SHORT FORM ORDER

INDEX No. 04-27725
CAL. No. 06-01419-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9/29/06
ADJ. DATE 11/3/06
Mot. Seq. # 001 - MotD

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LEONARD INCANDELA, JR.,

Plaintiff,

- against -

CREATIVE SIDING/DECKS & SEAMLESS GUTTERS, INC., ED SHAND and WILLIAM SCOPPETTONE,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion to dismiss or for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 19; Replying Affidavits and supporting papers 20 - 23; Other 24 (stipulation of adjournment); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the part of defendants' motion for summary judgment dismissing the second, third, fourth and sixth causes of action which allege breach of good faith, fair dealing, unjust enrichment, violation of GBL §771 for improper contract and seeking to pierce the corporate veil, is granted. The movant has demonstrated on prima facie proof that the multiple claims are duplicative of plaintiff breach of contract and unwarranted and that damages included in the claim are compensatory, not punitive; and it is

ORDERED that the part of defendants' motion for summary judgment on the first cause of action for breach of contract or, alternatively, to limit damages to $10,803.00 and to remove the within action to District Court pursuant to CPLR 325 for sanctions, costs and reasonable attorneys' fees pursuant to GBL §772, based on representations and damages incurred from the absence of a GAF certification and the subcontract or employment for performance of some of the project to an independent roofer, is denied (CPLR 3211, 3212; GBL §772). There are material questions raised concerning whether plaintiff had notice of the difficulty which was potentially imposed by the failure to

install new skylights, the impact of a GAF certification and the effect of the subcontract or employment of an independent roofer. Whether plaintiff contributed to the damage or voluntarily increased costs after defendants cured and remedied the defects at their own expense which plaintiff approved is also in issue. In addition, the amount of damage, if any, and the credibility of witnesses preclude judgment (CPLR 3212; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 597 [1980]; ***S.J. Capelin Associates v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1978]); and it is

ORDERED that those causes of action for which summary judgment has been granted are severed from the remaining claims and continued for trial (CPLR 3212[e]).

In this action the parties are neighbors who contracted in writing on November 22, 2003 for home improvement services. Plaintiff shopped for six estimates prior to the negotiation of the home improvement contract with defendants for the sum of $18,600. The work commenced on November 29, 2003 with the ripoff of plaintiff's old roof. This allegedly disclosed prospective problems concerning the skylights. The original consensus was that the skylights were not leaking; therefore, no change or replacement was required. Defendants timely performed the improvements. However, leaks occurred and caused secondary damage to the dwelling. Defendant Shand returned to the premises with his son to personally inspect and repair. The work was redone, repairs were completed and approved, and when no leaks were observed for nine months, plaintiff paid the outstanding balance. Subsequently plaintiff retained a new improvement contractor. The latter replaced the skylights and completed further repairs to plaintiff's greater satisfaction.

Plaintiff presently seeks recovery from defendants of the entire cost of the original contract, in addition to the cost of supplemental improvements performed by the second contractor and counsel fees. Plaintiff alleges breach of contract, good faith, fair dealing, unjust enrichment, violations of GBL §771 for noncompliance with contractual requirements, GBL §772 for fraudulent inducement of the contract and for misrepresentation of the existence of a GAF certification, the employment of subcontractors, and counsel fees under GBL §773 and seeks to pierce defendant's corporate veil to impose personal liability.

Other than a breach of contract with respect to performance, there is simply no factual or legal basis or evidence for the second cause of action, which claims breach of good faith and fair dealing (***Parker East 67th Ass. v The Minister, Elders & Deacons of the Reformed Protestant Dutch Church of the City of New York***, 301 AD2d 453, 754 NYS2d 255 [2003]); or the third cause of action alleging unjust enrichment (***Madison Hudson Assoc., LLC v Neumann***, 8 Misc3d 1025A, 806 NYS2d 445 [2005]; ***Joan Hansen & Co. v Everlast World's Boxing Hq. Corp.***, 296 AD2d 103, 744 NYS2d 384 [2002]); or the fourth cause of action, which claims violation of GBL §771 written contract requirements, which is clearly rebutted by the contract submitted (***Wowaka & Sons, Inc. v Pardell***, 242 AD2d 1, 672 NYS2d 358 [1998]; or the fifth cause of action for violation of GBL §§772 & 773 to impose a $500 penalty, in addition to attorneys' fees for false or fraudulent written representations, plus $100, maximum $250, for each violation or 5% of contract price, but no greater than $2,500. While counsel fees may be available at trial for failure of the defendants to advise plaintiff of the status of the roofer or the nature and scope of GAF protection, the penalties are limited (***Madden v Creative Services***, 84 NY2d 738, 622 NYS2d 478 [1995]); and plaintiff's sixth cause of action to pierce the corporate veil, based on an alleged fraud which is actually a claim for breach in performance, are all without merit. Defendants have conducted a legitimate business for twenty years. The individual defendant, Shand, is

the sole shareholder. Scoppettone is Shand's salesperson. Defendant is licensed and insured. There is no proof of fraud or grounds to infer that the plaintiff, if damaged, would not recover compensation from the insured corporate defendant such that liability might be properly imputed to the corporate principal (***EDK Enterprises, Inc. v C&S Wholesale Grocers, Inc.***, 30 AD3d 924, 818 NYS2d 319 [2006]; ***TNS Holdings Inc. v MKI Sec. Corp.***, 92 NY2d 335, 680 NYS2d 891 [1998]).

Finally, removal of this action to the District Court is not mandated where the Supreme Court has general jurisdiction and damages may exceed the jurisdictional limits of District Court (Constitution, State of New York, Art.6 §§7,16; Judiciary Law §140-b; CPLR 325).

Dated: MAR 0 5 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION