

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-1972

KEVIN MEEHAN,
Plaintiff

vs.

CHRISTOPHER F. NASH,
Defendant

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

INTRODUCTION

The plaintiff Kevin Meehan (Meehan) is represented by John G. O'Neill, Esq. and William F. Benson, Esq. The defendant Christopher F. Nash (Nash) is represented by Bill N. Jacob, Esq.

The present matter before the court is Meehan's motion for summary judgment to pierce a corporate veil to hold Nash individually liable. For the reasons set forth below, the plaintiff's motion for summary judgment is ALLOWED.

FACTUAL BACKGROUND

The complaint was filed October 5, 2011. Nash was defaulted. The default was removed. Nash filed an answer. No counterclaims have been filed. Discovery ended July 31, 2012. Rule 56 motions were to be filed by September 29, 2012. Meehan filed a motion for summary judgment on September 21, 2012.

Entered and Copies Mailed 12/24/12

Meehan is an individual. He has a business address at 8 Uxbridge Road, Mendon, Massachusetts. He owns commercial property in Worcester County which properties are located in Milford and Hopedale. The property consists of 15.61 acres.

Nash is an individual. He owned a home at 41 Cross Street, Topsfield, Massachusetts.

Topsfield Associates, Inc. (Topsfield) is a closely held Massachusetts corporation. It had a place the principal place of business at 29 Cross Street, Topsfield, Massachusetts. Topsfield is a commercial broker. It engages in development activities. Nash took over control of Topsfield in 2007. Nash is the corporation's sole stockholder.

On January 12, 2010, Meehan and Topsfield entered into a commercial lease for the leased premises for a two year period beginning January 1, 2010 and ending on December 31, 2011. Nash negotiated the lease on behalf of Topsfield. Nash executed the lease for the corporation. Nash was not a guarantor of the lease.

Under the terms of the lease and a related purchase and option agreement executed contemporaneously by the parties, Topsfield obtained an option to purchase the leased premises for one million five thousand dollars (\$1,500,000). The lease and option agreement provided Topsfield a two year period in which to investigate the leased premises in order to determine the feasibility of developing it for commercial use. Pursuant to the terms of the lease, Topsfield agreed to pay Meehan minimum rent in equal monthly installments of five thousand dollars (\$5,000). Rent was to be paid on the first day of each calendar month beginning January 1, 2010. Topsfield further agreed under the lease to pay, together with the minimum rent, additional rent of one thousand, six hundred thirty-one and sixty-six dollars and sixty-six cents (\$1,631.66) per month to cover real estate taxes and insurance.

Under the terms of the lease, if any payment of rent or additional rent was received by Meehan more than ten days after it became due, Meehan was entitled to assess a late charge in the amount of one and a half (1.5) percent of the overdue payment. This late charge was deemed to be additional rent under the terms of the lease. The lease further provided that in the event of Topsfield's default, Meehan would be entitled to recover the aggregate minimum rent and additional rent for the balance of the term of the lease.

After commencement of the lease, Topsfield honored its obligations for the first few months, that is the months of January, February and March 2010. Topsfield's last rent payment was for the month of March 2010.

Meehan at all times complied with his contractual obligations under the lease.

Numerous demands were made by Meehan upon Topsfield to meet its rent and additional rent obligations for the months of April 2010 through December 31, 2011. Topsfield defaulted under the terms of the lease in that Topsfield failed to pay Meehan one hundred and five thousand dollars (\$105,000) in the minimum rent and thirty-four thousand, two hundred and sixty four dollars and eighty-six cents (\$34,264.86) in additional rent for that time period. In addition, Topsfield failed to pay Meehan late payment charges for the period April 1, 2010 to September 1, 2010 in the amount of five hundred and ninety-six dollars and eighty-five cents (\$596.85).

On October 8, 2010, Meehan filed a complaint against Topsfield for breach of lease in Worcester Superior Court Civil Action No. 2010-02176. Topsfield, which then remained under the control of Nash, failed to answer or otherwise defend the complaint. On December 31, 2010,

the Worcester Superior Court entered a default judgment against Topsfield in the amount of one hundred thirty-nine thousand, eight hundred and sixty-one dollars and seventy-one cents (\$139,861.71) plus interest in the amount of three thousand, eight hundred and sixty-two dollars and fifty-two cents (\$3,862.52). Topsfield has not paid any amounts to satisfy the default judgment.

Since obtaining the default judgment, Topsfield has no assets to satisfy it. Currently Topsfield is obligated to pay Meehan the amount set forth in the default judgment one hundred forty-three thousand and seven hundred twenty four dollars and twenty-three cents (\$143,724.23) along with additional late payment fees in the amount of one thousand four hundred and ninety-two dollars and twelve cents (\$1,492.12) for the period October 1, 2010 to December 31, 2011. Pursuant to the terms of the lease, Meehan is also entitled to interest from Topsfield along with his costs and attorneys' fees.

