

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

BIG FOOT PROPERTIES, INC.,

Debtor.

CASE NO.: 3:11-bk-6868-JAF

FIRST FEDERAL BANK,

Plaintiff,

v.

Adv. No.: 3:12-ap-168-JAF

DANIEL E. FOOTMAN, JR. and
BIG FOOT PROPERTIES, INC.,

Defendants.

ORDER DISMISSING AMENDED COMPLAINT WITHOUT PREJUDICE

This proceeding is before the Court on Defendant Big Foot Property, Inc.’s Motion to Dismiss the Amended Complaint (Doc. 25, “Motion to Dismiss”; *see also* Doc. 24, “Amended Complaint”) and *pro se* Defendant Daniel E. Footman, Jr.’s (collectively, “Defendants”) Motion to Dismiss (Doc. 26).¹ Plaintiff First Federal Bank filed a Response in Opposition to the Motion to Dismiss (Doc. 27, “Response”). For the reasons set forth herein, the Amended Complaint (Doc. 24) is dismissed without prejudice.

Background

On September 19, 2011, Big Foot Properties, Inc. (“Big Foot”) filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.* On February 24, 2012, First Federal Bank (“First Federal”) initiated the instant adversary proceeding by filing the original

¹ The Court would note that Mr. Footman’s motion to dismiss contains disparaging comments as to First Federal Bank and its counsel (Doc. 26 at 1-2). Mr. Footman is cautioned that such remarks will not be tolerated by the Court and may be stricken if made in future filings.

complaint (Doc. 1). On May 25, 2012, the Court dismissed the original complaint for failure to state a claim (Doc. 20, “Order of Dismissal”).² In dismissing the complaint, the Court provided First Federal an opportunity to amend the complaint (Doc. 20 at 8).

The Amended Complaint makes the following allegations. First Federal holds a judgment against Daniel E. Footman, Jr. in excess of \$1 million (the “Judgment”) (Doc. 24 at 2).³ Big Foot owns a number of real properties (*id.* at 3). After First Federal acquired its judgment, but before Big Foot filed its bankruptcy petition, Mr. Footman provided First Federal with written correspondence wherein he stated he owned Big Foot’s real property and/or assets (*id.*). In this regard, Mr. Footman provided First Federal with information concerning his personal financial condition and assets, which included ownership of Big Foot’s real property (*id.*). Mr. Footman offered to turn over, convey, or transfer Big Foot’s real property in satisfaction of the personal judgment against him (*id.* at 4). Prior to filing the Petition, Mr. Footman was the sole shareholder of Big Foot (*id.* at 2). Mr. Footman presently holds a 1% interest in Big Foot.

The single-count Amended Complaint seeks entry of an order: (1) declaring Mr. Footman to be the alter ego of Big Foot; and (2) as a result, finding the corporate distinction between Big Foot and Mr. Footman should be disregarded and the liabilities for which Mr. Footman is personally liable to First Federal be declared liabilities of the bankruptcy estate of Big Foot (Doc. 24 at 5).

² The Court’s May 25, 2012 Order of Dismissal (Doc. 20) is incorporated by reference.

³ The Judgment was apparently entered against Mr. Footman on November 21, 2008 pursuant to a Tennessee action (*see* Doc. 24 at 2). The Judgment was later domesticated in Florida sometime after April 7, 2009 (*see id.*).

Discussion

I. Motion to Dismiss Standard

A motion to dismiss pursuant to Rule 12(b) tests the sufficiency of a complaint and asks the court to determine whether the complaint sets forth sufficient factual allegations to establish a claim for relief. When evaluating whether a plaintiff has stated a claim, a court must determine whether the complaint satisfies Rule 8(a)(2), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” To survive a Rule 12(b) motion, the complaint must contain enough factual matter (taken as true) to “raise [the] right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “[N]aked assertions devoid of further factual enhancement” will not satisfy Rule 8(a)(2)’s requirement of a short plain statement of the claim showing the pleader is entitled to relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 557) (internal quotations omitted). A “formulaic recitation of the elements of a cause of action will not do.” *Id.* Thus, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged.” *Twombly*, 550 U.S. at 555.

A mere possibility that the defendant acted in contravention to the law will not suffice. *Id.* Although a court must accept all well pleaded facts as true, it is not required to accept legal conclusions. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949.

II. Sufficiency of the Pleadings

Ordinarily, the result of piercing the corporate veil is that a corporation's shareholder(s) become liable for corporate liabilities. *Estudios, Proyectos e Inversiones de Centro Americo, S.A. (EPICA) v. Swiss Bank Corp., (Overseas) S.A.*, 507 So. 2d 1119, 1120 (Fla. 3d DCA 1987), review denied, 518 So. 2d 1274 (Fla. 1987). In order to pierce the corporate veil a plaintiff must prove: (1) the subject corporation is a mere instrumentality of the shareholder (*i.e.*, the shareholder dominated and controlled the corporation to such an extent that it did not have an independent existence and the corporation was in fact an alter ego of the shareholder); (2) the shareholder engaged in improper conduct (*i.e.*, the corporate form was used fraudulently or for an improper purpose); and (3) the fraudulent or improper use of the corporate form caused injury to the claimant. *Priskie v. Missry*, 958 So. 2d 613, 614-15 (Fla. 4th DCA 2007).

Conversely, a corporation may be held liable for the debts of a controlling shareholder, a remedy known as reverse corporate veil piercing, when the shareholder has formed or used the corporation to secrete assets and thereby avoid a pre-existing personal liability. *Estudios*, 507 So. 2d at 1120; *Braswell v. Ryan Invs., Ltd.*, 989 So. 2d 38, 40 (Fla. 3d DCA 2008) (denying reverse veil piercing because the act of taking title to assets in a corporate name preceded the claims and obligations sued upon).

Therefore, to state a claim for reverse corporate veil piercing, First Federal must set forth factual allegations which, if proven, would establish that Big Foot is a mere instrumentality of Mr. Footman. Additionally, Plaintiff must allege that Mr. Footman either created Big Foot or used Big Foot to secrete his assets in order to avoid a pre-existing liability to First Federal. In this instance, with respect to the later requirement, *supra*, the Court agrees with Defendants that First Federal has not alleged the subject real properties were owned by Mr. Footman

individually, or that any such ownership predates the liability owed to First Federal (*see* Doc. 24 at 2-5). Since a claim for reverse veil piercing requires that the corporation be used as a means by which to secrete assets of one of its shareholders, the lack of any such allegation(s) in this regard is fatal to First Federal's claim(s).

Conclusion

For the foregoing reasons, it is **ORDERED**:

1. Defendant Big Foot Property, Inc.'s Motion to Dismiss the Amended Complaint (Doc. 25) and *pro se* Defendant Daniel E. Footman, Jr.'s Motion to Dismiss (Doc. 26) are granted to the extent provided herein.
2. The Amended Complaint (Doc. 24) is dismissed without prejudice.
3. Plaintiff First Federal Bank is provided a second opportunity to amend the complaint within fourteen (14) days of the date of this Order.
4. If a second amended complaint is filed, Defendants shall have thirty (30) days from the date of its filing to plead thereto.

DATED this 27th day of September, 2012 at Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies To:

Mark S. Mitchell, Counsel for First Federal Bank
Jason A. Burgess, Counsel for Big Foot Properties, Inc.
Daniel E. Footman, Jr., *pro se*