

136 Field Point Circle Holding Co., LLC v Razinski
2019 NY Slip Op 31484(U)
May 24, 2019
Supreme Court, New York County
Docket Number: 155249/2016
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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136 FIELD POINT CIRCLE HOLDING COMPANY, LLC, PUTNAM
BRIDGE FUNDING III, LLC,

Plaintiffs,

- v -

ALEXANDER RAZINSKI, TANYA RAZINSKI, XENIA RAZINSKI,
INVAR INTERNATIONAL HOLDING, INC., INVAR
INTERNATIONAL, INC.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for

JUDGMENT - SUMMARY

In this action to recover on a previously issued judgment and for contractual relief, plaintiffs 136 Field Point Circle Holding Company, LLC (136 FPC) and Putnam Bridge Funding III, LLC (Putnam) move for partial summary judgment pursuant to CPLR 3212 on their second through ninth causes of action (NYSCEF #13 – Notice of Motion). Defendants Alexander Razinski, Tanya Razinski, Xenia Razinski, Invar International Holding, Inc. (Invar Holding), and Invar International, Inc. (Invar International) oppose the motion and cross-move for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint and awarding attorneys' fees and costs (NYSCEF #27 – Notice of Cross-Motion). The Decision and Order is as follows:

FACTS

This is a matter with a long and tortuous history that include multiple litigation in the state courts of New York and Connecticut, the Southern District of New York, and the Second Circuit Court of Appeals.

Since 2007, Alexander and Tanya Razinski have resided in a waterfront mansion located at 136 Field Point Circle (premises/home) in Greenwich, Connecticut. The Razinskis initially entered into an agreement to purchase the home and made a down payment of \$1 million against the purchase price. In June 2007, the Razinskis converted the purchase agreement into an option agreement to purchase the home and paid an additional \$9 million towards the option purchase price. The option gave the Razinskis the right to purchase the home by May 30, 2012, at a price of approximately

\$13 million. Failure to exercise the right to purchase would entail forfeiture of the initial \$10 million for the option to purchase.

The Razinskis style themselves as “entrepreneurs” and conduct their business activities through multiple entities, including Invar International and Invar Holding (NYSCEF #28 – Alexander Razinski (“AR”) Aff at ¶5). Invar International focuses solely on carrying out energy development projects and was involved in constructing and operating two power plants in Moscow. In 2009, Invar Holding was established as a holding company that owned all of Invar International’s stock (*id.*; NYSCEF #29 – Stock Certificate).

To construct the power plants, Invar International entered into a joint venture in 2005 with non-party Turkish construction and energy conglomerate Zorlu Enerji Elektrik Üretim Anonim Sirketi (Zorlu) and Talex International LLC (Talex) by creating a fourth entity – ICFS International, LLC (ICFS). Zorlu purchased a 51% stake in ICFS whereas Talex and Invar International each purchased 24.5% stakes (NYSCEF # 28 – AR Aff at ¶6). ICFS then created a Dutch corporation, Rosmiks International BV, which in turn created a Russian subsidiary, Rosmiks LLC, that became the owner of the power plants in Russia (*id.*).

The deal with Zorlu soured. Invar International claimed that it was defrauded and cut out of the venture when Zorlu defaulted on a loan (AR Aff at ¶7). Invar International and Talex commenced an arbitration against Zorlu in Geneva, Switzerland on April 15, 2010. The Notice of Arbitration is notable as it lists Invar International, but not Invar Holding as a claimant in the action (NYSCEF #30 – Arbitration Claim). Talex and Invar International were both initially represented by Latham & Watkins. However, in August 2011 Talex settled the arbitration without Invar International, at which point Invar International retained Freshfields and filed a new Statement of Claim on February 13, 2012 (AR Aff at ¶¶ 8, 11).

In 2012, the Razinskis found themselves with two major financial obligations – their purchase option on their home was about to come due, and they had the costs of the ongoing Zorlu arbitration. The Razinskis did not have the funds available to purchase the 136 Field Point Circle home and approached Nicholas Prouty, principal of both Putnam and 136 FPC, to arrange a mortgage to purchase the home. Prouty declined the mortgage offer. But, the parties came up with a different instrument – the so-called “Master Agreement”. The Master Agreement was designed to kill two birds with one stone.

During the negotiations over the Master Agreement in April 2012, Alexander Razinski advised Prouty that one of his corporations, Invar International, was in the midst of an international arbitration involving the construction of electrical power plants in Russia and that sufficient funds would be available to purchase back the home upon succeeding or settling the arbitration. The Razinskis claim that they were under a time crunch during this period because they needed to make a payment to the

Arbitration Panel on April 30, 2012, and needed a deal done with Prouty by April 23, 2012 (AR Aff at ¶13). Alexander Razinski claims that Putnam insisted that the Razinskis instruct Invar International's counsel, Freshfields, by letter, to turn over to Putnam, as a security for the "loan" on the house, funds received from Zorlu once the Arbitration was resolved. To this end, the "Direction Letter" was circulated between the parties, signed by Alexander Razinski, individually and as president of Invar International, and Putnam, and submitted to Freshfields on April 19, 2012 (NYSCEF #37 – Direction Letter).

The Direction Letter required that any arbitral awards or proceeds be paid directly to Freshfields rather than to any Invar Affiliates (*id.* at ¶1). As per the Direction Letter, Freshfields was directed to apply the proceeds to "any then-outstanding legal fees and expenses of your firm relating to the Arbitration, Arbitration costs and Arbitration funding costs, . . . you are directed to promptly . . . disburse the balance . . . to Putnam . . . which Putnam will apply to my obligations under the Contract and remit the balance to me" (*id.* at ¶2).

According to Razinski, the larger deal was still not in place, so on April 26, 2012, Putnam agreed to a bridge loan of \$1 million to fund the arbitration. However, by May 17, 2012, the parties signed the Master Agreement which entailed: (1) 136 FPC purchasing the Razinskis' purchase option; (2) 136 FPC exercising the purchase option against the non-party owner; (3) 136 FPC extending the Razinskis a one-year lease for the premises; and (4) extending the Razinskis a purchase option to be exercised within a one-year time period (NYSCEF #18 – Master Agreement). The Master Agreement specifically incorporated the Direction Letter as a mechanism of repaying 136 FPC (*id.* at §7.2).

The Razinskis argue that 136 FPC's acquisition of the purchase option was setup in an unusual bifurcated fashion in that 136 FPC could purchase the option from the Razinskis for either \$2.5 million or \$3.5 million because the agreement was essentially an installment loan (*id.* at §1.1). The Master Agreement stated that the second installment for \$1 million would become payable if 136 FPC was, in its absolute and sole discretion, satisfied with the progress of the arbitration (*id.*). The Master Agreement stated that if the Razinskis did not vacate the home "immediately upon the end of the Rental Term" then 136 FPC would "receive an immediate cash payment from the Razinskis of \$1 million in addition to any other remedies available to 136 FPC (*id.* at §2.3(c)). Additionally, the Master Agreement required that Invar Holding execute a guaranty on the Razinskis' obligation under the Master Agreement (*id.* at §8.1).

Settlement talks with Zorlu began in June 2012, and the Razinskis claim, with no evidentiary support, that Zorlu made an eight-figure settlement offer (AR Aff at ¶21). Alexander Razinski claims that the defendants kept Prouty abreast of the developments and asked that Prouty make the additional \$1 million available to continue funding the arbitration (*id.* at ¶20-21). The Razinskis claim that they were

required to submit final expert witness reports for the Arbitration on November 27, 2012, but that Invar International lacked the funds to pay the experts for their outstanding invoices and that Prouty refused to release the additional \$1 million (*id.* at ¶22). The Razinskis claim that with the November 27 deadline looming, they had to settle the matter or expose their inability to prosecute the arbitration. As such, Invar International settled with Zorlu for \$15 million in November 2012, the first \$10 million immediately distributable and the remaining \$5 million in November 2013 (*id.* at ¶23). The funds were paid by Zorlu to Freshfields, which then distributed the funds to itself to cover its legal fees and then to various “arbitration costs”, including expenses incurred by Invar International during the arbitration (*id.* at ¶26-30). At the end, the defendants state that nothing was left to distribute to Putnam under the Direction Letter.

The events described above spawned multiple litigations: two suits by the Razinskis and their companies in New York State Supreme Court, two suits by 136 FPC in the Southern District of New York (SDNY), and multiple cases regarding the home in Connecticut state court. The Razinski’s first action was filed in this court in July 2013 (NYSCEF #48 – Complaint in Index No. 652357/2013). In that matter, the Razinskis sought a declaratory judgment that the Master Agreement must be treated as an equitable mortgage (*id.*). This was rejected by the court and affirmed on appeal (*see Razinski v 136 Field Point Circle Holding Co. LLC*, 136 AD3d 436, 436 [1st Dept 2016]). However, the parties stipulated, and another justice of this court so-ordered, that the provision of the Master Agreement requiring the Razinskis to pay \$1 million if they did not vacate the property to be an unenforceable penalty (NYSCEF #49 – Order of Justice Joan A. Madden dated July 15, 2015 [Index No. 652357/2013]).

Nevertheless, in the SDNY litigation, Judge George Wood found that Invar Holding’s guaranty of the Master Agreement was valid and enforceable and that 136 FPC was entitled to the \$1 million from Invar Holding for their failure to vacate as the guaranty was absolute and unconditional even though the obligation guaranteed was an unenforceable penalty (*see 136 Field Point Holding Co. LLC v Invar International Holding, Inc.*, No. 1:13-cv-6285-GHW [SDNY March 19, 2015], *aff’d 136 Field Point Circle Holding Co. LLC v Invar Int’l Holding, Inc.*, 2016 US App Lexis 5376 [2d Cir Mar. 21, 2016]). Invar Holding has not made any payments in accordance with the judgments against it.

Currently on this court’s docket is the distinct, but related matter of *Invar International Holding, Inc. v 136 Field Point Circle Holding Co. LLC*, Index No. 651197/2014. This is referred to by the parties as the “Settle Short” action, wherein Invar and the Razinskis allege that 136 FPC’s and Putnam’s failure to extend an additional \$1 million for arbitration funding caused them extensive financial damage. The Settle Short action is relevant here to defendants’ claims regarding breach of contract and will be discussed below.

This present action began on June 22, 2016, with plaintiffs 136 FPC and Putnam asserting nine causes of action in their complaint wherein they seek: (1) to hold the individual defendants liable for the \$1 million judgment against Invar Holding on the Guaranty, on a corporate veil piercing theory; (2-5) relief under the theory that the transfers to Invar International of the settlement funds paid by Zorlu were fraudulent conveyances in violation of Debtor-Credit Law (DCL) §§273, 274, 275, and 276; (6) to hold Alexander Razinski and Invar International in breach of contract based on the alleged violation of the terms of the Direction Letter; (7) to find that Alexander Razinski, Tanya Razinski, and Invar Holding breached section 7.2(b) of the Master Agreement which prohibits defendants from amending, modifying, waiving or terminating the Direction Letter and that breach thereof requires an immediate payment of \$1 million; (8) attorneys' fees pursuant to DCL §276-a; and (9) attorneys' fees pursuant to the Master Agreement (NYSCEF #1 – Complaint ¶¶73-118). Both parties now seek summary judgment – plaintiffs on claims 2-9; defendants on all claims.

DISCUSSION

Standard on Motion for Summary Judgment

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). “A motion for summary judgment, irrespective of by whom it was made, empowers a court to search the record and award judgment where appropriate” (*GHR Energy Corp. v Stinnes Interoil Inc.*, 165 AD2d 707, 708 [1st Dept 1990]).

Debtor-Creditor Law Claims

Plaintiffs seek judgment on its four Debtor-Credit Law (DCL) claims; defendants seek dismissal of same. Plaintiffs' branch of motion on the DCL claims is denied and defendants' is granted.

According to the DCL,

[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without

regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration (DCL § 273).

As to “conveyances by persons in business”, the DCL provides:

Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent (DCL § 274).

As to “conveyances by a person about to incur debts” the DCL provides:

Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors (DCL § 275).

And, as to “conveyance made with intent to defraud,” the DCL provides:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors (DCL § 276).

Critically, all of plaintiff’s DCL claims require a conveyance of an asset.

Plaintiffs argue that “Mr. Razinski, an officer and shareholder of both Invar Holding and Invar International, caused a transfer of Invar Holding’s only asset to Invar International without consideration, rendering Invar Holding insolvent in violation of DCL § 273. Specifically, Mr. Razinski admitted that the potential proceeds from the settlement of the arbitration were Invar Holding’s only asset” (NYSCEF #24 – Pl’s Aff in Support at 19). Plaintiffs make effectively the same argument on DCL §§ 275-276 grounds as well. Plaintiffs allege that the transferred property in question – the funds attained from the settlement of the arbitration proceeds – was transferred without fair consideration and that Invar Holding was therein rendered insolvent and unable to pay its obligations to plaintiffs. However, plaintiffs’ version of events does not comport with the documentary evidence.

As an initial matter, the Arbitration was conducted by Invar International; the proceeds were the property of Invar International. The settlement proceeds were never an asset of Invar Holding and thus Invar Holding had no asset to convey as required by the DCL statute. Plaintiff’s argument rests exclusively on the ambiguous testimony

by Alexander Razinski at his post-judgment deposition in one of the SDNY cases (NYSCEF #23 –AR Deposition at 11-12).

At his June 5, 2015 deposition, Mr. Razinski, when asked about the “assets” of “the debtor” in 2012, stated that “[i]t was supposed to be one asset, which was a settlement of a legal procedure that was going on between Invar and Zorlu, which unfortunately did not happen towards satisfaction because [136 FPC] did not provide us with a million dollars that it was supposed to” (*id.*). Razinski then clarifies that “the debtor” refers to Invar International, not Invar Holding (*id.* at 14, ln 17).

