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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT)

JENNIFER M. DUSZA and)
MOSS & KUHN, P.A.,)

Plaintiff,)

vs.)

ORDER FOR DEFAULT JUDGMENT
C/A #96-CP-07-1555

FIRST OAK BROOK CORPORATION,)
MICHAEL P. LAMANTIA, JOSEPH)
P. NICOSIA, JR., and PETER)
DeJESSO,)

Defendants.)

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COOK COUNTY RECORDER

Date of Hearing: Tuesday, February 4, 1997
8:30 A.M.
Judicial Officer: R. Markley Dennis, Jr.
Counsel for Plaintiffs: James H. Moss
Counsel for Defendant, Nicosia: William C. Clark
Court Reporter: Priscilla Molewski

This matter was heard before me on the 4th day of February, 1997, pursuant to the Order for Default setting hearing for this date and time. Appearing at the hearing were James H. Moss, counsel for the Plaintiffs; Diane L. Logan, a witness for the Plaintiffs; and William C. Clark, counsel for the Defendant, Joseph P. Nicosia, Jr.

The Court heard testimony from the witness, Diane L. Logan, and has reviewed the documents offered by Plaintiffs as Exhibits 1 - 21. Based thereon, I MAKE THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. That the Plaintiffs, Jennifer M. Dusza and Moss & Kuhn, P.A. are the Plaintiffs who brought this action in Beaufort County, State of South Carolina. The Plaintiff, Moss & Kuhn, P.A., is a professional association engaged in the practice of law in Beaufort County, State of South Carolina; the Plaintiff,

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Certified - A True Copy

W. Howard...

W. Howard...

Box 266

3700 BMR

Handwritten initials

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Jennifer M. Dusza, is a client of the firm Moss & Kuhn, P.A. involved in the subject matter of this case.

2. That the Summons and Complaint was originally filed on the 25th day of September, 1996. [Exhibit #1]. The Plaintiffs attempted service on the Defendant, Joseph P. Nicosia, Jr. through several avenues. [Exhibits #2 - 4]. Of note is the comment contained on Exhibit #3 of the Sheriff's Deputy who attempted service: "Deputy entered; Mrs. Nicosia would not open door. Avoiding Service."

3. That service of the Summons and Complaint was personally accomplished upon the Defendant, Nicosia, on December 1, 1996 by service upon a white female, age 37 years, 5'4" in height and weighing approximately 128 pounds who identified herself as Mrs. Nicosia at the residence of Defendant, Nicosia, at 105 Livery Circle, Oakbrook, Illinois 60521. [Exhibit #5].

4. That on January 14, 1997, an Affidavit of Default as to Joseph P. Nicosia, Jr. and signed by James H. Moss was filed of record in this Court. [Exhibit #6]. This Affidavit attached the Affidavit of Service and alleged the date of service to be December 1, 1996 and that more than thirty days had elapsed since the service of the Summons and Complaint.

5. That an Order of Default was entered by the Honorable R. Markley Dennis, Jr. on January 14, 1997 and filed of record on January 15, 1997 as to the Defendant, Nicosia, and scheduling a default hearing for February 4, 1997 at 8:30 A.M. at the Beaufort County Courthouse. [Exhibit #7]

6. That the Order of Default, supported by the Affidavit of Default, was personally served upon the Defendant, Nicosia, on January 30, 1997, by service upon a white female, 37 years of age, 5'4" tall and weighing approximately 128 pounds, who identified herself to be Mrs. Nicosia. [Exhibit #8].

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7. That the Summons and Complaint were duly served upon the Defendant, Joseph P. Nicosia, Jr. and he is in default in this action. No responsive pleadings have been served upon the Plaintiffs on his behalf, nor has any extension of time been requested within which to file responsive pleadings.

8. That the Defendant, Nicosia, was duly served with notice of this default hearing, the Affidavit of Default and the Order of Default, and in fact, was represented by counsel on the date and at the time of hearing.

9. That the Plaintiff has fully complied with Rule 55 of the Rules of Civil Procedure for the State of South Carolina concerning scheduling a default hearing and this Court has acquired jurisdiction of these parties pursuant to lawful service of process.

10. That the entry of an Order of Default is an admission by the defaulting party of the well pleaded allegations in the Complaint. *State Ex Rel: Medlock vs. Love Shop, Ltd., 334 S.E. (2d) 528 (S.C. App. Ct. 1985).*

11. That based on the Summons and Complaint and the fact that all allegations thereof are deemed admitted, the Court finds that First Oak Brook Corporation, issued a policy of insurance to Sonny's Bar located in Beaufort, South Carolina. Subsequent to the filing of the litigation entitled *Jennifer M. Dusza, by her Guardian ad Litem, Irene Dusza vs. Estate of John Sheridan Pennefather, by and through his Temporary Administrator, Kenneth L. Tootle, Robert D. Sanders and Sokin Yun, a/k/a Sokyun Hoffman, d/b/a Sonny's, CIA #94-CP-07-196*, the Defendant, First Oak Brook Corporation, hired G. Edward Welmaker, Esquire, a duly licensed and practicing attorney in the State of South Carolina, to defend the action.

12. That sometime into the law suit, Defendant, Peter DeJesso, came to Beaufort County, State of South Carolina for purposes of a meeting with James H.

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Moss, attorney for Plaintiff, Dusza, to discuss settlement of the case. A settlement was, in fact, achieved on March 29, 1997 at the Beaufort County Courthouse, the terms of which were as follows: First Oak Brook Corporation of the Illinois Insurance Exchange agreed to pay the sum of \$700,000.00 in full and final settlement of the claim on August 1, 1996. [Exhibits #9 - 19].

13. That pursuant to further negotiation, the settlement funds were actually tendered in the form of Check #09096 of First Oak Brook Corporation, dated August 31, 1996, and inclusive of interest for the period from the date of settlement [08/01/96] to the date of tender [08/31/96], for a total of \$705,833.33.

14. That following the Labor Day holiday on Monday, September 2nd, and on September 5, 1996, the Plaintiff appeared before the Honorable Thomas Kemmerlin, Jr., Special Circuit Judge for the Fourteenth Judicial Circuit, and secured an Order for Approval of Settlement. [Exhibit #20].

15. That upon the entry of the Order for Approval of Settlement, the Plaintiff negotiated, in favor of First Oak Brook Corporation, and Sokin Yun, a/k/a Sokyun Hoffman, d/b/ Sonny's, a Release of All Claims, fully releasing these parties from any further liability to the Plaintiff, Jennifer M. Dusza and executed Check #09096 issued August 31, 1996 by First Oak Brook Corporation, a member of the Illinois Insurance Exchange, in the amount of \$705,833.33, representing the agreed upon settlement figure together with interest on the agreed upon date of payment [08/01/96] to the actual date of payment [08/31/96]. [Exhibit #21].

16. That Check #09096 of First Oak Brook Corporation was signed by Michael A. LaMautia and Joseph P. Nicosia, Jr. and delivered to the offices of Moss & Kuhn, P.A. in Beaufort, South Carolina, and processed through their

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clearing account, or Trust Account, for eventual payment at the First Oak Brook Corporation.

17. That subsequent thereto, Check #09096 was returned unpaid for insufficient funds by which time payments had already been made by the Plaintiff, Moss & Kuhn, P.A. from its Trust Account to the United States Navy and its client, Jennifer M. Dusza, resulting in considerable hardship to all parties in returning the funds to cover the overdraft imposed by the NSF condition of Check #09096 of First Oak Brook Corporation.

18. That the Complaint alleges that the Defendants, Peter DeJesso, Joseph P. Nicosia, Jr., Michael A. LaMautia and First Oak Brook Corporation entered into a civil conspiracy to obtain a Release of All Claims from Jennifer M. Dusza to protect both its insured, Sonny's, and First Oak Brook Corporation, and in falsely and fraudulently issuing a check which was post-dated for full and final payment to Jennifer M. Dusza.

19. That Section 36-2-803 of the Code of Laws of the State of South Carolina, 1976, as amended, provides for personal jurisdiction based upon conduct. This is part of the Uniform Commercial Code and provides as follows:

"(1) A Court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's

(a) transacting any business in this State;

(f) contracting to insure any person, property or risk, located within this State at the time of contracting; or

(g) entry into a contract to be performed in whole or in part by either party in this State; or"

There is a two (2) step analysis to determine whether South Carolina Courts may exercise personal jurisdiction over non-resident Defendants. First, the Court

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must determine if the non-resident Defendant's conduct meets the requirements of South Carolina's long-arm statute, and second, the Court must determine if non-resident Defendants had sufficient contacts with South Carolina to meet the Constitutional standards for due process. *Young vs. Jones, (D.C. S.C.) 816 Fed Supp. 1070*. This Court's analysis finds that the South Carolina Courts do have personal jurisdiction over these Defendants. *Krell vs. Carolina Bank (1984 S.C. App. Ct.) 320 S.E. (2d) 491*.

20. That a Contract was entered into in South Carolina and under South Carolina law, it is not necessary to determine that a binding Contract existed, but rather, only a *prima facie* showing that the trial Court should exercise jurisdiction is required. *White vs. Stephens, (1990) 387 S.E. (2d) 260*. Not only did these parties enter into a Contract, but because of the condition of the Plaintiff, Jennifer M. Dusza, Court approval of the Agreement or Contract was required and obtained. This Court concludes as a matter of law that this Court has jurisdiction of the parties hereto and the subject matter of this lawsuit. [See paragraph 9 above].

21. That although there is authority that a hearing may not be required where there is a liquidated sum requested, this action did initially request unliquidated amounts. Therefore, a hearing was scheduled and held. The Plaintiffs are apparently satisfied with the liquidated sum to which this Court believes the Plaintiffs are entitled by virtue of the default and deemed admission of the allegations of the Summons and Complaint.

22. That paragraphs 30, 31 and 32 of the Complaint state that the corporate veil of First Oak Brook Corporation should be pierced. That is also deemed admitted by virtue of the default of Defendant, Nicosia. The Complaint states the following in pertinent part:

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"The individual defendants, Michael A. LaMautia, Joseph P. Nicosia, Jr. and Peter DeJesso are personally responsible and liable for the obligations of the corporate defendant, First Oak Brook Corporation, arising as a result of the subject of this law suit, and the Plaintiffs are entitled to pierce the corporate veil so that each of these individual defendants is jointly and severally personally responsible for any liabilities of the corporate defendant, First Oak Brook Corporation, arising hereunder as a result of the gross under-capitalization of the corporation, the insolvency of the debtor corporation, together with such other factors as may be revealed through discovery, including the element of injustice or fundamental unfairness that would result if the acts of the corporation were not regarded as the acts of the individuals."

The equitable doctrine of piercing the corporate veil is not to be applied without substantial reflection and the party seeking to have the corporate identity disregarded has the burden of proving the doctrine should be applied. *Sturkie vs. Sifly*, 280 S.C. 453 313 S.E. (2d) 316 (Ct. App. 1984) As a general rule, a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears. However, the law will regard the corporation as an association of persons when the notion of the legal entity is used to protect fraud, justify wrong, or defeat public policy. *Id.*

Our courts have developed a two-prong test to be used in determining whether the corporate entity should be disregarded. The first prong of the test looks to the observance of corporate formalities by the dominant shareholder and consists of the following factors:

- (1) whether the corporation was grossly undercapitalized;
- (2) failure to observe corporate formalities;
- (3) non-payment of dividends;
- (4) insolvency of the debtor corporation at the time;
- (5) siphoning of corporate funds by the dominant stockholder;
- (6) non-functioning of other officers or directors;
- (7) absence of corporate records; and

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(8) the fact that the corporation was merely a facade for the operations of the dominant stockholder. *Sturkie, supra; Multimedia Publishing of South Carolina, inc. vs. Mullins, 314 S.C. 551, 431 S.E. (2d) 569 (1993); Cumberland Wood Products vs. Bennett, 308 S.C. 268, 417 S.E. (2d) 617 (Ct. App. 1992); C.t. Lowndes vs. Suburban Gas & Appliance, 307 S.C. 394, 415 S.E. (2d) 404 (Ct. App. 1991).* The second prong of the test requires that there be an element of injustice or fundamental unfairness if the acts of the corporation are not regarded as the acts of the individual. In proving fundamental unfairness, the Plaintiff must establish (1) the defendant was aware of the plaintiff's claim against the corporation; and (2) acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property. *Sturkie, supra.* The essence of the fairness test is "simply that an individual businessman cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." *Multimedia Publishing, supra* @ 573.

The Defendants, including Nicosia, executed a check in the amount of \$705,833.33 allegedly from the First Oak Brook Corporation, with the term "Illinois Insurance Exchange" set forth on the check. It is certainly a great public policy in the State of South Carolina that financial institutions be responsible for negotiable instruments, making payments to the public. This is especially so when the financial institution is an insurance company and when the persons signing the check know it is a negotiable instrument intended to transfer large sums of money which will be relied upon by the recipient.

Because the allegations of the Complaint are deemed to be true, it is clear that the corporate veil should be pierced and judgment entered against Defendant, Nicosia.

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23. The Court finds that the Plaintiffs are entitled to recover based on the Breach of Contract and are entitled to judgment against Joseph P. Nicosia, Jr., in the amount of the check, or \$705,833.33, which funds he promised to pay on behalf of First Oak Brook Corporation to Jennifer M. Dusza, when he knew, or should have known, that said funds were not available in said account.

NOW, THEREFORE, it is

HEREBY ORDERED that judgment be entered against Joseph P. Nicosia, Jr. in the liquidated amount of \$705,833.33, with pre-judgment interest thereon at the rate of 8-3/4%, as provided by law, in the amount of \$27,073.60 [09/01/96 - 02/07/97; 160 days @ \$169.21/day], for a total judgment in the amount of \$732,906.93.

IT IS SO ORDERED.

Walter
Beaufort, South Carolina

February 14, 1997

Markley Dennis, Jr.
MARKLEY DENNIS, JR., JUDGE *sr*

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