

**Rubin v Lealta, LLC**

2011 NY Slip Op 33666(U)

June 6, 2011

Supreme Court, Nassau County

Docket Number: 020862-10

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**THOMAS RUBIN,**

**Plaintiff,**

**-against-**

**LEALTA, LLC, DANIEL M. BECKER,  
LAURENCE A. SHADEK, HUGH GRINNON,  
and GEORGE HAROLD,**

**Defendants.**

-----X

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 020862-10  
Motion Seq. No.: 1  
Submission Date: 3/30/11**

**The following papers having been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Defendant Laurence A. Shadek ("Shadek") on January 10, 2011 and submitted on March 30, 2011. For the reasons set forth below, the Court grants the motion to the extent that the Court dismisses the third cause of action against Shadek, alleging conversion, and otherwise denies the motion.

**BACKGROUND**

**A. Relief Sought**

Defendant Shadek moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's causes of action against him.

Plaintiff Thomas Rubin ("Rubin" or "Plaintiff") opposes the motion.

## B. The Parties' History

The Verified Complaint ("Complaint") (Ex. D to Gottlieb Aff. in Supp.) alleges as follows:

Defendant Daniel M. Becker ("Becker") is the President of Defendant Lealta, LLC ("Lealta"), an Illinois limited liability company that has been involuntarily dissolved. From 2009 to the present, Defendant Shadek has been a Managing Director at Wellington Shields and Co., in which he also has an equity interest. From 1986 to 2009, Shadek was a Managing Director at H.G. Wellington and Co., in which he also had an equity interest. In 2009, H.G. Wellington and Co. merged with Wellington Shields and Co. to form Wellington Shields and Co., a member of the New York State Exchange ("NYSE") that holds itself out to the public as a full-service brokerage firm. Shadek allegedly held himself out to investors, clients and the public as an advocate of "good corporate governance" and "socially responsible investing" (Compl. at ¶ 9).

Shadek and Defendants Hugh Grinnon ("Grinnon") and George Harold ("Harold") were never employees, officers or equity owners of Lealta. Plaintiff alleges that Becker, Shadek, Grinnon and Harold dominated and controlled Lealta for their own purposes, commingled corporate funds with personal funds, disregarded corporate formalities and failed to capitalize Lealta adequately.

In the Complaint, Plaintiff alleges that Defendants fraudulently induced Plaintiff to wire transfer \$250,000 ("Funds") to Lealta, purportedly as a loan to Lealta. According to Plaintiff, Defendants Becker, Grinnon and Harold converted a portion of the Funds to their personal use and used the remaining Funds to purchase shares of stock in Vzillion, a publicly-traded internet start-up company. Defendants have further converted 250,000 shares ("Shares") of unrestricted stock in Vzillion, which allegedly properly belongs to Plaintiff. Defendants also falsely promised to repay the Funds with interest, and to transfer the Shares to Plaintiff at the time that he provided the Funds. Despite due demand, Defendants have refused to return the Funds, and have refused to transfer the Shares to Plaintiff. Defendants, instead, tendered "worthless shares" (Compl. at ¶ 19) of restricted Vzillion stock.

The Complaint sets forth the circumstances under which Plaintiff provided the funds and the alleged misrepresentations by Defendants. Those misrepresentations include, but are not limited to 1) Harold and Grinnon represented themselves to be officers of Lealta; 2) Harold and Grinnon represented that Shadek, a former NYSE enforcement official, was a corporate officer of Lealta; 3) Lealta was a financially sound corporate entity; and 4) Harold and Grinnon assured Plaintiff that the Funds were guaranteed and would be used solely to enable Lealta to purchase shares of stock in Vzillion. Plaintiff executed a loan agreement (“Loan Agreement”) (Ex. A to Compl.) that was signed by Becker as President of Lealta, as well as by Shadek and Grinnon next to the words “Signed by Lealta, LLC: by” (Loan Agreement at p. 2). Plaintiff alleges that Defendants concealed certain facts, including the insolvency of Lealta, at the time that Plaintiff provided the Funds.

The Complaint contains six (6) causes of action: 1) fraud, 2) aiding and abetting fraud, 3) conversion, 4) aiding and abetting conversion, 5) breach of contract against Lealta, and 6) breach of contract against all Defendants and a request that the Court pierce Lealta’s corporate veil and hold Harold, Grinnon, Shadek and Becker (“Individual Defendants”) jointly and severally liable for Lealta’s breach of contract. Shadek allegedly provided substantial assistance in committing the fraud and conversion by 1) signing the Loan Agreement “purportedly as corporate officer of Lealta” (Compl. at ¶¶ 50 and 62), allegedly with knowledge of the misrepresentations regarding the manner in which the Funds would be used; and 2) permitting Grinnon, Harold and Becker to falsely promote Shadek as an officer, shareholder and investor in Lealta (*id.* at ¶ 63).

In his Affirmation in Support, counsel for Defendants provides a copy of the Loan Agreement, as well as 1) a copy of the LLC File Detail Report for Lealta, LLC from the website of the Secretary of State of Illinois, last visited January 5, 2010, reflecting that it was involuntarily dissolved on May 14, 2010, and a copy of the Lexis-Nexis Comprehensive Business Report for Lealta, LLC (Gottlieb Aff. in Supp. at Ex. B), and 2) a copy of the Yahoo! Finance page for Vzillion, Inc., last visited January 5, 2010 (*id.* at Ex. C).

### C. The Parties' Positions

Defendant Shadek submits that Rubin has improperly named the Individual Defendants in this action, as it relates to the Loan Agreement that Rubin entered into with Lealta. According to Shadek, there is no basis for holding Shadek, the holder of a minority, non-controlling equity interest in Lealta, personally liable for Lealta's obligations. In support, Shadek notes that 1) the only representations made to Plaintiff are those contained in the Loan Agreement, which were made solely by Lealta; 2) Plaintiff has not alleged that Shadek himself made any representations to Plaintiff regarding his status in Lealta, the financial viability of Lealta or Shadek's guarantee of the Funds; 3) Shadek had no fiduciary or contractual duty to Plaintiff and, therefore, owed Plaintiff no duty to disclose; 4) Plaintiff has not alleged facts from which any fraudulent intent on Shadek's part may be inferred; 5) Plaintiff has not alleged facts supporting the "actual knowledge" standard required for aiding and abetting; and 6) the Complaint fails to allege facts supporting Plaintiff's claim that Shadek personally exercised the requisite dominion and control over Lealta to warrant piercing the corporate veil.

Plaintiff opposes Shadek's motion, submitting that Shadek's execution of the Loan Agreement, by which the Defendants deceived Rubin into providing the Funds which they converted to their personal use, supports the causes of action against Shadek. Shadek's participation in misleading Plaintiff into believing he was extending the Funds to Lealta, a now-defunct company, is sufficient to connect Shadek to the fraud and conversion.

Plaintiff submits, further, that Shadek's actual knowledge of the fraud may be inferred from facts including the "close timing of [the] sales pitch, the executed loan document and the siphoning off of monies coupled with only the four individual defendants acting in concert on 'behalf' of Lealta, while simultaneously lining their own pockets" (Aff. in Opp. at ¶ 9). Plaintiff contends, further, that Shadek's suggestion that the Individual Defendants and Leita acted independently of each other is belied by, *inter alia*, Shadek's execution of the Loan Agreement on behalf of Lealta, notwithstanding his claim that he is not an officer or director of Lealta.

Plaintiff also argues that it has pleaded the fraud allegations with adequate specificity. Plaintiff notes that the Complaint includes specific allegations regarding 1) Grinnon and Harold's claims to Plaintiff regarding the viability of Lealta, in part due to Shadek's positive reputation as an investor, 2) the execution, only days later, of the Loan Agreement by the

Individual Defendants, and 3) the subsequent, immediate transfer of the Funds to Becker, Grinnon and Harold who converted those funds to their personal use.

In reply, Shadek submits that Shadek's execution of the Loan Agreement and status as a minority, non-controlling shareholder in Lealta do not provide a basis for holding Shadek personally liable for Lealta's obligations. Shadek argues, further, that 1) Shadek's signature on the Loan Agreement, on behalf of Lealta, cannot be construed as his ratification of oral statements made by others; 2) given that the representations in the Loan Agreement were explicitly made by Lealta, not the Individual Defendants, Shadek cannot be held personally responsible for representations made in that Agreement; 3) the conversion cause of action is not viable because Plaintiff has failed to allege that Shadek exercised dominion over, or interfered with, Plaintiff's property; and 4) Plaintiff has failed to allege facts from which Shadek's actual knowledge may be inferred, or establishing Shadek's substantial assistance in the wrongdoing.

#### RULING OF THE COURT

##### A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

### B. Personal Guarantees for Corporate Obligations

The law regarding personal guarantees for corporate obligations stems from the Court of Appeals' decision in *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63 (1961). That Court stated:

In modern times most commercial business is done between corporations, [and] everyone in business knows that an individual stockholder or officer is not liable for his corporation's engagements unless he signs individually, and where individual responsibility is demanded, the nearly universal practice is that the officer signs twice, once as an officer and again as an individual.

*Id.* at 67.

The *Salzman* logic has been employed throughout the State's Appellate Divisions. See *Khiyaye v. MikeSad Enterprises, Inc.*, 66 A.D.3d 845 (2d Dept. 2009) (affirmed trial court's dismissal of complaint against individual defendant based on documentary evidence, where contract established that individual defendant executed contract solely in his corporate capacity); *Summit Rovins & Feldesman v. Fonar Corp.*, 213 A.D.2d 201 (1<sup>st</sup> Dept. 1995) (summary judgment properly granted in favor of individual defendant in absence of direct and explicit evidence of actual intent by him to be held personally liable for corporation's debts, citing *Salzman, supra*, at 67); *Stuyvesant Plaza Inc. v. Emizack, LLC.*, 307 A.D.2d 640 (3d Dept. 2003) (affirmed trial court's order granting summary judgment dismissing the complaint against individual defendant who submitted proof that she never intended to execute personal guaranty and plaintiff provided no competent proof in opposition). Cf. *Star Video Entertainment, LP v J&I Video Distributing, Inc.*, 268 A.D.2d 423 (2d Dept. 2000) (triable issue of fact existed where individual signed his name and word "Pres" underneath language on credit application providing that "the undersigned personally guarantees payment of the account").

### 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*, 66 A.D.3d 122, 126 (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*, 66 A.D.3d at 126, 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*, 66 A.D.3d at 126, 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*, 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

#### D. Relevant Causes of Action

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 rely 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).

CPLR 3016(b) provides, in relevant part, that “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake....the circumstances constituting the wrong shall be stated in detail.” The complaint must sufficiently detail the allegedly fraudulent conduct. See *Polonetsky v. Better Homes Depot, Inc.* 97 N.Y.2d 46, 55 (2007).

To establish a claim for conversion, a plaintiff must show that he had an immediate superior right of possession to the property and the exercise by defendants of unauthorized dominion over the property in question to the exclusion of plaintiff’s rights. *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 385 (1st Dept. 1992).

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).

To plead properly a claim for aiding and abetting fraud, a complaint must allege 1) the existence of an underlying fraud, 2) knowledge of the fraud on the part of the aider and abettor, and 3) substantial assistance by the aider and abettor in achievement of the fraud. *Stanfield Offshore Leveraged Assets, Ltd. v. Met. Life Ins. Co.*, 64 A.D.3d 472, 476 (1<sup>st</sup> Dept.), *app. den.*, 13 N.Y.3d 709 (2009), citing *Unicredito Italiano Spa v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 502 (S.D.N.Y. 2003) (internal quotation marks omitted), quoting *Gabriel Capital, L.P. v. NatWest Fin., Inc.*, 94 F. Supp. 2d 491, 511 (S.D.N.Y. 2000). Substantial assistance exists where 1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed; and 2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated. *Id.*, citing *Unicredito, supra*, at 502 (internal quotations omitted), quoting *McDaniel v. Bear Stearns & Co., Inc.*, 196 F. Supp. 2d 343, 352 (S.D.N.Y. 2002). A plaintiff alleging an aiding and abetting fraud claim may plead actual knowledge generally, particularly at the pre-discovery stage, so long as such intent may be inferred from the surrounding circumstances. *Balance Return Fund Limited v. Royal Bank of Canada*, 2011 N.Y. Slip Op. 2740, \*\* 3 (1<sup>st</sup> Dept. 2011), quoting *DDJ Mgt., LLC v. Rhone Group L.L.C.*, 78 A.D.3d 442, 443 (1<sup>st</sup> Dept. 2010).

New York law permits a claim for aiding and abetting conversion. *Dickinson v. Igoni*, 76 A.D.3d 943, 945 (2d Dept. 2010), quoting *Dangerfield v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2006 U.S. Dist. LEXIS 7761 (S.D.N.Y.) (plaintiff must show existence of violation committed by primary party, aider and abettor's knowledge of violation and substantial assistance by aider and abettor in achieving violation).

#### E. Application of these Principles to the Instant Action

The Court is mindful that Shadek's execution of the Loan Agreement next to the words "Signed by Lealta, LLC" supports the inference that he signed the Loan Agreement on behalf of Lealta rather than in his personal capacity. Plaintiff, however, has alleged facts from which the Court may infer that Shadek was an active participant, along with the other Individual

Defendants, in the alleged plan to obtain the Funds from Plaintiff through misrepresentation regarding the viability of Lealta and the purpose for which the Funds were to be used. In light of the alleged misstatements, and Becker, Grinnon and Harold's subsequent conversion of the Funds to their personal use, there exists a basis, at this nascent state of this litigation, to permit further discovery on Plaintiff's claim that there is a basis to pierce the corporate veil and hold the Individual Defendants, including Shadek, responsible for Lealta's obligations. Accepting the facts alleged as true and according to the Plaintiff every favorable inference that may be drawn therefrom, the Court concludes that the allegations in the Complaint state causes of action cognizable at law against Shadek, except with respect to the third cause of action alleging conversion. Specifically, 1) Plaintiff has adequately alleged causes of action for fraud, and aiding and abetting fraud, in light of the allegations that Defendants made material misrepresentations to Plaintiff to induce him to provide the Funds, and Shadek lent substantial assistance to the other Defendants by, *inter alia*, signing the Loan Agreement, purportedly as a corporate officer of Lealta; 2) Plaintiff has adequately alleged a cause of action for aiding and abetting conversion by establishing that Shadek lent substantial assistance to the other Defendants, by conduct including his execution of the Loan Agreement, who exercised unauthorized dominion over the Funds to the exclusion of Plaintiff's rights; and 3) Plaintiff has adequately alleged a cause of action for piercing the corporate veil and holding Shadek, and the other Individual Defendants, liable for Lealta's breach of the Loan Agreement in light of Plaintiff's allegations that Lealta "was grossly undercapitalized, siphoned funds to Becker, Grinnon, and Harold, and did not maintain adequate records or adhere to corporate formalities" (Compl. at ¶ 79) as demonstrated by a) Lealta's alleged failure to file an annual report with the Illinois Department of State, resulting in its involuntary dissolution, b) Lealta's alleged failure to record the Loan on its books and records, and c) the Individual Defendants' alleged use of Lealta to perpetrate a fraud on Plaintiff with respect to the Funds. In light of these allegations, at this stage of the litigation, the Court cannot state that, as a matter of law, Shadek's execution of the Loan Agreement absolves him from any personal liability.

The Court concludes, however, that the third cause of action, alleging conversion, is not viable as against Shadek, in light of Plaintiff's failure to allege that Shadek exercised dominion over the Funds. Accordingly, the Court dismisses the third cause of action as against Defendant Shadek.

All matters not decided herein are hereby denied.

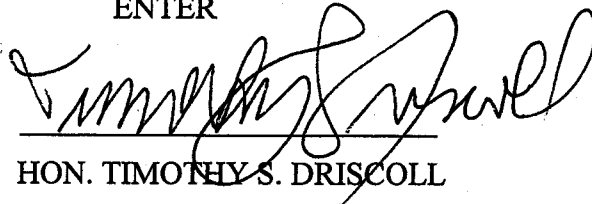
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear at a Preliminary Conference before the Court on June 15, 2011 at 9:30 a.m.

DATED: Mineola, NY

June 6, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**  
JUN 09 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE