

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

MOTION DATE: 9-15-16  
SUBMITTED: 9-15-16  
MOTION NO.: 007-MD

\_\_\_\_\_  
LIVE INVEST, INC.,

Plaintiff,

-against-

ZANE and RUDOFISKY  
Attorneys for Plaintiff  
601 West 26<sup>th</sup> Street, #1315  
New York, New York 10001

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

Defendants.

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Co-Counsel for Plaintiff  
114 Old Country Road, Suite 560  
Mineola, New York 11501

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GORDON, LLC  
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New York, New York 10004

Upon the following papers read on this motion to dismiss ; Notice of Motion and supporting papers 89-100 ; Notice of Cross Motion and supporting papers \_\_\_\_\_ ; Answering Affidavits and supporting papers 107-112 ; Replying Affidavits and supporting papers 116 ; it is,

**ORDERED** that the motion by the defendant Jericho Capital Corp. for an order dismissing the complaint insofar as asserted against it is denied.

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. Jericho now moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

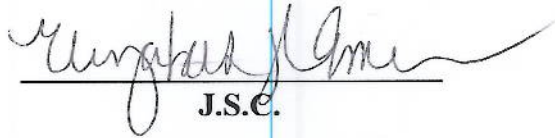
Generally, piercing the corporate veil requires a showing that the owner (1) exercised complete domination over the corporation with respect to the transaction attacked and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury (**Matter 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 [2<sup>nd</sup> Cir]; **D'Mel & Assocs. v Athco, Inc.**, 105 AD3d 451, 452).

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, **Leon v Martinez**, 84 NY2d 83, 87-88). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (**Id.** at 88). In assessing a motion under CPLR 3211 (a) (7), however, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (**Id.**).

In opposition to Jericho's motion, the plaintiff submits Morgan's post-judgment deposition testimony in the underlying matter. Morgan testified that, although he was the

managing member of Delta, Jericho ran the business. Morgan testified, "Jericho Capital called all the shots. I was the managing member, but it was their money. They ran that business. I followed orders." Morgan's testimony supports the plaintiff's allegations that Delta was dominated and controlled by Jericho and contradicts the documentary evidence upon which Jericho relies in support of its contention that it never managed or operated Delta. Under these circumstances, the court declines to dismiss the complaint insofar as it is asserted against Jericho. Accordingly, the motion is denied.

Dated: January 13, 2017

  
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J.S.C.

**ELIZABETH H. EMERSON**