SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

----------X

INDEX NO. 651200/2015

MOTION SEQ. NO. 008, 009

W. & M. OPERATING, L.L.C.,

Plaintiff,

- v -

JON BAKHSHI, FRANK PORCO, JOHN BEST, TIMOTHY RUGISFORD,

DECISION & ORDER ON MOTION

Defendants.

----------X

FRANK PORCO,

Third-Party
Index No. 595102/2017

Plaintiff,

-against-

150 RFT VARICK CORP., LINA KAY, BARRY MULLINEAUX, JED STILLER, HIROKUNI SAI, LARRY HUGHES, G166NY, LLC, LDH INVESTMENTS LIMITED PARTNERSHIP

Defendants.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 284, 285, 286, 287, 290, 291, 292, 293, 294, 295, 296

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335

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

Motions sequence numbers 008 and 009 are consolidated for disposition.

Third-party defendant Barry Mullineaux moves for summary judgment and for sanctions (seq. 008). Third-party plaintiff Frank Porco moves for summary judgment against Mullineaux and for "an order pursuant to CPLR 3025(c) permitting the amendment

of the pleadings to conform with the evidence on the record" (Dkt. 251). Mullineaux's motion is granted in part and Porco's motion is denied.

In his third-party action, Porco seeks to recover from Mullineaux, a former President and shareholder of 150 RFT Varick Corp. (the Company), money that Mullineaux allegedly caused the Company to pay himself first instead of paying certain guaranteed payments and the Company's rent, asserting that Mullineaux breached § 4.1 of the Company's shareholders agreement and that the payments to him are fraudulent conveyances pursuant to §§ 273 and 276 of the New York Debtor and Creditor Law (the DCL) (*see* 2019 Decision at 2).[1] These parties now move for summary judgment against one another.

Through discovery, it has come to light that the vast majority of the disputed payments were not made to Mullineaux personally, but rather to two companies that he wholly owns and controls, Perk Ventures, Inc. (Perk) and BTM Ventures, Inc. (BTM) (*see* Dkt. 297 at 6 [less than $25,000 paid to Mullineaux; approximately $350,000 paid to his companies]). Porco moves to hold Mullineaux personally liable, maintaining that the non-parties are "merely vehicles used by the Defendant to perpetrate fraud upon the creditors" of the Company and that Mullineaux exercised total dominion with respect to the transactions at issue to perpetrate a fraud against Porco that resulted in Porco's injury (*id.* at 25). Porco argues that if the court does not "pierce the corporate veil" and hold

[1] The facts are more fully set forth in two earlier decisions (Dkt. 129 [the 2018 Decision], Dkt. 200 [the 2019 Decision]). The breach-of-contract claim based on section 4.2 was only permitted to be asserted against the Company, and not against Mullineaux (2018 Decision at 11-12, 19; *see* 2019 Decision at 2).

Mullineaux liable for the payments Perk and BTM received then the pleadings should be conformed to add Perk and BTM as third-party defendants (*id.* at 26-27).

Veil piercing on this record is not an option for many reasons. To start, the entities have not been named as defendants or served and there is no pleading that alleges the non-party entities' veils should be pierced. Porco would have this court dispense with all of these requirements simply based on his summary-judgment submissions. In these submissions, he has not sufficiently asserted a basis for veil piercing for the very same reasons his initial veil-piercing claim failed; domination without corporate form abuse and fraud is inadequate (*TNS Holdings, Inc. v MKI Secs. Corp.*, 92 NY2d 335, 339 [1998]; *see* March 2018 Decision at 12-14). Porco again does not satisfy the fraud prong with proof of wrongdoing distinct from the underlying claim (*see* 2018 Decision at 13). Whether Mullineaux misused his position at the Company has nothing to do with potential abuse of the corporate form of his other companies, Perk and BTM. DCL and veil piercing claims are not the same, the former being more easily proven when, as alleged here, a transfer is made to an insider's company from an insolvent company (*see Matter of Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004], citing *Matter of P.A. Bldg. Co. v Silverman*, 298 AD2d 327, 328 [1st Dept 2002]).[2]

Porco may well have viable DCL claims against Perk and BTM, who would have to be proper defendants for there to be any relief. Indeed, DCL claims can only be asserted

[2] Though Porco's initial veil-piercing claim related to the Company as opposed to Mullineaux's companies Perk and BTM, the analysis is no different and he is reminded again to address the problems highlighted in the March 2018 Decision (and reemphasized in the 2019 Decision, at 2 n 3); otherwise, he cannot obtain the relief sought.

against transferees and not the individual who aided and abetted the conveyance (*Stillwater Liquidating LLC v CL Recovery Trading Fund III, L.P.*, 2019 WL 5266843, at *5-6 [Sup Ct, NY County Oct. 17, 2019] [collecting cases]; *see Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]).[3] Accordingly, the DCL claims based on payments to Perk and BTM are dismissed as against Mullineaux.

Nor is this a simple matter of expediently conforming the pleadings to the proof pursuant to CPLR 3025(c).[4] The proper DCL defendants, who must appear by counsel (*see* CPLR 321[a]), have not been named in a supplemental summons or pleading. Nor have they been served. Nor have they answered or opposed summary judgment. CPLR 3025(c)--usually invoked at trial and under circumstances when there would be no prejudice to present parties--is not an end run around proper procedure and pleading. Porco may move to amend to assert his DCL claims so long as he follows the CPLR (for example,

[3] Porco does not argue that any exception to this rule applies.

[4] CPLR 3025(c) ordinarily is invoked to modify claims and defenses between existing parties at trial, when a new exchange of pleadings does not occur (*see Reed v City of New York*, 304 AD2d 1, 9 [1st Dept 2003]). Pre-trial motions to amend, especially ones seeking to add new parties, are governed by CPLR 3025(b) and 305(a) (*see Ness Tech. SARL v Pactera Tech. Intl. Ltd.*, 180 AD3d 607 [1st Dept 2020]), including on summary judgment (*see B & H Fla. Notes LLC v Ashkenazi*, 149 AD3d 401, 402 [1st Dept 2017]). Otherwise, CPLR 3025(c) would be an exception that swallowed the rule, effectively obviating the requirement to submit a proposed pleading (*see Dragon Head LLC v Elkman*, 102 AD3d 552, 553 [1st Dept 2013]). Porco's motion should also indicate whether the note of issue should be vacated or that additional discovery from the new defendants is unnecessary. Before making such a motion, Porco shall provide Mullineaux with a proposed pleading (which, of course, shall not contain any previously dismissed claim) and Mullineaux shall inform Porco if he consents to the amendment, which would obviate the cost of a motion that seems likely to be granted. To the extent Mullineaux is inclined to argue that his summary judgment arguments concerning certain DCL elements militate against amendment, aside from the liberal standard for amendment being lower than summary judgment (*see MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499 [1st Dept 2010]), suffice it to say that Mullineaux has not eliminated all material questions of fact.

a proposed amended pleading must accompany the motion). Perk and BTM, which only recently came to light as potential defendants based on discovery that Mullineaux produced, may then appear through counsel and defend.[5]

The breach-of-contract claim against Mullineaux, based on the requirement that rent be paid "before any profits are distributed to the Shareholders" (Dkt. 71 § 4.1), is dismissed. Porco did not submit any proof of payment of profits to Mullineaux. Instead, he identified compensation and reimbursement that arguably should be deemed fraudulent conveyances due to the Company's insolvency and the lack of fair consideration. Porco does not even argue that the payments should be construed as profits. He merely contends they are violative of the DCL (*see* Dkt. 297 at 24-25) and DCL liability can be predicated on any insider payments made prior to payment of the "Guaranteed Payments" governed by § 4.2. Those DCL claims remain.[6]

Ultimately, Mullineaux himself faces less than $25,000 of liability compared to the approximately $350,000 faced by Perk and BTM. The parties are urged to discuss

[5] If the case proceeds against Perk and BTM, Porco may seek discovery from the witnesses who submitted affidavits in opposition to his motion. Given the posture of this case, documents that Mullineaux relied on in opposition that were not produced in discovery will not be precluded. Though preclusion is denied at this time, Mullineaux and any new counsel are cautioned that there will be consequences for failure to follow discovery orders and they should be guided accordingly as the action proceeds.

[6] The parties do not address whether Porco also qualifies as an insider at the time of some or all of the subject transfers, raising the question of whether controlling and non-controlling insiders have *pari passu* priority under DCL § 273.

settlement in light of this reality, as more litigation and potential enforcement proceedings could weigh them down for years (*see* Dkt. 257).[7]

Porco's claims, which were all addressed in the March 2018 Decision, are not frivolous and there is no basis for sanctions.

Accordingly, it is ORDERED that Porco's motion for summary judgment is denied and his motion to conform the proof to the pleadings is denied without prejudice to a proper motion to amend, which shall be made by November 30, 2020 unless the parties stipulate to extend this deadline to facilitate settlement discussions; and it is further

ORDERED that Mullineaux's motion for summary judgment is granted only to the extent that Porco's claim against Mullineaux for breach of section 4.1 and the portion of the DCL claims concerning transfers not made to Mullineaux personally are dismissed, and the balance of his summary judgment motion and his motion for sanctions are denied; and it is further

ORDERED that Porco shall provide the court with a status update by email by December 3, 2020, which shall address all of his remaining claims.

20201030160250JSCHECTE4388D73AFEE9B4CFBA252421E28AA2D85

10/30/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:		CASE DISPOSED	X	NON-FINAL DISPOSITION	
SEQ. 008	X	GRANTED IN PART			OTHER
SEQ 009	X	DENIED			

[7] The parties are commended for their civility during the pandemic. Hopefully, this spirit of cooperation will extend to real settlement discussions as resolution and finality would benefit them both. While Porco may feel that the facts are on his side, the legal issues, as should be evident from each of the court's decisions, are more complicated than the parties appreciate. Settlement, perhaps with the involvement of a mediator, is highly encouraged.