

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A. No. 04-2989-G

RONALDO ASSUNCAO,)
JOANNA ASSUNCAO, individually and)
as mother and next friend of)
BEATRIZE ASSUNCAO and)
DEBORAH ASSUNCAO,)
Plaintiffs,)
)
vs.)
)
NEW PALACE, INC., individually)
and as Trustee of the)
NEW PALACE NOMINEE TRUST,)
SAUGUS CONCESSIONS, INC.,)
MICHAEL RICARDO,)
PAUL O'DONNELL, and)
JOHN PASSEMATO,)
Defendants.)

PLAINTIFF'S MOTION TO RECONSIDER ORDER DISCHARGING ATTACHMENT

Plaintiffs Ronaldo Assuncao, et als. move this Honorable Court, pursuant to Rule 9D of the Superior Court Rules, for reconsideration of the August 3, 2004 order discharging the attachment against New Palace, Inc., as trustee of the New Palace Nominee Trust. As grounds therefore, plaintiff directly addresses the two issues raised by the court in the order, and offers additional record materials in support of the attachment:

1. In a similar case pending in the Suffolk Superior Court known as *Foster v. Saugus Concessions et al.*, C.A. No. SUCV2001-02771, substantial discovery on the issues of control of the Palace premises and corporate disregard has revealed the following:

- a. Defendant Russell. C. Robbat ("Mr. Robbat") is the President, Treasurer, and Clerk of defendant Saugus Concessions, Inc., d/b/a The Palace ("The Palace"). (Exhibit A, p.12).
- b. Mr. Robbat is also the President and Treasurer of defendant New Palace, Inc.("New Palace"), the sole trustee of New Palace Nominee Trust. Neither New Palace nor New Palace Nominee Trust have any employees. (Exhibit A, pp. 41-42, 47-48,56; see also Lease attached as Exhibit A to New Palace's Motion to Discharge Attachment). Thus, Mr. Robbat acts on behalf of New Palace.
- c. Mr. Robbat is also the President and sole shareholder of GR Holding Company, which has an approximate two-thirds interest in New Palace. GR Holding Company has no employees. (Exhibit A, pp. 15-17,47-48).
- d. Mr. Robbat has also been the Manager of The Palace since approximately January 1, 2000. His office is located on the second floor of The Palace where the incident underlying this action occurred. (Exhibit A, pp. 87,9, 111-12).
- e. New Palace holds title to the real estate at 1500 Broadway, Saugus, Massachusetts, and also owns lots and residential homes in the vicinity. (Exhibit A, pp. 41-42,57 -58).
- f. New Palace is the General Partner of New Palace Limited Partnership, the lessor of the land and buildings at 1500 Broadway, Saugus, Massachusetts. (Exhibit A, pp. 41-42; Lease p. 13).
- g. Mr. Robbat executed the lease on behalf of the landlord/lessor, New Palace, and also on behalf of its tenant/lessee, The Palace. (Exhibit A, p. 73; Lease, p. 13).

- h. The business addresses of The Palace, New Palace, and GR Holding Company are, one and the same: 1500 Broadway, Saugus, Massachusetts. (Exhibit A, pp. 9-10, 47-48).
- i. Deborah Daniels ("Ms. Daniels") is the Comptroller of The Palace and a personal assistant to Mr. Robbat. She is a full-time employee of The Palace, but also handles the accounts receivable and accounts payable for New Palace Limited Partnership. Ms. Daniels keeps Mr. Robbat informed with respect to various issues concerning the business of New Palace Limited Partnership. (Exhibit B, pp. 13-14, 103-04; Exhibit A, pp. 48-49, 97-99).
- j. Mr. Robbat took an active role in the hiring of managers at The Palace. (Exhibit A, pp. 88-89).
- k. Mr. Robbat met with Palace management personnel – including John Doherty ("Mr. Doherty"), The Palace's Director of Security – on at least a weekly basis to discuss the operation of the business, including security concerns. (Exhibit C, pp. 40, 172-73; Exhibit A, pp. 95-96).
- l. Mr. Robbat performed a host of functions and tasks at The Palace, including managerial, supervision and architectural design and decoration, and also interacted with Town of Saugus employees and other elected officials. (Exhibit A, pp. 89-90).
- m. Mr. Robbat took an active role in decision-making with respect to security concerns at The Palace, including determining the amount of police detail and

in-house security on a given night, and the uniforms worn by in-house security.

