

FILED

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

MAY 13 2014

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**BURBERRY LIMITED and BURBERRY USA,
Plaintiffs,**

**COUNTY CLERK'S OFFICE
NEW YORK
Index No. 110615/11**

-against-

DECISION & ORDER

**RTC FASHION INC. d/b/a DESIGNERS IMPORTS t/a
FASHION58.COM and ASHER HOROWITZ,

Defendants.**

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LOUIS B. YORK, J.:

This is a motion for summary judgment in favor of plaintiffs Burberry Limited and Burberry USA ("Burberry") for piercing the corporate veil and imposing liability on defendant Asher Horowitz ("Horowitz"). In addition, plaintiffs request summary judgment on the issue of liability only for fraudulent conveyance pursuant to the New York Debtor and Creditor Law § 272, § 273, § 273-a, § 274, § 275, § 276, and § 276-a against RTC Fashion Inc. d/b/a Designers Imports t/a Fashion58.com ("RTC") and Horowitz.

Burberry is involved in the design, manufacture, distribution and sale of high-end apparel and accessories. Burberry owns several prominent trademarks, including the Burberry Check and the Equestrian Knight Design.

Horowitz is the sole owner and officer of Designers Imports.com USA, Inc. (Designers), which has operated www.designersimports.com, dealing in designer-branded clothing and accessories. Horowitz registered the domain name for Designers Imports on August 11, 2003, and registered it with New York's Department of State on November 16, 2005.

Horowitz violated Burberry's intellectual property rights by selling counterfeit Burberry merchandise on his website. Burberry confronted Horowitz and on or about April 12, 2005, Horowitz and Burberry entered into a settlement agreement concerning the sale of counterfeit merchandise infringing on Burberry's trademarks. In the stipulation, Horowitz agreed to stop selling the merchandise.

However, Horowitz continued to and therefore violated the settlement agreement. On May 22, 2007, Burberry commenced a Federal Action against Designers for trademark infringement in the U.S. District Court, Southern District of New York. (*Burberry Limited v. Designers Imports, Inc.*, 07 Civ. 3997) ("Federal Action"). This resulted in a verdict for Burberry and the court entered a final judgment on July 29, 2010 that permanently enjoined Designers from infringing on any Burberry trademark, and awarded plaintiffs money damages plus costs and attorneys' fees, totaling \$2,592,070.89.

Defendant RTC owns and operates www.fashion85.com, a website that sells designer-branded clothing and accessories. RTC registered with the Department of State on February 3, 2010, and purchased the name www.rtcfashion.com. On May 4, 2010, Horowitz entered into an agreement with RTC for RTC to use www.designersimports.com for an annual fee of \$500. On June 22, 2010, RTC filed an Assumed Name Certificate with New York's Secretary of State for use of "Designers Imports."

According to Burberry, Horowitz depleted Designers' funds and assets by conveying www.designersimports.com to RTC in order to frustrate the enforcement of the judgment in the Federal Action. It filed the instant complaint in September 2011,

and asserted causes of actions for piercing the corporate veil and fraudulent conveyance pursuant to the New York Debtor and Creditor Law § 272, § 273, § 273-a, § 274, § 275, § 276, and for attorneys' fees under § 276-a.

Plaintiffs argue that they should be granted summary judgment on the first cause of action, piercing the corporate veil, in order to hold Horowitz liable for the Federal Action judgment. According to CPLR § 3212, a movant must establish its cause of action or defense "sufficiently to warrant a court, as a matter of law, in directing judgment in its favor" by tendering evidentiary proof in admissible form. *Brown v. City of New York*, 22 Misc.3d 893, 899, 870 N.Y.S.2d 217, 222 (1st Dept. 2008). "Once a movant has met the initial burden, the burden shifts to the party opposing the motion to establish, through admissible evidence, that judgment requires a trial of disputed material issues of fact." *Id.* Further, piercing the corporate veil generally "requires a showing that the individual defendants 1) exercised complete dominion and control over the corporation, and 2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury." *Damianos Reality Group, LLC v. Fracchia*, 35 A.D.3d 344, 345, 825 N.Y.S.2d 274, 276 (2nd Dept. 2006). 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." See *Superior Transcribing Service, LLC v. Paul*, 72 A.D.3d 675, 676, 898 N.Y.S.2d 234, 236 (2nd Dept. 2010).

Here, plaintiffs have established a *prima facie* claim for summary judgment based on its cause of action for piercing the corporate veil. It is undisputed that Horowitz is the sole shareholder, officer and director of Designers and RTC. In

Ventresca v. Realty Corp., the court awarded summary judgment against defendant corporation on this issue on the grounds that the corporation had no regular meetings, maintained no corporate records or minutes, was inadequately capitalized, and held no regular elections of directors and officers. *Ventresca Realty Corp. v. Houlihan*, 41 A.D.3d 707, 709, 838 N.Y.S.2d 609 (2nd Dept. 2007). Horowitz's own deposition and affidavit support plaintiffs' contention. Plaintiffs have shown through Horowitz's affidavit testimony that Designers has no by-laws, no stock transfer ledger, no minutes of its shareholders meetings, and no minutes of its board of directors meetings. Horowitz Aff., ¶19. Horowitz's only meetings were with his accountant on a yearly basis for the purpose of preparing his tax returns. *Id.* Furthermore, plaintiffs argue that Horowitz commingled Designers' assets for his personal use and points to Horowitz's affidavit, "I borrowed money from Designers to make an investment from my Scottrade account..." Horowitz Aff., ¶38. In addition, plaintiffs argue that Horowitz also used corporate funds for his personal use when he described using Designers' American Express business credit card to buy household and personal items. Horowitz Aff., ¶¶47-48. Plaintiffs also point out that Horowitz obtained several short-term loans from banks and religious organizations in order to keep Designers solvent. Horowitz Aff., ¶27.

Horowitz raises general arguments on response, none of which are persuasive. Horowitz failed to produce evidence that Designers retained sufficient earnings from corporate operations to meet its financial obligations, and instead argues that obtaining loans were customary within the Satmar Orthodox community, of which Horowitz is a member. Plaintiffs argue that the Satmar Orthodox custom is irrelevant in determining this matter because New York State law governs the pending issues, and therefore the

numerous short-term loans obtained suggest that Designers was undercapitalized at the time of its formation.

As plaintiffs have shown, Horowitz's own affidavit and deposition show that when RTC was formed, it took on the assumed name Designers Imports, just one month before final judgment in the Federal Action. RTC is almost identical to Horowitz's initial company's name. Plaintiffs argue that Horowitz formed RTC after realizing that Designers was facing a judgment against it, and dissolved Designers of its assets rendering it insolvent. Plaintiffs point to Horowitz's deposition describing how he licensed the website (www.designersimports.com) to RTC for the nominal annual fee of \$500. In response, Horowitz failed to prove any payments. Accordingly, the Court concludes, as a matter of law that Horowitz completely dominated and controlled the corporation, and abused the corporate form to advance his own personal interests. Plaintiffs have shown that Horowitz exercised his control to commit a wrong against the plaintiffs by dissolving Designers assets and transferring its domain name to his new company RTC, thereby rendering Designers incapable to satisfy the Federal Action judgment. Accordingly, as a matter of law, "equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice" (see *Matter of Morris v. New York Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 809 (1993), and therefore the Court grants plaintiffs' motion for summary judgment.

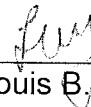
Accordingly, it is

ORDERED that the motion for summary judgment as to liability is granted in favor of plaintiff and against defendant on the first cause of action; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and upon the service and filing with said Clerk of a note of issue and statement of readiness and payment of the fee therefor, said Clerk shall cause the matter to be placed upon the calendar for such trial on damages.

Dated: May 9, 2014

ENTER:



Louis B. York, J.S.C

LOUIS B. YORK
J.S.C.

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NEW YORK