STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: November 10, 2014]

JACOB LICHT, INC., d/b/a LICHT PROPERTIES, Plaintiff,	:	
v.	:	**C.A. No. PB 12-4739**
CAPCO STEEL, LLC, f/k/a CAPCO STEEL CORPORATION; and WEBSTER BANK, N.A., Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court for decision is Defendant Webster Bank, N.A.'s (Webster) Motion for Summary Judgment against Plaintiff Jacob Licht, Inc., d/b/a Licht Properties (Licht). Licht's Complaint alleges that Webster is liable to it for all debts and obligations of Capco Steel, LLC, f/k/a Capco Steel Corporation (Capco) owed to Licht by virtue of Webster's status as a successor entity. Licht opposes Webster's motion.

During a hearing on the motion, the Court requested both parties submit supplemental memoranda on two fundamental issues, one being what case law should control Licht's "successor-in-interest" claim against Webster.[1] Indeed, as clarified by Licht in its Supplemental Memorandum in Support of its Objection to Webster's Motion for Summary Judgment, Licht's claims against Webster—albeit styled as "corporate successor liability"—essentially are not

[1] At the hearing, the Court posited that the central issue of whether Webster was liable to Licht was not based on theories of successor liability but rather based on some other applicable body of law. The Court theorized that the real issue of liability depended on whether Licht could demonstrate that Webster essentially stepped into the shoes of Capco—thereby becoming liable to Licht for Capco's debts—rather than basing liability on the other theories relied on by the contending parties. While neither Licht nor Webster has provided the Court the exact theory of liability in their supplemental memoranda, the Court, on its own, now applies the relevant principles of law.

governed by the traditional approach established in our state's case law on the subject. Instead, Licht's claims rest on its allegations that "on some level and to some degree, [Webster] step[ped] into the legal shoes of Capco, and exert[ed] a level of dominion, control and/or influence with regard to Capco's day-to-day business operations . . . ." Id. at 4. Thus, the Court must now deal with an issue not frequently addressed by Rhode Island courts; that is, whether a debtor's lender, through the lender's control and direction of the debtor's business affairs, may become liable to the debtor's separate creditors in actions for breach of contract and breach of fiduciary duty.

I

Facts and Travel

A

Leasing Agreements Between Licht and Capco

Licht is a Rhode Island limited liability company that owns several properties and surface parking lots throughout the City of Providence. (Compl. ¶¶ 1, 5). Beginning on September 29, 1998, Licht entered into multiple commercial real estate lease agreements with Capco for the use and occupancy of seven different properties.[2] (Gary N. Licht Aff. ¶¶ 2-8, May 27, 2014 (hereinafter Licht Aff.)). During the span of approximately fourteen years, Capco fully performed pursuant to the rental payment obligations of the lease agreements. (Compl. ¶¶ 13, 16; Licht Aff ¶¶ 9, 11). However, due to Capco's financial difficulties and its default on certain loans from Webster, Capco failed to make any further payments for the rental properties under the lease agreements after April 30, 2012. (Compl. ¶¶ 14, 17; Licht Aff. ¶¶ 10, 12; Webster Aff. ¶¶ 12-13, Feb. 28, 2014). As of May 31, 2012, Capco owed Licht approximately $19,906.36 in

[2] The lease agreements entered into between Licht and Capco involved four commercial spaces of certain complexes in Providence, Rhode Island, entered into between 1998 and 2005. (Compl. ¶¶ 6-9; Licht Aff. ¶¶ 2-5). Additionally, two separate lease agreements were entered into between Licht and Capco for the use and occupancy of surface parking lots in 1999 and 2010 and an agreement for the use and occupancy of a garage was entered into in 2009 on a month-to-month basis. (Compl. ¶¶ 10-12; Licht Aff. ¶¶ 6-8).

rental payments. (Compl. ¶ 20; Licht Aff. ¶ 21). Thereafter, as of the December 31, 2012 expiration date, Capco's liability to Licht increased to approximately $121,983.47. (Compl. ¶¶ 21-22; Licht Aff. ¶¶ 22-23).

According to the Licht Affidavit, it received email correspondence from Brian D. Maloney (Maloney)[3] of Altman & Company, LLC (Altman) regarding a potential payment of $22,000 from Capco that was "approved by the bank" to be made to Licht the week of July 20, 2012. See Licht Aff. ¶¶ 16-17. However, Glenn P. Marx (Marx), a Relationship Manager in the Restructure and Recovery Department of Webster, stated during his deposition that Webster was not approving budgets for Capco and any representation by Maloney to that effect would have been mistaken. See Marx Dep. 29:18-30:12, May 20, 2014. In any event, Licht did not receive such payment from Capco nor did Licht receive any other rental payments after May 1, 2012. See Licht Aff. ¶¶ 12, 17.

B

Webster's Relationship with Capco

Beginning on March 26, 2010, Capco—jointly with Capco Endurance, LLC—entered into a lending relationship whereby Webster provided Capco with an original $20,000,000 revolving line of credit. Webster Aff. ¶¶ 2-3, Feb. 28, 2014. Thereafter, Webster extended a series of other credit facilities to Capco, including a $3,000,000 overline that was restructured on September 20, 2011 into a $20,000,000 revolving credit facility and an $8,000,000 term loan. See id. ¶¶ 5-9. As of November 2011, Capco had five credit facilities with Webster: three direct lending facilities and two mortgage loans. (Marx Dep. 9:14-10:10). Around that time, Capco was struggling to meet its payment obligations with respect to the loans from Webster which

[3] Maloney was engaged by Capco at some point in 2012 as a Chief Risk Officer as required by Webster to take on the responsibility of fulfilling Capco's reporting requirements to Webster. (Marx Dep. 27:25-28:25).

prompted Marx's involvement in the lending relationship. See id. at 7:20-8:8. In order to ensure Capco's liquidity, Capco sold off its excess equipment (which served as collateral for Webster's loans) at auction.[4] See id. at 8:3-23, 22:3-12. Marx was tasked with overseeing and managing the auction process as Webster's representative. See id. at 7:24-8:15. The initial appraisals of the equipment were set by the auctioneer, although Webster was involved in establishing bid conditions and values. See id. at 13:9-15:20. The net proceeds from the auction were paid to Webster despite there being no default on the facilities at that time. Id. at 23:8-18.

Furthermore, Webster was involved in "the loans, the repayment of the loans, the compliance with covenants, the monitoring the various requirements of the legal documents and reporting." Id. at 18:8-14. Marx also attended multiple meetings in which new business development, account receivable and pending change orders were discussed; Marx attended such meetings because of Webster's concern about Capco's ability to meet its loan payments. See id. at 24:8-25:25. According to Marx, however, "[Webster's] role was not to tell [Capco] how to spend their money, or what priorities to meet. [Webster] expressed concern that they would have enough money to continue to operate to complete the jobs that were in their book of business that were active at the time." Id. at 26:18-23.

On February 24, 2012, Webster extended a $1,500,000 short term revolving loan. (Webster Aff. ¶ 10). On March 30, 2012, Capco defaulted on the short term revolving loan and on March 31, 2012, Capco defaulted on the $6,188,564.55 outstanding balance on the term loan. Id. ¶¶ 12-13. Around that time, Capco determined that it could not continue business operations and a wind down was appropriate. Id. ¶ 14. In order to assist with the wind down, Webster extended two $1,800,000 revolving loans to Capco. Id. ¶¶ 15-16, 25-26. According to Webster,

[4] Prior Capco payment defaults were cured prior to the auction through a restructuring in September 2011 that resulted in the aforementioned extension of new credit facilities. See id. at 21:14-19. Marx testified that he did not recall whether Webster directed the auction to occur. See id. at 22:13-23:7.

Capco retained Altman to assist with Capco's wind down and the "day-to-day management, budgeting and project work was being completed by [Capco] with the assistance of Altman." Id. ¶¶ 18, 20. Furthermore and relevant to the issues here, Webster asserts it "did not play any role in the operation and/or management of [Capco's] business operations at any time. At all times, Webster's relationship with Borrowers was that of a secured creditor . . . ." Id. ¶¶ 21-22.

At some point during the spring of 2012, Webster engaged Hollis Meddings Group, Inc. (Hollis Meddings) for purposes of monitoring Capco's completion of various construction projects and the company's winding down of its business. (Hollis Meddings Aff. ¶ 3, Mar. 4, 2014; Marx Dep. 30:13-22). Hollis Meddings was directly responsible to Webster but allegedly "did not play any role in the operation or management of the business operations of [Capco]," "make any decisions regarding [Capco's] business operations," or "direct or influence the decisions of [Capco] with respect to the disbursement of payables . . . ." (Hollis Meddings Aff. ¶¶ 6-7; Marx Dep. 30:23-31:14). With regard to whether Webster had to approve any payments of Capco, such as the payment to Licht, Marx did not recall if any requests for rental payments were specifically denied. See Marx Dep. 32:25-33:9. However, Webster did monitor Capco's budgets and, on occasion, would fund budgets prepared by Capco. Id. at 40:23-41:8. Marx testified that while the budget was examined as a whole as to whether Webster would provide the requisite funding, Webster did review—and sometimes reject—individual line items in the budget. See id. at 42:11-43:15.

Licht commenced the instant action against Capco and Webster, seeking, inter alia, to hold Webster liable for the outstanding rental debt owed by Capco to Licht. A default was entered against Capco on January 10, 2013. Webster filed the subject Motion for Summary Judgment on April 1, 2014.

II

Standard of Review

A motion for summary judgment is "'appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" Pichardo v. Stevens, 55 A.3d 762, 765 (R.I. 2012) (quoting Delta Airlines, Inc. v. Neary, 785 A.2d 1123, 1126 (R.I. 2001)); see also Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981) ("As a prerequisite to an order for summary judgment, the lower court must review the pleadings, affidavits, admissions, answers to interrogatories, and other appropriate evidence from a perspective most favorable to the party opposing the motion."). In reviewing a motion for summary judgment, a trial justice must not decide any existing genuine issues of material fact; if such issues of fact are found by the trial justice to be present, the motion for summary judgment must be denied. Steinberg, 427 A.2d at 340; O'Connor v. McKanna, 116 R.I. 627, 633, 359 A.2d 350, 353 (1976) ("[I]n passing on a motion for summary judgment, the question for the trial justice is whether there is a genuine issue as to any material fact and not how that issue should be determined.").

"[A] party who opposes a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions. Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1225 (R.I. 1996). Accordingly, in order to survive a motion for summary judgment, the nonmoving party "must present evidence from which a jury could draw reasonable inferences sufficient to create a genuine issue of material fact. Mitchell v. Mitchell, 756 A.2d 179, 185 (R.I. 2000). In light of this standard of review, the Court is mindful

that "'[s]ummary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously.'" DeMaio v. Ciccone, 59 A.3d 125, 129-30 (R.I. 2013) (quoting Estate of Giuliano v. Giuliano, 949 A.2d 386, 390 (R.I. 2008)).

III

Discussion

Licht asserts several claims against Webster in its Complaint, namely Count V alleging breach of fiduciary duty by Webster and Count VI alleging "corporate successor liability." In support, Licht alleges that "Webster has stepped into the shoes of and/or merged with Capco directing its day to day operations, and is effectively controlling all aspects of Capco's business operations" and therefore is liable for Capco's debts. (Compl. ¶¶ 51, 55). In moving for summary judgment, Webster argues that Counts V, VI, as well as Count VII (seeking an accounting of Webster's financial activity relative to Capco's business operations) should fail as a matter of law because Webster is not the "successor-in-interest" to Capco pursuant to the established five-part test formulated by our Supreme Court in H.J. Baker & Bro., Inc. v. Orgonics, Inc., 554 A.2d 196, 199 (R.I. 1989). (Def.'s Mot. Summ. J. 6). During the initial hearing on the summary judgment motion, the Court took the position that H.J. Baker and its doctrine of successor liability was not, in fact, the controlling legal theory.[5]

In opposing summary judgment, Licht contends that H.J. Baker does not involve a lender-borrower relationship and, therefore, the case and its corresponding doctrine should not apply to Licht's claims. As Licht explains, this is not a "garden variety" successor-in-interest case. Rather, Licht argues Webster is liable under a "separate body of law not otherwise contemplated by H.J. Baker" or any current, applicable case law in Rhode Island. Id. at 4.

[5] The Court recognizes that it is unusual for the Court to direct the parties on what it deems to be the appropriate legal theories; however here, the Court has done so because Licht averred that "Webster has stepped into the shoes of and/or merged with Capco . . . ." See Compl. ¶ 51.

Webster responds by directing the Court to the fact that Licht's supporting case law arises in the context of equitable subordination of claims in bankruptcy proceedings and, thus, has no bearing on the instant dispute. In any event, Licht's main argument in opposition to summary judgment is that (regardless of the specific legal theory) there are a plethora of material fact questions in this dispute regarding the extent, if any, of Webster's control over Capco.

A

The Inapplicability of H.J. Baker

In asserting that Webster is not the "successor-in-interest" to Capco, Webster originally based its motion for summary judgment on the assertion that Licht was unable to satisfy the standard set forth in H.J. Baker. Webster maintains that it is merely a secured creditor pursuant to the various credit facilities rather than a "successor entity" to Capco. On the other hand, Licht contends that H.J. Baker is wholly inapplicable to the instant dispute because that case only applies to a "new company" assuming control of an "old company" and is not applicable in the lender-borrower context.

Generally, it is well-settled that a transferee corporation will not be liable for the debts and liabilities of the transferor corporation due to the mere transfer of assets. 15A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 7122, at 209 (rev. vol. 2008) (hereinafter Fletcher) (citing, inter alia, H.J. Baker, 554 A.2d at 205). There are several exceptions to this rule precluding liability in actions for damages for breach of contract, including circumstances where the new company "'is merely a continuation or a reorganization of another, and the business or property of the old corporation has practically been absorbed by the new' . . . . In such a case, the new company will be held responsible for the old one's debts." H.J. Baker, 554 A.2d at 205 (quoting Cranston Dressed Meat Co. v. Packers Outlet Co., 57 R.I. 345, 348, 190 A. 29, 31 (1937))); see also Fletcher, supra, § 7122, at 217-18. Our Supreme

Court has characterized the H.J. Baker decision as "[t]he seminal case in this jurisdiction on successor corporate liability . . . ." Casey v. San-Lee Realty, Inc., 623 A.2d 16, 18 (R.I. 1993).

In that case, the Rhode Island Supreme Court adopted a five-part test from New Jersey for examining the "mere continuation" theory of successor liability. See H.J. Baker, 554 A.2d at 205. The five criteria for determining whether a "continuing" entity is present are:

> "(1) there is a transfer of corporate assets; (2) there is less than adequate consideration; (3) the new company continues the business of the transferor; (4) both companies have at least one common officer or director who is instrumental in the transfer; and (5) the transfer renders the transferor incapable of paying its creditors because it is dissolved either in fact or by law." Id. (citing test set forth in Jackson v. Diamond T. Trucking Co., 100 N.J. Super. 186, 196, 241 A.2d 471, 477 (1968)).

The H.J. Baker Court employed the "mere continuation" test to resolve whether one defendant's transfer of assets to another defendant imparted liability on the new defendant for the old defendant's debts. Id. at 198, 204-05.

In this case, as this Court noted at oral argument, Licht would be hard-pressed to meet any of the above elements. Licht is unable to show that any transfer of assets occurred, that the two corporate entities shared any directors or officers, or that any new business continued to operate. See id. Accordingly, as Licht correctly asserts in its Supplemental Memorandum, this case is not a typical successor-in-interest case and cannot be guided by the test set forth in H.J. Baker. In fact, it appears to this Court that Counts V and VI do not present claims of successor liability at all. Instead, the Court believes the instant dispute should be guided by the principles of "lender liability." See, e.g., A. Barry Cappello & Frances E. Komoroske, 42 Am. Jur. Trials 419 (2014) (hereinafter Lender Liability Litigation) ("Under traditional principles of lender liability, a creditor that has not assumed the formal indicia of ownership may become liable for the debts of its borrower if the lender's conduct is such as to cause it to become the debtor's agent, partner, or alter ego."); Richard S. Mittleman, Walter G. D. Reed & Michael A.

Silverstein, Lender Liability in Rhode Island: Non-Credit Risks of Bank Lending, at 3 (Nat'l Bus. Inst., Inc. ed. 1988) (reviewing various legal theories in which lender liability may arise).

B

A Lender's Undue Control Over a Borrower

While the parties disagree as to which body of law should govern the instant dispute, this Court finds that Licht has asserted two theories of lender liability against Webster: a claim for damages from a breach of fiduciary duty and liability pursuant to an instrumentality theory or "alter ego" theory. The doctrine of lender liability commonly arises in contexts where a borrower claims that the lender is liable to it in contract or tort for various causes of actions, such as breach of fiduciary duty and breach of contract.[6] See Lender Liability Litigation, supra, § 1; see also Pearson v. Component Tech. Corp., 247 F.3d 471, 492 (3d Cir. 2001) ("Courts have grappled with the question of lender liability in a wide variety of situations, such that the catch-phrase "lender liability" has now taken on a broad meaning to refer to any kind of liability that can grow out of the lender/borrower relationship."). However, for purposes of deciding the instant motion for summary judgment, the most relevant theory of liability is where third parties attempt to hold a lender liable on the theory that a lender has exercised total or complete control over a borrowing corporation such that the borrower was effectively run by the lender to the detriment of the borrower's other creditors. See id. (citing Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098 (5th Cir. 1973)); A. Barry Cappello & Frances E. Komoroske, 15 Am. Jur. Proof of Facts 3d 695, at § 4 (2014) (hereinafter Exercise of Undue Control) ("[T]here is no one theory under which liability is always imposed. Rather, a wide

[6] Indeed, "[l]ender liability . . . has now been recognized as a viable body of law in virtually every jurisdiction in the country." Lender Liability Litigation, supra, § 1. Interestingly, this body of law does not appear to have been examined in Rhode Island by our Supreme Court. Accordingly, the Court will look to outside, relevant supporting authority.

range of theories is available, from the torts of interference and breach of fiduciary duty to simple agency principles.").

Webster attempts to assert that Licht's supporting authority establishing Webster's potential liability through its alleged control over Capco arises solely within the context of equitable subordination. In that regard, Webster argues Licht is again unable to satisfy that respective standard. In support of its proposition, Webster cites to this Court's prior decision in HNY Holding Co. v. Danis Transp. Co., C.A. No. PB 02-6561, 2004 WL 2075158 (R.I. Super. Sept. 9, 2004) (Silverstein, J.). The Court, however, need not delve into an extensive analysis of equitable subordination as outlined in its prior decision in HNY Holding, as theories of lender liability are not exclusive to this context.[7] See Pearson, 247 F.3d at 492 (citing Combustion Sys. Servs., Inc. v. Schuylkill Energy Res., Inc., No. 92-4228, 1993 WL 514496 (E.D. Pa. Dec. 1, 1993)) for proposition that while lender liability claims often arise in context of bankruptcy proceedings whereby parties seek remedy of equitable subordination of lender's claims, such claims also arise where lender's control over borrower renders lender the real party in interest for borrower's debts); see also Lender Liability Litigation, supra, § 5 (explaining lender who exercises undue control over borrower may subject itself to a host of claims, including breach of contract actions and potentially having the lender's claim equitably subordinated in the borrower's bankruptcy). Regardless of the causes of action in which the theory is applied, a finding of liability turns on the extent of Webster's control over Capco; if Webster did not exercise the requisite level of control, then it cannot be liable under the instrumentality theory of liability or for breaches of fiduciary duty. See Schwan's Sales Enters., Inc. v. Commerce Bank & Trust Co., 397 F. Supp. 2d 189, 194 (D. Mass. 2005).

[7] While this Court's prior decision in HNY Holding analyzes claims for equitable subordination, the decision does contain some vestiges of lender liability. See HNY Holding, 2004 WL 2075158, at *10-11.

1

Instrumentality Theory of Lender Liability

Licht's supporting authority—while implicitly noting that the appropriate inquiry is the extent of Webster's control over Capco—is persuasive. However, Licht fails to identify on which theory of liability Webster's liability rests. Licht's authority, as noted by Webster in its Reply, discusses a lender's liability for undue control solely in the context of equitable subordination. The Court—in reviewing all theories of liability—will begin its analysis with an examination of the "instrumentality" theory of liability. See Schwan's, 397 F. Supp. 2d at 194 (internal quotation marks omitted) (defining instrumentality theory of lender liability as arising when "a creditor is responsible for the obligations of its debtor when the creditor treats the debtor as a mere business conduit for the purposes of the dominant corporation.").

To begin, "[t]here are situations in which a corporation may be held liable for the debts of another corporation under a theory known in corporate law as the instrumentality doctrine." F.C. Imports, Inc. v. First Nat'l Bank of Boston, N.A., 816 F. Supp. 78, 91 (D.P.R. 1993), abrogated on other grounds, Portugues-Santana v. Rekomdiv Int'l, 657 F.3d 56, 60 (1st Cir. 2011). The rationale behind holding the controlling corporation liable for the subservient corporation's debt is that the controlling corporation has misused the subservient's corporate form and is in actuality using that corporation for its own purposes and thus the debts of the subservient corporation belong to the controlling corporation. Krivo, 483 F.2d at 1102. "The instrumentality theory is akin to the piercing of the corporate veil doctrine, and has generally been used by *third party creditors* seeking to hold a lender liable for the debts of the borrower." FAMM Steel, Inc. v. Sovereign Bank, 571 F.3d 93, 104 (1st Cir. 2009) (emphasis in original).

One of the leading cases on the instrumentality doctrine and undue control of a debtor is Krivo, in which the United States Court of Appeals for the Fifth Circuit—in examining whether

a lending corporation was liable for a borrowing corporation's debts—explained that instrumentality cases "require a strong showing that the creditor assumed actual, participatory, total control of the debtor. Merely taking an active part in the management of the debtor corporation does not automatically constitute control, as used in the 'instrumentality' doctrine, by the creditor corporation." Krivo, 483 F.2d at 1105; accord FAMM, 571 F.3d at 105 (quoting 1 Lender Liability Law and Litigation § 1.03[4][a] (2009)) ("[T]he creditor's control and dominance over the borrower [must be] so substantial as to indicate that the effective control of the borrower's operations and affairs rests with the creditor."). In order to determine whether Webster exerted the requisite control over Capco to establish Webster's liability, the Court must consider "'the sum of [Webster's] conduct with respect to [Capco], total up all the indicia of control, and determine whether the cumulative conduct has tipped the scales.'" Schwan's, 397 F. Supp. 2d at 195 (quoting In re Beverages Int'l Ltd., 50 B.R. 273, 282 (Bankr. D. Mass. 1985)).

As the F.C. Imports Court concluded, there are two essential elements for liability under the instrumentality doctrine: "the dominant corporation must have controlled the subservient corporation," and "the dominant corporation must have proximately caused plaintiffs' harm through the misuse of its control." F.C. Imports, 816 F. Supp. at 91. Importantly, however, the mere existence of a creditor-debtor relationship or the mere taking of an active role in the management of the debtor corporation does not automatically constitute control under the instrumentality doctrine. Id.; see Gavin v. Sovereign Bank, No. 06-12314-DPW, 2008 WL 2622839, at *4 (D. Mass. June 30, 2008), aff'd sub nom., FAMM, 571 F.3d at 93. (internal quotation marks omitted) (brackets in original) ("The level of control necessary for lender liability under an instrumentality theory does not arise unless the plaintiff can show that the creditor [ ] obtained the power to direct the day-to-day management of the debtor."). But see Krivo, 483 F.2d at 1105 ("If a lender becomes so involved with its debtor that it is in fact

actively managing the debtor's affairs, then the quantum of control necessary to support liability under the "instrumentality" theory may be achieved."). The Schwan's Court further noted, "[t]he leverage the bank may have had as a practical consequence of the lending relationship itself is not dispositive, because [that limited control] is not 'the exercise of such total control over the debtor as to have essentially replaced its decision-making capacity with that of the lender.'" Schwan's, 397 F. Supp. 2d at 195 (brackets added) (quoting In re Clark Pipe & Supply Co., 893 F.2d 693, 701 (5th Cir. 1990)).

In Krivo, the Fifth Circuit was tasked with determining whether the plaintiffs could correctly predicate liability of one defendant corporation for the debts of another corporation under an instrumentality theory. Krivo, 483 F.2d at 1101. The Court found the evidence presented at the trial level was "wholly insufficient" to find the requisite "actual, operative, total control" necessary to establish liability. Id. at 1109. In support of this conclusion, the Court focused on—among other considerations—the specific conduct of the creditor corporation with respect to determining the precise scope of its control. See id. at 1110-12. Similarly, in Clark Pipe, the Fifth Circuit determined that a creditor's careful monitoring of its debtor's financial situation or advising the debtor on which course of action to follow is not inherently wrong. Clark Pipe, 893 F.2d at 702 (citing In re Teltronics Services, Inc., 29 B.R. 139, 172 (Bankr. E.D.N.Y. 1983)). Therefore, the Court in that case held the creditor did not have the "total" control necessary to permit an equitable subordination of its claim based on the instrumentality theory of lender liability. See id. In reviewing whether the bankruptcy court properly, equitably subordinated the creditor's claims, the Court analyzed a three-part test, in which the instrumentality or alter ego doctrine was employed. Id. at 699. In maintaining that it never directed decision-making regarding which creditors of the debtor would be paid, the creditor's control over the debtor's finances, while "admittedly powerful and ultimately severe, was based

solely on the exercise of powers found in the loan agreement. [The creditor's] close watch over Clark's affairs does not, by itself, however, amount to such control as would justify equitable subordination." Id.

As Licht correctly asserts in its Supplemental Memorandum, the facts of Clark Pipe do not greatly differ from the instant facts. While the Fifth Circuit concluded, based on the evidence before it, that the creditor corporation did not exercise "total" control over the debtor corporation to establish the creditor's liability, Licht vigorously contends that the "subject inquiry is fact intensive, and thus, must be determined by a finder of fact, which necessarily forecloses a determination of these issues on summary judgment." See Licht's Suppl. Mem. in Supp. of Obj. 7. The Court agrees.

In the present case, the parties submit conflicting evidence on Webster's involvement in Capco's affairs. In support of its motion for summary judgment, Webster simply maintains that Licht has failed to identify the proper body of law governing the instant factual dispute and as a result, limits its analysis solely to whether Licht can satisfy the standard for equitable subordination. Insofar as Licht has set forth an argument for the application of equitable subordination, Webster would be correct in its assertion; however, as explained above, lender liability may be invoked in a host of different circumstances of which only one includes the equitable subordination of claims. Interestingly, neither Licht nor Webster reach the issue of the level of control employed by Webster over Capco with respect to the instrumentality or alter ego theories of lender liability. On one hand, Webster maintains that it was only acting as a secured creditor exercising its contractual rights afforded to it while on the other hand, Licht argues Webster "stepped into the shoes" of Capco and controlled its day-to-day management. Accordingly, the Court, as a matter of law, is unable to glean from the evidence whether

Webster, in fact, had the "actual, operative, total control" to justify the conclusion that Capco was a "mere instrumentality." See Krivo, 483 F.2d at 1105.

Similar to Clark Pipe, Webster, as a lender-creditor, extended a series of credit facilities to Capco. Pursuant to the various loan agreements, Webster sought to monitor Capco's business operations and construction projects to facilitate collection of funds. See Clark Pipe, 893 F.2d at 701 ("Through its loan agreement, every lender effectively exercises "control" over its borrower to some degree."). If Webster was controlling which bills Capco should pay (as Licht asserts from email correspondences attached as an exhibit to the Licht Affidavit), then there is a strong argument for a finding of liability. See id. at 702 (noting creditor did not advise debtor on which bills to pay in support of finding creditor did not have requisite control over debtor for liability).

However, as explained above, creditors are afforded some leeway in the amount of involvement they have in the management of their debtor's affairs. See F.C. Imports, 816 F. Supp. at 91; see also 1 Gerald L. Blanchard, Lender Liability: Law, Practice, and Prevention § 5:8, at 326 (2014) ("The giving of general business advice on occasion, strong bargaining and the use of leverage or informing the debtor of the consequences of its failure to turn the business around do not constitute control."). Even though Webster's Affidavit and the affidavit of Hollis Meddings state otherwise, if Webster, through its agents, obtained the "power to direct the day-to-day management of the debtor," then Webster may be found to have possessed the level of control necessary for a finding of lender liability for Capco's debts. See Blanchard, supra, § 5:8, at 327 (citing FAMM, 571 F.3d at 103); see also id. § 5.7, at 323 ("[A] lender may offer advice and use the leverage which its position gives it vis-à-vis the debtor, without being viewed as controlling the debtor, so long as the debtor continues to operate, and the management of the debtor continues to make its own business decisions."). Additionally, other evidence suggests Webster's role was more limited in focus. See Krivo, 483 F.2d at 1111. For example, Marx

testified that neither Webster nor Maloney was tasked with approving budgets, although Marx did state that Webster, at times, reviewed and possibly rejected specific line items in the budget. According to Marx, however, Webster was not seeking to tell Capco how to spend its money. (Marx Dep. 26:18-23). In sum, the extent of control exercised by Webster with regard to the approval of certain budgets remains uncertain and very much in contention.

Because of the foregoing, it is clear to the Court that the instant dispute is too factually intensive to decide on summary judgment whether Webster unduly "controlled" Capco to become liable to Capco's creditors based on an instrumentality theory. See Blanchard, supra, § 5:8, at 324-25 (quoting James P. Koch, Bankruptcy Planning for the Secured Lender, 99 Banking L.J. 788, 798 n.28 (1982)) ("The issue [of control] is very fact-intensive and 'necessarily depends on the cumulative impact of the facts and circumstances of the particular case.'"). Accordingly, summary judgment is inappropriate at this time and must be denied.

2

Breach of Fiduciary Duty to Third Parties

Alternatively, another possible theory of liability that Licht appears to invoke is the existence of a fiduciary relationship between the lender and the borrower's creditors. See FAMM, 571 F.3d at 103 ("[U]nder certain circumstances, a lender may actively participate in or exercise control over the business of a borrower to such an extent that a fiduciary relationship arises"); Blanchard, supra, § 5:8, at 325 ("A party in control of another entity owes a fiduciary duty to that entity as well as to the creditors of the entity"). It is well-settled that a creditor is not liable for the debts of its borrowers. See Schwan's, 397 F. Supp. 2d at 195. "'[A]s a general rule lenders are not fiduciaries when it comes to collection on their claims.'" In re 604 Columbus Ave. Realty Trust, 968 F.2d 1332, 1361 (1st Cir. 1992) (quoting In re Kelton Motors, Inc., 121 B.R. 166, 191 (Bankr. D. Vt. 1990)); see also F.C. Imports, 816 F. Supp. at 91 ("Lenders have

traditionally been held to have no duty to third parties dealing with their borrower."). However, a lender may owe a fiduciary duty to a borrower's other creditors if that lender exercises a certain level of control over the borrower. See, e.g., In re Beverages, 50 B.R. 273 ("Where a creditor has taken control of the debtor, he assumes the fiduciary duties of management and a duty to deal fairly with other creditors."); In re American Lumber Co., 5 B.R. 470, 477-79 (D. Minn.1980).

As demonstrated with respect to the instrumentality theory of lender liability, the establishment of a fiduciary duty to a borrower's creditors depends on the extent of control exercised by the lender. See Mittleman, Reed & Silverstein, supra, at 97. The In re Beverages Court explained that "[c]ontrol of a corporation can be established by either stock ownership or the actual exercise of direction, management, or control." In re Beverages, 50 B.R. at 282 (citing Krivo, 483 F.2d at 1104). As contemplated by the Schwan's Court, issues of whether the lender dictated to the borrower what bills to pay or which creditors to prefer and whether the lender directed the borrower how to spend the lender's advances, were material to a finding of undue control. See Schwan's, 397 F. Supp. 2d 189, 197-98 (citing American Lumber, 5 B.R. at 478).

Accordingly, the analysis with respect to the establishment of a fiduciary duty from a lender's control over a debtor essentially mirrors the analysis presented above pursuant to the instrumentality doctrine. As a result, the Court need not expound more on this theory. Regardless of which legal theory Licht's arguments rest on, it is evident that questions of material fact permeate the entire case. Accordingly, this Court denies summary judgment.

As a final note, this Court need not reach the issue raised by Webster in its Motion for Summary Judgment of whether Licht lacks standing to assert claims for breach of fiduciary duty against Webster. Webster asserted that Licht's lack of standing was a result of Licht's failure to set forth any legal theory (whether based on successor liability or other theories) on which to

hold Webster liable for Capco's debts. Because Licht's allegations sound in lender liability, it is clear to the Court that Licht indeed has standing to assert—and indeed has raised questions of material fact—whether Webster may or may not be held liable for Capco's outstanding rental balance owed to Licht under the doctrine of instrumentality and breach of fiduciary duty. See Blanchard, supra, § 5:8 (noting lending entity may owe fiduciary duty to borrowing entity's creditors if embodying requisite level of control).

IV

Conclusion

Based on the foregoing analysis, it is clear to this Court that questions of material fact exist on the issue of whether Webster employed "actual, operative, total control" over Capco to render Capco a "mere instrumentality" of Webster, thereby exposing Webster to liability for Capco's debts. Additionally, the same questions of material fact surrounding Webster's control over Capco prevent the Court from deciding, as a matter of law, whether Webster owed a fiduciary duty to Capco's other creditors (i.e., Licht). Thus, due to the indirect invocation of claims of lender liability by Licht, the Court denies Webster's Motion for Summary Judgment.

Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Jacob Licht, Inc., d/b/a Licht Properties v. Capco Steel, LLC, f/k/a Capco Steel Corporation; and Webster Bank, N.A.
CASE NO:	PB 12-4739
COURT:	Providence County Superior Court
DATE DECISION FILED:	November 10, 2014
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiff:	Christopher M. Mulhearn, Esq.
For Defendant:	Matthew R. Shechtman, Esq.; Thomas E. Carlotto, Esq.