Plaintiffs’ argument is simply not supported by a fair reading of the deposition transcript. And plaintiffs’ argument to reject Alexander Razinski’s affidavit as contradictory and self-serving fails. While Alexander Razinski’s June 5, 2015 testimony was unclear, Razinski did clarify the asset issue later on in the same deposition. There is thus no contradiction between the affidavit on this motion and the prior deposition to reject Razinski’s affidavit.

Regardless, there is no other evidence that indicates that the settlement proceeds were ever the asset of Invar Holding. Indeed, all the documentary evidence indicates that the settlement proceeds were the asset of Invar International. Invar International maintained the arbitration claim, the Direction Letter is written as if the arbitration was in the name of Invar International, and the Settlement Agreement is in Invar International’s name (*see* NYSCEF #30 – Notice of Arbitration; NYSCEF #37 – Direction Letter)¹.

Besides Mr. Razinski’s errant comment at deposition, there is simply no proof that there even was a fraudulent conveyance of an asset for purposes of the Debtor-Creditor Law. If there was a conveyance, it was between Freshfields and Invar International, but there was no conveyance between Invar Holding and Invar International designed to deprive plaintiff creditors. Plaintiffs’ entire argument rests on this faulty assumption about the nature of the conveyance. As there is no conveyance, plaintiffs’ DCL claims all fail; defendants’ motion on claims 2-5 and 8 is granted.

Breach of Contract Claims

Plaintiffs allege two separate breach of contract claims. First, plaintiffs claim that defendants Alexander Razinski, Invar International, and Invar Holding breached the Direction Letter by directing that the arbitration proceeds go to other parties and/or entities besides Putnam and 136 FPC. Second, plaintiffs claim that defendants Alexander Razinski, Tanya Razinski, Invar International, and Invar Holding breached the Master Agreement by providing instructions to Freshfields regarding the disposition of the arbitration funds, in violation of Master Agreement ¶7.2(b)(ii) and

¹ This court also conducted an *in camera* review of the confidential Arbitration Settlement Agreement.

(iii). Although plaintiffs' notice of motion indicates that they were pursuing all breach of contract claims on their motion for summary judgment, plaintiffs' memorandum of law focuses on the breach claims against Alexander Razinski, and not Tanya Razinski or the Invar defendants (NYSCEF #24 – PI's Memo of Law in Support). Defendants, for their part, seek to dismiss all breach of contract claims.

The elements for a breach of contract claim are: (1) formation of a contract between the parties; (2) performance by one party; (3) failure to perform by the other party; and (4) resulting damage (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Critical to the instant matter, the court must look at the plain language of the contract to determine if there is a breach (*see Golden Gate Yacht Club v Societe Nautique de Geneve*, 12 NY3d 248, 256 [2009]).

Plaintiffs argue that Alexander Razinski breached the Direction Letter by directing the money to go to “an entity other than Putnam and/or Invar Holding” (NYSCEF #24 – PI's Memo at 15). Additionally, plaintiffs claim that Razinski breached the Master Agreement by directing Freshfields in the allocation of the Arbitration Proceeds. The Master Agreement at §7.2(b)(iii) states that the “Razinskis shall not... provide any other instruction or direction to Freshfields concerning Arbitration Proceeds, it being agreed and acknowledged that any breach of such covenant by the Razinskis would create significant and irreparable financial harm to [136 FPC] and, accordingly, will entitle [136 FPC] to receive an immediate cash payment from the Razinskis of \$1,000,000, which shall be in addition to, and not in lieu of, any other remedies available to [136 FPC] relating to such breach” (NYSCEF #18 at §7.2(b)).

The Direction Letter, for its part, reads:

“Upon receipt of any Arbitration Proceeds by your firm, you should provide written notice thereof to [Razinski] and Putnam and, after applying such Arbitration Proceeds to payment of any then-outstanding legal fees and expenses of your firm relating to the Arbitration, Arbitration costs and Arbitration funding costs (collectively, “Arbitration Expenses”), in each case in accordance with the terms and conditions of the engagement agreement between your firm and Invar International, Inc. dated December 23, 2011, you are directed to promptly... after receipt, disburse the balance of the Arbitration Proceeds directly to Putnam on [Razinski's] behalf... which Putnam will apply to my obligations under the Contract and remit the balance to [Razinski/Invar], accompanied by a statement prepared by your firm showing the amount of Arbitration Proceeds received and describing in reasonable detail the Arbitration Expenses satisfied therefrom and the resulting amount disbursed to Putnam. An indicative budget for the Arbitration Expenses is attached hereto as Schedule A” (NYSCEF #37 – Direction Letter at ¶2).

