motion to be a cross motion, but a motion in and of itself. After all, there is no dispute that the defendants filed this summary judgment motion via a notice of motion, paid a fee, and filed the motion on January 27, 2006, over three weeks after the motion should have been due.

As our Court of Appeals in *Miceli v State Farm Mutual Automobile Ins. Co.* makes clear, “court-ordered time frames (*see Kihl v Pfeffier*, 94 NY2d 118 [1999] – are not options, they are requirements, to be taken seriously by the parties” (3 NY3d 725, 726 [2004]). After all, “if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” (*Kihl v Pfeffier*, 94 NY2d at 123). Here, the motion for summary judgment is late. Even if the defendants had made it known that they were filing this motion, it is still a late motion. Nor is there any good cause warranting the leave to file this motion (*see Brill v City of New York*, 2 NY3d 648, 652 [2004]). Accordingly, the motion for summary judgment need not be considered.

#### D. Summary Judgment

However, even if the motion were to be considered on the merits, the court nonetheless denies the defendants’ motion. With or without Annette Fischer’s deposition, there are material

issues of fact warranting a denial of the Fischers' motion for summary judgment to dismiss the cause of action for piercing the corporate veil.

As the Fischers concede, they dominated and controlled the entity of Fashion Boutique. Indeed, the Fischers have failed to produce documents that would otherwise rebut the premise that they dominated Fashion Boutique; for instance, there are no bylaws or corporate records reflecting ownership of Fashion Boutique shares of stock. While the Fischers argue that there is no evidence whatsoever that the Fischers used its domination of the company to commit a fraud or wrong against the plaintiff, such an assertion is belied by facts indicating that the Fischer utilized corporate funds for trips (*see* Feldberg Supp Aff, Ex. 11 at 444-46, 518-19 [R. Fischer Dep.]), that the May 21, 1993 written retainer agreement expressly provided that Annette Fischer retained Weil Gotshal to represent Fashion Boutique (*see id.*, Ex. 50), and that defendant Randi Fischer herself conceded that the Fischers would remain responsible for bills issued by Weil Gotshal (*see id.*, Ex. 11 at 473).

Furthermore, the fact that the company was not in existence by the time the Fischers retained Weil Gotshal to prosecute its case and the issues regarding payments to other entities, such as Fashion Boutique's landlord (*see id.*, Ex. 52), its business attorneys (*see id.*, Ex. 10, 11), and its accountant (*see id.*, Ex. 11) all raise the possibility that the defendants are committing a fraud against Weil Gotshal. Finally, there is a material fact question as to whether the Fischers are indeed hiding behind the corporate entity to evade the obligation to pay the expenses associated with Fashion Boutique. Such issues of material facts relating to the underlying issue of whether the corporate form should be pierced warrant a denial of summary judgment.

As such, the Fischers' motion for summary judgment to dismiss the cause of action for piercing the corporate veil is denied.

**CONCLUSION**

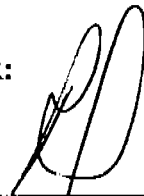
For the reasons stated, it is hereby

ORDERED that the motion to amend the Answer and Counterclaims is denied; and it is further

ORDERED that the motion for summary judgment to dismiss the cause of action for piercing the corporate veil is denied.

**Dated:** March 21, 2006

ENTER:



RICHARD B. LOWE III  
**RICHARD B. LOWE III**

**FILED**  
MAR 23 2006  
COUNTY CLERK'S OFFICE  
NEW YORK