IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

OPTIMA VENTURES, LLC, *et al.*	)	**CASE NO. CV 13 802814**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
	)	**JOURNAL ENTRY DENYING**
vs.	)	**AND GRANTING IN PART**
	)	**THE DEFENDANTS' MOTIONS**
K/B FUND IV CLEVELAND, LLC, *et al.*	)	**TO DISMISS THE AMENDED**
	)	**COMPLAINT**
Defendants.	)	

***John P. O'Donnell, J.*:**

This is a lawsuit by the buyer of an office building and garage against the seller and its agents alleging that the seller concealed information about conditions of the garage that will cost the buyer over $3,000,000 to repair. The defendants have moved to dismiss the amended complaint. The motions to dismiss are fully briefed and are decided by this entry.

STATEMENT OF FACTS[1]

The parties

Plaintiff Optima Ventures, LLC is the purchaser from the defendant K/B Fund IV Cleveland, LLC of the 20-story office building and attached garage on the northwest corner of East Ninth Street and St. Clair Avenue in downtown Cleveland.[2] The sale closed on August 16, 2010.[3]

Defendants CBRE, Inc. and CBRE Group, Inc. are companies in the business of brokering commercial real estate sales and managing commercial properties. The amended

[1] The facts given here are paraphrases of, or direct quotes from, the amended complaint, except where noted otherwise.
[2] The address is 1300 East Ninth Street. To those my age and older the building is probably known as the Bond Court office building. To those younger, it may be remembered as the Penton Media building.
[3] This is according to the complaint; the contract gives a closing date of August 18.

complaint refers to these separate entities together as CBRE. According to the amended complaint, CBRE was the property manager for K/B Fund IV Cleveland before and during the sale of the premises to Optima Ventures. CBRE was also K/B Fund IV Cleveland's broker for the sale, and defendant Bruce Bossick is an employee of CBRE who served as the on-site property manager and as the broker.

Defendant Koll Investment Management, Inc. is alleged to be owned by CBRE. The purchase agreement between Optima Ventures and K/B Fund IV Cleveland was executed by Koll and describes Koll as the general partner of KE Holdings, L.P. In turn, KE Holdings is a partner in KB Opportunity Investors, a partnership serving as the general partner of K/B Opportunity Fund IV, L.P., which itself is a partner in K/B Fund IV, a partnership and sole member of the defendant limited liability company. KE Holdings, KB Opportunity Investors, K/B Opportunity Fund IV and K/B Fund IV are not parties to the lawsuit.

The corporate and individual John Doe defendants are alleged to be people and entities who are owners of, or otherwise associated with, K/B Fund IV Cleveland and who received sales proceeds or other assets of K/B Fund IV Cleveland.[4]

Plaintiff Optima 1300, LLC is the assignee of Optima Ventures's interest in the contract.

The contract

Exhibit A to the amended complaint is a 24-page[5] document captioned "Purchase and Sale Agreement and Escrow Instructions." The seller is named as K/B Fund IV Cleveland and the buyer as Optima Ventures, LLC. The contract was made on June 28, 2010, with a closing

[4] Because K/B Fund IV is a separate corporate entity, even though not a party to this case, I will refer to the defendant in this case as "K/B Fund IV Cleveland" and not as "K/B Fund IV" to eliminate any possible confusion.
[5] Plus a cover page and two pages for a table of contents.

date of August 18. The purchase price is $46,500,000 and was secured by a deposit into escrow of $500,000.

The agreement provides the buyer with a due diligence period beginning at the time the contract was signed and ending on July 29. Section 4.3.1 allows "non-invasive inspections" of the property by the buyer during the due diligence period, conditioned on 48 hours' notice to the owner or its agent and the presence during the inspection of an agent of the seller. Section 4.1 requires the seller, during the due diligence period, to "make available" to Optima Ventures "any environmental, soils and/or engineering reports" about the property.

If Optima Ventures determined during the due diligence period that the property was "unacceptable for [its] purposes," then the plaintiff could have terminated the contract. Otherwise, by sections 11.2(a) and (d), Optima Ventures agreed that it was "satisfied with the physical condition, quality and quantity and state of repair of the Property in all respects" and that it had "made its own independent investigation" to its satisfaction.

Section 11.2(d) also includes an "as is" clause that says in all capital letters:

> THIS SALE IS MADE . . . WITHOUT REPRESENTATION, COVENANT OR WARRANTY OF ANY KIND . . . BY SELLER. . . . BUYER AGREES TO ACCEPT THE PROPERTY ON AN "AS IS" AND "WHERE IS" BASIS, WITH ALL FAULTS, AND WITHOUT ANY REPRESENTATION OR WARRANTY, ALL OF WHICH SELLER HEREBY DISCLAIMS . . . NO REPRESENTATION OR WARRANTY IS MADE BY SELLER AS TO . . . QUALITY, CONDITION . . . ABSENCE OF DEFECTS . . . [AND] ABSENCE OF FAULTS. . . . BUYER . . . HAS ENTERED INTO THIS AGREEMENT . . . RELYING UPON ITS OWN INVESTIGATION OF THE . . . CONDITIONS OF THE PROPERTY AND . . . BUYER IS NOT NOW RELYING . . . UPON ANY REPRESENTATIONS . . . MADE BY SELLER. . . . BUYER IS TAKING THE PROPERTY "AS IS" WITH ALL LATENT AND PATENT DEFECTS.

The "as is" clause was separately acknowledged by the buyer's initials after it in the body of the contract.[6]

[6] Contract, Exhibit A to the amended complaint, page 18.

Section 15.2 of the contract permits its assignment by Optima Ventures "to an affiliated entity" upon notice and a written assignment acceptable to the seller. Optima Ventures assigned its interest to Optima 1300, LLC on August 12.[7]

The amended complaint

During the due diligence period, Optima[8] retained EBI Consulting to inspect the property. Before that inspection, EBI asked Bossick to complete a questionnaire that included questions about the property's maintenance and repair history and asked for supporting documents. The answers did not identify any structural problems.

After closing and the transfer of the property, the buyer discovered in Bossick's former office at the property four sets of documents about the condition of the garage, including:

1) Records of an August 2008 engineering inspection of the garage by Grunwell-Cashero Co., including a report about, and proposals to fix, "material structural defects"[9];

2) Records of a December 2008 engineering inspection by Walker Restoration Consultants, including recommendations for repairs of the garage;

3) Records of a January 2009 garage inspection and repair estimate of Harry S. Peterson, Co.; and

4) Records of a January 2010 inspection by Jadco and its February 2010 report about necessary repairs to the garage.

In summary, these reports describe needed repairs to be done over ten years at a cost of more than $1,000,000. The amended complaint alleges that the defendants knew about all of

[7] Amended complaint, p. 9, ¶32.
[8] The amended complaint refers to "Optima" as meaning both Optima Ventures and Optima 1300. I will do the same unless noted otherwise.
[9] Am. complaint, p. 6, ¶22.

these inspections and estimates before the sale but concealed them from the buyer. Moreover, the amended complaint alleges that the defendants made representations before the sale that were inconsistent with the true condition of the garage as revealed by the reports.

The plaintiffs allege that the structural defects described in the reports – concrete slab deterioration below traffic topping membranes; deterioration of internal frame members in the garage structure; and deterioration of internal beams, tee-stems and columns – could not be discovered during the due diligence period because they were "visually undetectable"[10] by surface repairs done by the owner.

The plaintiffs' causes of action

Based on that version of events, the plaintiffs list six separate counts in their amended complaint: fraud by affirmative misrepresentation, fraud by failure to disclose known information, misrepresentation, negligence in providing information knowing that the plaintiffs would rely on it, breach of a contractual duty to disclose the four contractors' inspection reports and estimates, and piercing the corporate veil.

THE MOTIONS TO DISMISS

Defendant K/B Fund IV Cleveland filed its own motion to dismiss and the four other named defendants filed a joint motion to dismiss. But K/B Fund IV Cleveland has joined the co-defendants' motion and the co-defendants have joined K/B Fund IV Cleveland's motion.[11] I will therefore address both motions together and refer to the arguments in them as being advanced by all defendants unless noted otherwise.

[10] *Id*., p. 8, ¶27.
[11] See K/B Fund IV Cleveland's motion to dismiss, p. 2, and the co-defendants' motion to dismiss, p. 8, and their reply brief, p. 3.

The reasons given by the defendants that the amended complaint should be entirely dismissed are: the plaintiffs lack standing; K/B Fund IV Cleveland can't be sued because it no longer exists; the defendants did not have a legal duty to disclose defects; and the plaintiffs have not pled fraud with particularity.

LAW AND ANALYSIS

The defendants are asking that the amended complaint be dismissed under Rule 12(B)(6) of the Ohio Rules of Civil Procedure for failure to state a claim upon which relief can be granted. A Civil Rule 12(B)(6) motion tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown Mgmt*., 125 Ohio St. 3d 494, 497, 2010-Ohio-2057, ¶11. In considering the motion, a court must presume that all factual allegations are true and all reasonable inferences must be made in favor of the plaintiff. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St. 3d 489, 490 (1994). But only a complaint that states a plausible claim for relief will survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, 678.

The defendants also argue that the fraud claims should be dismissed because the plaintiffs have failed to meet the requirement of Civil Rule 9(B) that in all averments of fraud the circumstances constituting fraud shall be stated with particularity. Finally, as mentioned above, the defendants give several reasons why the plaintiffs lack standing to assert any of the causes of action in the amended complaint.

If the plaintiffs lack standing then the merits of the other arguments in support of dismissal do not have to be considered, so the question of standing will be addressed first.

Standing of the plaintiffs to bring the lawsuit

The defendants claim that Optima 1300 does not have standing to bring any of the claims in this lawsuit since Optima 1300 has never produced a written assignment of Optima Ventures's rights under the contract and Optima 1300 did not even exist when the alleged misrepresentations were made. In the alternative, they note that if Optima 1300 does have standing to sue by virtue of a valid assignment then the assignment prevents Optima Ventures from suing under the same contract. They also argue that Optima Ventures is not authorized to do business in Ohio.

The plaintiffs argue that both of them have standing to sue because the amended complaint "clearly alleges"[12] that they both were separately defrauded by the defendants and both sustained damages as a result.

A motion to dismiss for lack of standing is properly brought pursuant to Civil Rule 12(B)(6) for failure to state a claim upon which relief can be granted. *Beard v. N.Y. Life Ins. & Annuity Corp.*, 10th Dist. No. 12 AP-977, 2013-Ohio-3700, ¶7. Hence the allegations supporting standing are examined under the same deferential standard summarized above, namely accepting all factual assertions as true.

In order to have standing to assert a claim in Ohio, a party must demonstrate an "injury in fact." *Bank of N.Y. Mellon Trust Co., N.A. v. Unger,* 8th Dist. No. 97315, 2012-Ohio-1950, ¶27. An injury in fact requires a showing that the party suffered or will suffer a specific injury, that the injury is traceable to the challenged action, and that it is likely that the injury will be redressed by a favorable decision. *Id.*

[12] Plaintiffs' brief in opposition, p. 28.

Demonstrating their standing to sue, both of the plaintiffs allege injuries in fact by the conduct of all defendants through the following factual assertions in the amended complaint:

1. K/B Fund IV Cleveland and Optima Ventures were parties to a contract for the sale of the building and garage;
2. Optima Ventures assigned its interest in the contract to Optima 1300;
3. K/B Fund IV Cleveland breached the contract;
4. The other defendants are K/B Fund IV Cleveland's agents, through whom K/B Fund IV Cleveland acted to breach the contract;
5. All defendants made fraudulent misrepresentations to Optima Ventures and Optima 1300, or fraudulently concealed conditions at the property from both of them; and
6. Both plaintiffs were damaged as a result.

Accepting all of these assertions as true, at this stage of the lawsuit the plaintiffs have made a sufficient demonstration of standing to sue. As for K/B Fund IV Cleveland's argument that Optima Ventures has made no showing of an injury in fact, that is best left for a post-discovery dispositive motion or for trial.

Nevertheless, the defendants correctly point out that the written assignment required by the contract is not attached as an exhibit to the complaint, and no reason for its omission is offered. The motions to dismiss are thus construed to include an alternative motion for a more definite statement and are granted as such. The plaintiffs are ordered to file a more definite statement in support of the claims in the amended complaint. Their obligation to provide a more definite statement will be satisfied by filing a copy of the assignment from Optima Ventures to Optima 1300.

Amenability to suit of K/B Fund IV Cleveland

K/B Fund IV Cleveland also claims in the motion to dismiss that it cannot be sued or served or be subject to the court's personal jurisdiction because it no longer exists as a corporate entity. The plaintiffs oppose that portion of the motion to dismiss on the basis that the court has personal jurisdiction over Koll, and the allegation that Koll is the alter ego of K/B Fund IV Cleveland is enough to provide jurisdiction over K/B Fund IV Cleveland.

K/B Fund IV Cleveland was a Delaware limited liability company. On December 28, 2011, a certificate of cancellation of the company was filed with the Delaware secretary of state under Title 6, section 18-203 of the Delaware Code. K/B Fund IV Cleveland ceased to exist when its certificate of cancellation was filed and it cannot thereafter be sued. 6 Del. Code §§18-201(b) and 18-803(b). However, K/B Fund IV Cleveland can be sued if a Delaware court finds that its affairs were not wound up in compliance with the Delaware Limited Liability Company Act and then nullifies the certificate of cancellation, which effectively revives the limited liability company and allows claims to be brought by and against it. *Matthew v. Laudamiel*, 2012 Del. Ch. LEXIS 38 (Del. Ch. Feb. 21, 2012). But until that happens the first named defendant in the amended complaint here is a non-entity and must be dismissed.

Sufficiency of the fraud allegations

Civil Rule 9(B) reads, in pertinent part, as follows:

> (B) **Fraud, mistake, condition of the mind**. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

The rule's requirement of particularity is an exception to the general obligation of a plaintiff imposed by Civil Rule 8(A) to include in the complaint a "short and plain statement" of the grounds for relief. The justification for this deviation from the usual rule was concisely articulated by the Tenth District Court of Appeals:

> There are usually three reasons cited for the requirement of particularity. First, particularity is required to protect defendants from the potential harm to their reputations which may attend general accusations of acts involving moral turpitude. Second, particularity ensures that the obligations are concrete and specific so as to provide defendants notice of what conduct is being challenged. Finally, the particularity requirement inhibits the filing of complaints as a pretext for discovery of unknown wrongs. *Korodi v. Minot*, 40 Ohio App. 3d 1 (10th Dist. 1987).

The defendants' arguments that the amended complaint lacks sufficient detail must be considered with these reasons in mind.

A person alleged to have committed a fraud is accused of conduct that is not only intentional, but dishonest. Thus the allegation of fraud is more likely to affect a defendant's reputation than, for example, a claim of negligence. But if the allegation alone is enough to harm the reputation of these defendants then that damage was done by the filing of the amended complaint; the allegations cannot be unsaid. If the claim is dismissed at this stage the defendants could point to that fact to lessen their reputational damage but could not disperse entirely any cloud on their images. Moreover, an eventual summary judgment or verdict for the defendants would equally mitigate the effect on their reputations with the added benefit of assuring third parties that the actual facts of the case were considered and decided in the defendants' favor. Finally, I am not convinced that any of the people and companies constituting the universe of those who might consider doing business with the defendants in the future will be deterred by the amended complaint in this case. In my experience, businesspeople see getting sued as a hazard of doing business and not as a scarlet letter signaling a defendant's lack of virtue.

