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SHORT FORM ORDER INDEX NO. 36049/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

DML INTERIORS, INC.,

Plaintiff,

-against-

WENMAR CONTRACTING CORPORATION, WENMAR CONSTRUCTION MANAGEMENT, INC., WENMAR CONSTRUCTION MANAGEMENT, LLC, RONALD J. KAPLAN, RON J. KAPLAN, DEBORAH KAPLAN, JOHN AND JANE DOE,

Defendants.

ORIG. RETURN DATE: FEBRUARY 8, 2013
FINAL SUBMISSION DATE: FEBRUARY 14, 2013
MTN. SEQ. #: 001
MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
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GARDEN CITY, NEW YORK 11530
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DEFT'S/RESP ATTORNEY:
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516-248-9880

Upon the following papers numbered 1 to 6 read on this motion TO DISMISS.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Memorandum of Law 6; it is,

ORDERED that this motion by defendants, WENMAR CONTRACTING CORPORATION, WENMAR CONSTRUCTION MANAGEMENT, INC., WENMAR CONSTRUCTION MANAGEMENT, LLC, RONALD J. KAPLAN, RON J. KAPLAN, and DEBORAH KAPLAN (collectively "defendants"), for an Order: (1) pursuant to CPLR 3211 (a) (1), dismissing each of the causes of action contained in plaintiff's complaint against all defendants other than WENMAR CONSTRUCTION MANAGEMENT CORP. s/h/a defendants WENMAR CONSTRUCTION MANAGEMENT, INC. and WENMAR CONSTRUCTION MANAGEMENT, LLC, on the grounds that a defense thereto is founded on documentary evidence; and (2) pursuant to CPLR 3211 (a) (7) and 3015 (e), dismissing plaintiff's complaint, in part, against all defendants on the ground that plaintiff is an unlicensed home improvement contractor and is precluded from recovering damages from defendants for the home improvement contracting work which is the subject of this action, is hereby **GRANTED** to the extent set forth hereinafter. The Court has received an affirmation and affidavits in opposition to the instant application from plaintiff, and a reply thereto from

defendants. The Court has also received an unauthorized sur-reply affidavit from plaintiff which was filed after the return date of this motion and without an affidavit of service. As such, the Court has not considered the sur-reply in rendering the within decision and Order.

This action, sounding in breach of contract, was commenced on or about November 20, 2012. Plaintiff DML INTERIORS, INC. ("DML" or "plaintiff") alleges that it entered into contracts with defendants "to furnish labor, materials, equipment and related services in connection with construction and improvements to homes, offices, and businesses owned, managed or controlled" by defendants. DML further alleges that it performed all its work under the contracts in 2008 and 2009, but that defendants failed to pay the balance due totaling $70,081.00, despite due demand therefor. As such, DML has asserted three causes of action herein against defendants for breach of contract, unjust enrichment/*quantum meruit*, and an account stated, and seeks judgment in the amount of $70,081.00, plus attorneys' fees, costs and disbursements.

Defendants have now filed the instant motion to dismiss for the relief described hereinabove. Initially, defendants seek dismissal of the complaint as asserted against defendants WENMAR CONTRACTING CORPORATION, RONALD J. KAPLAN, RON J. KAPLAN, and DEBORAH KAPLAN. Defendants allege that plaintiff never entered into any contracts with any of these defendants. According to affidavits of RONALD J. KAPLAN and DEBORAH KAPLAN, these individual defendants "personally never made any agreement with plaintiff, or promise to pay plaintiff, for any of the construction work which is the subject of this lawsuit." Mrs. Kaplan further avers that "I am not now, nor have I ever been, an officer, director, shareholder or employee of defendants Wenmar Contracting Corporation, Wenmar Construction Management, Inc., or Wenmar Construction Management, LLC, or Wenmar Construction Management Corp." With respect to defendant WENMAR CONTRACTING CORPORATION, Mr. Kaplan alleges that he formed this corporation on July 15, 2010, well after the subject work was completed in or about July of 2009. As such, defendants seek dismissal of plaintiff's complaint as asserted against these defendants.

Additionally, defendants contend that as DML is an unlicensed home improvement contractor, it is barred from seeking recovery of money damages for any home improvement contracting work performed. Defendants indicate that prior to this suit, the parties exchanged certain documentation regarding the materials provided and labor performed by DML for which it seeks payment. In particular, defendants allege that DML seeks $58,851.10 in damages in connection with work performed at defendant RONALD J. KAPLAN's residence located at 28 Wyandanch Boulevard, Smithtown, New York, as well as $2,330.00 in damages in connection with work performed at Mr. Kaplan's daughter's

residence located at 1408 Odell Street, Woodbury, New York. Defendants argue that DML, as an unlicensed home improvement contractor, is precluded from now recovering these sums from defendants, and seeks dismissal of plaintiff's complaint to the extent of $61,181.10.

In opposition hereto, DML alleges that it did not need a home improvement license for the subject work, because it is a commercial contractor, not a home improvement contractor, and was acting as a sub-contractor to the general contractors, "Wenmar Construction Management Corp. and/or Wenmar Construction Management, LLC" on the three subject projects. DML argues that defendants, as sophisticated general contractors, fall outside the definition of "consumers" as that term is used in CPLR 3015 (e). DML informs the Court that it was hired by Ronald Kaplan, in his capacity as president of Wenmar Construction Management Corp. and Wenmar Construction Management, LLC, to install a backyard entertainment center at Mr. Kaplan's residence and to renovate a bathroom at Mr. Kaplan's daughter's residence. DML indicates that there were no written contracts at that time, merely verbal agreements between the general contractors and the sub-contractor. In addition, DML contends that Mr. Kaplan requested that DML purchase appliances valued at $14,012.63 for the backyard entertainment center, but that he failed to pay for them. DML alleges that it did not install the appliances. Therefore, DML argues that this particular service clearly falls outside the definition of home improvement contracting. The Court notes that defendants claim that DML did in fact install the appliances in the backyard entertainment center.

With respect to the individual defendants, DML alleges that the complaint should not be dismissed against them, as "there are material issues of fact for trial to determine if they should be personally liable for Wenmar's obligations to Plaintiff under the doctrine of piercing the corporate veil." DML claims that defendants have used the Wenmar entities to hire DML for their personal benefit for non-business purposes, and have used the corporate shield to avoid paying their debts to DML.

Where a defendant moves to dismiss an action, pursuant to CPLR 3211 (a) (1), asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; *see Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]).

Here, the Court finds that the documentary evidence submitted by defendants resolve the question of fact as to which defendant DML contracted with for the work performed at Mr. Kaplan's residence and office, and Mr. Kaplan's daughter's residence. The documentary evidence relied on by defendants consist of the following three requisitions for payment sent by DML on or about February 1, 2011, and again on or about March 31, 2011:

> 1. To "Wenmar Construction Management"; Re: Ron's House – Cuppola (sic); Total amount owed as of 2-1-2011: $58,851.10 (after credit given for payments made to date in the amount of $138,997.00);
>
> 2. To "Wenmar Construction Management Corp."; Re: Ron's Daughters (sic) Bathroom; Total amount: $2,330.00; and
>
> 3. To "Wenmar Construction"; Re: Ron's Office Smithtown, NY; Total amount: $8,900.00.

The requisitions for payment, generated by DML, are directed to the Wenmar Construction corporate entities that plaintiff contracted with and that plaintiff has sued herein, to wit: WENMAR CONSTRUCTION MANAGEMENT, INC. and WENMAR CONSTRUCTION MANAGEMENT, LLC. Plaintiff's vice president acknowledges that plaintiff "ha[d] been hired by Wenmar Construction Management Corp. and/or Wenmar Construction Management, LLC to work on various commercial projects and the parties had an ongoing business relationship." There is no allegation that DML ever contracted with defendants RONALD J. KAPLAN or DEBORAH KAPLAN individually. Indeed, the individual defendants, by sworn affidavits, aver that they did not enter into any contracts with plaintiff in their individual capacity, or promise to pay plaintiff for any of the transactions of the corporations. Moreover, Mr. Kaplan formed "Wenmar Contracting Corporation" on or about July 15, 2010, well after the completion of the subject work. Notwithstanding the foregoing, as will be more fully discussed *infra*, the action shall not be dismissed against defendants RONALD J. KAPLAN and DEBORAH KAPLAN at this juncture.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether plaintiff has a cause of action and not whether it may ultimately be successful on the merits (*see Stukuls v State of New York*, 42 NY2d

272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]). In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint (*see Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]).

The Court is persuaded by defendants' argument that recovery of a portion of the damages sought by plaintiff is barred because DML does not possess a valid home improvement license from the County of Suffolk.[1] Plaintiff has not alleged such a license or the governmental agency that issued its license in its complaint, or in response to the instant motion to dismiss, in violation of CPLR 3015 (e). In addition, the Court is mindful that pursuant to Section 563-17 (A) of the Suffolk County Code, it is "unlawful for *any person* to engage in any business as a home improvement contractor without obtaining a license therefor" (Suffolk County Code § 563-17 [A] [emphasis added]), and that Nassau County has a mirror licensing provision in its Code (*see* Nassau County Code § 21-11.2).

CPLR 3015 (e) provides in pertinent part:

> (e) License to Do Business.
>
> Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by . . . the Suffolk county department of consumer affairs . . . or the Nassau county department of consumer affairs, the complaint shall allege, as part of the cause of action, that plaintiff was duly licensed at the time of services rendered and shall contain the name and number, if any, of such license and the governmental agency which issued such license. The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter

(CPLR 3015 [e]).

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[1] Although not raised by either party, the Court notes that Mr. Kaplan's daughter's residence in Woodbury is located in the County of Nassau. Therefore, the work performed at this location is governed by the licensing provisions of the Nassau County Code.

This Court is aware that the purpose of CPLR 3015 (e) is to protect homeowners from unscrupulous unlicensed contractors, and to safeguard and protect consumers against fraudulent practices and inferior work by home contractors. The legislative purpose in enacting it was to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor was licensed. The Sponsors' Memoranda explain that the statute was introduced in the belief that CPLR 3015 (e)'s affirmative pleading requirement would provide additional protection to consumers, increase incentives for businesses to comply with licensing requirements and help to raise revenue (*see* Letter of Senator Halperin to Governor's Counsel dated July 21, 1983, Letter of Assemblyman Dunne to Governor's Counsel dated July 10, 1983; Bill Jacket, L 1983, ch 817; *see also B & F Bldg. Corp. v Liebig*, 76 NY2d 689 [1990]; *Todisco v Econopouly*, 155 AD2d 441 [1989]; *Zandell v Zerbe*, 139 Misc 2d 737 [1988]).

Furthermore, the First Department has held that CPLR 3015 (e) governs litigation between contractor and consumer, and does not apply to bar recovery by an unlicensed subcontractor from a contractor on a construction project (*see Migdal Plumbing & Heating Corp. v Dakar Developers*, 232 AD2d 62 [1997]). Although "consumer" is undefined in the statute, it has been construed to apply to a person, family or household (*Id.*; *see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3015:6 [drawing parallel with similar term in CPLR 105]). Moreover, CPLR 3015 (e) was devised to address a particular class of contractors, i.e., home improvement contractors (*Migdal Plumbing & Heating Corp.*, 232 AD2d 62).

In the instant case, DML was hired by the general contractor, the Wenmar entities, during the course of their ongoing business relationship. Under similar circumstances as presented herein, courts have held that commercial entities such as the Wenmar entities were not "consumers," and therefore the licensing requirement would not act as a bar to the claims asserted by plaintiff herein (*see Veltri v Platzner Int'l Group, Ltd.*, 7 Misc 3d 131[A] [App Term, 2d Dept 2005]; *SMAX Plumbing, LLC v H. Bittle & Son Topsoil, Inc.*, 37 Misc 3d 1201[A] [Sup Ct, Suffolk County 2012]; *Franklin Home Improvements Corp. v 687 6th Ave. Corp.*, 19 Misc 3d 1107[A] [Sup Ct, Kings County]; *Toulouse v Chandler*, 5 Misc 3d 1005[A] [Sup Ct, Westchester County 2004]).

However, this Court is cognizant of the Second Department's holding in *CMC Quality Concrete III, LLC v Indriolo*, 95 AD3d 924 (2012), wherein the appellate court held:

> Here, the general contractor established, prima facie, that the plaintiff [subcontractor] sought to recover damages for breach of a contract to perform home

> improvement services which required it to obtain a home improvement contractor license and that the plaintiff did not comply with that licensing requirement (*see* Laws of Westchester County, article XVI, § 863.312; *Westchester Stone, Sand & Gravel v Marcella, 262 AD2d at 404; Cappadona v Salman, 228 AD2d at 633; cf. Dickson v Bonistall, 19 AD3d 640, 641, 798 NYS2d 113 [2005]; American Fire Restoration v Gdanski, 216 AD2d 429, 430, 628 NYS2d 536 [1995])*. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of the motion which was for summary judgment dismissing the complaint insofar as asserted against the general contractor

(*CMC Quality Concrete III, LLC*, 95 AD3d 924, 926).

Although DML characterizes itself as a "commercial contractor," the Court finds that it was performing "home improvement contracting" at Mr. Kaplan and his daughter's residences, as that term is defined in Suffolk County Code § 563-16 and Nassau County Code § 21-11.1 (3). Therefore, based upon the controlling precedent of *CMC Quality Concrete III, LLC*, DML was required to possess a valid license from the Suffolk County Department of Consumer Affairs and the Nassau County Department of Consumer Affairs when it performed such work. Consequently, the Court is constrained to find that DML is barred from recovering damages for home improvement contracting work done at these two residences. As discussed, *supra*, there is a difference of opinion in the First and Second Departments as to the definition of a "consumer" as that term is utilized in CPLR 3015 (e).

With respect to piercing the corporate veil, the general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*see Bartle v Home Owners Coop.*, 309 NY 103 [1955]; *Seuter v Lieberman*, 229 AD2d 386 [1996]). The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2009]). Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury (*see Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135 [1993];

Gateway I Group v Park Ave. Physicians, P.C., 62 AD3d 141 [2009]). While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (*see Morris*, 82 NY2d 135; *Shisgal v Brown*, 21 AD3d 845 [2005]).

A plaintiff's attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners. Accordingly, New York does not recognize a separate cause of action to pierce the corporate veil. An action to pierce the corporate veil merely requires that the controlled corporation be named as a defendant in the action (*Hart v Jassem*, 43 AD3d 997 [2007]; *Old Republic Nalt. Title Ins. Co. v. Moskowitz*, 297 AD2d 724 [2002]).

In this matter, plaintiff has pleaded neither of the elements to pierce the corporate veil in its complaint, and the complaint does not set forth any allegations which, if true, would justify piercing the corporate veil and holding the individual defendants liable in their individual capacity (*see Morris*, 82 NY2d 135; *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016 [2007]; *Matter of Goldman v Chapman*, 44 AD3d 938 [2007]; *Levin v Isayeu*, 27 AD3d 425 [2006]; *cf. Pellarin v Moon Bay Dev. Corp.*, 29 AD3d 553 [2006]). However, as discussed, piercing the corporate veil is not a separate cause of action and, in opposition to defendants' motion, plaintiff has submitted affidavits of individuals with personal knowledge, to wit: the vice president and office manager of DML, who aver, among other things, that "the Wenmar Defendants and company revenues were used by defendants Ron and Deborah Kaplan, stockholders in the Wenmar Defendants, to construct an entertainment area on their personal property." Thus, plaintiff has amplified the complaint on the issue of whether the individual defendants used the corporate form as a mere device to further their personal rather than the corporate business, and whether through such domination they perpetrated a wrong against plaintiff by not paying for labor, material and services provided by plaintiff. Plaintiff has also raised questions of fact as to whether defendant DEBORAH KAPLAN was ever an officer and/or stockholder of the contracting Werner corporate entities.

Therefore, upon favorably viewing the facts alleged, and affording DML "the benefit of every possible favorable inference" (*AG Capital Funding*

Partners, L.P. v State Street Bank and Trust Co., 5 NY3d 582 [2005]), and considering the affidavits in opposition submitted by DML, the Court finds that this action must be dismissed as against defendant WENMAR CONTRACTING CORPORATION, having been formed on or about July 15, 2010, approximately one year after the subject work was completed. With respect to the damages sought by DML against the remaining defendants, the Court finds that DML is barred from recovering damages for home improvement contracting done at the two residences absent valid home improvement licenses. Although defendants seek a reduction of $61,181.10 in the amount sought by plaintiff herein, questions of fact exist regarding the installation of certain appliances purchased by DML at Mr. Kaplan's request totaling $14,012.63. Suffolk County Code § 563-16 and Nassau County Code § 21-11.1 (3) exclude from the definition of home improvement contracting the sale of goods by a seller who neither arranges to perform nor performs, directly or indirectly, any work or labor in connection with the installation of or application of the goods (*see* Suffolk County Code § 563-16; Nassau County Code § 21-11.1 [3]). Thus, the Court shall not reduce plaintiff's damages by the amount allegedly expended for the appliances purchased by DML. Furthermore, the Court finds that plaintiff has alleged facts on the issue of piercing the corporate veil sufficient to withstand dismissal of the complaint as asserted against the individual defendants.

Accordingly, for the reasons stated hereinabove, this motion to dismiss is **GRANTED** to the extent that plaintiff's complaint is dismissed as against defendant WENMAR CONTRACTING CORPORATION, and the amount of damages sought by plaintiff herein is reduced from $70,081.00 to $22,912.53.

The foregoing constitutes the decision and Order of the Court.

Dated: June 4, 2015

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**