

<b>Park Ave. 400 Partnership, L.P. v Cambridge U.S., Ltd.</b>
2007 NY Slip Op 30680(U)
February 7, 2007
Supreme Court, New York County
Docket Number: 0604010/2004
Judge: Richard B. Lowe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, Jr.  
*Justice*

PART 56

Park Avenue 400 Partnership

INDEX NO. 604 010/04

MOTION DATE 11/1/06

MOTION SEQ. NO. 004

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

- v -

Cambridge U.S.

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

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
FEB 16 2007  
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, JR.

Dated: 2/7/07

J.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 PART 56

-----X  
PARK AVENUE 400 PARTNERSHIP, LP,

Plaintiff,

Index No. 604010/04

-against-

CAMBRIDGE U.S., LTD., S.P. CAMBRIDGE, INC.,  
S.G. APPAREL, LLC, TNC APPAREL, INC., CAMBRIDGE  
MEMBERS CO., KYONG H. YUN, YOUN S. KIM,  
KYU SUNG, IN HO LEE, DONG LAG LEE,

Defendants.  
-----X

RICHARD B. LOWE III, J.,

This is an action by plaintiff, Park Avenue 400 Partnership LP, to recover the amount of a \$242,620.55 judgment for unpaid rent, additional rent, interest and costs, entered in a prior proceeding (*Park Avenue 400 Partnership, LP v Cambridge Trading Ltd.*, Index No. 602730/01 [Sup Ct, N Y County, Feb. 19, 2004]), against the non-party entity Cambridge Trading Ltd. (Cambridge Trading). There are four causes of action asserted in plaintiff's complaint. The first cause of action alleges that plaintiff was fraudulently induced to enter into a lease agreement with Cambridge Trading. The second seeks to pierce the corporate veil, alleging that Cambridge Trading was a mere alter ego of the defendants, that was used to avoid further obligations under the lease when defendants decided to stop doing business on the leased premises. Plaintiff's third cause of action alleges that the \$5,000 balance remaining in Cambridge Trading's bank account was fraudulently transferred to defendants, or to others, on their behalf, and the fourth cause of action asserts that defendants were unjustly enriched through their use and occupancy of the leased premises.

Defendants Kyu Sung, In Ho Lee, and Dong Lag Lee failed to answer plaintiff's complaint, and a default judgment was entered against them on September 26, 2005.

Under motion sequence 004, the remaining defendants now move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves for partial summary judgment against defendants Kyong Yun and Cambridge U.S. Ltd. (Cambridge US), on the first, second and the fourth causes of action alleged in the complaint.<sup>1</sup>

The parties do not dispute that plaintiff and judgement creditor Park Avenue 400 Partnership is the landlord of the building located at 400 Park Avenue, New York, New York. On or about July 30, 1998, Cambridge Trading, through defendant Kyong Yun, entered into a written lease agreement with plaintiff for portions of the ground floor of the 400 Park Avenue building. The lease was for a term of 13 years and two months, ending September 30, 2011, and provided, "Tenant shall use and occupy demised premises for the retail sale of men's wear and related accessories." The parties do not dispute that the \$208,000 security deposit recited in the lease was reduced to \$190,000 under a separate written agreement, and that defendant Cambridge US, not Cambridge Trading, actually occupied and sold men's wear from the premises.

Cambridge Trading stopped paying rent after tender of the September 2000 payment, and plaintiff alleges that Cambridge Trading and/or Cambridge US stopped doing business on the premises in or around November 2000, in violation of lease rider provisions requiring Cambridge Trading to operate a first class men's clothing store on the premises Monday through Saturday of each week during the lease period, from 11:00 a.m. to 5:00 p.m. Plaintiff served notice of

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<sup>1</sup> In various documents annexed by defendants, the captioned defendant Kyu Sung is named Kyu Young Sung, and defendant Cambridge Trading Co. is denominated Cambridge Trading Co., Ltd.

termination on or about May 8, 2001, which cancelled the lease effective May 15, 2001. A judgment of ejectment was entered against Cambridge Trading in the Supreme Court, New York County, on April 29, 2002 (Omansky, J.). After litigation which included, among other things, application of the \$190,000 security deposit, a money judgment was entered against Cambridge Trading, on February 19, 2004, for the sum of \$242,620.55 in rental arrears, interest, costs and disbursements. Plaintiff maintains that the entire amount remains outstanding. After conducting post-trial discovery, plaintiff commenced the instant action for damages equivalent to the amount of the unpaid judgment.

During post judgment proceedings, plaintiff deposed defendant Yun. Yun testified that at the time he negotiated the lease with plaintiff, he was Secretary of defendant S.P. Cambridge, Inc. (S. P. Cambridge), Secretary of Cambridge US, and President and sole employee of Cambridge Trading. Yun testified that he operated the businesses through offices located at 1270 Broadway, New York, New York. Yun testified that defendant S.P. Cambridge, a United States corporation, owns the building located at 1270 Broadway, and that S.P. Cambridge is a wholly owned subsidiary of defendant Cambridge Members Co. Ltd. Documents indicate that S.P. Cambridge purchased 1270 Broadway in 1992. Yun testified that defendant Cambridge Members Co. Ltd., a Korean corporation with its principal place of business in Seoul, Korea, owns the "Cambridge Members" trademark, and that at the time that he signed the lease for 400 Park Avenue, S.P. Cambridge, was the United States licensee for the trademark.

Yun testified that he was sent to the United States by Cambridge Members Co. Ltd. in 1996 to work for S.P. Cambridge, which, at the time, was predominantly in the business of leasing space at 1270 Broadway. Yun testified that shortly after his arrival, S.P. Cambridge

began importing men's clothing with the Cambridge Members trademark, and selling those goods exclusively to defendant Cambridge US. Defendants' documents show that Cambridge US, formerly Cambridge Members, Inc., was incorporated in 1992 to manufacture, import, export or sell mens and women's clothing, and that it operated a retail men's clothing store at 1270 Broadway under a written lease agreement with S.P. Cambridge from 1993 through the end of 2000. Defendant In Ho Lee was Secretary of both Cambridge US and S.P. Cambridge at that time.

Yun testified that Cambridge Trading had no assets or capital, and that the only activity undertaken by Cambridge Trading between 1997 and 2000 was to enter into the lease transaction with plaintiff. Tax returns for Cambridge Trading from 1998 to 2000 identify defendant Kyu Sung as the sole owner of Cambridge Trading, and denominate Cambridge Trading as an "inactive" corporation. The fact, as highlighted by defendants, that Cambridge Trading was used to enter into another lease transaction for space at the World Trade Center, does not alter that status. Yun testified that Cambridge Trading did no business on the leased premises, and maintained no books and records other than the checking account statements and tax returns.

Yun testified that, after entering into the lease with plaintiff, Cambridge Trading "subleased" the 400 Park Avenue premises to Cambridge US, without notice to the landlord, and without a written sublease agreement. In a 1998 Financial Statement for Cambridge US, annexed by plaintiff, Cambridge US announced that it "opened a new store on Park Avenue, New York City under a lease agreement that expires June 30, 2011" (Lenz Aff., Exh M). Yun testified, during a February 23, 2006 deposition, that he signed the lease on behalf of Cambridge Trading, intending that Cambridge US would operate a retail establishment on the premises. As

confirmed by copies of cancelled checks for both entities, all monies used to pay rent at 400 Park Avenue were remitted to Cambridge Trading by Cambridge US. Yun testified that he used Cambridge Trading to enter into the lease, because he learned to avoid liability by using different corporations.

