

Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of a single decision and are determined as follows:

This is an action by plaintiffs Wilmer Morales and Martha Seda to recover damages for breach of a construction contract dated September 2, 2004, pursuant to which Galindo Construction Corp. was to perform certain renovations at a two-family house owned by the plaintiffs. Plaintiffs allege, among other things, that the work performed by the defendants was not performed in a skillful professional and workmanlike manner. Plaintiffs have also asserted claims for fraud, to disregard the corporate forms of the defendants, and to discharge the mechanics' lien filed by Galindo Construction Corp. in the sum of \$46,300.00 on March 16, 2005. The Galindo defendants served an answer and interposed 17 affirmative defenses and counterclaims to foreclose on the mechanics' lien, and to recover damages for breach of contract, unjust enrichment, promissory estoppel, quantum meruit, and conversion. Defendants Multi-Service Hemuz Corp., Hector Munoz and Luz Dora Arias served an answer and interposed 14 affirmative defenses. The complaint against Mr. Galindo was dismissed pursuant to an order dated October 20, 2005.

Plaintiffs Wilmer Morales and Martha Seda purchased the real property known as 89-23 Lefferts Boulevard, Forest Hills, New York, on February 5, 2004. The subject premises has a certificate of occupancy for a two-family house. Wilmer Morales entered into a written agreement with Galindo Construction Corp., dated September 2, 2004, to perform certain renovations for the sum of \$120,000.00 and this contract was terminated on February 7, 2005, at which time defendants had been paid \$110,000.00. The evidence does not support the existence of an oral agreement between Morales and Galindo to supervise any construction work at the premises prior to entering into the September 2, 2004 contract, as claimed by Morales at his deposition. After purchasing the subject property, Mr. Morales engaged the services of Building Violations Solutions (BVS) to draft architectural plans for renovations to the premises and to submit such plans to the Department of Buildings. BVS expedites architectural services for the removal of Department of Buildings' violations, and expedites the approval process for permits to perform construction, but does not perform any of the actual construction work. Plaintiffs allege in the complaint that during the performance of Galindo Construction Corp.'s work, Mr. Morales spoke with an architect about problems with said work and that the architect inspected the premises and attempted to contact Galindo Construction Corp. The complaint also alleges that the architect noticed an essential "steel support beam" was missing from the first floor. At his deposition, Mr. Morales identified

the architect as Mr. Jamal, and claimed that both Mr. Jamal and Mr. Camino inspected the premises during the construction, and that he met with Mr. Arango many times, but that Mr. Galindo refused to meet with Arango.

Tulio Camino, Jr., BVS's owner, testified at his deposition that he visited the premises once prior to the beginning of construction in February or March 2004 in order to inspect it and ensure that the renovations that Mr. Morales wanted could be performed pursuant to the Building Code. He stated that the only other time he visited the premises was after Mr. Jamal received the deposition subpoena. He also stated that Mr. Morales had stated that he was dissatisfied with the construction, but never discussed the details of the construction work.

Wilmer Arango testified that he was hired by BVS to measure the house and prepare a set of architectural drawings although he is not a licensed architect or professional engineer. He stated that he visited the premises sometime after the plaintiffs purchased it, but prior to May 2, 2004, and that he gave his drawings to BVS. Mr. Arango stated that he did know specifically what was wrong with the construction, only that it was taking a long time to finish. He stated that he could not say whether or not the work was done correctly, or if the contractor was doing a good job, that he didn't know what the contract between Morales and Galindo Construction Corp. provided for, as it was a matter between Morales and the contractor. BVS forwarded the drawings to Muzzaffar Jamal, a professional engineer, who reviewed and signed them, so that they could be submitted to the Department of Buildings.

Mr. Jamal testified at his deposition that he is a professional engineer, and not an architect. He stated that the only time he went to the premises was on April 6 or 7, 2006, after he was served with a deposition subpoena, that he never inspected the work performed by Galindo Construction Corp., and never heard of this entity prior to learning about the present action. He stated that the only time he was contacted by Mr. Morales after he had reviewed and signed the plans, was after Galindo Construction Corp. notified the Department of Buildings that it was no longer the contractor of record for the subject premises.

Plaintiffs allege that they hired various contractors and construction workers to repair and finish the work performed by Galindo Construction Corp., and in response to the second set of interrogatories by Galindo Construction Corp., they produced notarized statements from six construction workers. Each of these individuals stated that they were hired by the plaintiffs to perform work at the premises for which they were paid in cash. None of these individuals stated that they repaired or re-did work

that had been poorly performed by Galindo Construction Corp. In addition, none of the proposals from other contractors are in admissible form, and, therefore, they lack probative value.