Nash is the sole shareholder of Topsfield. He is the president, treasurer, secretary and director of Topsfield. Topsfield does not maintain or have financial statements, profit and loss statements, ledgers or books of accounts. At the time that Topsfield entered into the lease, which was negotiated and executed by Nash on its behalf, Topsfield did not have sufficient funds to meet its then current obligations including its monthly rent obligations under the lease. The few payments made to Meehan under the lease were made directly from Nash's personal bank account. For the period of time from October 2008 through present, Topsfield has had a balance in its bank account of approximately four hundred dollars (\$400). On several occasions Nash utilized Topsfield's assets for his own personal benefit. For example, Nash admitted at deposition that in or around March of 2008, Nash paid a contractor forty thousand dollars

(\$40,000) in funds from Topsfield's bank account for renovations to a building that Nash personally owned. Between December 2008 and August of 2010, Topsfield generated thirty-seven thousand, five hundred dollars (\$37,500) in revenue. As of October 2010, those funds were no longer in Topsfield's bank account and neither Topsfield nor Nash can account for them. Accordingly, those funds were not available to pay any part of the default judgment.

On several occasions, Nash used his personal funds to pay the expenses and debts of Topsfield. For example, in transactions involving the same commercial projects as the lease in this case, Nash used his own funds to pay Topsfield's debts to the Carol Smith and Smith Family Trust in connection with another commercial lease that had been executed by Topsfield and to Guerriere & Halnon an engineering firm. For several years prior to and during the lease period, Topsfield used an office in the building that Nash owned personally. Nash concedes that Topsfield never paid rent to Nash for the use of that office. Nash holds title to a truck and car personally, but those vehicles are reported as assets of Topsfield on its corporate tax returns and Topsfield claims a depreciation deduction for the vehicles on its return. On March 23, 2012, Nash sold personal real estate holdings for four million, four hundred thousand dollars (\$4,400,000) and part of the property sold including the building that Nash had paid a contractor to renovate with funds from Topsfield's bank account.

DISCUSSION

Under Mass. R. Civ. P. 56(c), summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. It is the moving party's burden to affirmatively demonstrate the absence of a triable issue. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). This burden is satisfied either by submitting affirmative

evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party satisfies its burden, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” Mass. R. Civ. P. 56(e).

A corporation is a separate entity from the stockholders and officers. Spaneas v. Travelers Indem. Co., 432 Mass. 352, 354 (1996). Ownership by one person of all the stock does not by itself warrant personal liability for the failed obligations of the corporation. Albert Richards Co., Inc. v. Mayfair, Inc., 287 Mass. 280, 288 (1934). However “[t]he doctrine of corporate disregard is an equitable tool that authorizes courts, in rare situations, to ignore corporate formalities, where such disregard is necessary to provide a meaningful remedy for injuries and to avoid injustice.” Attorney Gen. v. M.C.K., Inc., 432 Mass. 546, 555 (2000). It is permissible to pierce the corporate veil “in rare particular situations in order to prevent gross inequity.” My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614, 620 (1968).

There are twelve factors which should be considered when deciding whether to disregard the corporate form: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by the dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; (12) use of the corporation in promoting fraud. Evans v. Multicon Constr. Corp., 30 Mass. App. Ct. 728, 733 (1991).

Meehan contends that evaluating the undisputed facts under the twelve factor test shows that Topsfield's corporate identity should be disregarded and Nash should be held personally responsible for the amount owed to Meehan. Nash argues that material facts are in dispute including whether there was fraudulent activity on his part and whether his actions with respect to the corporation are sufficient to pierce the corporate veil.¹

Evaluating the facts in a light most favorable to Nash, an analysis of the relevant factors supports the conclusion that the corporate form should be disregarded in this case, and Nash should be held personally liable.²

Nash owned and exercised pervasive control over Topsfield. He was the sole shareholder, president, treasurer, secretary and director of Topsfield. He made all the management decisions and all assets of Topsfield were controlled by him. Nash also negotiated and executed the lease with Meehan on behalf of Topsfield.

A confused intermingling of assets existed between Nash and Topsfield in that the payments made to Meehan under Topsfield's lease were made directly from Nash's personal bank account. Nash used his own funds to pay debts to others on transactions involving the same commercial project as the lease in this case. Additionally, it is undisputed that Nash holds title to vehicles which were reported as assets of Topsfield on tax returns, and Topsfield uses an office

¹ Nash also argues that the parties have not had a sufficient opportunity to conduct discovery in this case, so a summary judgment motion is premature. However, discovery ended in July of 2012, and Meehan filed his Motion for Summary Judgment on September 21, 2012.

² This first factor, common ownership, is not relevant because it applies when determining whether one corporation should be disregarded in order to impose liability on another corporation. See My Bread Baking Co., 353 Mass. at 619. There is also no evidence regarding the seventh factor, whether any dividends have been paid.

building which Nash owns personally and has never paid rent to Nash for the use of the office.

There is no evidence of the amount of capitalization of Topsfield when Nash created the corporation, but since October 2008, Topsfield has only had a balance in its bank account of approximately \$400.00. In January of 2010, when Nash negotiated a lease with Meehan on behalf of Topsfield for \$5,000 a month with additional rent to cover real estate taxes and insurance, Topsfield did not have sufficient funds to meet these obligations. Nash had to make payments on the lease for Topsfield from his personal account in order to meet the company's obligations. Topsfield currently has no assets to satisfy the default judgment against it and the additional late payment fees.

Nash argues that since Topsfield is a closely held corporation, it does not have to adhere to every corporate formality in order to maintain its shareholders' immunity, however the evidence shows that Topsfield completely disregarded the formalities of record keeping and financial reports. While there is evidence that Topsfield has filed annual reports and corporate tax returns in the past, Topsfield does not maintain or have corporate records such as financial statements, profit and loss statements, ledgers or books of accounts. Because Topsfield does not have financial statements or maintain corporate records, there is no evidence that Nash is carrying out the duties of the officers and directors such as treasurer and secretary. See Dujon v. Williams, 5 Mass. L. Rptr. 456 (Mass. Super. 1996) (while president, treasurer, director, and sole stockholder kept significant corporate records, his failure to keep internal records pertaining to the actual operation of the business suggested a lack of respect for separate corporate entities).

There is evidence that Nash, as the only shareholder, siphoned away corporate assets and used the corporation for his own personal transactions. For example, Nash paid a contractor

\$40,000 in funds from Topsfield's bank account for renovations to a building which he personally owned. He then sold the building along with other property for \$4,400,000.

The final factor in the analysis is the use of the corporation in promoting fraud. If the corporate form is used to inflict injury or fraud, equity will permit the corporate shield to be penetrated to remedy a wrong. My Bread Baking Co. 353 Mass. at 618-620. Here, the evidence shows that Nash was aware at the time that Topsfield entered into the lease negotiated by Nash that Topsfield did not have sufficient funds to meet its obligations under the lease. Nash, as the sole officer, director, and shareholder, had knowledge of Topsfield's earnings over the past several years and its current state of income when it entered into the lease. Furthermore, the \$37,500 in revenue which Topsfield did generate was no longer in Topsfield's bank account in October 2010 and neither Topsfield nor Nash could account for it, and it could not be used to pay the default judgment.

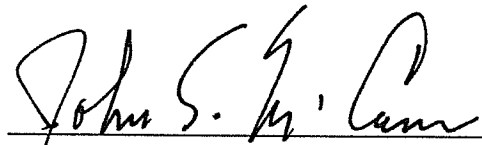
The determination of whether to disregard the corporate form should come after examining all twelve factors to decide whether the corporation's over-all structure and operation misleads. Evans, 30 Mass. App. Ct. at 736; see also M.C.K., Inc., 432 Mass. at 555 (judge properly disregarded corporate entities after thoroughly reviewing of all the evidence and evaluating each of the twelve factors). Here, the evidence clearly establishes that Nash exercised pervasive control over Topsfield. He siphoned away the corporation's assets and used the corporation for his personal benefit. The intermingling of assets between Nash and the corporation, the absence of corporate records and nonobservance of formalities, and the fact that Topsfield negotiated a lease on behalf of Topsfield knowing that the corporation had little funds at its disposal leads this court to conclude that the overall structure and operation of Topsfield

allowed Nash to mislead Meehan so he could avoid liability.

Piercing the corporate veil is appropriate to prevent a gross inequity and allow Meehan to hold Nash liable for Topfield's failure to perform its obligations on the lease. My Bread Baking Co., 353 Mass. at 620-621.

ORDER

Summary Judgment shall enter on behalf of the plaintiff Kevin Meehan and against the defendant Christopher F. Nash. Damages are assessed in the amount of one hundred forty-five thousand, two hundred and sixteen dollars and thirty-five cents (\$145,216.35). Pursuant to the terms of the lease, the court awards reasonable attorneys' fees and costs. Counsel for plaintiff shall submit an affidavit in support of attorneys' fees within thirty (30) days.



John S. McCann
Justice of the Superior Court

DATED: December 20, 2012