WILLIAM E. STEFAN, Plaintiff, v. DOMINICK ASSOCIATES, LLC and THE LEONARD ROSEN FAMILY, LLC, T.I.C, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-2959-13 CIVIL ACTION
DOMINICK ASSOCIATES, LLC and THE LEONARD ROSEN FAMILY, LLC, T.I.C., Third-Party Plaintiffs, v. KEY HANDLING SYSTEMS, INC., And INTERMODAL PROPERTIES, LLC, Third-Party Defendants.	FILED SEP 18 2015 James J. DeLuca, J.S.C.

DECISION OF COURT AFTER TRIAL

This action was tried before the Court over eight (8) days. In this action Dominick Associates, LLC ("Dominick") and The Leonard Rosen Family, LLC, T.I.C. (the "Rosen Trust," which together with Dominick are referred to collectively as "Landlord") seek judgment against Key Handling Systems, Inc. ("Key"), William E. Stefan ("Stefan") and Intermodal Properties, LLC ("Intermodal" which, together with Key and Stefan, are referred to collectively as "Defendants") for rent and other charges claimed as to the real property located at 137 West Commercial Avenue,

Moonachie, New Jersey (the "Moonachie Property"). The legal theories on which the liability of Stefan and/or Intermodal are premised are common law fraud, fraudulent transfer and piercing the corporate veil.[1]

The Court heard the testimony of seven (7) witnesses during the course of the trial. The witnesses who testified were: Stefan; Adriana Paradiso ("Paradiso"), the manager of Dominick; Nathan Rosen ("Rosen"), the manager of the Rosen Trust; Jocelyn Lopez ("Lopez"), an employee of Key who worked in various positions in Key's accounting department from approximately August 2006 until March 2013; Kevin O'Connor ("O'Connor"), a certified public accountant who was accountant for Key, Stefan and Intermodal at all relevant time periods; Allen D. Wilen ("Wilen"), an accounting expert retained by the Landlord; and Kevin Clancy ("Clancy"), an accounting expert retained by Stefan. The following constitutes the Court's decision in accordance with R. 1:7-4 of the New Jersey Court Rules.

On December 17, 1996, Dominic Paradiso and Leonard Rosen, Partners, as landlord, entered into a lease (the "December 17 Lease") with Key with respect to the Moonachie Property. By its terms, the December 17 Lease was to terminate on March 31, 2007. (See, Exhibit P-1 in evidence.)

On April 1, 2007, the parties[2] entered into a first amendment to the December 17 Lease (the "First Amendment") (see, Exhibit P-2 in evidence) pursuant to which,

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[1] The issue of Key's liability to Landlord pursuant to the Lease Agreement (as defined herein) is conceded by Key. The sole issue as to Key is the amount of damages. This issue has been deferred until after the Court's determination of the claims against Stefan and Intermodal.

[2] The First Amendment identifies Midway Industrial Terminal ("Midway") as landlord. The Court understands that Midway assigned the Lease Agreement to Dominick and the Rosen Trust which own the Moonachie Property as tenants in common.

among other things, the term was extended to March 31, 2017. The December 17 Lease and First Amendment are referred to collectively as the "Lease Agreement." No guarantees of any type were executed in connection with the Lease Agreement.

Pursuant to §12 of the December 17 Lease, the Tenant [Key] agreed that it would not at any time, without first obtaining Landlord's prior written consent, subject any fixtures, furnishings or equipment in or on the Moonachie Property which are affixed to the realty to any mortgages, liens, conditional sales agreements, security interests or encumbrances.

Key was in the business of engineering, assembling and selling conveyor systems to retailers across the United States, such as Ralph Lauren/Polo, Burlington Coat Factory, Federated Department Stores and Lord & Taylor, and governmental entities such as the United States Postal Service. Stefan testified that he served as president/CEO of Key since March 2010 when he entered into a Stock Redemption Agreement pursuant to which Key agreed to acquire those shares of Key owned by the VanMelis family ("VanMelis"). Prior to the Stock Redemption Agreement, the stock ownership of Key was as follows: 34% by Stefan; 8% by William P. Stefan, Jr. ("William"), Stefan's son; 8% by Amy Stefan, Stefan's daughter; and 50% by VanMelis. The VanMelis shares are held in escrow pending payment of the amounts agreed to pursuant to the Stock Purchase Agreement. The amount owed to VanMelis is payable in 2016. So long as the VanMelis shares are in escrow, VanMelis has no right to vote said shares.

Stefan testified at trial that the recession of 2008 was "devastating" for Key's retail commercial clients such as Ralph Lauren/Polo. Stefan testified that the recession also affected Key's business with the United States Postal Service. As a result of the downturn in the economy, Key's financial condition was adversely impacted.[3] Because of the 2008 economic downturn, Stefan testified that in 2010 he began making loans to Key so that Key could pay its bills. Stefan testified that without these loans he was concerned Key would go out of business. According to the evidence, Stefan advanced funds directly to Key or to Key through Intermodal.[4] (See, Exhibits D-76 and D-77 in evidence.) According to Stefan and Clancy, Intermodal was used by Stefan, from time to time, as a conduit for funds borrowed by Stefan from line(s) of credit which he maintained at Sun National Bank ("Sun"). Funds borrowed by Stefan from Sun were provided to Key through Intermodal.

In early April 2009 Key requested a rent reduction from Landlord. Such request is confirmed in an e-mail from Paradiso to Stefan dated April 2, 2009, which states:

> "Bill – It would assist my reviewing your rent reduction request with my partners if you could forward audited financials for 2008, financials for Q1 2009 and your budget forecast for the balance of 2009 and into 2010."
> (See, Exhibit D-60 in evidence, page LL 02663.)

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[3] Stefan testified that between 2005 through 2007 Key was profitable. (See Exhibit P-13 in evidence.)

[4] Intermodal is a limited liability company that was formed in 2005 by Stefan and his son, William P. Stefan ("William"). Stefan owns 75% of Intermodal and William owns 25% of Intermodal. Intermodal is the owner of a commercial warehouse building located at 501 New County Road, Secaucus, NJ, which it leases to a third party, unaffiliated with Stefan or Key.

,On April 9, 2009 (at approximately 10:07 a.m.), Rosen advised Paradiso that he had Key's "financials" reviewed by a consultant who advised Rosen that:

1. Business [of Key] way off in '08
2. Contraction going on
3. They [Key] are 2/3 of what they were
4. Contracts in process not that much
5. But, they are not going out of business any time soon.

(See, Exhibit D-61 in evidence, pages LL 02714 – 02715.)

On April 9, 2009, at approximately 2:26 p.m. (see, Exhibit D-61 in evidence, page LL 02714), Rosen sent a follow-up e-mail to Paradiso which reads in part as follows:

> "I am ambivalent on Key. 1) I am thinking we offer Key 15% [rent reduction] but that it needs to be personally guaranteed. My guess is that Bill [Stefan] will not do that and that will be it. 2) we shouldn't offerer [sic] them anything. We had trouble getting a mortgage and we are having our own problems."

On April 14, 2009, Dave Martin, an employee of Key, specifically advised Paradiso and Rosen as follows:

> "The current deep recession has created a 'perfect storm' for our industry as virtually all segments are down significantly in new business opportunities. Previously, the Postal segment has not been impacted significantly by recessions as their whole customer base has not been affected so completely until now. You may have noticed that your junk mail...has dropped dramatically. You may be grateful for this, but, for the USPS, that was a major source of revenue. Add to this the general uncertainty about the extent of government bailouts and subsequent oversight, and our customers are reluctant to commit to

> long-term capital projects at this time. The near-turn outlook is indeed daunting and that is why we are taking steps necessary to survive in '09. ...our forecast is that this will be the norm for the balance of this year and that 2010 will begin a recovery period."
>
> (See, Exhibit D-60 in evidence, page LL 02661.)

According to the testimony of Paradiso and Rosen, Key never followed up on the request for the rent reduction and none was provided.

On January 6, 2010, David Cohn, the CFO of Key, advised Paradiso that the rent would be late (see, Exhibit D-62 in evidence). On January 19, 2010, Paradiso wrote to Rosen since no rent had yet been received from Key. Paradiso states, "This is not a good sign." (See, Exhibit D-63 in evidence.) As of March 18, 2010, Key had failed to pay common area maintenance charges ("CAM") due under the Lease Agreement totaling $26,242.64, which charges dated back to December, 2009 (see, Exhibit D-65 in evidence).

On or about November 3, 2010, Stefan, who according to his trial testimony, had already begun advancing monies to Key, filed a UCC-1 financing statement against Key's assets, including "cash, accounts receivable, equipment and inventory." (See, Exhibit P-91 in evidence.) This financing statement was filed at Stefan's request by Brianna Boedding ("Boedding"), Key's comptroller.[5]

By e-mail dated December 7, 2010 at 3:13 p.m., Bob Garafalo ("Garafalo") of Key contacted Paradiso and requested a copy of a "lot survey" for the Moonachie

[5] This Court was presented with no evidence that as of November 2010 Key had entered into any formal document reflecting the advances made to it by Stefan, including, but not limited to, any promissory note or security agreement.

Property. (See, Exhibit D-41 in evidence, page LL 00027.) On December 7, 2010 at 4:10 p.m. Paradiso responded to Garafalo, "Please advise why you require the survey..." (See, Exhibit D-41 in evidence, page LL 00026.) On December 9, 2010 at 12:13 p.m. Stefan responded by e-mail to Paradiso's inquiry as follows:

> "Because of the serious financial challenges Key is presently going through, I [Stefan] was compelled to loan the company [Key] a considerable amount of money.
>
> "My attorney Robert Ritter is suggesting that we make a UCC filing and has requested the survey.
>
> "Should you have any questions, please contact him at your convenience." (See, Exhibit D-41 in evidence, page LL 00025.)

On December 9, 2010, 12:37 p.m. Robert Ritter, Esq. ("Ritter"), Stefan's counsel, e-mailed Paradiso directly regarding the requested information stating:

> "Not really a lot survey. I need a metes and bounds description on the property. Many thanks." (See Exhibit D-41 in evidence, page LL 00025.)

It appears that after the 12:37 p.m. e-mail from Ritter, Paradiso reached out to the Landlord's counsel, Laurie Meyers, Esq. ("Meyers') of Wilentz, Goldman & Spitzer. See e-mail from Paradiso to Rosen dated December 9, 2010. (See, Exhibit D-42 in evidence) in which Paradiso states:

> "Laurie [Meyers] did read my e-mail. Let's hear back from her regarding the implications then I'll respond to Bill. Yup crap we could have a double vacancy."

By e-mail dated December 9, 2010 at 12:54 p.m., Paradiso responded directly to Ritter and Stefan with a copy to Rosen and Meyers (see, Exhibit D-41 in evidence, page LL 00024) as follows:

> "Robert – Attached is the property description. Please let me know if you require additional information. Regards, Adrianna."[6]

On December 9, 2010 at 1:04 p.m., Rosen responded to Ms. Paradiso's e-mail of 12:37 p.m. (see, Exhibit D-42 in evidence) stating:

> "It is probably just Bill filing for a lien against Key since he is loaning the company money. The UCC makes it official.
>
> Still a good thing to let Laurie [Meyers] know..." (Emphasis added.)

The next day (December 10, 2010 at 11:42 a.m.) Paradiso responded to Rosen as follows:

> "Yes, I think that is it – but at least we know how the company is staying afloat. So we can't assume anything with them. Just hope that we don't have a double vacancy."

(See, Exhibit D-42 in evidence.)

The evidence introduced at trial shows that in December 2010, Key executed and delivered to Stefan a promissory note (the "Note") in the amount of $1,500,000. (See, Exhibit P-9 in evidence.) The Note was payable "on demand." The Note provides that:

> "Lender [Stefan] has advanced to Borrower [Key] against this Promissory Note the principal sum of $750,000 of which $696,000 plus interest is unpaid as of the date hereof. Lender contemplates that he may make further advances to Borrower pursuant to this Note and that said advances shall be reflected in the books and records of Lender and Borrower."

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[6] On December 9, 2010 at 1:18 p.m. Ritter responded by e-mail to Paradiso as follows: "That's what I needed. Thank you." (See Exhibit D-41 in evidence, page LL 00024.)

The evidence at trial further shows that in December 2010, Key executed and delivered to Stefan a Security Agreement (see, Exhibit P-10 in evidence) pursuant to which Key granted to Stefan a security interest in all assets of Key wherever located. The Security Agreement provides that it was given

> "To secure the payment and performance of all obligations of Borrower set forth in this agreement, the note and any other obligations of Borrower to the Lender, Borrower grants to the Lender a security interest in the following collateral,[7] which collateral shall also secure any future advances or refinancings made by Lender to Borrower."

On December 7, 2010, Ritter forwarded a UCC-1 financing statement to the New Jersey Department of Treasury (see, Exhibit D-10 in evidence). The UCC financing statement lists the Debtor as Key and the Secured Party as Stefan. The UCC financing statement describes the collateral as

> "All of the assets and properties of the Debtor, including without limitation, all of the types and items of collateral listed and described in **Exhibit "A"** attached hereto and made a part hereof."

The UCC was filed with the New Jersey Department of the Treasury on December 14, 2010.

Additionally, by letter dated December 9, 2010, presumably after receiving the metes and bounds description of the Moonachie Property from Paradiso, Ritter forwarded a similar UCC-1 financing statement listing Key as Debtor and Stefan as Secured Party to the "Registry Division" of the Bergen County Clerk's office. (See,

[7] Schedule A to the Security Agreement describes the collateral, which includes all inventory, all cash and receivables, all machinery and equipment, all goods and general intangibles.

Exhibit D-11 in evidence.) This UCC financing statement was recorded with the Bergen County Clerk on December 13, 2010.

Key's financial statement as of December 31, 2010 (see, Exhibit P-6 in evidence), show total assets of $3.6 million. Key had obtained a loan from CapitalOne Bank in the amount of $507,000. Based upon Key's 2010 financial statement, Key had at least $3.1 million of unencumbered assets.

In 2011 Key began falling behind in the payment of rent and other charges due under the Lease Agreement. (See, Exhibits D-67 and D-68 in evidence.) On April 1, 2011, Stefan and Rosen met in person to discuss Key's failure to pay the amounts due under the Lease Agreement. Rosen prepared a summary of the meeting. (See, Exhibit D-45 in evidence.) During that meeting, as reflected in Rosen's summary, Stefan advised Rosen that Key lost $300,000 in 2009 and $1.0 million in 2010. Stefan further advised Rosen that he [Stefan] "...put $1.3 million of his own funds into the business at the end of last year." Stefan further told Rosen that Key's business with the U.S. Postal Service had been "slow over the last 3 years." Key has a $10 million "proposal" from the Post Office that he "thinks" will close within 90 days. Stefan also spoke with Rosen about an offer to buy a rival, which would be financed by a "VC partner." Rosen states in his memo:

> "Bill may have been painting a happy face on a dire situation, but it is encouraging that they are not just trying to hang on by their fingernails, they are actively and creatively trying to grow the business. All in all, the situation is positive, but with obvious risks."

