

**IN THE COURT OF COMMON PLEAS  
COUNTY OF PHILADELPHIA  
CIVIL TRIAL DIVISION**

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<b>Chhaya Management, LLC c/o Nehal Desai</b>	:	
<i>Plaintiff</i>	:	<b>June Term, 2015</b>
	:	
<b>v.</b>	:	<b>No. 00691</b>
	:	
	:	<b>Commerce Program</b>
<b>Cigar Wala, LLC;</b>	:	
<b>Cigar Wala News Stand, LLC;</b>	:	<b>No. 1285 EDA 2019</b>
<b>Chestnut 733 Associates, LP;</b>	:	
<b>The Goldenberg Group, Inc.;</b>	:	
<b>Goldenberg MANAGEMENT, Inc.;</b>	:	
<b>Maulikkumar Shah; Kamal Patel; and</b>	:	
<b>Dhanji Desai</b>	:	
	:	
<i>Defendants</i>	:	

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**J. DJERASSI**

**OPINION**

**JANUARY 8, 2020**

**INTRODUCTION**

The Commerce Court of Philadelphia has been engaged since 2012 in adjudicating a series of contentious business disputes over a small tobacco store in Center City Philadelphia called the Chestnut Smoke Shop. This is the second time a judgment has been entered by the Commerce Court.

This time, an appeal is filed by plaintiff after an award of \$660,000 in its favor. Dissatisfaction stems from this court’s summary judgment finding that this is a contract case between corporations and one without personal liability, but as explained in our Findings of Facts and Conclusions of Law incorporated and attached here at Exhibit A, plaintiff sued the wrong individual if it wanted a court to pierce a corporate veil.

Following a bench trial, we found in favor of plaintiff Chhaya Management and against defendant Cigar Wala. We did not find liability by individual defendants Malik Shah and Patel. This is because Cigar Wala's corporate breach of contract was caused solely by Dhanji Desai who diverted corporate funds to himself. His fraud eventually led to a corporate money shortfall that made Cigar Wala fall behind on rent payments to its landlord and a default to the Pennsylvania Lottery. There was no evidence that linked either Malik Shah or Patel to the shortfalls themselves or to any conduct giving rise to a piercing of a corporate veil as to them. And for strategic reasons known only to plaintiff, Chhaya Management chose not to sue Dhanji Desai in this case. His joinder as an additional defendant in this case was by Malik Shakh and Patel but even after Dhanji Desai became a party, Chhaya Management chose not to sue him personally.

At summary judgment and for reasons explained in our summary judgment Opinion which is attached and incorporated here as Exhibit B, defendant Goldenberg Management, Inc. was dismissed. The remainder of plaintiff's the case was handled under the gist of the action doctrine.

Shortly before trial, Malik Shah and Patel withdrew their fraud claim against Dhanji Desai. We then then dismissed him without objection from Chhaya Management. The case was tried in contract and focused on Cigar Wala's early termination of the Management Agreement and consequent damages.

## **FACTS**

In 2014, retired President Judge Pamela Dembe presided over a bench trial and adjudicated an ownership dispute over Cigar Wala, LLC ("Cigar Wala"). The litigants in *Kamal Patel and Maulik Shah v. Desai Dhanji and Akash Investment, LLC* (Phila. No.

120702814) were Maulikimar Shah (“Malik Shah”), Kamal Patel (“Patel”) and additional defendant Dhanji Desai (“Dhanji Desai”). On June 18, 2014, Judge Dembe awarded Patel 50% ownership of Cigar Wala, 25% to Shah and 25% to Dhanji Desai.

Several weeks before this judgment, Dhanji Desai had signed a Management Agreement with Nehal Desai giving him responsibilities to operate the Chestnut Smoke Shop for five years. At the time, Nehal Desai believed Dhanji Desai was Cigar Wala’s president and we ultimately found apparent authority. The Management Agreement bound the corporations, plaintiff Chhaya Management and defendant Cigar Wala in a contract.

A little more than eleven months later, Cigar Wala’s majority owners, as determined by Judge Dembe, terminated the agreement for reasons explained in detail in our attached Findings of Fact and Conclusions of Law dated December 10, 2018. (Incorporated as Exhibit A).

We found this termination was a breach of contract by Cigar Wala, but it was caused by fraudulent conduct by Dhanji Desai. He had misappropriated Chestnut Smoke Shop revenues without the knowledge of Malik Shah, Patel or Chhaya Management’s Nehal Desai. Much of the skimmed money was cash from Pennsylvania State Lottery sales but Dhanji Desai also mishandled proceeds from the sale of tobacco and candy products. Ultimately, his fraud affected Cigar Wala’s lease at the 8<sup>th</sup> and Chestnut Street store with defendant Goldenberg Management Group (“Goldenberg”) because money was not available to pay Cigar Wala’s rent. Malik Shah and Patel discovered the fraud after Judge Dembe’s decision when Goldenberg sought Cigar Wala’s eviction in the Municipal Court of Philadelphia in an eviction complaint filed in July 2014. Not only was Cigar Wala in default on its lease, but it was also in default with the Pennsylvania State Lottery. We found both defaults were due solely to the malfeasance of Dhanji Desai.

After almost a year of trying to stabilize Cigar Wala with Chhaya Management still operating the store in collaboration with Dhanjii Desai, Malik Shah and Patel resolved Goldenberg's eviction action by making a new deal with Goldenberg. They did this by forming a new company, defendant Cigar Wala New Stand, LLC ("Cigar Wala New Stand") and signing a new lease between Goldenberg and the new company. The back rent was paid off and default with the Pennsylvania State lottery was cured through the infusion of new personal investment into Cigar Wala Newstand. The new capital allowed Cigar Wala Newstand to operate the Chestnut Smoke Shop at its original location and selling Pennsylvania lottery ticket machines.

This process was not seamless, however, because of events that took place on May 11, 2015. This was the day Cigar Wala breached its contract with Chaya Management by demanding that Nehal Desai relinquish his operation of the store. Malik Shaw, Patel and a representative of Goldenberg required Nehal Desai to leave the premises and he did. The majority owners of Cigar Wala and Goldenberg then changed the store's door lock and Nehal Desai was disinvited from returning to the store as a manager. There were no physical injuries and Nahal Desai left the store after loading his car with some of the store's tobacco and candy inventory. Over the next several days, Malik Shah, Patel and Goldenberg completed paperwork securing a new lease for the Chestnut Smoke Shop through Cigar Wala Newstand, and back rent was paid. The lotteries sales resumed nearly a year later after the balance owed was paid, and after some bureaucratic delay.

Chhaya Management filed this lawsuit demanding lost profits through the end of five year term under the contract and reimbursement for inventory. After summary judgment, Goldenberg was dismissed as landlord was not a party to the Management Agreement. Before trial, Malik Shaw and Patel voluntarily discontinued their suit against Dhanji Desai.

Following a trial between plaintiff Chhaya Management, and remaining defendants Cigar Wala, Cigar Wala Newstand, Malik Shaw and Kamal Patel, we found Cigar Wala's early termination had breached the Management Agreement. We awarded lost profits in the amount of \$660,000 and the balance of inventory in the amount of,,, for an aggregate XXXXXXXXX payable by Cigar Wala to Chhaya Management. We found no liability by Malik Shaw, Kamal Patel or Cigar Wala Newstand.

### **RELEVANT PROCEDURAL HISTORY**

Judge Dembe entered judgment in *Kamal Patel and Maulik Shah v. Desai Dhanji and Akash Investment, LLC* (Phila. No. 120702814) on June 18, 2014.

On June 4, 2015, Chhaya Management, LLC c/o Nehal Desai filed a complaint commencing this case. Initial named defendants were Cigar Wala, Cigar Wala News Stand, Malik Shah, Kamel Patel, the Goldenberg Group, Inc. and Chestnut 733 Associates, LP.

Alleged claims were: Count I, injunctive relief; Count II, breach of contract; Count III, unlawful eviction; Count IV, conversion; Count V, civil conspiracy; Count VI, aiding and abetting tortious conduct.

By stipulation among the parties, on March 16, 2016, Chhaya Management filed an amended complaint to remove the Goldenberg Group, Inc, and substitute Goldenberg Management, Inc. ("Goldenberg Management"). Thereafter, defendants filed answers.

Summary judgment litigation began on May 6, 2016, when Goldenberg Management filed a summary judgment motion against plaintiff contending lack of contract privity and arguing for dismissal of tort claims based on the gist of the action doctrine.

Goldenberg Management's summary judgment motion against plaintiff was followed a month later on June 10, 2016 by a joinder complaint filed against Dhanji Desai by defendants

Patel, Malik Shaw, Cigar Wala and Cigar Wala Newstand. Docket review shows service of process was completed but Dhanjii Desai never answered. Defendants however never moved for a default judgment against him and Djanii remained in the case as a party until his voluntary discontinuance by defendants shortly before trial.

On July 22, 2016, plaintiff Chhaya Management filed a summary judgment motion against defendants Cigar Wala, Cigar Wala Newstand, Malik Shah and Kamel Patel (Control No. 16070536). Goldstein had also filed summary judgment motion against Chhaya Management (Control No. 16081375). and v Cigar Wala, cigar Wala Newstand, Patel and Malik Shay filed its own summary judgment motions against Chhaya Management in a reply motion at Control No. 16070536). During a period in this case in which this court was handling contentious collateral litigation consuming nearly two years, on May 25, 2017, we entered two orders and one opinion incorporated at Exhibit B.<sup>1</sup>

In summary, Plaintiff's actions against Goldenberg Management and its subsidiary 722 Chestnut Associates were entirely dismissed, and Plaintiff's actions in tort against the remaining defendants were also dismissed, but was set for trial on whether there was a contractual breach of the Management Agreement.

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Thereafter, following a pretrial conference in which the individual defendant's appeared pro se and the corporate defendants were unrepresented, a bench trial was scheduled. Counsel already incorporated at Exhibit B. on defendant's interwhis was followed a month later on June

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<sup>1</sup> The lengthy collateral litigation involved discovery and injunctive hearings caused by Dhanji Desai's failure to produce a key to a Pennsylvania Lottery machine in order to perform an accounting of Cigar Wala revenues for potential damages in favor of Chhaya Management. There was also substantial litigation associated with a motion by defense counsel Thomas J. Wagner, Esquire to withdraw as attorney for defendants Cigar Wala, Cigar Wala Newstand, Malik Shaw and Patel. Mr. Wagner was ultimately permitted to withdraw by order dated March 26, 2018, after all hope of amicable resolution had been exhausted and Mr. Wagner had been working pro bono for some time.

10, 2016 by a joinder complaint filed against Dhanji Desai as an additional defendant. This filed a timely answer and summary judgment litigation commenced soon after with a motion n answer counterclaims on Dhanji Desai was later joined as an additional defendant by defendants Patel, Malik Shah, Cigar Wala News Stand and Cigar Wala.<sup>2</sup>

After President Judge Dembe's retirement from the bench in July 2015, this Court was assigned her docket. Summary judgment motions were cross-filed and the summary judgment outcome was the following:

"Based on the foregoing, motions for summary judgment are Granted in part and Denied in part as follows: Defendants Chestnut 733 Associates, L.P. and Goldenberg Management, Inc.'s motion for summary judgment at Control No. 16081375 is granted and plaintiff's claims against those defendants are Dismissed. Plaintiff Chhaya Management's motion for summary judgment at Control No. 16072651 is Denied; defendant Cigar Wala, LLC, Cigar Wala News Stand, LLC and Malik Shah's motion for summary judgment at Control No. 16070536 is Granted in part on Count III (unlawful eviction), Count IV (conversion), Count V (conspiracy) and Count VI (aiding and abetting tortious conduct)"<sup>3</sup>

A breach of contract claim at Count III remained after disposition of summary judgment motions. This contract claim was set for trial with Chhaya Management as plaintiff and Cigar Wala, Cigar Wala News Stand, Malik Shah and Patel as defendants. Dhanji Desai was also set for trial on the contract claim as an additional defendant joined by Patel and Malik Shah.

Goldenberg Management and Chestnut 733 had been dismissed because neither defendant was a party to the Management Agreement between Chhaya Management and

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<sup>2</sup> See docket report, 150600691, December 11, 2015.

<sup>3</sup> A copy of this Court's Summary Judgment Order and Opinion dated May 25, 2017 is attached and incorporated by reference as Exhibit B.

defendant Cigar Wala, Also, their conduct when evicting Cigar Wala was not tortious because it was accomplished with the agreement of Cigar Wala's controlling management---namely Malik Shak and Patel who then signed a new lease with Goldenberg Management on behalf of Cigar Wala Newstand which paid off Cigar Wala's back rent.

On March 26, 2019 private counsel for defendants Cigar Wala, Cigar Wala News Stand, Malik Shah and Patel was granted leave to withdraw.<sup>4</sup> Patel and Malik Shah represented themselves pro se.

A first bench trial resulted in mistrial on August 16, 2018. A second bench trial took place on November 5, 2018, and November 6, 2018.

Findings of Fact and Conclusions of Law were entered on December 10, 2018 in favor of Chhaya Management and against Cigar Wala in the amount of \$667, 116. There was no finding of liability against Malik Shah, Patel, or Cigar Wala News Stand.

As to Cigar Wala New Stand, though the party was unrepresented, we did not find Chhaya Management proved its contract claim against Cigar Wala Newstand because it was not a party to the Management Agreement between Cigar Wala and Chhaya Management. There was also another relevant finding---namely in rogue fashion, Dhani Desai had sabotaged the arrangement between Chhaya Management's Nehal Desai and Cigar Wala, and this was not due to any alleged breach by Cigar Wala Newstand.

After trial, Chhaya Management filed motions for post-trial relief on December 17, 2018. Confusingly, Chhaya Management also filed a Notice of Appeal on January 9, 2019 which was docketed at 259 EDA 201. The appeal was quashed with leave for Chaya Management to file a

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<sup>4</sup> By this time, Thomas J. Wagner, Esq. was granted leave to withdraw. This case was on page 37 of its docket report.



new appeal after judgment. This court then denied post-trial motions without an opinion and entered judgment on April 1, 2019.

Because Chhaya Management's April 9, 2019 Notice of Appeal outlines legal claims, we did not order a Rule 1925 Statement. We now organize our Opinion in three sections to address the issues appellant raises.

**I. This Case is a Contractual Dispute Involving a Breach of a Management Agreement. The Gist of the Action Doctrine Applies to this Case and Tort Claims Were Correctly Dismissed. As the Management Agreement is not a Lease Agreement Over Tenancy In Property, Plaintiff's Unlawful Eviction Claim was Also Properly Dismissed.**

Plaintiff's Complaint avers defendants Malik Shah, Kamel Patel, Goldenberg Management, Inc. and Chestnut 733 ("Goldenberg Management") and Cigar Wala Newstand engaged in tortious conduct on May 15, 2015, the day Cigar Wala breached its Management Agreement with Chhaya Management.<sup>5</sup>

We granted summary judgment dismissing the tort counts because this case hinges on a contractual relationship involving management of the Chestnut Cigar Shop business---not whether Chhaya Management was tortuously evicted from the store. This is because the landlord

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<sup>5</sup> Goldenberg Management had terminated Cigar Wala's lease for failure to pay rent. Goldenberg Management obtained an eviction order in Philadelphia's Municipal Court which Cigar Wala appealed.

When Malik Shaw and Patel, on behalf of Cigar Wala, paid all back rent owed, the Municipal Court appeal became moot. This meant Cigaw Wala and Goldenberg Management were free to terminate the original lease if both parties agreed. Under circumstances where the Municipal Court had already ordered Cigar Wala's eviction, we found there was nothing wrong with the decision of the majority owners of Cigar Wala to accept what was now a mutual termination of the original lease with Goldenberg Management, which then signed a lawful new lease with Cigar Wala Newstand.

The difficulty giving rise to this case is that while Cigar Wala was free to agree to a mutual termination of its lease with Goldenberg, it was still bound to the terms of its separate Management Agreement with Chhaya Management.

tenant issue was between Cigar Wala and Goldenberg while the management issue was between Chhaya Management and Cigar Wala.

In our summary judgment memorandum opinion at Exhibit A, we noted Goldenberg Management evicted Cigar Wala for failing to pay rent that was due. This failure occurred through no personal fault of Malik Shaw, Kemel Patel of Nahal Desai, Chayya Managmenyt's owner. Instead, despite Judge Dembe's JuneXXXX 201r judgment order, neither Shah nor Patel were able to take control of the store for almost a year and during this time, Cigar Wala's minority owner was mingled corporate funds with his personal pocket and failed to pay Cigar Wala's bills with the landlord and the Pennsylvania Lottery.

Thus, we found that on May 11, 2015, Cigar Wala as a corporate entity, through its majority owners, breached Cigar Wala's contract with Chhaya Management. This corporate breach took place regardless of its cause which was Dhanji Desai's malfeasance. Indeed, his misconduct was , the subject of cross-claims and counter claims ultimately withdrawn by defendants Cigar Wala, Cigar Wala Newstand, Malik Shaw and Patel.

In summary, this case as tried falls under the gist of action doctrine. *Mirizio v. Joseph*, 4A. 3d 1073, 1279 (Pa. Super. 2010) (ordinarily breach of contract claims are not tort claims). Where a contract is breached and remedies are declared in the contract itself, there is no reason to try this case in tort. *Aruio v. Erie Ins. Co.*, 106 A.3d. 48 (Pa. 2014) (if the facts establish that a breach is governed by a contractual term and the breach does not involve a public duty, then the dispute falls under contract). This case involves a private contract case with damages calculated according to terms of the contract itself in the amount of nearly \$700,000. Accordingly, all tort counts in this case involving conversion and conspiracy were properly dismissed at summary judgment.

Regarding conversion, Chhaya Management had to prove that property other than inventory governed by the Management Agreement was unlawfully taken. This was not shown. Since there was no other property in dispute, we heard expert witness testimony and applied the terms of the Management Agreement itself to determine our inventory award in favor of Chayya Management and against Cigar Wala in the amount of \$59,947.92.<sup>6</sup>

As there was no tort cause of action in this case, we also dismissed civil conspiracy.

**II. Plaintiff's Expert Witness Testimony on Damages was Considered and Applied. However, There is an Error in Failing to Include Non-Lottery Inventory Loss to the Damages Awarded to Chhaya Management and Remand is Requested to Amend Judgment and Enter the Correct Damages.**

Plaintiff Chhaya Management claims the court precluded expert testimony on damages from expert witness Charles Luden. This is mistaken since Mr. Luden testified as a plaintiff expert. We found him credible and relied on his opinion.

However, plaintiff is correct that we erred in calculation of damages payable by Cigar Wala to Chhaya Management. The mistake is at Paragraph 16 of our Findings of Fact and Conclusions of Law where our calculated damages do not include Chhaya Management's loss from unreimbursed non-lottery inventory.

Accordingly, this court agrees that an additional \$59,946.92 representing non-lottery inventory must be added to our original judgment of \$667,116 in favor of Chhaya Management.

Therefore, the correct aggregate total is \$727,072.92 ---not counting interest or delay damages. This court requests remand to enter a new judgment order with an amended damage number in favor of Chhaya Management and against Cigar Wala.

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<sup>6</sup> Paragraph 16 of our Findings of Facts and Conclusions of Law.

**III. Plaintiff did not present evidence to pierce the corporate veil of individual defendants Malik Shaw and Kamal Patel who were themselves victims of malfeasance by Cigar Wala minority owner Dhanji Desai.**

Chhaya Management claims we erred by not piercing the corporate veil as to individual defendants Patel and Malik Shaw. Though the issue was not raised during pleadings or at trial, we respond on the merits as this claim illustrates the consequences of the decision Chhaya Management made not to sue Dhanji Desai for his role in plaintiff's damages.

As explained in our Findings of Fact and Conclusions of Law, neither Malik Shah nor Patel controlled Cigar Wala at the time corporate monies were pilfered for personal use by Dhanji Desai. This was the situation despite Judge Dembe's judgment that actual controlling owners were Malik Shaw and Patel, who together own 75% of Cigar Wala.

Rather than relinquish control as the court had ordered, Dhanji Desai continued to freeze out Malik Shah and Patel. He did so with Chhaya Management's Nehal Desai operating the store on a day-to-day basis and the two of them managed Cigar Wala's bills. Unfortunately, Dhanji Desai took money away from Cigar Wala and bills went unpaid through no fault of Malik Shaw or Patel personally. We also found that Nehal Desai was not responsible either for the shortfalls that eventually led to Cigar Wala's loss of its Goldenberg lease and Pennsylvania Lottery privileges.

Regarding Chhaya Management's appellate claim here against Malik Shaw and Patel, we found no evidence supporting piercing a corporate veil. This is not to say that if Dhanji Desai had remained in the case, evidence would appear to justify a piercing of the corporate veil as to him.

A piercing of the corporate veil allows liability to be assessed against an equity owner of a corporation under certain conditions. *Lomas v. Kravitz*, 130 A.3d 127 (Pa. Supr. Ct. 2015). The

key is control of the corporation. If an individual operates through a corporate form and controls the company, but then intermingles corporate and personal affairs to carry out a fraud, courts will pierce the corporate veil against the person(s) who controls the company and are benefitting from the fraud. *Ashley v. Ashley*, 452 Pa. 228, 393 A.2d 637, 641 (1978). “We have said that whenever one in control of a corporation uses that control, or uses the corporate assets, to further his or her own personal interests, the fiction of the separate corporate identity may properly be disregarded. *Village of Camelback Property Owners Assn. v. Cald*, 538 A.2d 528, 532 (Pa. Super. Ct. 1988).

We found that Malik Shaw and Patel had no ability to control either Dhanji Desai or Cigar Wala itself even after the company began receiving delinquency notices from Goldberg Management and the Pennsylvania Lottery. Moreover, neither Malik Shaw nor Patel benefited from Dhanji Desai’s fraud. On the contrary, his fraud cost both Patel and Malik Shaw the need to find new investment funds so Cigar Wala Newstand could operate the Chestnut Smoke Shop at its 8<sup>th</sup> and Market location and sell lottery tickets.<sup>7</sup>

For these reasons, if the piercing of the corporate veil claim is not waived, it fails on the merits.

**BY THE COURT**

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**RAMY I. DJERASSI, J.**

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<sup>7</sup> Chhaya Management has persuaded this court to find liability against Cigar Wala, and this of course was on the basis of a breach of contract. Another avenue of liability might have been through a participation theory by which Cigar Wala’s corporate liability attaches, based on the tortious activities of an owner of the corporation itself. See *Allegheny Supply Company v. Wolf Run Mining* (Pa. 1, J3 A.3d 53, 58-59, 60) (Pa. Supr. 2012). Participation theory was not part of our conclusions of law as we found Cigar Wala should have honored its contract with Chhaya Management regardless of Dhanji’s Desai’s torts.