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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

CHRISTIAN RISHEL, a Florida resident

Plaintiff,

vs.

CHARLES PARKS, a Florida resident; BOLD CITY GARAGE, INC., a Florida corporation; NEW VISION PERFORMANCE, INC., a Florida corporation; and DOE DEFENDANT I

Defendants.
_______________________________________/

CIRCUIT CIVIL DIVISION

CASE NO.: 16-2019-CA-4503

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BASED ON DEFAULT

1. Summary Judgment Standard.

"Summary Judgment is proper 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." Kitchen v. Ebonite Recreation Centers, Inc., 856 So.2d 1083, 84-5 (5th DCA 2003) (*citing* Fla. R. Civ. P. 1.510(c) and Fisel v. Wynns, 667 So.2d 761, 764 (Fla.1996)). A party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the non-moving party. Kitchen, 856 So. 2d 1085 (*citing* Bruckner v. City of Dania Beach, 823 So.2d 167, 170 (Fla. 4th DCA 2002)).

The evidence used by the non-moving party must meet at least the preponderance of the evidence standard. Visingardi v. Tirone, 193 So. 2d 601, 604 (Fla. 1966). Speculation does not meet the preponderance of the evidence standard. Gooding v. University Hosp. Bldg., Inc., 445

So. 2d 1015, 1018 (Fla. 1984). Evidence used by the non-moving party must be based on personal knowledge. Humphrys v. Jarrell, 104 So. 2d 404, 09 (Fla. 2nd DCA 1958); Fla. R. Civ. P. 1.510.

2. The Entry Of A Default Results In The Defendant Admitting Liability To The Well-Pled Facts In The Complaint.

A default admits every cause of action that is sufficiently well-pled to properly invoke the jurisdiction of the court and to give due process notice to the party against whom relief is sought. Bowman v. Kingsland Development, Inc., 432 So. 2d 660, 662 (Fla. 5th DCA 1983). A default also admits the plaintiff's entitlement to liquidated damages due under the pleaded cause of action, but not unliquidated damages[2]. *Id*. Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law. Cirprian-Escapa v. City of Orlando, 172 So. 3d 485, 489 (Fla. 5th DCA 2015) (*citing* Bowman, 432 So. 2d at 662).

3. Default Was Entered On Sufficiently Well-Pled Causes Of Action.

As of August 5, 2019, all Defendants were properly served with the Summons and Complaint in this action. After failing to timely respond to the Complaint, the Clerk entered defaults against all Defendants, pursuant to Rule 1.500(a) of the Florida Rules of Civil Procedure, in which all Defendants were in default as of August 21, 2019.

The causes of action in Plaintiff's Complaint are sufficiently pled. Plaintiff alleged the requisite elements to establish valid claim alter ego, violation of the Florida Motor Vehicle Repair Act (Fla. Stat. § 559.920), unjust enrichment, and conversion for both Plaintiff's money

[2] See Section 4 of this Memorandum of Law, below.

and Plaintiff's vehicle. Due to the Defendants' default they're deemed as having admitted every cause of action that is sufficiently well-pled to invoke the jurisdiction of the court. Bowman v. Kingsland Development, Inc., 432 So. 2d 660, 662 (Fla. 5th DCA 1983).

4. Unliquidated Damages May Be Obtained Through Due Process Hearing With Notice Provided To Defendant(s).

Some damages in the instant case are liquidated because the proper amount to be awarded can be determined with exactness, as pled in Plaintiff's Complaint. Additionally, the total amount of Plaintiff's damages may be certainly determined by an arithmetical calculation or by factual determination and sworn testimony, as it is pled in the Complaint as a sum of ($19,500.00), testified for in Plaintiff's Affidavit of Indebtedness[3]. Therefore, such money damages are liquidated, as the Court can award damages with exactness from the pleadings by an arithmetical calculation or by and through the alleged - and consequently admitted - facts themselves.

There are also damages pled for by the Plaintiff which are unliquidated, which include, but are not strictly limited to, attorney's fees and costs.[4] Damages are "unliquidated" if they cannot be ascertained to an exact sum without taking an examination of the facts upon which to base a value judgment. Rich v. Spivey, 922 So. 2d 326 (Fla. 1st DCA 2006) (*citing* Sec. Bank, N.A. v. BellSouth Adver. & Publ'g Corp., 679 So. 2d 795, 800 (Fla. 3d DCA 1996)). As one cannot account for charges of services and a reasonable basis for attorney's fees without a presentation of facts or affidavits providing their truthfulness, every claim of damages for services and attorney's fees is a claim for unliquidated damages. Id. Thus, a defaulting party has a due process entitlement to notice and an opportunity to be heard as to the presentation and

[3] See "Exhibit B" Plaintiff's Affidavit of Indebtedness.
[4] See all attached affidavits provided by Plaintiff. Also, a hearing has been requested by Plaintiff upon filing of this motion.

evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages. *See* Bowman.

5. There Is No Disputed Issue Of Material Fact On Count I For Alter Ego.

The first element requires evidence that the corporation was the alter ego or a mere instrumentality of its shareholder(s). Under the "alter ego" theory, the plaintiff must establish that "the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation." Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008). Stated differently, individual liability under the alter ego theory is imposed where "the personal affairs of the shareholder become confused with the business affairs of the corporation." *See* Solomon v. Betras Plastics, Inc., 550 So. 2d 1182, 1184-85 (Fla. 5th DCA 1989).

Alternatively, the "mere instrumentality" theory may be used to pierce the corporate veil of a subsidiary corporation to reach the parent corporation's assets. Id. at 1184. Under the mere instrumentality theory, the plaintiff must establish that the parent corporation's control is to such a degree that the subsidiary is a mere instrumentality of the parent. Ocala Breeders' Sales Co. v. Hialeah, Inc., 735 So. 2d 542, 543 (Fla. 3d DCA 1999); Kelly v. Am. Precision Indus., Inc., 438 So. 2d 29, 31 (Fla. 5th DCA 1983).

Regardless of the theory, Florida courts have identified several factors to aid in their veil piercing analysis. Specifically, for the alter ego/mere instrumentality element, Florida courts consistently utilize the following factors: (i) domination by a single or few shareholder(s) (i.e., a wholly-owned subsidiary or a corporation with one or two individual shareholders); (ii) failure to follow corporate formalities (e.g., failure to issue stock, elect a board of directors, and keep corporate records); (iii) commingling of corporate and personal affairs (e.g., funds put in and taken out of the corporation for personal rather than corporate purposes); (iv) inadequate capitalization. *See* Hilton Oil Transp. v. Oil Transp. Co., S.A., 659 So. 2d 1141, 1151-52 (Fla. 3d DCA 1995).

Additionally, for veil piercing cases that involve parent-subsidiary relationships, Florida courts also consider the following factors: (i) common management (same directors and officers control both the parent and subsidiary); (ii) business discretion (the subsidiary displays very little business discretion); (iii) shared facilities (the subsidiary and the parent share the same facilities, address, and telephone numbers); use of parent's employees (the subsidiary's contracts are performed by employees of the parent); shared financial accounts (the subsidiary shares bank accounts and financial obligations with the parent); payment of debts and obligations (the parent pays the salaries, expenses, or losses of the subsidiary); arms-length transactions (the subsidiary fails to deal with the parent at arms-length); financing (the parent finances the subsidiary); tax treatment (the parent and subsidiary file consolidated income tax returns); independent profit centers (the parent and subsidiary are not treated as independent profit centers). *See* Ocala Breeders' Sales Co., 735 So. 2d at 543-44; Hilton Oil Transp., 659 So. 2d at 1151-52.

However, while these are the most common factors, these lists are not exhaustive, and no single factor is dispositive. Moreover, a mere failure to follow corporate formalities, without more, is not enough to pierce a corporation's veil. John Daly Enters., LLC v. Hippo Golf Co., Inc., 646 F. Supp. 2d 1347, 1353 (S.D. Fla. 2009). Further, Florida courts will not pierce the corporate veil merely because the corporation is owned by only a few shareholders or is a wholly owned subsidiary. *See* Hilton Oil Transp., 659 So. 2d at 1152.

Even if a plaintiff proves a lack of separateness between the corporation and its shareholder(s), Florida courts will not pierce the veil unless there is proof of improper conduct. Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1117 (Fla. 1984). Therefore, the second element requires proof that the corporation was either organized or used to mislead or defraud creditors. Id. More specifically, Florida courts have noted improper conduct includes a corporation being formed with the intent to use the corporation to frustrate creditors. The corporation was organized or used to mislead creditors or to perpetrate a fraud upon them, or to evade existing personal liability. Steinhardt v. Banks, 511 So. 2d 336, 339 (Fla. 4th DCA 1987). The Defendant, and the Defendant corporations also included in this action, essentially functioned within one another, and had no separate business conducted in an independent fashion. Defendant formed one company, or possibly both companies, with the intent to defraud creditors, and to escape personal liability for his negligent repairs. There has been no legitimate business purpose, separate of another, established by Defendant NEW VISION PERFORMANCE, INC., or Defendant, BOLD CITY GARAGE, INC. Defendant stated that his license was docked with NEW VISION PERFORMANCE, INC., but his shop was BOLD CITY GARAGE, INC., clearly displaying a lack of use or reason for the company being formed.

6. There Is No Disputed Issue Of Material Fact On Count II For Violation of Fla. Stat. § 559.920.

Fla. Stat. § 559.920 (of the "Florida Motor Vehicle Act" or the "Act") provides various unlawful acts and practices of motor vehicle repair shops and employees thereof, and specifically states that misrepresenting that repairs have been made to a motor vehicle is in violation of the Act. Defendant also fended off any attempts for Plaintiff to recoup his losses by providing false stories as to why there was a delay for repair. Fla. Stat. 559.920(8). Defendant misrepresented his character as a mechanic, stating that he would get the job done efficiently and without delay. To this date, after numerous attempts, and visits by the police, Defendant has yet to provide Plaintiff access to his vehicle. Fla. Stat. § 559.920(9). Such violations are not all inclusive, as Defendant has violated numerous provisions of the Act. Nonetheless, the Act states that damages attained by only one violation may be brought by action to recoup. Fla. Stat. § 559.921(1) ("Any customer injured by a violation of this part may bring an action in the appropriate court for relief. The prevailing party in that action may be entitled to damages plus court costs and reasonable attorney's fees. The customer may also bring an action for injunctive relief in the circuit court.")

7. There Is No Disputed Issue Of Material Fact On Count III For Unjust Enrichment.

Unjust enrichment is legal fiction described as "an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended." Tipper v. Great Lakes Chem. Co., 281 So. 2d 10, 13 (Fla. 1973).

To recover under an unjust enrichment theory, the following elements must be proven: (i) lack of an adequate remedy at law; (ii) a benefit conferred upon the Defendant by the Plaintiff, coupled with the Defendant's appreciation of the benefit (i.e., an "enrichment"); and (iii) acceptance and retention of the benefit under circumstances that make it inequitable for him or her to do so without paying the value of it (i.e., an "injustice"). Challenge Air Transport, Inc. v. Transportes Aereos Nacionales, S.A., 520 So. 2d 323 (Fla. 3d DCA 1988).

In order to have been unjustly enriched, a party must have received the benefit without paying for it. *See* Zaleznik v. Gulf Coast Roofing Co., 576 So. 2d 776 (Fla. 2d DCA 1991) (where an owner allows a subcontractor to improve property, knowing that the contractor would default and be unable to pay the subcontractor, it would be unjust for the owner to retain the benefit of the work without paying anyone at all.)

Defendants obtained the benefit of being paid a considerable sum to earn interest on or otherwise put to use, while also obtaining the benefit of desirable reputation within the community by wrongfully possessing the vehicle owned by the Plaintiff. This is considering the fact that the Plaintiff's vehicle is a model car replica, or the chassis of such with working wheels. The vehicle has been in the Defendants possession for roughly six months, for which there is no reasonable expectation that the vehicle will be returned to the Plaintiff either repaired or in the same condition it arrived at the Defendants' shop. Considering the damage possibly done to the vehicle in the meantime, the Defendants would be unjustly enriched if the Defendants simply returned the vehicle to Plaintiff as is, in which at this point, there should be damages paid for the wrongful detention and conversion of Plaintiff's vehicle for so long.

8. There Is No Disputed Issue Of Material Fact On Count IV and V For Conversion of Plaintiff's Money And Plaintiff's Vehicle.

Conversion applies when someone intentionally interferes with personal property belonging to another person. For a conversion claim, a plaintiff must establish four elements: (i) the plaintiff owns or has the right to possess the personal property in question at the time of the interference; (ii) that the defendant intentionally interfered with the plaintiff's personal property; (iii) that the interference deprived the plaintiff of possession or use of the personal property in question; and (iv) that the interference caused damages to the plaintiff.

A defendant might not be liable for conversion if a defendant's temporary interference does not necessarily deprive the rightful owner of the possession or use of the property. (*See* Harper & Row Pubs. v. Nation Enters., 723 F.2d 195, 201 (2nd Cir. 1983)) ("Conversion requires not merely temporary interference with property rights, but the exercise of unauthorized dominion and control to the complete exclusion of the rightful possessor.")

The Defendants have possessed Plaintiff's vehicle for roughly six months. After roughly two months of possession of Plaintiff's vehicle, which was provided to Defendant for purposes of repair (installing an engine into a model automobile), Plaintiff and Plaintiff's counsel began contacting the Defendants to receive updates on repairs. Defendants told various mistruths to Plaintiff and Plaintiff's counsel in order to delay counsel's intervention in the repair process. Months later, with Defendants still in possession of Plaintiff's vehicle, Plaintiff's counsel instructed Plaintiff to have local police authorities visit the work site in order to obtain correspondence from the Defendants. Every attempt was either inauspiciously timed or avoided by the Defendants, as the officers could not receive meaningful correspondence from the Defendant. The only correspondence received was from Defendant PARKS, stating that he was going to call the Plaintiff and Plaintiff's counsel that day, in which Defendant PARKS, by knowledge and belief, did not do so. The Defendants acts of avoidance and forbearance of Plaintiff's requests has shown the Defendants' dominion of possession and ownership of the vehicle.

CONCLUSION

Motion for summary judgment should be granted in favor of the Plaintiff for the foregoing reasons. The Plaintiff has alleged sufficiently well-pled causes of action in a case where the Defendants have defaulted admitting each of those causes of action and additionally admitting the Plaintiffs entitlement to damages. The damages in the instant case are liquidated because the proper amount to be awarded can be determined with exactness of the cause of action as pleaded.

DATED this 7th day of September, 2019.

Respectfully Submitted By,

/s/ Carl G. Hawkins

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY AND AFFIRM that a true and correct copy of the foregoing was uploaded to the Florida E-Filing Portal, which will send a copy via electronic mail to any counsel or parties of record, and was mailed, via certified mail, to the abode, or to the appropriate registered agents nominated with the Florida Department of State, Division of Corporations, on this 7th day of September, 2019.

/s/ Carl G. Hawkins

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