Rosen concludes his memo regarding the April 1, 2011 meeting as follows:

> "He [Stefan] told me [Rosen] that he believes Key will be debt free in 90 days and that he will pay as he can. He told me he would put together a plan with his accountant and communicate what he expects to be able to pay in the near future."

By letter dated May 20, 2011, Paradiso, on behalf of the Landlord, advised Key of its continuing default under the Lease Agreement (Exhibit D-46 in evidence). The May 20 letter provides that the past due amount for rent and common area charges total $162,413.94. Such amounts were for 3 months rent for March, April and May 2011 and common area charges dating back to 2010.

During 2011 Key continued to pay Landlord on an irregular basis. As of August 1, 2011, the amounts owed by Key to Landlord under the Lease Agreement totaled $81,676.57 (see Exhibit D-47 in evidence) for June/July 2011 rent and common area charges invoiced to Key.

After August 1, 2011, Landlord and Stefan continued to communicate with Stefan regarding the status of payments due under the Lease Agreement. On or about September 7, 2011, Paradiso left Stefan a voice mail regarding a $50,000 payment that Stefan said would be made on behalf of Key (see, Exhibit D-48 in evidence).

By letter dated October 5, 2011, the Landlord's counsel (Meyers) sent a "Notice of Default" to Key and Key's counsel (James Dugan, Esq. of Waters, McPherson & McNeil) in which Landlord demanded payment of the outstanding balance of $191,449.70 within ten (10) days. (See, Exhibit D-49 in evidence.)

On or about October 6, 2011, Stefan and Boedding on behalf of Key, Rosen, Paradiso and the Landlords' counsel (Meyers) met at Key's office at the Moonachie Property at which time Key agreed to pay the Landlord a total of $204,189.10 for the following items:

> $95,419.83 for rent for August, September and October, 2011.
>
> $63,613.22 for rent for November and December, 2011.
>
> $4,414.89 for CAM charges for the second, third and fourth quarters of 2011.
>
> $40,741.16 for real estate taxes for the third and fourth quarters of 2011. (See, Exhibit P-22 in evidence.)

In return for these payments, Landlord agreed to waive late charges arising under the Lease Agreement. (See, Exhibit P-22 in evidence). It is undisputed that Key paid the amount as set forth above.

Thereafter, Key failed to make the monthly payments under the Lease Agreement for January 2012 (see, Exhibit P-24 in evidence). Key also failed to pay the rent and other charges due for February 2012 (see, Exhibit P-25 in evidence).

On February 13, 2012, Paradiso informed Rosen of her latest discussion with Boedding, during which Paradiso was informed that:

> "She [Boedding] is working on payments and will let me know if she is cutting checks on Thursday.
>
> "She [Boedding] said she's waiting for [Stefan] to tell her if she can pay everything they owe to us to date (rent, CAM) or partial payment (rent) this week."
>
> (See Exhibit P-25 in evidence.)

On or about February 28, 2012, Paradiso met with Stefan. This meeting was confirmed in an e-mail from Paradiso to Stefan dated February 29, 2012 (see, Exhibit P-26 in evidence) in pertinent part as follows:

> "Bill –
>
> "It was a pleasure to catch up with you yesterday.
>
> "We will keep our fingers crossed that your deal with Ferag proceeds to a productive result."
>
> * * *
>
> "Lastly, I'm attaching the latest summary of amounts past due to us totaling $78,338.39. We hope that you will be able to cut us a check next week as you mentioned, and would greatly appreciate it if you could let us know if this will be happening."

In late March 2012 Stefan again met with Paradiso and Rosen regarding, among other things, the status of payment. By e-mail dated March 26, 2012 (see, Exhibit P-27 in evidence), Paradiso wrote to Stefan as follows:

> "Bill –
>
> "Just a note of thanks for updating myself and Nathan [Rosen] on Friday."
>
> * * *
>
> "Additionally, could you let us know when we could expect payment of the latest amounts due? Attached is e-copy of the amounts due (same as hard copy we gave you on Friday).
>
> We understand times are still challenging but are trying to plan for and meet our obligations as well."

By e-mail dated April 12, 2012 (see Exhibit P-28 in evidence) Paradiso again asked Stefan about the status of past due amounts under the Lease Agreement, which then totaled $88,894.12 representing unpaid rent for March/April 2012 of approximately $63,500 plus unpaid CAM charges. Stefan advised in response:

> "I apologize for not notifying you sooner.
>
> "We were expecting a sizeable payment from one of our clients (Net-A-Porter) this last week but between the American holidays and the Europeans celebrating Easter on Monday, there was a serious delay.
>
> "Reasonably sure it should hit by Monday and will release as much and as fast as possible.
>
> "Sincerely appreciate your kind understanding and continued patience."

It appears that Key paid the March 2012 rent to the Landlord, since by e-mail dated May 23, 2012 (see Exhibit P-29 in evidence), Paradiso advised Stefan that the balance owed by Key to Landlord was $110,820.23, including rent for April/May 2012 of $64,285.00 plus CAM and real estate taxes for the second quarter of 2012.

Rosen testified that on or about May 1, 2012, he met with Stefan and Paradiso to discuss Key's failure to make payments pursuant to the Lease Agreement. Stefan advised that Key continued to have a "cash flow" problem. Rosen testified that Stefan showed 'forecasts." Rosen does not have any specific recollection of such forecasts, which were not introduced into evidence.

Rosen testified that Stefan told them during the May 1, 2012 meeting that he [Stefan] was considering selling Key. Rosen testified that Stefan specifically mentioned the "Polo" account and that Key was expecting an order from Polo. During

the May 1, 2012 meeting, Stefan proposed paying the Landlord a partial payment of $25,000 per month[8] with the difference between the rent due under the Lease Agreement plus interest being paid in the future. Rosen testified that at the May 1, 2012 meeting Stefan projected that Key would have $21 million in sales. Rosen testified that he believed Stefan's sales projections since Stefan went into detail as to the customers and he [Stefan] had a "grip" on the business. On May 23, 2012, Paradiso sent Stefan an e-mail reflecting that the past due rent and other charges owed by Key to Landlord totaled in excess of $110,000 (see, Exhibit P-29 in evidence).

Rosen testified that Key paid the $25,000 for approximately three (3) months and then stopped making payments of the reduced amount. On or about July 31, 2012, Paradiso wrote to Rosen as follows: "Just to let you know bill [sic] called me today. Tried to call him back but missed him. Will get to him tomorrow. He owes us a lot of $." (See, Exhibit P-30 in evidence.)

Rosen testified that after Key stopped paying the partial payments of $25,000 per month, Stefan, Paradiso and Rosen again met in early October 2012 to discuss Key's failure to make payments. During this meeting in early October 2012, Stefan, Paradiso and Rosen discussed that, except for some "tweaks," Key had a contract in hand from Polo. Stefan offered to pay a lump sum amount of $100,000 for amounts due under the Lease Agreement and that Key would be current by the end of the year (2012). According to Rosen, Stefan advised that Key continued to have "cash flow" problems but could pay. Rosen testified that at this meeting in early October 2012

[8] At that time the monthly rent due under the Lease Agreement was $32,142.90. (See Exhibit P-29 in evidence.)

Stefan, for the first time, made reference to holding a security interest in assets of Key. Rosen said that he had not previously heard of such a security interest and that this was contrary to Rosen's understanding as to the terms of the Lease Agreement which prohibited liens against Key's assets. Stefan was asked to provide financial information to the Landlord and Stefan agreed. According to Rosen, Stefan agreed that Key would be current with the Landlord by the end of the year (2012).

On Monday, October 8, 2012, Lopez, who was then serving as the Accounting Department Manager of Key, provided certain financial information to Rosen and Paradiso as requested, specifically: "Current Key Financials," "Revenue Pipeline" and "Expected payment schedule to [Key] for balance of the year." (See Exhibit P-41A in evidence.) Rosen testified he wanted this financial information because Stefan said he had a security interest against Key's assets, which Rosen did not think was possible. Rosen testified that in connection with the financial information provided he [Rosen] primarily focused on Key's forecast, which is set forth on pages designated LL 02649-02650. According to Rosen, based upon Key's forecast, as of September 30, 2012, Key had actually "booked" approximately $10 million in sales.

Exhibit P-41A includes a letter dated October 5, 2012 in which Key, through Stefan, advised that it was presently "bidding" and "fully expect to close out $5 million in sales within 30 days, and an additional $5 million by years end." The October 5 letter continues, "...we feel confident that we will be able to pay down at least $100,000 during the first week in November and be completely current by the end of December 2012." (See Exhibit P-41A in evidence, page LL 02638.)

Rosen testified that based upon the materials provided on October 8, 2012, including the October 5 letter, Landlord held off evicting Key because Landlord thought Key would be able to make payments due under the Lease Agreement. However, Rosen remained concerned that Key would be able to pay its rent.[9]

On October 19, 2012, Landlord's counsel (Meyers) sent another notice of default to Key and its counsel demanding payment of past due rent, additional rent and other charges of $198,074.42, plus late charges of $157,397.66 pursuant to the Lease Agreement. (See Exhibit P-31 in evidence.) The October 19 letter specifically states: "based upon prior discussions between Landlord and Tenant and in an effort to partially settle this outstanding amount, my clients expect to receive a partial payment on November 1, 2012." Key failed to make any partial payment on November 1, 2012.

On December 5, 2012, after the October 19 default letter was sent, Stefan, Paradiso and Rosen again met to discuss Key's failure to make the $100,000 payment discussed during the early October meeting. At the December 5 meeting, Stefan advised that the Polo order, discussed at the meeting of early October 2012, had not yet been received but required "tweaking." During that meeting Stefan advised that he was speaking with Sapient Automation in an attempt to sell Key. On December 18, 2012, Lopez sent to Landlord information regarding a potential sale of Key to Sapient Automation. (See Exhibit P-102 in evidence, which includes forecasts and a

[9] During the trial Rosen testified that it was his understanding, based upon his discussions with Stefan and various documents provided to Rosen by Key, that in order to "break even" Key required annual sales of $18 million.

financial summary of Key.) The financial information (Exhibit P-102 in evidence) does not reflect any security interest of Stefan in Key's assets. Rosen testified that prior to December 2012, Rosen had never reviewed 2011 financial statements of Key and he [Rosen] doubted that Stefan had a security interest in assets of Key.

After not receiving any payment by November 1, 2012 or by the end of 2012, Landlord, via Rosen, advised Stefan that the Landlord was commencing eviction proceedings. See e-mail from Rosen to Stefan dated January 17, 2013, Exhibit P-33 in evidence, which states in pertinent part as follows:

> "Dear Bill,
>
> "You've been a good tenant & an honorable gentleman, and we want to work with you to make this deal work, however, my partners are rightfully skeptical because of the rollercoaster we've been on since 2007. We have all agreed that we are at a point where we cannot allow ourselves to be put at further risk. To this end our attorney filed the eviction order on today [sic]."

On January 22, 2013, Landlord commenced an eviction proceeding to remove Key from the Moonachie Property. (See Exhibit P-34 in evidence.) On February 14, 2013, Stefan met with Paradiso, Rosen and Landlord's counsel at the Bergen County Courthouse and agreed to vacate the Moonachie Property by February 28, 2013, unless alternate payment arrangements were made. (See Exhibit P-35 in evidence.) Such arrangements were not made and this litigation ensued.

I. ALLEGED MISREPRESENTATIONS BY STEFAN

Landlord asserts that Stefan made misrepresentations and omissions which constitute fraud. The five elements of common law fraud are (1) a material

misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other party rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damage. See, Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997).

Landlord contends that Stefan falsely made representations and willful omissions as to Key's financial condition. In particular, Landlord asserts that Stefan represented in 2012 that Key had weathered its financial difficulties and would, by the end of 2012, be able to repay Landlord the outstanding arrears under the Lease Agreement. Landlord asserts that as late as September 2012, Stefan represented that Key would do $20 million in sales in 2012 and that Key was experiencing a "cash flow" issue. Landlord asserts that since Stefan had in prior years made representations that Key would pay arrears and in fact did pay such arrears, Landlord withheld commencing eviction proceedings until early 2013 and it was only after Key failed to pay the arrears by the end of 2012 that Landlord filed the eviction action.

Further, Landlord contends that prior to the meeting in early October 2012 Stefan never disclosed to the Landlord that Stefan had filed a UCC financing statement against Key's assets to secure advances which Stefan allegedly made to Key. In support of such position, Landlord asserts that Stefan never provided to Landlord a copy of the promissory note or security agreement between Stefan and Key and that instead of disclosing that Stefan was a secured creditor or Key, Stefan

represented to the Landlord that Key had turned around its business and would be able to re-pay the Landlord.

Landlord also asserts that Stefan knew that Key's sales revenues for 2012 were false. Landlord asserts that Stefan intentionally withheld financial information that would have called into question the representations that he was making to the Landlord regarding Key.

Proof of fraud is not presumed and must be made by clear and convincing evidence. See, Stochastic Decisions, Inc. v. DiDomenico, 236 N.J. Super. 388 (App. Div. 1989), certif. denied, 121 N.J. 607 (1990). This Court finds that Landlord has failed to sustain its heavy burden of proof. In particular, based upon the testimony of Paradiso, Rosen and Stefan and documentary evidence introduced at trial, this Court finds that Stefan was candid with Landlord as to Key's financial difficulties. Such candor dates back to 2009 when Key requested a rent reduction from the Landlord as a result of a slowdown in Key's business (see, Exhibits D-60 and D-61 in evidence) and continued through 2012. Further, Stefan consistently met with Landlord's representatives and informed them of Key's activities, including Key's effort to sell Key to third parties.