A review of the “indicative budget” reveals one sentence that states: “Invar currently estimates that the Arbitration Expenses will total approximately US \$7.2 million” (*id.* at Schedule A).

Alexander Razinski was deposed by Mitchell Baker, Esq., counsel for plaintiff, and the pertinent testimony regarding the distribution of arbitration proceeds is as follows:

“[Baker]: When you said that the arbitration was settled, the monies went to Invar International even though it was, you testified it was an asset of the debtor, who made the decision of where the money went?”

“[Razinski]: The decision was made collectively between Zorlu, Freshfields and Invar Inc.”

“[Baker]: Your lawyers had a decision making in where the monies would go?”

“[Razinski]: Yes, because they had to take quite a lot out of the portion of the money, absolutely more than that we agreed with them it settled, money goes to them first so they can take their cut.”

“[Baker]: I understand the money would go to the lawyers.”

“[Razinski]: First.

“[Baker]: I understand that more than anybody. The question is: is that you stated that the settlement of the Zorlu Arbitration was an asset of the debtor but the monies after the attorneys were paid and all of the expenses were paid, went to Invar International Inc.”

“[Razinski]: Yes.”

“[Baker]: My question is: Who made that decision? Was it you, sir, that made that decision?”

“[Razinski]: Yes.”

(NYSCEF #23 – AR Deposition at 40-41).

Alexander Razinski confirms that he directed Freshfields in the allocation of the arbitration proceeds in his affidavit on this motion (NYSCEF #28 – AR Aff at ¶25). He avers that “[a]fter Freshfields received the first settlement payment, and after consulting with me, Freshfields wire transferred \$5,746,305.84 to Invar International’s account at Citibank, N.A. on November 30, 2012” and that “Freshfields applied the remaining \$4,253,694.16 to the first category of Arbitration Expenses – its own then-outstanding legal fees and expenses – as well as to some of the outstanding expert fees and counsel’s bills” (*id.*). Razinski continues that “[i]n November 2013, Freshfields received the second settlement payment, and on November 27, 2013, it wired \$4,219,732.16 into Invar International’s account” and “Freshfields withheld \$780,267.84 to reimburse itself for its then-outstanding legal fees” (*id.*).

Razinski further states that once Freshfield’s bills were paid, “Arbitration costs” and “Arbitration Funding costs” were paid next (*id.* at ¶26). Razinski claims that “arbitration costs included the fees and expenses of the multiple other law firms,

besides Freshfields, and expert witness firms that provided legal or expert services to Invar International in the Arbitration itself” and also the sums paid to the panel of arbitrators (*id.* at ¶27). Razinski then states that arbitration costs “also included the expenses incurred by Invar International itself during the time, beginning in 2010, when it had been frozen out of the joint venture and its only business consisted of the prosecution of the Arbitration and the New York and Virginia Actions” and that the “plain meaning of the term ‘costs’ necessarily includes the costs incurred by a party itself in pursuing its claim. During that time, Invar International’s employees were engaged in, among other things, marshaling evidence for the Arbitration and working with counsel and expert witnesses to develop Invar International’s damage claims. All of its expenses, including costs of travel relating to the Arbitration, pertained to the Arbitration” (*id.* at ¶28). Invar International’s “expenses” included paying the Razinskis’ salaries and travel expenses.

Razinski then claims that the third category of expenses authorized by the Direction Letter, arbitration funding costs, allowed the Razinskis, Invar Holding, and three Invar Affiliates to be paid back for loans taken out to support the arbitration (*id.* at ¶29). Defendants argue that “Arbitration costs” is not qualified by the limiting phrase ‘then-outstanding’, and the Direction Letter defines the term ‘Arbitration’ broadly to include not only the Arbitration itself, but also “any... further proceedings relating thereto and other proceedings to which Invar International Inc. or any of its affiliates or associated persons or entities, including without limitation, members of the Razinski family... are parties involving the same or similar facts” (NYSCEF #60 – Def’s Memo at 13-14).

The issue here is that defendants breached the Master Agreement by directing Freshfields in the distribution of the arbitration proceeds when §7.2(b)(iii) specifically instructed the Razinskis and the Invar companies to refrain from interfering in the distribution of the proceeds. Alexander Razinski’s deposition testimony and affidavit confirm that he consulted with Freshfields in determining where the proceeds were to go. This is a breach of the explicit terms of the Master Agreement.

Razinski was specifically prohibited from providing Freshfields instruction besides the Direction Letter and he admitted in both his deposition and affidavit that he directed Freshfield’s allocation of “arbitration costs” and “arbitration funding”. It is thus clear that Razinski breached Master Agreement §7.2(b)(iii) and is therefore liable, at a minimum, for the \$1 million penalty as indicated in the Master Agreement.

Defendants’ arguments that the proceeds were appropriately distributed ring hollow. The Direction Letter language was written to direct Freshfields on how to distribute the arbitration proceeds. Freshfields was directed, “in accordance with terms and conditions of the engagement agreement between Freshfields and Invar International” to: (1) apply the arbitration proceeds to its then-outstanding legal fees and expenses related to the arbitration; (2) apply the proceeds to ‘arbitration costs’; (3) apply the proceeds to ‘arbitration funding costs’; (4) disburse the balance to Putnam;

(5) at this point, Putnam would apply the proceeds to Invar/Razinski's obligations; and then (6) Putnam would remit the balance to Razinski/Invar. Freshfields was directed to prepare a statement "showing the amount of Arbitration Proceeds received and describing in reasonable detail the Arbitration Expenses satisfied therefrom and the resulting amount disbursed to Putnam" (NYSCEF #37 – Direction Letter at ¶2).

Thus, based on the submitted evidence and upon searching the record, Razinski also breached the Direction Letter. "[I]t is a 'cardinal rule of construction' that the court adopt an interpretation that renders no portion of the contract meaningless" (*Wallace v 600 Partners Co.*, 205 AD2d 202, 206 [1st Dept 1994]). Defendants' interpretation of the Direction Letter would render portions of it meaningless. Per the terms of the Direction Letter, it would not make sense for Freshfields to distribute Arbitration Proceeds to Invar International as "arbitration costs" in step two as was done as this would render step six redundant. Furthermore, the Direction Letter, in conjunction with the Master Agreement, clearly countenanced that Freshfields would handle paying "arbitration costs" and "arbitration expenses" and Invar/Razinski would not have a role in this portion of the arrangement. The course of action chosen by Alexander Razinski therefore breached the Direction Letter.

Defendants' arguments for dismissal are rejected. Defendants argue that: (1) the Direction Letter did not permit Putnam to use the arbitration settlement funds to satisfy 136 FPC's claims against Invar Holding; (2) Putnam incurred no damages due to the alleged breach of the Direction Letter; (3) nothing is owed to Putnam under the Direction Letter as the funds were disbursed properly; and (4) that 136 FPC's prior material breach of the Master Agreement excuses the Razinskis from their obligations under the Direction Letter and Master Agreement.

Defendants' First Argument for Breach Dismissal

Defendants first argue that because the Direction Letter uses the phrase "Putnam will apply to my obligations under the Contract and remit the balance to me," plaintiffs cannot succeed on the breach of contract claims as the Direction Letter does not give Putnam the right to apply the settlement funds to satisfy 136 FPC's judgment against Invar Holding (NYSCEF #37 – Direction Letter at ¶3, emphasis added). Defendants argue that "my obligations" must refer only to Alexander Razinski.

Defendants' argument does not make sense in the context of the entire Direction Letter as it states in explicit language that "this instruction letter is a valid and legally enforceable contract among Invar International Inc., [Razinski], and Putnam and, accordingly, Putnam is entitled to enforce it against Invar International Inc. and [Razinski]" (*id.*). The Direction Letter also states that the agreement is "executed with Putnam Bridge Funding III LLC, and/or its affiliates or assigns," clearly demonstrating that Putnam has the ability to enforce the claims of 136 FPC via the Direction Letter (*id.*). The "obligations" referenced in the Direction Letter include the

payment to plaintiffs of any remaining arbitration proceeds after paying attorneys' fees, arbitration costs, and arbitration funding costs.

Additionally, the Direction Letter is incorporated into the Master Agreement which states that the "Razinskis shall not (and shall cause the other Invar Affiliates to not)... amend, modify, waive, or terminate the Arbitration Proceeds Direction letter or... provide any other instruction or direction to Freshfields concerning the Arbitration Proceeds, it being agreed and acknowledged that any breach of such covenant by the Razinskis would cause significant and irreparable financial harm to [136 FPC]" (Master Agreement at ¶7.2(b)). This language demonstrates that Putnam and 136 FPC can enforce each other's claims against the defendants.

Defendants' underlying argument that plaintiffs cannot recover on the \$1 million guaranty via the contract cause of action is rejected. Sections 8.1 and 8.2 of the Master Agreement, specifically contemplates that:

"[t]he Razinskis and Invar Holdings shall not (and shall cause the other Invar Affiliates to not) by any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities, other act or omission, avoid or allow any of the Invar Affiliates to avoid the observance or performance of any of the terms of Invar Guaranty or otherwise impair or diminish the value of the Invar Guaranty to Purchaser, but the Razinskis and Invar Holdings each will (and each will cause the other Invar Affiliates to), at all times in good faith carry out of all the provisions of the Invar Guaranty and take any action as may reasonably be requested by Purchaser in order to protect the rights of Purchaser under the Invar Guaranty against impairment or diminution in value, consistent with the purpose of the Invar Guaranty." (NYSCEF #18 at §8.1).

