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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 116929/2006

PERI FORMWORK SYSTEMS

VS

BANAS, ANTHONY C.

Sequence Number : 001

DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ___ Yes (X) No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 16 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 8 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Peri Formwork Systems,

Plaintiff

-against-

Anthony C. Banas and
Anselmo Genovese a/k/a
Sammy Genovese,

Defendants.

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DECISION/ORDER
Index No.: 116929/06
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	**Numbered**
Pltff's N/M [§3215] w/ DEC affirm, exhs	1
Proof of Service	2

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

Plaintiff asserts a number of causes of action against the two named defendants. Neither defendant has answered the complaint nor appeared, therefore plaintiff seeks entry of a default judgment against them with an Inquest on damages. This motion is itself submitted to the court on default, though proof of service has been filed. For the reasons that follow, although plaintiff has proved the defendants have defaulted, the motion for entry of a default judgment is denied, without prejudice.

Background

Plaintiff served each defendant with the summons and complaint on December

6, 2006. "Miss Banas" a person of suitable age and discretion (apparently his daughter) accepted service at the Banas' home for Mr. Banas. CPLR 308 (2). After making three attempts to personally serve Mr. Genovese, plaintiff served Mr. Genovese by affixing a copy of the summons and complaint to the door of his place of residence on December 6, 2006 and then mailing copies of the summons and complaint the next day.

Both defendants' time to answer or appear has expired and not been extended by the court. Plaintiff has also complied with additional notice requirements of CPLR § 3215 (g) (3) (i) since this motion was served more than twenty (20) days prior to entry of judgment.

Despite such notice and additional notice, neither defendant has answered, appeared or otherwise moved with respect to the complaint. Since a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom, [Rokina Optical Co. Inc. v. Camera King, Inc., 63 NY2d 728 (1984)] plaintiff is entitled to a default judgment in its favor, provided it otherwise demonstrates it has a prima facie cause of action. Gagen v. Kipany Productions Ltd., 289 AD2d 844 (3rd dept. 2001). Plaintiff has not, however, done so.

Although the complaint is verified, this motion is supported only by the affirmation of counsel. Many allegations are free-wheeling, not based upon personal knowledge, and offered without a scintilla of additional proof.

Plaintiff describes an agreement it had with Mr. Banas for the purchase and rental of formwork and shoring systems for use at a project located at One Spring

Street in New Brunswick, New Jersey. The agreement, dated October 22, 2004, was apparently executed by Mr. Banas. No other details about this agreement has been offered, nor has plaintiff provided a copy of it. Plaintiff contends it delivered the formwork, etc., in December 2004, as per this agreement.

Subsequently, on January 7, 2005, plaintiff and Mr. Genovese entered into a similar agreement for the purchase and rental of formwork and shoring systems, also to be used at One Spring Street.

On February 8, 2005 Genovese entered into yet another agreement with plaintiff, again for formwork and shoring systems.

Based upon these agreements, plaintiff claims it is owed in excess of $260,000 for materials, equipment, and services.

Plaintiff contends that Messrs Banas and Genevose are the owners or principals of Manhattan Super. It contends further that the owner of the project at One Spring Street paid Manhattan Super the sum of $713,750 on February 5, 2005 and the sum of $8,039,000 on June 7, 2005. Plaintiff contends that notwithstanding the debt owed to plaintiff, and the fact the payments were made to Manhattan Super who was supposed to pay its subcontractors, Manhattan Super did not pay any portion of that money to Periform, but instead executed two waivers of liens and releases.

Plaintiff alleges that the waiver and pattern of non-payment is part of a scheme by Messrs Banas and Genovese to defraud Peri and improperly enrich the defendants. Plaintiff contends that the statement in the waiver, that "all workmen employed by it or its subcontractors upon the Project have been fully paid to the date hereof" is untrue as

is the further statement that "all vendors and materialmen from whom it or its subcontractors have purchased materials used in the Project have been paid for materials delivered on or prior to the date hereof." Plaintiff asserts that both defendants knew this was a false statement at the time they made it and they made it with the intent to defraud Peri.

Plaintiff describes further examples of what it claims are fraudulent misrepresentations by the defendants, stating that this is part of their *modus operandi* to obtain materials and services, without paying for them. Plaintiff also asserts that Manhattan Super is nothing more than a shell corporation, used to shield the individually named defendants from personal liability.

The elements of an action for actual fraud are the a misrepresentation or an omission of fact, which is false, and known to be false by the defendant, scienter, reasonable reliance and injury. Small v. Lorillard Tobacco Co. Inc., 94 NY2d 43, 57 (1999). The circumstances constituting the fraud cannot be conclusory but must be plead with particularity. CPLR § 3016 (b). Where, however, the defendant has exclusive knowledge necessary to particularize the true nature of the fraud, there is a relaxation of the rigid pleading requirements. Jered Constructing Corp. V. New York City Transit Authority, 22 NY2d 187 (1968).

