SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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MILLTEX DISTRIBUTORS, LLC,

Plaintiff,

- v -

CAMERON STEWART, INC. and CAMERON STEWART

Defendants.

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INDEX NO. 650260/2017

MOTION DATE 11/02/2018

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The plaintiff in this breach of contract action, Milltex Distributors LLC (Milltex), seeks to recover unpaid rent under a commercial lease agreement with defendant Cameron Stewart, Inc. (Stewart, Inc.), and the corporation's president, Cameron Stewart. The defendants move for summary judgment pursuant to CPLR 3212 seeking to dismiss all claims against Stewart individually. Milltex opposes the defendants' motion and cross-moves for summary judgment on the complaint as against both defendants, relying on the principle of piercing the corporate veil in regard to Stewart. The defendants' motion is denied. The plaintiff's cross-motion is granted as to the corporate defendant.

It is well settled that the proponent of a motion for summary judgment pursuant to CPLR 3212 must establish its entitlement to such relief as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad

v New York University Medical Center, supra; O'Halloran v City of New York, supra. This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In December 2004, Stewart Inc. entered into a commercial lease with Milltex for a lease term from January 2005 through December 2011 at an annual rent of $145,200. Cameron Stewart signed the lease as President of Cameron Stewart, Inc. No personal guaranty was signed. In November 2011, Stewart, Inc. entered into a lease extension with Milltex through December 2016 at an annual rent of $167,715. Cameron Stewart again signed as President of the corporation. Laura Belt signed as Vice-President of Widgeon Management Corp., property manager and agent for Milltex. In June 2016, the corporation was dissolved and the assets sold for $75,000. In August 2016, Stewart, Inc. stopped paying rent and abandoned the premises, several months prior to the expiration of the lease term.

First, the plaintiff has met its burden on the cross-motion as to the corporate defendant by submitting proof in admissible form to establish a breach of contract and lack of any defenses by that defendant. The plaintiff's proof includes the pleadings, the subject lease and lease extension, deposition testimony of Stewart, and an affidavit by Laura Belt Ponomarev. The plaintiff's proof establishes the elements of a breach of contract claim: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendants' breach of that contract, and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425 (1st Dept. 2010). The defendants raise no triable issue as to this branch of the motion. Indeed, the defendants concede that the corporation breached the lease, vacated the premises before expiration of the lease term and left an unpaid balance. Their opposition to the plaintiff's cross-motion consists merely of an affirmation of their attorney. Since plaintiff's counsel claims no personal knowledge of the underlying facts, the contents of his affirmation are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010).

As to damages, however, the plaintiff's submissions fall short of establishing the precise nature and amount of damages. While the complaint seeks "no less than $93,796.43" in total

damages, and the plaintiff is clearly entitled to recover unpaid rent from the corporate lessee, the motion papers do not establish any particular amount for unpaid rent, unpaid additional rent and/or any other category of damages. Thus, the amount of damages must be established at a trial or inquest.

As to defendant Cameron Stewart, neither party has established entitlement to summary judgment on their respective motions. Ordinarily, a corporation exists independently of its owners, as a separate legal entity, and its owners are not liable for the actions of the corporation. See Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135 (1993). The doctrine of piercing the corporate veil is a limitation to this rule, "typically employed by a third party seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation." Id. "Piercing the corporate veil requires a 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." Ciavarella v Zagaglia, 132 AD3d 608, 608-609 (1st Dept. 2015) (quotation and citation omitted); see also Fantazia Int'l Corp. v CPL Furs New York, Inc., 67 AD3d 511 (1st Dept. 2009). "[U]ndercapitalization of a corporation and the corporation's owner's personal use of corporate funds, which results in the corporation's being unable to pay a judgment, constitute wrongdoing and injury sufficient to satisfy the second prong of [Matter of Morris v New York State Dept. of Taxation & Fin., supra.]" Ciavarella v Zagaglia, supra at 609. However, a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil. See Skanska USA Bldg., Inc. v Atalntic Yards B2 Owner LLC, 146 AD3d 1 (1st Dept. 2016); Bonacasa Realty Co., LLC v Salvatore, 109 AD3d 946 (2nd Dept. 2013); Treeline Mineola, LLC v. Berg, 21 AD3d 1028 (2nd Dept. 2005). Finally, since a fact-specific analysis is necessary when determining whether to pierce the corporate veil, summary judgment is generally not appropriate. Emposimato v CICF Acquisition Corp., 89 AD3d 418, 420 (1st Dept. 2011); see First Bank of Ams. v Motor Car Funding, Inc., 257 AD2d 287, 294 (1st Dept. 2008).

In seeking dismissal of the complaint as against Cameron Stewart, the defendants rely upon an affidavit of Stewart and the deposition testimony of Laura Belt Ponomarev. The crux of their argument is that Stewart was never a party to the lease and did not personally guarantee the lease. While that is factually accurate, the defendants miss the mark. The plaintiff is not alleging that Stewart was a party to the lease or that he signed a personal guaranty. Rather, the

plaintiff is proceeding under the principle of piercing the corporate veil. In that regard, the deposition testimony of Stewart, submitted by the plaintiff, establishes that the corporation was formed solely by Stewart, Stewart was the sole shareholder of the corporation, the corporation had no corporate officers or board of directors, the corporation never made corporate resolutions for any of its acts, including the ultimate sale of assets and distribution of the sale proceeds, and that Stewart unilaterally decided to vacate the premises and "stop paying rent." That deposition, together with the deposition testimony of Laura Belt Ponomarev, and her affidavit, which was submitted by the plaintiff, indicate that Stewart exercised complete domination over the corporation. Ponomorev represents that during the years she was managing agent, all communications and transactions with the corporate tenant went through Stewart only. Ponomarev testified that, although the defendant company had employees, she could not speak to them but "could only deal with Cameron Stewart personally" and "was not allowed to discuss anything without Cameron Stewart." She also testified that notices were sent to him personally at home and not to the corporation. One of those notices was submitted by the defendants in support of their motion.

While the proof submitted shows that Stewart exercised complete domination over the corporation, it falls short of establishing as a matter of law that such domination was used to commit a fraud or wrong against the plaintiff warranting piercing of the corporate veil. In that regard, Milltex maintains that the corporation was undercapitalized and that Stewart fraudulently transferred its assets. See Matter of Morris v New York State Dept. of Taxation & Fin., supra; Ciavarella v Zagaglia, supra. However, in support of that contention it provides nothing more than Stewart's testimony that the proceeds of the sale of the corporate assets were used to pay other unspecified existing debts. Although Stewart's counsel limited further inquiry on that issue, the plaintiff had a full opportunity to seek discovery and represented at the compliance conference on April 19, 2018, that all discovery was, in fact, complete. Nor has the plaintiff shown that Stewart's decision to breach the lease constituted the type of fraud or wrongful act necessary to pierce the corporate veil. Indeed, as stated previously, a mere breach of contract, without more, does not constitute a fraud or wrong warranting application of that principle. See Skanska USA Bldg., Inc. v Atalntic Yards B2 Owner LLC, supra.

Therefore, the parties' submissions present a triable issue, *inter alia*, as to (1) whether by undercapitalization, fraud or other wrong, Stewart caused injury to the plaintiff such that he

may be held liable for the corporation's breach of contract and, (2) what damages are owed to the plaintiff.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is denied; and it is further,

ORDERED that the plaintiff's cross-motion for summary judgment is granted to the extent that summary judgment is awarded to the plaintiff and against defendant Cameron Stewart, Inc., on the issue of liability on the cause of action for breach of contract, damages to be determined at trial or inquest, and the cross-motion is otherwise denied; and it is further,

ORDERED that the plaintiff and defendant Cameron Stewart shall appear for a status/settlement conference in Part 42 on December 12, 2019, at 9:30 a.m. and bring a copy of this order to the conference, and it is further

ORDERED that the parties shall appear at the conference by counsel with full settlement authority, unless a Stipulation of Discontinuance is filed *prior* to that date.

This constitutes the Decision and Order of the court.

10/10/2019
DATE

NANCY M. BANNON, J.S.C.

HON. NANCY M. BANNON

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE