SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

LUKOIL NORTH AMERICA, LLC,

Plaintiff,

- against -

NANCY SHURKA, MELANIE SHURKA, MATHEW SHURKA, ASHLEY SHURKA, NATALIE ZERNITSKY, EDEN ZERNITSKY, JASON SHURKA, RACHEL CARMAZI, EFRAIM SHURKA, MANNY SHURKA, ESTHER ZERNITSKY, MALKA CARMAZI, 302-16 THIRD AVE LLC, ASH/MAT ENTERPRISES LLC, BEACH CHANNEL LLC, BEARGES LLC, CHURCHY LLC, DOUG LLC, FUMP LLC, HELF ENTERPRISES LLC, J.E.M. PROPERTIES LLC, L.S.E. LLC, M&V LLC, MAMON LLC, MANNY ENTERPRISES LLC, MILL BASIN LLC, MISHGY LLC, MOLABA LLC, MORVARY LLC, OFFICE MANAGEMENT LLC, PUPPY LLC, ROGER LLC, SCOTT PLAZA LLC, SHAD LLC, SHEKEL LLC, SHOWRAKA LLC, SHURGETT LLC, SINAI LLC, STATE LLC, SUN PLAZA ENTERPRISE, LLC, YADID LLC, YEHUDA LLC, ZAHAV ENTERPRISES LLC, ZOHAR LLC, and ZUBA LLC,

Defendants.

TRIAL/IAS PART 19
Index No.: 604574-15
Motion Date: 4/18/16; 5/24/16
Sequence Nos.: 001, 002

MD, MG
XXX

The following papers have been read on this motion:

Sequence No. 1:

Notice of Motion To Compel Disclosure..... 1
Affirmation in Support and Exhibits..... 2
Affirmation in Opposition..... 3
Reply Affirmation in Further Support and Exhibits..... 4

Sequence No. 002:
Notice of Motion, Affirmation in Support, Affidavit of Manny Shurka and Exhibits..5
Memorandum of Law in Opposition.....6
Affirmation in Opposition.....7
Defendants' Memorandum of Law/Defendants' Reply Memorandum of Law.....8
Affidavit in Reply of Manny Shurka.....9

PRELIMINARY STATEMENT

In Sequence No. 001, plaintiff brings this application for an order pursuant to CPLR § 3124 granting plaintiff's motion to compel disclosure of the documents demanded in plaintiff's first request for production of documents to defendants and plaintiff's first set of interrogatories directed to defendants, awarding reasonable costs and fees to plaintiff for defendants' willful disobedience pursuant to 22 NYCRR § 130-1.1, and granting such other relief as the Court deems just and proper. Defendants have submitted opposition to this application.

In Sequence No. 002, defendants bring this application for an order pursuant to CPLR § 3212, granting defendants' summary judgment dismissing plaintiff's complaint, together with such other and further relief as this Court may deem proper. Plaintiff has submitted opposition to this application.

BACKGROUND

Lukoil North America, LLC ("Lukoil") obtained a default judgment against Petroleum Distribution, Inc. ("PDI"), a non-party to this action. PDI had been a distributor of petroleum products for Lukoil for 25 years, when Lukoil terminated their relationship. Plaintiff's complaint, signed by plaintiff's counsel alleges, that PDI transferred assets of more than $700,000 worth of petroleum products supplied by Lukoil, but not paid for by PDI, and that PDI paid approximately $300,000 per year in personal salaries and health insurance to affiliated companies and/or individual family members at a time when PDI was insolvent, or was rendered insolvent as a result of such transfers.

Plaintiff's Complaint (Exh. "A") asserts that a business, which operates under the trade name Signature Investment Group ("SIG") consists of multiple limited liability companies and other entities, all of which were controlled and operated by four siblings and their respective children. Plaintiff's counsel contends that SIG defendants, and individual defendants, are alter

egos of PDI, as they completely dominated and controlled PDI, using it as a mere conduit to further their own interests, and to defraud Lukoil. Plaintiff claims that the individual and limited liability company defendants should be held individually and severally liable to plaintiff for the debt owed by PDI to Lukoil.

Motion Sequence No. 1 is a discovery motion which seeks to compel disclosure of documents demanded in plaintiff's First Request for Production of Documents and plaintiff's First Set of Interrogatories, and awarding reasonable costs and fees for defendants' willful disobedience pursuant to 22 NYCRR § 130-1.1.

Defendants' affidavit and defendants' counsel's affirmation both oppose the motion, and cross-move for summary judgment dismissing the Complaint. They point out that plaintiff has had unfettered access to the books and records of PDI during the course of their litigation against them. Defendant PDI, having lost its source of income as a result of Lukoil's termination of their supplier contract, allegedly expended 98% of its resources for payment for gasoline and fuel products, and only 2% was expended on medical insurance, rent, supplies, and salaries, and that this information was clearly reflected in PDI documents obtained by Lukoil, including tax returns and bank records.

The defendants' affidavit and counsel's affirmation both claim, that despite all of the information made available to Lukoil, including the opportunity to depose the PDI accountant, which they have failed to do, Lukoil is not able to identify a single improper divestiture of assets by PDI to any of the named defendants. Instead, they claim, plaintiff has embarked on a massive fishing expedition, in an effort to recoup 2% of $700,000 ($14,000) from individuals and entities which were not involved in the operation of PDI.

Defendants also claim that the requested discovery is overly broad, and not likely to lead to the discovery of relevant information. They further contend that the purpose of the litigation is nothing more than an effort to harass and batter the individuals and limited liability companies into surrender, just as plaintiff forced PDI to permit a default after the ability to fund a defense was exhausted. By virtue of their cross-motion, they claim that discovery should be stayed pending its determination.

In Motion Sequence No. 2, defendants seek summary judgment pursuant to CPLR § 3212

dismissing the Complaint. The Complaint identifies SIG as a trade name under which siblings Efraim Shurka, Manny Shurka, Esther Zernitsky, and Malka Carmazi ("Siblings") have operated a family business over several decades. It allegedly includes numerous separate entities, primarily single-purpose limited liability companies, all or most of which own commercial property in the United States, or majority interests in Israel, or elsewhere abroad. Prior to 1999, title to SIG's real estate was held in 17 single-purpose corporations. By a series of transactions, title was transferred from the corporations to limited liability companies, and the children of Efraim, Manny, Esther and Malka became members of the companies. By Agreement dated January 18, 2002 (Exh. "B" to Complaint [Exh. "A" to Cross-motion]), the transfers from the corporations to the limited liability companies resulted in a series of promissory notes to the transferor corporations, payable to the individual shareholders in proportion to their pro rata ownership of the corporate stock.

As set forth in the Agreement, the Siblings were irrevocably appointed as managers for life, and constituted the Board of Managers over the transferred assets. The Board Members retained "full and unfettered discretion in all matters affecting the assets, including but not limited in fixing their own salaries and the dividends payable to the Beneficiaries, regardless of the financial condition of the assets and/or entities', and prohibited interference by the Beneficiaries. The beneficiaries, the children of the Siblings, agreed to repay a loan agreement to the Siblings, in the amount of $8,348,296, solely from positive cash flow of the various interchangeable real estate holdings after all operating expenses, including loans and mortgages have been paid. Payments were to be on an annual basis over 39 years.

Beginning at ¶ 65, the Complaint signed by plaintiff's counsel, identifies PDI as a petroleum and gasoline distributor which is subject to the 2002 Agreement, and to whom Lukoil began selling its petroleum products in 2009, after acquiring a distributor agreement originally entered between PDI and another entity (Getty). Manny, Esther, and Efraim, three of the Siblings, were authorized to and acted on behalf of PDI. The shareholders of PDI are identified as Nancy Shurka, Melanie Shurka, Mathew Shurka, Ashley Shurka, Jason Shurka, Natalie Zernitsky, and Eden Zernitsky. The Complaint asserts, on information and belief, that Malka Carmazi, Rachel Caarmazi, Michelle Carmazi, and Benny Carmazi exercise ownership and

control over PDI under the terms of the 2002 Agreement.

At ¶¶ 69 — 73, plaintiff alleges that between March and April of 2012, Lukoil supplied PDI with products worth $710,609, that PDI sold the petroleum products to third parties for an amount in excess of $710,069, and, rather than pay Lukoil, diverted the proceeds of sale to one or more defendants. PDI thereafter commenced an action against Lukoil on or about May 31, 2012, entitled *Petroleum Distribution Inc. v. Lukoil Oil Company, Lukoil North America, LLC and Lukoil USA, Inc.,* in Supreme Court, Nassau County, under Index No. 6962/2012, to which Lukoil asserted counterclaims. Lukoil ultimately obtained a judgment in its favor against PDI for $1,379,740.71, which remains unpaid.

The Complaint, beginning at ¶ 74, asserts that plaintiff should be entitled to pierce the corporate veil of PDI because defendants completely dominated PDI, which was a mere conduit to further defendants' personal affairs. Plaintiff alleges that Manny, Esther, and Efraim used PDI to draw personal salaries and provide personal health insurance for themselves, and their children Nancy, Melanie, Mathew, Ashley, Jason, Natalie, and Eden, and that these distributions totaled up to $300,000 per year. In addition, plaintiff alleges that Malka, Rachel, Michelle and Benny received personal benefits from PDI's assets.

Plaintiff contends that PDI and SIG defendants are interrelated, with overlapping control and ownership by Manny, Esther, Efraim, Nancy, Melanie, Mathew, Ashley, Jason, Natalie, and Eden, and that they do not abide by the necessary corporate formalities. The foregoing individuals are the sole employees of PDI, and many of them are also officers and employees of other SIG defendants. Allegedly, PDI did not hold regular meetings, or elect officers as required by its certificate of incorporation, and PDI and SIG share the same business address at 150 East 58th Street, Suite 2400, New York, New York 10155. Defendants' control and domination of PDI was allegedly used to defraud Lukoil through the transfer of corporate assets, over $700,000 from the sale of petroleum products, and approximately $300,000 per year in salaries and personal health insurance.

The Complaint proceeds to Assert two Causes of Action. The First alleges fraudulent conveyance in violation of Debtor and Creditor Law § 273, in that at the time of transfers, PDI was insolvent, or thereby rendered insolvent. The Second Cause of Action alleges a violation of

Debtor and Creditor Law § 273-a, in that PDI transferred assets at a time when PDI was a counterclaim defendant for damages alleged by Lukoil in their counterclaim against PDI. The Complaint seeks damages from defendants in the amount of the judgment against PDI, $1,379,740.71 on the First and Second Causes of Action, as well as punitive and exemplary damages.

In opposition to the motion for summary judgment, plaintiff claims that defendants have failed to meet their burden of showing that there are no material issues of fact in dispute with respect to plaintiff's fraudulent conveyance claims. They deny defendants' assertions that plaintiff is unable to identify any transfers of money "from the sale of petroleum (or otherwise)" between PDI and defendants. They claim that limited discovery that defendants have produced has shown multiple "suspicious transfers" between PDI and various LLC defendants, including Beach Channel LLC ("Beach Channel"), Doug LLC, Roger LLC, Scott Plaza LLC, Sinai LLC, and Sun Plaza LLC. Plaintiff points to, as an example, a General Ledger Sheet for Scott Plaza LLC which shows a transfer on September 20, 2011 of $37,000 from PDI to Scott Plaza on September 20, 2011, which is listed as a loan. The next entry on the General Ledger shows a transfer of $37,000 from Scott Plaza to defendant Manny Enterprises LLC on September 21, 2011.

Plaintiff then itemizes a series of transfers involving Scott Plaza LLC, Sinai LLC, Beach Channel LLC, Doug LLC, Roger LLC, and Sun Plaza Enterprise LLC. With the exception of Roger LLC, which reflects only transfers into PDI, each of the other transactions involve transfers into PDI from the defendants, and corresponding transfers from PDI to defendants in the same amount shortly thereafter.

In addition to factual issues allegedly raised by these transactions, plaintiff also contends that summary judgment should be denied because there are material issues of fact regarding the transfer of assets from PDI to pay the personal salaries and health insurance premiums of some of the defendants. Plaintiff points to the testimony of Manny Shurka at his deposition, in which he states that he received a salary of $15,000 per year from PDI so that he and family members could obtain health insurance. When PDI was no longer a viable enterprise, he began using another defendant, 302-16 Third Ave. LLC as a source of income for the purpose of obtaining

medical insurance.

In reply, defendants reiterate that both causes of action, under Debtor and Creditor Law §§ 273 and 273-a, are deficient in that Lukoil, after having PDI's records and banking records for over a year, asserts only that employees' wages and health benefits should be set aside as fraudulent conveyances. Defendants assert that Lukoil cannot establish that any transfers made by PDI were not for fair consideration; that there were any transfers of petroleum products or their proceeds at all; that the sole remedy for violations of §§ 273 or 273-a would be rescission of the claimed transfers; and the management structure of PDI was in effect for years before Lukoil ever transacted business with PDI, and was in place for approximately thirty years while doing business on a daily basis with Lukoil, making it impossible to conclude that the corporate structure was conceived to commit any wrong against Lukoil.

In its opposition to the motion for summary judgment, defendants claim that based upon what appears to have been an extensive review of PDI's books and records, produced in this and the former PDI litigation, plaintiff fails to document a single transaction which would establish a basis for the causes of action alleged in the Complaint. There is no contradiction of the fact that PDI distributed its petroleum products to third parties, not the defendants; the claimed suspicious transactions reflect nothing more than loans made to PDI from defendant entities, so as to enable PDI to make immediate electronic fund transfers to Lukoil, and that these loans were promptly repaid in full; these loans were fully documented on the PDI company books, and were made and repaid more than a year before the PDI litigation with Lukoil; and, as a matter of law, salaries and employment benefits paid to employees in the course of a debtor's continued operation are deemed to be for fair consideration; and there is no basis for the claim for punitive damages.

DISCUSSION

Piercing the Corporate Veil

" ' The general rule . . . is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability.' " (*Superior Transcribing Service, LLC v. Paul,* 72 A.D.3d 675 [2d Dept. 2010], quoting *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.* 66 A.D.3d 122, 126 [2d Dept. 2009]). It is true, however, that " 'equity will intervene to pierce

the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice.' " (*Skolnick v. Kutroy,* 65 A.D.3d 1214, 1215 [2d Dept. 2009][internal citations omitted]).

A party seeking to pierce a corporate veil must establish that the owners exercised complete domination of the corporation with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong against plaintiff, which resulted in injury to plaintiff (*Superior Transcribing Service, LLC* at 676; *Millennium Const., LLC v. Loupolover,* 44 A.D.3d 1016 [2d Dept. 2007]). The latter case affirmed the dismissal of a counterclaim against the president and sole shareholder of a construction corporation.

"To state a cause of action under the doctrine of piercing the corporate veil, the 'plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation [or LLC] and 'abused the privilege of doing business in the corporate [or LLC] form to perpetrate a wrong or injustice.'" (*Board of Managers of Beacon Tower Condominium v. 85 Adams Street, LLC,* 136 A.D.3d 680 [2d Dept. 2016][internal citations omitted]). Plaintiff goes to great length to identify the relationship of individual defendants to PDI, and that Manny, Esther, and Efraim received salaries and health insurance benefits through the company. It also alleges that many of the employees of PDI are also officers and employees of other SIG defendants, and that their control and domination of PDI enabled them to defraud Lukoil through the transfer of corporate assets of $700,000 from the sale of petroleum products and the payment by PDI of approximately $300,000 in salaries and personal health insurance.

Mere salaries and health benefits, which, according to the Affidavit of Manny Shurka in support of the motion at ¶26, total less than one-half of one percent of the annual sales, is, as a matter of law, fair and reasonable compensation, and plaintiff fails to state a cause of action with respect to such payments. (*Cilco Cement Corp. v. White,* 55 A.D.2d 668 [2d Dept. 1976]). The allegation that the defendants exercised dominion and control over PDI and thereby diverted $700,000 to themselves is purely conclusory, for which plaintiff has not set forth a credible or admissible basis in fact.

Plaintiff's lawyer's affirmation make reference to a series of transactions as "suspicious",

but this is unsubstantiated, and unsupported by an expert.. A review of the cited transactions does not evidence a single dollar of corporate funds to any of the named defendants, other than return of funds received by PDI from them. Defendants submit the affidavit of Manny Shurka, in which he states that these transactions were for the purpose of enabling PDI to make required electronic payments for petroleum products received by them from plaintiff. He explains that all of these payments from defendants to PDI, of which plaintiff was well aware, constituted short term loans from defendants to PDI, which were promptly repaid. While plaintiff refers to this arrangement as suspicious, they have not produced any relevant opinion of an accountant, or other expert, which would substantiate their otherwise unsubstantiated categorization of the transactions as such.

Attorneys are not free to launch into proceedings based upon speculation that the discovery process could reveal a basis for acquisition of assets in pursuit of the collection of a debt. Rule 3.1 of the Rules of Professional Conduct provide that "(a) lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." The action by plaintiff, and its demands for discovery, are akin to a "fishing expedition" in search of a cause of action, which is impermissible. (*Liberty Imports v. Bourguet,* 146 A.D.2d 535 [1st Dept. 1989]). While that case involved pre-action disclosure, the net effect is the same in this action brought against forty-five (45) defendants.

Plaintiff's assertion that defendants have been the recipients from PDI of the proceeds of the sale of petroleum and petroleum products consists only of conclusory allegations, without any factual basis, and is subject to dismissal. Absent particularized allegations as to the improper diversion of corporate funds to defendants, the complaint must be dismissed. (*Goldstein v. Bass,* 138 A.D.3d [1st Dept. 2016]).

Plaintiff in *Goldstein* alleged that many units in a cooperative corporation were sold at below- market rates, and that the managing agent obtained a contract at an above- market rate. While plaintiff identified various transactions which she claims were "rubber-stamped", there were no particularized allegations as to what board members should have considered or investigated to properly inform themselves, and the complaint failed to allege facts that would establish that the sale of units at below-market prices could not have been the product of sound

business judgment.