Fraud should also be alleged in details that are "concrete and specific so as to provide defendants notice of what conduct is being challenged." That purpose of Civil Rule 9(B) is satisfied by the amended complaint. In summary, the plaintiffs allege that the defendants were well aware of the structural problems with the garage but lied to the plaintiffs about them or

didn't tell the plaintiffs when asked. From the amended complaint, it appears the only person communicating with Optima Ventures for the defendants was Bruce Bossick, but even if that identification is not crystal clear from the amended complaint, the defendants are surely aware of the names of their agents who dealt with the plaintiffs and, almost as surely, those people can be counted on one hand.

As for using the amended complaint as a pretext for discovery of unknown wrongs, the plaintiffs already have evidence of the alleged wrongs: the reports showing latent defects in the garage, the fact that the defendants were aware of those reports, and the fact that the reports' contents were never revealed to the plaintiffs. These facts are, as far as I can tell, undisputed. And while those facts alone do not presage a verdict for the plaintiffs they are enough to demonstrate that the possibility that this lawsuit is a pretext to discover other wrongs is near nil.

It is thus apparent that dismissing the fraud claims for want of sufficient detail about how the fraud was perpetrated would not serve any of the purposes of the rule requiring particularity at the pleading stage. But even if those purposes would be served they have to be balanced with a plaintiff's ordinary inability to know without the benefit of pretrial discovery every detail of how a fraud was committed. A successful fraud is an undetected fraud. The plaintiffs here found out the true condition of the property only upon uncovering the experts' reports about the condition of the garage. At that point the plaintiffs knew the facts alleged in the complaint: that the reports were not disclosed, that misrepresentations were made on the EBI questionnaire, and that the defects were concealed by work done on the garage. But without discovery they would have no way of knowing exactly who associated with the defendants knew about the fraud, what they knew, when they knew it and when they decided to keep it from the plaintiffs. To this point

they have alleged what they know and it is enough to entitle them to conduct discovery to learn all of the details that the defendants complain are omitted from the lawsuit.

To put it in simple terms, a fraud should not be rewarded because the means to achieve it are ingeniously hidden. The plaintiffs here have alleged what they can and it is enough to satisfy Civil Rule 9(B).

The defendants are on less shaky ground in arguing that the fraud claims for nondisclosure and negligent disclosure be dismissed because the property was sold "as is." But the resolution of these claims too is best left to a consideration of the evidence in the case through a summary judgment motion or trial. Although the amended complaint separately lists six different causes of action, it is easier to look at them as two – fraud and breach of contract, both of which survive the motion to dismiss – and then let discovery reveal whether a fraud was actually committed and, if so, the means by which it was accomplished. Additionally, the force of an "as is" clause can be vitiated when the seller lies about the property's condition or conceals a defect so it cannot be found upon inspection, and the plaintiffs allege both of those things.

Piercing the corporate veil

1. The plaintiffs' allegations

Count six of the amended complaint covers paragraphs 79 through 87 of the pleading. The exact allegations of those paragraphs are worth scrutinizing.

First, the plaintiffs allege that the defendants concealed their "actual ownership interest"[13] in the building and in K/B Fund IV Cleveland and hid their "participation in"[14] the sale. They also claim that the defendants other than K/B Fund IV Cleveland were the ultimate recipients of the purchase money. Taken alone or together, those facts add up to nothing. I am not aware of

[13] Am. complaint, ¶80.
[14] *Id*.

any legal duty of a corporate entity to disclose to a buyer of real estate owned by the entity either the names of the entity's owners or the ultimate disposition of the purchase money.

The plaintiffs continue by averring that the money went to the other defendants to render K/B Fund IV Cleveland "insolvent and/or judgment-proof and thereby attempting to destroy the availability of legal and/or financial recourse for"[15] K/B Fund IV Cleveland's "breaches and/or other unlawful conduct."[16] To that point, the most the plaintiffs have alleged is a fraudulent transfer.

The amended complaint goes on to say that K/B Fund IV Cleveland and its members arranged their corporate entities so they could be canceled after the sale "to thereby cheat and defraud Optima, the 'Buyer.'"[17] Again, these facts, if true, might support a claim for fraudulent transfer but it is difficult to conceive how either Optima Ventures or Optima 1300 could have been further cheated or defrauded once the transaction was complete since there was no post-closing opportunity for the defendants to have said or done something upon which the plaintiffs would have relied to their detriment.

The averments in paragraph 81 continue:

> Koll and/or others has/have profited by orchestrating the diversion of sales proceeds to a surviving entity(ies) or individuals with the intent to leave Optima without compensation for the enormous economic harm inflicted by the affirmative misrepresentations, concealments, and/or failures to disclose to Optima and/or its representatives material information about the Garage's true condition. Unless the corporate veil is pierced to hold Koll and/or the Doe Defendants liable for that wrongdoing, their shell game will effectuate great injustice against Optima.

Here again, the plaintiffs essentially summarize the wrongdoings ("misrepresentations, concealments, and/or failures to disclose") of the named defendants besides Koll, and claim that

[15] *Id.*
[16] *Id.*
[17] *Id.*

the money from the sale was transferred so it couldn't be recouped by the plaintiffs upon discovering the fraud. This is nothing more than a fraudulent transfer claim, the elements of which include a conveyance made with intent to hinder future creditors. Under the facts as pled, Koll and the John Doe defendants would not be named under a corporate veil piercing theory but as transferees who received the money that K/B Fund IV Cleveland intended to put out of the plaintiffs' reach. In short, paragraph 81 and related paragraphs 84 through 87 do little[18] to state facts that would justify piercing the corporate veil to hold Koll and the John Doe defendants personally liable.

Instead, the meat of the plaintiffs' claim that the corporate veil should be pierced is in paragraphs 81 through 83, where they allege: Koll and the John Doe defendants "exercised complete dominion and control over K/B such that K/B had no separate mind, will, and/or existence of its own;"[19] Koll and the John Does "are the alter ego and/or mere instrumentality of K/B;"[20] and that Koll and the John Does "used its/their dominion and control over K/B to commit fraudulent, unlawful, or other unjust acts against Optima through K/B."[21]

2. The defendants' arguments

The defendants advance several reasons to support dismissal of the claim that K/B Fund IV Cleveland's corporate veil should be pierced. They note, accurately, that piercing the corporate veil is an equitable remedy and not a distinct cause of action. They go on to assert that the amended complaint's factual allegations are insufficient to show the existence of the elements needed to pierce the corporate veil. Finally, they argue that K/B Fund IV Cleveland is

[18] These allegations might have some bearing on whether corporate funds were siphoned or diverted by the owners, which is a relevant consideration in deciding whether the corporate form should be disregarded.
[19] Amended complaint., ¶81.
[20] *Id*., ¶82.
[21] *Id*., ¶83.

a necessary party to any lawsuit seeking to pierce the corporate veil, and since K/B Fund IV Cleveland cannot be a party (because it doesn't exist) the claim can't be made in its absence.

a. *Piercing the corporate veil as a cause of action*

"Piercing the corporate veil" is not a cause of action in and of itself, but rather, is a legal rule or doctrine that permits a court to disregard the formal corporate structure. *Trinity Health Sys. v. MDX Corp.*, 180 Ohio App. 3d 815, 2009-Ohio-417, ¶26 (7th Dist.). But by inartfully labeling their "pierce the corporate veil" allegations in the amended complaint as "Count VI" the plaintiffs did not doom the allegations to be dismissed for failure to state a claim. Instead, the allegations are enough to give notice to the other defendants that the plaintiffs intend to show that the shareholders[22] themselves are liable for the misconduct alleged in the portions of the amended complaint alleging causes of action for fraud and breach of contract, and the allegations should be reviewed under Civil Rule 12(B)(6) to determine whether they state a claim sufficient to impose personal liability on the shareholders. To do that, a consideration of the justification for the doctrine is useful.

b. *Allegations sufficient to support piercing the corporate veil*

The reasons for the doctrine were first explicated by the Ohio Supreme Court in 1993:

> A fundamental rule of corporate law is that, normally, shareholders, officers, and directors are not liable for the debts of the corporation. (Citation omitted.) An exception to this rule was developed in equity to protect creditors of a corporation from shareholders who use the corporate entity for criminal or fraudulent purposes. . . Under this exception, the "veil" of the corporation can be "pierced" and individual shareholders held liable for corporate misdeeds when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity. Courts will permit individual shareholder liability only if the shareholder is indistinguishable from or the "alter ego" of the corporation itself. *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 67 Ohio St. 3d 274, 287 (1993).

[22] I know that owners of a limited liability company are called members. But most of the "corporate veil" case law comes from disputes involving traditional corporations, hence the decisions typically refer to "shareholders." Since shareholders stand in essentially the same relation to a corporation as members do to a limited liability company, I will use the terms interchangeably.

The court went on to name the circumstances that would support piercing the corporate veil. The corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong. *Id.*, at syllabus 3.[23]

The amended complaint thus must be examined to decide whether it includes enough factual allegations to satisfy this test. Here, the defendants complain that "the paragraphs relating to [the p]laintiffs' veil piercing claims, though rife with hyperbolic prose and conclusory legal assertions, fail to offer factual allegations sufficient to establish a claim for veil piercing."[24] In particular, the defendants point to the absence in the amended complaint of allegations that K/B Fund IV Cleveland was insufficiently capitalized or insolvent, that it did not observe corporate formalities, that corporate funds were diverted for personal use, or that the company was a façade for the dominant shareholder.

First, the paragraphs of the amended complaint describing a fraudulent transfer do allege, in essence, the diversion of corporate funds for personal use.

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[23] I cite to Ohio law fully aware of the defendants' contention that Delaware law applies here because K/B Fund IV Cleveland was incorporated in Delaware. A plaintiff seeking to pierce the corporate veil under Delaware law must demonstrate the first and third elements of the Ohio test, but for the second element must also show that the corporation was formed to facilitate fraud or similar wrongdoing. Yet that is exactly the element rejected by the Ohio Supreme Court in *Belvedere* as not reflecting "the realities of modern corporate life" and as "simply too strict." Moreover, Delaware courts seem to be backing away from that strict test and instead requiring "fraud or something like it." (In any event, the Court will not launch into a protracted choice of law analysis because it is convinced that regardless of which law is applied to the alter ego question -- whether federal, Delaware or Oklahoma common law -- the outcome is the same. Fraud or something like it is required. *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 268 (D. Del. 1989).)

[24] K/B Fund IV Cleveland's renewed motion to dismiss, p. 22.

But more broadly, facts that would permit piercing the corporate veil are usually not out in the open and readily knowable. As with a fraud claim, owners of a corporation who are using the corporate form as their alter ego with the intent of shielding themselves from liability do not typically bare the company to the party being wronged to an extent sufficient to allow that party to know the details of the company's finances, whether it is scrupulously observing corporate formalities and whether it is nothing but a front for the controlling shareholder. If, after discovery, the evidence of record fails to demonstrate any genuine issues of material fact about these indicia of misuse of the corporate shield then the defendants will be entitled to summary judgment. But until then, the plaintiffs have alleged what they can to put the defendants on notice that they intend to pursue the defendants other than K/B Fund IV Cleveland for the wrongs done to them.

c. *Can the corporate veil be pierced without K/B Fund IV Cleveland as a party?*

Which leads to the defendants' final argument in support of not permitting the plaintiffs to attempt to pierce the corporate veil: Under Civil Rule 19, K/B Fund IV Cleveland is a necessary and indispensable party to the lawsuit so the corporate veil claim against the shareholders cannot proceed without it.

Civil Rule 19 provides, in pertinent part:

> (A) **Persons to be joined if feasible**. A person who is subject to service of process shall be joined as a party in the action if . . . he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .
>
> (B) **Determination by court whenever joinder not feasible**. If a person as described in subdivision [(A)(2)] hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties

before it, or should be dismissed, the absent person being thus regarded as indispensable. . . .

The defendants argue that K/B Fund IV Cleveland, the alleged alter ego of the shareholder(s) to be held liable, is a necessary party because it "has an obvious interest relating to the subject action: namely, that it may be found liable for defrauding plaintiffs."[25] But this position is inconsistent with the defendants' earlier argument that the amended complaint against K/B Fund IV Cleveland must be dismissed because it is no longer in existence. Accepting that as true – which I do and which is why the motion to dismiss K/B Fund IV Cleveland is granted – how can a nonexistent entity "claim an interest" in the subject of this lawsuit or be exposed to "double, multiple, or otherwise inconsistent obligations" by the result in this case? The defendants' position also ignores the explicit condition in Civil Rule 19(A) that a necessary party must be a person who is subject to service of process.

K/B Fund IV Cleveland is dead. It has no interests. It is not subject to service of process. Unless its certificate of cancellation is nullified, it can do nothing and nothing can be done to it.[26] It is thus not a necessary party under Civil Rule 19(A) and there is no need to examine under Civil Rule 19(B) whether, in equity and good conscience, the case should not proceed without K/B Fund IV Cleveland.

CONCLUSION

The bottom line

The plaintiffs claim that the seller and its agents knew the garage needed over $1,000,000 worth of repairs but hid this fact from them by not disclosing it as required by the contract, covering up the defects with superficial repairs, and lying about the defects when asked. It is

[25] *Id.*, p. 17.
[26] If the certificate of cancellation is nullified at the plaintiffs' request, then K/B Fund IV Cleveland will be a party to this lawsuit, making the Civil Rule 19 argument moot.

undisputed that the seller had reports from four different experts detailing the garage's state of disrepair. In the context of a motion to dismiss, and without the benefit of discovery, the amended complaint is sufficient to state claims for fraud and breach of contract, and to permit the possibility of piercing the corporate veil of K/B Fund IV Cleveland to hold its owners responsible for the fraud and breach of contract. Therefore, the defendants' motions to dismiss the amended complaint are denied, except for the motion to dismiss K/B Fund IV Cleveland, which is granted.

As noted on page 8, the alternative motion for a more definite statement that I find implicit in the defendants' argument that the plaintiffs failed to attach a written assignment of the sales contract to the amended complaint is granted, and the plaintiffs are ordered to file a more definite statement in support of the claims in the amended complaint. That obligation will be satisfied by filing as a supplement to the amended complaint a copy of the assignment from Optima Ventures to Optima 1300 or some explanation for why it can't be produced.

A word of caution

Despite overruling the majority of the motion to dismiss, and recognizing that discovery has yet to be undertaken, I do wonder about the plaintiffs' ultimate prospects of proving some of their claims. In particular, the amended complaint asserts all of the causes of action jointly on behalf of both plaintiffs. That allegation makes me curious to learn what unusual facts exist to support a finding that the defendants separately damaged two plaintiffs by breaching a contract 1) entered into with Optima Ventures and then 2) assigned by Optima Ventures to Optima 1300 before closing. Assuming a breach, my limited imagination prevents me from seeing how both plaintiffs can claim to have been damaged. Similarly, it seems logical that the defendants misrepresented the garage's true condition to, or concealed it from, one plaintiff or the other, not

both, and that only one or the other could have relied on the misrepresentation and been damaged by such justifiable reliance.

Yet I am open to evidence that these logical improbabilities happened in this case, hence I have denied most of the motions to dismiss. At the same time, the plaintiffs are reminded that they are bound by the provisions of Civil Rule 11 and Ohio Revised Code section 2323.51, and they should be willing to amend or withdraw claims as the facts learned in discovery warrant.

IT IS SO ORDERED:

_____ _____

Judge John P. O'Donnell Date

SERVICE

A copy of this journal entry was sent by email to the following on January 20, 2015.

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Judge John P. O'Donnell