STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ROCHESTER LINOLEUM & CARPET CENTER, INC., d/b/a ROCHESTER FLOORING RESOURCE,

Plaintiff,

v.

HOMESTEAD DEVELOPMENT CORP., HOMESTEAD N.Y. PROPERTIES, INC., JACK R. HASSALL and ALLISON HOMES, INC.,

Defendant.

DECISION AND ORDER

Index #2006/01874

A flooring subcontractor has sued the general contractor, Homestead Development Corporation, and the owners, Homestead, N.Y. Properties, Inc., and Allison Homes, Inc., together with the person allegedly controlling all three entities, for payment of the amounts due on the various subcontracts in connection with residential developments in various parts of Ontario and Monroe Counties. It appears that the general contractor, Homestead Development, has shut down the business for lack of profitability and has considered a bankruptcy filing. The record shows that, on June 15, 2005, plaintiff entered into a contract with Homestead Development, denominated the "Homestead Development Corporation Master Sub-Contract Agreement," calling for flooring work in connection with a number of homes to be built on lots

owned by Allison Homes, Inc. Allison Homes, in turn sold the homes to the ultimate owners in all but one of the cases, i.e., Lot #8 of the Renaissance Subdivision in the Town of Victor, which is a model home still currently titled to Allison Homes.

By reference to invoices prepared by the plaintiff, which list Allison Homes together with Homestead Development Corporation as the entities for which home flooring work was completed, together with an allegation that each of the defendants operated "in furtherance of Defendants' joint enterprise," Pelusio affidavit of 12-12-06, at ¶17, and the allegation that plaintiff dealt solely with the individual defendant, Jack R. Hassall, who is a shareholder, president and treasurer of Allison Homes, and who runs and controls the daily activities and makes all major decisions for Allison Homes, id. at ¶18, plaintiff seeks summary judgment for unpaid invoices totaling $73,902.00 as against Allison Homes and Homestead Development Corporation on the First and Second Causes of Action.

Defendants protest that plaintiff's contract was with Homestead Development, the general contractor on each of these projects, that there is no basis to impose liability on Allison Homes, and that summary judgment cannot be ordered even as to Homestead Development because the amount in controversy remains in dispute.

"Unless an owner has undertaken liability toward a

subcontractor under the terms of the general contract, the subcontractor, because it is not in privity with the owner, may not assert a cause of action that is contractual in nature against it." Mariacher Contracting Company, Inc. v. Kirst Construction, Inc., 187 A.D.2d 986, 987 (4th Dept. 1992). Inasmuch as the First Cause of Action alleges a breach of contract, plaintiff's motion for summary judgment as against Allison Homes, Homestead NY Properties, and Hassall is denied and the cross-motion for summary judgment in favor of each such defendant dismissing the claim is granted. The corporate piercing claim, such as it is, will be discussed below.

The Second Cause of Action seeks the same amount sought in the First Cause of Action, on the ground that defendants have been unjustly enriched at plaintiff's expense. Plaintiff would be precluded from recovering against Allison in quasi-contract or unjust enrichment under the Clark-Fitzpatrick rule (70 N.Y.2d 382) because there was a valid and enforceable written agreement between plaintiff and the general contractor covering the same subject matter, and also because plaintiff's work was done, in the eyes of the law and contract, for the benefit of the general contractor, not the owner. Id. 187 A.D.2d at 987-88; Schuler-Haas Elec. Corp v. Wager Constr. Corp., 57 A.D.2d 707, 707-08 (4th Dept. 1977). "Generally, a landowner is not liable to a subcontractor for work performed on the owner's property in

furtherance of the sub-contract in the absence of an agreement to pay the general contractor's debt or circumstances giving rise to such an obligation." Id. 57 A.D.2d at 708.

Here, plaintiff's proof in support of it's motion fails to establish as a matter of law an agreement to pay or circumstances giving rise to such an obligation on behalf of the owner. Plaintiff's proof falls well short of what is required, viz, the sub's agreement to continue work upon receipt of the owner's "promise that the sub would get paid." U.S. East Telecommunications, Inc. v. US West Communication Services, Inc., 38 F.3d 1289, 1299 (2d Cir. 1994). See also, EFCO corp. v. U.W. Marx, Inc., 124 F.3d 394, 401 (2d Cir. 1997)("presumption is overcome, and the landowner may be liable, where the landowner prompts the subcontractor to undertake its work or to continue its work under the assumption that the landowner will pay it directly"). Events occurring after the work was performed, such as payments by the owner to facilitate the owner's closing with the ultimate home buyer, whether to release a mechanic's lien or the like, do not meet plaintiff's initial burden on summary judgment nor do they raise an issue of fact on the cross-motion. Id. 124 F.3d at 401-02. Plaintiff's allegation that "Hassall, in various communications to Plaintiff, has admitted that Defendants owe monies to the Plaintiff" (emphasis in original) is conclusory only, not stated to be made on personal knowledge of Pelusio (the

affiant), and is otherwise not elaborated or supported by admissible evidence that Hassall made such an admission. Hassall denies he made the admission thereby establishing, with the other proof submitted by defendants, that Allison, Homestead, and Hassall are entitled to judgment as a matter of law.

Nor are the invoices attached to plaintiff's moving papers availing, inasmuch as they cannot create liability where none was established before, are handwritten but not subscribed by the party sought to be charged, and plaintiff admits that no payments by the owners were made in response to them such as would imply a promise of future payments by the owner. Cf., M. Paladino, Inc. v. J. Lucchese & Son Contracting Corp., 247 A.D.2d 515, 516 (2d Dept. 1998). Just because plaintiff made a unilateral decision to include Allison on these invoices does not establish, nor does it raise an issue of fact concerning, whether Allison agreed to be bound thereby for direct payment bypassing the contractual arrangements/structure. Thus, this case is unlike those in which the owner was held liable or where an issue of fact was raised whether the owner was, indeed, liable. See Brown Bros. Elec. Contractors, Inc. v. Beam Const. Corp., 41 N.Y.2d 397, 401-02 (1977)(general contractor defaulted after which owner made direct promises to sub offering to put its name on checks made out to general contractor; owner took over as general contractor and sub began to bill owner alone without objection and owner promised

direct payment of all but a disputed extra); Concordia General Contracting v. Peltz, 11 A.D.3d 502 (2d Dept. 2004)(owner's oral agreement to pay subcontractor directly for future work); Pyramid Champlain Company v. R.P. Brosseau & Company, 267 A.D.2d 539 (3d Dept. 1999)(agreement by owner to assume primary obligation to pay for materials shipped by supplier).

Nor is coordination of work schedules directly with the owner or acceptance by the owner of the work a predicate for owner liability in the absence of an agreement by the owner to pay or circumstances implying such an agreement. Sybelle Carpet and Linoleum of Southampton, Inc. v. East End Collaborative, Inc., 167 A.D.2d 535 (2d Dept. 1990). Finally, plaintiff makes much of the email or letter sent by Hassall to one of the home buyers. Plaintiff did not authenticate the email by affidavit or otherwise, however. Moreover, the transaction records plaintiff's effort to bill a homeowner for the work, not that buyer's predecessor in interest, Allison, and thus the communication undercut's any claim that plaintiff was looking to Allison for payment. Indeed, the email states that the work involved an upgrade requested of plaintiff by the ultimate home buyer, not any work done for the general contractor, or for that matter Allison. It does not evidence any post-completion agreement by Allison to pay plaintiff directly.

Plaintiff's motion papers refer to interlocking ownership of

the defendant entities, common employees, joint enterprise, and refer to Homestead as a "shell" corporation, but they wholly fail to establish as a matter of law that the corporate forms should be disregarded to hold Allison, Homestead N.Y. Properties, and Hassall liable. Defendants establish as a matter of law, however, that corporate formalities were observed and that otherwise there is no reason to pierce the corporate veil; plaintiff fails to raise an issue of fact on the issue. Dember Const. Corp. v. Staten Island Mall, 56 A.D.2d 768 (1st Dept. 1977); Custer Builders, Inc. v. Quaker Heritage, Inc., 41 A.D.2d 448, 450-51 (3d Dept. 1973).

Accordingly, plaintiff's motion for summary judgment is denied, except that the motion for summary judgment on liability only against Homestead Development is granted. Defendants' motion for summary judgment is denied with respect to the Third Cause of Action against each defendant, Edgewater Constr. Co. v. 81 & 3 of Watertown [Appeal No. 2], 1 A.D.3d 1054, 1057 (4th Dept 2003), on appeal after remand, 24 A.D.3d 1229, 1230-31 (4th Dept. 2005)(diversion defined), and otherwise is granted, except with respect to Homestead Development as to which defendants' motion is denied.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: January 30, 2007
Rochester, New York