

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH EBIN and YERUCHUM JENKINS, :
individually and on behalf of all :
others similarly situated, :

Plaintiffs, :

-v- :

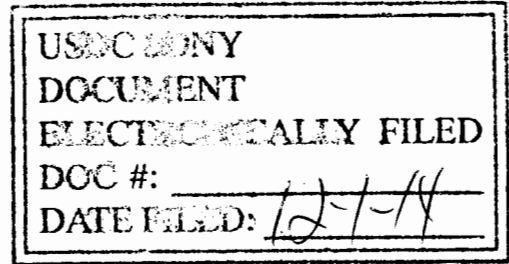
KANGADIS FAMILY MANAGEMENT LLC, :
ARISTIDIS KANGADIS, ANDROMAHI :
KANGADIS, and THEMIS KANGADIS, :

Defendants. :

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14-cv-1324 (JSR)

MEMORANDUM ORDER



JED S. RAKOFF, U.S.D.J.

Lead plaintiffs Joseph Ebin and Yeruchum Jenkins bring this consumer class action, asserting claims for relief against defendants Kangadis Family Management LLC ("KFM"), Aristidis Kangadis, Andromahi Kangadis, and Themis Kangadis. Defendants are a family management company and three family members who are the principal shareholders of Kangadis Food Inc. ("KFI"), a New York-incorporated business that allegedly engaged in the practice of selling containers of Capatriti-branded "100% Pure Olive Oil" that actually contain an industrially processed substance known as "olive-pomace oil" or "pomace." Plaintiffs assert six causes of action against defendants under a "piercing the veil" theory: (1) breach of express warranty, (2) breach of implied warranty of merchantability, (3) deceptive acts or practices under New York General Business Law section 349, (4) violation of the New Jersey

Consumer Fraud Act, (5) negligent misrepresentation, and (6) fraud. Compl. ¶¶ 87-139.¹

This case is related to *Ebin v. Kangadis Food Inc.*, 13 Civ. 2311 (JSR) ("*Ebin I*"), in which the same plaintiffs brought a consumer class action directly against KFI, asserting almost identical causes of action to those in this case. On June 6, 2014, KFI filed for Chapter 11 bankruptcy in the United States Bankruptcy Court in the Eastern District of New York, No. 14-72649. The bankruptcy action stayed *Ebin I* pursuant to 11 U.S.C. section 362(a). After learning of the bankruptcy stay in *Ebin I*, the Court allowed plaintiffs to re-file their complaint in the instant case (which had been dismissed without prejudice on April 18, 2014 pending resolution of *Ebin I*).

On October 2, 2014, defendants moved for summary judgment, asserting that plaintiffs had not produced sufficient evidence to hold defendants liable under a piercing the veil theory. After full briefing, the Court granted summary judgment in favor of defendants on October 23, 2014, because "plaintiffs have failed to adduce competent evidence from which any reasonable juror could conclude that defendants used their alleged domination of Kangadis Food Inc. as a means to accomplish the fraud here alleged." Order dated October 23, 2014. This Memorandum Order sets forth the reasoning behind that decision and directs the entry of final judgment.

¹ Each cause of action was also brought as a direct, non-veil-piercing claim against defendants Aristidis Kangadis and Themis Kangadis, individually, but the Court dismissed the direct claims in an Order dated September 18, 2014.

Both parties correctly employ New York law to the analysis of whether plaintiffs may pierce the veil. As this is a diversity case, the choice of law rules of the forum state control. *Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc.*, 933 F.2d 131, 137 (2d Cir. 1991). Under New York law, the law of the state of incorporation governs a determination of whether to pierce the corporate veil. *Fletcher v. AteX, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995). KFI is incorporated in New York. See Defendants' Memorandum of Law in Support of Motion for Summary Judgment ("Def's. Br.") at 11.

Under New York law, piercing the 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." *Morris v. N.Y. State Dep't of Taxation and Fin.*, 82 N.Y.2d 135, 141 (1993). However, as already determined by this Court, a preexisting judgment against the corporation, or an otherwise prior-established liability, is not a prerequisite to piercing the corporate veil under New York law. See Order dated September 18, 2014, at 4 (denying defendants motion on this issue).²

² Defendants nonetheless revisit this argument, citing to *Morris v. N.Y. State Dep't of Taxation and Fin.*, 82 N.Y.2d 135, 141 (1993), for the proposition that corporate liability is a prerequisite to piercing the veil. See Defs. Br. at 4-5 n.2; Defendants' Memorandum of Law in Reply and in Further Support of Motion for Summary Judgment ("Def's. Reply Br.") at 2-3. In *Morris*, the corporation had actually been found to have no tax obligation and the Department of Taxation and Finance was trying to hold the principal of the corporation liable for an

Nevertheless, plaintiffs have failed to produce sufficient evidence on summary judgment to sustain their claims under this theory. Summary judgment is appropriate where, in viewing the evidence in the light most favorable to the non-moving party, there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although "piercing the veil" (and similar theories like "alter ego") often involves factual issues to be submitted to the jury, *Am. Protein Corp. v. AB Volvo*, 844 F.2d 56, 59 (2d Cir. 1988); *Camofi Master LDC v. College P'ship, Inc.*, 452 F. Supp. 2d 462, 474 (S.D.N.Y. 2006), a court "will not shy away from [its] responsibility to undertake a careful summary judgment analysis when confronted with the issue of alter ego liability." *In re Tax Indebtedness of Coppola*, No. 91 Civ. 0919, 1994 WL 159525, at *3 (E.D.N.Y. 1994).³

obligation instead. *Morris*, 82 N.Y.2d at 144. As stated in the Order denying the motion to dismiss, *Morris* does not discuss whether an attempt to pierce the veil may be made without joining the underlying corporation where liability has not yet been determined. See Order dated September 18, 2014, at 4. Defendants also assert that plaintiffs may not pierce the veil because New York does not recognize it as a separate cause of action. Defs. Br. at 4-5 n.2; Defs. Reply Br. at 2 (citing *Hart v. Jassem*, 843 N.Y.S.2d 121 (2d Dep't 2007)). *Hart* is distinguishable in that the plaintiff there included a separate and distinct cause of action to pierce the veil in addition to his other causes of action. *Hart*, 843 N.Y.S.2d at 122-23. Here, plaintiffs pursue six causes of action under a piercing the veil theory, which is permissible under New York law. See, e.g., *Baby Phat Holding Co., LLC v. Kellywood Co.*, 991 N.Y.S.2d 592, 594 (1st Dep't 2014); *Chase Manhattan Bank (Nat'l Ass'n) v. 264 Water St. Assocs.*, 571 N.Y.S.2d 281, 282 (1st Dep't 1991).

³ Plaintiffs assert that because piercing the veil law is fact-intensive, there is effectively a presumption against summary judgment. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 5 (citing *David v. Glemby Co., Inc.*, 717 F. Supp. 162, 166 (S.D.N.Y. 1989)). This Court disagrees. Rule 56(a) admits of no exceptions.

Here, plaintiffs have totally failed to adduce competent evidence that any reasonable person could find establishes the second prong of the two-prong veil-piercing test.⁴ To satisfy the second prong, plaintiff must "establish that the owners, *through their domination, abused the privilege of doing business in the corporate form* to perpetrate a wrong or injustice against [the plaintiffs] such that a court in equity will intervene." *Morris*, 82 N.Y.2d at 142 (emphasis added).

In supposed satisfaction of this prong, plaintiffs simply assert that "[a] reasonable jury could certainly find that class members who purchased a tin labelled '100% Pure Olive Oil,' but instead received pomace oil, suffered an injury that was caused by the Kangadis's [sic] domination of KFI." Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 18. But apart from this wholly conclusory statement, they provide no evidence that defendants used their *domination* as a means to accomplish a fraud that justifies holding defendants derivatively liable for the claims for relief, as opposed to the corporation

⁴ In addition, plaintiffs have failed to satisfy the first prong with respect to Andromahi Kangadis and KFM. Specifically, plaintiffs have presented essentially no evidence that Andromahi Kangadis exercised domination over KFI. In fact, the evidence suggests the opposite - despite the fact that she was a shareholder, her role as Secretary was meaningless and she was at most only an employee of the corporation. The fact that she and her husband personally guaranteed KFI's mortgage does not signify her domination, given the lack of evidence of her involvement in any aspect of corporate decision-making. As to KFM, plaintiffs have presented no evidence that KFM as a corporation has exercised any control or discretion over KFI regarding the transaction at issue. The evidence suggests that the corporations are related, in that they share the same shareholders, but in viewing all the evidence, no jury could find that KFM had "complete domination" over KFI relating to the allegations in the complaint.

itself. Logically, the fraud or wrong that a party must show when trying to pierce the veil must be independent from the wrongs that it seeks to remedy in the underlying causes of action. Otherwise, upon a showing of domination, the mere existence of valid causes of action would usurp the entire second prong of the analysis. Plaintiffs must show there is a genuine issue of material fact for the jury to decide as to whether the defendants, using their domination, abused the corporate form in furtherance of a fraud. *See, e.g., Baby Phat Holding Co., LLC v. Kellywood Co.*, 991 N.Y.S.2d 592, 595 (1st Dep't 2014)) ("Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing"); *Atateks Foreign Trade, Ltd. v. Private Label Sourcing, LLC*, 402 Fed. App'x 623, 626-27 (2d Cir. 2010) (finding that the fraudulent transfer of funds between two related corporations that exacerbated one corporation's insolvency and made it less able to pay damages was a "wrong" in this context); *Austin Powder Co. v. McCullough*, 628 N.Y.S.2d 855, 856-57 (3d Dep't 1995) (finding that the corporation's undercapitalization and principal's personal use of corporate funds influenced the corporation's ability to pay a judgment).

As plaintiffs have made no showing that defendants used their domination to abuse the corporate form and perpetrate a fraud or

wrong against plaintiffs, summary judgment must be granted dismissing this cause of action with prejudice.

The Clerk of the Court is directed to close this case and enter final judgment for defendants.

SO ORDERED.

Dated: New York, NY
November 26 2014


JED S. RAKOFF, U.S.D.J.