The annexed 1998 Financial Statement states that Cambridge US, “has material transactions with affiliates...[and] is dependent upon financial support from the affiliates and shareholders....” The shareholders of Cambridge US, and their respective investments and interests, are identified in a November 1999 “Consent Authorizing Action Without Meeting” (Defendants’ Exh Q) as: Yun (\$2.5 million dollars or approximately 56%); Dong Lag Lee (\$1 million dollars or 22%); S.P. Cambridge (\$ .42 million dollars or 9%); Sung (\$ .4 million dollars or approximately 9%); and non-party K.S. Rim (\$ .18 million dollars or 4%). Tax returns annexed by defendants, confirm that Cambridge US operated at a loss during its entire tenure at 400 Park Avenue. Yun testified that Cambridge US stopped doing business at 400 Park Avenue in November 2000, and that it stopped doing business at 1270 Broadway in December 2000. Yun testified that, concurrently, S.P. Cambridge stopped importing Cambridge Members goods, and that the right to market Cambridge Members goods was given to defendant TNC Apparel Inc. (TNC), pursuant to a written licensing agreement with Cambridge Members Co. Ltd. According to a certificate of incorporation annexed by defendants, TNC was incorporated around the time that Cambridge US stopped doing business at the 400 Park Avenue space, on or about November 2, 2000.

Yun testified that TNC commenced operations out of the same, but expanded, space previously occupied by Cambridge US at 1270 Broadway, in or around August 2001, under a

written lease with S.P. Cambridge, with the same manager that worked for Cambridge US. The lease agreement between S.P. Cambridge and TNC, dated December 28, 2000, is signed by defendant Dong Lag Lee, as president of S.P. Cambridge and Kun S. Rim, as President of TNC.

Defendant Youn S. Kim testified, during his deposition, that he was President of TNC from 2001 to 2004, and that he was President of S.P. Cambridge for over four years prior to his deposition on February 23, 2006. Kim testified that, before he came to the United States, he worked as Managing Director of Cambridge Members Co., Ltd., in Korea, and that he was employed by Cambridge US for a few months in 1997. Kim testified that TNC purchased Cambridge Members goods directly from Cambridge Members Co., Ltd., and that, after TNC stopped doing business, in or around 2005, the right to market Cambridge Members goods was given to a non-party entity, BK House.

Yun testified that, after Cambridge US stopped doing business at 400 Park Avenue, there was a \$5,000 balance in the Cambridge Trading bank account which he used to pay “administrative expenses” such as tax preparation and attorney’s fees. His testimony regarding which company retained the attorney and accountant, however, was inconclusive. Yun also testified that, Cambridge US transferred all of its remaining inventory, worth over \$1 million dollars to an individual named Toru Nojiri, in partial payment of outstanding loans. Yun testified that Toru Nojiri ran a clothing manufacturing business in Guatemala called Cando Corporation. The 1998 Financial Statement for Cambridge US, lists Cando Corporation as a wholly owned subsidiary, and a November 21, 2000 purchase agreement states that Cambridge US sold Cando Corp. to Nojiri in further satisfaction of its outstanding obligations to him.

Documents annexed by defendant indicate that, over time, Nojiri loaned Cambridge US in excess of \$10 million dollars.

A Secretary of State search annexed by defendants indicates that the additionally named defendant, S.G. Apparel, LLC (SGA), was incorporated in 2003. Yun testified that he became the Manager of SGA in 2003, and that SGA operates a women's clothing store at 1270 Broadway, under a lease with S.P. Cambridge. A copy of the lease, dated March 31, 2004 is annexed to defendants' moving papers. Yun testified that he had no ownership interest SGA, and that the company is wholly owned by a non-party, Kwang S. Kim.

In moving to dismiss plaintiff's first cause of action for fraud, defendants assert, as would be appropriate on a motion addressed to the pleading, pursuant to CPLR Rule 3016 (b), that plaintiffs failed to specifically allege the details of the purported misrepresentations. The misrepresentations identified by plaintiff, however, are contained within the four corners of the lease, pursuant to which Cambridge Trading, through Yun, represented, among other things, that it would "...use the demised premises for the retail sale of men's wear and related accessories," give written notice to the landlord of any sublease, and provide the landlord with a copy of the sublease agreement. Yun's admission, that he signed the lease knowing that Cambridge Trading would never take possession, and that he never intended it to, when coupled with the fact that Cambridge Trading was an "inactive corporation" with no business and no assets, arguably makes the statement that Cambridge Trading would occupy and operate a men's clothing store the premises, a misrepresentation of present fact, and aligns this case more closely with cases holding that a promise made with a preconceived and undisclosed intention of not performing is a misrepresentation (*Deerfield Communications Corp v Cheseborough-Ponds, Inc.*, 68 NY 2d

954 [1986], quoting *Sabo v Delman*, 3 NY2d 155 [1957]; see also *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112,122 [1995] [a false statement of present intention may be sufficient to support an action for fraud]).

Plaintiff's reliance on the representation that Cambridge Trading would operate a retail store on the premises, however, is clearly contradicted by the terms of the lease. For instance, paragraph 3 of the Additional Rider to the lease expressly allows assignment or sublease to a wholly owned subsidiary or parent corporation, and paragraph 45 (b) (iii) of the Lease Rider contemplates use and occupation by other entities using the Cambridge Members trademark. The contingency of another party occupying the space was also contemplated under paragraph 11 of the lease, providing that in the event the tenant did allow another party to use the Premises in breach of the Lease, the landlord, "may, after default by Tenant, collect rent from the assignee, under-tenant or occupant, and apply it to the rent due under the lease, without release of the Tenant." Plaintiff, therefore, cannot claim justifiable reliance upon the statement, as contained in the lease, that Cambridge Trading would operate a men's clothing store on the premises, and without justifiable reliance, there can be no cause of action for fraud (see *Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 57 [1999]; *Dembeck v 220 Cent. Park South, LLC*, 33 AD 3d 491 [1<sup>st</sup> Dept 2006]).

In addition, even if it could be said that plaintiff justifiably relied on the agreement by Cambridge Trading to give written notice of sublease, and to provide plaintiff with a copy of any sublease agreement, those statements are promises of future conduct which are not actionable as fraud (see *Bencivenga & Co. v Phye*, 210 AD2d 22 [1<sup>st</sup> Dept 1994]; *Abelman v. Shoratlantic*

*Dev. Co.*, 153 A.D.2d 821, 822 [2d Dept 1989]). The failure to perform those covenants is a breach of contract, and it is well settled that a cause of action for fraud will not lie where the “only fraud relates to a breach of contract” (see *WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]; *Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114,115 [1st Dept 1998]). Plaintiff has not sought to amend the complaint to change its theory of pleading, and in the absence of additional statements or representations that induced plaintiff to forgo its right to require a guaranty or some other form of assurance, in addition to the \$190,000 security deposit, the first cause of action alleged in plaintiff’s complaint for fraud, is dismissed.<sup>2</sup>

Plaintiff’s second cause of action is not inhibited by the dismissal of plaintiff’s first cause of action for fraud, as it is not necessary to plead or prove fraud in order to pierce the corporate veil, so long as plaintiff can show that the defendants’ control of the subject corporation was used to perpetrate a wrongful or unjust act toward the plaintiff (*Lederer v King*, 214 AD2d 354 [1<sup>st</sup> Dept 1995], citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135,141 [1993]). Piercing the corporate veil is not a cause of action independent of plaintiff’s

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<sup>2</sup> Although it is not necessary to address the issue, defendants fail to conclusively demonstrate that plaintiff’s cause of action for fraud is time barred. A cause of action for fraud in the inducement accrues at the time of execution of the contract (*Ply\*Gem of Laurel, Inc. v Lee*, 91 AD2d 513 [1<sup>st</sup> Dept 1982]). The period of limitations is six years from accrual, or two years from the time the alleged fraud, with reasonable diligence, could have been discovered, whichever is longer (CPLR 203 [g]; 213[8]; *Fabozzi v Coppa* 5 AD3d 722 [2d Dept 2004]; see also *Lucas-Plaza Hous. Dev. Corp. v Corey*, 23 AD3d 217 [1<sup>st</sup> Dept 2005]; *Avalon LLC v Coronet Poperties Co.*, 306 AD2d 62 [1<sup>st</sup> Dept], lv denied 100 NY2d 513 [2003]). Plaintiff alleges that it did not discover the alleged misrepresentations until after it attempted to collect on the judgment in 2004. At best, therefore, there are issues of fact regarding whether plaintiff could have discovered the fraud with reasonable diligence more than two years prior to commencement of the action (see e.g. *Mitschele v Schultz*, \_\_AD3d\_\_, 826 NYS2d 14, 19 [1<sup>st</sup> Dept 2006]; *Transport Workers Union of America Local 100 AFL-CIO v Schwartz*, 32 AD3d 710, 716-17 [1<sup>st</sup> Dept 2006]).

claim against the corporation, and assumes that the corporation itself is liable for the obligation sought to be imposed (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141; *Lederer v King*, 214 AD2d 354, *supra*). In this case, breach of the lease agreement by Cambridge Trading, and the damages arising as a result of that breach, were fixed in a prior action (*Park Avenue 400 Partnership LP v Cambridge Trading, Ltd.*, Sup Ct, NY County Index No. 602730/01). Plaintiff's second cause of action, therefore, is an action on the judgment, against parties plaintiff claims are or should be liable.

The primary, and legitimate, purpose of incorporating, is to limit or eliminate personal liability (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 140; *Walkovszky v Carlton*, 18 NY2d 414, 417 [1966]; *Damianos Realty Group, LLC v Fracchia*, \_\_AD3d\_\_, 825 NYS2d 274, 275 [2d Dept 2006]; *Ventresca Realty Corp v Houlihan*, 28 AD3d 537 [2d Dept 2006]). As a general rule, therefore, corporations exist independently of their owners, and parent and subsidiary corporations are to be treated separately and independently for purposes of assigning legal responsibility (see *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1<sup>st</sup> Dept 2005]; *Meshel v Resorts Intl. of N.Y., Inc.*, 160 AD2d 211 [1st Dept 1990]). Moreover, although the privilege of doing business in the corporate format is not without limitations, and courts can, and will, disregard the corporate form, whenever necessary, to prevent fraud or to achieve equity (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 140; *Walkovszky v Carlton*, 18 NY2d at 417; *Damianos Realty Group, LLC v Fracchia*, 825 NYS2d at 275), those seeking to pierce the corporate veil bear a "heavy burden," and must show that the corporation was dominated as to the transaction attacked, and that such domination was used to perpetrate a fraud or otherwise resulted in wrongful or inequitable

consequences (*TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998]; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141; *Sheridan Broadcasting Corp. v Small*, 19 AD3d at 332). Alternatively, plaintiff must show that there was a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, and other forms of commingling, such as common use of office space and equipment (*Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1<sup>st</sup> Dept 1996]; see *Porter v LSB Indus.*, 192 AD2d 205 [4<sup>th</sup> Dept 1993]). Under either factual showing, plaintiff must demonstrate that the parties sought to be held responsible for the obligation of the corporation abused the privilege of doing business in the corporate form to perpetrate a wrong against the plaintiff (*Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 142).

In this case, the evidence submitted on the cross motions demonstrates, *prima facie*, that Cambridge US was the real party in interest on the underlying lease transaction. It held itself out as the actual lessee in its 1998 Financial Statement, it paid the rent, and it operated a men's clothing store from the premises, as anticipated under the lease. Defendants admitted both in testimony, and through documentary evidence, that Cambridge Trading was an "inactive corporation," and that Cambridge US and/or Yun controlled the amount of money that was deposited into the Cambridge Trading checking account. Other documents and testimony demonstrate that there were overlapping shareholders and officers, that the corporations shared office space, and there is no evidence that Cambridge US and Cambridge Trading observed corporate formalities or engaged in arms length transactions. With respect to defendant Cambridge US, therefore, defendants' motion to dismiss is denied, and plaintiff's cross motion

for summary judgment against Cambridge US, on the second and fourth causes of action alleged in the complaint, is granted (*see e.g. Galin Partnership v Flynn*, 295 AD2d 473 [2d Dept 2002][*absence of formalities such as corporate meetings and records and inadequate capitalization of lessee corporation*]; *Anderson Street Realty Corp. v RHMB New Rochelle Leasing Corp.*, 243 AD2d 595 [2d Dept 1997][*lessee corporation was alter ego on lease transaction*]; *see also Ventresca Realty Corp v Houlihan*, 28 AD3d at 538[*allegations of complete dominion and control over no asset corporate lessee*]; *in accord Weinstein v Willow Lake Corp.*, 262 AD2d 634 [2d Dept 1999]).

Granting summary judgment against Cambridge US on an alter ego theory, however, appears to provide plaintiff with little additional relief, as the evidence submitted by the parties indicates that the corporation is now inactive, and that its remaining assets were transferred to other affiliated parties, not joined in this action. With respect to piercing the corporate veil against the shareholders and officers of Cambridge Trading and/or Cambridge US, a default judgment has already been entered against shareholder defendants Sung, and Dong Lag Lee. However, the court makes no determination with respect to whether liability would attach to those individuals on the merits.

Piercing the corporate veil is based upon principals of agency and *respondeat superior* (*Walkovszky v Carlton*, 18 NY2d at 417). As noted by Judge Fuld, "it is one thing to assert that a corporation is a fragment of a larger corporate combine which actually conducts the business...quite another to claim that the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends" (*Walkovszky v Carlton*, 18 NY2d at 418-19). In this case, although Yun

was the majority shareholder of Cambridge US, and the sole officer and employee of Cambridge Trading, he did not own Cambridge Trading, and it is not clear from the evidence, that he was acting in his own capacity or for his personal benefit.

With respect to the corporate defendants, the seemingly interchangeable officers and shareholders, and the continuity of business purpose, create an inference that Cambridge US and Cambridge Trading were merely alter egos for S.P. Cambridge, and its parent corporation, Cambridge Members Co. Ltd. Similar inferences may be drawn with respect to TNC in light of the proximity of its incorporation to the date defendants stopped paying rent and ceased doing business as Cambridge US, the overlap of ownership interests, the continuity of men's clothing operations through TNC at the 1270 Broadway location, Yun's inability to specify for which entity payment of the \$5,000 balance in the Cambridge Trading Account was made, and the fact that TNC went out of business shortly after plaintiff commenced the instant action against it in 2004. The evidence of domination and control by S.P. Cambridge and Cambridge Members Co., Ltd, however, is not conclusive. Such evidence does, however, raise triable issues of fact with respect to whether Cambridge Trading and Cambridge US were mere alter egos of S.P. Cambridge and/or Cambridge Members Co., Ltd, and with respect to whether TNC was being controlled for the purpose of avoiding the obligations of Cambridge Trading and Cambridge US under the lease. These issues cannot be determined upon the evidence submitted in support of the cross motions (*see Damianos Realty Group, LLC v Fracchia*, 825 NYS2d at 275, quoting *First Bank of Americas v Motor Car Funding*, 257 AD2d 287, 294 [1999]). Accordingly, defendants' motion to dismiss plaintiff's second cause of action, to pierce the corporate veil, as asserted

against Yun, S.P. Cambridge, Cambridge Members Co., Ltd., and TNC, is denied. Plaintiff's cross motion for judgment, against Yun, also, is denied.

As noted above, plaintiff limits its third cause of action is for fraudulent conveyance to the \$5,000 that remained in the Cambridge Trading checking account after its default on the lease. A fraudulent conveyance under section 273 of the New York Debtor & Creditor Law is defined as "a conveyance made...by a person who is or will thereby be rendered insolvent as to creditors without regard to his actual intent if the conveyance is made...without fair consideration." Defendants' statement that the checks from the Cambridge Trading account, which included payments to Yun, and to Cambridge US, after Cambridge Trading stopped paying rent, reflect business in the ordinary course, is contradicted by Yun's inability to differentiate the entities that incurred the obligations that were paid from that account, and the admission that Cambridge Trading conducted no business. Defendants' further argument, that Cambridge Trading was already insolvent, and, thus, could not be rendered insolvent by the transaction, is of little value in light of the fact that Cambridge US, and or others, controlled the amount of money that Cambridge Trading retained on deposit at any given time. Defendants' motion to dismiss plaintiff's third cause of action, as asserted against Yun, S.P. Cambridge, Cambridge Members Co., Ltd., and TNC, is denied.

In opposition to defendants' motion to dismiss, and in support of the cross motion, plaintiff asserts that its fourth cause of action, for unjust enrichment, is limited to use and occupancy of the leased premises. For the reasons set forth above, with respect to plaintiff's causes of action to pierce the corporate veil, and to set aside fraudulent conveyances, defendants' motion to dismiss plaintiff's unjust enrichment claim, as asserted against Yun, S.P. Cambridge,

and Cambridge Members Co., Ltd. is denied. As asserted against defendant TNC, however, the motion is granted. TNC was not incorporated until after Cambridge Trading defaulted on the lease in 2000. There is no evidence that it conducted business on the leased premises, only that it occupied the space previously occupied by Cambridge US at 1270 Broadway, and there is no evidence that TNC utilized Cambridge US or Cambridge Trading to conduct business on the premises. Accordingly there is no to factual basis to support a claim that TNC was unjustly enriched through its use and occupancy of the premises.

With respect to defendants S.G. Apparel LLC, and Youn S. Kim, defendants' motion for summary judgment is granted, and plaintiff's complaint, as asserted against these parties is dismissed. The certificate of incorporation for S.G. Apparel LLC demonstrates that it was created after the judgment of ejectment and termination of the landlord-tenant relationship between plaintiff and Cambridge Trading. An inference of abuse does not arise where a corporation is formed for legal purposes or is engaged in legitimate business (*TSN Holdings v MKI Sec. Corp.*, 92 NY2d at 339-40; *Sheridan Broadcasting Corp. v Small*, 19 AD3d at 332). There is no evidence that S.G. Apparel LLC had control over either Cambridge US or Cambridge Trading in relation to use or occupation of the leased premises, no evidence of asset transfers, and no other indicia of control which would be sufficient to assign liability on any of the remaining causes of action. With respect to defendant Youn S. Kim, the evidence demonstrates that Kim held a number of interlocking positions, the most significant of which, his presidency of S.P. Cambridge, and of TNC, appear to have taken place after TNC commenced operations in or around 2001. There is nothing on the record to demonstrate an abuse of his position as president

of TNC, in relation to plaintiff, and thus, there is no basis on the record to hold him individually liable on the underlying transactions or the causes of action alleged.

Accordingly, for the reasons set forth above, it is:

ORDERED, that defendants' motion for summary judgment dismissing plaintiff's complaint is granted, in part, to the extent of: 1) dismissing plaintiff's complaint, in its entirety, as asserted against defendants S.G. Apparel LLC, and Youn L. Kim, and the Clerk is directed to enter judgment thereon; 2) dismissing plaintiff's first cause of action, for fraudulent inducement, as asserted against Cambridge U.S., Ltd., S.P. Cambridge, Inc., TNC Apparel, Inc., Cambridge Members Co., and Kyong H. Yun; and 3) dismissing the fourth cause of action, for unjust enrichment, as asserted against defendant TNC Apparel, Inc. The balance of defendants' motion for summary judgment is denied; and it is further

ORDERED, that plaintiff's cross-motion for summary judgment is granted, in part, on the second, third, and fourth causes of action alleged in the complaint, as asserted against defendant Cambridge U.S. Ltd. The Clerk is directed to enter judgment against Cambridge U.S. Ltd. for the sum of \$242,620.55, plus interest thereon from February 19, 2004. Plaintiff's cross-motion, in all other respects, is denied.

Dated: *February 7, 2007*

ENTER:

*[Signature]*  
HON. RICHARD B. LOWE, III

J. S. C.

**FILED**  
FEB 16 2007  
NEW YORK  
COUNTY CLERKS OFFICE