Thus, defendants arguments are defeated by sections 8.1 and 8.2 of the Master Agreement.

Defendants also argue that a prior \$360,000.00 judgment against the Razinskis for deferred rental payments precludes this action on res judicata grounds. This argument is rejected as plaintiffs' breach of contract claim is distinct and based on entirely separate grounds – namely, that defendants materially misdirected and misappropriated arbitration funds to avoid paying Putnam/136 FPC. These are distinct actions based on different facts than defendants' failure to pay rent. Plaintiff will not be allowed to double recover, but the breach of contract claim is distinct from the failure to pay rent judgment.

Defendants' Second Argument for Breach Dismissal

Defendants' second argument that Putnam incurred no damage as a result of Razinski's alleged breach of the Direction Letter is rejected. Defendants do not make a

prima facie showing that plaintiffs experienced no damage – indeed, as discussed above, it has been established that breaches of both the Master Agreement and Direction Letter occurred, and it is only a question of *how much* damage plaintiffs incurred due to defendants’ breaches. The plaintiffs are due, at a minimum, the \$1 million as specifically accounted for in §7.2(b)(iii) of the Master Agreement. However, determining the full extent of plaintiffs’ damages was not briefed on the motion or cross-motion. Further, defendants’ attempt to use invoices and spreadsheet purporting to document the ‘arbitration costs’ and ‘arbitration expenses’ is unavailing as the “evidence” is unverified and unusable on the instant motion and cross-motion. Defendants are therefore unable to show that “no damage” occurred.

Next, defendants argue that prior judgments preclude this action as duplicative. However, plaintiffs here are seeking to redress a different wrong than the rent judgment and attorneys’ fees judgments addressed in prior litigation. The injuries for the violations of the Master Agreement and Direction Letter as to the assignment of the arbitration proceeds are distinct, and therefore, this action is not precluded.

Defendants’ Third and Fourth Arguments for Breach Dismissal

Defendants’ third argument that Putnam is owed nothing under the Direction Letter because the funds were allocated properly is rejected for the same reasons as defendant’s second argument. Defendants’ instant argument goes to the extent of damages incurred and does not relate to the issue of liability. As such, defendants’ third argument does not defeat plaintiffs’ breach of contract cause of action.

Defendants fourth argument that 136 FPC’s alleged breach of the Master Agreement excuses defendants’ obligations is rejected. The defendants currently maintain a separate lawsuit against 136 FPC and Putnam known as the “Settle Short” action, arguing the 136 FPC committed a material breach of the Master Agreement by refusing in bad faith to make a \$1 million payment to continue funding the Arbitration. Defendants argue that 136 FPC breach excuses performance and until the other action is resolved, this remains a question of fact.

Plaintiffs respond that defendants’ “Settle Short” argument is collaterally estopped by Justice Madden’s October 30, 2015 Order under Index No. 651197/2014. A review of Justice Madden’s decision reveals that all that was decided was that the Settle Short claims did not preclude recovery on 136 FPC’s claims for unpaid rent, which was an independent obligation from the arbitration funding (NYSCEF # 53 – Decision and Order dated October 30, 2015 (Hon. Joan A. Madden) at 4-6). Judge Wood of the SDNY also did not express any view regarding the alleged breach of the Master Agreement – indeed Judge Woods stated “[o]n the papers before me, I cannot adjudicate whether the alleged breach of the Master Agreement excused a breach of the Direction Letter. I expressly state no view on that issue” (NYSCEF #66 – J. Wood May 6, 2016, Oral Decision). Plaintiffs do not make any other arguments in response to defendants’ claims. However, defendants do not win this argument.

While defendants correctly posit that a material breach by Party A to a contract generally excuses performance by Party B (*see Viacom Outdoor Inc. v Wixon Jewelers, Inc.*, 82 AD3d 604 [1st Dept 2011]), the rule that breach excuses performance may not apply where the promises of the parties are independent of each other (*see Pfizer, Inc. v Stryker Corp.*, 348 F Supp 2d 131, 147 [SDNY 2004], *citing Rosenthal Paper Co. v National Folding Box & Paper Co.*, 226 NY 313, 320 [1919] [“By a long series of decisions, the rule has been established that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties, as expressed by them, and by the application of common sense to each case submitted for adjudication”]; *see also Rudman v Cowles Communications, Inc.*, 30 NY2d 1, 13 [1972] [“In determining whether contracts are separable or entire, the primary standard is the intent manifested, viewed in the surrounding circumstances”]). The obligation at issue in the *Invar International Holding, Inc. v 136 Field Point Circle Holding Co. LLC* (Index No. 651197/2014) matter is entirely distinct from the breached obligation at issue here.

