

Citibank, N.A. v East 65th St. Owners LLC

2023 NY Slip Op 33778(U)

October 24, 2023

Supreme Court, New York County

Docket Number: Index No. 651089/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CITIBANK, N.A.,

Plaintiff,

- v -

EAST 65TH STREET OWNERS LLC, 66TH STREET UNIT OWNERS LLC, HALSEY LANE OWNERS, LLC, AMETHYST REALTY LLC, HELIUM REALTY LLC, GRAPHITE REALTY LLC, PRINCE HARRY REALTY LLC, SULFUR REALTY LLC, TURQUOISE REALTY LLC, TIGER EYE REALTY LLC, ZINC REALTY, LLC, ALEXANDRITE REALTY CORP., ALMAZ REALTY CORP., BLOODSTONE REALTY CORP., BULL CONSULTING INC., CORAL REALTY CORP., DENGHA REALTY CORP., DYLAN REALTY CORP., GRANAT REALTY CORP., IZUMRUD REALTY CORP., QUARTZ REALTY CORP., ZHEMCHUG REALTY CORP., ZOLOTO REALTY CORP., 43-05 VERNON BOULEVARD, LLC, ELLEN M. WALKER AND ETHAN GERBER AS TRUSTEES UNDER 136 EAST 65TH STREET IRREVOCABLE RESIDENCE TRUST U/A DATED OCTOBER 28, 2010, ELLEN M. WALKER AND MAMED DZHANIYEV AS TRUSTEES UNDER 200 EAST 66TH ST. RESIDENCE TRUST U/A 6/15/08, and ELLEN M. WALKER AND ETHAN GERBER AS TRUSTEES UNDER 108 HALSEY STREET IRREVOCABLE RESIDENCE TRUST U/A FEBRUARY, 2013,

Defendants.

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 340, 342, 343, 344, 345, 346, 347, 348, 349, 377, 378

were read on this motion to/for SUMMARY JUDGMENT (BEFORE JOIND)

The following e-filed documents, listed by NYSCEF document number (Motion 007) 225, 226, 227, 228, 229, 324, 325, 326, 327, 328, 329, 330, 331, 350

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 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, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 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, 332, 333, 334, 335, 336, 337, 338, 339, 341, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 379, 380, 381

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is

The issue here is whether Citibank, N.A.'s (Citibank) attachments have priority over other financial institutions which turns on Citibank's reverse veil piercing theory. Citibank contends that if the borrower's real estate entities are the borrower's alter egos, then Citibank would collect from the proceeds of any sale of that real property ahead of other creditors.

In motion sequence number 06, intervenor Sterling National Bank (Sterling)¹ moves pursuant to CPLR 3212 for summary judgment declaring that Citibank's attachments of the Real Estate Entities (REEs)² are invalid and dismissing the complaint.

¹ "Sterling assigned its various rights and interest in this case to GF Judgments LLC and its nominees Cote Dzur Mixed Use LLC, Eriqre Mixed Use LLC, ENAF Mixed Use LLC, Grappa Mixed Use LLC, Madrid Mixed Use LLC, Margo Mixed Use LLC, Patron Mixed Use LLC, Pravda Mixed Use LLC, Sake Mixed Use LLC, Siberia Mixed Use LLC and GF Judgments II LLC." (NYSCEF 189, Cole aff n 1.) The court adopts the parties' use of the term "Sterling" to refer to the intervenor.

² The "Real Estate Entities" are Alexandrite Realty Corp, Almaz Realty Corp., Amethyst Realty LLC, Bloodstone Realty Corp., Coral Realty Corp., Dylan Realty Corp., Granat Realty Corp., Graphite Realty Corp. (Freidman owned 33%), Helium Realty LLC, Izumrud Realty Corp., Prince Harry Realty LLC, Quartz Realty Corp., Sulfur Realty LLC, Tiger Eye Realty LLC, Turquoise Realty LLC, Zhemchug Realty Corp., Zoloto Realty Corp., Bull Consulting, Inc., Denga Realty Corp., Zinc Realty LLC, and 43-05 Vernon Boulevard, LLC. (NYSCEF 202, Evgeny A. Freidman's December 31, 2010 Statement of Financial Condition, Investments in Real Estate and Lease Holding Companies and Trusts at CitiE65_0004602; NYSCEF 203 Evgeny A. Freidman's Investments in Real Estate and Lease Holding Companies and Trusts at CitiE65_0005062 [as of June 30, 2012]; NYSCEF 204, Evgeny A. Freidman's Investments in Real Estate and Lease Holding Companies and Trusts at CitiE65_0005072 [as of December 31, 2012].)

In motion sequence number 07, defendant Graphite Realty LLC (Graphite) joins in Sterling's motion and moves for dismissal of all claims against it.

In motion sequence number 08, plaintiff Citibank moves pursuant to CPLR 3212 for summary judgment against intervenor Sterling (and each of the other defendants, to the extent that the court declines to enter default judgment against them) on each of its claims for relief in the complaint. Citibank also moves for dismissal of Sterling's and Graphite's affirmative defenses and counterclaim. Finally, Citibank moves for default judgments against the REEs without an evidentiary hearing.

Background

Citibank Loans

In 2012, Citibank loaned Evgeny Freidman's³ taxi medallion companies over \$31 million. (NYSCEF 197, Walsh Declaration ¶¶ 5, 12 [Citibank Senior Vice President]; NYSCEF 192, Loan Letter [\$10 million]; NYSCEF 194, Loan Letter [\$21 million].) As security for these loans, Citibank accepted: (1) liens on taxi medallions, (2) Freidman's guaranty, (3) a lien on Freidman's cash deposits, and (4) a lien on all property held by Freidman's company, Taxi Club Management, Inc. (TCM). (NYSCEF 197, Walsh Declaration ¶¶ 10, 17; NYSCEF 193, Personal Guaranty [\$10 million loan]; NYSCEF 195, Personal Guaranty [\$21 million loan].)

Freidman owned the above commercial entities in whole except for Graphite Realty Corp., all of which were established before Citibank issued its loans. In addition to the above, the "Real Estate Entities" also include East 65th Street Owners LLC, 66th Street Unit Owners LLC, and Halsey Lane Owners LLC (Residential REEs), one of which was organized after Citibank's 2012 loans—Halsey Trust in 2013. (NYSCEF 246, 65th Street Trust Agreement; NYSCEF 247, 66th Street Trust Agreement; NYSCEF 248, Halsey Trust Agreement.)

³ Freidman died in October 2021.

On July 1, 2013, Citibank issued a \$1.5 million revolving line of credit to TCM. (NYSCEF 197, Walsh Declaration ¶ 23.) TCM agreed to a security interest in all of its assets. (NYSCEF 198, TCM Security Agreement; NYSCEF 197, Walsh Declaration ¶ 25.) Freidman executed a personal guaranty. (NYSCEF 196, July 1, 2013 Guaranty.)

In connection with these loans, Citibank did not obtain (1) a security interest in Freidman's REEs, (2) loan guaranties on the REEs, mortgages or (3) security interests in the REEs. (NYSCEF 197, Walsh Declaration ¶¶ 5, 10, 12, 17, 23.) In this 2019 action, Citibank seeks to reverse pierce the corporate veils of the REEs.

Sterling Loans

On March 25, 2014, Sterling loaned Freidman's medallion companies over \$22 million. (NYSCEF 7, Katz aff ¶¶ 3-4 [Senior Vice President of Sterling].) Sterling obtained liens on medallions and guaranties of payment from Freidman. (*Id.* ¶¶ 5, 6.) Pursuant to the Security Agreement entered into by Friedman and Sterling, Sterling has a lien on all of Freidman's "right, title and interest" in the REEs. (*See Sterling v Friedman*, Index No 160715/17 [Sterling Action], NYSCEF 7, Sterling Security Agreement § 3.) Sterling's "collateral, i.e., its perfected security interest in the [REEs], did not extend directly to the real property owned by the [REEs]. ... [Sterling's] collateral consists of its secured interest in the [REEs] themselves. . . . That interest is personal property, not the underlying real property," known by the parties in this action as the dirt. (*Sterling Natl. Bank v Freidman*, 202 AD3d 495, 496 [1st Dept 2022].)

Capital One Loan and Judgment

Capital One Taxi Medallion Finance (Capital One) also lent to Freidman's medallion companies. On July 10, 2015, Capital One obtained a \$8,484,949.30

judgment against Freidman in New York County. (NYSCEF 210, Judgment by Confession.) Capital One filed transcripts of its judgment in Suffolk County on November 19, 2015, and in Queens and Kings Counties on January 19 and 20, 2016, against Freidman, not the REEs. (NYSCEF 211, Transcripts of Judgments.) On June 15, 2018, Capital One assigned its judgment to Sterling. (NYSCEF 222, Assignment of Judgment.)

Procedural History and EDNY Bankruptcy Action

On March 6, 2015, Citibank initiated an action in this court against Freidman on his guaranty as well as 22 medallions owning defendants (Initial Action). (*Citibank N. A. v Bombshell Taxi LLC et al* 650691/2015.) On May 19, 2015, Judge Oing issued an Order of Seizure. (Initial Action, NYSCEF 99, Order of Seizure.)

In April 2015, Freidman transferred his ownership interests in the REEs to offshore trusts (Foreign Trusts). (*Citibank v Bombshell Taxi LLC (In re Hypnotic Taxi LLC)*, 543 BR 365, 369 [Bankr EDNY 2016]; see also NYSCEF 236, Bankruptcy Court June 12, 2016 Decision After Trial at 5-6.) Such transfer of the REEs -- Sterling's collateral -- into the Foreign Trusts was a violation of the Sterling Security Agreement.

On July 22, 2015, the 22 medallion-owning defendants in the Initial Action filed for bankruptcy in the Eastern District of New York (Bankruptcy Action). (NYSCEF 234, Schwed aff ¶ 4.) On November 5, 2015, in an action on Freidman's guaranty⁴, Citibank asked the Bankruptcy Court for an attachment to "deal with all these competing lien

⁴ "Citibank is proceeding on its claims against Freidman, as guarantor, as it is entitled to. These claims are unsecured, and the record on this motion clearly establishes the need for attachment to prevent any further transfer of assets by Freidman." (*In re Hypnotic Taxi LLC*, 543 BR 365, 382 [Bankr EDNY 2016].)

holders” because Citibank is “behind other creditors with respect to the [REEs].” (NYSCEF 214, tr. at 18:13-19:23 [Bankruptcy Action].) “Because we have real estate entities right now that own this property. We don’t have a judgment against those entities. In order for us to take the properties of those entities, we are asking this Court to find that we had a right to levy against the dirt.” (*Id.* at 18:8-12.) Again, Citibank’s legal theory for attaching the REEs is reverse alter ego. The Bankruptcy Court issued a prejudgment attachment and authorized attachment of the REEs⁵ on January 12, 2016. (*Citibank, N.A. v Bombshell Taxi LLC (In re Hypnotic Taxi LLC)*, 543 BR at 382.)

“On April 21, 2016, Citibank ... moved for a determination that Freidman and the Trusts are alter egos.” (*Citibank, N.A. v Bombshell Taxi LLC (In re Hypnotic Taxi LLC)*, 2017 Bankr LEXIS 3546, at *19 [Bankr EDNY 2017]; *see also* NYSCEF 237, Bankruptcy Court Decision.) In April 2016, the United States Marshal levied against the REEs’ properties/dirt in New York, Kings, Queens and Suffolk Counties. (*Id.* at *21.)

In January 2017, Citibank filed a motion in Bankruptcy Court for an order declaring the US Marshal’s levies on the properties to be effective because the REE are Freidman’s alter egos. (*Id.* at *14-15.) On March 7, 2017, Citibank’s motion was denied after a hearing. (*Id.* at *23.) Citibank renewed the motion on March 20, 2017. (*Id.*) Again, the Bankruptcy Court denied Citibank’s alter ego motion on the basis that the REEs were not parties to the Bankruptcy Action, holding that “an affirmative finding

⁵ “If the order does specify certain property, the sheriff is not prohibited from levying upon any other property when it is necessary to do so to secure enough property to guarantee the availability of the amount set forth in the attachment order.” 12 Weinstein, Korn & Miller, *New York Civil Practice* ¶ 6211.05 (2015). (*In re Hypnotic Taxi LLC*, 543 BR 365, 384 [Bankr EDNY 2016].) Citibank’s attachments are not limited to the REEs; Citibank can levy upon other properties.

that the REE are alter egos of Freidman, made in the context of a motion against the REE, in an adversary proceeding in which they are not defendants, may cut off the Real Estate Entities' ability to commence a petition under CPLR 6221 challenging the attachment." (*Id.* at *46.)

The Bankruptcy Court also found that the Foreign Trusts, not the REEs, are "alter egos of Freidman and that the veils of the [Foreign] Trusts may be pierced." (*Id.* at *39.) Citibank established that Freidman, not the trustees, controlled the Foreign Trusts because Freidman was "empowered to remove and replace the Trustees at any time." (*Id.* at *35.) The Bankruptcy Court further found that Freidman's transfer of his interests in the REEs to the Foreign Trusts constituted an effort to "frustrate the enforcement of a judgment that might be rendered in Citibank's favor" against those ownership interests, thereby harming Citibank. (*Id.* at *37.)

On December 4, 2017, Sterling filed a petition seeking a determination of its priority rights in collateral pursuant to CPLR 5239 and for a turnover of assets pursuant to 5227. (Sterling Action, NYSCEF 1, Petition.)

On October 5, 2018, the Bankruptcy Court entered judgment in favor of Citibank and against Freidman for \$47,924,456.18. (NYSCEF 241, Citibank Judgment.)

Citibank Action

On February 21, 2019, Citibank initiated this action seeking to reverse-pierce the corporate veils between Freidman and the REEs. (NYSCEF 1, Summons and Complaint.) Citibank seeks the following declarations and findings of fact: (1) "prior to the Residential Property Transfers, Freidman's creditors, including Citibank, had the right, pursuant to EPTL § 7-3.1, to recover from the Residential Properties as if they

were owned by Freidman;” (2) “Freidman directed the trustees of the Domestic Trusts to make the Residential Property Transfers with actual intent to hinder, delay and defraud his creditors (DCL § 276);” (3) “Citibank was entitled to disregard the Residential Property Transfers and attach or levy execution upon the Residential Properties as if they were owned by Freidman (DCL § 278 & EPTL § 7-3.1);” (4)(a) “Each of the Domestic Trusts was Freidman's alter ego;” (4)(b) “Each of the Residential [REEs] was Freidman's alter ego;” (4)(c) “Each of the Multi-Family [REEs] was Freidman's alter ego;” (4)(d) “Each of the Commercial [REEs] was Freidman's alter ego;” and (5) “the Marshal's levy against each of the Properties constitutes a valid lien against each Property as of the date of the Marshal's levy against each Property.” (NYSCEF 234, Schwed aff ¶15; see also NYSCEF 1, Summons and Complaint at 22-37.)

In May 2019, the court granted Sterling's motion to intervene in this action in the absence of opposition. (NYSCEF 46, Decision and Order [mot. seq. no. 001].) In its answer, Sterling asserts the following affirmative defenses: (1) res judicata “Citibank's claims are barred by the doctrine of res judicata on the ground that the same issue was previously raised, and denied, in the Bankruptcy Court, and Citibank split its causes of action from an already pending action in this Court;” (2) statute of limitations as to the residential properties; and (3) laches dues to Citibank's unreasonable delay in commencing this action. (NYSCEF 31, Verified Answer at 25.) Finally, Sterling's fourth affirmative defense and counterclaim is that Citibank cannot establish that its levies of attachment constitute liens securing Citibank's judgment against the REEs. (*Id.*) Accordingly, Sterling seeks to vacate the order of attachment and void the levies pursuant to CPLR 6221 and 6223. (*Id.* at 26.)

Sterling served contention interrogatories directed to the predicates of Citibank's alter ego claim.⁶ Citibank responded that it "has not alleged that Freidman intended that any particular action or transaction by which he controlled each Real Estate Entity cause loss to or injure Citibank specifically." (NYSCEF 190, Citibank Interrogatory Responses at 11.) On June 15, 2020, the court clarified its ruling that Sterling's security interest extended to the REEs, not the dirt. (Sterling Action, NYSCEF 156, Decision and Order [mot. seq. no. 004], *affd Sterling Natl. Bank v Freidman*, 202 AD3d 495, 496 [1st Dept 2022].) The Appellate Division, First Department, pointed out that "as shareholder of the Real Estate Entities, [Sterling] would be entitled to sell the underlying properties and take money from the sale, subject to the interests of any creditors." (*Sterling Natl. Bank v Freidman*, 202 AD3d at 496.)

Discussion

Default Judgments Against the REEs

Citibank asserts that it is entitled to default judgment against the REEs, none of which have appeared in this action. Citibank challenges Sterling's standing because "defenses asserted by non-defaulting parties (i.e., Sterling) cannot cure the default of the defaulting parties, alter the fact that the defaulting parties are deemed to have admitted the allegations in the complaint, or bar entry of default judgment against the defaulting defendants." (NYSCEF 321, Citibank's Memo in Support at 41.) Citibank argues that Sterling lacks standing to raise defenses on behalf of the REEs, which did not appear, and thus, have allegedly waived the statute of limitations affirmative

⁶ The Commercial Division rules allow for contention interrogatories. (Commercial Division Rule 11-a [d].) The court finds Sterling's interrogatories unobjectionable and helpful.

defense. Citibank's objection to Sterling's standing --now when Sterling asserts this affirmative defense --is rejected in light of Citibank's consent to Sterling's intervention. Nevertheless, Sterling filed an answer, including an affirmative defense of statute of limitations, and thus, Citibank's objection is unfounded. (NYSCEF 31, Verified Answer.)

Citibank's attack on Sterling's 2019 intervention is also rejected since Citibank consented to the intervention and any objection now is woefully late. Accordingly, Citibank's reliance on *HSBC Bank USA v Martin-Lloyd*, 45 Misc 3d 1203(A) (Sup Ct, Kings County, 2014) is misplaced since there the intervenor did not file a motion to dismiss for seven years after defendant's default. Likewise, the court rejects Citibank's misinterpretation of this court's clarification that Sterling's security interest is in the REEs shares, not the property (dirt) directly. (Sterling Action, NYSCEF 156, Decision and Order [mot. seq. no. 004].) Sterling's basis for intervention was and is its REEs shares which entitle Sterling to sell the dirt. (*Sterling Natl. Bank v Freidman*, 202 AD3d at 496.)

Summary Judgment Motions

Summary judgment should be granted only when it is clear that no triable issue of fact exists. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986] [citation omitted].) On a motion for summary judgment, the burden is on the movant to make a showing of entitlement to summary judgment as a matter of law. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) If such a showing has been made, the burden shifts to the opposing party to produce sufficient evidence to establish the existence of material issues of fact. (*Id.*) In deciding a summary judgment motion, the "evidence must be

analyzed in the light most favorable to the party opposing the motion.” (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997] [citation omitted].)

As a preliminary matter, the court dismisses Citibank’s action against two of the Residential REEs (65th Street Trust and 66th Street Trust) as barred by the six-year statute of limitations. (CPLR 213 [1].) Since Citibank filed this action on February 21, 2019, and the transfers occurred in 2003 and 2011, the court is compelled to dismiss Citibank’s action to the extent it concerns these two trusts. Citibank cannot rely on the Bankruptcy Court’s finding of alter ego based on Freidman’s fraudulent April 2015 transfers of the 65th Street Trust and 66th Street Trust to the Foreign Trusts, not the Residential REEs, to avoid Citibank’s judgment, to save its claim here. Likewise, Citibank’s collateral attack on this court’s June 15, 2020 decision, which Citibank characterizes as depriving Sterling of the factual predicate for its intervention, is rejected as an impermissible CPLR 2221 motion to renew and reargue two years after the decision on consent. Rather, “as shareholder of the Real Estate Entities, [Sterling] would be entitled to sell the underlying properties and take money from the sale, subject to the interests of any creditors.” (*Sterling Natl. Bank v Freidman*, 202 AD3d at 496.) To be clear, the court’s decision granting Sterling’s motion to intervene was based on Citibank’s consent to Sterling’s intervention. Therefore, Sterling’s motion is granted as to the Residential REEs which are dismissed from the action.⁷

⁷ On December 21, 2021, the Halsey Residential Property sold in a mortgage foreclosure leaving a surplus of \$18,832.26. (NYSCEF 219, Foreclosure Action Surplus Monies Form.) If the court accepts Citibank’s contention that the 2013 Halsey Trust was void under EPTL 7-3.1(a), then Capital One’s judgment has priority to the surplus. Therefore, Citibank would not be entitled to the surplus in any case.

“The doctrine of piercing the corporate veil is 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. The concept is equitable in nature.” (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 140-41 [1993] [citations omitted].) “[H]istorically, incorporation is designed to limit liability of owners of the corporation — not to limit a corporation’s liability for acts of its officers; the whole concept of ‘piercing’ involves going beyond the corporate form to reach the normally insulated-from liability owners rather than, ... pursuing the corporation itself for claims or judgments against its officers.” (*State v Easton*, 169 Misc2d 282, 288-90 [Sup. Ct., Albany County 1995] [citations omitted].) However, “[r]everse” piercing involves holding “a corporation liable for the debts of its owners.” (*Id.*) Traditional piercing requires a showing of fraud that injured plaintiff, while alter ego piercing requires a showing of domination of the corporation that injured plaintiff.

“When a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego, the corporate form may be disregarded to achieve an equitable result.” (*Austin Powder Co. v McCullough*, 216 AD2d 825, 827 [3d Dept 1995] [citations omitted].) “To make out a cause of action for liability on the theory of piercing the corporate veil because the corporation at issue is the defendant's alter ego, the complaining party must, above all, establish that the owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party

asserting the claim such that a court in equity will intervene.” (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013] [citation omitted].)

Citibank’s reverse alter ego theory is rejected. “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 and citations omitted] *affd* 31 NY3d 1002 [2018].) Accordingly, Citibank must prove: (1) Freidman exercised complete domination over each REE and (2) Freidman’s domination caused injury to Citibank. Breach of contract is not a wrong that supports veil piercing of any kind. (*Id.* at 12 [holding that “a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil”]; *Kahan Jewelry Corp. v Coin Dealer of 47th St., Inc.* 173 AD3d 568 [1st Dept 2019].)

Even if the court accepts that Freidman dominated each REE, the domination must have caused injury to Citibank. (*See Morris*, 82 NY2d at 141-42.) However, Citibank fails to identify such a wrongful transaction by any of the REEs. Citibank cannot rely on the creation of the Foreign Trusts and wrongful transfer of the REEs to the Foreign Trusts. While it is apparent that the Foreign Trusts were created to avoid Citibank’s judgment, the transfers were not the acts of the REEs, which were instead the victims of the Foreign Trusts’ wrongful acts. Indeed, in response to Sterling’s interrogatories, Citibank responded that it “has not alleged that Freidman intended that any particular action or transaction by which he controlled each Real Estate Entity

caused loss to or injure Citibank specifically.” (NYSCEF 190, Citibank’s Interrogatory Answers at 10.) Citibank’s failure to identify a wrong by each REE against Citibank is fatal to this action and its alter ego theory.⁸

Unlike the Foreign Trusts, the REEs were not created to avoid Citibank’s judgment and Citibank does not assert otherwise. (*Id.* at 11.) In fact, the REEs continued to pay Citibank’s loans in 2015 and 2016. (NYSCEF 212, Banco Popular Cancelled Checks.)

To the extent that Citibank asserts that incorporation of the REEs was wrongful, the act of incorporation is not sufficient as corporations may incorporate to escape liability. (See *Morris*, 82 NY2d at 140.) In any case the corporations here were incorporated long before Citibank’s loans. For example, Amethyst Realty LLC was incorporated in 2008. (NYS Secretary of State, <https://apps.dos.ny.gov/publicInquiry/EntityListDisplay>.)

Next, Citibank fails to offer any proof that the purpose of any unidentified transaction was to cause injury to Citibank. Rather, Citibank asserts that it need not prove wrongful transactions, causation, or injury. Instead, Citibank insists that it need only show that Freidman’s control of the REEs was for personal ends. Even where courts accept complete control of the corporation as the wrongful act, it must be targeted at the plaintiff. (*Musman v Modern Deb*, 50 AD2d 761, 762 [1st Dept 1975])

⁸ Scholars opine that the two veil piercing theories (traditional fraud or wrong vs. alter ego) are identical because the “wrong” necessary for both is the same. (Stephen B. Presser, *Piercing the Corporate Veil*, § 2:35 at 636, n 10 [2019-2020 ed.].) The first ground for piercing requires “fraud, illegality, inequity, perversion of the corporate form, dishonesty or injustice.” (*Id.*) The definition of “wrong” required for alter ego veil piercing is “fraud, illegality, inequity, perversion of the corporate form, dishonesty or injustice” targeting the proponent of veil piercing, here Citibank. (*Id.*)

[citation omitted] [holding that “[t]he control must actually be used to commit a wrong against the plaintiff and must be the proximate cause of the plaintiff’s loss”]; *E. States Elec. Contrs., Inc. v William L. Crow Constr. Co.*, 153 AD2d 522, 523 [1st Dept 1989] [citation omitted] [holding control and misuse must cause plaintiff’s loss]; *Rudler v MLA Law Offices, LTC*, 2021 US Dist LEXIS 123934 at *12 [EDNY July 1, 2021] [applying New York law] [“Although reverse veil piercing is rare, it may be appropriate in cases where the alter ego is being used as a ‘screen’ for the dominating entity”].) Indeed, the Bankruptcy Court very clearly rejected Citibank’s theory that control is sufficient for alter ego. (NYSCEF 214, Bankruptcy Court Transcript at 19-24 [“THE COURT: I do not believe that the facts that you have put before me in the litigation that -- with the trust, was sufficient for me to make a finding that the State Court -- the state -- that the real estate entities were alter egos of Mr. Friedman’s. I know that it -- that the motion was denied based upon the fact that you hadn’t even bothered to bring them into the action, but I don’t think that just saying, well, they are all controlled by Mr. Friedman is enough”].)

Even if the court considers Citibank’s evidence of Friedman’s dominance and control of the REEs as evidence of wrongdoing, none of the wrongdoing is targeted at avoiding Citibank’s judgment. Signs indicating impermissible domination warranting veil-piercing include:

“(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated

corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.”

(*Deutsche Bank v Vik*, 2015 NY Slip Op 30163(U) [Sup Ct, NY County 2015] [citations omitted].) Citibank's dominance evidence⁹ fails to establish a wrong against Citibank and causation. For example, Citibank asserts “the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like.” (NYSCEF 321, Citibank's Memo in Support at 24.) As proof, Citibank relies on the failure of the REEs to produce any governing documents in the Initial Action. Based on Citibank's evidence, the REEs' failure to keep records long preceded Citibank's loans- it was not targeted at avoiding Citibank's judgment. Overlap in personnel and common office space are equally meaningless here since, again, Freidman's history of using employees from the taxi management companies' locations long preceded Citibank's loans and its judgment. Moreover, running the taxi business was a legitimate purpose and wrongful transactions that have a legitimate business purpose will not support a finding of dominance for alter ego purposes. (*Aspire Music Group, LLC v Cash Money Records, Inc.*, 169 AD3d 441, 441-42 [1st Dept 2019] [“These allegations describe

⁹ Citibank's reliance on Bankruptcy trial and deposition testimony to establish the dominance factors is problematic since Sterling was not present at the trial, or any of the depositions offered, and thus had no opportunity to cross examine Freidman. (See CPLR 3117[a][3][i] and CPLR 4517[a][3].) As is the protocol for summary judgment motions, the court relies on the testimony that is not contradicted and by a witness who would presumably be called to testify at trial. (CPLR 3212[b].) However, the court cannot rely on Freidman's testimony since he is deceased, and thus, the court cannot assess his credibility.

legitimate business conduct; there is no indication that Universal engaged in this conduct for the purpose of harming plaintiff”).) Here, Freidman was admittedly running a business with nearly 1,000 taxi medallions.

Likewise, Citibank’s objection to the REEs’ undercapitalization is also insufficient to establish wrongdoing. (See *Evemeta, LLC v Siemens Convergence Creators Corp.*, 2020 NY Misc LEXIS 9609, at *40 [Sup Ct, NY County 2020] [holding “undercapitalization and personal use of corporate funds only constitutes a ‘fraud or wrong’ where the plaintiff took those actions for the purpose of rendering the company unable to pay a judgment to defendants”).) Finally, Citibank’s objection to intermingling funds is laughable since Citibank designed Freidman’s “Control Disbursement Accounts” for the purpose of defendants writing checks while maintaining zero balances. (NYSCEF 199, Walsh Declaration ¶ 5; NYSCEF 325, tr. at 176:15-22 [Deposition of Mayra Franceschini, Citibank Senior Relationship Service Specialist].) While all the factors need not be “tethered to the transaction being challenged” for the purposes of determining dominance, here none of the factors are tethered to Citibank or its judgment. (*Starr Russia Investments III B.V. v Deloitte Touche Tohmatsu Ltd.*, 192 AD3d 525, 527 [1st Dept 2021].) Moreover, Citibank adamantly refuses to offer any evidence of wrong directed against Citibank, insisting that it is not required to prove wrongful acts causing Citibank’s loss. (NYSCEF 190, Citibank Interrogatory Responses at 10-11.)

While the above reasoning constitutes the legal authority for this decision, the court also agrees with Sterling that allowing Citibank to benefit from reverse piercing here is simply unjust. The loans to Freidman are business transactions for which

Citibank, the lender, bargained for certain rights. It is inequitable to extend liability beyond those bargained for rights. Where the lender is sophisticated and well-aware of its lending risk, it is limited to the benefit of its bargain; it cannot choose to seek additional recourse ex post facto. (*Skanska USA Bldg. Inc.*, 146 AD3d at 12.) Citibank's chosen remedies were (1) promissory notes with the medallion company borrowers, (2) liens on the borrower's medallions, (3) Freidman's personal guaranty, and (4) a lien on property owned by TCM. (NYSCEF 191, Walsh Declaration ¶¶1-8.) Citibank failed to get guarantees from the REEs, liens on Freidman's related ownership interests or on their underlying real properties. Citibank cannot revise its bargained for loan and seek such relief now by "reverse piercing." Such abuse of this legal vehicle is unjust. (See *Brunswick Corp. v Waxman*, 599 F2d 34, 35 [2d Cir 1979]; *Skanska*, 146 AD3d at 12.) Since reverse veil piercing is an equitable remedy, the court declines to invoke it here to remedy Citibank's poor business practices.

Dismissal of Affirmative Defenses and Counterclaim

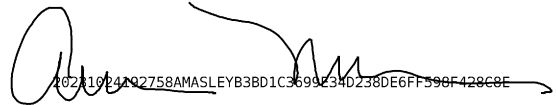
Citibank's motion to dismiss defendants' affirmative defense and counterclaim is denied as moot.

Accordingly, it is

ORDERED that Sterling's motion for summary judgment (seq. no. 06) is granted, and the complaint is dismissed against Sterling and the defendants; Citibank's requested relief is denied. Sterling's motion is granted as to the Residential REEs which are dismissed from the action. Sterling's motion is denied as to Sterling's request to invalidate an attachment issued by the Federal Court, not this court; and it is further

ORDERED that Graphite’s motion for summary judgment (seq. no. 07) is granted, and the complaint is dismissed against it; and it is further

ORDERED that Citibank’s motion for summary judgment in its favor, dismissal of Sterling’s and Graphite’s affirmative defenses and counterclaim, and a default judgment against the REEs without an evidentiary hearing (seq. no. 08) is denied and Citibank’s requested relief is denied.



10/24/2023

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE