SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

Index Number : 651648/2013
LAU, GLEN K
vs.
LAZAR, MD, TERRY
SEQUENCE NUMBER : 010
DISMISS

INDEX NO. _____
MOTION DATE 9/8/14
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 144-149

Answering Affidavits — Exhibits _____ | No(s). 150

Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 10/7/14

SHIRLEY WERNER KORNREICH 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 54

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GLEN LAU, MD, MEDICAL FOREFRONTS OF BROOKLYN, LLC, MEDICAL FOREFRONTS EQUIPTMENT, LLC, MEDICAL FOREFRONTS FINANCIAL SERVICES, LLC, MEDICAL FOREFRONTS MANAGEMENT SOLUTIONS, LLC, and MEDICAL FOREFRONTS, LLC,

Plaintiffs,

-against-

TERRY LAZAR, TMS ENTERPRISES, LP, TDK HEALTHCARE CONSULTING, LLC, and THE AMBULATORY SURGERY CENTER OF BROOKLYN, LLC d/b/a NEW YORK CENTER FOR SPECIAL SURGERY,

Defendants.

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Index No.: 651648/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Defendants Terry Lazar, TMS Enterprises, LP, TDK Healthcare Consulting, LLC, and The Ambulatory Surgery Center of Brooklyn, LLC, d/b/a, New York Center for Special Surgery (the Surgery Center) move, pursuant to CPLR 3211, to dismiss the 1st-19th and 24th-28th causes of action in the Third Amended Complaint (the TAC). Defendants' motion is granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

The court assumes familiarity with its decision on defendants' motion to dismiss plaintiffs' Second Amended Complaint (the SAC), which is set forth in an order dated March 5, 2014 (the Prior Decision).[1] *See* Dkt. 135. The Prior Decision discusses the allegations in this case, which have not materially changed. In short, this case is about how Lazar, an accountant, allegedly committed serious misconduct against Lau, a doctor with whom he contracted to run

[1] All capitalized terms have the same meaning as in the Prior Decision.

the Surgery Center. The Prior Decision discusses how this case "centers on: (1) the alleged liability the contracting corporate defendants have for breaching the subject contracts; and (2) the alleged liability Lazar, individually, or his related companies, have for unjust enrichment and fraud claims or through veil piercing theories." Prior Decision at 5. While the scope of defendants' alleged misconduct is significant, this case does not warrant 45 separate causes of action, the amount pled in the SAC.

The TAC, which plaintiffs filed on March 27, 2014 [*see* Dkt. 137], purports to remedy this problem by reducing the cause of action to 28. These 28 causes of action, in reality, only encompass 5 categories of claims: tortious interference (1st-4th), breach of contract (5th-6th & 18th-25th), unjust enrichment (7th-17th), conversion (26th), and anticipatory breach of contract (27th-28th). Additionally, on the unjust enrichment claims, plaintiffs assert a veil piercing theory of liability. For the reasons set forth below, and notwithstanding the lack of clarity that the TAC still suffers from, none of plaintiffs' causes of action warrant dismissal. Plaintiffs' veil piercing claim, however, is dismissed.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing

Guggenheimer v Ginzburg, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

A. Privity, Individual Liability, and Veil Piercing

At the outset, Lazar argues that he is not a proper party on plaintiffs' claims for tortious interference, breach of contract, and unjust enrichment. Lazar, of course, is not a proper defendant on a breach of contract claim when he is not the contracting party. *See Aetna Health Plans v Hanover Ins. Co.*, 116 AD3d 538 (1st Dept 2014). However, the lack of privity is, in any event, irrelevant. As discussed below, Lazar may be held personally liable for his actions giving rise to the corporate defendants' alleged beaches because Lazar is alleged to have caused those breaches (tortious interference) and allegedly retained money due under those contracts which belongs to plaintiffs (unjust enrichment).

Next, Lazar's reliance on sections 609 and 610 of New York's Limited Liability Company Law is misplaced. These statutes provide that "[a] member of a limited liability company 'cannot be held liable for the company's obligations by virtue of his [or her] status as a

member thereof." *Matias v Mondo Props. LLC*, 43 AD3d 367, 367-68 (1st Dept 2007). In other words, members are not personally liable for the contractual debts of the LLC. *See B & C Realty, Co. v 159 Emmut Props. LLC*, 106 AD3d 653, 655 (1st Dept 2013) However, section 610 does not immunize LLC members from their own wrongful conduct, such as when they cause the LLC to breach a contractual payment obligation and then personally retain that money. Again, these are acts of tortious interference and unjust enrichment. Lazar cites no case supporting the proposition that personal liability for such acts does not exist simply because the tortfeasor owns equity.

That being said, plaintiffs have not sufficiently pleaded facts supporting a veil piercing theory. As this is plaintiffs' **third** amended complaint, another chance to do so will not be granted. Veil piercing is a means to hold members liable for the LLC's actions. *See Grammas v Lockwood Assocs, LLC*, 95 AD3d 1073, 1075 (2d Dept 2012). As "courts are loathe to disregard the corporate form" [*see Baccash v Sayegh*, 53 AD3d 636, 639 (2d Dept 2008)], veil piercing claims are subject to a heightened pleading standard. Plaintiffs recognize this. Indeed, their brief quotes this court's recitation of the veil piercing factors. *See* Dkt. 150 at 10-11, quoting *Max v GS Agrifuels Corp.*, 2013 WL 1154937, at *3 (Sup Ct, NY County 2013) (Kornreich, J.):

> In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff. *Fantazia Int'l Corp. v CPL Furs New York, Inc.*, 67 AD3d 511, 512 (1st Dept 2009), citing *Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 140 (1993). Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity.

No one factor is dispositive. *Id.*, citing *Freeman v Complex Computing Co.*, 119 F3d 1044 (2d Cir 1997).

Plaintiffs, however, appear to have read no further than their quoted portion of the court's decision in *Max*, which then went on to explain that under New York law, "a plaintiff may not merely assert that veil piercing is warranted and parrot the relevant factors in the complaint. Rather, the plaintiff must allege facts that form the basis for the contention that these factors are present." *Max*, 2013 WL 1154937, at *4, accord *E. Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775 (2011). Plaintiffs maintain that simply pleading Lazar's ownership and control of the corporate co-defendants along with his personal guarantee of their debts is sufficient. Plaintiffs are wrong. Even were sufficient facts cited to prove domination, "domination and control alone are insufficient to pierce the corporate veil." *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 41 (1st Dept 2012). Moreover, a personal guarantee of a small business' debts is routine; it is certainly not a factor militating in favor of veil piercing.[2]

Regardless, most fatal to plaintiffs' veil piercing claim is the absence of any allegation that the defendants' corporate structure was used to defraud plaintiffs. In all instances, a veil piercing claim requires "the complaining party [to] establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form **to perpetrate a wrong or injustice against the party asserting the claim.**" *Tap Holdings, LLC v Orix Finance Corp.*, 109 AD3d 167, 174 (1st Dept 2013) (emphasis added); *see also ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 (2011), citing *E. Hampton*, 16 NY3d at 776 (piercing the corporate veil claim properly dismissed where plaintiff failed to allege any harm purportedly **resulting from** an abuse or perversion of the corporate form) (emphasis added).

[2] Since many small businesses cannot obtain loans without providing a guarantor, the relevance of this fact for veil piercing purposes would disproportionally deprive owners of small businesses of the protection of the corporate form.

To be sure, plaintiffs may have been defrauded, but they were defrauded by defendants' conduct, not defendants' corporate structure. Veil piercing is a means to ensure that fraud is not committed by an entity intentionally made to be judgment proof. But where, as here, all defendants are alleged to have themselves committed wrongdoing, and each of them may be held liable, the corporate veil may not be pierced without facts suggesting that undercapitalization may frustrate the enforcement of a judgment.

B. The LOI Claims

Defendants seek dismissal of plaintiffs' claim under the LOI based on plaintiffs' counsel's representation at a prior oral argument that the SAC was not asserting a claim thereunder. *See* Dkt. 134 (2/11/14 Tr. at 16-17). Defendants do not, on this motion, seek dismissal of this cause of action for failure to state a claim. In opposition, plaintiffs' counsel avers that he misspoke and that he always intended to pursue a clam under the LOI. The court takes judicial notice of how poorly and confusingly the SAC was drafted, so it is unsurprising that their author erroneously remembered which claims were included among 45 causes of action. While plaintiffs' pleadings continue to test the court's patience,[3] the court will not apply the harsh remedy of judicial estoppel to this claim, especially since defendants have not articulated any actual resulting prejudice.[4]

C. Unjust Enrichment

[3] The court explicitly noted that the 45 claims pled, for the most part, were duplicative, unnecessary and the root of much confusion. Nonetheless, the TAC pleads 28 causes of action, many of which are still duplicative. Based on the serious allegations and defendants' borderline contempt in connection with the prior injunction hearing (i.e., in the interests of justice), the court allows the TAC to stand in its current form.

[4] It should also be noted that neither party properly articulated the standard for when a judicial admission warrants estoppel. *See generally Matter of Liquidation of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 (1996); *see also One Beacon Ins. Co. v Espinoza*, 37 AD3d 607, 608 (2d Dept 2007).

To state a claim for unjust enrichment, "the plaintiff must allege 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.'" *Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 (2012), quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 (2011). However, "[w]here the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 (2009), accord *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987).

Plaintiffs acknowledge that they may not simultaneously maintain claims against a defendant for breach of contract and unjust enrichment. Plaintiffs, however, seek to hold non-contracting parties, Lazar in particular, liable for being unjustly enriched. Ordinarily, the existence of a written contract prohibits the assertion of an unjust enrichment claim against a non-contracting party for rights arising from the contract. *See Vitale v Steinberg*, 307 AD2d 107, 111 (1st Dept 2003). Ergo, the privity requirement cannot be eviscerated via a quasi-contract claim. An exception exists, however, when recovery is sought against a non-contracting party for wrongfully obtaining contractual proceeds due under the contract, so long as the disposition of money sought via the unjust enrichment claim does not contravene the express terms of the contract. *See Trade Expo Inc. v Bancorp*, 2014 WL 4634989, at *2 (Sup Ct, NY County 2014) ("Where one party misappropriates property from another and uses that property to pay a debt to a third party, an action for unjust enrichment may lie against the party who ultimately received the money"), accord *3105 Grand Corp. v City of New York*, 288 NY 178 (1942); *see also*

SungChang Interfashion Co., Ltd. v Stone Mountain Accessories, Inc., 2013 WL 5366373, at *20 (SDNY 2013), citing *Hughes v BCI Int'l Holdings, Inc.*, 452 FSupp2d 290, 304 (SDNY 2006).

In this case, Lau personally loaned approximately $1.4 million to the Surgery Center (and also paid approximately $1.3 million of the Surgery Center's expenses), money Lazar allegedly used to pay off his personal debts (or the debts of his companies which he personally guaranteed). Additionally, Lazar's companies are alleged to have benefited from their improper retention of medical equipment that plaintiffs leased from a third-party. These allegations, if proven, make it "against equity and good conscience" to permit Lazar and his companies to benefit from these defalcations.

D. Conversion

Similarly, plaintiffs have stated a claim for conversion. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 (2006). The equipment leased by plaintiffs, which was to be used in the Surgery Center, was the subject of multiple contempt hearings due to defendants' repeated refusal to return such equipment. It is undisputed that defendants have no right to that equipment; it was leased from a third-party, and defendants are not a party to that lease. Plaintiffs, who have a superior right to the property, may maintain a conversion claim to recover that equipment.[5]

E. Remaining Arguments

As for defendants' repudiation, anticipatory breach, and conflict of interest arguments, they border on the frivolous. Defendants cannot seriously argue that their actions are excused

[5] The equipment was ordered to be returned. If, as alleged, it has not been returned, and as noted in the Prior Order, plaintiffs have leave to renew their contempt motion.

based on plaintiffs' failure to perform, since the timeline of events, as alleged, indicates that all bad acts began with defendants. No matter, the parties' performance is a disputed question of fact and thus is not a proper consideration on a motion to dismiss, where the truth of plaintiffs' allegations is assumed. Likewise, the notion that the Services Agreement was self-dealing also implicates disputed facts. But, it should be noted that this is an odd argument for defendants to be asserting since the very purpose of the parties' business arrangement, as the contracts reflect, was to have plaintiffs provide services to the Surgery Center. That Lau caused the Surgery Center to hire the corporate plaintiffs appears to be the fulfillment of the contracts, not a breach thereof. Accordingly, it is

ORDERED that defendants' motions to dismiss the TAC is granted in part as follows: (1) the veil piercing claims are dismissed; (2) the breach of contract claims may only be asserted against the contracting parties; and (3) the motion is otherwise denied.

Dated: October 7, 2014

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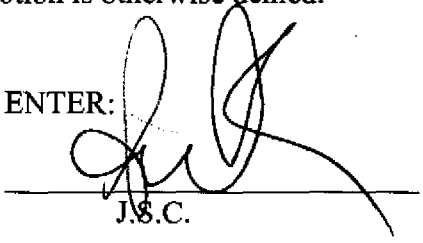

J.S.C.