

Sung Hwan Co., Ltd. v Rite Aid Corp.

2011 NY Slip Op 30238(U)

January 30, 2011

Sup Ct, NY County

Docket Number: 112444/01

Judge: Richard B. Lowe

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

PRESENT: _____
Justice

PART 56

Sung Hwan

INDEX NO. 112444/01

- v -

MOTION DATE 5/26/10

Rite Aid Corporation

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with the attached memorandum decision.

FILED

FEB 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

[Signature]

J.S.C.

Dated: 1/29/11

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):

FILED

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

FEB 03 2011

-----X
SUNG HWAN CO., LTD.,

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff,

-against-

Index No. 112444/01

RITE AID CORPORATION,

Defendant.

-----X

Richard B. Lowe, III, J.:

Motions with sequence numbers 008, 009, and 011 are consolidated for disposition.

Defendant moves, in motion sequence number 008, for summary judgment dismissing the complaint. In motion sequence number 009, plaintiff moves, pursuant to CPLR 3212 and CPLR article 53, for an order recognizing and enforcing the February 9, 2001 money judgment issued by the District Court of Seoul, South Korea. In motion sequence number 011, defendant moves for leave to file two supplemental affidavits in opposition to plaintiff's motion for summary judgment.

Defendant's Motion for Leave to File Additional Affidavits (Sequence Number 011)

Defendant brings this motion because of certain alleged misstatements made by counsel for plaintiff at the oral argument held before this court on July 19, 2010. Defendant seeks leave to file the "supplemental affidavits" (which plaintiff denominates "sur-reply affidavits") in order to "correct Sung Hwan's misstatements and to ensure an accurate factual record" (Point II, Defendant's 7/26/10 Memo of Law in Support of Motion Sequence No. 011, at 9).

There is nothing new in the factual statements propounded by both sides on this motion. Everything said in the motion papers has already been set forth in the voluminous record already before the court. The court is confident in its ability to read the record and to comprehend what is revealed there.

Therefore, defendant's motion for leave to file additional affidavits is denied. The court will not read or consider the affidavits in making its determinations on these motions.

Defendant's Motion for Summary Judgment Dismissing the Complaint (Sequence Number 008)

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers"

(Johnson v CAC Business Ventures, 52 AD3d 327, 328 [1st Dept 2008], quoting Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman, 39 AD3d 303, 306 [1st Dept 2007], citing Alvarez, 68 NY2d at 324*). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso, 50 AD3d 535, 544 [1st Dept 2008]*). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A., 64 AD3d 477, 478 [1st Dept 2009]*); *see also Sheehan v Gong, 2 AD3d 166, 168 [1st Dept 2003]* ["The court's role, in passing on a motion for summary judgment, is solely to

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determine if any triable issues exist, not to determine the merits of any such issues”], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiff’s amended complaint seeks a “judgment based upon recognition and enforcement of the judgment of a foreign Court pursuant to CPLR 5303 et seq.” (Amended Complaint, first paragraph). As this court has already stated during the oral argument held on July 19, 2010:

Liability has in fact been determined. So we’re not retrying what occurred in Korea. The only issue, and when I say liability, liability in terms of the wrong that was committed, has been determined to have been committed.

The only question in terms of liability before me is whether it is Thrifty or whether it is Rite Aid.

But it seems to me the question that is before the Court is, if not simple, rather narrow, and it is whether Rite Aid assumes the liability of Thrifty, period

(Transcript of 7/19/10 Oral Argument, at 19, 20). Put another way, the question is whether “[t]he Seoul District Court (22nd Division, Civil) had personal jurisdiction over RITE AID in the Korean action” (Amended Complaint, ¶ 42), such that its judgment against Rite Aid may be recognized and enforced by this court.

CPLR Article 53

New York’s Uniform Foreign Country Money-Judgments Recognition Act (the Act) is codified in article 53 of the CPLR. “Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here” (*CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.*, 100 NY2d 215, 221 [2003]). The Act applies “to any foreign country judgment which is final, conclusive and enforceable” (CPLR 5302). With some exceptions, such a judgment “is conclusive between

* 5]

the parties to the extent that it grants or denies recovery of a sum of money” (CPLR 5303). Of the grounds for nonrecognition listed in CPLR 5304, only section 5304 (a) (2) (“the foreign court did not have personal jurisdiction over the defendant”) is at issue here. Bases for personal jurisdiction are set forth in CPLR 5305, none of which applies here, except possibly section 5305 (b) (“The courts of this state may recognize other bases of jurisdiction”).

“New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts,’ and, in accordance with that tradition, the State adopted the Uniform Foreign Country Money-Judgments Recognition Act as CPLR article 53” (*John Galliano, S.A. v Stallion, Inc.*, 15 NY3d 75, 79-80 [2010], quoting *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d at 221).

[I]n seeking enforcement of a foreign money judgment in New York, “the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment” (*CIBC Mellon Trust Co.*, 100 NY2d at 222). “[T]he inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York’s concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law” (*Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78, 83 [2006]). “If the above criteria are met, and enforcement of the foreign judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding” (*id.*)

(*id.* at 81). “As the proponent, plaintiff bears the burden of making a prima facie showing that the mandatory grounds for nonrecognition -- i.e., due process and personal jurisdiction -- do not exist (*see* CPLR 5304 [a]) and that CPLR article 53 requirements are satisfied (*see* CPLR 5302; *CIBC Mellon Trust Co. v Mora Hotel Corp.* [296 AD2d 81, 87-99 (1st Dept 2002)])” (*Wimmer*

* 6]
Canada, Inc. v Abele Tractor & Equipment Co., 299 AD2d 47, 49 [3d Dept 2002]).

In this case, the Court of Appeals has already determined “that the Korean court’s exercise of personal jurisdiction over Rite Aid was entitled to comity and satisfied the requirements of CPLR 302 (a) (3)” (*Sung Hwan Co., Ltd. v Rite Aid Corp.*, 46 AD3d 288, 289 [1st Dept 2007], citing *Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78 [2006]). However,

the Court of Appeals’ decision was limited to the propriety of the assertion of long-arm jurisdiction under CPLR 302 (a) (3), and did not address the separate corporate status defense asserted by Rite Aid in opposing the instant motion.

The record evidence establishes that Rite Aid has preserved the separate corporate status defense. Rite Aid raised this defense in opposing plaintiff’s prior motion for summary judgment pursuant to CPLR 3213, and that motion was denied, in part, because there were triable issues of fact regarding the nature of the corporate relationship between Rite Aid and its affiliate

(*ibid.*; see also *Sung Hwan Co., Ltd. v Rite Aid Corp.*, Index No. 112444/01 [Sup Ct, NY County], motion seq. no. 005, 7/29/09 Order, at 4-5 [“the Appellate Division remanded to this Court the question of corporate identity and rejected arguments that Rite Aid waived that defense”]).

Applicable Law

“A preliminary question concerns the choice of law to be applied” (*Japan Petroleum Co. [Nigeria] Ltd. v Ashland Oil*, 456 F Supp 831, 841 n 17 [D Del 1978]; see also *Andover Realty v Western Electric Co.*, 100 AD2d 157, 162 [1st Dept 1984] [“the court is confronted in the first instance with the issue of determining the appropriate choice of law to be applied herein’ (citation omitted)”]).

New York choice of law relies on a “paramount interest” test, under which “the law of the jurisdiction having the greatest interest

in the litigation will be applied and ... the facts or contacts which obtain significance in defining state interest are those which relate to the purpose of the particular law in conflict” [internal citations omitted]

(*Soviet Pan Am Travel Effort v Travel Committee, Inc.*, 756 F Supp 126, 131 [SD NY 1991]).

“Because a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away” (*Kalb, Voorhis & Co. v American Financial Corp.*, 8 F3d 130, 132 [2d Cir 1993], quoting *Soviet Pan Am Travel Effort*, 756 F Supp at 131; see also *Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 75 [2d Dept 2004] [“Ordinarily, the state of incorporation has the greatest interest in determining the extent of insulation that will be afforded the shareholders of corporations incorporated under its laws”], citing *Kalb, Voorhis & Co.*, 8 F3d at 132; *Fletcher v AteX, Inc.*, 861 F Supp 242, 244 [SD NY 1994], *affd* 68 F3d 1451 [2d Cir 1995] [“Under New York choice of law principles, ‘[t]he law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders,’” quoting *Kalb, Voorhis & Co.*, 8 F3d at 132]; *Soviet Pan Am Travel Effort*, 756 F Supp at 131 [applying New York’s “paramount interest” test]).

Defendant has argued all along that, since Delaware is the state of its incorporation, Delaware law should govern the determination of this issue. Plaintiff urges that New York’s choice of law principles apply, but suggests that the law of the subsidiary’s incorporation, not the parent’s, should control, i.e., that California law should be applied because Thrifty PayLess, Inc. (TP) is incorporated in California, and the unincorporated ice cream plant is located in that state. This argument is less than compelling, however, because TP is not a party in this action. Plaintiff’s contention that choice of law rules only govern liability issues, and not

jurisdictional ones, is also unpersuasive.

Accordingly, this court will apply Delaware's substantive law in determining defendant's corporate structure and the issue of whether the Korean court properly exercised personal jurisdiction over defendant in Korea.

DISCUSSION

The Corporate Structure

At issue here is the question whether the acts of the California unincorporated ice cream plant and its owner, TP, a California corporation which is a subsidiary of defendant,¹ may be attributed to defendant, such that the Korean court properly exercised personal jurisdiction over defendant in the Korean action.

One issue that cannot be resolved on these summary judgment motions is whether defendant is a holding company. In 2006, James Comitale, then Vice President and Assistant General Counsel of Rite Aid, attested that defendant, "[a]t all times relevant to this action ... has been a holding company; its assets consist solely of the stocks of its subsidiaries that own or operate various facilities. Rite Aid has directors and officers but no employees" (Comitale 11/6/06 Aff., ¶ 3). However, in its November 12, 1996 joint proxy statement/prospectus, defendant informed its stockholders that it was one of the largest retail drugstore chains in the United States; that as of August 31, 1996, it operated 2,796 drugstores and employed 36,000 employees; and that "Pharmacy service forms the core of Rite Aid's business" (*see* RAC

¹Concerning the ownership of the ice cream plant, *see* TP's 10-K filed 12/25/96: effective 12/12/96, TP is wholly owned subsidiary of defendant; TP owns ice cream plant in El Monte, CA; *but also see* Comitale 11/6/06 Aff., ¶ 9: ice cream plant was owned by Thrifty Realty Company, a wholly owned subsidiary of Thrifty Corporation, a wholly owned subsidiary of TP.

000995). In its March 1, 1997 10-K, defendant again stated that “The company’s primary business is the operation of retail drugstores” (RAC 000069), and indicated that it owned the California ice cream plant (RAC 000071). In its May 29, 1997 10-K405, defendant again stated that it operated over 3,600 stores and had over 3,000 associates (RAC 000090), although a couple of pages later, it proposed to encourage its 73,000 associates to bring about record sales in 1998 (RAC 000092). Once again, the description of defendant’s business was that “Rite Aid Corporation operates over 3,600 retail drugstores in the eastern and western United States” (RAC 000115). In its 1997 Annual Report, defendant claimed that it operated 3,600 drugstores and had 73,000 associates/employees (RAC 000171, 000172). Defendant’s 1998 10-K filing again documented that “The company’s primary business is the operation of retail drugstores,” detailed that it employed 83,000 persons, and asserted that “The registrant also owns its 52,200 square foot ice cream manufacturing facility located in El Monte, California” (RAC 000004).

With respect to the issue of what business defendant is in, the testimony of Comitale and the public filings of defendant conflict with each other. Therefore, the issue of whether defendant is a holding company remains unresolved.

However, that issue of fact does not preclude summary judgment because it is clear that, since the merger in December 1996, TP has been defendant’s wholly owned subsidiary, and that, although, in 1996, the ice cream plant was owned by TP or Thrifty Realty Company, by the filing of defendant’s 1997 10-K, after the merger, defendant claimed ownership of the plant (RAC 000071).

“[U]pon a proper showing corporate entities as between parent and subsidiary may be disregarded and the ultimate party in interest, the parent, be regarded in law and fact as

the sole party in a particular transaction” (*Pauley Petroleum v Continental Oil Co.*, 43 Del Ch 516, 521, 239 A2d 629, 633 [Del Supr 1968]). “Delaware law provides two theories that allow a court to exercise jurisdiction over a parent corporation based on its jurisdiction over a subsidiary: the agency theory and the alter ego theory” (*LivePerson, Inc. v NextCard, LLC*, 2009 WL 742617, *4, 2009 US Dist LEXIS 22902, *11 [D Del 2009]).

“Under the alter ego or piercing the corporate veil doctrine, courts will ignore the corporate boundaries between parent and subsidiary if fraud or inequity is shown. The agency theory, by contrast, examines the degree of control which the parent exercises over the subsidiary” [citation omitted]

(*Sprint Nextel Corp. v iPCS, Inc.*, 2008 WL 2737409, *10, 2008 Del Ch LEXIS 90, *43-44 [Del Ch 2008]; see also *EBG Holdings LLC v Vredzicht’s Gravenhage 109 B.V.*, 2008 WL 4057745, *10 n 83, 2008 Del Ch LEXIS 127, *40 n 83 [Del Ch 2008]).

“It is only the exceptional case where a court will disregard the corporate form’ [citation omitted]” (*Sprint Nextel Corp.*, 2008 WL 2737409 at *11, 2008 Del Ch LEXIS 90 at *45; see also *Wallace v Wood*, 752 A2d 1175, 1183 [Del Ch 1999] [“‘Persuading a Delaware court to disregard the corporate entity is a difficult task’ (citation omitted)’]; *Fletcher v Atex, Inc.*, 861 F Supp at 244 [“(d)isregard of the corporate entity is appropriate only in exceptional circumstances’ (citation omitted)’]).

Agency

The concept of agency rests upon the exercise of an agent of authority reposed in the agent by the principal. “Actual authority is that authority which a principal expressly or implicitly grants to an agent” (*Billops v Magness Construction Co.*, 391 A2d 196, 197 [1978], quoted by *Jurimex Kommerz Transit G.M.B.H. v Case Corp.*, 2007 WL 2153278, *2, 2007 US

App LEXIS 18113, *5, *5-6 [3d Cir 2007]). This authority may be indicated by a principal to an agent by written or spoken words or by conduct which conveys to the agent the reasonable belief that the principal wants him to act on behalf of the principal (*Jurimax Kommerz Transit*, 2007 WL 2153278 at *2, 2007 US App LEXIS 18113 at *6). “Regardless what form the authorization takes, an essential requirement for establishing actual authority is that it stem from a manifestation by the principal” (*ibid.*).

On the other hand,

[t]he concept of apparent agency or authority focuses not upon the actual relation of a principal and agent, but the apparent relationship. Manifestations by the alleged principal which create a reasonable belief in a third party that the alleged agent is authorized to bind the principal create an apparent agency from which spring the same legal consequences as those which result from an actual agency. The manifestations may be made directly to the third party, or may be made to the community in general In order to establish a chain of liability to the principal based upon apparent agency, a litigant must show reliance on the indicia of authority originated by the principal, and such reliance must have been reasonable [interior citations omitted]

(*Billops*, 391 A2d at 198; *see also Sears Roebuck & Co. v Marcozzi*, 2001 WL 1555662, *2, 2000 Del CP LEXIS 44, *4 [Del Ct Common Pleas [2000]). “When dealing with apparent authority, the emphasis shifts to third party reliance on the acts of the principal and the agent as opposed to any express or implied grant by the principal. It is important to note that apparent authority can never be derived from the acts of the agent alone” (*Finnegan Construction Co. v Robino-Ladd Co.*, 354 A2d 142, 144 [Del Super 1976], quoted by *Rittenhouse Associates v Potts*, 1981 WL 15084, *1, 1981 Del Ch LEXIS 579, *3 [Del Ch 1981]). “Under Delaware law, two elements are necessary to establish apparent agency. First, by its acts and conduct the principal must hold out the alleged agent as being authorized to act in the principal’s behalf. Second, the

third party must reasonably rely upon this representation” (*Yellow Book USA, LP. v Dearworth*, 2002 WL 31999361, *4, 2002 Del CP LEXIS 78, *10 [Del Ct Common Pleas 2002], citing *Billops*, 391 A2d 196, *supra*).

It is a general principle of corporate law deeply “ingrained in our economic and legal systems” that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries. ... “Neither does the mere fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate” [internal citations omitted]

(*United States v Bestfoods*, 524 US 51, 61 [1998]). However, “[u]nder the agency theory, the court may attribute the actions of a subsidiary company to its parent where the subsidiary acts on the parent’s behalf or at the parent’s direction” (*C.R. Bard Inc. v Guidant Corp.*, 997 F Supp 556, 560 [D Del 1998], quoted in *LivePerson, Inc.*, 2009 WL 742617 at *4, 2009 US Dist LEXIS 22902 at *11). “[U]nder the agency theory ‘the existence and entity of the agent are not ignored or set aside but affirmed, and the principal held [liable] precisely because the agent did act in the course of his employment’ [citation omitted]” (*C.R. Bard*, 997 F Supp at 560; *see also EBG Holdings*, 2008 WL 4057745 at *10 n 83, 2008 Del Ch LEXIS 127 at *40-41 n 83). “Thus, under the agency theory ‘only the precise conduct shown to be instigated by the parent is attributed to the parent’ [citation omitted]” (*ibid.*).

A corporation does not become the agent of another just because the parent holds a majority of its voting shares, or because the two corporations have common officers and directors, or because the corporations have made arrangements for “economy of expense and convenience of administration” (*see Japan Petroleum*, 456 F Supp at 841, 846). Rather,

[w]hen applying the agency theory, a court should focus its inquiry on the arrangement between the parent and the subsidiary, the

authority given in that arrangement, and the relevance of that arrangement to the plaintiff's claim. The court must avoid "the notion that a parent company can be held liable for the obligations of a subsidiary [under the agency theory] purely on the basis of domination and control." Instead, there must be a "close connection between the relationship of the two corporations and the cause of action" [internal citations omitted]

(*C.R. Bard Inc.*, 997 F Supp at 560; *see also Jurimex Kommerz Transit*, 2007 WL 2153278 at *2, 2007 US App LEXIS 18113 at *5 ["Not only must an arrangement exist between the two corporations so that one acts on behalf of the other and within usual agency principles, but the arrangement must be relevant to the plaintiff's claim of wrongdoing. In ... determining whether ... subsidiaries were acting as ... agents[, the court] necessarily must focus on the 'specific transaction' that gave rise to the alleged liability," i.e., "evidence of the agency relationship must be specific to the transaction from which the alleged liability arises" (internal quotation marks and citations omitted)]).

Nevertheless, the court must still consider "the degree of control which the parent exercises over the subsidiary" (*Applied Biosystems, Inc. v Cruachem, Ltd.*, 772 F Supp 1458, 1463 [D Del 1991]).

In order to determine whether or not a sufficient degree of control exists to establish an agency relationship, the Court must look to a wide variety of factors, such as stock ownership, officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origin of subsidiary's business and assets

(*Japan Petroleum Co.*, 456 F Supp at 841; *see also LivePerson, Inc.*, 2009 WL 742617 at *4, 2009 US Dist LEXIS 22902 at *11-12, citing *C.R. Bard Inc.*, 997 F Supp at 559; *EBG Holdings LLC*, 2008 WL 4057745 at *11, 2008 Del Ch LEXIS 127 at *45, citing *Applied Biosystems v Cruachem, Ltd.*, 772 F Supp at 1465-1466). Moreover, "the control must be actual, participatory,

and total” (*Japan Petroleum Co.*, 456 F Supp at 841). “No one factor is either necessary or determinative; rather it is the specific combination of elements which is significant” (*Applied Biosystems*, 772 F Supp at 1463). Moreover, “[a]lleged subsequent agency authority, real or apparent[,] is of no help to plaintiff here. ... [E]vidence of something occurring on a later date to show that type of authority is irrelevant to [plaintiff’s] claim’ [citation omitted]” (*Jurimex Kommerz Transit*, 2007 WL 2153278 at *3, 2007 US App LEXIS 18113 at *8).

Jurisdiction over defendant in the Korean court cannot be premised on the agency theory. Sufficient evidence of defendant’s actions which would indicate TP’s authority to act on defendant’s behalf is lacking.

Plaintiff’s communications concerning its economic problems caused by the tainted ice cream, and its displeasure because it did not receive the desired response to its communications, were overwhelmingly directed to TP, not defendant (*see* RAC 004327-004331; RAC 004307; RAC 004305-004306; RAC 004303-004304; SH 001850-001852; RAC 004300-004302). Moreover, plaintiff cannot now claim that TP was defendant’s agent when, at the time of the communications, it failed to discern what relationship, if any, existed between them. Failing this awareness, plaintiff cannot have reasonably relied on any alleged representation by defendant concerning TP’s alleged authority to act on defendant’s behalf.

On February 10, 1998, in an e-mail to plaintiff’s counsel, Gerson identified himself as “Senior Vice President and General Counsel,” but only his e-mail address indicated that he was affiliated with defendant. In the e-mail itself, Gerson stated that “Thrifty [not defendant] does not acknowledge any liability to your client for the matters referred to in your letter” (Crosby Depo., Ex. 73, 2/10/98 e-mail). On the following day, plaintiff responded,

addressing Gerson as Senior Vice President and General Counsel of Thrifty Ice Cream (RAC 004286). On February 16, 1998, Gerson offered to meet with plaintiff's counsel at defendant's headquarters in Camp Hill, Pennsylvania, but he did not identify himself by any title, and only his e-mail address indicated any connection to defendant (Crosby Depo., Ex. 75). Plaintiff's subsequent February 1998 letters to Gerson were again addressed to Elliot S. Gerson, Senior Vice President and General Counsel of Thrifty Ice Cream, not of defendant (*see* SH 001705 [2/19/98 letter]; SH 001702/RAC 004288 [2/27/98 letter]). E-mails from Gerson to plaintiff's attorney, Jong (Jason) Sun Ha, using Gerson's address, ESGerson@riteaid.com, which did not identify Gerson as a corporate executive of defendant (*see* Crosby Depo., Ex. 76 [2/26/98 e-mail agreeing to meeting]; SH 001703 [2/27/98 - setting date and time for meeting]; SH 001701 [3/10/98 - post-meeting - "We have carefully considered your materials. We do not believe we have any responsibility to your client and will not pay anything to it"]), fail to indicate that defendant was in any way involved in plaintiff's woes.

Of the numerous letters which TP sent to Korea on the "A Division of Rite Aid Corporation" letterhead, only one connected TP, defendant and ice cream, and there is no indication that plaintiff was a recipient of the letter (RAC 004240 [9/17/97 letter to I.F.M.: "This would be very costly for both I.F.M. and Sung Huan [*sic*] because a new license from Rite Aid for Thrifty Ice Cream will cost \$250,000"). As this letter has nothing to do with the listeria problem, it cannot serve as a basis for a finding of agency.

However, at the March 5, 1998 meeting in San Francisco, where plaintiff and TS/defendant attempted to negotiate a settlement of the TS/plaintiff dispute, Gerson gave Ha his business card. That business card identified Gerson as the general counsel and an executive vice

president of defendant (*see* Gerson Depo., at 62-63). In an April 14, 1998 faxed letter responding to that meeting, Ha advised “Elliot Gerson, Esq., Senior Vice President and General Counsel, Riteaid” that if Gerson did not change his position of non-payment, Ha would commence litigation in Korea (RAC 004290-004291).

It appears that only the card which Gerson exchanged with Ha at the March 1998 meeting indicated that defendant had some connection with TP. Under either actual or apparent authority, this is insufficient to establish that TP acted as an agent for defendant.

Alter Ego/Piercing the Corporate Veil

Under the alter ego theory, a court may attribute the actions of a subsidiary to its parent and ignore corporate boundaries if the court finds that the subsidiary is a mere ‘alter ego’ of the parent. ... In Delaware, to reach a parent corporation under the alter ego theory, the party asserting jurisdiction must establish some fraud, injustice, or inequity in the use of the corporate form [interior citations omitted]

(*C.R. Bard Inc.*, 997 F Supp at 559).

A subsidiary corporation may be deemed the alter ego of its corporate parent where there is a lack of attention to corporate formalities, such as where the assets of two entities are commingled, and their operations intertwined. An alter ego relationship might also lie where a corporate parent exercises complete domination and control over its subsidiary

(*Mobil Oil Corp. v Linear Films*, 718 F Supp 260, 266 [D Del 1989]). “Delaware courts apply ‘the alter ego theory rather strictly ...’ Courts generally only disregard the corporate entity in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or equitable considerations among members of the corporation are involved” (*EBG Holdings LLC*, 2008 WL 4057745 at *11, 2008 Del Ch LEXIS 127 at *47; *see also id.* at 2008 WL 4057745 at *12 n 100, 2008 Del Ch LEXIS 127 at *49 n 100 [“Effectively, the corporation must be a sham

and exist for no other purpose than as a vehicle for fraud' (citations omitted)"].

Although there is evidence of interlocking directorates, legal services performed by defendant on behalf of TP, and combined financial statements and filings, in all the many exhibits and evidence submitted in this matter since its inception in 2001, there is no indication that TP was incorporated, or the ice cream plant established, "for no other purpose than as a vehicle for fraud." Nor is there evidence that defendant exercised "complete domination and control" over TP, or that defendant used TP to perpetrate some "contravention of law or contract [or] public wrong." Nor can the court discern any basis "in the interest of justice" to disregard defendant's corporate entity. In short, there is no ground for establishing jurisdiction over defendant in Korea based upon the alter ego theory or piercing the corporate veil.

Plaintiff's Motion for an Order Recognizing and Enforcing the February 9, 2001 Korean Judgment (Sequence Number 009)

Given the above determinations, plaintiff's motion is denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion (motion sequence number 011) for leave to file additional affidavits is denied; and it is further

ORDERED that plaintiff's motion (motion sequence number 009) is denied; and it is further

ORDERED that defendant's motion (motion sequence number 008) for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment

accordingly.

Dated: January 30, 2011

ENTER



J.S.C.
JON. HICHAM B. LOWE

FILED

FEB 03 2011

NEW YORK
COUNTY CLERK'S OFFICE