

SHORT FORM ORDER

**INDEX
NO.: 605639-15**

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

LIVE INVEST, INC.,

Plaintiff,

-against-

**CLIFFORD MORGAN; GAMMA
ENTERPRISES, LLC; ALPHA DIRECT
MARKETING LLC, and JERICHO CAPITAL
CORP.,**

Defendants.

**MOTION DATE: 9-15-16
SUBMITTED: 9-15-16
MOTION NO.: 008-MG**

**ZANE and RUDOFISKY
Attorneys for Plaintiff
601 West 26th Street, #1315
New York, New York 10001**

**CHAPNICK & ASSOCIATES, P.C.
Co-Counsel for Plaintiff
114 Old Country Road, Suite 560
Mineola, New York 11501**

**LAX & NEVILLE LLP
Attorneys for Defendants Clifford Morgan,
Gamma Enterprises, LLC, and Alpha Direct
Marketing LLC
1450 Broadway, 35th Floor
New York, New York 10018**

Upon the following papers read on this motion to dismiss ; Notice of Motion and supporting papers 101-106 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 113-114 ; Replying Affidavits and supporting papers 115 ; it is,

ORDERED that the motion by the defendants Clifford Morgan; Gamma Enterprises, LLC; and Alpha Direct Marketing, LLC, for an order dismissing the complaint insofar as asserted against them is granted.

The plaintiff is the successor-in-interest to TonicCare, LLC (“TonicCare”), which was engaged in the skin-care business. On October 15, 2010, TonicCare entered into an agreement with Delta Direct Marketing, LLC (“Delta”), that allowed Delta to sell and distribute its products on consignment. The agreement required Delta to use its best efforts to sell and distribute the inventory of TonicCare’s products that was consigned to it (the “consigned inventory”). TonicCare was dissolved on December 31, 2010, and the plaintiff succeeded to its rights under the agreement with Delta. The plaintiff terminated that agreement on March 16, 2012, and commenced an action against Delta in this court alleging, inter alia, that Delta had failed to use its best efforts to sell and distribute the consigned inventory and that it had failed to


account therefor. A default judgment was entered against Delta on July 17, 2014. Delta's motion to vacate its default was denied by an order of this court dated December 16, 2015. No part of the judgment has been satisfied.

The plaintiff seeks to pierce Delta's corporate veil. On May 28, 2015, it commenced this action against Clifford Morgan ("Morgan"); Gamma Enterprises, LLC ("Gamma"); Alpha Direct Marketing, LLC ("Alpha"); and Jericho Capital Corp. ("Jericho"). The plaintiff alleges that Delta was a sham entity and the alter ego of Morgan, Gamma, Alpha, and Jericho. Morgan was the managing member of Delta and the manager and president of both Gamma and Alpha. He had an ownership interest in Gamma, which had an ownership interest in both Delta and Alpha. Jericho had a 51% ownership interest in both Delta and Alpha until it sold those interests to Gamma on December 31, 2011. Morgan, Gamma, and Alpha now move to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (7).

Generally, piercing the corporate veil requires a showing that the owner (1) exercised complete domination over the corporation with respect to the transaction attacked and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury (**Matter of Morris v New York State Dept. of Taxation & Fin.**, 82 NY2d 135, 141). The corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's agent or alter ego (**Matter of Island Seafood Co. v Golub Corp.**, 303 AD2d 892, 893). Factors to be considered include whether there was an overlap in ownership, officers, directors, and personnel; a failure to adhere to corporate formalities such as the issuance of stock, the election of directors, and the keeping of corporate records; inadequate capitalization; commingling of assets, and the use of corporate funds for personal use (**Id.** at 893-894, *citing* **Wm. Passalacqua Bldrs., Inc. v Resnick Devs. S. Inc.**, 933 F2d 131, 139 [2nd Cir]; **D'Mel & Assocs. v Athco, Inc.**, 105 AD3d 451, 452). The mere claim that the corporation was completely dominated by the defendants, or conclusory assertions that the corporation acted as their alter ego, without more, will not suffice to support the equitable relief of piercing the corporate veil (**Damianos Realty Group, LLC v Fracchia**, 35 AD3d 344).

Liberally construing the allegations of the complaint in the plaintiff's favor, accepting the alleged facts as true, and according the plaintiff the benefit of every possible favorable inference (*see*, **Leon v Martinez**, 84 NY2d 83, 87), the court finds that the plaintiff has failed to plead any particularized facts to substantiate its conclusory allegations, which are upon information and belief, that Delta was dominated and controlled by Morgan, Gamma, and Alpha (*see*, **Andejo Corp. v South St. Seaport Ltd. Partnership**, 40 AD3d 407; **Albstein v Elany Contracting Corp.**, 30 AD3d 210). Accordingly, the motion is granted.

Dated: January 13, 2017


J.S.C.
ELIZABETH H. EMERSON