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

PRESENT: HON. RICHARD B. LOWE III *Justice* PART 56

Clay Drywall

- v -

Amerisbuild

INDEX NO. 604007/05

MOTION DATE 3/22/07

MOTION SEQ. NO. 003

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JUN 14 2007
COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LOWE, III

Dated: 6/13/07

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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CLAY DRYWALL, INC.,

Plaintiff,

-against-

Index No. 604007/05

AMERIBUILD CONSTRUCTION MANAGEMENT, INC., PROPERTY MANAGEMENT GROUP, INC., HFZ CAPITAL GROUP LLC, HFZ REAL ESTATE DEVELOPMENT ASSOCIATES LLC and 240 WEST 73rd STREET LLC,

Defendants.

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Hon. Richard B. Lowe, III:

In this action for breach of contract and account stated, defendants Property Management Group Inc. (PMG), HFZ Capital Group LLC (HFZ Capital), and 240 West 73rd Street LLC (West 73rd Street) move, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing the complaint as against them. For the reasons set forth below, defendants' motion is granted.

On November 19, 2001, plaintiff Clay Drywall, Inc. and defendant HFZ Real Estate Development Associates LLC (HFZ Real Estate) entered into an agreement between Owner and Contractor (the Agreement [attached to the Aff. of Joseph Mirer as Exh A]), pursuant to which plaintiff was to perform drywall and carpentry work at the building located at 240 West 73rd Street, New York, New York (the Premises). The complaint alleges that between November 29, 2001 and October 1, 2003, at the request of defendants, "plaintiff rendered certain work, labor and services and furnished materials, all for the agreed price and reasonable value of" $563,366.38, "no part of which has been paid to Plaintiff, although payment thereof has been

duly demanded" (Complaint, ¶¶ 65-66). The complaint contains two causes of action. The first cause of action is for account stated. The second cause of action is for breach of contract. Plaintiff seeks judgment against defendants in the amount of $563,366,38, plus costs and disbursements.

The first cause of action must be dismissed as against the moving defendants because it fails to state a cause of action for account stated, and the documentary evidence annexed to the complaint fails to establish a cause of action for account stated.

The entire first cause of action is based on the following allegation:

> That between on or about November 13, 2001 and October 1, 2003, an account was stated between the Plaintiff and the Defendants, copies of the invoices for which are annexed hereto as Exhibit "1" and made a part hereof, and that upon such statements a balance of FIVE HUNDRED SIXTY THREE THOUSAND THREE HUNDRED SIXTY SIX DOLLARS AND 33/100 CENTS ($563,366.38) was due to Plaintiff from Defendants.

Complaint, ¶ 61; see also id., ¶ 62.

These allegations are insufficient to sustain a claim for an account stated. Under New York law, "[a]n account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other" (Shea & Gould v Burr, 194 AD2d 369, 370 [1st Dept 1993], quoting Chisholm-Ryder Co. v Sommer & Sommer, 70 AD2d 429, 431 [4th Dept 1979]). Under this cause of action, the receipt and retention of an account, without objection within a reasonable period of time, coupled with an agreement to make partial payment, gives rise to an account stated (Morrison Cohen Singer & Weinstein, LLP v Ackerman, 280 AD2d 355 [1st Dept 2001]; Biegen v Paul K. Rooney, P.C.,

269 AD2d 264 [1st Dept], lv denied 95 NY2d 761 [2000]; Shea & Gould v Burr, 194 AD2d 369, supra). Thus, "[a]n account stated assumes the existence of some indebtedness between the parties, or an express agreement to treat the statement as an account stated" (M. Paladino, Inc. v J. Lucchese & Son Contr. Corp., 247 AD2d 515, 516 [2d Dept 1998]; see also Erdman Anthony & Assoc. v Barkstrom, 298 AD2d 981 [4th Dept 2002]). "It cannot be used to create liability where none otherwise exists" (M. Paladino, Inc. v J. Lucchese & Son Contr. Corp., 247 AD2d at 516; see also Grinnell v Ultimate Realty LLC, 38 AD3d 600 [2d Dept 2007] [a cause of action alleging an account stated cannot be utilized simply as another means to attempt to collect under a disputed contract]).

Here, plaintiff has completely failed to allege that the parties had an agreement to treat plaintiff's claim as an account stated, or that defendants agreed to make any partial payment. Accordingly, since, as set forth below, plaintiff has no breach of contract claim against defendants PMG, HFZ Capital and West 73rd Street, plaintiff's claim is based upon a mere demand for payment, which cannot sustain an account stated claim (see M. Paladino, Inc. v J. Lucchese & Son Contr. Corp., 247 AD2d 515, supra [account stated claim dismissed after court determined plaintiff had no contract claim]).

Moreover, a review of the documents attached as Exhibit 1 to the complaint reveals that none of the invoices are directed to PMG, HFZ Capital or West 73rd Street, and thus cannot constitute an account stated against these defendants (see Brown Rudnick Berlack Israels LLP v Zelmanovitch, 11 Misc 3d 1090(A) [Sup Ct, Kings County 2006] [in order for an account stated to be established, the invoices must be addressed to the party responsible for the payment]; see also M & A Constr. Corp. v McTague, 21 AD3d 610 [3d Dept 2005] [a cause of action for

account stated cannot be maintained when the plaintiff does not establish that an account was presented to the defendants]; Abbot, Duncan & Weiner v Ragusa, 214 AD2d 412 [1st Dept 1995] [same]).

It must also be noted that the documents annexed as Exhibit 1 to the complaint do not constitute an account stated against anyone. Many of the documents appear to be plaintiff's internal notes. Most documents do not include any pricing information. There is no document which establishes an account, or serves as a summary of invoices or amounts that are outstanding and due, or a balance that it due.

Accordingly, the complaint fails to state a cause of action for account stated as against the moving defendants, and must be dismissed.

Likewise, plaintiff's second cause of action for breach of contract does not state a cause of action against the moving defendants, as it fails to present evidence of any contract between plaintiff and the moving defendants. Ziel Feldman, the Principal of PMG, HFZ Capital, HFZ Real Estate and West 73rd Street, alleges that there is no contract, other than the Agreement between plaintiff and HFZ Real Estate, pursuant to which plaintiff supplied any work, labor, services or materials to the Premises (see Aff. of Ziel Feldman, ¶ 18), and indeed, none of the voluminous documents attached to the complaint reveal a contract between plaintiff and the moving defendants. There is no allegation in the complaint that PMG, HFZ Capital or West 73rd Street executed or were otherwise parties to the Agreement, or that there is any other basis to claim that these defendants are liable under the Agreement. In addition, a review of the Agreement itself establishes that the only signatories to the Agreement are plaintiff and HFZ Real Estate (see Mirer Aff., Exh A). PMG is not a party to the Agreement. HFZ Capital is not a

party to the Agreement. West 73rd Street is not a party to the Agreement (see id.).

As a general rule, in order for someone to be liable for a breach of contract, that person must be a party to the contract (Smith v Fitzsimmons, 180 AD2d 177, 180 [4th Dept 1992] ["As a general rule, privity or its equivalent remains the predicate for imposing liability for nonperformance of contractual obligations"]; Perma Pave Contr. Corp. v Paerdegat Boat and Racquet Club, 156 AD2d 550, 551 [2d Dept 1989] ["It is well settled that a subcontractor may not assert a cause of action to recover damages for breach of contract against a party with whom it is not in privity"]; see e.g. HDR, Inc. v International Aircraft Parts, 257 AD2d 603, 604 [2d Dept 1999] ["Neither of these defendants was a party to the contract alleged to have been breached. As such, they cannot be bound by the contract"]).

Here, privity of contract does not exist – nor has it been alleged – between plaintiff on one hand, and PMG, HFZ Capital or West 73rd Street on the other. The moving defendants are not alleged to be parties to the Agreement, and the complaint contains no allegations that provide a basis for holding them contractually liable under any other theory. As a result, the second cause of action for breach of contract as against PMG, HFZ Capital and West 73rd Street fails to state a cause of action, and must be dismissed, pursuant to CPLR 3211 (a) (1) and (7) (see id.).

In opposition, plaintiff does not deny that the moving defendants were not signatories to the Agreement. Plaintiff asserts that, nevertheless, the motion to dismiss must be denied on the ground that Ziel Feldman is a principal of each of the moving defendants. Plaintiff contends that, because there is common ownership and an apparent overlap of responsibilities between HFZ Real Estate and PMG, HFZ Capital and West 73rd Street, it would be premature to

consider a motion to dismiss against any of the named defendants until discovery is complete. In essence, plaintiff's argument appears to be that HFZ Real Estate's corporate identity should be disregarded, and that the moving defendants should be liable for the alleged breach of contract by HFZ Real Estate.

This bare allegation, however, set forth in plaintiff's opposing affidavit, is not sufficient to support a claim for piercing the corporate veil. To do so, plaintiff was required to plead 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" (Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 141 [1993]; see also TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 [1998] ["Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences"]).

Plaintiff has not met this requirement. It has not alleged that there has been domination of HFZ Real Estate by any of moving defendants, nor has plaintiff alleged that the moving defendants used that domination to commit a fraud on it.

Plaintiff also contends that the breach of contact cause of action cannot be dismissed because the moving defendants are necessary parties to the breach of contract cause of action. In support of this argument, plaintiff cites CPLR 1001 (a), which provides that:

> Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made

plaintiffs or defendants.

Here, it is clear that the moving defendants are not necessary parties to a determination of HFZ's liability under the Agreement. The only parties that are necessary in order for complete relief to be accorded between plaintiff and HFZ Real Estate under the Agreement are plaintiff and HFZ Real Estate, the only signatories to the Agreement. Because the moving defendants are not parties to the Agreement, they are not necessary parties to plaintiff's breach of contract action (see Migliore v Manzo, 28 AD3d 620 [2d Dept 2006] [buyer's father was not necessary party in buyer's action against seller to reform contract for sale of stock, even though buyer transferred his share to his father subsequent to execution of contract, where buyer and seller were only signatories to contract, and thus, complete relief could be afforded between them]). Likewise, the mere corporate relationship between HFZ Real Estate and the moving defendants does not make the moving defendants necessary parties to the breach of contract cause of action (see Taran Furs v Champagne Bridals, 116 AD2d 970 [4th Dept 1986] [debtor, which was separate and distinct from corporation, was not necessary party in action by seller against corporation for breach of contract, even though debtor and corporation shared common ownership]).

In addition, as the moving defendants are not parties to the Agreement, they will obviously not be "inequitably affected by a judgment in the action" (see Country Vill. Towers Corp. v Preston Communications, 289 AD2d 363 [2d Dept 2001]; Boccardi v Horn Constr. Corp., 204 AD2d 502 [2d Dept 1994]).

Accordingly, plaintiff's second of cause of action for breach of contract must be dismissed as against the moving defendants.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is hereby severed and dismissed as against defendants Property Management Group, Inc., HFZ Capital Group LLC and 240 West 73rd Street LLC, with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it further

ORDERED that the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated: June 11, 2007

ENTER:

HON. RICHARD B. LOWE, III