

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY  
Justice

IA Part 32

\_\_\_\_\_  
YURY KHIYAYEV

x Index  
Number 9721 2008

Motion  
Date October 23, 2008

- against -

Motion  
Cal. Number 6

MIKESAID ENTERPRISES, INC., et al.

Motion Seq. No. 1

\_\_\_\_\_x

The following papers numbered 1 to 15 read on this motion by defendants pursuant to CPLR 3211 to dismiss the complaint, and a cross motion by plaintiff for leave to amend the complaint.

Papers  
Numbered

- Notice of Motion - Affidavits - Exhibits ..... 1-5
- Notice of Cross Motion - Affidavits - Exhibits ... 6-9
- Answering Affidavits - Exhibits ..... 10-11
- Reply Affidavits ..... 12-15

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

There is no merit to defendants' assertion that the complaint should be dismissed due to errors in the spelling of defendants' names. Defendants have not demonstrated any prejudice from the insignificant errors. A defect or irregularity in a summons or pleading will be disregarded or subject to amendment in the absence of prejudice. (CPLR 305[c], 2001, 3026.) In addition, an amendment to correct a misnomer will be permitted where, as here, (1) the court has acquired jurisdiction over the intended but misnamed defendant, and (2) the defendant was fairly apprised that he was the party the action was intended to affect and will not be prejudiced by the amendment.

(See, Holster v Ross, 45 AD3d 640 [2007]; Kingalarm Distribs. v Video Insights Corp., 274 AD2d 416 [2000].) The Court notes that, in addition to the invalidity of the contention that the errors in defendants' names affected the jurisdiction which would have been obtained by proper service of process on them, defendants waived all jurisdictional objections by stipulation dated May 5, 2008.

Considered together with the amendment proposed in the cross motion that supplies the amount of damages to which plaintiff deems himself entitled, the complaint is also adequate to give notice of the transactions or occurrences intended to be proved and the material elements of plaintiff's cause of action. (CPLR 3013.) Inasmuch as defendants have not answered, and their time to do so has been extended by this motion, the plaintiff may amend his complaint once as of right. (CPLR 3025[a]; see, Johnson v Spence, 286 AD2d 481 [2001]; STS Mgt. Dev. v New York State Dept. of Taxation & Fin., 254 AD2d 409 [1998]; Miller v General Motors Corp., 99 AD2d 454 [1984], affd 64 NY2d 1081 [1985].) Particulars of plaintiff's claim, furthermore, may be obtained through a demand for a bill of particulars. (CPLR 3042[a].)

Dismissal of the complaint is, however, warranted with respect to defendant Sadykov. The gravamen of the cause of action asserted against defendants is that the construction work performed pursuant to a contract was not done in a workmanlike manner. Such a cause of action sounds in breach of contract, not negligence. (See, Staten Is. N.Y. CVS, Inc. v Gordon Retail Dev., LLC, \_\_\_ AD3d \_\_\_, 2008 NY Slip Op 9982 [2d Dept 2008]; Panasuk v Viola Park Realty, LLC, 41 AD3d 804 [2007]; Gordon v Teramo & Co., Inc., 308 AD2d 432 [2003].) The contract at issue was drawn on the corporate letterhead and states, in the first paragraph, that it is an agreement between plaintiff, described as owner, and the corporate defendant, described as contractor. The rights and obligations set forth in the contract in the terms and conditions specifically agreed to by the owner and contractor are to be performed by or for the owner or the contractor.

The signature line of the contract designated for the contractor is in the name of MikeSad Enterprises, Inc. Defendant Sadykov's name does not appear anywhere in the written agreement. Thus, the documentary evidence establishes that the contract was entered into between plaintiff and the corporation and that defendant Sadykov was not a party to the contract, completely refuting a factual allegation necessary to sustain the breach of contract cause of action against defendant Sadykov. (CPLR 3211[a][1], [a][7]; see, Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977].)

Defendant Sadykov also may not be held personally liable on the contract as an officer and/or principal of the corporation since there are no factual allegations in the complaint that Sadykov executed the agreement in other than his capacity as corporate officer or with the intent to bind himself individually under the contract. (See, Maranga v McDonald & T. Corp., 8 AD3d 351 [2004]; Gordon, 308 AD2d at 433; see also, Panasuk, 41 AD3d at 805.) Moreover, the above-referenced language of the subject contract itself indicates that Sadykov executed the agreement in his representative capacity. (See, Newman v Berkowitz, 50 AD3d 479 [2008]; 150 Broadway N.Y. Assocs., L.P. v Bodner, 14 AD3d 1 [2004].) The absence of a reference to his

corporate office above or below Sadykov's signature is not determinative of this issue. (Id.)

Accordingly, the motion is granted to the extent that the complaint is dismissed insofar as it is asserted against defendant Sadykov. The cross motion is granted to the extent that plaintiff shall serve an amended complaint containing the proposed amendments only with regard to the corporate defendant within 20 days of service of a copy of this order with notice of entry. The summons is deemed amended to reflect the proper name of the corporate defendant. All other requests for relief are denied.

The foregoing constitutes the decision, order, and opinion of the Court.

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Hon. Charles J. Markey  
Justice, Supreme Court, Queens County

Dated: Long Island City, New York  
January 15, 2009

**Appearances:**

**For Plaintiff:** Stephen David Fink, Esq., 118-35 Queens Boulevard [suite 1220], Forest Hills, NY 11375

**For Defendants:** Law Offices of Nathan Pinkhasov, PLLC, by Edward C. Donnelly, Esq., 95-20 63<sup>rd</sup> Road [suite B], Rego Park, NY 11374