

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGENT NATIONAL BANK : CIVIL ACTION
 :
 v. :
 :
 DEALERS CHOICE AUTOMOTIVE :
 PLANNING, INC., and :
 PAYMENTS, INC. : NO. 96-7930

MEMORANDUM AND ORDER

HUTTON, J.

June 1, 1999

Presently before the Court are Plaintiff Regent National Bank's Motion for Partial Summary Judgment (Docket No. 43), Plaintiff's Renewed Motion for Partial Summary Judgment (Docket No. 67), Defendants Dealers Choice Automotive Planning, Inc., Payments Inc., Kevin Lang, and Abraham Weinzimer's Memorandum of Law in Opposition (Docket No. 79), Plaintiff's Reply Memorandum (Docket No. 86), and Defendants' Sur Reply Memorandum of Law in Opposition (Docket No. 91). For the following reasons, the Plaintiff's motion is **DENIED**.

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. In June, 1994, Plaintiff Regent National Bank ("Regent") decided to enter the business of financing automobile insurance premiums. Regent entered into a servicing agreement with K-C Insurance Premium Finance Company, Inc. ("K-C"), which Alvin Chanin owned and Antimo Cesaro managed. In the

insurance premium business, the customer pays a down payment on the premium, the lender pays the entire annual premium, and the customer pays the remainder in installments. If the customer defaulted, the contract would be canceled and the lender would receive a return premium from the insurer for the uninsured period. Thus, while this business was relatively safe, it was not without its risks.

Cesaro introduced Regent to Defendant Dealers Choice Automotive Planning, Inc. ("DCAP"). DCAP was a licensed New York broker that located insurance premium financing customers. In the fall of 1994, DCAP referred customers to Regent on an experimental basis and, at the same time, conducted discussions with Regent to enter a more permanent arrangement. In January 1995, Regent and Defendant Payments, Inc., a licensed premium finance broker and affiliate of DCAP, entered into an agreement. The agreement provided that: (1) insurance buyers would contact DCAP for financing; (2) DCAP would refer the buyers to Regent; (3) Regent would loan the money necessary to buy the automobile insurance; and (4) the buyers would then service their debts to Regent. In exchange for referring it business, Regent would pay Payments a fee of \$40 for every individual referred. The agreement also had a recourse provision which stated: "The financing of all insurance contracts have been and are with recourse."

On two occasions, the parties extended the period during which the recourse provision would continue in effect. First, in a letter agreement dated February 15, 1995, the parties agreed that: "The financing of all insurance premium finance contracts have been and shall continue to be with recourse until May 15, 1995, or until such time as the rules and/or laws change to allow us to eliminate this provision, whichever is sooner." Second, in letter agreement dated May 15, 1995, the parties agreed to extend the recourse period indefinitely, stating: "The financing of all insurance premium finance contracts have been and shall continue to be with recourse until such time as the rule and/or laws change to allow us to eliminate this provision."

In 1995 and 1996, the parties did a fair amount of business. Chanin and Cesaro represented that any cancellations had been low and assured Regent that there was only minimal losses under any cancellations. In April 1996, however, Regent discovered that the cancellations had been greater than represented by Chanin and Cesaro. Indeed, the Office of the Controller of Currency insisted that Regent cease from participating in the insurance premium financing business because there were millions of dollars of unreported and uncollectible losses. Regent was able to continue business only after finding a replacement financing company.

After seeking to collect return premiums due, Regent met with DCAP principals and demanded that they make good on the recourse provision. DCAP refused to honor the recourse provision. On November 27, 1996, Regent filed this lawsuit against DCAP and Payments for breach of contract. As damages, Regent seeks indemnification under the recourse provision of the January 4, 1994 contract, as extended or amended.

In response to Regent's complaint, Payments brought a counterclaim against Regent for breach of contract. In this counterclaim, Payments claims that Regent breached the contract by failing to adhere to the proper procedure for terminating the contract. Payments alleges that it suffered over \$40,000 in direct damages and consequential damages.

In addition to the counterclaim, DCAP and Payments brought a Third Party Complaint for indemnification against several of Regent's officers, including Harvey Porter, Regent's President and Chief Executive Officer, Abraham Bettinger, a Regent Director and large shareholder, and Kristen Evan, Regent's Chief Operating Officer. DCAP and Payments claimed that these Regent officers made false representations concerning the recourse provision "with the intention that Payments and DCAP rely upon them, and with the intent to deceive Payments and DCAP to their injury." Thus, DCAP argued that Porter, Bettinger, and Evan were jointly and severally liable to it for any amount it must disgorge to Regent under the

recourse provision. DCAP and Payments also sought to introduce evidence of the claimed misrepresentations in order to negate the recourse provision.

