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SCANNED ON 7/6/2007

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

PRESENT: Shirley Werner Kornreich PART 30

0602079/2002

MELVILLE REALTY
vs
XOXO CLOTHING

SEQ 2

SUMMARY JUDGMENT

EX NO. 602079/02

TION DATE

TION SEQ. NO. (002)

TION CAL. NO.

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the memorandum decision dated 6-25-07

FILED

JUL 06 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6-25-07

Shirley Werner Kornreich J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30

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MELVILLE REALTY COMPANY, INC.,

Index No.: 602079/02

Plaintiff,

DECISION AND ORDER

-against-

XOXO CLOTHING COMPANY, INCORPORATED,
EUROPE CRAFTS IMPORTS, INC. and
ARIS INDUSTRIES, INC., as successors to LOLA, INC.,

Defendants.

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HON. SHERRY KLEIN HEITLER, JSC:

In this commercial landlord/tenant action, plaintiff moves for summary judgment on the complaint, while defendants cross-move for summary judgment to dismiss the complaint (motion sequence number 002). For the following reasons, plaintiff's motion is granted and defendants' cross motion is denied.

BACKGROUND

The Parties

The events that underlie this action can be traced to June 10, 1990, when plaintiff Melville Realty Company, Inc. (Melville Realty) and non-party Broadway Chess King, Inc. (Broadway Chess), as co-tenants, entered into a 15-year lease (the Lease)[1] for certain commercial space, located at 732 Broadway in the County, City and State of New York (the Premises), with non party Harmony Realty Company (Harmony), as landlord. Melville Realty and Broadway Chess were both originally owned by a corporate parent entity called Melville Corp. (Melville), although that entity was acquired by CVS, Inc. (CVS) in 1995, and its assets were extensively reorganized at that time. As

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[1] The parties amended the Lease one time with the effect that the term of the Lease expired on July 31, 2006. See Notice of Motion, Moffatt Affidavit, Exhibit B.

part of that reorganization, Broadway Chess was officially dissolved on April 12, 1995.[2] Nonetheless, on July 10, 1996, Broadway Chess entered into a 10-year sublease (the Sublease) for the Premises with an entity called 8-3 Retailing, Inc. (8-3 Retailing).[3] Although Melville Realty was not a party to the Sublease, on the date of execution, 8-3 Retailing's corporate parent, Lola, Inc. (Lola), also executed a guaranty (the Guaranty) on 8-3 Retailing's behalf in favor of Melville Realty in order to obtain Melville Realty's consent to the Sublease. As will be discussed, Melville has commenced this action to recover monies allegedly due under that Guaranty.

The relevant portions of the Guaranty provide as follows:

> Section 1. Guarantor [i.e., Lola] hereby unconditionally, absolutely and irrevocably guarantees to Obligee [i.e., Melville Realty] the prompt payment when due and the full and faithful performance and observance by Obligor [i.e., 8-3 Retailing] pursuant to the Sublease ... and agrees to pay on demand any and all expenses (including reasonable counsel fees and disbursements) incurred by Obligee in enforcing any rights under this Guaranty or under the Sublease.
>
> Section 2. Guarantor guarantees that the Obligations will be paid, performed and observed strictly in accordance with the terms of the Sublease, regardless of any law, statute, rule, regulation, decree or order now or hereafter in effect in any jurisdiction affecting or purporting to affect in any manner any of such terms or the rights or remedies of Obligee with respect thereto. The obligations of the Guarantor under this Guaranty are independent of the Obligations [i.e., under the Sublease]. The liability of the Guarantor under this Guaranty shall be absolute and unconditional, shall not be affected, released, terminated, discharged or impaired, in whole or in part, by, and Obligee may proceed to exercise any right or remedy hereunder, irrespective of:
>
> > (a) any lack of genuineness, regularity, validity, legality or enforceability, or the voidability, of the Sublease or any other agreement or instrument relating thereto; ...

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[2] Plaintiff claims that Broadway Chess's dissolution was inadvertent.

[3] Plaintiff alleges that Broadway Chess had engaged a real estate broker to look for a subtenant before it filed for dissolution.

(h) any bankruptcy, insolvency, assignment for the benefit of creditors, receivership, trusteeship or dissolution of or affecting Obligor; ...

(l) Obligee's consent to any assignment or successive assignments of the Sublease by Obligor;

(m) the failure to give Guarantor any notices whatsoever; or

(n) any other circumstances which might in any manner or to any extent constitute a defense available to Obligor, or vary the risk of Guarantor, or might otherwise constitute a legal or equitable discharge or defense available to a surety or guarantor, whether similar or dissimilar to the foregoing;

all from time to time before or after any default by Obligor under the Sublease, and with or without further notice to or assent from Guarantor.

Section 3. Guarantor represents and warrants to Obligee that: ...

(d) this Guaranty has been duly executed and delivered and constitutes a legal, valid and binding obligation of the Guarantor, enforceable against it in accordance with its terms ... .

Section 4. Guarantor hereby waives ... (b) ... performance or observance of any of the Obligations [under the Sublease]; ... (f) the right to interpose all substantive and procedural defenses of the law of guaranty, indemnification and suretyship, except the defenses of prior payment or prior performance by Obligor or excuse of Obligor therefrom of the Obligations which Guarantor is called upon to pay or perform under this Guaranty, (g) all rights and remedies accorded by applicable law to guarantors, or sureties, including, without being limited to, any extension of time conferred by any law now or hereafter in effect ... .

Section 12. This Guaranty is a continuing guaranty and shall (a) remain in full force and effect until payment, performace and/or observance in full of the Obligations and all other amounts payable under this Guaranty, (b) be binding upon Guarantor, its successors and assigns, and (c) inure to the benefit of and be enforceable by Obligee and its successors, transferees and assigns or by any person to whom Obligee's interest in the Sublease may be assigned. Whenever in this Guaranty reference is made to Obligee or Obligor, the same shall be deemed to refer also to the then successor or assign of Obligee or Obligor.

In July of 1999, counsel for Lola and 8-3 Retailing wrote CVS (Melville Realty's and Broadway Chess's new corporate parent) to inform it that Lola was going to be merged into defendant XOXO Clothing Company, Incorporated (XOXO), a wholly owned subsidiary of defendant Aris Industries, Inc. (Aris), and that after the merger, XOXO would own all of Lola's assets and obligations, but would itself still be wholly owned by Aris. Counsel requested that CVS consent to any necessary assignments of the Lease or the Guaranty with regard to 8-3 Retailing and Lola. On August 10, 1999, Aris merged Lola with defendant Europe Crafts Imports, Inc. (Europe Crafts), another of its wholly owned subsidiaries, and thereafter transferred all of Europe Crafts's assets (including Lola's obligations under the Guaranty) to XOXO.[4] At their respective depositions, Europe Crafts's controller, Kevin Webber (Webber), and Aris's chief financial officer, Paul Spector (Spector), both admitted that XOXO did not pay any consideration to Europe Crafts for its acquisition of Lola's assets. Subsequently, between August of 1999 and February of 2002, 8-3 Retailing continued to occupy the Premises and to do business there under the name "XOXO."

In January of 2002, 8-3 Retailing breached the Sublease by failing to pay Harmony certain monies designated therein as "additional rent." In February of 2002, 8-3 Retailing further breached the Sublease by failing to pay Harmony any rent or additional rent whatsoever, and by vacating the Premises without notice. At his deposition on February 20, 2004, Spector admitted that Aris's board of directors had decided to take "whatever steps we had to do to get out of the leases" (i.e., the Sublease between 8-3 Retailing and Harmony) and that he had communicated this decision to

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[4] Aris evidently consummated the initial merger between Lola and Europe Crafts rather than XOXO at the insistence of its lender. After the merger, Aris also installed Greg Feine (Feine), Lola's president and CEO, as an officer of Europe Crafts and XOXO and a director of Aris, Europe Crafts and XOXO.

Webber. Spector also stated that, after 8-3 Retailing's vacatur of the Premises, Europe Crafts and XOXO had "no business," and that Europe Crafts had "no assets," while XOXO had a bank account "with $40.00 in it." These companies were not dissolved, however.

At that point, Harmony commenced an action against Melville Realty in this court to recover the amounts due, pursuant to the Sublease and other money damages.[5] Harmony and Melville Realty eventually settled that action, and Melville Realty took the additional step of mitigating its damages thereunder by again re-renting the Premises to a new subtenant called Omnipoint Communications, Inc. (Omnipoint) on October 28, 2002 for a term equal to the unexpired period of the original Sublease (the New Sublease). Melville Realty notes, however, that Omnipoint's rental obligation under the New Sublease amounts to less than 8-3 Retailing was obligated to pay under the original Sublease.[6] Melville Realty thus wishes to recover the amounts that it had to pay Harmony in connection with the previous action, the difference between 8-3 Retailing's and Omnipoint's rental obligations, and the costs, expenses and legal fees, etc. that it incurred in both the previous action and this one.

Prior Proceedings

Melville commenced this action on June 5, 2002, and its complaint sets forth one cause of

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[5] That action was entitled Harmony Realty Co., LLC v Melville Realty Company, Inc., CVS New York, Inc. d/b/a "CVS", and CVS Pharmacy, Inc. (Index No. 600890/02).

[6] The original Sublease, which incorporated by reference the payment terms of the Lease, provided that the occupant of the Premises was to pay $421,478.00 per year for the tenth, eleventh and twelfth years of the Lease, and $472,055.00 per year for the thirteenth, fourteenth and fifteenth years of the Lease. The New Sublease provides that Omnipoint is to pay a fixed rent of $412,500.00 for the entire period of its occupancy.

action for breach of the Guaranty. Defendants initially moved to dismiss this action, pursuant to CPLR 3211; however, the court denied that motion (motion sequence number 001) in a decision dated December 23, 2002. Thereafter, defendants served an answer on January 17, 2003, that includes the affirmative defenses that: 1) the complaint fails to set forth a cause of action; 2) Melville Realty's claim is barred by the equitable doctrines of laches, waiver, estoppel and/or unclean hands or by the statute of limitations; 3) Melville Realty's claim is barred because there was no privity of contract between it and defendants; 4) Melville Realty's claim is barred because defendants did not assume any of Lola's obligations under the Guaranty; and 5) the Sublease is defective, and the Guaranty is therefore unenforceable and/or a legal nullity. Melville Realty now moves for summary judgment on the complaint, and defendants cross-move for summary judgment to dismiss the complaint.

DISCUSSION

Plaintiff's Motion

I. Plaintiff's Claim

Melville Realty seeks summary judgment on its sole cause of action for breach of the Guaranty. The Appellate Division, First Department, has held that a trial court may properly grant summary judgment on such a claim "upon proof of the loan documents, including the guaranty agreement, and failure to pay in accordance therewith." Bank of Am. v Tatham, 305 AD2d 183, 183 (1st Dept 2003). The Appellate Division has also ruled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'"

Maysek & Moran, Inc. v S.G. Warburg & Co., 284 AD2d 203, 204 (1st Dept 2001), quoting Lake Constr. & Dev. Corp. v City of New York, 211 AD2d 514, 515 (1st Dept 1995). Here, Melville Realty has presented the Guaranty that Lola executed in Melville Realty's favor in order to secure 8-3 Retailing's performance under the Sublease. Melville Realty also claims: 1) that 8-3 Retailing breached the terms of the Sublease; 2) that, as a result of that breach, Melville Realty became financially liable to Harmony and incurred money damages;[7] and 3) that defendants, as Lola's successors under the Guaranty, have unjustly failed to reimburse Melville Realty for its monetary losses, costs and attorney's fees. If proven, the foregoing elements would clearly constitute prima facie proof of a breach of guaranty claim under the holding of Bank of Am. v Tatham, supra. Here, defendants concede both the existence and the terms of the Guaranty, and the fact that they have not paid Melville Realty. However, they raise legal arguments as to the validity and enforceability of the Guaranty, and as to whether it applies to them.

A. Against Europe Crafts and XOXO

Anticipating these arguments, Melville Realty first contends in its brief that the documentary evidence clearly shows that defendants Europe Crafts and XOXO each, in turn, became a successor of Lola's obligations under the Guaranty by virtue of their consecutive mergers. As evidence, Melville Realty points to Aris's SEC filings which show that Aris did indeed purchase Lola, merge it into Europe Crafts, and thereafter transfer all of Europe Crafts's assets to XOXO in August of 1999. Defendants do not contest this evidence. Thus, it is clear that, and the court finds that, both

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[7] Regarding this element, Melville Realty specifies that it is seeking money damages comprised of: 1) the amounts that it had to pay Harmony in connection with the previous action; 2) the difference between 8-3 Retailing's and Omnipoint's rental obligations; and 3) the costs, expenses and legal fees, etc. that it incurred in both the previous action and this one.

Europe Crafts and XOXO are successors of Lola's obligations under the Guaranty.

B. Against Aris

Melville Realty next argues that the corporate veils of both Europe Crafts and XOXO should be pierced to hold their parent company, Aris, liable for Lola's obligations under the Guaranty, and that Aris should also be deemed a legal successor of Lola, pursuant to the de facto merger doctrine. Defendants contest both of these points of argument.

B (I) Piercing the Corporate Veil

With respect to the former argument, the Court of Appeals holds that "[g]enerally, ... piercing 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 [citations omitted]." Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141 (1993). Regarding the element of domination, the Appellate Division, First Department, holds that a trial court should consider such factors as the disregard of corporate formalities, inadequate capitalization, intermingling of funds, overlap in corporate ownership, officers, directors and personnel, common office space or telephone numbers, the degree of discretion demonstrated by the allegedly dominated corporation, whether the corporations are treated as independent profit centers, and the payment or guarantee of the corporation's debts by the dominating entity, although no one of these factors is dispositive of the issue. See Simplicity Pattern Co. v Miami Tru-Color Off-Set Serv., 210 AD2d 24, 25 (1st Dept 1994), citing Passalacqua Bldr. v Resnick Developers S., Inc., 933 F2d 131 (2d Cir 1991). Regarding the element of "fraud" or "wrongdoing," the Court of Appeals holds that "[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination,

abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d at 142. Defendants correctly point out that, as a general rule, "this fact-laden claim to pierce the corporate veil [i.e., whether there has been, 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] is particularly unsuited for resolution on summary judgment." Forum Ins. Co. v Texarkoma Transp. Co., 229 AD2d 341, 342 (1st Dept 1996). However, Melville Realty also correctly points out that, where the moving party makes out a prima facie case and the party opposing the motion fails to raise any triable issues of fact, a determination to pierce the corporate veil may appropriately be made on a motion for summary judgment. See e.g. Old Republic Natl. Tit. Ins. Co. v Moskowitz, 297 AD2d 724 (2d Dept 2002); Hyland Meat Co. v Tsagarakis, 202 AD2d 552 (2d Dept 1994).

Here, Melville Realty alleges that: 1) the evidence shows that Aris completely directed both XOXO's and Europe Crafts's actions during the merger with Lola; 2) there is a significant overlap of officers and directors between Aris, XOXO and Europe Crafts; 3) Aris directed XOXO to breach the Sublease, and XOXO lacked the discretion to question this decision; and 4) other factors exist that mitigate in favor of piercing Aris's corporate veil, including, inter alia, that Aris and Europe Crafts share office space, that XOXO's and Europe Crafts's annual board meetings are held as joint meetings when Aris's board meets, that Aris has licensed and/or sold trademarks that officially belonged to both XOXO and Europe Crafts on several occasions, that Aris has consolidated its financials with those of its subsidiaries and that XOXO and Europe Crafts have appeared by Aris's counsel in other actions pending in this court. Melville Realty supports its claims regarding the Lola

merger with documentary evidence including: 1) the Hart-Scott-Rodino Premerger Notification Statement filed in conjunction therewith, and Aris's cancelled check for the $45,000.00 filing fee; 2) the merger contract itself, under which Aris agreed to deliver 6,500,000 shares of its own common stock and $10,000,000 in cash to pay for the merger; 3) the SEC filing statement that Aris filed after the merger, which confirms the foregoing, confirms that Aris wholly owns both XOXO and Europe Crafts, and also states that Aris "consummated" the merger of Lola with and into Europe Crafts, after which Europe Crafts "contributed" all of Lola's assets to XOXO; and 4) the deposition testimony of Webber and Spector that XOXO did not pay any consideration to Europe Crafts for its acquisition of Lola's assets.

Melville Realty supports its allegation that there is "significant overlap" of officers and directors between Aris, XOXO and Europe Crafts with defendants' second amended response to interrogatories and with Webber's and Spector's deposition testimony, all of which admit that allegation. Melville Realty supports its allegations that Aris directed XOXO to breach the Sublease, and that XOXO lacked discretion to question this decision, with Spector's deposition testimony that Aris's board of directors had decided to take "whatever steps we had to do to get out of the leases" (i.e., the Sublease between 8-3 Retailing and Harmony) and that he had communicated this decision to Webber. Finally, Melville Realty supports its miscellaneous allegations regarding joint office space, joint board meetings, consolidated financials, joint appearance by counsel and Aris's licensing and sale of Europe Crafts's and XOXO's corporate property, with Spector's deposition testimony, with Aris's own 1999 and 2003 SEC disclosure statements, with copies of trademark licensing and sales agreements between Aris and other principals and with pleadings filed in other actions in this court. Defendants do not contest any of the foregoing evidence or present any evidence of their own

that would tend to contradict it, but instead merely cite the general rule that summary judgment motions are normally inappropriate vehicles with which to determine whether or not to pierce the corporate veil.

After reviewing the foregoing evidence, however, the court finds that Melville Realty has made a prima facie showing of a number of the factors that indicate corporate "domination;" i.e., a complete lack of discretion by Europe Crafts and XOXO with respect to both the Lola merger and the conduct of 8-3 Retailing's business at the Premises. In addition, the payment by Aris of all of the consideration involved in the Lola merger, its evident intermingling of its own funds with those of its subsidiaries, the lack of corporate formalities between Aris, Europe Craft and XOXO, Aris's licensing and sale of Europe Crafts and XOXO's corporate property, and the large degree of overlap in corporate ownership, officers, directors and personnel as between Aris and its two subsidiaries is further evidence of Aris's control. Finally, the common office space used by Aris and its two subsidiaries, and inadequate capitalization as demonstrated by Spector's testimony that Europe Crafts now has no assets and XOXO has a bank account containing $40.00, are factors to consider when deciding to pierce the corporate veil. In the absence of any argument or evidence from defendants to the contrary, the court finds that Melville Realty has proven the "corporate domination" element of its claim to pierce Aris's corporate veil.

The next inquiry is whether Aris used its control of Europe Crafts and XOXO "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 and Fin., 82 NY2d at 141. Melville Realty argues that the result of Aris's directive that XOXO breach the Sublease was that Melville Realty became liable to Harmony for substantial money damages. Defendants do not deny that Aris directed XOXO to breach the

sublease or that Melville Realty incurred money damages to Harmony after the ensuing litigation. Indeed, their only responsive argument on this point is that an issue of fact exists as to whether 8-3 Retailing was obligated to pay rent at all, since Broadway Chess had been dissolved and had not assigned the Sublease. However, since the Sublease plainly states that it is subordinate to, refers to, and incorporates all of the terms of the Lease, including the payment provision contained therein, 8-3 Retailing would remain obligated to pay. It has been held proper to pierce the corporate veil of a parent corporation that directs a subsidiary to breach a lease and thereby occasion a third party to sustain money damages via non payment of rent. See e.g. Simplicity Pattern Co. v Miami Tru-Color Off-Set Serv., 210 AD2d at 30. Thus, the court finds that Melville Realty has sufficiently proven that Aris used its corporate domination of its subsidiaries to cause them to commit a wrongful act against Melville Realty that resulted in Melville Realty sustaining damages. Accordingly, the court concludes that Aris's corporate veil should be pierced and that it should also be deemed a successor of Lola's obligations under the Guaranty, along with Europe Crafts and XOXO.

B (ii) The De Facto Merger Doctrine

As an alternative argument, Melville Realty contends that Aris should bear responsibility for Europe Crafts's and XOXO's actions pursuant to the "de facto merger" doctrine. The court notes that defendants failed to respond to this argument at all. As the Appellate Division, First Department, has observed,

> A transaction structured as a purchase-of-assets may be deemed ... a 'de facto' merger, even if the parties chose not to effect a formal merger, if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the

> uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation.

Matter of New York City Asbestos Lit., 15 AD3d 254, 255 (1st Dept 2005), citing Fitzgerald v Fahnestock & Co., 286 AD2d 573, 574 (1st Dept 2001).

Melville Realty argues that Lola's merger into Europe Crafts and then into XOXO was actually a de facto merger between Lola and Aris, as evinced by the facts that: 1) Aris used its own common stock and funds as the consideration for the transaction; 2) Aris installed Greg Feine, Lola's president and CEO, as an officer of Europe Crafts and XOXO and a director of Aris, Europe Crafts and XOXO after the merger; and 3) Aris dissolved Lola after the merger. As the Appellate Division, First Department, has observed, "continuity of ownership exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction." Matter of New York City Asbestos Lit., 15 AD3d at 256. Such is clearly the case here, as evinced by the fact that Lola's owners received Aris's stock as consideration for the merger. It is also uncontested that Aris dissolved Lola immediately after the merger and transferred all of its assets to XOXO (via Europe Crafts). With respect to "assumption of liabilities," section 1.3 of the merger agreement plainly states that "at the Effective Time ... all debts, liabilities and duties of [Lola] shall become the debts, liabilities and duties of [XOXO]." Finally, Feine's installation as an officer and director of Europe Crafts and XOXO is also obviously evidence of "continuity of management or personnel." Since all of the factors enunciated by the Appellate Division, First Department, for determining whether a "de facto merger" has occurred were present in the transaction between Lola, Aris and its subsidiaries, the court finds that that transaction was, indeed,

a de facto merger between Lola and Aris. Accordingly, the court finds that Aris is also liable for Lola's obligations under the Guaranty on that theory.

The court finds that Melville Realty has proven: 1) the existence of the Guaranty and its terms; 2) that 8-3 Retailing breached the Sublease; 3) that Melville Realty became financially liable to Harmony and incurred money damages as a result of that breach; and 4) that all of the named defendants are Lola's successors under the Guaranty. The court now also finds that the plain language of Section 1 of the Guaranty also clearly requires Lola's successors to reimburse Melville Realty for its monetary losses, costs and attorney's fees. Defendants nonetheless raise several defenses to Melville Realty's assertion that they are liable as Lola's successors.

II. Defenses

In their brief, defendants first argue that there is a question of fact as to "whether the Guaranty covers the Sublease claimed to have been breached" because "[c]learly, the Guaranty refers to a 'sublease' between 8-3 Retailing, Inc. and Melville." Melville Realty replies that this defense is barred by section 2 (a) of the Guaranty, which specifically provides that Melville Realty may exercise its rights thereunder "irrespective of ... any lack of genuineness, regularity, validity, legality or enforceability, or the voidability of the Sublease or any other agreement or instrumentality relating thereto." New York State law routinely upholds such provisions. See e.g. Raven El. Corp. v Finkelstein, 223 AD2d 378 (1st Dept 1996). Thus, defendants' argument is indeed barred. The court also finds that defendants' argument is belied by the plain language of the Guaranty, which clearly identifies the Sublease between Broadway Chess and 8-3 Retailing. There is no justification for defendants' suggestion that the court should construe the Guaranty as referring to an imaginary sublease between Melville Realty and 8-3 Retailing. The "'courts may not by construction add or

excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.'" See Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 (2004), quoting Reiss v Financial Performance Corp., 97 NY2d 195, 199 (2001); see also Humble Oil & Ref. v Jaybert Esso Serv. Sta., 30 AD2d 952 (1st Dept 1968) (The misnomer of the principal obligor in the contract does not affect the validity of the obligation). Accordingly, the court rejects defendants' first opposition argument.

Defendants also argue that there is a question of fact as to whether Broadway Chess had the legal capacity to enter into the Sublease in 1996, because it had been dissolved in 1995 and was not a "de facto corporation." Melville Realty replies that, despite its (allegedly inadvertent) dissolution, Broadway Chess was a "de facto corporation" with the legal capacity to execute the Sublease for its co-tenancy interest in the Premises. See Plaintiff's Reply Memorandum, at 11-12. Melville Realty is correct. As the Court of Appeals long ago held in Garzo v Maid of the Mist Steamboat Co. (303 NY 516 [1952]),

> Corporations whose charters may have expired continue to have a de jure existence for the purpose of winding up their affairs, and, to that end, meetings may be held, corporate property conveyed, suits brought and defended, directors elected and debts paid. In addition, where ... a corporation carries on its affairs and exercises corporate powers as before, it is a de facto corporation as well, and ordinarily no one but the state may question its corporate existence.

Id. at 523-524; see also A. A. Sutain, Ltd. v Montgomery Ward & Co., 22 AD2d 607 (1st Dept 1965), affd 17 NY2d 776 (1966). Melville Realty also cites BCL § 1006 as granting Broadway Chess the capacity to enter into the Sublease on the ground that Broadway Chess's co-tenancy leasehold on the Premises was its only corporate asset and, accordingly, the execution of the New Sublease for the duration of the original Sublease term was a permissible act of winding up Broadway Chess's

corporate affairs. The Appellate Division, Second Department, has rendered a decision which held that BCL § 1006 conferred legal capacity upon a corporate lessor's estate to enter into a commercial lease where the lease was executed after the death of the lessor's sole shareholder. Sign Up USA, Inc. v JCF Assoc., 33 AD3d 905 (2d Dept 2006). The court reasoned that the corporation still held title to the property that was the subject of the lease, and that the corporation's managing officer therefore had the right, pursuant to BCL § 1006, to lease out that property pending the corporation's dissolution as an act of winding up the corporation's business affairs. In this court's estimation, the foregoing holding supports Melville Realty's argument that Broadway Chess retained the legal capacity to lease out its only remaining corporate asset - i.e., the Premises. As such, pursuant to the foregoing, the court finds that Broadway Chess's execution of the Sublease constituted a legally permissible "conveyance of property" in conjunction with the winding up of its corporate affairs. Accordingly, the court rejects defendants' capacity argument[8] and finds that Melville Realty has established that the Guaranty is legally effective and binding on defendants. However, that does not end the inquiry.

III. Affirmative Defenses

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[8] Defendants also raised an estoppel argument in connection with their capacity argument, which Melville Realty responded to in its reply papers. However, because the court has found that Broadway Chess did have capacity to enter into the Sublease, it need not determine whether defendants are estopped from denying the existence of such capacity. Also, as previously discussed, the court has already reviewed and rejected defendants' third opposition argument that an issue of fact exists as to whether 8-3 Retailing was obligated to pay rent at all, since Broadway Chess was dissolved and had not assigned the Sublease.

As the Appellate Division, First Department, has observed, "it is the burden of the summary judgment opponent to present admissible evidence showing the existence of a triable issue of fact or a defense warranting denial of summary judgment." Plantamura v Penske Truck Leasing, 246 AD2d 347, 348 (1st Dept 1998). It has been held improper to grant summary judgment to a plaintiff where the defendant relies on the affirmative defenses set forth in a verified answer. See e.g. Hladczuk v Epstein, 98 AD2d 990 (4th Dept 1983). Here, defendants' verified answer includes the affirmative defenses that: 1) the complaint fails to set forth a cause of action; 2) Melville Realty's claim is barred by the equitable doctrines of laches, waiver, estoppel and/or unclean hands or by the statute of limitations; 3) Melville Realty's claim is barred because there was no privity of contract between it and defendants; 4) Melville Realty's claim is barred because defendants did not assume any of Lola's obligations under the Guaranty; and 5) the Sublease is defective, and the Guaranty is therefore unenforceable and/or a legal nullity. The court notes that defendants failed to include any argument that specifically relates to these affirmative defenses in their brief. Nonetheless, they must be disposed of.

With respect to defendants' affirmative defense that the complaint fails to set forth a cause of action, the court has already found that Melville Realty has adequately proven all of the elements of its claim for the reasons discussed in the first section of this decision. Accordingly, the court now finds that defendants' first affirmative defense does not raise a triable issue of fact as to Melville Realty's cause of action.

With respect to defendants' affirmative defense that Melville Realty's claim is barred by the equitable doctrines of laches, waiver, estoppel and/or unclean hands or by the statute of limitations, the defendants do not include arguments regarding same. Thus, the court must treat this affirmative

defense as a conclusory allegation. It is axiomatic that "'averments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment.'" Banco Popular N.A. v Victory Taxi Mgt., 1 NY3d 381, 383 (2004). Accordingly, the court finds that defendants' second affirmative defense does not raise a triable issue of fact as to Melville Realty's sole cause of action.

Finally, as regards defendants' third, fourth and fifth affirmative defenses, the court has already rejected the contention that Melville Realty's claim is barred because there was no privity of contract between it and defendants, that defendants did not assume any of Lola's obligations under the Guaranty, and that the Sublease is defective (and the Guaranty is therefore unenforceable and/or a legal nullity) for the reasons discussed earlier in this decision. The court also finds that defendants have waived the right to assert these affirmative defenses, as will be discussed in the section of this decision that disposes of defendants' cross motion. Therefore, the court now finds that defendants' third, fourth and fifth affirmative defenses do not raise any triable issues of fact as to Melville Realty's claim, either. Accordingly, the court grants Melville Realty's motion for a summary judgment on its sole cause of action for breach of the Guaranty to the extent of finding that defendants are liable to Melville Realty. At this juncture, the court notes that although Melville Realty's moving papers specified the items of money damages that it incurred as a result of defendants actions, they did not specify exact dollar figures for each item (some of which may have continued accruing during the pendency of this motion). Accordingly, the court refers the issue of computing the amount of money damages that defendants now owe to Melville Realty to a Special Referee to hear and report.

Defendants' Cross Motion

In their cross motion, defendants argue that they are entitled to summary judgment dismissing the complaint as a matter of law. As previously mentioned, the party seeking summary judgment bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Defendants specifically argue that they are entitled to summary judgment because: 1) the Guaranty refers to a different obligation from the one claimed to have been breached; 2) both the obligation referred to in the Guaranty and the Guaranty itself are void; 3) the Guaranty has not been triggered because there is no debt owed to Broadway Chess; and 4) the Guaranty has not been triggered because 8-3 Retailing did not default on a payment obligation to Broadway Chess. In connection with these claims, defendants cite precedent drawn from the law of guaranty to support the propositions that "a guarantor is not liable unless the principal is bound," and that "[i]f the principal obligation is unlawful, then the guaranty is unenforceable." In response, Melville Realty replies that in section 2 (f) of the Guaranty, defendants specifically waived "the right to interpose all substantive and procedural defenses of the law of guaranty, indemnification and suretyship, except the defenses of prior payment or prior performance by Obligor or excuse of Obligor therefrom of the Obligations which Guarantor is called upon to pay or perform under this Guaranty." Melville Realty then notes that such waivers are routinely upheld by the courts of this state. Melville Realty is correct. See e.g. Lehman Bros. Holdings, Inc. v Matt, 34 AD3d 290 (1st Dept 2006). Therefore, the court finds that defendants arguments are barred by the plain language of the Guaranty. Accordingly, the court also finds that defendants have failed to sustain their burden of proof on their cross motion, and denies said cross motion in full.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiff Melville Realty Company, Inc. is granted solely on the issue of liability; and it is further

ORDERED that the issue of the amount of money damages is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 119) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of co-defendants XOXO Clothing Company, Incorporated, Europe Crafts Imports, Inc. and Aris Industries, Inc. is, in all respects, denied.

Dated: JUNE 25, 2007

SHERRY KLEIN HEITLER
J.S.C.