Defendant Galindo Construction Corp. has submitted an affidavit from Denise P. Bekaert, a registered and licensed architect, who inspected the subject premises on March 28, 2006, and reviewed the September 2, 2004 contract and change orders, the drawings executed by Mr. Jamal, and the Department of Buildings' online records for the subject premises. Ms. Bekaert states that in her professional opinion the construction work performed by Galindo Construction was performed in a workmanlike manner, and complied with the architectural plans and change orders directed by the owners. She further states that the Department of Buildings' records, which are attached to her affidavit, reveal numerous complaints regarding the premises prior to the execution of the September 2, 2004 contract, and that both Department of Buildings and Environmental Control Board violations were issued regarding construction work at the premises prior to September 2, 2004. After Galindo Construction Corp., stopped working at the premises, additional complaints were made to the Department of Buildings. On January 4, 2006 and March 5, 2007, two complaints were made regarding an illegal conversion from a two-family home to a four-family home. Ms. Bekaert states that when she inspected the premises, she observed four distinct living quarters complete with kitchen appliances, and kitchen and bathroom fixtures, and that in her professional opinion the house was altered to house four distinct apartments, which is two more units than that allowed under the certificate of occupancy. She also states that the Department of Buildings' records indicate that a violation regarding the alteration in violation of the certificate of occupancy was issued on May 15, 2004, prior to the Galindo contract.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form that demonstrates the absence of any material issues of fact (see Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Stahl v Stralberg, 287 AD2d 613 [2001]). The motion must be supported by an affidavit from a person with knowledge of the facts, setting forth all material facts (CPLR 3212[b]). Here, the affidavit of Mr. Galindo, the president of Galindo Construction Corp., as well as the relevant portions of the Mr. Morales' and the non-parties' depositions, the affidavit of defendant Galindo's expert, and the documentary evidence establishes that Galindo Construction Corp. is entitled to summary judgment dismissing the first cause of action for breach of contract. Plaintiffs have failed to submit any papers in opposition to Galindo Construction Corp.'s motion, and the evidence

submitted does not raise any triable issues of fact as regards plaintiffs' claims of unfinished or shoddy work that was within the scope of the contract, or an oral agreement pre-dating the September 2, 2004 contract. Therefore, defendant Galindo's request to dismiss the first cause of action for breach of contract is granted.

Plaintiffs' third cause of action against Galindo Construction Corp, for fraud is also dismissed. In actuality, it is a cause of action to recover damages for breach of contract, inasmuch as the alleged falsity was a provision of the contract of sale. "Merely alleging scienter in a cause of action to recover damages for breach of contract, unless the representations alleged to be false are collateral or extraneous to the terms of the agreement, does not convert a breach of contract cause of action into one sounding in fraud" (Del Ponte v 1910-12 Ave. U. Realty Corp., 7 AD3d 562, 562, [2004], quoting Noufrios v Murat, 193 AD2d 791, 792 [1993]; see Ka Foon Lo v Curis, 29 AD3d 525 [2006]; Lakehill Assoc. v 6077 Jericho Turnpike Realty Corp., 18 AD3d 506, 508 [2005]; Cerabono v Price, 7 AD3d 479, 480 [2004]; Breco Envtl. Contrs. v Town of Smithtown, 307 AD2d 330 332 [2003]).

Plaintiffs' fifth cause of action to disregard the corporate form in order to hold John Galindo liable is dismissed. Piercing the corporate veil is an equitable doctrine which allows courts to disregard the corporate form whenever necessary to prevent fraud and hold corporate owners liable for the corporation's obligations (see Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 140-141 [1993]; State of New York v Robin Operating Corp., 3 AD3d 769, 771 [2004]). This is a fact-based determination which generally requires a showing that the owners exercised complete domination of the corporation with respect to the transaction or matter at issue, and used that control to perpetrate a fraud or wrong against the plaintiff which led to the plaintiff's injury (see Matter of Morris v New York State Dept. of Taxation & Fin., supra at 141; Bartkowski v Lemcke, 25 AD3d 894 [2006]; Rebh v Rotterdam Ventures, 252 AD2d 609, 610 [1998]; Lally v Catskill Airways, 198 AD2d 643, 644-645 [1993]). "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" (Matter of Morris v New York State Dept. of Taxation & Fin., supra at 142; Ventresca Realty Corp. v Houlihan, 28 AD3d 537 [2006]; Heim v Tri-lakes Ford Mercury, Inc., 25 AD3d 901 [2006]; Treeline Mineola, LLC v Berg, 21 AD3d 1028 [2005]). No such showing has been made here by the plaintiffs, and the court notes that the complaint has already been dismissed as to Mr. Galindo. Therefore, no such action remains as against the corporation.

Defendant Galindo Construction Corp.'s request for summary judgment dismissing plaintiffs' seventh cause of action to discharge the mechanics' lien, and for summary judgment on its counterclaims to foreclose on the mechanics' lien and for breach of contract, unjust enrichment, promissory estoppel, quantum meruit and conversion is denied. Galindo Construction Corp. filed a mechanics' lien on March 16, 2005, for labor and materials in the sum of \$46,300.00. Mr. Galindo, in his affidavit, states that Galindo Construction Corp. completed all of the work in accordance with the \$120,000.00 construction contract and that during the course of the work, Galindo Construction Corp. was paid \$110,000.00. Plaintiffs, in their complaint, admit that \$10,000.00 remains outstanding on said contract. Mr. Galindo also states that Galindo Construction Corp. performed additional construction and renovation work pursuant to change orders or additions to the contract at the request of the plaintiffs, totaling \$40,060.00, and that at the time the contract was terminated by the plaintiffs, it was owed a total of \$46,300.00. The mechanics' lien states, in pertinent part, that the agreed price and value of the labor and material furnished and performed from September 6, 2004 through February 7, 2005 was \$160,000.00, and that there remained unpaid \$27,780.00 for labor and \$18,520.00 for materials furnished, totaling \$46,300.00. In view of the fact that defendants' moving papers fail to explain the discrepancy in the amounts owed under the September 2, 2004 contract, the \$40,060.00 claimed on January 31, 2005 and the \$46,300.00 claimed in the March 26, 2005 mechanics' lien, a triable issue of fact exists as to the amount allegedly owed to Galindo Construction Corp. for the work performed under the contract and for additional work or changes approved by the plaintiffs.

Galindo Construction Corp.'s request for summary judgment on its sixth counterclaim for conversion of tools and building materials is denied, as no evidence has been submitted in support of this counterclaim.

Defendant's request to dismiss the complaint pursuant to CPLR 3126 is denied, as moot. To the extent that defendant seeks an order of preclusion, this request is granted to the extent the plaintiffs shall be precluded from presenting any evidence in support of its seventh cause of action to discharge the mechanics' lien and in defense of the counterclaims as regards the items which was the subject of the so-ordered stipulation of November 11, 2006, and all prior orders of the court, unless plaintiffs serve all such items upon counsel for defendant within 10 days from the date of service of this order with notice of entry.

Defendants Hector Munoz, Multi-Service Hemuz Corp. (sued herein as Multi-Services Munoz Corp.) and Luz Dora Arias' separate motion for summary judgment dismissing the second cause of action

for breach of contract, the fourth cause of action for fraud, and the sixth cause of action to disregard the corporate form, is granted. Plaintiffs have failed to submit an affidavit or affirmation in opposition to the within motion, and the "response" submitted by plaintiffs' counsel in the nature of a memorandum of law, lacks probative value. The evidence presented establishes that defendants Hector Munoz, Multi-Service Hemuz Corp., and Luz Dora Arias were not parties to the September 2, 2004 contract. Although Multi-Service Hemuz Corp. is mentioned in the agreement, it clearly was a subcontractor of Galindo Construction Corp., and not a signatory to that agreement. Mr. Munoz states in his affidavit that Multi-Service Hemuz Corp. performed some demolition work at the subject premises during the first three weeks of the job, at Galindo Construction Corp.'s request, who paid it \$3,000.00. There is no evidence that Multi-Service Hemuz Corp. or the individual defendants performed, or agreed to perform, any other work at the premises, or that the demolition work was not performed in a professional and workmanlike manner. Plaintiffs' claims of breach of contract and fraud against these defendants, therefore, are wholly unsubstantiated, and are dismissed.

The court further finds that no basis exists to set aside the corporate form, in order to maintain a claim against Hector Munoz and his wife, Luz Dora Arias (see Matter of Morris v New York State Dept. of Taxation & Fin., supra; Ventresca Realty Corp. v Houlihan, supra; Heim v Tri-lakes Ford Mercury, Inc., supra; Treeline Mineola, LLC v Berg, supra).

In view of the foregoing, defendant Galindo Construction Corp.'s motion is granted to the extent that plaintiffs' first, third, and fifth causes of action are dismissed, and is denied in all other respects. Defendants Hector Munoz, Multi-Service Hemuz Corp., and Luz Dora Arias' motion for summary judgment dismissing the complaint is granted, and the request for sanctions and an award of costs and attorneys' fees is denied.

Dated: August 10, 2007
