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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
RICHARD COHEN, NANCY COHEN and INA GROHMAN,	**NASSAU COUNTY**
Plaintiffs,	**Index No: 015131-08**
	Motion Seq. Nos. 2, 3 and 4
-against-	**Submission Date: 2/5/10**

SEKURA ASSET MANAGEMENT, INC. a/k/a SEKURA ASSET MGMT INC., JB WORKS INC., F & I SERVICES, INC., MANAGEMENT DYNAMICS, INC., F & B PROPERTY INVESTMENTS, LLC, INTRADAYSIGNAL.COM INC., HEE WAN BAE a/k/a HEE W. BAE a/k/a JONATHAN BAE and LYUDMILA BABAYEVA a/k/a LYUDMILA I. BABAYEVA a/k/a LYUBNILA EABAYEVA,

Defendants.

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The following papers having been read on these motions:

Notice of Motion, Affirmation in Support
Affidavit in Support and Exhibits.....x
Affirmation in Opposition, Affidavits in Opposition (2) and Exhibits....x
Plaintiff's Reply Affirmation in Support.....x
Notice of Motion, Affirmation, Affidavits (2) and Exhibit.....x
Affirmation in Opposition and Affidavit in Support.....x
Notice of Cross Motion, Affirmation in Support and Exhibits.....x
Affidavit in Support (D. Andriello) and Exhibit.....x
Affidavit in Opposition (L. Babayeva).....x

This matter is before the Court for decision on 1) the motion filed by Plaintiffs Richard Cohen ("R. Cohen"), Nancy Cohen ("N. Cohen") and Ina Grohman ("Grohman") (collectively

"Plaintiffs") on April 20, 2009, 2) the motion filed by Defendants Hee Wan Bae a/k/a Hee W. Bae a/k/a Jonathan Bae ("Bae") and Lyudmila Babayeva a/k/a Lyudmila I. Babayeva a/k/a Lyubnila Eabayeva ("Lyudmila") (collectively "Individual Defendants") on November 23, 2009, and 3) the cross motion filed by Plaintiffs on January 5, 2010, all of which were submitted on February 5, 2010. For the reasons set forth below, the Court 1) denies Plaintiffs' motion for summary judgment against the Individual Defendants with leave to renew upon the completion of discovery; 2) denies Plaintiffs' motion for a default judgment against Defendants Sekura Asset Management, Inc. a/k/a Sekura Asset Mgmt. Inc. ("Sekura"), JB Works, Inc. ("JB"), F & I Services, Inc. ("F & I"), Management Dynamics, Inc. ("Dynamics"), F & B Property Investments, LLC ("F & B") and Intradaysignal.com Inc. ("Com") (collectively "Corporate Defendants") with leave to renew upon the completion of discovery; and 3) denies the Individual Defendants' motion for a stay of discovery and directs the Individual Defendants to respond to Plaintiffs' pending discovery requests within forty-five (45) days of this decision. The Court further directs that any Defendant wishing to invoke a privilege with respect to those discovery requests must provide to the Court, within forty-five (45) days of this decision, all documents responsive to the discovery demands regarding which Defendant asserts a privilege, as well as a privilege log reflecting the legal ground asserted for withholding each document in question. The Court also directs counsel for the Plaintiffs, on or before April 23, 2010, to provide the Court and opposing counsel with a letter outlining the status of the related criminal proceeding against Bae being prosecuted by the Nassau County District Attorney's Office ("D.A."). That letter shall include 1) the date of any scheduled grand jury presentment, and 2) whether the D.A. has filed criminal charges against Lyudmila.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff and against the Individual Defendants and awarding Plaintiff the sum of $126,050 plus the costs of this motion.

Defendants Bae and Babayeva move for an Order, pursuant to CPLR § 2201, staying discovery on the grounds that they are the targets of criminal investigations.

Plaintiffs also move for an Order, pursuant to CPLR § 3215, granting a default judgment

in favor of Plaintiffs against the Corporate Defendants in the sum of $126,050 plus the costs of this motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. B to A. Dilimetin Aff.), filed August 13, 2008, alleges as follows:

Plaintiffs are residents of Nassau County who reside at 44 Tobin Avenue, Great Neck, New York. Sekura, JB and Com are corporations organized and existing under the laws of the State of New York ("New York") that maintain an office at 50 Tobin Avenue, Great Neck, New York ("Office Address"). F & I, Dynamics and F & B are corporations and limited liability companies organized and existing under the laws of the State of Georgia and licensed to do business in New York that maintain an office at the Office Address. Bae and Babayeva are individuals of legal age who transacted business at the Office Address.

Bae and Lyudmila, through the Corporate Defendants, entered into a scheme pursuant to which they accepted "earnest money" (Complaint at ¶ 13) from individuals, including Plaintiffs, and agreed to pay a high interest payment within a short period of time. Bae and Lyudmila made several scheduled payments to Plaintiffs with payments from Bae's personal checking account and other payments from the checking accounts of Sekura, JB, Com and the other Corporate Defendants.

Bae and Lyudmila improperly commingled the funds they received from Plaintiffs and others with funds of the Corporate Defendants and transferred the funds to themselves for their personal use. Plaintiffs allege that the Individual Defendants never intended to pay off any of the money that Plaintiffs gave to them and accepted that money under false pretenses. Plaintiffs further allege that the Individual Defendants operated this scheme by using the Corporate Defendants to shield themselves from liability and avoid their financial obligations to Plaintiffs and others.

Plaintiffs allege that the Corporate Defendants were alter egos of the Individual Defendants as demonstrated by, *e.g.*, 1) the overlap of ownership, office location and telephone numbers of the Corporate Defendants and Individual Defendants, 2) Bae's signature on all of the checks of the Corporate Defendants, and 3) Bae's status as CEO of all of the Corporate Defendants.

The Complaint contains four (4) causes of action. In the first cause of action, Plaintiffs allege that the Individual Defendants, doing business through the Corporate Defendants, breached their contractual obligations to Plaintiffs and owe Plaintiffs the sum of $126,050.00 "as an account stated," plus interest from August 18, 2007. Plaintiffs also seek punitive damages in the sum of $350,000.

In the second cause of action, Plaintiffs allege that the Individual Defendants fraudulently transferred funds from the Corporate Defendants to the Individual Defendants. Plaintiffs ask the Court to void that transfer. Plaintiffs also seek compensatory damages in the sum of $126,050, plus interest from August 18, 2007, as well as punitive damages in the sum of $350,000.

In the third cause of action, Plaintiffs allege that Defendants effected a fraudulent conveyance between the Corporate and Individual Defendants in an effort to avoid their obligations to satisfy their debts to the Plaintiffs. Plaintiffs ask the Court to set aside this transfer and impose a lien in favor of Plaintiffs in the sum of $126,050 with interest from August 18, 2007.

In the fourth cause of action, Plaintiffs ask the Court to hold the Defendants in contempt for knowingly accepting the profits from the allegedly fraudulent transfers. Plaintiffs seek judgment against Defendants in a sum representing the fair value of all unlawfully transferred assets, as well as reasonable attorney's fees.

The Defendants served a Verified Answer ("Answer") dated September 19, 2008. In the Answer, Defendants deny most of the allegations in the Complaint and deny knowledge or information sufficient to form a belief as to the truth of others. Defendants also assert five (5) affirmative defenses: 1) the Complaint fails to state a cause of action; 2) Plaintiffs failed to join necessary and dispensable parties; 3) Plaintiffs assumed the risk of their investments; 4) Plaintiffs failed to mitigate their damages; and 5) to the extent that Plaintiffs assert that they lent money to Defendants, the loans are void because they are in violation of General Obligations Law § 5-501.

Plaintiffs affirm that the law firm of Pena & Kahn, which represented the Defendants when they submitted their Answer, has moved to be relieved and that current counsel for the Defendants, Neil Iovino, Esq., represents only the Individual Defendants. Plaintiffs provide a Notice of Appearance dated January 2, 2009 (Ex. C to A. Dilimetin Aff.) reflecting that Mr.

Iovino was retained and appeared for the Individual Defendants only. The Court's records, however, reflect that Pena & Kahn filed an Order to Show Cause to be relieved which was withdrawn in June of 2009 as a result of a stipulation between counsel.

Plaintiffs provide the following documentation ("Supporting Documents") (Ex. D to A. Dilimetin Aff.) in support of their motion: 1) a document dated April 18, 2007 on Sekura stationery, signed by Bae, certifying that he received $100,000 from N. and R. Cohen and that they would receive payouts of $15,000 on July 25-30 and $115,000 (which "includes original money") on October 25-30, 2) a document on JB stationery, signed by Bae on November 29, 2005, certifying that he received $50,000 from R. and N. Cohen, that "[i]n return the following payment schedule applies:" $3,000 on January 5, February 5 and March 5, 2006, and stating that the original amount of $50,000 would be returned on March 5, 2006, 3) a document on Sekura stationery dated June 5, 2006, with Bae's name but not his signature, certifying that Bae received $50,000 from R. and N. Cohen and that the following payment schedule applied: $3,000 on July 5, August 5 and September 5, 2006 and stating that the original amount of $50,000 would be returned on September 5, 2006, 4) a cashier's check payable to Sekura from Grohman dated May 30, 2006 in the sum of $50,000, 5) a cashier's check payable to JB from Grohman dated November 28, 2005 in the sum of $25,000, and 6) a check payable to JB from N. Cohen dated November 28, 2005 in the sum of $25,000.

Plaintiffs affirm that "[Defendants] have acknowledged and agreed to pay their debt to [Plaintiffs] in the amount of $126,050.00" (A. Dilimetin Aff. at ¶ 6) but do not provide any writing reflecting such an acknowledgment. Plaintiffs also provide printouts from the New York and Georgia Departments of State (Ex. E) regarding the Corporate Defendants that, they submit, support their allegation that the Defendants are alter egos of each other.

Plaintiffs provide an Affidavit in Support of R. Cohen dated April 15, 2009 in which he affirms that 1) this matter is "for earnest monies loaned and received by defendants and [Bae] from me who agreed to personally pay back the loan" (R. Cohen Aff. at ¶ 3); and 2) according to Exhibits C and D to A. Dilimetin's Affirmation "it is clear that there is no doubt that defendant owes the debt, they agreed to pay said debt hence Plaintiff's motion should be granted in its entirety" (R. Cohen Aff. at ¶ 4). R. Cohen provides no additional details regarding the transactions that form the basis of the Complaint.

Lyudmila provides an Affidavit in Opposition dated May 19, 2009 in which she affirms as follows:

The Supporting Documents are not addressed to or signed by Lyudmila, and she did not agreed to be personally responsible for the transactions at issue. Lyudmila submits that Plaintiffs have failed to present any proof demonstrating her liability to them.

Bae provides an Affidavit in Opposition dated May 29, 2009 in which he affirms as follows:

Bae submits that the Supporting Documents and other paperwork submitted by Plaintiffs do not establish that Bae agreed to be personally responsible for the repayment of the alleged loans. Rather, it was the Corporate Defendants that received money from Plaintiffs and are responsible for repaying them. Bae avers that he acknowledged the Supporting Documents in his corporate capacity and that he never agreed personally to repay the Plaintiffs. He notes further that one of the Supporting Documents is unsigned. Finally, Bae notes that he denied Plaintiffs' allegations in the Answer.

In their Reply Affirmation dated September 1, 2009, Plaintiffs submit that Lyudmila is liable to Plaintiffs because she was involved with the Corporate Defendants and benefitted from the improperly obtained proceeds. Plaintiffs also affirm that Bae has been indicted in the Criminal Action for Grand Larceny in the Second Degree, Scheme to Defraud and other charges related to his allegedly taking money from Plaintiffs. Plaintiffs do not provide an Indictment number or the date on which the Grand Jury returned the indictment.

Plaintiffs also affirm that "Summary Judgment was granted in another case where defendants took money from another party" (L. Dilimetin Reply Aff. at ¶ 7) and provide the name and index number of that matter. Plaintiffs do not elaborate on the alleged connection between that matter and the instant action.

With respect to their motion to stay discovery, Individual Defendants provide Affidavits in Support of Lyudmila and Bae dated November 11, 2009 in which they affirm as follows:

Bae affirms that he was recently charged with several felonies and believes that Plaintiffs are the complainants in an least one of those actions ("Criminal Action"). In support, Bae provides copies of felony complaints ("Felony Complaints") dated May 28 and 29, 2009 (Ex. 1 to Bae Aff. in Support) charging him with 1) one count of Scheme to Defraud in the First Degree

in violation of Penal Law § 190.65, and 2) four (4) counts of Grand Larceny in the Second Degree in violation of Penal Law § 155.40(1). The Felony Complaints cover time periods between May 20, 2004 and May 28, 2009 and make reference to JB, Sekura and Com. All the Felony Complaints allege, *inter alia*, that Bae 1) accepted investments from the alleged victims; and 2) "engaged in a scheme constituting a systematic ongoing course of conduct with intent to steal the victim's money."

Bae avers, further, that the Criminal Action has not been resolved and "appears to be proceeding to either Grand Jury action or trial...because I am informed that there has been no acceptable plea bargain offer present by the Nassau County District Attorney ["District Attorney"] to the present time" (Bae Aff. in Support at ¶ 1). Bae asks the Court to stay discovery because he risks incriminating himself in the Criminal Action if he responds to interrogatories, provides requested documents or testifies at a deposition in the instant action. He also submits that he may assert his spousal privilege and decline to testify regarding communications with Lyudmila, his wife.

Lyudmila also asks the Court to stay discovery proceedings because her participation in discovery proceedings would potentially incriminate Bae in the Criminal Action. She also submits that she may assert her spousal privilege and decline to testify regarding communications with Bae, her husband.

In his Affirmation in Support dated November 19, 2009, Mr. Iovino affirms that the Criminal Action "awaits grand jury action" (Iovino Aff. in Support at ¶ 3). Mr. Iovino also provides copies of Plaintiffs' discovery requests (Ex. 2 to Iovino Aff. in Support) which include 1) Notices to take Examination before Trial, 2) Notices to Produce, and 3) Demands for Interrogatories.

In their Affirmation in Opposition dated December 31, 2009, in contrast to the Reply Affirmation dated September 1, 2009, counsel for Plaintiffs affirms that the District Attorney has not convened a grand jury in the Criminal Action and is continuing to investigate the matter. Plaintiffs affirm, further, that Plaintiffs served discovery demands on Defendants on November 16, 2009 and that Defendants have not responded to those demands.

In support of their motion for a default judgment against the Corporate Defendants, Plaintiffs provide an Affirmation in Support dated December 31, 2009 in which Plaintiffs'

counsel affirms that, since the withdrawal of Pena & Kahn as counsel, the Corporate Defendants have failed to appear at court conferences and no attorney has entered an appearance on their behalf.

Plaintiffs also provide an Affidavit in Support of Dina Andriello ("Andriello") dated December 17, 2009 in which Andriello affirms as follows:

Andriello is a representative of Accounts Receivable Management Solutions, a company authorized as Plaintiffs' agent to collect the allegedly unpaid debt that is the subject of this action. Andriello makes numerous assertions regarding the transactions among the parties, of which Andriello apparently has no personal knowledge, and provides her opinion regarding the legal conclusions to be drawn from those transactions. Andriello also affirms that Lyudmila posted the deed to her home as collateral with allegedly commingled funds, and makes other claims regarding the operation of the Corporate Defendants but does not provide the basis for these assertions. Andriello does provide a printout dated August 11, 2008, from an unnamed source, in support of her affirmation that Lyudmila is the contact for service of process for JB.

In her Affidavit in Opposition dated January 4, 2010, Lyudmila affirms as follows:

Lyudmila affirms that she has never had any contact with Andriello, or the company for which she works, and submits that Andriello is unqualified to offer an opinion regarding Lyudmila's culpability. Lyudmila also affirms, *inter alia*, that 1) she never signed any letters accepting any loans, or any documents accepting loans for any company; 2) she never represented that money that Plaintiffs lent would be treated as an investment; 3) she was not involved in the loan process; 4) she is not involved with any of the Corporate Defendants; 5) although she was listed as JB's contact for service of process, she played almost no role in its daily operations; and 6) she is unaware that any assets at issue were transferred to her.

C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to summary judgment by demonstrating that the Defendants 1) obtained money from Plaintiffs by promising them a return on their investment/loan; 2) failed to repay Plaintiffs; and 3) dispensed with corporate formalities to such an extent that the Court should pierce the corporate veil and conclude that the Corporate Defendants are the alter ego of the Individual Defendants. The Individual Defendants oppose Plaintiffs' motion and submit that the affirmations of the Individual

Defendants raise factual issues that render summary judgment inappropriate.

The Individual Defendants move for a stay of discovery in light of the pending Criminal Action, submitting that requiring Bae to respond to discovery requests may implicate his privilege against self-incrimination in the Criminal Action. The Individual Defendants also submit that they should not be required to respond to requests that implicate their privilege not to testify regarding marital communications. Plaintiffs oppose that application, submitting that they will be prejudiced by such a delay.

Plaintiffs also move for a default judgment against the Corporate Defendants, who have not retained substitute counsel or appeared at any court conferences.

RULING OF THE COURT

A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Default Judgment Standard

CPLR § 3215(a) permits a party to seek a default judgment against a Defendant who fails to make an appearance. The moving party must present proof of service of the summons and the complaint, affidavits setting forth the facts constituting the claim, the default, and the amount due. CPLR § 3215 (f); *Allstate Ins. Co. v. Austin*, 48 A.D.3d 720 (2d Dept. 2008). The moving party must also make a *prima facie* showing of a cause of action against the defaulting party. *Joosten v. Gale*, 129 A.D.2d 531 (1st Dept. 1987).

C. Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 884 N.Y.S.2d 94, 98 (2d Dept.

2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 884 N.Y.S.2d at 98, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton,* 884 N.Y.S.2d at 98, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton,* 884 N.Y.S.2d at 99, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

The decision whether to pierce the corporate veil in a given instance depends on the particular fact and circumstances." *Weinstein v. Willow Lake Corp.*, 262 A.D.2d 634, 635 (2d Dept. 1999). Veil piercing is a fact-laden claim that is not well suited for summary judgment resolution. *Damianos Realty Group LLC v. Fracchia*, 35 A.D.3d 344 (2d Dept. 2006), quoting *First Bank of Americas v. Motor Car Funding*, 257 A.D.2d 287, 294 (1st Dept. 1999).

D. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to reply upon it, 3) justifiable reliance of the other party on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence*

Real Estate, 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007).

For an action on an account stated, where the parties have agreed that the defendant owes the plaintiff a certain amount of money on an account, the plaintiff must prove that 1) there has been an accounting of the alleged debt; 2) there is a specific balance due to the plaintiff by the defendant; 3) the defendant expressly or impliedly promised to pay the plaintiff; and 4) the defendant has not paid. *See Bock v. Breindel*, 5 A.D.2d 1007 (2d Dept. 1958); *Tridee Assoc., Inc. v. Board of Educ. of City of New York*, 22 A.D.3d 833 (2d Dept. 2005); and *United Consolidated Industries v. Mendel's Auto Parts, Inc., supra.*

Attorney's fees are incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties. *Hooper Assoc. Ltd. v. AGS Computers*, 74 N.Y.2d 487 (1989).

E. Stay of Discovery

Pursuant to CPLR § 2201, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just. The issuance of a stay pursuant to CPLR § 2201 is in the discretion of the trial court. *Research Corporation v. Singer-General Precision, Inc.*, 36 A.D.2d 987, 988 (3d Dept. 1971). Although the pendency of a criminal proceeding does not give rise to an absolute right to a stay of a related civil proceeding, the court may exercise its discretion to stay proceedings in a civil action until the resolution of the related criminal dispute. *Matter of Astor*, 62 A.D.3d 867, 868-869 (2d Dept. 2009), citing *DeSiervi v. Liverzani*, 136 A.D.2d 527 (2d Dept. 1988), quoting *Klitzman, Klitzman & Gallagher v. Krut*, 591 F. Supp. 258, 269-270 n. 7 (D.N.J. 1984), *aff'd* 744 F.2d 955 (3d Cir. 1984).

Granting a stay of a civil proceeding to await the outcome of a pending parallel investigation is appropriate when the interests of justice seem to require such action. *U.S. v. Private Sanitation Industry*, 811 F. Supp. 802, 805 (E.D.N.Y. 1992), citing *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986), quoting *U.S. v. Kordel*, 397 U.S. 1, 12 (1970). In making this determination, the court should balance: 1) the private interest of the plaintiff in proceeding expeditiously with the civil litigation, as balanced against the prejudice to the plaintiff if delayed, 2) the private interests of and burden on the defendant, 3) the convenience to the courts, 4) the interest of persons who are not parties to the civil litigation, and 5) the public interest. *Private*

Sanitation, 811 F. Supp. at 805.

The fact that the witness may invoke the privilege against self-incrimination is not necessarily a basis for precluding civil discovery. *Matter of Astor,* 62 A.D.3d at 869, quoting *State of New York v. Carey Resources*, 97 A.D.2d 508, 509 (2d Dept. 1983). Moreover, the Fifth Amendment privilege only protects a person from being incriminated by his own compelled testimonial communication. *Id.* at 870, quoting *United States v. Doe*, 465 U.S. 605, 611 (1984). While courts have recognized the difficulty that defendants face in choosing between presenting evidence in their own behalf and asserting their Fifth Amendment rights, a court need not permit a defendant to avoid this difficulty by staying a civil action until a pending criminal prosecution has been terminated. *Matter of Astor* at 62 A.D.3d at 869, quoting *Steinbrecher v. Wapnick*, 24 N.Y.2d 354 (1969).

Matter of Astor involved an appeal of the Surrogate Court's orders 1) denying appellant's motion to stay discovery pending resolution of a related criminal proceeding against him; 2) denying appellant's motion for a protective order; and 3) directing appellant to turn over to the court all documents responsive to the discovery demands regarding which appellant asserted a privilege, as well as a privilege log reflecting the legal ground asserted for withholding each document in question. 62 A.D.3d at 867-868. In affirming the Surrogate Court's decision, the Appellate Division in *Matter of Astor* held that, absent unique circumstances, a defendant may not assert a blanket refusal to answer questions based upon the Fifth Amendment privilege against self incrimination, and may only assert the privilege where there is reasonable cause to apprehend danger from a direct answer. *Id.* at 869, quoting *Chase Manhattan Bank, Nat'l Ass'n v. Federal Chandros, Inc.*, 148 A.D.2d 567 (2d Dept. 1989). The witness is, of course, uniquely qualified to determine whether an answer may tend to be incriminating. Nevertheless, when the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate. *Id.* In such a case, to invoke effectively the protections of the Fifth Amendment, a party must make a particularized objection to each discovery request. *Id.*

The court in *Matter of Astor* concluded that, as appellant was not being compelled to create the documents in question, there would not be a Fifth Amendment violation merely because the documents, on their face, might incriminate him. 63 A.D.3d at 870. Rather, appellant was required to show that the very act of producing the documents, if compelled by the

court, would have testimonial aspects and an incriminating effect. *Id.* The Second Department concluded that, as it was not readily apparent whether production of the documents in question would be testimonial, the procedure that the Surrogate Court ordered was proper. *Id.*

F. Spousal Privilege

CPLR § 4502(b) provides as follows:

> A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage.

G. Application of these Principles to the Instant Action

The Court concludes that Plaintiffs have not demonstrated their right to summary judgment against the Individual Defendants, or a default judgment against the Corporate Defendants, in light of 1) the absence of sworn allegations from the Plaintiffs regarding the specifics of the alleged transactions with Plaintiffs including a) whether the Individual Defendants advised Plaintiffs that the funds that Plaintiffs provided were intended as a loan or an investment; b) whether, if those funds were intended as an investment, the Individual Defendants advised Plaintiffs how they could guarantee a particular return on those funds and, therefore, whether Plaintiffs' reliance was reasonable; c) whether Lyudmila made any representations to Plaintiffs or otherwise participated in the transactions at issue; and d) the extent to which the Individual Defendants made reference to the involvement of the Corporate Defendants in the transactions; and 2) the factual disputes of the parties regarding, *inter alia*, a) the extent to which the Individual and Corporate Defendants overlapped and, therefore, the appropriateness of piercing the corporate veil, and b) Lyudmila's involvement in the transactions at issue.

Accordingly, the Court denies the Plaintiffs' motions for summary judgment and a default judgment, with leave to renew upon the completion of discovery.

Moreover, given the *Matter of Astor* court's recognition of both (1) the rather narrow circumstances in which a stay of discovery is appropriate pending a criminal investigation, and (2) a trial court's discretion with respect to issuing a stay, the Court denies the Individual Defendants' motion for a stay of discovery. Instead, the Court directs the Individual Defendants to respond to Plaintiffs' pending discovery requests within forty-five (45) days of this decision. The Court further directs that any Defendant wishing to invoke a privilege with respect to those

discovery requests must provide to the Court, within forty-five (45) days of this decision, all documents responsive to the discovery demands regarding which Defendant asserts a privilege, as well as a privilege log reflecting the legal ground asserted for withholding each document in question.

The Court also directs counsel for the Plaintiffs, on or before April 23, 2010, to provide the Court and opposing counsel with a letter outlining the status of the Criminal Action. That letter shall include 1) the date of any scheduled grand jury presentment, and 2) whether the D.A. has filed criminal charges against Lyudmila.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a conference on May 4, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY
April 2, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.