SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x **TRIAL/IAS PART: 11**

TMCC, INC., GMM CONSULTING, INC.,

Plaintiffs,

-against-

JENNIFER CONVERTIBLES, INC.,

Defendant.

----------x

NASSAU COUNTY

Index No: 601748-18
Motion Seq. No. 1
Submission Date: 6/8/18

Papers Read on this Motion:

Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits....x
Memorandum of Law in Support.....x
Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x
Reply Memorandum of Law in Further Support.....x

This matter is before the court on the motion filed by Defendant Jennifer Convertibles, Inc. ("Jennifer" or "Defendant") on April 3, 2019 and submitted on June 8, 2018. For the reasons set forth below, the Court grants Defendant's motion to dismiss the Verified Complaint, but denies Defendant's application for the imposition of sanctions against Plaintiffs and their counsel.

BACKGROUND

A. Relief Sought

Defendant moves for an Order 1) pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing the Verified Complaint in its entirety; and 2) pursuant to 22 NYCRR 130-1.1, sanctioning Plaintiffs TMCC, Inc. ("TMCC") and GMM Consulting, Inc. ("GMM") ("Plaintiffs") and their counsel ("Plaintiffs' Counsel") for their frivolous conduct in filing this action.

Plaintiffs oppose the motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. 2 to Hirst Aff. in Supp.) alleges as follows:

Plaintiffs are New York corporations located in Farmingdale, New York. Hartsdale Convertibles ("Hartsdale") is a wholly owned subsidiary of Jennifer, a New York corporation located in Woodbury, New York. TMCC and Hartsdale entered into a 10 year lease ("Lease") for space located at 1821 Route 110, East Farmingdale, New York (the "Demised Area") (Comp. at ¶ 7). GMM also entered into a 10 year lease at the Demised Area for consulting services. The terms of the Lease allowed attorney's fees to be awarded to a party who had to resort to court action to enforce the terms and conditions of the Lease. The Lease also allowed for a late payment fee at 4% above the prime for untimely payments. The Lease also required Hartsdale to pay any tax escalation from year to year.

The monthly rate for TMCC is as follows: August 2017 ($42,109.82); September 2017 ($42,109.82); October 2017 ($42,109.82); and November 2017 ($43,794.21). The monthly rate for GMM was amended to as follows: August 2017 ($8,000.00); September 2017 ($8,000.00); October 2017 ($8,000.00); and November 2017 ($8,000.00). The Lease required the payment of tax increases, which in 2017 was $10,000.00, and Defendant paid $5,000.00 of this sum. TMCC also paid $50,000 in a security deposit, of which Defendant never reimbursed TMCC $10,000 of that sum. Jennifer also made late payments for one year, from November 2016 to November 2017. The Complaint also provides the calculations for the prime rate + 4% for the period from November 2016 to November 2017 (Comp. at ¶ 17).

The total late fee, between both Plaintiffs, is $48,355.89. Plaintiffs allege that all payments were made to Plaintiffs from Jennifer. Jennifer "became an actor in the above transactions and in part (if not all) of Hartsdale's business dealings" (Comp. at ¶ 21). Jennifer allegedly used Hartsdale "distinctively from Hartsdale's business" (*id.* at ¶ 22) and Hartsdale was "but a dummy corporation of Jennifer" (*id.*). The Demised Premises were signed at all relevant times with Jennifer-based branding. In a prior landlord-tenant proceeding against Defendant, Plaintiff was awarded a money judgment and attorney's fees in the sum of $5,000.00. Plaintiffs allege that Plaintiff is owed the sum of $270,479.56.

The Complaint contains a single cause of action which is based on the following

allegations:

1) Hartsdale breached its contract with Plaintiff [1] through failing to make the payments in accordance with the Lease, as amended, in the sum of $265,479.56;

2) Hartsdale forced Plaintiff to commence a summary proceeding, wherein Plaintiff was compelled to expend $5,000.00 in attorney's fees;

3) Plaintiff is currently expending attorney's fees in collecting this debt;

4) Jennifer is liable for the acts, actions and omissions of Hartsdale; and

5) Plaintiffs, consequently, have been damaged in a sum in excess of the jurisdictional sums of all lower courts.

