

**D2D Holdings LLC v Bridgemarket Assoc., L.P.**

2019 NY Slip Op 32368(U)

August 6, 2019

Supreme Court, New York County

Docket Number: 160344/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

-----X

D2D HOLDINGS LLC and D2D BRIDGEMARKET LLC,

Plaintiffs,

- v -

BRIDGEMARKET ASSOCIATES, L.P. and
BRIDGEMARKET ASSOCIATES MANAGEMENT INC.,

Defendants.

-----X

BRIDGEMARKET ASSOCIATES, L.P. and BRIDGEMARKET
ASSOCIATES MANAGEMENT INC.,

Plaintiffs,

- v -

JENEL MANAGEMENT CORP.,

Defendant.

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INDEX NO. 160344/2017

MOTION DATE 02/11/2019,
04/22/2019

MOTION SEQ. NO. 004, 005

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595843/2018

The following e-filed documents, listed by NYSCEF document number (Motion 004) 113, 114, 115, 116,
117, 118, 119, 120, 121, 122, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139,
140, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 150, 151, 152, 153,
154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174,
175, 176, 177, 178, 179, 180, 181, 182, 183, 184

were read on this motion to/for AMEND CAPTION/PLEADINGS

Motion (Seq. 004) by Plaintiff D2D Holdings LLC, Plaintiff D2D Bridgemarket LLC, and Third-
Party Defendant Jenel Management Corp. to dismiss the third-party complaint (the "3PC") as
against Jenel Management Corp., pursuant to CPLR 3211 (a) (1) and (7), is granted; and motion
(Seq. 005) by Plaintiffs D2D Holdings LLC and D2D Bridgemarket LLC to amend the
complaint, pursuant to CPLR 3025 (b), is granted in part and denied in part, and the cross-motion
by Defendants Bridgemarket Associates L.P. and Bridgemarket Associates Mangement Inc. to
dismiss the amended complaint upon the granting of the motion to amend, pursuant to CPLR
3211 (a) (1), (5), (7), and for sanctions, pursuant to 22 NYCRR § 130-1.1 (c), is denied.

## BACKGROUND

The instant action involves a lease dispute over a retail space at 405 East 59th Street, which is located directly under the 59th Street Bridge in Manhattan (“the Premises”). Defendant Bridgemarket Associates L.P. (“Landlord” or “Bridgemarket”) is the landlord of the Premises pursuant to a ground lease with the City of New York. Defendant Bridgemarket Associates Management Inc. (“Manager” or “Bridgemarket Management”) is the property manager of the Premises. In March of 1998, Landlord entered into a lease (“the Original Lease”) of the premises with the supermarket chain Atlantic & Pacific Tea Company Inc. (“A&P”), and this lease was subsequently amended on two occasions.

In or about 2015, A&P filed for bankruptcy, and A&P’s leasehold rights to the Premises were put up for sale as part of the bankruptcy proceedings. On December 3, 2015, Bridgemarket and Plaintiff D2D Holdings LLC (“D2D Holdings”) entered into a letter of intent (the “LOI”) wherein it was agreed that D2D Holdings would submit a bid to acquire A&P’s leasehold rights, and, following a successful bid, the parties would subsequently make certain amendments to the Original Lease—namely that the base rent would be increased and that certain restrictions on the tenant would be removed. D2D Holdings thereafter assigned its rights under the LOI to D2D Bridgemarket LLC (“D2D Bridgemarket” or “Tenant”).

The LOI stated as follows:

“Promptly following the Closing, D2D shall elect to either amend and modify the Existing Lease (a ‘Lease Amendment’), or amend and restate the Existing Lease in its entirety (an ‘A&R Lease’) to reflect the terms contained in this Letter. The option elected by D2D (i.e., either the Lease Amendment or the A&R Lease) is sometimes referred to herein as the ‘New Lease’. Landlord will instruct its counsel to prepare a draft of the New Lease for the review and approval of the Parties and their respective counsel, to reflect the terms contained in this Letter. The remaining terms of the Existing Lease not addressed in this Letter shall not be modified, except to the extent necessary to give effect to the terms described herein. Landlord and D2D shall use commercially reasonable efforts to finalize the New Lease, and negotiate in good faith to diligently finalize and execute the New Lease promptly after the Closing. Notwithstanding the foregoing, the Parties hereby acknowledge and agree that this Letter shall be binding upon Landlord and D2D, as the new ‘Tenant’, and shall be deemed to amend and modify the terms of the Existing Lease until the New Lease has been executed in full. The Existing Lease (as amended and modified by the Lease Amendment or this Letter, as applicable) or the New Lease is sometimes referred to herein as the ‘Lease’.”

(Letter of Intent [NYSCEF Document No. 2.] at 1.)

On December 15, 2015, the Bankruptcy Court approved D2D Bridgemarket’s bid, and D2D Bridgemarket entered into a lease sale agreement (the “LSA”) with A&P, purchasing the leasehold rights for \$4,000,000. According to Tenant D2D Bridgemarket, after it entered into the LSA, Landlord Bridgemarket informed Tenant that approval by the bank (the “Bank”) holding and servicing the mortgage on Landlord’s ground lease would be required for certain

amendments contemplated by the LOI, and that Landlord assured Tenant that such approval would be forthcoming.

Thereafter, Landlord and Tenant began working on amending the terms of the Original Lease as contemplated by LOI. Although the parties had not yet signed an amendment to the Original Lease, Tenant began paying an increased monthly base rent of \$181,944.23—increased from \$161,110.90—in April 2016. According to Tenant, after months of attempting to amend the Original Lease, Landlord presented Tenant with a proposed amendment which “notably excluded many of the material amendments and modifications set forth in the LOI, including: (a) the right to sublease and/or assign without landlord’s consent; (b) the lifting of the use restrictions on the premises; and (c) the right to obtain a leasehold mortgage.” (Affirm in Supp of Seq. 004, Ex. A [Complaint ¶ 33].) According to Tenant, Landlord informed Tenant that these restrictions could not be removed from the lease because the Bank would not agree to it.

On November 27, 2016, the parties executed a third amendment to the Original Lease (the “Third Amendment”). At the same time, the parties executed a separate and contemporaneous “Side Letter Agreement” in which it was acknowledged that certain amendments contemplated by the LOI had not been accomplished, and, accordingly, the parties reserved any rights or remedies relating to those certain amendments, and agreed to “cooperate in good faith to execute such further amendments to the Lease as may be reasonably requested by one party, and acceptable to the other party, to further evidence the within provisions.” (Side Letter Agreement [NYSCEF Document No. 3] ¶ 6.)

According to Tenant, because the amendments contemplated by the LOI were never fully implemented, Tenant struggled to find a subtenant for almost a year. As such, in August 2017, one of Tenant’s principals Joseph Dushey (“Joseph”) approached Landlord’s principal Sheldon Gordon (“Sheldon”) to request a reduction in the base rent. According to Landlord, Sheldon had recently confided to Joseph that he had received a terminal cancer diagnosis and had only months to live. As such, Landlord asserts that Tenant sought to pressure Sheldon into accommodating its request by playing on Sheldon’s fears for his family’s financial security in the short time before Sheldon’s death.

According to Landlord, under duress, Sheldon agreed to provide a “partial rent kickback”<sup>1</sup> for the month of September 2017, wherein, after Tenant submitted payment in full for that month, Landlord would refund a portion of the payment such that Tenant’s net payment would amount to \$104,166.67 for that month. (3PC ¶ 31.)

This first “partial rent kickback” was made in early September. Sheldon died on September 28, 2017. A second “kickback” for October 2017 was made days after Sheldon died. According to Landlord, Sheldon’s wife Christine Gordon (“Christine”) had just inherited running Landlord from Sheldon and was unaware that a second “kickback payment” occurred. Thereafter, Christine informed Tenant that it would receive no further “kickbacks.”

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<sup>1</sup> What Landlord refers to as a “partial rent kickback,” Tenant refers to as a “refund.” (*See infra.*)

According to Tenant, Sheldon – on behalf of Landlord – did not simply agree to one or two “kickback payments,” but orally agreed to a permanent reduction of the monthly base rent to \$104,466.67. Tenant asserts that Landlord “structure[d] the arrangement for payment” such that Tenant would pay the \$181,944.23 due under the parties amendment to the Original Lease every month, and the Landlord would then “refund” \$77,777.56 reflecting the “spread,” so that Tenant was effectively paying a new “Reduced Base Rent” of \$104,166.67. (Compl. ¶¶ 41-44.)

The parties, however, agree that whatever the agreement was between Tenant and Landlord, it was never reduced to a signed writing. Rather, various drafts of an agreement were sent back and forth between the parties, with the last draft coming from Tenant’s counsel.

The parties agree that Tenant did not pay any rent for the month of November 2017 when it came due on November 1, 2017, and that Landlord then sent Tenant notices of default on November 3 and November 17, 2017.

On November 21, 2017, Tenant filed the instant action and moved, by order to show cause, for a *Yellowstone* injunction, with a request for a temporary restraining order (“TRO”) to enjoin Landlord from taking any steps to terminate the lease. The Court hearing the TRO application granted the TRO on the condition that Tenant pay Landlord \$104,166.67 on November 27, 2017 and \$104,166.67 on December 4, 2017.

Tenant subsequently withdrew its application for *Yellowstone* relief. Following discussions between the parties and this Court, Tenant agreed to continue paying monthly installments of \$104,166.67, with the balance of the monthly base rent—\$77,777.56—to be deposited in Tenant counsel’s escrow account.

On June 26, 2018, on motion by Landlord for pendente lite relief (Seq. 003), this Court ordered Tenant to pay the full Base Rent—and other charges deemed “Additional Rent” pursuant to the lease terms—that had accumulated up to that date in the amount of \$622,225.28. The Court further ordered Tenant to pay the full Base Rent and Additional Rent during the pendency of the action, with the understanding that Tenant could recover in damages if it ultimately prevailed on the merits in establishing that a modification of the monthly base rent occurred. Tenant complied with the Court’s order by wiring said sum to Landlord on June 28, 2018.

However, on July 2, 2018, Tenant’s counsel informed the Court via letter that because of Landlord’s “continuing breach” of the LOI, Side Letter, and Landlord’s “prior agreement to have modified the Lease, Plaintiffs have no choice but to surrender the [Premises] to Landlord effective as of June 30, 2018.” (Affirm in Opp. to Seq. 004, Ex. 18 [Surrender Letter] at 1.) Tenant’s counsel stated further: “Plaintiffs will continue to pursue their claims for substantial monetary damages in this action, and reserve their right to seek leave of the Court to amend their complaint to assert additional claims against Defendants for the substantial rental amounts previously paid to Landlord, and otherwise.” (Id.)

Because the Court’s June 26, 2018 order required Tenant to pay full Base Rent and Additional Rent to Landlord pending the disposition of the action, Tenant sought to clarify

“whether modification of the Court’s Order is required given Tenant’s surrender of the Premises.” (Id.)

On September 13, 2018, the parties appeared before the Court and the subject of Tenant’s surrender was discussed on the record. The parties then entered into a stipulation that was so-ordered by the Court (the “Surrender Stipulation”). The Surrender Stipulation states in relevant part:

“Tenant previously tendered a voluntarily surrender of its rights and interest in the Premises to Landlord, and exclusive possession thereto, free of any claims to possession or occupancy by third parties. Landlord accepts Tenant’s surrender, subject to the parties’ reservation of all of their rights, claims and defenses, including, but not limited to, Landlord’s claim (i) as to the effective date of such surrender, and (ii) for unpaid rent and additional charges due under that certain lease, dated as of March 23, 1998, and all amendments thereto, among other claims, and Tenant’s claim for damages, among other claims.

The parties hereby agree that all agreements between Landlord and Tenant concerning the Premises, including, without limitation, that certain Letter of Intent, dated as of December 3, 2005, that certain lease, dated as of March 23, 1998, and all amendments thereto (collectively, the “Lease” ), and that certain Side Letter Agreement, dated as of November 7, 2016, have been terminated by reason of Tenant’s surrender of the Premises and that there are no continuing obligations between the Landlord and Tenant concerning the Premises, subject to the parties reservation of their rights, claims, remedies and defenses as currently asserted in this action and as may hereafter be asserted, including, but not limited to, the effective date of Tenant’s surrender and Landlord’s claim for unpaid rent and additional rent, among other claims, and Tenant’s claim for damages, among other claims.”

(Affirm in Opp to Seq. 004, Ex. 19 [Surrender Stipulation] ¶ 1.) The parties further reserved “their respective rights, claims and defenses concerning any alleged breach of the aforesaid agreements” and it was agreed that the provision June 28, 2018 order requiring Landlord to continue paying rent was deleted.

As the Court then understood matters—based on the parties’ statements on the record and the plain terms of the Surrender Stipulation—the parties were to complete discovery on the remaining issues in the action which in sum and substance were whether the LOI and Side Letter were breached, and whether there was an oral modification of the monthly rent.

However, thereafter, Landlord filed a third-party complaint (the “3PC”) against third-party defendant Jenel Management Corp. (“Jenel”). In sum and substance, the 3PC seeks to pierce the corporate veil as against Jenel arguing that Jenel used its domination and control over Tenant to “participate in a fraudulent scheme to denude Tenant of its assets in order to make it judgment proof, and render it unable to honor and pay its obligations under the Lease to Landlord.” (Memo in Opp to Seq. 004 at 15.)

On the first motion before this Court (Seq. 004), Plaintiffs and Jenel—both represented by the same counsel—seek to dismiss the 3PC.

In addition, following the aforesaid motion, Plaintiffs then filed a motion (Seq. 005) seeking leave to amend their complaint, pursuant to CPLR 3025 (b), namely to add a cause for a mandatory injunction restoring Tenant to possession of the premises. Defendants oppose Plaintiffs' motion to amend, arguing that the proposed amended complaint is palpably improper—given Tenant's surrender of the Premises. Defendants cross-move arguing that, in the event that the Court grants Plaintiffs' motion to amend, the Court should dismiss the Complaint with prejudice pursuant to CPLR 3211 (a) (1), (5) and (7). Defendants further cross-move for costs and fees, arguing that the motion to amend is frivolous pursuant to 22 NYCRR § 130-1.1 (a).

As will be discussed below, the motion to dismiss the 3PC (Seq. 004) is granted; the motion to amend (Seq. 005) is granted in part and denied in part, and Defendants' cross-motion to the motion to amend (Seq. 005) is denied.

### DISCUSSION

This Court will first discuss Plaintiffs' motion to amend its complaint along with Defendants' cross-motion (Seq. 005), and then it will discuss Plaintiffs' motion to dismiss the 3PC (Seq. 004).

#### I. Plaintiffs' Motion to Amend and Defendants' Cross-Motion (Seq. 005)

CPLR 3025 (b) provides as follows:

“A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

“As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017] [holding that leave should be granted “absent prejudice or surprise resulting therefrom”].) “[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] citing *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008].)

Most significantly and of greatest concern to Landlord, Tenant seeks to amend its complaint to add a cause of action for “a mandatory injunction directing Defendants to comply with the LOI, Side Letter and Rent Reduction Agreement, and upon such compliance, restore Tenant to possession of the Premises for the balance of the lease term.” (Affirm in Supp. of Seq. 005, Ex. B [Proposed Am. Compl.] ¶ 61.)

The elephant-sized problem with the Plaintiffs’ motion is that Tenant incontrovertibly surrendered possession of the premises pursuant to the so-ordered Surrender Stipulation. In their three-page memorandum in support, Plaintiffs hardly address the problem posed by their surrender except to say:

“In light of the Order of Justice Kalish, dated September 13, 2018, a copy of which is annexed to the Amended Verified Complaint as Exhibit 4, pursuant to which both parties reserved ‘all of their respective rights, claims and defenses concerning any alleged breach of the aforesaid agreements’, Defendants cannot credibly claim that they have been prejudiced or surprised in any way.”

(Memo in Supp. of Seq. 005 at 2 [emphasis added].) That is to say, it would appear that Tenant’s position on this motion is that, notwithstanding the language of the stipulation—stating that Tenant surrendered possession, that Landlord accepted, and that “the parties hereby agree that all agreements between Landlord and Tenant concerning the Premises ... have been terminated by reason of Tenant’s surrender of the Premises and that there are no continuing obligations between the Landlord and Tenant concerning the Premises ...”—the inclusion of a “reservation of rights” meant that Tenant’s surrender was meaningless and that Tenant could assert a right to retake possession for the remainder of the lease at any time.

The Court rejects Plaintiffs’ argument as without merit. As a general and well-established rule, when a landlord accepts a tenant’s surrender of the premises, the lease is terminated. (*See* 74A N.Y. Jur. 2d Landlord and Tenant § 921; *Underhill v Collins*, 132 NY 269, 271 [1892].) The landlord’s acceptance of the surrender can occur by the landlord’s express acceptance or by “operation of law” when “the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated, and can be inferred from the conduct of the parties.” (*Wasserman v Ewing*, 270 AD2d 427, 428 [2d Dept 2000].) That Plaintiffs fail to offer a single case for the proposition that a tenant can be restored to possession after a landlord’s acceptance of surrender is telling. Moreover, Plaintiffs’ argument that they somehow reserved the right to retake possession based on a reservation of rights is misguided.

First and foremost, for the Court to read such a right into the Surrender Stipulation would produce an absurd result: it would read the Surrender Stipulation as there not being a surrender of the leasehold rights by Tenant and an acceptance of the surrender by Landlord.

Second, in the relevant portion of the agreement, the parties reserved their respective “rights, claims, remedies and defenses as currently asserted in this action and as may hereafter be asserted, including, but not limited to, the effective date of Tenant’s surrender and Landlord’s claim for unpaid rent and additional rent, among other claims, and Tenant’s claim for damages,

among other claims.” Nowhere in this reservation of rights is there a hint that Tenant had any inclination to assert a right to the very possession rights it explicitly gave up in the so-ordered Surrender Stipulation.

Third, for this Court to read the stipulation as allowing Tenant to assert a claim to retake possession, this Court would create a dangerous precedent that a mere “reservation of rights” in an agreement to accept a surrender of the lease means that there has not in fact been a surrender.

For all these reasons, the Court finds that the branch of Plaintiffs’ motion seeking to amend the complaint to assert ongoing rights of possession is palpably insufficient and clearly devoid of merit. (*Williams v 268 W. 47th Rest. Inc.*, 160 AD3d 436, 437 [1st Dept 2018].) Were the Court to allow such amendment, it would then grant Defendants’ cross-motion to dismiss this branch of the amended complaint on the grounds that Plaintiffs’ are barred from asserting such claims by the Surrender Stipulation pursuant to CPLR 3211 (a) (1) and (5). Furthermore, allowing Plaintiffs to amend the complaint would cause significant prejudice to Defendants, as the parties agreed, as a condition of the Surrender Stipulation, to delete the provision of the June 28, 2018 order requiring full, ongoing payment of the monthly base rent.

Notwithstanding that the Court denies Plaintiffs leave to amend to assert possession rights as an ongoing tenant – after the date of the surrender – it appears that Plaintiffs also seek leave to amend their claims for monetary damages under the various claims for breaches of contract. For example, Plaintiffs seek to amend the amount of money that they claim to have “sunk” into the leasehold—from \$7,000,000 to \$12,000,000. The Court finds that these proposed amendments—that do not assert leasehold rights after the date of surrender—are not palpably improper or clearly devoid of merit.

As such, to the extent that Defendants assert that the Court should deny the branch of Plaintiffs’ motion seeking to update their claims for monetary damages because Plaintiffs waited too long to amend or because Plaintiffs did not include a redlined version of the proposed complaint until their reply papers, this Court rejects those arguments. The Court finds that the amendments which relate exclusively to Plaintiffs’ causes of action for monetary damages do not prejudice Defendants.

Accordingly, Plaintiffs are granted leave to amend the complaint to update their claims for monetary damages, but the branch of Plaintiffs’ motion to assert a cause of action to be restored to possession of the Premises is denied.

Lastly, the branch of Defendants’ cross-motion for sanctions, pursuant to 22 NYCRR § 130-1.1 (c) is denied.

## **II. Motion to Dismiss the 3PC Seeking to Pierce the Corporate Veil (Seq. 004)**

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, “the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Peery v United Capital*

*Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law." (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

When considering a CPLR 3211 (a) (1) motion to dismiss, where a defense is founded upon documentary evidence, dismissal "is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law." (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626–27 [1st Dept 2017] [internal citations omitted].)

"The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence."

(Id.)

"The party seeking to pierce the corporate veil bears the heavy burden of showing 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." (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016] [internal quotation marks omitted] *affd*, 31 NY3d 1002 [2018]; *see also Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012] ["New York law disfavors disregard of the corporate form.].) "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998].) Although the determination of whether to pierce the corporate veil is often said to be a "fact laden inquiry," nonspecific or conclusory allegations without reference to particularized factual assertions are insufficient to sustain claims based on alter ego liability. (*See Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 49 [2018]; *2001 Real Estate Space Catalyst, Inc. v Stone Land Capital, Inc.*, 2019 N.Y. Slip Op. 30155[U], at 8 [Sup Ct, New York County 2019] [Crane, J.]

Although Landlord points to certain indicia of domination, this Court need not consider whether Landlord has sufficiently alleged sufficient domination of Tenant by Jenel because the 3PC fails to sufficiently allege the second element for piercing the veil – the perpetration of a fraud or wrong.

The complaint alleges three purported "wrongs" perpetrated by Jenel through Tenant. The first is that Joseph—who according 3PC is both a principal of Tenant and Jenel—upon

learning of the impending death of Landlord's principal Sheldon, pressured Sheldon into providing Tenant with \$77,777.56 rent "kickbacks" for the months of September and October respectively.

The second wrong alleged is that—after making the outstanding payments up to June 28, 2018—Jenel caused Tenant to stop paying rent and surrender possession of the premises to Landlord, with Landlord accepting Tenant's surrender pursuant to the so-ordered Surrender Stipulation.

The third purported wrong is that Jenel is funding the instant litigation on behalf of Plaintiffs "to pressure Landlord into selling the Premises to Jenel, and to disrupt Landlord's ability to sell the Premises to any other potential buyer." (Memo in Opp. at 9; 3PC ¶¶ 47-49.) According to Landlord, Joseph called Christina in August 2018 and stated, "Just who do you think is going to buy Bridgemarket when there is an ongoing lawsuit." (3PC ¶ 48.)

These first two purported wrongs pertain to issues of potential contractual liability between Landlord and Tenant, as alleged, and are not acts which would justify this Court in disregarding the corporate form "to prevent fraud or to achieve equity." (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140 [1993].) That is to say, they do not satisfy the "fraud or wrong" element for veil piercing.

At most, the 3PC alleges that Jenel dominated and controlled Tenant and therefore Jenel should be held liable for Tenant's breaches of contract with Landlord. However, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil." (*Skanska USA Bldg. Inc. v Atl. Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016], *affd*, 31 NY3d 1002 [2018]; *see also Kahan Jewelry Corp. v Coin Dealer of 47th St. Inc.*, 173 AD3d 568, 569 [1st Dept 2019] [affirming summary judgment to alter ego defendant where plaintiffs failed to show that said defendant's "domination was abused in order to commit a fraud against plaintiffs, apart from the alleged breach of contract, which does not constitute a wrong warranting piercing the corporate veil"].) There are no factual allegations to support a finding that Jenel caused these breaches for its own personal gain or that Jenel caused Plaintiffs to enter into these transactions for the purposes of harming Defendants. (*See JTS Trading Ltd. v Trinity White City Ventures Ltd.*, 139 AD3d 630, 631 [1st Dept 2016]; *Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 41 [1st Dept 2012]; *compare Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 49 [2018] [allowing veil piercing claims against investor defendants to proceed where complaint sufficiently alleged that said defendants, "used their control of the corporate form for the unlawful purpose of intentionally divesting the corporate assets through fraudulent conveyances, under the guise of dividends and redemptions, which in turn rendered these companies insolvent and unable to pay their creditors"].)

Landlord argues that the 3PC "adequately alleges that Jenel used their domination and control over the Tenant to participate in a fraudulent scheme to denude Tenant of its assets in order to make it judgment proof, and render it unable to honor and pay its obligations under the Lease to Landlord." (Memo in Opp. at 15.) This argument however is belied by the documentary evidence, including the pleadings, in-court statements and the Surrender Stipulation. Rather, the documentary evidence shows incontrovertibly that Landlord and Tenant

were both sophisticated commercial entities that negotiated at arms-length through sophisticated counsel. It is beyond credulity that Landlord did not understand that Tenant was organized as a single-purpose entity whose sole asset would be its leasehold rights.<sup>2</sup> If Landlord had concerns about Tenant becoming judgment proof, it could have negotiated for a guaranty of the lease by a more liquid party—like Jenel—or it could have negotiated for a larger deposit. Instead, Landlord chose to pursue other interests in negotiations, such as an increase in the base rent.

Perhaps, Landlord chose not to pursue such in negotiations because it knew that if Tenant breached the lease terms, Landlord could potentially evict Tenant and thereby acquire Tenant's leasehold rights—which Plaintiffs paid \$4,000,000 to acquire. Ironically, Landlord essentially acquired Tenant's leasehold rights when Tenant surrendered possession of the premises on July 2, 2018. Landlord now complains that it seems unlikely that it will be able to collect on a judgment in the event that it prevails in this action. This supposed predicament is not a basis to pierce the corporate veil.

Lastly, with regard to Landlord's argument that Jenel is funding the instant lawsuit on Plaintiffs' behalf to pressure Landlord into selling the Premises to Jenel, that is not a sufficient basis to pierce the corporate veil. As a preliminary matter, it bears noting that the 3PC was filed before Plaintiffs' motion to amend, wherein Plaintiffs sought to be restored to possession of the Premises—which Defendants have successfully argued lacks merit. As such, as a sophisticated commercial entity advised by sophisticated counsel, Defendants should have known that, after Tenants' surrender, the litigation only pertained to claims for monetary damages based on alleged breaches of contract and a purported oral modification of the lease terms—the litigation did not concern any claims to property interests in the Premises. Moreover, this apparent "pressure" that Landlord may have felt is not a cognizable injury and providing funding for Plaintiffs to pursue their aforesaid breach of contract claims hardly satisfies the "fraud" or "wrong" element for piercing the corporate veil.

## CONCLUSION

ACCORDINGLY, it is hereby

ORDERED that the motion (Seq. 004) of Plaintiffs D2D Holdings LLC and D2D Bridgemarket LLC and Third-Party Defendant Jenel Management Corp., pursuant to CPLR 3211, is granted and the third-party complaint is dismissed in its entirety as against Jenel Management Corp., with costs and disbursements to said Third-Party Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Third-Party Defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal of the third-party action and that all future papers filed with the court bear the amended caption; and it is further

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<sup>2</sup> "This Court notes, parenthetically, that the use of single purpose entities for real estate transactions is not only permitted under New York law, but is very common." (*First Sterling Corp. v Union Sq. Retail Tr.*, 2012 N.Y. Slip Op. 33378[U] [Sup Ct, NY County 2012] [Kapnick, J.], affd, 102 AD3d 490, 490 [1st Dept 2013].)

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within twenty (20) days of the date of this order, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that that the motion (Seq. 005) of Plaintiffs D2D Holdings LLC and D2D Bridgemarket LLC, pursuant to CPLR 3025, is granted, in part, to the extent that Plaintiffs are given leave to amend their claims for monetary damages only, and that the remainder of the motion is denied; and it is further

ORDERED that the cross-motion (Seq. 005) of Defendants Bridgemarket Associates, LP and Bridgemarket Associates Management Inc., pursuant to CPLR 3211 and 22 NYCRR § 130-1.1, is denied; and it is further

ORDERED that the balance of this action shall continue.

This constitutes the decision and order of the Court.

8/06/2019  
DATE

*Robert D. Kalish*  
HONORABLE ROBERT D. KALISH  
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	