STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

SUGAR TREE SQUARE, LLC,
Plaintiff,

v. **Case No. 15-148357-CB**
Hon. James M. Alexander

TOP MODELS SALON, INC and
SOUHAYLA DENHA,
Defendants.
_____/

OPINION AND ORDER FOLLOWING BENCH TRIAL

This matter is before the Court on Plaintiff's Complaint. In a prior lawsuit (14-144303-CK), Plaintiff obtained a judgment for $128,189.70 against non-party Top Models Salon & Boutique ("Top Models Boutique") based on its failure to pay rent under the Lease's terms. Defendant Souhayla Denha executed a Guaranty on said Lease.

In an apparent effort to collect on said judgment, Plaintiff filed the present action against Top Models Salon, Inc and its sole shareholder, Denha. This is so because, after vacating Plaintiff's premises, Denha opened up another salon under the name Top Models Salon, Inc "a half mile away, with all of the assets from [Top Models Boutique]."

Plaintiff's theory of this case is that Top Models Salon is "merely a shell entity behind which Denha hid to carry on a business in her personal capacity and used primarily for shielding herself from personal liability."

Plaintiff's Complaint alleges claims for (Count I) Alter Ego/Veil Piercing; (Count II) Alter Ego/Mere Continuation; (Count III) Alter Ego/De Facto Merger; (Count IV) Promissory

Estoppel; (Count V) Unjust Enrichment; and (Count VI) Fraudulent Misrepresentation.

The Court conducted a one-day bench trial on July 7, 2016. At trial, the Court heard the testimony of Alex Wancier, the Vice President of Commercial Operations for Plaintiff's Property Manager (Oakland Management), and Defendant Souhayla Denha.

Following trial, the parties were ordered to order a transcript and to file proposed findings of fact and conclusions of law within 21 days from the date the transcript was received. The transcript was filed on August 11, 2016, and Plaintiff filed its Proposed Findings of Fact and Conclusions of Law on September 1, 2016. Defendant failed to file its Proposed Findings of Fact and Conclusions of Law and has not sought leave to do so after the deadline ran.

The Court has considered the trial testimony and reviewed the exhibits and Plaintiff's post-trial submission. Based on the foregoing, the Court issues this Opinion and Order as its findings of fact and conclusions of law, pursuant to MCR 2.517.

I. Introduction

According to the parties' Joint Final Pretrial Order, Plaintiff's theory of this case is that Defendant Top Models Salon is or was an alter ego/mere instrumentality of Denha. Plaintiff further claims that Denha has not observed corporate formalities, has comingled funds, and failed to maintain Top Models Boutique as separate from herself. Plaintiff also claims that Top Models Salon is a de facto successor/mere continuation of Top Models Boutique. As a result, Plaintiff argues that both Denha and Top Models Salon should be liable for Plaintiff's judgment against Top Models Boutique.

Defendants, on the other hand, believe that Plaintiff's claims are barred by res judicata and a release and settlement. Further, Defendants maintain that Top Models Salon is not an

alter-ego or successor of Top Models Boutique.

The following facts are uncontested under the parties' Joint Final Pretrial Order:

1. Denha is the sole managing member of Top Models Boutique.
2. On October 22, 2010, Top Models Boutique entered into a lease for space in Plaintiff's premises.
3. Top Models Boutique failed to pay rent to Plaintiff under the lease.
4. Plaintiff filed suit and was granted a judgment against Top Models Boutique for $128,189.70.
5. Denha and her husband were dismissed from said case.
6. Top Models Boutique left the premises in November 2014.
7. Denha is the sole managing member of Top Models Salon.
8. Top Models Salon was incorporated in December 2014.
9. Top Models Salon entered into a lease for space located at 5755 West Maple and is currently operating there.
10. Top Models Salon "has the same employees, same clients, and offers the same services" that Top Models Boutique did.

But the parties identified the following contested facts:

1. "Whether there was a merger between [Top Models Boutique] and [Top Models Salon] sufficient to hold [Top Models Salon] liable for the debts (and specifically [Plaintiff's] judgment] of [Top Models Boutique]."
2. "Whether S. Denha's management and/or operation of [Top Models Boutique] rendered that entity a mere instrumentality of herself and that in doing so she and the entity committed a wrong or fraud, and as a result of these, [Plaintiff was damaged].

Initially, the Court finds that Plaintiff has abandoned its claims alleged in Counts IV, V, and VI for Promissory Estoppel, Unjust Enrichment; and Fraudulent Misrepresentation, respectively. This is so because Plaintiff: (1) failed to include these claims in the Joint Case Management Plan filed early in the case; (2) failed to include these claims in the Relevant Law section of the Joint Final Pretrial Order; (3) failed to include facts relevant to said claims in the contested or uncontested facts portion of the Joint Final Pretrial Order; (4) in the Joint Case Management Plan, the Joint Final Pretrial Order, **and** in opening argument, described this case as solely a veil piercing and successor liability case; and (5) did not present any testimony or other evidence to support these claims at trial.

As a result, Plaintiff's Counts IV, V, and VI are DISMISSED. This leaves only Plaintiff's alter ego and veil piercing claims (Counts I, II, and III).

II. Findings of Fact

At the conclusion of the prior action (Case No. 14-144303-CK), Plaintiff understood that Denha and her husband "would be dismissed and have no further liability" with respect to the $128,198.70 judgment against Top Model Boutique. (TT at 20).

In Connection with the settlement, on May 22, 2015, the parties executed a document titled "Settlement Agreement After Facilitation," which provides: "Upon payment to Plaintiff of $10,000 today, a consent judgment against Defendant LLC will enter for $128,189.70 and the individual defendants will be dismissed with prejudice and without costs or attorney fees." (D. Ex. A).

The individual Defendants tendered a check to Plaintiff dated May 22, 2015, and Plaintiff issued a receipt for the same. (D. Ex. A). Five days later, on May 27, 2015, an Order in Case No.

14-144303-CK entered that dismissed the individual Defendants with prejudice. (D. Ex. B).

Despite the settlement agreement resolving Plaintiff's claims against Denha, Plaintiff sued her again because it learned that she may have siphoned funds from Top Models Boutique into Tom Models Salon. (TT at 20-21). Plaintiff does not claim (nor did it present any evidence) that it tendered back the $10,000 settlement funds Denha paid to it before filing suit against her.

Denha testified that Top Models Boutique is not different than Top Models Salon. (TT at 42). Top Models Salon "has the same employees, same clients, and offers the same services" that Top Models Boutique did. (Uncontested facts). Top Models Salon has the same phone number as Top Models Boutique. (TT at 43). A web search for the old Salon redirects to the new Salon's website. (TT at 43).

Some of the equipment from the old salon is used at the new salon. (TT at 44). Denha manages the new salon just like she did the old salon. (TT at 44). Denha paid Top Models Salon's initial lease down payment at the new location out of the Top Models Boutique's bank account. (TT at 46, P. Ex. 6). Denha also paid for architecture services (blueprints) for Top Models Salon out of the Top Models Boutique's bank account. (TT at 47, P. Ex. 6). Denha also paid for construction/remodeling for the Top Models Salon out of the Top Models Boutique's bank account. (TT at 48, P. Ex. 6).

Denha also paid for rent for Top Models Salon out of the Top Models Boutique's bank account. (TT at 49, P. Ex. 6). Denha also paid for granite for the front desk for Top Models Salon out of the Top Models Boutique's bank account. (TT at 49, P. Ex. 6).

Denha described these payments for Top Models Salon's needs out of Top Models Boutique's bank account as the companies "still in process of changing the account, bank account." (TT at 49).

Denha finally closed the Top Models Boutique bank account in February 2015. (TT at 55-56, P. Ex. 10). There was no formal wind up or notice to creditors that Top Models Boutique was discontinuing doing business. (TT at 56).

Based on all of the foregoing, the Court finds that Top Models Salon was initially funded, in great part, by assets and funds belonging to Top Models Boutique. The new salon has the same management, the same employees, the same customers, the same equipment, the same phone number, and the same way of doing business as the old salon.

III. Conclusions of Law

Based on the above findings of fact, the Court makes the following conclusions of law.

A. Defendant Souhayla Denha

In order to successfully pierce the corporate veil, a plaintiff must establish the following: "First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff." *Nogueras v Maisel & Associates*, 142 Mich App 71, 86; 369 NW2d 492 (1985).

With respect to Defendant Denha, Defendant argued that the underlying Settlement Agreement barred Plaintiff's claims against her.[1] Indeed, the plain language of the Settlement Agreement provides that Plaintiff's claims would be resolved with a $128,189.70 consent judgment against Top Models Boutique and the individual defendants were dismissed with

1 Michigan law is well-established that "[a] contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998).

prejudice in exchange for a $10,000 payment. This payment was made. Plaintiff negotiated this deal. The Court will not invade the parties' express intention in so making.

As a result, based on the parties' express Settlement Agreement, any Plaintiff claim originating from Top Models Boutique's non-payment of rent against Defendant Denha individually is barred. For this reason, all Plaintiff claims against Defendant Denha, individually, are DISMISSED in their entirety.[2]

B. Defendant Top Models Salon, Inc.

With respect to Defendant Top Models Salon, in *Lakeview Commons v Empower Yourself*, 290 Mich App 503; 802 NW2d 712 (2010), the Court of Appeals reiterated "basic rule in Michigan regarding successor liability" is as follows:

> The traditional rule of successor liability examines the nature of the transaction between predecessor and successor corporations. If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies. The five exceptions are as follows:
>
> "(1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the

2 Although not raised by Defendants, the Court is also concerned with the implication of Michigan's tender-back rule to Defendant Denha. Defendants pled the affirmative defense of a release. The Individual Defendants (including Defendant Denha) paid $10,000 to Plaintiff end all of Plaintiff's claims relating to the $128,189.70 consent judgment against Top Models Boutique. Despite this payment, Plaintiff again sued Denha individually relating to the $128,189.70 consent judgment against Top Models Boutique. But Plaintiff did not tender back the $10,000 prior to filing suit – contrary to the tender-back rule, which applies even when a plaintiff brings allegations sounding in fraud in the inducement (as the case here). See *Stefanac v Cranbrook Educational Community*, 435 Mich 155; 458 NW2d 56 (1990), and *Keech v SR Jacobson Dev Corp*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2006 (Docket No. 258598). This Rule appears also to bar claims against Denha individually.

> transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation."

Furthermore, *Foster* explained the "mere continuation" doctrine:

> After examining the relevant policy concerns, this Court in *Turner* concluded that a continuity of enterprise between a successor and its predecessor may force a successor to "accept the liability with the benefits" of such continuity. *Turner* held that a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. *Turner* identified as an additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation.

This Court recently held in *RDM Holdings, Ltd. v. Continental Plastics Co.,* 281 Mich.App. 678, 717–719, 762 N.W.2d 529 (2008), that successor liability applies to corporations and limited liability companies in purely commercial contexts, such as a breach of a lease agreement. In *RDM Holdings,* the plaintiff was a commercial business that entered into a lease agreement with Continental–Lighting, L.L.C. (Lighting). Lighting filed for bankruptcy and, subsequently, Continental–Coating, L.L.C. (Coating), was created. The trial court granted summary disposition, finding no genuine issue of material fact regarding whether Coating was liable for the breach of the lease agreement under a successor-liability theory. This Court reversed, concluding that the plaintiff had presented sufficient evidence to create a genuine issue of material fact because the plaintiff had presented evidence reflecting a continuation in management, personnel, assets, and general business operations of Lighting by Coating.

Lakeview Commons v Empower Yourself, 290 Mich App at 506-508; quoting *Foster v Cone–Blanchard Machine Co*, 460 Mich 696, 702-704; 597 NW2d 506 (1999) and *Turner v Bituminous Cas Co*, 397 Mich 406, 417 n 3; 244 NW2d 873 (1976).

Such is the case here. Defendant's own testimony establishes that the new salon (Top

Models Salon) is a mere continuation of the old salon (Top Models Boutique). Just like described in *Lakeview Commons* and *RDM Holdings*, there is a "continuation in management, personnel, assets, and general business operations." Further, assets of the old salon were used to fund the buildout and startup of the new. This isn't even close. Top Models Salon is a mere continuation of Top Models Boutique such that Top Models Salon is liable on Top Models Boutique's debt to Plaintiff.

As a result, the Court GRANTS judgment on Plaintiff's Count II against Top Models Salon, Inc. in the amount of $128,189.70.

IV. Summary/Conclusion

For all of the foregoing reasons, the Court finds that Plaintiff has established its entitlement to judgment on Count II for Alter Ego/Successor Liability – Mere Continuation. Based on the same, the Court enters a Judgment **against Top Models Salon, Inc. only** in the amount of $128,189.70. Because the Court has done so on Count II, it need not consider Plaintiff's Counts I and III as to Defendant Top Models Salon, which are DISMISSED.

But Plaintiff has failed to establish that the Court should pierce the corporate veil and attach personal liability to Defendant Denha. As a result, Defendant Denha is DISMISSED as a Defendant from this case.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

October 20, 2016 /s/ James M. Alexander
Date Hon. James M. Alexander, Circuit Court Judge