Even allowing plaintiff the greatest latitude, this motion does not offer any further information than what is in the complaint. Thus, plaintiff's lawyer's reiteration of the bare boned allegations in the complaint do not support his first cause of action for fraud. Moreover, the fraud described deals with allegedly false statements made to *the*

project owner, a non party to this action, in connection with a waiver and general release. The waiver and release is for the benefit of the project owner so that any title insurer is assured that there are no liens against the property. Thus, while the defendants may have filed a false statement, when in fact Manhattan Super or the defendants owed money to the plaintiff, Periform has pled insufficient facts to support the first cause of action. To the extent that Periform alleges the defendants made fraudulent statements in connection with any contracts between the parties, and therefore have committed a tort, those allegations would not state a cause of action. A breach of contract is not a tort unless a legal duty independent of the contract itself has been violated apart from the nature of the contract itself. North Shore Bottling Co. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171 (1968); Ivan Mogull Music Corp. v. Madison-59th Street Corp., 162 A.D.2d 336 (1st Dept.,1990). In any event, the breach of contract claim may only lie against Manhattan Super (see discussion *infra*).

Plaintiff also fails to support its 2nd cause of action, which is for conversion. "Conversion" is the wrongful interference with the property of another. Republic of Haiti v. Duvalier, 211 AD2d 379 (1st dept. 1995). In order to assert a cause of action for conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted. State v. Seventh Regiment Fund, Inc., 98 NY2d 249 (2002). According to the complaint, certain money was paid by the project owner to Manhattan Super. A portion of the money was, according to plaintiff, to have been used by Manhattan Super to pay its subcontractors and for materials used on the project.

Even assuming *arguendo* the statement in the waiver and release by Manhattan

Super is false, the complaint makes no factual allegation that Manhattan Super had *no* right to the money that the project owner paid to Manhattan Super in the first place. Thus, plaintiff's conversion claim wholly ignores the fact (accepting what they claim is true, solely for the purposes of this motion) that Manhattan Super also had a right to this money. Without any further information, plaintiff is not entitled to a default judgment on this cause of action either.

Plaintiff's 3rd cause of action is for "civil conspiracy" by the defendants and it too is bare boned. New York does not recognize an independent tort of civil conspiracy. Le Sammom Bldg. Corp. v. Dudek, 177 A.D.2d 390 (1st Dept.,1991); Alexander & Alexander of New York, Inc. v. Fritzen, 68 N.Y.2d 968 (1986). Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort. Therefore, if plaintiff's fraud claim fails, this cause of action would also fail. Alexander & Alexander of New York, Inc. v. Fritzen, supra. Moreover, although plaintiff claims the defendants have engaged in a common scheme or plan to defraud it [Agostini v. Sobo, 304 AD2d 395 (1st dept. 2003); Truong v. AT & T, 243 AD2d 278 (1st dept.1997)], these conclusory statements are offered without any proof.

There are other overarching problems that affect the complaint as a whole and the individual causes of action asserted. First, plaintiff seeks relief against individual defendants on the one hand but also asserts claims against Manhattan Super, a nonparty and the alleged "shell" used by the individual defendants. The details of the agreements plaintiff is relying upon are murky, and no copy of an agreement is provided. If its agreement is with a corporation and not the individually named

defendants, there is the added burden of convincing the court to pierce the corporate veil to reach the individuals. Aubrey Equities v. SMZH 73rd Assocs., 212 A.D.2d 397 lv. denied 92 N.Y.2d 802 (1998). The whole point of incorporating a business is to limit or shield the corporate owner from the corporate liability. Morris v. New York State Dept. of Taxation and Fin., 82 N.Y.2d 135, 140 (1993).

There is also the issue of whether New Jersey law differs from New York law on mechanic's liens, waivers and releases, and if so, the effect of the waiver and lien having been executed in New Jersey. This project took place in New Jersey as well, and it is not at all apparent that New York lien law applies and/or what plaintiff's rights were, if any, to the money paid to Manhattan Super under New Jersey Law.

The court will not, at this time, dismiss the complaint, nor will it, however, enter a default judgment against the defendants as urged by plaintiff. The deficiencies identified above are but a few that still need to be addressed through affidavits by persons with knowledge of the facts, documents, and anything else that will provide firm support for the claims in the complaint. Plaintiff may renew its motion within ninety (90) days with appropriate supporting information. If plaintiff fails to timely renew, the court will consider the action abandoned and this case will be dismissed thereafter.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
May 8, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.