On November 26, 1997, this Court held that these alleged misrepresentations were inconsistent with the language of the written agreement and subsequent extensions. See Regent Nat'l Bank v. Dealer's Choice Automotive Planning, Inc., No. CIV.A.96-7930, 1997 WL 786468, at *7 (E.D. Pa. Nov. 26, 1997). Thus, the Court held that the parol evidence rule barred any such third party claim. See id. The Court then dismissed the Third Party Complaint against Porter, Bettinger, and Evan. See id.

On July 2, 1998, Plaintiff filed a motion to amend the complaint. The Plaintiff moved to amend the complaint because, while Defendants' answer states that Payments is a wholly owned subsidiary of DCAP, this may not be the case. Abraham Weinzimer, one of DCAP's two owners, testified at his deposition that he and Kevin Lang were the sole owners of Payments. Thus, Regent moved for leave to amend the complaint to add these parties as defendants. Defendants DCAP and Payments consented to Plaintiff's motion for leave to amend. Plaintiff filed an amended complaint naming Lang and Weinzimer as defendants.

On August 18, 1998, Defendants filed an answer to this amended complaint. Defendants' answer to the amended complaint added several counterclaims on behalf of the original Defendants,

DCAP and Payments, as well as on behalf of Lang and Weinzimer. In addition, the answer to the amended complaint added a host of entities affiliated with DCAP ("DCAP Brokers") as new parties and named them as counterclaim plaintiffs. Under the auspices of the DCAP Brokers counterclaims, the Defendants again served a Third Party Complaint against Porter, Bettinger, and Evans. It was undisputed that the addition of these parties and counterclaims was made without leave of court. Furthermore, most of these counterclaims were already pending in a New York State proceeding which has since been stayed by the Supreme Court of New York until the resolution of this case.

On December 16, 1998, the Court struck the Defendants' entire answer to the amended complaint pursuant to Federal Rules of Civil Procedure 15(a) and 13(f). See Regent Nat'l Bank v. Dealer's Choice Automotive Planning, Inc., No. CIV.A.96-7930, 1998 WL 961377, at *5 (E.D. Pa. Dec. 15, 1998). The Court found that the addition of these new parties and counterclaims would cause great prejudice to the Plaintiff by necessitating additional discovery, expense, and time. See id. The Court also denied Regent's pending summary judgment motion to allow for completion of discovery. See id. at *8.

On February 11, 1999, Regent filed a renewed motion for partial summary judgment on the liability issues. In its motion, Regent also seeks dismissal of Defendants' remaining counterclaim

for breach of contract. Defendants filed a memorandum in opposition and also requested that the Court enter judgment in their favor.¹

II. STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the

¹ The Defendants' request for dismissal of Regent's action is not in the form of a properly filed motion or cross-motion. Rather, Defendants simply ask for this relief in their response to Regent's motion. Accordingly, the Court will not address their request.

nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Plaintiff's Breach of Contract Claim

Regent argues that it is entitled to summary judgment on their breach of contract claim. In order to prove a breach of contract under Pennsylvania law, a plaintiff must prove five elements.² These elements are: (1) the existence of a valid and binding contract to which the plaintiff and defendants were parties; (2) the contract's essential terms; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) damages resulting from the breach. See Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa. 1996), aff'd mem., 114 F.3d 1172 (3d Cir. 1997).

Regent contends that this Court should enter summary judgment in their favor because the Court already rejected

² This Court previously found that Pennsylvania law governs this case. See Regent Nat'l Bank, 1997 WL 786468, at *4.

Defendants' defenses to the recourse provision in its November 26, 1997 opinion. In that Opinion, the Court granted the Third Party Defendants' motion to dismiss the Third Party Complaint. See Regent Nat'l Bank, 1997 WL 786468, at *7. In so ruling, the Court found that:

The agreement was specific and unequivocal as to the recourse provisions' enforceability, and the Court easily finds that it was integrated on this point. The subsequent letter agreements extending [the recourse provision] indefinitely are likewise clear. They in no way suggest that Regent would not attempt to enforce the recourse provision, and only state that the parties' intent that the provision be phased out as soon as the law permits.

Id. Using this language of the Court's Opinion as support, Regent contends that the Court rejected all of the Defendants' defenses to liability under the recourse provision and, therefore, summary judgment should be entered in their favor on the breach of contract claim under the law of the case doctrine.

The law of the case doctrine provides that a district court will not revisit its prior decisions. See Al Tech Specialty Steel v. Allegheny Int'l Credit, 104 F.3d 601, 605 (3d Cir. 1997); 18 Moore's Federal Practice § 4478. These rules apply in the case of any issue that has actually been decided, whether expressly or by necessary implication. See Bolden v. SEPTA, 21 F.3d 29, 31 (3d Cir. 1994). As long as the court or courts have manifested a decision on an issue, absent extraordinary circumstances the matter

may be reviewed only upon appeal to a superior appellate court.
See id.

While the Court agrees that it already rejected many of Defendants' defenses in the November 26, 1997 Opinion, it cannot agree that the law of case doctrine mandates entry of summary judgment in Regent's favor. In the November 26, 1997 Opinion, the Court rejected the Defendants' First Affirmative Defense that the recourse provision is vague, the Defendants' Third Affirmative Defense that Regent is estopped from enforcing the extension of the recourse provision, the Defendants' Fourth Affirmative Defense that the agreement is unenforceable as not mutually agreed upon and indefinite under New York banking law, and the Defendants' Fifth Affirmative Defense that they were fraudulently induced into the recourse provision. As Regent correctly points out, these defenses are no longer viable under the law of case doctrine because the Court already found that the recourse provision and subsequent letter agreements in this case were clear, specific, and unequivocal. See Regent Nat'l Bank, 1997 WL 786468, at *7.

Nevertheless, there are many issues which the Court did not address in the November 26, 1997 Opinion. For instance, the Court has not addressed the Defendants' First Affirmative Defense³

³ In their First Affirmative Defense, Defendants contend that the letter agreement is vague, indefinite, and unenforceable as a matter of law. In the November 26, 1997 Opinion, the Court found that the letter agreement was clear. Thus, under the law of the case doctrine, the Court has already rejected the First Affirmative Defense to the extent that it argues the letter
(continued...)

that the letter agreements extending the recourse provision are unenforceable because these agreements lacked consideration. See Graham v. Jonnel Enters., Inc., 257 A.2d 256, 258 (Pa. 1969) (noting that, under Pennsylvania law, a modification of an existing contract requires additional consideration on both sides). Regent counters by arguing that: (1) the letter agreements extending the recourse provision were not major modifications, and thus did not require additional consideration, and (2) that modifications were for consideration. Thus, there is a genuine issue of material fact concerning whether the letter agreements lacked consideration, and thus, are not enforceable.

Furthermore, the Court has not yet addressed the Defendants' argument that the contract terminated before Regent demanded recourse under the contract. Defendants contend that Regent lost any rights to demand recourse once it terminated the contract. Defendants also contend that, even if Regent did not lose these the right to demand recourse upon termination, Regent did not make such a demand within a reasonable time. Regent responds by arguing that "[t]he only reasonable interpretation of the contract is that the recourse provision attaches to all

³(...continued)

agreement was vague and indefinite. This Opinion, however, did not address the argument that the letter agreement was unenforceable as a matter of law. In their opposition to the Plaintiff's summary judgment motion, the Defendants argue that the letter extensions are not enforceable as a matter of law because they were not supported by consideration. Thus, the Court has not addressed this aspect of the Defendants' First Affirmative Defense.

contracts financed during the duration of the Agreement." The Court concludes that this issue is a material fact remaining for trial.

Finally, the Court has not yet addressed whether Regent may hold DCAP, Lang, and Weinzimer liable for breach of contract under a theory of alter ego liability.⁴ Even though the contract in this case was between Regent and Payments, Regent maintains that DCAP, Lang, and Weinzimer are liable for any damages because Payments was a thinly-capitalized entity and completely dependent on DCAP. Defendants respond by arguing that Regent failed to provide sufficient evidence to "pierce the corporate veil."

A corporation is a legal entity separate and distinct from its shareholders. See United States v. Sain, 141 F.3d 463, 474 (3d Cir. 1998). Thus only the corporation, not its owners, are liable for the corporation's debts. See id. Under Pennsylvania law, there is a strong presumption against piercing the corporate veil. See Lumax Indus., Inc. v. Aultman, 669 A.2d 893, 895 (Pa. 1995). A corporation is regarded as an independent entity even if its stock is owned entirely by one person. See College Watercolor Group, Inc. v. William H. Newbauer, Inc., 360 A.2d 200, 207 (Pa. 1976).

⁴ Regent argues that default judgment should be entered against Lang and Weinzimer because they failed to respond to the amended complaint. This Court does not address this issue because Regent failed to comply with Rule 55 of the Federal Rules of Civil Procedure.

In Ashley v. Ashley, 393 A.2d 637 (Pa. 1978), the Pennsylvania Supreme Court set forth guiding principles for a court to use when determining whether it should disregard a corporation's corporate form in order to hold one in control of a corporation liable for that corporation's debts. See id. at 641. The Ashley court stated:

Th[e] legal fiction of a separate corporate entity was designed to serve convenience and justice and will be disregarded whenever justice or public policy demand and where rights of innocent parties are not prejudiced nor the theory of the corporate entity rendered useless. We have said that whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate entity may properly be disregarded.

Ashley, 393 A.2d at 641 (citations omitted). Pennsylvania courts have applied the flexible approach adopted in Ashley to hold that no finding of fraud or illegality is required in order to pierce the corporate veil. See Rinck v. Rinck, 526 A.2d 1221, 1223 (Pa. Super. 1987). Instead, the corporate form may be disregarded "whenever it is necessary to avoid injustice." Id.; see also Ragan v. Tri-County Excavating, Inc., 62 F.3d 501, 508-09 (3d Cir. 1995).

In determining whether to pierce the corporate veil, a court should consider the following factors: (1) whether the corporation is grossly undercapitalized for its intended purpose; (2) whether corporate formalities were followed; (3) whether dividends were paid; (4) whether the corporation is insolvent; (5)

whether the dominant shareholder has siphoned funds; (6) whether there exist other officers; and (7) whether the corporation is merely a facade for the operations of the dominant stockholder. See Solomon v. Klein, 770 F.2d 352, 353-54 (3d Cir. 1985). A finding of alter-ego liability is a factual determination that must be supported by the record. See Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc., 727 F.2d 279, 283 (3d Cir. 1983). Thus, whether there are facts sufficient to support the piercing of the corporate veil is an issue that may be decided by a jury. See Cantiere DiPortovenere Piesse v. Kerwin, 739 F. Supp. 231, 236 (E.D. Pa. 1990).

In this case, a reasonable jury could find that the corporate veil of Payments should be pierced based on the facts presented by Regent. This issue, however, cannot be decided as a matter of law. Therefore, the Court denies Regent's motion for summary judgment on this issue.

In sum, while the Court agrees that it rejected most of Defendants' defenses to liability and that many of Defendants' defenses are irrelevant for purposes of this motion because they pertain to damages, the Court cannot agree that the Court entirely decided the issue of liability in the November 26, 1997 Opinion.⁵

⁵ With respect to damages, the Defendants contend that: (1) Regent failed to mitigate their damages - Second Affirmative Defense; (2) Regent did not suffer any damages - an argument made in opposition to the summary judgment motion; and (3) Regent suffered damages as a consequence of its own actions - an argument made in opposition to the summary judgment
(continued...)

As noted above, there are several issues pertaining to liability which remain for trial. Accordingly, the Court denies Regent's motion for summary judgment in this respect.

B. Defendants' Breach of Contract Counterclaim

Regent also moves for summary judgment on the Defendants' sole remaining counterclaim for breach of contract. In their counterclaim, Payments asserts that Regent breached the contract by failing to adhere to the proper procedure for terminating the contract. Payments alleges that it suffered over \$40,000 in direct damages and consequential damages. Regent contends that this counterclaim should be dismissed because: (1) the agreement could be terminated at anytime; (2) the Office of Comptroller of the Currency instructed Regent to cease business immediately; (3) performance was impossible; and (4) Defendants have failed to produce documents relevant to damages.

The Court finds that the record is incomplete on this issue. There is simply a lack of affidavits, deposition testimony, or other properly considered evidence before the Court. Therefore, the Court will reserve judgment and rely on Rule 50 of the Federal Rules of Civil Procedure to determine whether Payments produced

⁵(...continued)
motion. The Court finds that these arguments are not relevant to the motion before the Court, that is, whether Regent is entitled to summary judgment on the issue of liability for breach of contract.

legally sufficient evidence of their breach of contract counterclaim.

An appropriate Order follows.

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O R D E R

AND NOW, this 1st day of June, 1999, upon consideration of Plaintiff's Motion for Partial Summary Judgment (Docket No. 43) and Renewed Motion for Partial Summary Judgment (Docket No. 67), IT IS HEREBY ORDERED that the motions are **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.