Further, Landlord claims that Stefan did not advise until October 2012 that he [Stefan] was asserting a security interest in Key's assets. Such claim is belied by the emails in December 2010 between Stefan, Paradiso, Rosen and the respective representatives and counsel in which Stefan, either directly or through his representatives, specifically advised Landlord that he had made advances to Key and

securing said advances pursuant to a UCC financing statement. (See Exhibit P-41/ D-92 in evidence.) Indeed, Paradiso and Rosen acknowledged that as of December 2010 they understood that Stefan had personally advanced money to Key and that was how Key was surviving based upon Stefan's advances to Key. (See, Exhibit D-41 in evidence.) Further, it is clear that in December 2010 Landlord consulted with counsel regarding these matters. (See, Exhibit D-42 in evidence.) At no time did Landlord raise any issues regarding the advances from Stefan to Key or Stefan's UCC filing.[10]

This Court does not find credible the testimony of Paradiso and Rosen that it wasn't until a meeting in early October 2012 that they first learned that Stefan had filed a financing statement against Key's assets. The e-mails of December 2010 made Landlord and its counsel aware of Stefan's loans and his intention to file a UCC financing statement against Key's assets. Further, even if this Court were to believe the testimony of Paradiso and Rosen, at no time after October 2012 did Landlord allege any default under the Lease Agreement as a result of Stefan's security interest in Key's assets. Landlord's default letter dated October 19, 2012 (Exhibit P-31 in evidence), fails to mention any default based upon Stefan's security interest. The sole ground for the default was Key's failure to pay the amounts due under the Lease

[10] Despite Key's continuing default under the Lease Agreement and Stefan's disclosure regarding his advances to Key and the filing of UCC financing statements, neither Landlord nor its counsel apparently made any effort to obtain a UCC search against Key. If such was obtained, it was never introduced into evidence at trial.

Agreement. In short, the evidence does not support Landlord's claim that Stefan failed to disclose his security interest in Key's assets.[11]

Further, Landlord asserts Stefan knew that the sales revenues and projections, provided on October 8, 2012, for 2012 were false. The revenues information provided to the Landlord on October 8, 2012 by Key were projections, that is, in futuro estimates of Key's performance in 2012. Such projections, by their very nature, are not subject to claims for misrepresentation. Fraud cannot be premised on future promises to act. Statements about the future cannot ordinarily be the basis of a claim for fraud. See, Ocean Cape Hotel Corp. v. Masefield Corp., 63 N.J. Super. 369, 380 (App. Div. 1960) and Piechowski v. Matarese, 54 N.J. Super. 333, 345 (App. Div. 1959). Fraud must relate to a present or pre-existing fact and cannot be predicated on unfulfilled promises or statements relating to future events. Statements relating to future events are generally regarded as mere expression of opinion. A statement as to a future event cannot, in the very nature of the case, be false when made. See 5 Am. Jur. Proof of Facts 2d. 727 (1975). A projection is simply that and it does not serve as the basis of a claim for misrepresentation or fraud.

The history of the relationship between Key and Landlord shows that commencing in 2008/2009 Key's performance under the Lease Agreement was erratic.

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[11] During the course of the trial, Landlord made much of Key's failure to obtain Landlord's consent to the Stefan security interest. However, the Lease Agreement does not prohibit any security interest against all of Key's assets but only against those that become fixtures on the Moonachie Property. Key was permitted to grant security interests in its other assets, including inventory, accounts receivable and other personal property, which were the assets used by Key to repay Stefan. Further, Landlord successfully asserted a claim against Key's assets under the Loft Act, N.J.S.A. 2A:44-165 et seq. and was provided with the proceeds of the auction conducted by Landlord as to Key's assets which remained at the Moonachie Property. Landlord actually benefited from Stefan's advances to Key since Landlord received rent during 2010, 2011 and 2012, which might not otherwise been paid to it.

During this entire period, Landlord continually attempted to keep Key as tenant since Landlord's representative stated that they did not want a "double vacancy" at the Moonachie Property. (See Exhibit D-42.) Additionally, there is no doubt that Landlord was aware that it did not have a personal guarantee from Stefan or any personal collateral from Stefan. During the course of the negotiations with Key, Landlord, on a number of occasions, discussed having Stefan sign a personal guarantee or provide personal collateral. (See Exhibit D-61 and Exhibit P-33 in evidence.) Stefan never did so.

In short, this Court finds that Stefan made no material misrepresentation of a presently existing or past fact. Rather, any alleged misstatements related to future performance by Key and cannot be the basis of a fraud claim. Additionally, it must be noted that Landlord was well aware that Key had not performed in accordance with the Lease Agreement over a number of years. Indeed, Landlord, dating back to 2010, was wary of Key's performances, stating that Landlord could not "assume anything with them." (See Exhibit D-42 in evidence.) During the period from 2009 – 2012, the Landlord's emphasis was on continuing to keep Key as a tenant so that it would not have a vacancy at the Moonachie Property. While the Court certainly understands Landlord's concern, it was this motivation and not Stefan's alleged misstatements which allowed Key to remain at the Moonachie Property until February 2013. As such, this court finds that any reliance based upon Key's anticipated performance under the Lease Agreement was not reasonable. For the

foregoing reasons, this Court finds that Landlord has not sustained its burden to prove fraud by clear and convincing evidence.

II FRAUDULENT TRANSFERS

Landlord asserts that Stefan and/or Intermodal received transfers from Key totaling $1,052,478.00[12] in violation of N.J.S.A. 25:2-7(a) of the New Jersey Uniform Fraudulent Transfer Act (the "NJUFTA"). (See Landlord's Trial Memorandum dated April 2, 2015, at pages 25 – 28 and Landlord's Closing Memorandum dated April 30, 2015, at pages 4 – 6.)[13] N.J.S.A. 25:2-27(a) provides in relevant part:

> "a transfer...by a debtor is fraudulent as to a creditor whose claim arose before the transfer...if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer...and the debtor became insolvent as a result of the transfer."

Claims of fraudulent transfer must be proven by clear and convincing evidence. See, Jecker v. Hidden Valley, Inc., 422 N.J. Super. 155 (App. Div. 2011). The elements to be proven to show a violation of N.J.S.A. 25:2-27(a) are as follows: (i) the creditor's claim must have existed prior to the asset transfer; (ii) the transfer did not pay reasonably equivalent value in exchange for the transfer; and (iii) the debtor was

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[12] This amount is calculated as follows: $18,775 (see Exhibit P-94 in evidence, lines 30 and 71), plus $883,703.00 as reflected in Exhibits D-76 and 77 in evidence, plus $150,000 received by Stefan from Dearborn MidWest Conveyor Co. from the sale of assets acquired by Stefan during the public auction of Key's assets conducted by the Landlord. Landlord asserts that since Key was obligated to provide a non-compete agreement, Key is entitled to an unspecified credit in the amount claimed by Stefan from Key. (See Landlord's Trial Brief at pages 17-18 and Landlord's Closing Memorandum at page 5.)

[13] The court notes that the Landlord's complaint in this matter references a single alleged fraudulent transfer of $350,000. Notwithstanding the limited amount set forth in the Landlord's complaint, this Court considers the total amount of the alleged fraudulent transfers ($1,052,478.00) for purposes of this decision.

insolvent at that time or the debtor became insolvent as a result of the transfer. See, Sun National Bank v. Visci, 2011 N.J. Super. Unpub. Lexis 1478 (App. Div. 2011). The term "claim" is defined in the NJUFTA as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." See, N.J.S.A 25:2-21. That section of the NJUFTA also defines the term "asset" as "property of a debtor, but the term does not include: (a) Property to the extent that it is encumbered by a valid lien."

N.J.S.A. 25:2-30(e) provides that a transfer is not voidable under N.J.S.A. 25:2-27 if the transfer results from enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code. Thus, to the extent the recipient of the alleged fraudulent transfer is a secured creditor, there is no fraudulent transfer.

There is no dispute that Landlord was a creditor of Key. As of February 14, 2013, Key acknowledged that it was indebted to Landlord for $654,113.60 due under the Lease Agreement. (See Exhibit P-35 in evidence.) Additionally, at trial, the parties stipulated that Key was insolvent in 2010, 2011 and as of June 30, 2012. The parties made no such stipulation for the time periods after June 30, 2012. Landlord's expert, Wilen, testified that at the time of all transfers, Key was "insolvent." Stefan's expert, Clancy, provided no opinion as to Key's solvency/insolvency. The Court was presented with no financial statements of Key after June 30, 2012 or tax returns of Key after December 31, 2012. However, it is clear to the Court, based upon the testimony of Wilen and Stefan and the documentary evidence submitted, that Key

was not paying its debts as they become due and that Key was accordingly insolvent at the time of the transfers. See, N.J.S.A. 25:2-23(a).[14]

Nevertheless, Stefan asserts he is a secured creditor of Key who was properly asserting his security interest in Key's assets and thus payments to him or as directed by him cannot be fraudulent under the NJUFTA. Landlord, on the other hand, asserts, alternatively, that the alleged security interest held by Stefan was a "sham," amounts advanced by Stefan were "equity" investments, or that amounts advanced by Stefan should be deemed unsecured.

As noted above, Wilen's report dealt with the solvency/insolvency of Key. The Wilen report reached no conclusion as to whether the amounts advanced by Stefan were either equity or a loan (whether secured or unsecured.) Wilen's report at ¶49 states:

> "A demand note (i.e. no due date) from the CEO/ shareholder might be characterized as an equity investment, especially when the note has no specific payment terms or maturity and when payment should only be made in accordance with the earnings of the entity."

Wilen's report at ¶51 further states:

> "If the promissory note is recharacterized as an equity investment, the payments made to the investment holder would again be subject to the New Jersey Statutes, in this case, Title 14A – Corporations..."

At trial, during cross-examination, Wilen admitted that his report reached no conclusion as to whether the amounts advanced by Stefan to Key were either equity

[14] N.J.S.A. 25:2-23(a) provides that a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation. N.J.S.A. 25:2-23(b) provides that a debtor who is generally not paying his debts as they become due is presumed to be insolvent.

or loan. Nevertheless, Wilen testified that in his view Stefan's advances were unsecured loans. This Court did not find Wilen's testimony credible on this issue. Since his expert's report reached no conclusion on the issue of equity versus loan, this Court will not accept his trial testimony that the amounts advanced by Stefan to Key were unsecured loans.

Wilen conceded during his trial testimony that his solvency/insolvency analysis as to Key has no applicability or relevancy to the extent Stefan held a security interest against Key's assets. Wilen further agreed that Key's financial statement as of December 31, 2010, showed total assets of $3,628,000, of which only $507,000 were encumbered by a lien of approximately $507,000 to CapitalOne, leaving Key with unencumbered assets of approximately $3,100,000. Thus, as of December 2010 when the Note and Security Agreement between Stefan and Key were executed, Key had more than sufficient unencumbered assets to support the loans from Stefan to Key.[15]

According to the evidence, Stefan advanced funds either directly to Key or to Key through Intermodal. (See, Exhibits P-76 and 77 in evidence). According to Stefan and Clancy, Intermodal was used by Stefan as a conduit for funds borrowed

[15] Wilen also testified that to the extent the recipient of a fraudulent transfer advanced additional funds, after receipt of such transfer such recipient would be entitled to assert a "new value" defense. In such event, the amount of the alleged fraudulent transfer would be reduced to the extent of the new advances. See, N.J.S.A. 25:2A-30(f)(1).

by Stefan from line(s) of credit which he maintained at Sun. Funds borrowed by Stefan from Sun[16] were then provided to Key through Intermodal.[17]

Starting in March 2010 Stefan either directly, using funds from Stefan's personal accounts, or through Intermodal, using the Sun LOC, began advancing monies to Key. See Exhibit P-94 in evidence and D-76 and D-77 in evidence.

At trial, Stefan's expert, Clancy, testified as to his analysis of these advances. Clancy's analysis covered the time period from January 2011 through March 2013. Clancy candidly admitted that he did not attempt to verify the amount as set forth in Stefan's chart of purported advances and receipts which constitute Exhibit P-94 in evidence. Rather, Clancy testified that relying upon the books and records of Stefan, Key and Intermodal, Clancy reached the following conclusions:

(1) Stefan provided over $780,000 in loans to Key (the "W.E. Stefan Loans") during the period 2011 through 2013;

(2) Key repaid approximately $473,000 to Stefan during 2013 and 2014;

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[16] This apparently was done as a matter of convenience, since once the funds were borrowed by Stefan from Sun, they were promptly put into Intermodal's account at Sun and then immediately forwarded to Key.

[17] On June 3, 2010, Stefan signed a memorandum of understanding (Exhibit D-6 in evidence) regarding Stefan's borrowing of monies from Intermodal as follows:

> "As a result of my buyout of [VanMelis'] stock, in addition to the financial pressures Key is facing it will probably be necessary for me to borrow money from our Intermodal account. In the event that we happen to sell Intermodal prior to Key repaying any outstanding loans to me, said amount of loans shall be deducted from my equity interest in Intermodal, at the time of closing."

(3) Stefan made $718,410 of additional loans to Key, through Intermodal. Stefan provided $718,410 to Intermodal during 2011 and 2012 (the "W.E. Stefan Intermodal Funds"), and Intermodal, in turn, provided $718,410 to Key no later than one day after receiving those funds from Stefan;

(4) During March of 2013, Key repaid approximately $360,000 to Intermodal;

(5) Key recorded the receipt of:

a. The W.E. Stefan Loans in Key's W.E. Stefan loan account ("Key's W.E. Stefan Loan Account") within Key's books and records, and

b. The W.E. Stefan Intermodal Funds in Key's W.E. Stefan Loan Account;

(6) Intermodal recorded:

a. The receipt of the W.E. Stefan Intermodal Funds in Intermodal's W.E. Stefan loan account ("Intermodal's W.E. Stefan Loan Account") within Intermodal's books and records, and

b. The transfer of funds to Key in Intermodal's W.E. Stefan Loan Account, and

(7) The W.E. Stefan Loans and the W.E. Stefan Intermodal Funds and the repayment of those loans were not recorded by Key or Intermodal as the receipt or the return of equity.

The Court found Clancy's opinions to be credible. Clancy's thorough expert report traced the source of the funds, the dates of the transfers to Key and the treatment of the funds on the books and records of Key and Intermodal as to the advances made by Stefan during 2011 through 2013. As to the advances made in

2010, the Court found credible Stefan's testimony as to the amounts advanced as reflected on Exhibit P-94 in evidence and the Note (Exhibit P-9 in evidence). The Note reflects that as of December 2010, Stefan had advanced to Key the principal sum of $750,000, of which $696,000 was outstanding. There is no competent evidence to contradict the advances made by Stefan in 2010.[18]

At trial, Landlord argued that the amounts advanced to Key by Stefan exceeded the $1.5 million set forth in the Note. However, Landlord's argument that the amounts in excess of $1,500,000 are unsecured ignores the specific terms of the Security Agreement, which provides that Stefan is granted a security interest in Key's assets for "all obligations" of Key to Stefan. Thus, even to the extent Stefan advanced funds in excess of $1,500,000, the Court finds such excess funds to be secured.

Landlord asserts that Stefan's loan should not be secured since they were not disclosed to Key's accountant, O'Connor, and were not reflected on Key's financial statements. Stefan and O'Connor agreed that it was not until sometime in 2012 that Stefan actually advised O'Connor of his security interest in Key's assets. Thereafter, O'Connor reflected Stefan's security interest in Key's financial statements. While it would have been preferable for said disclosure to have been made at the time of the loans, a debtor's failure to reflect a secured loan on its books and records does not

[18] At trial, Landlord spent much time seeking to discredit the amounts as set forth in Exhibit P-94 in evidence. This Court need not accept all of the amounts set forth in P-94 in evidence. Suffice it to say, the Court is satisfied that the totals advanced as described in the Note and in the Clancy Report (Exhibit D-76 and D-77 in evidence) total at least $2,196,310, consisting of $696,000 (outstanding in December 2010) plus $781,900 (directly advanced by Stefan to Key after January 1, 2011) plus $718,410 (advanced by Stefan through Intermodal after January 1, 2011).

render said loan as unsecured. Further, Landlord cannot escape the fact that in 2010 Stefan advised Paradiso and Rosen that he had advanced funds to Key and was having his lawyer file UCC financing statements against Key.

This Court finds that commencing in December 2010 Stefan had a valid and perfected security interest in Key's assets which secured all obligations of Key to Stefan. During the period from 2010-2013, Stefan was repaid a total of $883,703.00, an amount well below the $2,196,310 advanced by Stefan to Key. Such repayments were made to Stefan as a secured lender and thus are not fraudulent transfers.[19]

This Court finds that the advances made by Stefan to Key were secured loans, not equity investments. Further, the Security Agreement makes clear that Key and Stefan intended

> "to secure the payment and performance of all obligations of Borrower set forth in the Agreement, the note and any other obligations of Borrower to Lender, Borrower grants to Lender a security interest in the following collateral, which collateral secures any future advances or refinancings by Lender to Borrower." (Emphasis added.)

This unambiguous provision makes clear that the security interest granted to Stefan by Key covers advances made to Key pursuant to the note, as well as any other obligations owed by Key to Stefan. Thus, while the note by its terms is limited to $1,500,000 plus interest and costs, other principal amounts advanced to Key by Stefan are also covered by the security interest.

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[19] Further, the amount received by Stefan from MidWest in the amount of $150,000 is not a fraudulent transfer. To the extent Key was entitled to receive funds from MidWest, such amounts were subject to Stefan's security interest. Accordingly, said amounts were subject to Stefan's security interest in Key's assets.

N.J.S.A. §12A:9-204(c) provides that a security agreement may provide that collateral secures...future advances or other value, whether or not the advances or value are given pursuant to commitment. Here, the Security Agreement between Stefan and Key provides that future advances are secured by the lien given in favor of Stefan. As such, Stefan holds a valid security interest in all assets of Key for all amounts advanced by Stefan to Key. See also, In re Watson, 286 B.R. 594 (Bankr. N.J. 2002).

Throughout the trial Landlord asserted that Stefan did not treat his advances to Key as loans because there was no amortization schedule, Stefan failed to send a demand letter to Key and Stefan failed to keep track of interest which had accrued on the advances. Landlord provides no citation for the proposition that Stefan lost his secured status as a result of those matters.[20]

In light of the above, this Court finds that Stefan was a secured creditor to Key and that the payments made to him were not fraudulent transfers.

III PIERCING THE CORPORATE VEIL

Landlord asserts that it is entitled to impose liability on Stefan and Intermodal for Key's obligations to the Landlord by piercing the corporate veil. In support of their position, Landlord asserts that (i) Stefan had pervasive control over both Key and Intermodal and was able to take money out and put money in those entities as he chose; (ii) Stefan operated Intermodal out of Key's offices and deposited monies

[20] Further, Stefan sought to preserve his interest in Key's equipment, since once the Landlord served a notice that it would auction the equipment, Stefan promptly asserted his right in same. While it is true that Judge De La Cruz held that under the Loft Act, Landlord had a priority over Stefan's claim, Stefan unquestionably treated his advances to Key as secured.

allegedly belonging to the other in each other's bank account; (iii) Intermodal used Key's employees to conduct communication and clerical work for Intermodal; and (iv) Stefan was the majority shareholder of both Key and Intermodal. See Landlord's Closing Memo at p. 9. Further, Landlord asserts that Stefan used Intermodal to defeat the ends of justice and perpetrate a fraud. Finally, Landlord asserts that Stefan commingled funds and assets between Key, Intermodal and himself, failed to keep reliable records as to the loans made to Key either directly by Stefan or through Intermodal. See Landlord's Closing Memo at p. 10.

Piercing the corporate veil and holding individuals and/or entities responsible for the debts of a corporation is a drastic equitable remedy. See, State Capital Title & Abstract Co. v. Pappas Bus. Servs., LLC, 646 F. Supp. 2d 668, 680 (D.N.J. 2009) ("piercing the corporate veil is an extraordinary exception to the principle that shareholders and members of a corporate entity are shielded from individual liability").

The "primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." Richard A. Pulaski Const. Co., Inc. v. Air Frame Hangars, Inc., 195 N.J. 457, 472 (2008). Because piercing the corporate veil is an extreme remedy, courts only apply it when the corporate form is being "utilized as a subterfuge to justify wrong or perpetuate fraud." Yacker v. Weiner, 109 N.J. Super. 351, 356 (Ch. Div. 1970) aff'd, 114 N.J. Super. 526 (App. Div. 1971). This equitable remedy is limited solely to instances of injustice and fraud:

> We abide by "the fundamental propositions that a corporation is a separate entity from its shareholders, and

> that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." State, Dept. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500, 468 A.2d 150 (1983) (citations omitted). In light of those principles, we have explained that "[e]xcept in cases of fraud, injustice, or the like, courts will not pierce a corporate veil." *Ibid.* (citations omitted). The limitations placed on a claimant's ability to reach behind a corporate structure are intentional, as "[t]he purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, to perpetrate fraud, to accomplish a crime, or otherwise to evade the law[.]" *Ibid.* (citations omitted). Hence, to invoke that form of relief, "the party seeking an exception to the fundamental principle that a corporation is a separate entity from its principal bears the burden of proving that the court should disregard the corporate entity."

Richard A. Pulaski Const. Co., Inc., supra. at 472 (emphasis added).

To warrant piercing the corporate veil in New Jersey "a party must establish two elements: 1) that the subsidiary was dominated by the parent corporation, and 2) that adherence to the fiction of separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law." Verni ex rel. Burstein v. Harry M. Stevens, Inc., 387 N.J. Super. 160, 199-200 (App. Div. 2006).

As the party seeking to pierce the corporate veil, Landlord bears the burden of "proving that the court should disregard the corporate entity." Tung v. Briant Park Homes, Inc., 287 N.J. Super. 232, 240 (App. Div. 1996). Landlord must prove its case by a clear and convincing standard. See, D.R. Horton, Inc. – New Jersey v. Dynastar Dev., LLC, 2005 W.L. 1939778 (N.J. Super., Law Div., August 10, 2005) at *26.

The first element requires proof of the complete domination and control of both the entity's policy and business practices. See Mueller v. Seaboard Commercial Corp.,

5 N.J. 28, 34 (1950). An individual may also be liable for corporate obligations if he or she was using the corporation as his alter ego to perpetuate a fraud or injustice. Sean Wood, L.L.C. v. Hegarty Grp., Inc., 422 N.J. Super. 500, 517 (App. Div. 2011).