Plaintiffs seek judgment against Defendants [sic] in the sum of $270,479.56, along with prejudgment interest, attorney's fees, costs and disbursements.

In support of the motion, John Garg ("Garg"), the President of Jennifer, provides a copy of the Sublease Agreement dated as of August 18, 2009 between TMCC, as sub-landlord, and Hartsdale as sub-tenant (Ex. 1 to Garg Aff. in Supp.). In further support of the motion, counsel for Jennifer ("Defendant's Counsel") provides copies of the following (Exs. 3-6 to Hirst Aff. in Supp.): the "Entity Information" page for TMCC, which Defendant's Counsel obtained from the official website of the New York State Department of State, Division of Corporations ("DOS"), on April 3, 2018 (Ex. 3); the "Entity Information" page for GMM, which Defendant's Counsel obtained from the official website of the DOS (Ex. 4); the Notice of Petition and Petition for Non-Payment filed by TMCC against Jennifer and Hartsdale in the District Court of the County of Suffolk, Second District: Babylon Part, in the matter titled *TMCC, Inc. v. Hartsdale Convertibles, Inc. & Jennifer Convertibles, Inc.* Index No. 1204-17.BA ("Prior Action") (Ex. 5),; and the "Stipulation of Discontinuance with Prejudice as Against Jennifer Convertibles, Inc." dated October 3, 2017, filed in the Prior Action (Ex. 6).

Defendant's Counsel affirms that Plaintiffs commenced the above-captioned action ("Instant Action") on February 6, 2018. By email dated February 20, 2018 (Ex. 7 to Garg Aff. in Supp.), Defendant's Counsel advised Plaintiffs' Counsel Gregory A. Goodman ("Goodman")

[1] The sole cause of action refers to "Plaintiff" in the singular, without designating the particular Plaintiff to which Plaintiffs are referring (*see* Comp. at ¶¶ 26-29).

that 1) Plaintiffs had already commenced an action alleging substantially the same claims alleged in the Instant Action; 2) those claims were voluntarily discontinued with prejudice by stipulation dated October 31, 2017; and therefore 3) the Instant Action, which alleges substantially the same claims that Plaintiffs had dismissed with prejudice in the Prior Action, was barred by *res judicata*. For these reasons, Defendant's Counsel asked Goodman to withdraw the Complaint on the grounds that it was frivolous. Plaintiffs declined to withdraw their Complaint. Defendant's Counsel affirms that Plaintiffs' refusal to withdraw the Complaint has resulted in Jennifer expending unnecessary time and money defending the allegedly frivolous Instant Action, which has included filing the instant motion. Defendant's Counsel affirms that Jennifer is prepared to submit Defendant's Counsel's invoices for legal fees incurred in defending this action, should the Court so request.

The Petition in the Prior Action alleges as follows: 1) Hartsdale and Jennifer are sublessors of the Demised Premises pursuant to the Lease made on or about August 18, 2009; 2) pursuant to the Lease, there was due to Petitioner from Respondent [2] rent and additional rent as set forth on Exhibit A to the Petition, which refers to the period of July 2017 through October 2017, in the amount of $222,439.28; 3) Respondent remains in possession of the Demised Premises without Petitioner's permission after the default; 4) Petitioner has incurred reasonable attorney's fees and costs in connection with prosecuting the Prior Action and Respondent's default in performing its obligations under the Lease; and 5) pursuant to the Lease, Petitioner is entitled, as additional rent, to a judgment for the reasonable attorney's fees, interest and costs incurred by Petitioner as a result of Respondent's default in performing its obligations under the Lease.

In opposition, Gerald McCrystal ("McCrystal") affirms that he is the owner of TMCC and GMM. McCrystal affirms that in 2009, he was approached by Harley Greenfield ("Greenfield"), who stated that he was the owner of Jennifer, and Ed Seidner ("Seidner"), who was the Chief Operating Officer of Jennifer. At that time, Jennifer owned 54 stores and was in direct competition with the Ashley Furniture Franchise ("Ashley") for the New York and Long Island territorial markets. Greenfield and Seidner advised McCrystal that the building that McCrystal

[2] The Petition refers to Hartsdale and Jennifer collectively as the "Respondent/Sub-Tenant."

leased on Route 110 in Farmingdale was perfect for Jennifer, and an agreement was reached to sublease the space for a period of 10 years. Both Greenfield and Seidner represented themselves as the owners of Jennifer. Jennifer, at that time, was interested in making the store an Ashley Furniture Homestore, which was a brand that Jennifer licensed. Therefore, TMCC and GMM entered into a sublease with Hartsdale on August 2009, which was supposed to expire on October 31, 2019.

McCrystal affirms that in 2010, Jennifer filed a Petition in Bankruptcy Court under Chapter 11 of the Bankruptcy Code. The Petition was resolved as to the Demised Premises when Jennifer and McCrystal agreed to allow the sublease to remain intact, except that the GMM portion was at a 60% discount. This occurred 6 months after Jennifer filed for bankruptcy protection.

McCrystal affirms that he sometimes picked up the monthly rent checks from Janet Dawher, an employee of Jennifer, when Jennifer was late with the rent. On other occasions, Jennifer mailed the rent checks to McCrystal. When Jennifer had trouble making payments on the Lease, McCrystal communicated with Wayne Stewart, another Jennifer employee. McCrystal also interacted with Garg, the Chief Executive Officer of Jennifer. Jennifer advised McCrystal that they were trying to assign the sublease directly to Ashley. McCrystal affirms that the monthly billings, when addressed, were primarily paid to McCrystal from Jennifer, and McCrystal provides copies of checks that Jennifer sent to him (Ex. 2 to Goodman Aff. in Opp.). McCrystal affirms that his store, consisting of TMCC and GMM, was branded with the Ashley Furniture brand, which was under license from Jennifer, the items from the store were branded with Ashley merchandise as Jennifer had the Ashley license, and McCrystal always dealt with personnel from Jennifer.

McCrystal affirms that Hartsdale eventually defaulted on the Lease, and McCrystal filed a non-payment Petition in Suffolk County District Court against both Hartsdale, the Lease signatory, and Jennifer. Judgment was entered against Hartsdale. McCrystal affirms that the District Court did not have jurisdiction over Jennifer because it was not on the Lease. McCrystal affirms that TMCC is owed the following sums: August 2017 ($42,109.82); September 2017 ($42,109.82); October 2017 ($42,109.82); and November 2017 ($43,794.21), as well as $10,000 of the $50,000 security deposits. He affirms, further, that GMM is owed the following sums:

August 2017 ($8,000.00); September 2017 ($8,000.00); October 2017 ($8,000.00); and November 2017 ($8,000.00). In addition, late fees in the amount of $48,355.89 are owed. McCrystal affirms that he is seeking judgment against Jennifer on the grounds that he dealt exclusively with Jennifer, and Jennifer "completely dominated" Hartsdale (McCrystal Aff. in Opp. at ¶ 20).

In further opposition to the motion, Goodman submits that it is undisputed that Hartsdale is a wholly owned subsidiary of Jennifer, and that a ten-year sublease was entered into for the Demised Premises. The signatories of the sublease (Ex. 1 to Garg Aff. in Supp.) are TMCC and Hartsdale. The sublease contains an Exhibit B, titled "Fixed Rent Schedule," and the bottom portion of that document states "Additional Monthly Rent paid to GMM Consulting, Inc."

Goodman affirms that a landlord-tenant proceeding, specifically the Prior Action, was erroneously filed against Jennifer. Goodman submits that, while Jennifer is responsible to Plaintiffs due to its domination of its subsidiary Hartsdale, Jennifer was not a direct party to the Lease at issue. Therefore, Goodman submits, any stipulation of discontinuance with prejudice is without force or effect with respect to the Instant Action. Under all of the circumstances, Goodman submits, there is a triable issue of fact as to whether Jennifer inappropriately dominated Hartsdale and, therefore, is liable for the unpaid rent that is alleged in the Complaint.

C. The Parties' Positions

Defendant submits that 1) the Court should dismiss the Complaint because Jennifer, the only Defendant in the Instant Action, is not a party to the Lease; 2) while the Complaint apparently seeks to allege that Jennifer can still be liable because Hartsdale is its subsidiary, or its alter ego, the allegations in the Complaint in support of those theories are entirely conclusory; 3) the Court should also dismiss the Complaint because a) the Prior Action, which was dismissed with prejudice as to Jennifer, was based on TMCC's claims that Jennifer and/or Hartsdale failed to pay rent during July through October 2017; b) the Instant Action is based on nearly identical allegations; and c) the Instant Action is brought by the same parties or parties in privity with the parties that commenced the Prior Action, as GMM, though not a named plaintiff in the Prior Action, was fully represented in the Prior Action by TMCC, an affiliate that had the authority to asset claims on its behalf; 4) the Court should dismiss GMM's claim because it is not a party to the Lease, and because the Complaint does not adequately plead a breach of contract as to GMM;

5) to the extent that GMM's claims are based on an agreement other than the Lease (*see* Comp. at ¶ 8 - "Plaintiff GMM also entered into a 10-year lease at the demised area for consulting services"), those claims must fail because GMM does not identify any separate agreement or articulate the material terms on which its claims are based; and 6) the Court should impose sanctions against Plaintiffs and their counsel because Plaintiffs were aware of the Prior Action, which they filed just months before filing the Instant Action, were advised by Defendant's Counsel of the Petition and Stipulation of Discontinuance in the Prior Action which barred the Instant Action, and nonetheless pursued the Instant Action.

Plaintiffs oppose the motion submitting that 1) the Complaint states a cause of action against Jennifer on a corporate domination theory by virtue of Plaintiffs' allegations that Jennifer was involved in all aspects of the Lease, as amplified by McCrystal in his affidavit in support; 2) the fact that GMM is not listed on the Lease does not preclude its recovery in the Instant Action; 3) the Stipulation of Discontinuance does not bar this litigation because the Petition in the Prior Action involved a lease between TMCC and Hartsdale, which never mentioned Jennifer, and, in any case, the Stipulation of Discontinuance would not bar the Instant Action as asserted by GMM which was not a party in the Prior Action; and 4) there is no basis for the imposition of sanctions against Plaintiffs because Plaintiffs have raised meritorious claims regarding Jennifer's domination of Hartsdale, and have responded with a well-reasoned opposition to Defendant's *res judicata* claim.

In reply, Defendant submits that 1) Plaintiffs have failed to plead the elements of alter ego liability because Plaintiffs have failed to present any factual allegations supporting the conclusion that Defendant and Hartsdale abused the privilege of doing business in the corporate form, thereby perpetrating a wrong resulting in the injury allegedly suffered by Plaintiffs; 2) Plaintiffs have failed to respond to, or refute, Defendant's contention that GMM has failed to allege a viable breach of contract claim; and 3) the Court need not reach the issue of whether Jennifer can be liable as an alter ego of Hartsdale because the Prior Action, which was predicated on TMCC's claims for nonpayment of rent against Jennifer and Harstdale, was dismissed with prejudice, and Plaintiffs could have alleged an alter ego claim in the Prior Action and/or named GMM as a plaintiff in the Prior Action, even though GMM's interests were already represented in the Prior Action by TMCC.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

CPLR § 3211(a)(5) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the bases that the cause of action may not be maintained because of collateral estoppel or *res judicata*. The doctrine of *res judicata* operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding. *Luscher v. Arrua*, 21 A.D.3d 1005, 1006-07 (2d Dept. 2005), quoting *Koether v. Generalow*, 213 A.D.2d 379, 380 (2d Dept. 1995). The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *Serio v. Town of Islip*, 87 A.D.3d 533 (2d Dept. 2011), citing *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13 (2008), quoting *Matter of Grainger* [*Shea Enters.*], 309 N.Y. 605, 616 (1956).

B. Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose

of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), *aff'd* 16 N.Y.3d 775 (2011), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 66 A.D.3d at 126, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton v. Sandpebble,* 66 A.D.3d at 126, citing, *inter alia, Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton v. Sandpebble,* 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

It is well settled that liability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary. At the very least, there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored. *McCloud v. Bettcher Indus., Inc.*, 90 A.D.3d 1680, 1681 (4th Dept. 2011), citing *Billy v. Consolidated Mach. Tool Corp.*, 51 N.Y.2d 152, 163 (1980), *rearg. den.* 52 N.Y.2d 829 (1980), quoting *Lowendahl v. Baltimore & Ohio R.R. Co.*, 247 App. Div. 144, 155 (1936), aff'd 272 N.Y. 360 (1936), rearg. den. 273 N.Y. 584 (1937).

C. Breach of Contract

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *El-Nahal v. FA*

Management, Inc., 126 A.D.3d 667, 668 (2d Dept. 2015) citing, *inter alia*, *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2d Dept. 2013). To state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached. *Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751 (2d Dept. 2011) citing, *inter alia*, *Peters v. Accurate Bldg. Inspectors Div. of Ubell Enters., Inc.*, 29 A.D.3d 972 (2d Dept. 2006).

D. Frivolous Conduct

Conduct is frivolous within the meaning of 22 NYCRR § 130-1.1 where, *inter alia*, it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, or undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another. *Miller v. Miller*, 96 A.D.3d 943, 944 (2d Dept. 2012), citing 22 NYCRR §§ 130-1.1(c)(1) and (2) and citing, *inter alia*, *Dank v. Sears Holding Mgt. Corp.*, 69 A.D.3d 557, 558 (2d Dept. 2010). A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR § 130-1.1(c) has the burden of demonstrating that the conduct of the opposing party was frivolous within the meaning of the rule, or that the action or proceeding was commenced or continued in bad faith. *Miller v. Miller*, 96 A.D.3d at 944.

E. Application of these Principles to the Instant Action

The Court grants Defendant's motion to dismiss the Complaint. In so doing, the Court initially concludes that the Instant Action is barred, pursuant to the doctrine of *res judicata*, by virtue of TMCC's filing of the Prior Action. In the Prior Action, TMCC asserted substantially the same claims alleged in the Instant Action. Moreover, inasmuch as TMCC is in privity with GMM, it could have then asserted any claims now alleged by GMM. The voluntary discontinuance with prejudice of the Prior Action against Jennifer, pursuant to stipulation, thereby renders the doctrine of *res judicata* applicable to the Instant Action.

Moreover, even assuming that GMM were not in privity with TMCC, the Complaint is nonetheless insufficient to the extent that it asserts a breach of contract based on a separate agreement (*see* Comp. at ¶ 8) because Plaintiffs provide no details regarding the contract allegedly breached, or the specific provision of the contract that was allegedly breached. In addition, to the extent that the Complaint is based on the theory that Jennifer is responsible for

Hartsdale's obligations on an alter ego theory of liability, the Court concludes that the allegations in support of that contention are insufficient to establish that Jennifer exercised complete domination over Hartsdale in the transaction at issue. Nor do Plaintiffs sufficiently allege that there was an abuse of the privilege of doing business in the corporate form that perpetrated a wrong that caused injury to Plaintiffs.

The Court denies Defendant's request for the imposition of sanctions. The Instant Action is not entirely frivolous because it is based on Plaintiffs' contention that there may be a basis for holding Jennifer responsible for the acts of Hartsdale, its subsidiary. While the Court rejects Plaintiffs' arguments and dismisses the Complaint, the Court cannot conclude that the filing of the Instant Action was frivolous.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
June 21, 2018

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUN 21 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE