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| <b>Totaram v SDSDM, LLC</b>  |
| 2020 NY Slip Op 33788(U)   |
| August 3, 2020   |
| Supreme Court, Schenectady County  |
| Docket Number: 2019-1137   |
| Judge: Michael R. Cuevas   |
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STATE OF NEW YORK

SUPREME COURT

COUNTY OF SCHENECTADY

**PRESENT: HON. MICHAEL R. CUEVAS**  
**JUSTICE OF THE SUPREME COURT**

DHARAMDEO TOTARAM and his wife,  
 DANIELLA TOTARAM,

**DECISION AND ORDER**

Plaintiffs,

Index No.: 2019- 1137

RJI No.: 46-1-2020-0254

-against-

SDSDM, LLC, ADESH BUDHRAJ, DEBORAH  
 BUDHRAJ, and CARRIBEAN FAST CASUAL, INC.  
 1133 Ardsley Road, Schenectady, New York 12308, and

TROPICS RESTAURANT & BAR  
 201 South Brandywine Avenue, Schenectady, New York  
 12307

Defendant.

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**NOTICE:**

**PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103 (B)(2) OR 2103 (B)(6), THE ADDITIONAL DAYS PROVIDED SHALL APPLY, REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.**

**APPEARANCES:**

Dennis M. Englert, Esq. (Attorney for Plaintiffs)

Lawrence A. Kirsch, Esq., Gerald Weinberg, P.C. (Attorney for Defendants)

**MICHAEL R. CUEVAS, J.**

Defendant Deborah Budhraj, Adesh Budhraj, individuals, and SDSDM LLC, a limited liability company ("Defendants"), move this Court to dismiss the action on the basis that they are not proper parties and should not have been named as defendants in this

action. While Defendants do not specifically identify what civil procedure provision they seek to dismiss under, this Court will evaluate whether Plaintiffs survive *CPLR Section 3211 (a) (7)* scrutiny. Dharamdeo Totaram and Daniella Totaram (“Plaintiffs”) filed this action, along with a second action, due to the actions of a security guard employed by Caribbean Fast Casual, Inc. (“Caribbean”). Plaintiffs withdrew the action against SDSDM, LLC in their opposition. *Englert Aff. ¶8*.

### **BACKGROUND**

Plaintiffs’ allege that Defendants, along with Caribbean Fast Casual, Inc., are the owners of the premises known as Tropics Restaurant and Bar. *Amended Complaint, ¶12*.<sup>1</sup> The Amended Complaint, filed on July 26, 2019, alleges that Defendants were negligent and failed to properly hire, train, and supervise their employees, among other allegations. *Amended Complaint, ¶¶7-22*. Plaintiffs also claim vicarious liability in their Opposition, but this was not specifically outlined in their Amended Complaint. *Englert Aff. ¶8*.

On September 15, 2018, Plaintiffs were at Tropics, when they were injured by an employee of the restaurant/bar. *Amended Complaint, ¶¶12-22*. Specifically, they allege that Plaintiff Dharamdeo Totaram sustained physical and mental injuries, and has been permanently injured as a result of being assaulted by that employee. *Amended Complaint, ¶¶17-18, 20*. Plaintiffs seek loss of consortium damages for Daniella Totaram as the wife of Plaintiff Dharamdeo Totaram. *Amended Complaint, ¶¶23-25*.

Caribbean Fast Casual, Inc., was incorporated with the New York State Secretary of State (“DOS”) on January 19, 2020. *Kirsch Aff. ¶4, Ex. D*. The DOS corporate website indicates that Deborah K. Budhraj is the CEO of Caribbean. *Kirsch Aff. ¶4, Ex. D*. Caribbean corporation runs the Tropics Restaurant and Bar under a DBA, and is used only for this purpose. *Kirsch Aff. ¶¶4, 5, Ex. D; Englert Aff. ¶4*. The officers of Caribbean

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<sup>1</sup>Exhibit D, attached to the Kirsch Affidavit, paragraph 4, is a Department of State Public Inquiry System print out, which establishes that Deborah K. Budhraj is the identified Chief Executive Officer of Caribbean Fast Casual, Inc. There are no documents submitted on either the motion to dismiss, or opposition, establishing that Adesh Budhraj was an officer in the corporation.

acted within their corporate capacity. *Kirsch Aff.* ¶¶4, 5, 8, *Ex. D.* SDSDM, LLC, held title to the premises where Caribbean is located. *Kirsch Aff.* ¶6.

**I. DISMISSAL UNDER CPLR SECTION 3211 (a) (7)**

A motion to dismiss is warranted where a pleading is defective on its face, and fails to state a cause of action under the law. *CPLR §3211 (a)(7)*. A motion to dismiss may be made even against a claim that is perfectly plead. The Court must accept the facts alleged in the complaint as true, provide plaintiff the benefit of every possible favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory. *Torok v. Moore's Flatword & Founds, LLC*, 106 A.D. 3d 1421 (3d Dept. 2013); *Sokol v. Leader*, 74 A.D. 3d 1180 (2d Dept. 2010). The standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268 (1977).

Plaintiffs' Amended Complaint alleges a negligence cause of action against all Defendants. The allegations against the individual Defendants' include: negligent training, negligent supervision, negligent maintenance, and negligent hiring. As officers, directors, or board members of the corporation defendant, an individual can only be held liable under the doctrine of piercing the corporate veil. In the Amended Complaint at issue, there are no allegations or facts plead to support a cause of action against the individual Defendants under the piercing the corporate veil doctrine.

**II. TO ESTABLISH INDIVIDUAL LIABILITY PLAINTIFF MUST PLEAD FACTS TO SHOW THE COURT SHOULD PIERCE THE CORPORATE VEIL**

A corporation exists independently of its owners, who are not personally liable for its obligations, and individuals may incorporate for the express purpose of limiting their liability. *Matter of Franklin St. Realty Corp. V. NYC Env'tl. Control Bd.*, 34 N.Y. 3d 600 (2019); *Bartle v. Home Owners Coop.*, 309 N.Y. 103 (1955). However, under certain circumstances the court can impose personal liability on corporate owners for the

obligations of their corporation under the piercing the corporate veil theory.<sup>2</sup> *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y. 2d 135, 140-141 (1993).

Piercing the corporate veil requires a showing that the individual defendants exercised complete domination and control to commit a fraud or wrong against the plaintiff, which resulted in an injury. *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y. 3d 30 (2018); *Morris*, 82 N.Y. 2d, at 140-141. Under the doctrine, "[e]quity will intervene to pierce the corporate veil' and permit the assertion of claims against the individuals who control the corporation, in order to avoid fraud or injustice." *James v. Loran Realty Corp.*, 20 N.Y. 3d 918 (2012); *Island Seafood Co. v. Golub Corp.*, 303 A.D. 2d 892 (3d Dept. 2003). The First Department has found that a plaintiff seeking to pierce the corporate veil must allege, with the requisite "particularized statements detailing fraud or other corporate misconduct", facts that would warrant piercing the corporate veil. *Sheridan Broadcasting Corp. v. Small*, 19 A.D. 3d 331, 332 (1<sup>st</sup> Dept. 2005); *Sheinberg v. 177 E. 77*, 248 A.D. 2d 176, 177 (1<sup>st</sup> Dept. 1998), *lv. denied* 92 N.Y.2d 844 (1998). The Second Department has found that the Complaint must not be particularized, but must contain "[s]tatements ... sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" *East Hampton Union Free School Dist. V. Sandpebble Bldrs., Inc.*, 66 A.D. 3d 122, 125 (2d Dept. 2009), *aff'd* 16 N.Y. 3d 775. The Court of Appeals has accepted a Complaint that alleged all facts and inferences drawn from them that establish the basic elements of the doctrine of piercing the corporate veil, as sufficient. *Cortlandt*, 31 N.Y. 3d, at 30.

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<sup>2</sup> However, the First and Fourth Departments have held that a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced. *Pequero v. 601 Realty Corp.*, 58 A.D. 3d 556 (1<sup>st</sup> Dept. 2009); *Wagner v. Waterman Estates, LLC*, 128 A.D. 3d 1504 (2015). The commission of a tort doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e., an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act. *Id.*

The party seeking to pierce the corporate veil must establish that the "controlling corporation [or person] abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against a party such that a court in equity will intervene." *Cortlandt, supra*, 31 N.Y. 3d 30; *Morris, supra*, 82 N.Y. 2d, at 135. "Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use." *D'Mel & Assoc. v. Athco, Inc.*, 105 A.D. 3d 451 (1<sup>st</sup> Dept. 2013); *Millennium Constr. v Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007); *Abbott v. Crown Mill Restoration Dev., LLC*, 109 A.D. 3d 1097 (4<sup>th</sup> Dept. 2013). Where the underlying action involves an assault on corporate premises, by an employee, plaintiff must allege the piercing the corporate veil theory and establish that the alleged domination of the corporate entity caused the personal injury. *Morris, supra*, 82 N.Y.2d, at 135.

Even accepting the allegations in the Complaint as true, the Complaint fails to even mention the concept of piercing the corporate veil, let alone, outline allegations and facts that support a claim that the individual Defendants should be held liable under such a theory. In their Opposition, Plaintiffs argue that since neither Caribbean nor Tropics are public companies with stock traded on an exchange and have less than 35 shareholders, they are privately held and considered "close corporations." *Englert Aff.* ¶5. Close corporations allow shareholders to act as would a general partnership in day to day operations. *Englert Aff.* ¶5. But if the shareholders step in to run the company, they retain limited liability as shareholders, but take on the fiduciary duties of directors. *Englert Aff.* ¶6. Essentially, Plaintiffs seek to hold Adesh Budhraj and Deborah Kim Budhraj liable under a failure to fulfill a fiduciary duty theory. *Englert Aff.* ¶6. Further, Plaintiffs argue that

Defendants are vicariously responsible for the acts of their employees even though it is a willful tort.<sup>3</sup> Both of these assertions fail.

Conduct constituting an abuse of the privilege of doing business in the corporate form is a material element of any cause of action seeking to hold an owner personally liable for the actions of his or her corporation. Here, nothing in the complaint suggests that the individual Defendants acted other than in his or her capacity as director, officer, or board member of the corporation, or that they failed to respect the separate legal existence of the corporation, or that any of them treated the corporate assets as their own, or that they in any other way abused the privilege of doing business in the corporate form. Moreover, there is no assertion, or support, in the Amended Complaint that either Adesh Budhraj or Deborah Budhraj were personally responsible for the alleged assault, or that they exerted complete domination over the corporation to merit liability under a theory of piercing the corporate veil.

### **CONCLUSION**

Since the Amended Complaint fails to adequately state a cause of action as against Adesh Budhraj and Deborah Budhraj, under the doctrine of piercing the corporate veil and because the plaintiff has not offered any evidence to establish or suggest that it has a cause of action against them, the Amended Complaint is dismissed as against Adesh Budhraj and Deborah Budhraj. This Court also would have granted the dismissal against SDSDM, LLC had Plaintiffs not voluntarily agreed to withdraw all claims against that entity.

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<sup>3</sup> Plaintiffs cite to *Rounds v. Delaware, L&W.R. Co.*, 64 N.Y. 129 (1876) and *Ochsenbein v. Shapley*, 85 N.Y. 214 (1881) to support their claims for vicarious liability. But these cases do not address piercing the corporate veil to hold employers liable, and as such are inapplicable to the present matter. Moreover, both cases arise out of the 1800s.

**THE COURT'S RULING**

ORDERED that the Defendants' motion to dismiss the Amended Complaint against individuals' Adesh Budhraj and Deborah Budhraj is hereby granted without prejudice;

ORDERED that Plaintiffs' Amended Complaint is hereby stricken as against Adesh Budhraj and Deborah Budhraj pursuant to CPLR 3211 (a)(7), without prejudice;

ORDERED, that Plaintiffs shall submit a Second Amended Complaint as against only Caribbean Fast Casual, Inc. within thirty (30) days of the execution of this Order;

ORDERED that this decision constitutes the Order of this Court.

Dated: August 3, 2020  
at Schenectady, New York

  
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HON. MICHAEL R. CUEVAS  
Supreme Court Justice

**ENTER:**

Papers Considered:

Motion to Dismiss

Affidavit of Lawrence A. Kirsch, Esq.

Exhibit A: Amended Summons

Exhibit B: Amended Complaint

Exhibit C: Answer

Exhibit D: DOS Corporate Print Out for Caribbean Fast Casual, Inc.

Affirmation in Opposition of Dennis M. Englert, Esq.

Reply Affidavit of Lawrence A. Kirsch, Esq.