

Pensmore Invs., LLC v Gruppo, Levey & Co.

2017 NY Slip Op 30661(U)

April 6, 2017

Supreme Court, New York County

Docket Number: 650002/2014

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PENSMORE INVESTMENTS, LLC,

Index No.: 650002/2014

Plaintiff,

DECISION & ORDER

-against-

GRUPPO, LEVEY & CO., GRUPPO, LEVEY HOLDINGS, INC., GRUPPO, LEVEY PARTNERS, INC., THE JANE MICHAEL 1999 TRUST, CLAIRE GRUPPO as trustee for THE JANE MICHAEL 1999 TRUST, THE CLAIRE GRUPPO TRUST, the trustee for THE CLAIRE GRUPPO TRUST, JANUARY MANAGEMENT, INC., MAGIC MANAGEMENT, LLC, CLAIRE GRUPPO, HUGH LEVEY, WILLIAM SPRAGUE, EVAN LEVEY, FROG POND PARTNERS, L.P., JANUARY PARTNERS, L.P., and IFG CAPITAL MANAGEMENT, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 016 and 017 are consolidated for disposition.

Defendants Gruppo, Levey & Co. (GLC), GLC Partners, Inc. (incorrectly referred to in the caption as “Gruppo Levey Partners, Inc.”) (GLCP), January Management, Inc. (January Management), Magic Management, LLC (Magic), Claire Gruppo (Claire), and Hugh Levey (Hugh) move, pursuant to CPLR 3212, for partial summary judgment on and dismissal of the veil piercing claims asserted against them by plaintiff Pensmore Investments, LLC (Pensmore). Seq. 016. Pensmore opposes and moves (1) for summary judgment on all of its causes of action in its Third Amended Complaint (the TAC); and (2) to hold Hugh and Claire in contempt for violating a February 25, 2015 temporary restraining order (the TRO). Seq. 017. All of the

remaining defendants oppose Pensmore's motion.¹ For the reasons that follow, Pensmore's motion is granted in part and denied in part and defendants' motion is denied.

I. Background

This case has a long and tortured history, which was most recently addressed in the court's April 23, 2015 decision:

The court assumes familiarity with the procedural history and factual background of the underlying dispute in this litigation – namely, plaintiff's multi-year saga of attempting to collect a debt, now worth in excess of \$2.6 million, from defendants. What was once a mere summary judgment in lieu of complaint on notes (Index No. 653628/2011) (the Original Action), due to defendants' refusal to pay, has ballooned into an enforcement proceeding involving veil piercing and fraudulent transfer claims and, most recently, has spilled over into the Leveys' pending divorce proceedings. ...

The Original Action was settled. Defendant Gruppo Levey Holdings, Inc. (GLH) acknowledged it owed plaintiff \$1,701,222.26 and agreed to pay off the amount by September 2013, and defendants Levey and [defendant William] Sprague each guaranteed \$625,000 of the GLH debt. The defendants defaulted and the instant action [] followed, based upon the [parties' February 19, 2013 settlement agreement (the Settlement Agreement)]. Judgment was granted against both Sprague and Levey in the amounts of the guarantee plus interest, and the remaining causes of action were severed and continued.

See Dkt. 202 (the April 2015 Decision) at 1-2.² Familiarity with the April 2015 Decision, along with the underlying facts and allegations, is assumed. Unless otherwise indicated, the facts

¹ After the instant motions were briefed, argued, and fully submitted, by stipulation dated January 4, 2017, Pensmore discontinued its claims against defendant Evan Levey (Evan). See Dkt. 491. This mooted Evan's summary judgment motion. See Dkt. 493. Also mooted are all portions of Pensmore's motion pertaining to its claims against Evan, which are not discussed. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

² On March 15, 2016, the Appellate Division modified the portion of the April 2015 Decision pertaining to Wendy Levey's intervention petition. See *Pensmore Investments, LLC v Gruppo, Levey & Co.*, 137 AD3d 558 (1st Dept 2016). The portions of the April 2015 Decision applicable to defendants (i.e., the court's rulings on the motion to dismiss the Second Amended Complaint [the SAC] and the prior contempt motion) were not appealed and, therefore, were undisturbed by the Appellate Division's decision.

recited herein, which are drawn from the parties' joint statement (Dkt. 407) and the evidence submitted on this motion, are undisputed. The court's discussion of the facts is limited to that necessary to understand the court's rulings on the veil piercing claims.

After the April 2015 Decision was issued, on May 5, 2015, Pensmore filed the TAC, which remains its operative pleading. *See* Dkt. 209. The TAC asserts eight causes of action: (1) breach of the Settlement Agreement against all defendants based upon a veil piercing theory; (2) veil piercing against all defendants except Sprague;³ (3) a now withdrawn claim for fraudulent inducement of the Settlement Agreement against GLC, GLH, Hugh, and Claire [*see* Dkt. 229 (May 18, 2015 stipulation withdrawing the TAC's third and fifth causes of action)]; (4) unjust enrichment against the Jane Michael 1999 Trust (the JM Trust), the Claire Gruppo Trust (the CG Trust), January Management, Claire, Hugh, and Evan (who, as noted, is no longer a defendant in this action); (5) a now withdrawn [*see* Dkt. 229] aiding and abetting fraudulent inducement claim against GLCP, GLC, January, Hugh, and Claire; (6) fraudulent conveyance claims under New York Debtor & Creditor Law (DCL) §§ 271, 272, 273, and 278, asserted only against GLH;⁴ (7) fraudulent conveyance claims, under DCL § 275, against GLH and Hugh;⁵ and (8) fraudulent

³ This cause of action is both duplicative of the first cause of action and is dismissed because veil piercing is a means to extend liability beyond the contracting defendant, not an independent cause of action. *See PK Rest., LLC v Lifshutz*, 138 AD3d 434, 436 (1st Dept 2016).

⁴ No specific conveyances are listed, but it appears that the DCL claims are predicated on some of the same transactions at issue on the veil piercing claim.

⁵ Again, only scant details of the challenged transfers are pleaded. *See* TAC ¶ 160 (referring to an unspecified amount transferred on March 12, 2013 and transfers of \$25,000 and \$10,000 in April 2013).

conveyance claims, under DCL §§ 274 and 276, against GLH, GLC, GLCP, January, Magic, Hugh, Claire, and Evan.⁶

In the April 2015 Decision, the court explained that the SAC, like the TAC, “is replete with examples of Hugh and Claire transferring money between corporate defendants without regard to corporate formalities” for the purpose of keeping GLH “artificially [] cash poor to avoid judgments against it, while money flowed through GLC and the other companies in order to pay expenses.” *See id.* at 9; *see also id.* at 10-11 (providing examples and citations to bank records). The court further noted that defendants did not “dispute the occurrence of these transactions, nor d[id] they meaningfully dispute the allegations that the manner in which the transfers were made was for the purpose of providing a continued source of funding for GLH and Hugh despite the subject judgments and restraining notices.” *See id.* at 11. Indeed, both in support of their own motion and in opposition to Pensmore’s motion, defendants still do not dispute the occurrence of these transactions, nor do they proffer any non-conclusory assertions refuting the notion that Hugh and Claire completely dominate and control the defendant corporate entities and trusts.

There is no question of fact that all of the defendant entities were dominated and controlled by Hugh and Claire. This is borne out by the robust financial discovery proffered by Pensmore to successfully sustain its pleadings and obtain an attachment. The discovery also leaves no doubt that Hugh and Claire have kept GLH cash poor by funding it only to the extent of paying its expenses, doing business through affiliates, such as GLC and GLCP. For instance, Claire admitted that she opened new GLCP bank accounts specifically for the purpose of evading the restraining notices issued by Pensmore because “[w]e needed a bank account to run [the]

⁶ Once more, no specific transfers are pleaded. Instead, Pensmore seems to rely on its veil piercing allegations.

business.” *See* Dkt. 406 at 13-14, citing Dkt. 364 (Claire’s 10/14/15 Dep Tr. at 101). GLH, as a result, remains a judgment proof entity. That being said, as discussed below, the fact that the corporate form of GLH was abused does not mean that all of its subsidiaries and owners are necessarily subject to veil piercing.

In support of their motion, defendants argue that Pensmore cannot prove (or that there is at least a material question of fact regarding) the so-called fraud prong of the applicable veil piercing standard. Specifically, they contend that GLH was judgment proof before the Settlement Agreement was executed. According to defendants, Pensmore knew GLH was judgment proof, and therefore sought (but did not obtain) a greater guarantee amount from Hugh and a separate guarantee from Claire. Defendants aver that their refusal to acquiesce to Pensmore’s demands, coupled with Pensmore’s decision to nonetheless execute the Settlement Agreement with GLH being the primary counterparty-obligor, should bar Pensmore’s veil piercing claims given its knowledge of the credit risk posed by GLH.

Pensmore responds that while it may have known about GLH’s lack of funds, it could not have known that GLH would be kept underfunded after the Settlement Agreement was executed. Pensmore claims that it was given reason to believe that GLH would come into more money by virtue of prospective deals specifically listed in Exhibit E to the Settlement Agreement, the funds from which were supposed to be used by GLH to pay Pensmore. *See* Dkt. 373 at 7 (“Gruppo, Levey will produce detailed monthly updates of each transaction identified in Exhibit E.”), 81-84 (Exhibit E); *see also* Dkt. 440 at 9 (“over \$500,000 was earned on Exhibit E deals”). According to Pensmore, the cash in GLH’s bank account (and Pensmore’s knowledge of that balance) at the time the Settlement Agreement was executed should not be considered the sole dispositive veil piercing factor given the other evidence of defendants’ fraud.

On February 19, 2016, after the completion of discovery, Pensmore filed a Note of Issue. On April 1, 2016, the parties filed the instant summary judgment motions. After oral argument, the court reserved on the motions pending supplemental briefing on the applicable veil piercing standard (the parties ignored the well-settled rule that the law of the state of a company's incorporation governs a claim to pierce that company's corporate veil;⁷ instead, they relied exclusively on New York law). *See* Dkt. 442 (10/6/16 Tr.).

On October 20, 2016, the Appellate Division affirmed this court's August 11, 2015 order (Dkt. 268) granting Pensmore's motion for a prejudgment attachment. *See Pensmore Investments, LLC v Gruppo, Levey & Co.*, 143 AD3d 588 (1st Dept 2016) (the October 20 AD Decision). The Appellate Division wrote:

[Pensmore] established a likelihood of success on its veil piercing claim by showing that defendants used a variety of corporate entities and accounts to collect and disburse money to themselves and the various corporate entities without consideration or corporate formalities, and **that they used this web of payments to keep the judgment debtor corporation [i.e., GLH] in business but grossly undercapitalized** by paying its debts without putting any funds into it [*see Shisgal v Brown*, 21 AD3d 845, 848 (1st Dept 2005)].

Contrary to defendants' contention, this case is not like [*Timur on 5th Ave. v Jim, Jack & Joe Realty Corp.*, Index No. 603233/2000 (Sup Ct, NY County Sept. 6, 2001) (Cahn, J.), *aff'd* 302 AD2d 223 (1st Dept 2003)]. In that case, there was no allegation of deceit or wrongdoing. Indeed, there, the defendants did nothing more than take out a lease through a holding company, which the plaintiff knew was an operating company with no assets. **Here, in contrast, defendants are alleged to have thwarted the bargain plaintiff made with the corporate judgment debtor by consistently starving the debtor of cash and capitalization.**

See id. at 588 (emphasis added). The Appellate Division's decision supports Pensmore's veil piercing claims, and its rejection of defendants' reliance on the very authority they proffer on the instant motion (*e.g.*, *Timur*) demonstrates that many of the arguments now made by defendants

⁷ *See MMA Meadows at Green Tree, LLC v Millrun Apts. LLC*, 130 AD3d 529, 530 (1st Dept 2015); *Flame S.A. v Worldlink Int'l (Holding) Ltd.*, 107 AD3d 436, 438 (1st Dept 2013).

regarding Pensmore's veil piercing claims are without merit. The court, therefore, focuses the bulk of its analysis on the principal issue not yet considered – whether, on Pensmore's claim for breach of the Settlement Agreement, defendants' disregard of corporate formalities in keeping GLH judgment proof was done for the purpose of defrauding Pensmore. In other words, the relevant inquiry is whether the shell game played by defendants was specifically aimed at ensuring that GLH would not be capable of paying Pensmore the amount due on the Settlement Agreement.

II. Discussion

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment

motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

As an initial matter, there is no question of fact that GLH breached the Settlement Agreement by failing to pay Pensmore the amounts due thereunder. By order dated April 8, 2014, Pensmore was granted summary judgment on this claim, as well as summary judgment against Hugh and Sprague on the portion of the Settlement Agreement they personally guaranteed. *See* Dkt. 52. Judgments based on these partial summary judgment rulings were entered. The only remaining prong of the first cause of action for breach of the Settlement Agreement is the portion of such claim which seeks to impose liability on the remaining defendants by virtue of Pensmore's veil piercing claims.

That being said, before the court reaches the veil piercing claims, it denies summary judgment to Pensmore on all of its other claims. With respect to unjust enrichment, the court not only denies Pensmore summary judgment, but *sua sponte* grants defendants summary judgment because a written contract (i.e., the Settlement Agreement) governs the parties' rights. *MG W. 100 LLC v St. Michael's Protestant Episcopal Church*, 127 AD3d 624, 626 (1st Dept 2015) ("the existence of ... a valid and enforceable written agreement governing the parties dispute [] precludes recovery in quasi contract for events arising out of the same subject matter"), citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987); *see Randall's Island Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 (1st Dept 2012) ("there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim").

Summary judgment also is denied on Pensmore's DCL claims. While Pensmore's notice of motion indicates that it seeks summary judgment on *all* claims pleaded in the TAC [*see* Dkt.

352 at 1], in its moving brief, Pensmore fails to set forth cogent arguments about why summary judgment is appropriate on its DCL claims. None of the sections in Pensmore's moving brief are devoted to the DCL claims, nor is there any serious analysis of the DCL standard. The brief, instead, focuses almost exclusively on the veil piercing claims. *See* Dkt. 406 at 2-3. The only mention of the DCL claims comes either in terse footnotes (*see id.* at 26 n.6) or in the section pertaining to the now-withdrawn claims against Evan. *See id.* at 29-30.⁸ Without regard to the arguments made by defendants in opposition, summary judgment on Pensmore's DCL claims is denied for its failure to proffer a sufficient prima facie case. *See Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) ("Failure to make [a prima facie] showing requires denial of the [summary judgment] motion, regardless of the sufficiency of the opposing papers.").

Turning now to veil piercing, the court begins by noting that the parties' initial briefs (i.e., the moving, opposition, and reply briefs on both motions) erroneously rely on New York law, and, moreover, do not properly analyze each of the corporate veils that Pensmore seeks to

⁸ Pensmore's DCL claims may prove to be the only means of recovery. That is because, as discussed herein, under Delaware's strict veil piercing standard, Pensmore may not be able to prove that the defendant entities did not, collectively, function as bona fide companies such that piercing to the individuals is warranted. Many of the supposed undisputed facts recited in Pensmore's reply brief (*see* Dkt. 438 at 4-7) to demonstrate the sham nature of the defendant entities concern the legitimacy of specific transactions. For instance, Pensmore raises the issue of whether Hugh and Claire should have been paying themselves while the companies were insolvent by virtue of their debt to Pensmore. *See Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 (1st Dept 2016). Notably absent from Pensmore's analysis is the question of whether defendants are running a real business entitled to the protections of the corporate form. At trial, Pensmore must be careful to distinguish the issues of whether the corporate entities should be treated as alter egos of each other and whether the business as a whole functions as a mere alter ego of Hugh and Claire. Based on the record, the former appears easier to prove; the latter must be based on more than proof of transfers violative of the DCL. *See Taberna Preferred Funding II, Ltd. v Advance Realty Grp. LLC*, 45 Misc3d 1204(A), at *17 (Sup Ct, NY County 2014) (explaining difference between DCL and veil piercing claims). While Pensmore may well have strong DCL claims, curiously, as noted above, it did not brief the DCL claims in a manner necessary to sustain its prima facie burden on a motion for summary judgment.

pierce.⁹ In particular, Pensmore's moving brief is replete with discussion of matters irrelevant to the requisite veil piercing inquiry, such as defendants' pre-Settlement Agreement conduct (e.g., misrepresentations about GLH's potential sources of revenue and promises by Hugh and Claire regarding GLH's intention to pay the settlement amount, which would be relevant, perhaps, to its withdrawn claim for fraudulent inducement).¹⁰

Defendants' approach is equally misguided. They argue that entering into an agreement with a knowingly cash poor entity supposedly serves as a *per se* bar to veil piercing; but they rely on cases involving contracts with a special or single purpose vehicle (SPV), which is why their argument was rejected by the Appellate Division. See October 20 AD Decision, 143 AD3d at 588.¹¹ In this case, GLH is not an SPV, nor was it formed specifically for the purpose of entering into the Settlement Agreement. On the contrary, as defendants admit, GLH is a company that has operated as a going concern since 1998. See Dkt. 445 at 5 ("It is beyond dispute that GLH has operated for over fifteen years."). Further, GLH is a corporation, and, thus, the latitude afforded to LLCs with respect to lax corporate formalities is less warranted. See

⁹ The failure to cite or apply any of the applicable Delaware law would have been, without more, grounds to deny the parties' motions. That said, in light of the extensive record submitted on this motion, the court afforded the parties the opportunity to submit supplemental briefs to address the applicable law.

¹⁰ The relevant section heading describes these allegations as "Defendants' Fraudulent Intent From Day One", by which Pensmore means the original loan in 2010. See Dkt. 406 at 8.

¹¹ This court is routinely faced with veil piercing claims against SPVs, and has addressed how Delaware's veil piercing law applies to them, including the legal significance of making the decision to contract with a shell instead of a more solvent affiliate or principal. See *EB Ink Techs., LLC v Lamocu Holdings, LLC*, 2016 WL 6947946, at *5-6 (Sup Ct, NY County 2016); *Capone v Castleton Commodities Int'l LLC*, 2016 WL 1222163, at *8 (Sup Ct, NY County 2016) ("The essence of a bargain not to sue a more solvent parent entity is an agreement to take counterparty credit risk."), *aff'd* 2017 WL 1013629 (1st Dept Mar. 16, 2017) ("The motion court properly dismissed the veil-piercing claims, as plaintiffs' allegations are not sufficient to support such a claim, especially in light of their concession that the entities were established for a legitimate business purpose.").

NetJets Aviation, Inc. v LHC Commc'ns, LLC, 537 F3d 168, 178 (2d Cir 2008) (applying Delaware law; noting that “[i]n the alter-ego analysis of an LLC, somewhat less emphasis is placed on whether the LLC observed internal formalities because fewer such formalities are legally required”; but that “[o]n the other hand, if two entities with common ownership ‘failed to follow legal formalities when contracting with each other it would be tantamount to declaring that they are indeed one in the same.’”), quoting *Trustees of Vill. of Arden v Unity Const. Co.*, 2000 WL 130627, at *3 (Del Ch 2000). Accordingly, the applicable standard is Delaware’s treatment of the corporate veil of a corporation operating as a going concern. That being said, as noted by the *NetJets Aviation* court, in either the corporate or LLC context, where, as here, multiple companies fail to follow corporate formalities with respect to each other (i.e., money flowing between GLH, GLC, and GLCP) without corresponding board minutes or contracts indicating that Hugh and Claire were not simply treating the companies as mere alter egos, veil piercing may be warranted upon the requisite proof of the fraud prong.¹²

Given that preface, the most logical starting place is the corporate veil of GLH since it is the sole contractual counterparty liable for the amounts sought by Pensmore (i.e., the amount in excess of that personally guaranteed by Hugh and Sprague). GLH is a Delaware corporation. Delaware law, therefore, applies to Pensmore’s claim to pierce GLH’s corporate veil. *See MMA*

¹² For instance, Claire’s admission that she opened new GLCP bank accounts for the purpose of running the “business” suggests that it was not important, from her perspective, which entity’s bank accounts were nominally used to pay the bills. She takes that position despite insisting that the law treat her companies as distinct for the purpose for segregating GLH’s liability under the Settlement Agreement.

Meadows, 130 AD3d at 530; *Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 (1st Dept 2008).¹³

“To state a ‘veil-piercing claim’ [under Delaware law], the plaintiff must plead facts supporting an inference that the corporation, through its alter-ego, has created **a sham entity designed to defraud investors and creditors.**” *Crosse v BCBSD, Inc.*, 836 A2d 492, 497 (Del 2003) (emphasis added). “Delaware takes corporate formalities seriously.” *Base Optics Inc. v Liu*, 2015 WL 3491495, at *23 (Del Ch 2015), citing *Wallace v Wood*, 752 A2d 1175, 1183 (Del Ch 1999). “[P]ersuading a Delaware court to pierce the corporate veil is a difficult task. Absent compelling cause, a court will not disregard the corporate form or otherwise disturb the legal attributes, such as limited liability, of a corporation.” *Midland Interiors, Inc. v Burleigh*, 2006 WL 4782237, at *3 (Del Ch 2003) (quotation marks omitted). Delaware “courts have only been persuaded to pierce the corporate veil after substantial consideration of the shareholder-owner’s disregard of the separate corporate fiction and the degree of injustice impressed on the litigants by recognition of the corporate entity.” *Crosse*, 836 A2d at 497. “Determining whether to [pierce the corporate veil] requires a fact intensive inquiry, which may consider the following

¹³ The CG Trust (a New York trust) owns 98% of GLH’s stock. Claire is the sole beneficiary of the CG Trust. Claire, therefore, is the beneficial owner of 98% of GLH. The remaining 2% of GLH’s stock is owned by January Management, a Connecticut corporation that is the general partner of defendant January Partners, L.P. (January Partners), a Delaware limited partnership that owns real property in Greenwich, Connecticut. The TAC claims that Hugh and Wendy Levey each owned 48% of January Partners, with the remainder owned by January Management, Evan, and non-party Mariel Levey (it is unclear from the record whether the divorce proceeding affected this ownership split). See TAC ¶ 24. As discussed herein, while Delaware law applies to a claim to pierce the corporate veils of GLH, GLC, GLCP, and January Partners, New York law applies to the CG Trust (assuming veil piercing, and not trust law, is applicable), and Connecticut law applies to a claim to pierce the corporate veil of January Management. So if, for instance, Delaware law permit the corporate veil of GLH to be pierced so as to impose liability on the CG Trust and January Management, New York and Connecticut law, respectively, would have to be applied before liability could be imposed on the individual defendants. The same analysis should be applied to the other defendants, which are not discussed at length given the disposition of the instant motions.

factors, none of which are dominant: (1) whether the company was adequately capitalized for the undertaking; (2) whether the company was solvent; (3) whether corporate formalities were observed; (4) whether the controlling shareholder siphoned company funds; or (5) whether, in general, the company simply functioned as a facade for the controlling shareholder.” *Winner Acceptance Corp. v Return on Capital Corp.*, 2008 WL 5352063, at *5 (Del Ch 2008).

To prove the so-called “fraud” prong of the veil piercing standard, the plaintiff must prove more than domination and disregard of corporate formalities. *Id.* (“Delaware courts also must find an element of fraud to pierce the corporate veil.”); see *In re Opus E. LLC*, 528 BR 30, 64-65 (Bankr D Del 2015) (“Merely presenting evidence of dominion or control ... without evidence of fraud or similar injustice [] will not support alter ego liability.”) (citations omitted). The fraud or injustice must be distinct from the underlying breach of contract. See *EBG Holdings LLC v Vredzicht’s Gravenhage 109 B.V.*, 2008 WL 4057745, at *12 (Del Ch 2008) (“the requisite element of fraud under the alter ego theory must come from an inequitable use of the corporate form itself as a sham, and not from the underlying claim”); *Medi-Tec of Egypt Corp. v Bausch & Lomb Surgical*, 2004 WL 415251, at *4 (Del Ch 2004) (“[plaintiff’s] alter ego argument also fails because it has not alleged that the corporate form in and of itself operates to serve some fraud or injustice, distinct from the alleged wrongs of [defendant]”). In other words, “the corporation effectively must exist as a sham or shell through which the parent company perpetrates injustice.” *Nat’l Gear & Piston, Inc. v Cummins Power Sys., LLC*, 975 FSupp2d 392, 406 (SDNY 2013), citing *In re Sunbeam Corp.*, 284 BR 355, 366 (Bankr SDNY 2002) (“There must be an abuse of the corporate form to effect a fraud or an injustice—**some sort of ‘elaborate shell game.’**”) (emphasis added), quoting *Outokumpu Eng’g Enterprises, Inc. v Kvaerner EnviroPower, Inc.*, 685 A2d 724, 729 (Del Super 1996).

Pensmore claims that defendants are playing an “elaborate shell game” and that Hugh and Claire operated GLH through GLC and GLCP to accomplish the injustice of depriving Pensmore of the full amount due under the Settlement Agreement. The court finds that Pensmore has made a sufficient prima facie showing that Hugh and Claire completely dominate GLH, GLC, and GLCP. As discussed in the court’s prior decisions, noted by the Appellate Division in the October 20 AD Order, and set forth extensively in Pensmore’s briefs, Hugh and Claire grossly undercapitalized GLH without regard to corporate formalities by funneling funds and receiving revenue through GLC and GLCP. *See* Dkt. 406 at 14-15 (examples of transfers); *id.* at 16-17 (citing deposition testimony of Hugh and Claire, where they did not dispute the court’s findings in the April 2015 Decision with respect to the discussed improper transfers); *see also* Dkt. 440 at 9 (noting more than \$1 million of GLH expenses and transfers despite GLH having an account balance of \$0).

In opposition, defendants do not raise a question of material fact regarding domination or lack of corporate formalities with respect to GLH.¹⁴ They do, however, contend that Pensmore has not established that their lack of adherence to corporate formalities was done for the purpose of defrauding Pensmore. Specifically, they claim that, with respect to the fraud prong, “Pensmore’s allegations amount to nothing more than allegations of a simple breach of contract by GLH.” *See* Dkt. 430 at 22. That is a specious contention. To be sure, as noted, Pensmore has proven GLH’s breach of the Settlement Agreement. But Pensmore’s veil piercing claim is not based on that breach. It is based on the ways in which defendants ensured that GLH’s underlying business could continue to function without providing the necessary liquidity for

¹⁴ Their only attempt to do so relied on authority rejected and distinguished by the Appellate Division in the October 20 AD Order, or authority that is inapposite for reasons addressed earlier (e.g., arguments based on cases involving SPVs).

GLH to pay its creditors. Ergo, the veil piercing claim is based on proof that Hugh and Claire specifically kept GLH cash poor to ensure that Pensmore could never collect the full amount of the Settlement Agreement from GLH.

There is nothing in the robust record before the court that refutes this contention. Nonetheless, defendants aver that “[w]hile Pensmore complains that GLH is ‘cash poor’ and ‘judgment-proof,’ it does not and cannot allege that money was improperly transferred from or otherwise diverted from GLH during 2013 (or thereafter) to render GLH judgment-proof in the event of a default under the Settlement Agreement.” *See* Dkt. 351 at 25. This statement is demonstrably false and borderline frivolous. In light of the court’s TRO and attachment order and the findings made by the court in the April 2015 Decision, it takes serious chutzpah for defendants to claim that no money was improperly transferred or diverted from GLH “during 2013 (or thereafter).” Under Delaware law, deliberately undercapitalizing a company to keep it judgment proof while operating the business through another alter-ego company is a textbook example of when veil piercing is appropriate. *See Winner*, 2008 WL 5352063, at *5.

The court, therefore, rejects defendants’ argument that Pensmore “cannot establish that any of the entities was dominated in connection with the Settlement Agreement such that the entity ceased to have a separate legal existence.” *See* Dkt. 445 at 3. Their conclusory denial of their intent to defraud without actually addressing any of the specific improper transfers discussed in Pensmore’s papers and supporting exhibits is insufficient. They also ignore the fact that they failed to disclose the closing of Exhibit E transactions [*see* Dkt. 373 at 7 (“Gruppo, Levey will produce detailed monthly updates of each transaction identified in Exhibit E.”)], which generated funds that could have (and should have) been used to pay Pensmore. *See* Dkt. 440 at 9 (“over \$500,000 was earned on Exhibit E deals”). There is no question of fact that, but

for the deliberate undercapitalization of GLH, GLH would have had significant funds to pay something to Pensmore. GLH may not have been able to pay Pensmore all of the money owed, but that fact is not dispositive; it certainly is not an excuse to pay nothing. Despite defendants' protestations to the contrary, their deliberate undercapitalization of GLH for the purpose of keeping GLH judgment proof is the very sort of fraud that warrants veil piercing. *See U.S. Bank N.A. v U.S. Timberlands Klamath Falls, L.L.C.*, 2005 WL 2093694, at *1 (Del Ch 2005) ("veil piercing is appropriate when a company is a sham entity designed to defraud investors and creditors.") Non-payment of the settlement and fraudulent siphoning of money through alter-egos are distinct wrongs.

No reasonable finder of fact could conclude that GLH, GLC, and GLCP are entitled to rely on the liability shield of their corporate veils. The way in which these companies were operated and the clear intent to defraud Pensmore necessitates the imposition of alter ego liability. Ergo, summary judgment is granted to Pensmore on its claim to pierce the corporate veils between GLH, GLC, and GLCP.

Summary judgment on Pensmore's other veil piercing claims as to the other defendants, however, is denied because the issue of whether the companies, collectively, operated as a bona fide business distinct from its owners implicates material questions of fact. The First Department has cautioned that veil piercing claims "are 'fact-laden' and 'not well suited for summary judgment resolution.'" *Emposimato v CICF Acquisition Corp.*, 89 AD3d 418, 420 (1st Dept 2011), quoting *First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 294 (1st Dept 1999). While this rule is not absolute [see *Webmediabrands, Inc. v Latinvision, Inc.*, 46 Misc3d 929, 934 (Sup Ct, NY County 2014) (Friedman, J.), citing *Ventresca Realty Corp. v Houlihan*, 41 AD3d 707, 709 (2d Dept 2007) (granting summary judgment on veil piercing

claim)], the exception is not met by Pensmore's other veil piercing claims. For the reasons set forth above, the court finds that the sham nature of the corporate veils between GLH, GLC, and GLCP is beyond dispute, but that the requisite inquiry necessary to make similar findings with respect to the other defendants is too fact laden for summary disposition.

To explain, the fact that corporate affiliates do not operate as separate entities does not necessarily mean that, collectively, the business is an alter ego of its owners. After all, if the companies would still have lacked the means to pay Pensmore had they observed corporate formalities, it would be unreasonable to put Hugh and Claire on the hook. In other words, there is a real question about whether Pensmore could have been made whole *even if the companies were not operated as alter egos*. This question of fact is material to the issue of whether piercing the corporate veil of the business to reach its owners (i.e., making Hugh and Claire liable for the full amount of the Settlement Agreement) can be justified on the ground that the corporate form abuse had the actual effect of harming Pensmore.

The record strongly suggests that, both at the time of the Settlement Agreement in February 2013 and to date, the business was not awash in cash, nor did it have a deal pipeline indicating a thriving enterprise. To be sure, Claire admittedly violated the Article 52 restraining notices, but only for the purpose of paying the rent and making sure the employees receive their paychecks. She was putting money into the business, not taking it out. A thriving business does not need constant infusions of cash to keep the lights on, nor are business owners in the habit of making gratuitous capital contributions. The fact that Claire chose to further invest in the business out of her own pocket cannot be said to have harmed Pensmore's ability to enforce its judgment against GLH. Had Claire simply stopped paying the bills, the possibility of dissolution or bankruptcy may not have been unforeseeable.

Yet, Pensmore wants to hold Claire personally liable under a contract to which she is not a party – and was not made a party over Pensmore’s objection. Pensmore, nonetheless, agreed to settle for the full amount *only* with GLH, despite knowing that GLH, at the time, did not have the means to pay that amount of money. Granted, Pensmore was given assurances that certain future revenues would be forthcoming, which, if received by GLH, GLC, or GLCP, may be recoverable by Pensmore by virtue of piercing those companies’ corporate veils. Pensmore, however, had no right to expect that in the event GLH or its subsidiaries ultimately lacked the means to pay the amounts due under the Settlement Agreement, that Hugh and Claire would personally pick up the full tab.¹⁵ Pensmore – perhaps unwisely given the recalcitrance shown by defendants – expressly agreed to take GLH credit risk on the Settlement Agreement in excess of that personally guaranteed by Hugh and Sprague (which, it should be noted, has now been satisfied). To rewrite that bargain by holding Hugh and Claire liable for the full amount is to not only give Pensmore the benefit of a better bargain than it struck, but to give it the benefit of the very bargain it actually sought – but failed – to procure at the negotiating table.

To be relieved from the consequences of that bargain, Pensmore must prove that, counterfactually, the absence of corporate form abuse would have resulted in the defendant entities having the means to satisfy GLH’s liability. It is far from clear that, even had Hugh and Claire not treated GLH, GLC, and GLCP as alter egos, there would have been sufficient *corporate* funds to pay Pensmore. But for a veil piercing basis for liability (or Pensmore’s DCL claims), Hugh and Claire will not be subject to personal liability. To hold them liable for abdicating corporate formalities in a way that did not actually decrease the amount of assets

¹⁵ Pensmore’s reliance on alleged pre-contract oral assurances to the contrary are unavailing. The Settlement Agreement’s allocation of corporate and personal liability was bargained-for. Had the parties intended for Claire to undertake personal liability, the parties would have so contracted.

available to the company to pay Pensmore is not a fraud sufficient to justify the imposition of personal liability. In other words, for the fraud prong to be satisfied with respect to Hugh and Claire, Pensmore must prove that they unjustifiably funneled corporate funds to themselves and that, had they not done so, Pensmore would have been able to recover the amounts sought from the companies in excess of the assets they currently have on hand. Pensmore has not made such a showing on this motion, nor have defendants demonstrated that Pensmore could not do so at trial.¹⁶

Aside from their own discussed failure to rely on applicable law or cases with analogous facts, the facts defendants proffer in support of their motion contorts reality in a way that cannot be considered a bona fide prima facie case. There is no doubt that serious financial improprieties were committed here with the apparent purpose of frustrating Pensmore's collection efforts. The existence of prima facie evidence of such malfeasance was used by this court and the Appellate Division to justify an attachment. To the extent defendants have arguments that may ultimately absolve Hugh and Claire of personal liability, they are more properly made to the finder of fact, who can sort out their motives and reconcile, with far more precision than proffered on this motion, the real reasons for the ways in which the money flowed. Summary judgment is denied to both sides.

In sum, while the ways in which GLH, GLC, and GLCP were operated warrant veil piercing, the veils of those entities are the only ones that may be pierced by way of summary

¹⁶ If Pensmore cannot carry this burden at trial, Hugh and Claire do not deserve to be held personally liable because, despite their behavior, they would not have been the proximate cause of Pensmore's inability to satisfy its judgment against GLH, GLC, and GLCP. Veil piercing liability does not exist as a mere punishment for being sloppy about corporate formalities. The point of veil piercing is to impose alter ego liability due to the causal relationship between malfeasance and fraud on a creditor. Without proving that Hugh and Claire did anything that made the companies, collectively, unable to pay Pensmore, the requisite fraud cannot be said to be present.

judgment.¹⁷ Any further piercing requires a trial.¹⁸ In this case, the discovery record in Pensmore's possession is vast, and there may well be grounds to hold all of the defendants liable, including Hugh and Claire (who, it should be noted, may also have personal liability on the DCL claims that will be tried).

Finally, Pensmore's motion to hold Hugh and Claire in contempt for violating the TRO is denied. This contempt motion is nothing more than reargument of the court's prior denial of such relief and is meagerly tacked on at the end of Pensmore's moving brief without any meaningful analysis. *See* Dkt. 406 at 30. In reply, Pensmore relies on Claire admitting to have violated the TRO at her deposition. *See* Dkt. 440 at 13-14. While such admissions may demonstrate the willfulness of the violations, the court declines to hold her in contempt for the same reasons set forth in the April 2015 Decision.¹⁹ Accordingly, it is

ORDERED that Pensmore's motion for summary judgment to pierce the corporate veil of GLH to hold GLC and GLCP liable under the Settlement Agreement is granted, Pensmore's summary judgment motion is otherwise denied, and Pensmore's motion to hold Hugh and Claire in contempt is denied; and it is further

ORDERED that the court *sua sponte* dismisses the second (veil piercing) and fourth (unjust enrichment) causes of action; and it is further

¹⁷ Judgment on the full outstanding amount of the Settlement Agreement will be entered against GLC and GLCP, and the remainder of the action will be severed.

¹⁸ Since summary judgment piercing beyond GLC and GLCP is denied, the further downstream veil piercing analysis of the parties for which New York and Connecticut law apply is unnecessary at this juncture (but will be necessary at trial).

¹⁹ The court also declines to consider defendants' request (no notice of cross-motion was filed) for sanctions against Pensmore, which the court finds to be frivolous. Defendants' sanctions application rings hollow in light of their own conduct and their baseless contention that Pensmore's claims are frivolous.

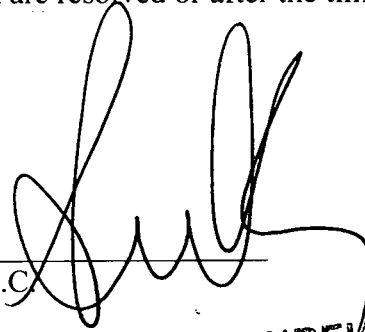
ORDERED that Pensmore shall submit a proposed order directing the entry of judgment against GLC and GLCP that severs the remaining claims against the remaining defendants; and it is further

ORDERED that the motion by GLC, GLCP, January Management, Magic, Claire, and Hugh for partial summary judgment and their informal cross-motion for sanctions against Pensmore are denied; and it is further

ORDERED that the parties shall promptly contact the court to schedule a pre-trial conference after all interlocutory appeals of this decision are resolved or after the time to file such appeals has elapsed.

Dated: April 6, 2017

ENTER:



J.S.C.

**SHIRLEY WERNER KORNREICH
J.S.C.**