Dominance and control under the doctrine have traditionally been recognized by a corporation's failure to adhere to corporate formalities, including the failure to keep separate books and records or issue stock, commingling of funds, or otherwise engaging in acts that would amount to daily dominance and control over the subsidiary, the first prong of the doctrine may be satisfied. See, D.R. Horton, Inc. supra. (citing State, Dep't of Envtl. Prot. v. Ventron Corp., supra., 499).[21]

The second element requires a finding of fraud or injustice. See OTR Assoc. v. IBC Services, Inc., 353 N.J. Super. 48, 51 (App. Div. 2002). "It is only upon proof of some injustice or fraud that the court will go behind the corporate façade to impose liability on the individuals who control the corporation." Coppa v. Taxation Div. Dir., 8 N.J. Tax 236, 246 (1986). "Even in the presence of dominance and control, liability will be imposed only where the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." State Dep't of Environ. Prot., supra. at 501.

To pierce the corporate veil of Key to reach Stefan and/or Intermodal, Landlord must also prove that the alleged misuse of corporate formalities caused them harm.

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[21] The standard for piercing a corporation's veil is modified to accommodate the special characteristics of a limited liability company. The court in D.R. Horton held that courts should not give significant weight to the element of corporate formalities in the veil-piercing analysis because the New Jersey Limited Liability Company Act expressly enables LLC managers and partners "to engage in financial transactions with the company, including lending and borrowing money, and assuming obligations of the company," and because the New Jersey's limited liability statute expressly state that the corporate veil piercing doctrine applies to limited liability companies. Id. at *32.

D.R. Horton, Inc., 2005 WL 1939778, at *19, that is, the acts of Stefan and Intermodal were the cause of Landlord's damage, and its loss was not caused by the Landlord's own acts. See id. (finding that piercing the corporate veil is not appropriate where the plaintiff would not have done anything differently had it known that the defendant corporations were jointly owned). Causation "...is an important, if not essential element, in determining, in a contract case, that an owner's domination of a corporation has been used as an instrument of fraud or injustice, or to circumvent the law." Id. at *31.

The testimony at trial showed that Key is a New Jersey corporation that sold conveyor systems to customers nationwide since 1968. It generated sales of over $36 million in 2007. Even after the 2008 recession, Key continued to generate between $10 to $25 million dollars in sales. Key employed over 25 employees at the time it was evicted from the Moonachie Property. Intermodal is a limited liability corporation formed in 2005 and owns and leases a single commercial property located in Secaucus, New Jersey, to an unrelated commercial tenant. The testimony and evidence at trial showed that Key and Intermodal are not subsidiaries of one another, they do business in separate markets, they file separate tax returns, they keep separate books and records, they do not share offices, and they do not share bank accounts. They are different entities, have different ownership, and do not share customers. Thus, Landlord has not shown that Key was a mere instrumentality of Stefan or Intermodal.

Landlord asserted that Stefan is a part owner of both entities and some of the loans that Stefan made to Key came through Intermodal. The fact that Stefan was a part owner of Key and Intermodal is insufficient to establish domination. Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 520 (App. Div. 2011) ("ownership alone is not enough for piercing."). Joint ownership is only relevant when "one entity owns an interest in another entity 'for the purpose of control, so that the subsidiary company may be used as a mere agency or instrumentality for the [holding] company....'" Id. at 520. Even when there is a principal in control of day-to-day operations of two entities, such evidence is insufficient to establish the domination element. State Dep't of Environ. Prot., supra. at 501 (holding that constant involvement in one firm's personnel in day-to-day business of another corporation was not sufficient to establish dominance). Here, Key and Intermodal were involved in completely separate and unrelated businesses. The Court finds that based upon the testimony of Stefan, that although Stefan is a 75% owner of Intermodal, his son manages Intermodal.

Second, Stefan's loans to Key through Intermodal do not justify piercing the corporate veil. The money, as to which Intermodal was a conduit, was sent directly to Key and booked by Intermodal as loans to Stefan. All the money loaned to Key, whether by Stefan directly or through Intermodal, was recorded and reflected in Key's financial records as money owed to Stefan. It was never booked, by either Key or Intermodal, as a loan from Intermodal to Key.

Based upon the evidence, the Court finds that Landlord would not have acted any differently if Intermodal and Stefan had observed more stringent separation from Key. The testimony of both Rosen and Paradiso makes clear that throughout the period from 2010 through 2012, Landlord's focus was on avoiding a "vacancy" at the Moonachie Property and not whether monies were being advanced to Key by Stefan, whether directly or through Intermodal.

The Court finds that Key and Intermodal are separate entities with separate corporate records. Key and Intermodal did not share offices or hold themselves out to be one and the same. In this case, Landlord never relied on the alleged "commingling" and "lack of corporate" form between Stefan, Intermodal and Key. Landlord, represented by able counsel, could have evicted Key at any point during 2010, 2011 or 2012 when Key was regularly in default under the Lease Agreement. Landlord did not do so. Rather, Landlord continued to collect rent from Key without regard to the source of the funds.[22]

As noted above, Stefan loaned money to Key either directly or through Intermodal. These loans allowed Key to continue to pay rent to the Landlord. Stefan did not dissipate the assets of Key to defeat the claims of creditors. Based upon the testimony of Stefan and Clancy and the documentary evidence introduced at trial, rather than siphoning off monies, Stefan advanced monies to Key which only served to benefit the creditors of Key, including Landlord. See, Trustees of the Local 1245 Health Fund v. Key Handling Systems, Inc., 2015 U.S. Dist. Lexis 9557 (D.N.J. 2015);

[22] It is telling that the Landlord was aware at all relevant times that it held no personal guaranty from Stefan regarding Key's obligations under the Lease Agreement.

N. Am. Steel Connection, Inc. v. Watson Metal Prods. Corp., 515 F. App'x, 176 (3rd Cir. 2013) and Craig v. Lake Asbestos of Quebec, 843 F. 2d 145 (3rd Cir. 1988). The trial testimony is clear that the monies advanced by Stefan to Key enabled Key to pay in excess of $1.0 million in rent to Landlord from 2010 to 2012 and did not defraud Landlord.

The entire purpose of the piercing the corporate veil doctrine is to prevent instances of fraud or injustice. The "hallmarks of abuse of privilege of incorporation" are "typically the engagement of the subsidiary in no independent business of its own but exclusively the performance of a service for the parent and, even more importantly, the undercapitalization of the subsidiary rendering it judgment-proof." OTR Assoc. v. IBC Services, Inc., supra. at 51. In other words, "it is only upon proof of fraud or injustice that a court will pierce the corporate veil to impose liability on the corporate principals." Pharmaceutical Sales and Consulting Corp. v. J.W.S. Delavau Co., Inc., 59 F. Supp. 2d 408, 413 n.5 (D.N.J. 1999).

Landlord fails to show how Stefan's loans defrauded its creditors.[23] The New Jersey Courts have held that "where individuals set up 'legitimate business structures to further their personal and business plans' and 'd[o] not use their partnerships to commit fraud or defeat the ends of justice[,]' the veil-piercing doctrine will not apply." Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 522 (App. Div. 2011).

[23] Even after the repayment of certain funds by Key, Stefan remains a secured creditor of Key in the amount of at least $1,312,607 ($2,196,310 advanced, less $883,703 repaid).

Conclusion

This Court finds Landlord has not met its burden in this matter. Landlord's claims of misrepresentation, fraudulent transfers and piercing the corporate veil have not been proven by clear and convincing evidence. Accordingly, this Court finds in favor of Stefan and Intermodal and finds no liability on their part to Landlord. Counsel for Stefan and Intermodal are to submit a form of judgment under the five-day rule.

Counsel for Landlord is to contact the Court in writing to schedule a proof hearing as to its damage claim against Key.

Dated: September 18, 2015

Hon. James J. DeLuca, J.S.C.