Similarly, in the instant case, plaintiff's counsel's hearsay affidavit has identified a series of "suspicious" transactions, but fails to allege facts sufficient to conclude that such transactions were illegitimate, and resulted in PDI rendering itself insolvent so as to preclude plaintiff from recovering on its subsequent judgment.

Among the considerations in determining whether a corporate veil should be pierced are the absence of formalities which are part and parcel of normal corporate existence, such as issuance of stock, the election of directors, and the keeping of corporate records; inadequate capitalization; commingling of assets, and use of corporate funds for personal use (*Id.* at *1016—1017; Heller & Co. v. Video Innovations, Inc.,* 730 F.2d 50 [2d Cir. 1984]).

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be "material issue of fact" it "must be genuine, bona fide and substantial to require a trial." (*Leumi Financial Corp. v. Richter,* 24 A.D.2d 855 [1st Dept. 1965]).

But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

Plaintiff in this case has obviously had essentially unfettered access to the records of PDI, both in their counterclaim in the prior PDI action, as well as in the instant proceeding. Despite this, they have failed to unearth a single transfer of funds from PDI to any of the multiple defendants in this action. The indebtedness of some $700,000 from PDI to Lukoil came at the tail end of a relationship which had been ongoing for some thirty years, including the relationship with Lukoil's predecessor. Transactions between and among PDI and individuals, and limited liability companies of which they were members, in years prior to the termination by Lukoil of the relationship, are irrelevant to whether PDI improperly transferred assets to defendants at the terminus of the relationship between Lukoil and PDI. Plaintiff is unable to produce a scintilla of evidence of such improprieties, and forcing defendants to undergo an exhaustive discovery process, when the issue is the conduct of PDI, is a futile exercise, with no reason to believe that it will produce any information other than what has already been learned by plaintiff.

Having failed to uncover a single distribution from PDI to defendants during the pendency of litigation, or which rendered PDI insolvent, plaintiff is relegated to its claim that the payment of salaries and health benefits to employees is sufficient to warrant piercing the corporate veil. This claim too, must fail. The payment of less than one-half of one percent of PDI's sales revenues, including $15,000 per year annual salary, and health insurance benefits, cannot, under any rational basis, constitute unreasonable payments and fraudulent conveyances (*Cilco Cement Corporation v. John J. White,* 55 A.D.2d 668 [2d Dept. 1976]; see also, *CIT Group/Commercial Services, Inc. v. 160-09 Jamaica Avenue Limited Partnership,* 25 A.D.3d 301 [1st Dept. 2006]).

The Court in the latter case, while finding the conveyance for back rent in an oral lease to be fraudulent, reiterated that a conveyance that renders a conveyor insolvent, is fraudulent as to creditors without regard to actual intent, if the conveyance is made without fair consideration. A conveyance which renders the conveyor insolvent, is without fair consideration, and is not made in good faith, is fraudulent as against a creditor. The minimal salary and health care benefits paid by a company which had done over $1,000,000,000 in business over the course of a business relationship, can hardly be considered unreasonable.

CONCLUSION

This case is a debt collection action, wherein without any substantive proof, of any material facts and based on plaintiff's attorney's allegations and conclusions, this Court is essentially asked to pierce the corporate veil and allow a suit against the debtors related companies and their shareholders to continue.

The Court will not allow this case to continue for three separate and independent reasons.

First, the plaintiff's motion papers do not establish that there was ever a good faith basis to bring this action to pierce the corporate veil and to pursue these debts against these forty-five (45) defendants;

Second, plaintiff offers no proof in non-hearsay form, that would defeat these forty-five (45) defendants' motion for summary judgment; and

Third, while plaintiff requests further discovery, plaintiff does not make a showing with any material specificity what that discovery may yield and plaintiff offers no expert opinions to support its position after having access to the discovery in the original debtor's action and some discovery in this action. The motion papers are clear that the plaintiff has not demonstrated that more discovery could lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the defendants. The plaintiff's hope and speculation that discovery might reveal some action on the part of each of the forty-five (45) defendants that would cause the piercing of the corporate veil and allow a recovery of the debt is insufficient to support the denial of the plaintiff's motion for summary judgment. (See *Anzel v. Pisterino*, 105 A.D.: 3d 784 [2nd Dept. 2013]).

For each of these three separate and independent reasons, this Court dismisses this action brought, in this fashion, against these forty-five (45) defendants.

Defendants' motion for summary judgment dismissing the Complaint is granted. Plaintiff's motion to compel additional discovery is denied as moot.

To the extent requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
June 13, 2016

ENTER:

Jerome C. Murphy

JEROME C. MURPHY
J.S.C.