SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE Jaffe PART 12
J.S.C. Justice

Index Number : 150342/2011
CANE, PETER S.
vs.
HERMAN, JULIAN MAURICE
SEQUENCE NUMBER : 005
DISMISS ACTION

INDEX NO. _____
MOTION DATE 9/12/12
MOTION SEQ. NO. 005

The following papers, numbered 1 to 6, were read on this motion to/for dismiss the complaint

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1,2
Answering Affidavits — Exhibits _____ | No(s). 3,4
Replying Affidavits _____ | No(s). 5,6

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 1/18/13

BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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PETER S. CANE,

Plaintiff,

-against-

JULIAN MAURICE HERMAN, TUDOR INVESTMENT HOLDINGS CORP., J. MAURICE HERMAN as trustee of the J. Maurice Herman Revocable Trust dated October 28, 2002, WINDSOR PLAZA LLC, CONSOLIDATED REALTY HOLDINGS LLC,

Defendants.

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Index No. 150342/11

Argued: 9/12/12
Motion Seq. No. 005
Motion Cal. No.: 003

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Peter S. Cane, Esq., self-represented
230 Park Avenue
New York, NY 10169
212-922-9800

For defendant:
M. Darren Traub, Esq.
Herrick, Feinstein LLP
2 Park Avenue
New York, NY 10016
212-592-1400

By notice of motion dated April 23, 2012, defendants move pursuant to CPLR 3211(a)(1), (5), and (7) for an order dismissing the complaint. Plaintiff opposes. In addition to the parties' submissions, a transcript of the oral argument held before the justice previously assigned to this matter was reviewed.

I. PERTINENT BACKGROUND

In July 1992, plaintiff moved into an apartment at 36 Gramercy Park in Manhattan, a building then owned by non-party Mayfair York, LLC (Mayfair). (Affirmation of M. Darren Traub, Esq., dated Apr. 23, 2012 [Traub Aff.], Exh. B). Defendant Julian Maurice Herman was a managing member of Mayfair. (*Id.*, Exh. D).

In 2001, Mayfair commenced an action against plaintiff. (Affirmation of M. Darren Traub, Esq., in Reply, dated May 24, 2012 [Traub Reply Aff.], Exh. C). Shortly thereafter, plaintiff joined issue with service of his answer, asserting a cross-claim for attorney fees. (Traub Aff., Exh. D).

By contract dated November 1, 2002, Mayfair was sold to an entity in which Herman had no interest. (*Id.*). On December 31, 2002, Mayfair assigned, *inter alia*, its interest in the 2001 action to defendant Tudor Investment Holdings Corporation (Tudor), of which Herman was president. (Traub Reply Aff., Exh. A).

By agreement dated January 5, 2004, Tudor assigned to Herman its right to monies potentially received from the 2001 action. (Traub Aff., Exhs. B, D). Shortly thereafter, Mayfair moved for an order granting leave to amend the caption of the 2001 action to substitute Tudor as plaintiff. (Traub Aff., Exh. D). On June 9, 2004, over plaintiff's objection, the motion was granted. (Traub Reply Aff., Exh. B).

By order dated December 2, 2005, Herman was sanctioned for "abusing the Court and judicial economy." (Affidavit of Peter S. Cane, Esq., in Opposition, dated May 8, 2012 [Cane Opp. Affid.], Exh. A).

By order dated January 11, 2006, Mayfair's claims against plaintiff were dismissed, and plaintiff was awarded attorney fees. (Traub Aff., Exhs. B, D). Thereafter, a hearing on plaintiff's fees was held before a special referee, who issued a report reflecting that plaintiff was entitled to $144,700. (*Id.*, Exh. D).

In April 2006, plaintiff moved for an order attaching the assets of a number of business entities associated with Herman and confirming the special referee's report. (*Id.*).

By agreement dated July 26, 2006, Herman assigned the rights to receive monies from the 2001 action to Atmas Corporation (Atmas). (*Id.*, Exhs. B, D).

By order dated September 26, 2006, another justice of this court denied plaintiff's motion for attachment, concluding that plaintiff had failed to demonstrate that Herman had intended to defraud him by making the assignments. (*Id.*, Exh. D). The court also confirmed the special referee's report and awarded plaintiff, pursuant to Real Property Law (RPL) § 234, an additional $14,830 in attorney fees incurred in connection with the hearing before the special referee. (*Id.*).

On November 6, 2006, a $172,036.51 judgment was entered against Tudor in plaintiff's favor. (*Id.*, Exh. B).

On September 3, 2011, plaintiff commenced the instant action with the service of a summons and complaint. (*Id.*, Exh. D). By motion dated November 7, 2011, defendants moved for an order dismissing the complaint. Before the May 9, 2012 return date of the motion, plaintiff filed an amended complaint on April 3, 2012, , asserting claims for piercing the corporate veil, attorney fees, and punitive damages. (*Id.*, Exh. B). Defendants thereupon withdrew their motion to dismiss the original complaint and filed the instant motion.

II. THE AMENDED COMPLAINT

The amended complaint contains the following allegations:

> Tudor and Atmas were pure shell corporations. Neither had any capital, assets, employees or any legitimate business operations. None of the assignments between and among Herman, Tudor and Atmas was for consideration, and none served any proper legal purpose. Herman dissolved Tudor not long after Cane obtained the judgment. Herman dissolved Atmas thereafter. Herman's indiscriminate transfers of assets and liabilities between himself and at least two shell corporations with no assets or operations is plainly abusive of the corporate form.

(*Id.*).

In his first cause of action, denominated "Piercing the Corporate Veil as to Julian Herman," plaintiff alleged, in pertinent part, that "defendant Julian Herman dominated defendants Tudor, Atmas, Julian Herman Trust, Windsor, and Consolidated and brazenly abused the privilege of doing business in the corporate form and continues to do so to frustrate a judgment of the Court." (*Id.*). In the second cause of action, denominated "Piercing the Corporate Veil as to Herman Entities," plaintiff alleges, in pertinent part, that

> Julian Herman has and continues to abuse the privilege of using the corporate form to conceal substantial assets that would otherwise be available to satisfy the judgment of the Court. The instrumentalities of this abuse include but are not limited to Tudor, Atmas, Julian Herman Trust, Windsor, and Consolidated. . . . Cane's judgment should therefore be made enforceable, jointly and severally, against the[m] . . . ." (*Id.*).

In the third cause of action, for attorney fees, plaintiff alleges, in pertinent part, that "[t]he court previously determined that Cane is entitled to legal fees and costs . . . . Cane is therefore entitled to all ancillary fees and costs spent in collecting on the judgment." (*Id.*). And in the fourth cause of action, for punitive damages against Herman, he alleges, in pertinent part, that "Herman's fraud on the Court and corporate shell game shortly before the trial and again shortly before judgment abused the privilege of using the corporate form in the most cynical and deceptive manner possible to intentionally mislead the Court into issuing an unenforceable judgment." (*Id.*).

III. CONTENTIONS

Defendants assert that plaintiff fails to state a claim for piercing the corporate veil of Tudor, Atmas, the Julian Herman Trust, Windsor, and Consolidated as to Herman, as his claims that Herman controls these entities and that they are undercapitalized are conclusory, and they maintain that in any event, control and undercapitalization are insufficient to state a claim.

(Traub Aff.). They contend that plaintiff also fails to state a claim for piercing the corporate veil so as to hold these entities liable for the judgment, as there exists no cause of action for piercing the corporate veil independent of a claim asserted against the corporation. (*Id.*). Additionally, defendants observe that plaintiff's claim for punitive damages must be dismissed as there exists no separate cause of action for it, and even if plaintiff were to prevail on his veil piercing claims, punitive damages are not awarded for abuse of the corporate form. (*Id.*). Moreover, they maintain that plaintiff fails to state a claim for attorney fees absent a statute, agreement, or court rule providing for their recovery in this matter. (*Id.*). And they argue that the amended complaint should be dismissed, as plaintiff's claims that Herman acted fraudulently were rejected by the previously assigned justices on June 9 and September 26, 2006. (*Id.*).

In opposition, plaintiff claims that it is undisputed that Herman is the sole shareholder, officer, and director of Tudor and Atmas, that his control over the entities is incontrovertible, that they are completely unfunded, that defendants offer no evidence refuting the allegations in the amended complaint, and thus, that he has set forth a claim for piercing the corporate veil. (*Id.*). He additionally asserts that his claim for punitive damages should not be dismissed as Herman has engaged in dilatory tactics throughout the litigation and has been sanctioned, and that he would provide an affidavit detailing Herman's abuse of the court at the court's request. (*Id.*). In any event, he claims that he is entitled to discovery as to whether Herman has engaged in conduct that would provide additional grounds for the imposition of punitive damages. (*Id.*). Plaintiff maintains that he is entitled to attorney fees as he seeks enforcement of a fee award, and thus, the instant action constitutes a "fee-on-fee" action. (*Id.*). And he contends that Herman should be ordered to secure the judgment by depositing $500,000 with the court. (*Id.*).

In reply, defendants observe that they need not offer evidence refuting plaintiff's claims in order to prevail on a CPLR 3211(a)(7) motion, that plaintiff offers no support for his allegations regarding Herman's control over Tudor and Atmas, and that he makes no allegations against Windsor Plaza LLC (Windsor) and Consolidated Realty Holdings LLC (Consolidated) in his amended complaint. (Reply Mem. of Law in Further Support). Moreover, they assert that plaintiff's claims as to Herman's dilatory tactics should not be considered, as they are not included in the amended complaint, and that he is not entitled to attorney fees as the instant action does not constitute a fee-on-fee action. (*Id.*). They additionally claim that, to the extent that plaintiff's request for an order directing Herman to deposit $500,000 with the court is construed as an application for prejudgment attachment pursuant to CPLR 6201, it should not be granted as Tudor, not Herman, is the judgment debtor, and in any event, removal or assignment of property does not warrant attachment absent proof of fraud. (*Id.*).

IV. ANALYSIS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, "accept the alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory." (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Only the contents of the complaint and any affidavits submitted in opposition may be considered. (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1 [1st Dept 2012]).

A. Veil piercing claims

1. First cause of action

To state a claim for piercing the corporate veil, a party "must establish that the owners, through their dominion, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." (*Sound Communications, Inc. v Rack & Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011]). Conclusory allegations of control by a shareholder are insufficient to warrant piercing the corporate veil (*Vue Mgt., Inc. v Photo Assoc.*, 81 AD3d 569 [1st Dept 2011]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559 [2d Dept 2002]; *Metro. Transp. Auth. v Triumph Advertising Prod., Inc.*, 116 AD2d 526 [1st Dept 1986]), as are claims that the corporation has insufficient assets "to assure the recovery sought" (*Walkovsky v Carlton*, 18 NY2d 414, 419 [1966]; *Casa de Meadows Inc. (Cayman Islands) v Zaman*, 76 AD3d 917, 923 [1st Dept 2010]).

Neither the amended complaint nor the opposition to this motion contains factual support for plaintiff's claim that Tudor and Atmas were shell corporations under Herman's control, and he makes no such allegations against Windsor or Consolidated. Plaintiff thus fails to state a cause of action for piercing the corporate veil. (*See Itamari*, 298 AD2d 559 [plaintiff failed to state corporate veil piercing claim where he failed to allege, in complaint or in opposition papers, facts sufficiently demonstrating shareholder's dominion over corporation]; *Metro. Transp. Auth.*, 116 AD2d 526 [same]). Even if plaintiff's claims of control and undercapitalization were not conclusory, the mere insufficiency of assets does not state a claim. (*See Casa de Meadows*, 76 AD3d 917 [plaintiff's allegation that shareholder used domination of corporation to transfer its assets in order to prevent satisfaction of judgment entered against corporation insufficient to veil

piercing claim]; *see also Brito v DILP Corp.*, 282 AD2d 320 [1st Dept 2001] [defendant granted summary judgment on plaintiff's claim for piercing corporate veil even though corporation had insufficient assets to satisfy plaintiff's damages as plaintiff failed to "plead or prove with specific facts" that corporation was used for shareholder's personal business]).

2. Second cause of action

There can exist no separate, free-standing cause of action for piercing the corporate veil (*Morris v State Dept. of Taxation & Finance*, 82 NY2d 135 [1993]), and absent any allegation that the entities listed in the second cause of action own or are otherwise affiliated with Tudor, and not simply with Herman, plaintiff has failed to state a claim

In light of these determinations, defendants' claim that plaintiff's causes of action for piercing the corporate veil are barred by res judicata or collateral estoppel need not be addressed.

B. Punitive damages claim

As plaintiff fails to state a claim for piercing the veil of any of the corporate defendants, and as there exists no independent cause of action for punitive damages (*Rocanova v Equit. Life Assur. Socy.*, 83 NY2d 603 [1994]; *Stein v Doukas,* 98 AD3d 1024 [2d Dept 2012]; *Goldstein v Winard*, 173 AD2d 201 [1st Dept 1991]), plaintiff also fails to state a cause of action for punitive damages. An affidavit detailing Herman's behavior would be immaterial, and no discovery would uncover anything that would make it material.

C. Attorney fees claim

Absent any viable claims, plaintiff is not entitled to attorney fees.

D. Request for order directing deposit of $500,000

Even if plaintiff's request for an order directing Herman to deposit $500,000 with the

court were deemed a cross-motion for attachment pursuant to CPLR 6201, which permits attachment when a defendant, "with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property," Tudor, not Herman, is the judgment debtor, and thus, there exists no legal basis for attaching Herman's assets.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

ENTER:

Barbara Jaffe, JSC

DATED: January 18, 2013
New York, New York