The crux of “Settle Short” action is whether 136 FPC breached §1.1(b) of the Master Agreement by failing to provide Invar with an additional \$1 million in arbitration funding. Section 1.1 of the Master Agreement regarding the disposition of the Razinski’s purchase option on the Greenwich, CT home and which they sold to 136 FPC for arbitration funding capital, reads:

“Assignment of Purchase Option. Conditioned upon, and effective immediately prior to, occurrence of the Real Estate Closing, Razinski shall assign the Purchase Option Agreement to Purchaser pursuant to the Assignment and Assumption Agreement . . . in exchange for an “Option Acquisition Payment” consisting of: (a) \$2,548,181.86 paid by Purchaser to the Razinskis at the Real Estate Closing pursuant to Section 1.2; and (b) an additional \$1,000,000 if Purchaser is satisfied, in its sole and absolute discretion, with the progress of the Arbitration and Invar’s business” (NYSCEF #38 – Master Agreement at §1.1).

Because § 1.1(b) is a purely discretionary contract provision, it has no bearing and is unrelated to the defendants’ obligations to pay Putnam pursuant to the Direction Letter or the breach of Master Agreement §7.2(b)(iii). Hence, there is no need to forestall judgment on defendants’ breach of the Master Agreement and the Direction Letter. Defendants’ motion is denied.

Veil Piercing Claim

Defendants move to dismiss plaintiffs’ first cause of action to pierce the corporate veil and hold the Razinskis personally liable for the \$1 million judgment against Invar Holding. Defendants argue that (1) as a matter of law, a veil-piercing claim cannot be based on a breach of contract absent evidence that any defendant

engaged in fraudulent or comparable conduct; and (2) the claim seeks to enforce a contractual term already held to be unenforceable as a matter of public policy.

Piercing the corporate veil “requires a showing [of two essential elements]: that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” (*Morris v New York State Dept. Of Taxation & Finance*, 82 NY2d 135, 141 [1993]).

Defendants’ motion on this claim is denied. While it is correct that “a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil”, plaintiffs’ allegations here are more serious than a simple breach of contract and involve the Razinskis using their domination of the Invar companies to commit a fraud against the plaintiffs, causing their injury (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016]). It is undisputed that Invar Holding and Invar International are closely held corporations that are owned and operated by the Razinskis. Plaintiffs allege that defendants misappropriated the arbitration proceeds and that the Razinskis improperly paid themselves salaries out of the proceeds.

Defendants’ other argument that plaintiffs are merely attempting to use veil piercing as a backdoor to collect on an unenforceable penalty is incorrect. Judge Woods found that the guaranty was valid and issued a \$1 million judgment against Invar Holding, even though the underlying provision in the Master Agreement was found to be unenforceable. Thus, there is no backdoor maneuvering here – plaintiffs are merely attempting to enforce and collect upon their legally valid guaranty judgment. If plaintiffs can prove that the Razinskis, as the officers, directors, and shareholders of the Invar companies abused the corporate form to avoid paying the judgment, then veil piercing is an appropriate remedy. As such, defendants’ motion must be denied.

Claims Against Tanya and Xenia Razinski

Defendants move to dismiss the complaint as against Tanya and Xenia Razinski. However, as the veil piercing claim is still active, it is premature to dismiss this matter as against Tanya Razinski and Xenia Razinski since they are corporate officers and shareholders of Invar Holding. As such, defendants’ motion is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of plaintiffs’ motion for summary judgment regarding the debtor-creditor law claims and accompanying attorneys’ fee claim is denied; it is further

ORDERED that the branch of plaintiffs' motion for summary judgment on the breach of contract claims is granted as it relates to Alexander Razinski's liability; it is further

ORDERED that the branch of defendants' cross-motion for summary judgment regarding the debtor-creditor law claims is granted, and plaintiff's Causes of Action 2-5 and 8 are dismissed; it is further

ORDERED that the branch of defendants' cross-motion for summary judgment to dismiss the breach of contract claims is denied; it is further

ORDERED that the branch of defendants' motion for summary judgment to dismiss the veil piercing claims is denied; it is further

ORDERED that the branch of defendants' motion to dismiss the complaint as to Tanya Razinski and Xenia Razinski is denied; and it is further

ORDERED that Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

5/24/2019

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE