

**Z Worldwide, Inc. v Worldwide Links, Inc.**

2011 NY Slip Op 30574(U)

February 24, 2011

Supreme Court, Nassau County

Docket Number: 023807/2009

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 7**

Z WORLDWIDE, INC.,

Plaintiff,

INDEX NO.: 023807/2009  
MOTION DATE: 12/23/10  
SEQUENCE NO.: 02

- against -

WORLDWIDE LINKS, INC. and  
LEONARD ROITMAN,

Defendants.

The following documents were read on this motion:

Order to Show Cause for Leave to Reargue Prior Motion .....	1
Affirmation of Martin Saperstein in Opposition to Motion .....	2
Reply Affirmation of Lance Grossman in Further Support of Motion .....	3

**PRELIMINARY STATEMENT**

Defendants move for reargument of the motion which resulted in the prior decision and order of this Court dated June 21, 2010. Defendants contend that the Third and Fourth Causes of Action should have been dismissed against the individual defendant Roitman. They assert that the Court failed to dismiss the Third Cause of Action when plaintiff failed to demonstrate the elements of Debtor and Creditor Law § 274; failed to rule on whether the Third Cause of Action should have been dismissed as failing to comply with CPLR § 3016 (b); failed to find that plaintiff relied on any actions of defendants as a requisite element for a claim of fraud; improperly determined that the Fourth Cause of Action adequately asserted a cause of action with

the particularity required by CPLR § 3016 (b); improperly denied the application to dismiss the Fourth Cause of Action by failing to scrutinize the claim under the requisite enhanced pleading requirement; and failed to conclude that claims, couched in terms of tort, were actually contract claims, thus requiring dismissal.

### BACKGROUND

In this action, plaintiff claims that Worldwide Links, Inc., a domestic corporation of which defendant Reitman is the sole shareholder and officer, sold batteries to plaintiff. The sale amount was \$390,805.98, against which there was a prior credit of \$208,565, leaving a claimed unpaid balance of \$182,239.98.

The first cause of action alleges a breach of contract while the second claims an account stated, in that from time to time, plaintiff sent statements to defendants which were not contradicted or protested. The third and fourth cause of action, about which defendants seek reargument, allege fraudulent conveyances on the part of both defendants, and claim that Roitman exercised complete domination and control of Worldwide Links for his own benefit, and that he caused the conveyance of assets of Worldwide, rendering it incapable of making payments to creditors. The fourth cause of action seeks to pierce the corporate veil of Worldwide Links on the grounds that Roitman has abused the privilege of doing business under corporate form, and that he has sought to cause economic damage to plaintiff in the amount of \$150,000 involving a prior unrelated matter.

### DISCUSSION

The motion to reargue is granted. The issue at this juncture of the proceedings is whether or not the third and fourth cause of action adequately stated a claim upon which relief can be granted against either or both of the defendants.

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.”<sup>1</sup> A

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<sup>1</sup> *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703—704 (2d Dept. 2008).

motion pursuant to CPLR 3211 (a)(7) will fail if, taking all facts alleged as true, and according them every favorable inference, the complaint states in some recognizable form a cause of action known to our law.<sup>2</sup>

In the Third Cause of Action plaintiff asserts that Roitman exercises complete domination and control over Worldwide Links, to a degree that Worldwide Links had no independent existence as of the date of the transactions in question. It further alleges that while Worldwide Links was incurring obligations, Roitman transferred to himself, without fair consideration, Worldwide Links' assets for his personal benefit, and to the detriment of creditors of Worldwide Links, leaving it without adequate capital to pay its obligations. Debtor and Creditor Law §274 provides as follows:

Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

The various causes of action for under the Debtor and Creditor Law for constructive fraudulent conveyance are *sui generis* equitable claims that are distinct and independent from a cause of action for fraud, since causes of action under the Debtor and Creditor Law do not require proof of a misrepresentation or intent to defraud.<sup>3</sup> Therefore, the enhanced pleading requirements of CPLR § 3016(b) are inapplicable, since that section by its very terms applies only to "misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence." Defense counsel misapprehends the law in this area.<sup>4</sup>

Defendants also contend that plaintiff may not bring a cause of action under DCL § 214 because he is not a judgment creditor of the defendants. Defense counsel also misapprehends the

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<sup>2</sup> *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38 (2d Dept. 2006).

<sup>3</sup> See 30 N.Y. Jur.2d Creditors' Rights §§ 312, 360

<sup>4</sup> See *Menaker v. Alstaedter*, 134 AD2d 412 (2d Dept. 1987).

law in this area. Sections 278<sup>5</sup> and 279<sup>6</sup> of the Debtor and Creditor Law, both titled with language beginning “Rights of creditors,” set out creditors’ remedies and standing to claim a constructive fraudulent conveyance under the preceding sections, including DCL § 274. These sections by their very terms permit “creditors whose rights have not matured” to institute an action under the Debtor and Creditor Law. Therefore, these sections do *not* require that a creditor obtain a judgment before proceeding with a valid claim under these sections. At this time, the defendants do not dispute that plaintiff, having furnished the sold goods on credit, is a “creditor” of the defendants.<sup>7</sup>

Upon reconsideration, the Court’s denial of the motion to dismiss the Third Cause of Action is adhered to.

In the Fourth Cause of Action plaintiff asserts upon information and belief, that Roitman has abused the corporate form to perpetrate a fraud upon Z Worldwide. Piercing of the corporate veil is not generally an easy matter. It is permitted only when the persons sought to be held accountable abused the corporate form in order to perpetrate a fraud,<sup>8</sup> or, “[t]he corporate veil

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<sup>5</sup> DCL § 278 (Rights of creditors whose claims have matured) provides:

1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,
  - a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
  - b. Disregard the conveyance and attach or levy execution upon the property conveyed.
2. A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

<sup>6</sup> DCL § 279 (Rights of creditors whose claims have not matured) provides:

- Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,
- a. Restrain the defendant from disposing of his property,
  - b. Appoint a receiver to take charge of the property,
  - c. Set aside the conveyance or annul the obligation, or
  - d. Make any order which the circumstances of the case may require.

<sup>7</sup> See Garner, *Black’s Law Dictionary* (7<sup>th</sup> ed.) defining “creditor” in part as “one who gives credit for money or goods...”

<sup>8</sup> *Morris v. NYS Dept. of Taxation & Fin.*, 82 N.Y.2d 135 (1993)

will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego."<sup>9</sup> Thus a corporation's limited liability can be disregarded only when the corporate form is abused to perpetrate a fraud or when the corporate form is essentially a sham and nothing more than an alter ego.

Defense counsel cites law regarding the heightened pleading requirements applicable to actions against officers or employees of a corporation for the acts of the corporation.<sup>10</sup> However, defense counsel also misapprehends the law in this area. Piercing the corporate veil exists as a doctrine that addresses the occasional need to hold the actual owners of a corporation personally liable, despite the limited liability of the corporate entity. Corporate officers and other employees, on the other hand, might not be owners of the corporation, yet their own acts on behalf of the corporation may subject them to personal liability. The doctrine described in *Petkanas* applies to this latter issue, when an officer or employee is sought to be held personally liable, though that officer or employee may not be an owner of the corporation.

At this stage of the proceedings, the question is whether the plaintiff has adequately alleged the factors necessary to constitute a claim against which relief can be granted. "Veil-piercing is a fact-laded claim that is not well suited for resolution on a motion to dismiss."<sup>11</sup> However, an action to pierce the corporate veil is not an action for recovery in itself, rather it is only an equitable doctrine that is antecedent to recovery from owners of a corporation.<sup>12</sup>

Allegations in this case regarding abuse of the corporate form clearly would survive if they had been placed under another cause of action or in an introductory section of the complaint. Instead, the piercing of the corporate veil constitutes—at least in title—the plaintiff's Fourth

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<sup>9</sup> *John John LLC v. Exit 63 Dev. LLC*, 35 AD3d 540 (2d Dept. 2006)

<sup>10</sup> *Petkanas v. Kooyman*, 303 AD2d 303 (1<sup>st</sup> Dept. 2003).

<sup>11</sup> *First Bank of Americas v. Motor Car Funding*, 257 AD2d 287 (1<sup>st</sup> Dept. 1999).

<sup>12</sup> *Hart v. Jassem*, 43 AD3d 997 (2d Dept. 2007).

Cause of Action. While the Fourth Cause of Action does allege facts surrounding a purchase made by Roitman on plaintiff's credit with a specific intent to defraud the plaintiff—a cause of action in itself against Roitman in his personal capacity—the plaintiff through its counsel has alleged that the Fourth Cause of Action is not fraud.<sup>13</sup> Since the allegations themselves in the Fourth Cause of Action can fit within various legally cognizable causes of action, dismissal of the cause of action with prejudice is not warranted.

Upon reconsideration, the Court dismisses the Fourth Cause of Action without prejudice and grants the plaintiff leave to amend the fourth cause of action, if it so chooses, within 30 days of this decision.

This constitutes the Decision and Order of the Court.

Dated: February 24, 2011

  
J.S.C.

**ENTERED**  
MAR 02 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>13</sup> Saperstein Aff. at ¶ 24.