(Exhibit C, pp. 59-61, 78-80; Exhibit A, pp. 105-08).

- n. Mr. Robbat was present at meetings with the Saugus Police Department and The Palace's Director of Security, Mr. Doherty, at which police procedures at The Palace were reviewed. Mr. Robbat had input into how police officers detailed at The Palace would be utilized, as well as the scope of such details. (Exhibit A, p. 105).
- o. Mr. Robbat was well aware of the long and substantial history of criminal activity taking place at The Palace, and was kept informed of significant incidents at The Palace by Ms. Daniels. (Exhibit A, pp. 97-99, 121-24, 135-37; Exhibit B, pp. 42-43).
- p. Metal detectors were installed at The Palace subsequent to a stabbing in 1990. Police records reflect a huge number of incidents at The Palace across a wide spectrum, including fights of various degrees of severity and, in some cases, deadly weapons. There were complaints made by and to the police department, and complaints by the Saugus Board of Selectmen. (Exhibit A, pp. 121-24; Exhibit D, page 3).
- q. In 2000, Mr. Robbat was aware that the Saugus police detail working at The Palace were generating Palace-related incident reports. (Exhibit A, pp. 100-01).
- r. Mr. Robbat was present at a May 5, 2000, meeting with the Saugus Police Department and The Palace management in which parking lot issues (including vehicle vandalism), underage drinking, and the use of Ecstasy were discussed.

One week after this meeting, a Saugus police officer came to The Palace and Mr. Robbat gave him a draft of policies that Mr. Robbat believed were useful in addressing the issues that they had previously discussed. (Exhibit A, pp. 135-37).

- s. Mr. Robbat's usual custom and practice was to circulate through the various different clubs at The Palace during nights when the clubs were in operation, observing conditions in the clubs and consulting with various employees. (Exhibit A, pp. 111-14).

2. In this case, the defendants have alleged only \$1,500,000 of liability insurance applicable to plaintiff's claim.

Legal Analysis

A. The Landlord/Tenant Caselaw Relied Upon by New Palace is Inapplicable

There is ample evidence that New Palace, via the actions of its President and Treasurer, Mr. Robbat — who is also the President, Treasurer, Clerk, and Manager of The Palace — controlled the premises at The Palace by, for example, hiring and supervising managerial staff, establishing architectural designs and decorations, and interacting with Town of Saugus employees and elected officials on Palace-related business. Discovery has also revealed that New Palace, via Mr. Robbat, had knowledge of the dangerous conditions at The Palace, and had an opportunity to observe the overall security situation there.

New Palace argues that, as a matter of law, it did not owe Ronaldo Assuncao a duty to maintain adequate security because, as the commercial landlord and owner of The Palace, it exercised no control over the leased premises where the incident occurred (citing *Sheehan v. El*

Johnan, Inc., 38 Mass.App.Ct. 975, 976 (1995)). Moreover, New Palace states, it was not required by the terms of its lease with Saugus Concessions, Inc., to provide security or insure safety at The Palace (citing *Whittaker v. Saraceno*, 418 Mass. 196, 197 (1994); *Luisi v. Foodmaster*, 50 Mass.App.Ct. 575, 577 (2000); *Tuchinsky v. Beacon Property Management Corp.*, 45 Mass.App.Ct. 470, 472 (1998); *Agustynowicz v. Bradley*, 25 Mass.App.Ct. 404 (1988)).

As an initial matter, New Palace's focus on the lease's allocation of maintenance responsibility between the "landlord" (New Palace) and the "tenant" (The Palace) is improper, because such allocation "is a matter between the Landlord and [The Palace], but does not bind the plaintiff[], who w[as] not a party to the lease." *Hopkins v. F.W. Woolworth Co.*, 11 Mass.App.Ct. 703, 707 (1981). Furthermore, while it is true that the terms of the lease between New Palace and Saugus Concessions did not require New Palace to provide security at The Palace, the assertion that New Palace exercised no control over The Palace is directly contradicted by the evidence adduced in the Foster discovery, which clearly indicates that Mr. Robbat controlled both corporations in such a manner that the two were effectively one entity. That discovery reveals The Palace and New Palace's entwined organizational structures, and the centrality of Mr. Robbat to both entities; Mr. Robbat's control of both New Palace and The Palace; and Mr. Robbat's and New Palace's knowledge of dangerous conditions at The Palace. In light of this evidence, no distinction exists between the "landlord" and "tenant" here, thereby rendering inapplicable the "control-oriented" easelaw relied upon by New Palace.

This evidence clearly punctures New Palace's reliance on *Luisi V. Foodmaster*, 50 Mass.App.Ct. 575, 577 (2000). *Sheehan v. El Johnan, Inc.*, 38 Mass.App.Ct. 975, 976 (1995), is

equally unavailing to New Palace. In that case, the plaintiff, an employee of the Framingham, Massachusetts tenant (the United States Postal Service) brought suit against the landlord seeking damages for injuries she sustained when she slipped and fell on ice in the parking area. The Appeals Court held that summary judgment was properly granted for the landlord, who was located in Brooklyn, New York, had not contracted to perform daily maintenance and snow and ice removal, and did not purport to control the premises. *Id.* at 976. Significantly, unlike the New Palace scenario – in which the "landlord's" President and Treasurer was simultaneously the "tenant's" hands-on, in-the-trenches Manager, with personal involvement in operations of the premises, particularly in the sensitive area of security – in *Sheehan*, there was "no opportunity for the [landlord] to notice the hazard and take steps to eliminate it." *Id.* at 976.

Whittaker, Tuchinsky, Agustynowicz, and Nunan – the remaining cases New Palace relies upon in its Motion – are likewise distinguishable from the present case, since none of them involved a "landlord" like New Palace, whose President and Treasurer was personally entwined in the tenant's daily business and decision-making, and aware of the hazard which ultimately gave rise to the litigation. Rather, the landlords in those cases were either genuinely separate and distinct entities with no control over the premises, see *Agustynowicz*, 25 Mass.App.Ct. at 408, and *Nunan*, 325 Mass. at 553, or lacked knowledge of any hazards therein. See *Tuchinsky*, 45 Mass.App.Ct. at 472; *Whittaker*, 418 Mass. at 200.

B. *New Palace is Liable Pursuant to the Doctrine of Corporate Disregard*

The doctrine of corporate disregard is an equitable tool that authorizes courts, in rare situations, to ignore corporate formalities where such disregard is necessary to provide a

meaningful remedy for injuries and to avoid injustice. *Attorney General v. M.C.K.. Inc.*, 432 Mass. 546, 556 (2000). Pursuant to the seminal Massachusetts case applying the doctrine, disregard of separate corporate entities may be warranted when there is "active and pervasive control" of related business entities by the same controlling person(s) and there is an "injurious consequence" of the intercorporate relationship. *My Bread Baking Co. v. Cumberland Farms, Inc.*, 353 Mass. 614, 620 (1968). The relevant factors in determining whether a corporate entity may be disregarded are:

(1) common ownership; (2) pervasive control; (3) confused intermingling of business assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation s funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.

Evans v. Multicon Const. Corp., 30 Mass.App.Ct. 728, 733 (1991) (citing *Pepsi-Cola Metropolitan Bottling Co. v. Checkers. Inc.*, 754 F.2d 10, 14-16 (1st Cir. 1985))

First, as detailed above, there is clearly an abundance of evidence demonstrating "active and pervasive control" of New Palace and The Palace by Mr. Robbat. Specifically, Mr. Robbat is the President and Treasurer of both corporations, and is also the President and sole shareholder of GR Holding Company, which has an approximate two-thirds interest in New Palace. All three entities share the same business address: 1500 Broadway, Saugus, Massachusetts (which is also the location of Mr. Robbat s office). Neither New Palace, New Palace Nominee Trust, nor GR Holding Company have any employees. Additionally, Mr. Robbat has been the Manager of The Palace since January 1, 2000, and he executed the lease on behalf of both the "tenant" and the

"landlord." The two entities also share the same bookkeeper, Ms. Deborah Daniels, a full-time Palace employee and personal assistant to Mr. Robbat.

Mr. Robbat also took a hands-on role in the operation of The Palace by hiring and supervising managers; meeting on at least a weekly basis with the Director of Security, Mr. John Doherty, to discuss security concerns; and performing other active functions ranging from architectural design to determining police details and in-house security. Robbat's pivotal role in these areas is germane to the question of what corporate "hat" he wore when performing this role.

Second, there is an "injurious consequence" to plaintiff from the intercorporate relationship between The Palace and New Palace, as substantial assets and ownership of the premises, buildings, and land are in New Palace's hands, while The Palace has only limited insurance coverage, thereby depriving plaintiff of fair and just compensation for the catastrophic injuries he sustained. See, e.g., *Cabot Safety Intermediate Corp. v. Arkon Safety Equipment, Inc.*, 12 F.Supp.2d 180, 182 (D.Mass. 1998) ("inability to obtain discoverable material" was an "injurious consequence" to the plaintiff); *Gopen v. American Supply Co., Inc.*, 10 Mass.App.Ct. 342, 344-45 (1980) ("injurious consequence" found where parent corporation misrepresented subsidiary's financial condition, thereby inducing lessor to enter into commercial lease).

Furthermore, the evidence obtained through discovery in the Foster case demonstrates that the following five Pepsi/Evans factors have been met: common ownership; pervasive control; confused intermingling of management; nonfunctioning of officers and directors; and use of the corporation for transactions of the dominant shareholders. Importantly, "the exercise is, of course, not one in counting. One examines the twelve factors to form an opinion whether the overall structure and operation misleads." *Evans*, 30 Mass.App.Ct. at 736.

. Given this record, the doctrine of corporate disregard should be invoked here in order to prevent gross inequity to plaintiff due to the limited amount of liability insurance possessed by the defendants which is applicable to plaintiff's claim. See 13 *Massachusetts Practice, Business Corporations*, § 29.4, page 429 & n.25 (2003) (noting that "[m]any cases continue to state, as an overlay to the whole [My Bread] analysis, that the corporate veil may be pierced in rare instances to . . . prevent gross inequity.").

C. *New Palace Was Aware of Unsafe Conditions at The Palace and Was in a Position to Remedy Same*

An additional basis exists for upholding the attachment here. New Palace was aware of unsafe conditions at The Palace and was in a position to remedy such conditions. This basis is completely independent of the bases discussed above, which are grounded in corporate law. It is well-established that a duty of care "may fall on both landlord and tenant in cases where the landlord and tenant are aware of the unsafe condition and in a position to do something about it." *Sheehan v. El Johnan, Inc.*, 38 Mass.App.Ct. 975, 976 (1995). See also, e.g., *Hopkins v. F.W. Woolworth Co.*, 11 Mass.App.Ct. 703, 705-06 (1981) (duty to exercise reasonable care imposed on a landlord in a commercial setting); *Mounsey v. Ellard*, 363 Mass. 693, 707-08 (1973) (owner of premises has a duty to exercise reasonable care to lawful visitors). As noted above, the allocation of security obligations in a lease – even between genuinely distinct entities – does not operate to relieve these common law obligations of a landlord (or tenant) to an injured person who is not a party to the lease. *Hopkins*, 11 Mass.App.Ct. at 707.

It is clear from the evidence adduced that Mr. Robbat, was well-aware of the dangerous conditions at The Palace and had an opportunity to observe and oversee the overall security situation. Further, New Palace was in a position to remedy the dangerous conditions at The Palace, as Mr. Robbat took an active role in decision-making with respect to security concerns at The Palace, including: holding weekly meetings with The Palace's Director of Security to discuss security issues; determining the amount of police detail and in-house security on a given night, as well as the scope of such details; and participating in meetings with the Saugus Police Department and The Palace's Director of Security at which police procedures at The Palace were reviewed.

Conclusion

In light of the foregoing, the attachment entered on July 13, 2004 should remain in full force and effect, and defendant's motion to discharge same should be denied. In order to minimize any potential prejudice to defendant New Palace, plaintiffs would be amenable to an expedited discovery and trial schedule.

Plaintiffs,
By their attorneys,

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