COPY

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

ASAD AHMAD and **SALMA AHMAD,** Plaintiff, - against - **JM BUILDERS & ASSOCIATES, INC; FM 2 SQUARE CONSTRUCTION CORP;** and **FRANK MARTUSCIELLO,** Defendant.	**INDEX NO.:** :	**2004-23703**
	MOTION SEQ. NO.: :	004 - MD
	ORIG. MOTION DATE: :	09/20/06
	MOTION SEQ. NO.: :	005 - Mot D
	ORIG. MOTION DATE: :	11/01/06
	FINAL SUBMIT DATE: :	05/02/07

UPON the following papers numbered 1 to 85 read on these Motions:

- Plaintiffs' Motion (004) (Pages 1-11 & Exhibits A-I);
- Defendants FM2 & MARTUSCIELLOs' Support (Pages 12-15);
- Defendant JM BUILDERS' Opposition (Pages 16-34);
- Plaintiffs' Reply (Pages 35-47 & Exhibit A);
- Plaintiffs' Motion (005) (Pages 48-57 & Exhibit A);
- Defendant JM BUILDERS' Opposition (Pages 58-67);
- Plaintiffs' Reply (Pages 68-77 & Exhibit A);
- Defendant JM BUILDERS' Combined Opposition (Pages 78-83 & Exhibits A-D);
- Plaintiffs' Counsel's Letter, dated April 30, 2007 (Pages 84-85);

it is,

ORDERED, that the first application of Plaintiffs is hereby denied in all respects; and the second application of Plaintiffs is hereby granted in part and denied in part.

This action was brought to recover damages arising out of an alleged breach of written contract, dated December 16, 2003, between Plaintiffs and Defendants JM BUILDERS, for construction of a home at 472 Edgewood Avenue, St. James, New York.

Plaintiffs move this Court (004) for an Order, pursuant to CPLR 2221(d), (e) and (f), for leave to reargue and/or renew this Court's Order dated July 5, 2006, which Order dismissed all causes of action against former Defendant MELI and amended the caption in this action to remove him.

Plaintiffs then move this Court (005) for;

1. An Order, pursuant to CPLR 3025(c), granting leave to amend the Complaint to conform it to the evidence, or CPLR 3025(b), granting leave to amend the Complaint on such terms as may be just; and an Order; and
2. An Order, pursuant to CPLR 3124, Compelling Defendants JM BUILDERS and MELI (who the Court

notes is no longer a Defendant herein) to provide proper responses to Plaintiffs' Notice of Discovery and Inspection and Demand for Interrogatories.

With regard to the affirmation submitted in support of the first application herein, this Court offers a caution that same states, "...written contract dated December 16, 2003, which contract was entered into between Plaintiffs and Defendants J.M. BUILDERS & ASSOCIATES, INC. (hereinafter JM BUILDERS) and JOE MELI...", and that nowhere in the submissions offered to this Court is such a contract, entered into by JOE MELI, but instead this Court is in possession of a contract, the last page of which is dated 12/6/03 (submitted by Plaintiffs, and attached to the affirmation referenced herein) which is entered into by Plaintiffs and "JOE MELI, President, J.M. Builders", ONLY.

As to that portion of Plaintiffs' first application, regarding renewal, it is well settled that an application to renew must be based on additional material facts which were in existence at the time the prior motion was made, but were not then known to the party moving for leave to renew; and that in order to succeed, the moving party must demonstrate that the new facts not offered on the prior motion would change the previous determination rendered (*See:* ***Greene v NYCHA***, 283 AD2d 458 [2 Dept 2001]). The Court finds that the new facts offered would not have resulted in a different decision in the within matter. Therefore, leave to renew is hereby denied.

As to that portion of Plaintiffs' first application, regarding reargument, it is well settled that such a motion is addressed to the discretion of the Court, affording the moving party an opportunity to demonstrate that the Court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law, and not to afford an opportunity to argue once more the same questions previously decided (*See:* ***Hoey-Kennedy v Kennedy***, 294 AD2d 573 (2 Dept, 2002); ***Long v Long***, 251 AD2d 631 (2 Dept, 1998); ***Foley v Roche***, 68 AD2d 558 [1 Dept 1979]; and CPLR 2221(d)). A motion to reargue is not a means by which the unsuccessful party can obtain a second opportunity to argue issues previously decided or to present new or different arguments relating to previously decided issues. (*See:* ***McGill v Goldman***, 261 AD2d 593 (2 Dept, 1999); and ***Pahl Equipment Corp v Kassis***, 182 AD2d 22 (1 Dept, 1992). The Court found nothing to support Plaintiffs' request for relief herein, and stands fully by its prior decision. Therefore, leave to reargue is hereby denied.

As to that portion of Plaintiffs' second application, regarding leave to amend the Complaint, first the Court acknowledges the strategy herein to make an end-run around the Court's prior ruling dismissing this action against Defendant MELI, and directs the parties herein to ***Cippitelli Bros Towing and Collision, Inc v Rosenfeld,*** 171 AD2d 637, 566 NYS2d 950 [2 Dept 1991], wherein the Appellate Division, Second Department, in a case clearly on point, states, "...the decision to grant or deny leave to amend is committed to the discretion of the Supreme Court (*see,* ***Mayers v D'Agostino,*** 58 NY2d 696). Where, as here, the plaintiffs' motion was submitted as part of their motion for reargument, the Supreme Court did not improvidently exercise its discretion in denying leave to amend the complaint.". The Court notes that this action dates back to 2004, and that there has already been an Amended Complaint filed by Plaintiffs herein.

Furthermore, in a decision even more strikingly on point, there are numerous very instructive quotations from ***Courageous Syndicate, Inc v People-to-People Sports Committee, Inc,*** 141 AD2d 599, 529 NYS2d 520 [2 Dept 1988]:

"It is without question that motions to amend pleadings "shall be freely given upon such terms as may be just with the decision to allow or disallow the amendment committed to the court's discretion" (***Rothfarb v Brookdale Hosp,*** 139 AD2d 720, 721-722, *citing* CPLR 3025[b]; ***Barnes v County of Nassau,*** 108 AD2d 50, 52; ***Koch v St Francis Hosp,*** 112 AD2d 142; ***Scarangello v State of New York,*** 111 AD2d 798)."

"...the merits of a proposed amendment will not be examined on the motion to amend--unless the insufficiency or lack of merit is clear and free from doubt"' (***Rothfarb v Brookdale Hosp,*** *supra*, at 722, *quoting from* ***Norman v Ferrara,*** 107 AD2d 739, 740). However, when such an examination is necessary, leave to amend should be denied where "the amendment sought is palpably improper or insufficient as a matter of law" (***Barnes v County of Nassau,*** *supra*, at 52)."

"This court has repeatedly observed that"no cause of action to recover damages for fraud arises when the only fraud charged relates to a breach of contract" (***Edwil Indus v Stroba Instruments Corp,*** 131 AD2d 425; *see,* ***Spellman v Columbia Manicure Mfg Co,*** 111 AD2d 320; ***Gould v Community Health Plan,*** 99 AD2d 479)."

"...leave to amend was properly denied "[s]ince the cause of action at issue here does not allege the breach of a duty extraneous to, or distinct from the contract between the parties" (***Edwil Indus v Stroba Instruments Corp,*** *supra; see,* ***North Shore Bottling Co v Schmidt & Sons,*** 22 NY2d 171; ***Channel Master Corp v Aluminium Ltd Sales,*** 4 NY2d 403)."

"Additionally, the court properly dismissed the complaint as against the defendant Leonard Milton personally. Generally, a "'director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken"' (***Murtha v Yonkers Child Care Assn,*** 45 NY2d 913, 915, *on remand* 69 AD2d 813, *quoting from* ***Matter of Brookside Mills [Raybrook Textile Corp],*** 276 App Div 357, 367; *see,* ***Burger v Brookhaven Med Arts Bldg,*** 131 AD2d 622, 623; ***Citicorp Retail Servs v Wellington Mercantile Servs,*** 90 AD2d 532). Moreover, "'[A] corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith ... [and did not commit] independent torts or predatory acts directed at another"' (***Murtha v Yonkers Child Care Assn,*** *supra*, at 915, *quoting from* ***Buckley v 112 Cent Park S,*** 285 App Div 331, 334). The complaint must allege that the officers' or directors' "acts were taken outside the scope of their employment or that they personally profited from their acts" (***Citicorp Retail Servs v Wellington Mercantile Servs,*** *supra*, at 532). We find that, although entitled "fraud", the plaintiffs' second cause of action merely states a breach of contract claim and, furthermore, that the allegations contained therein do not represent that the defendant Leonard Milton "acted for personal profit or committed independently tortious acts" (***Citicorp Retail Servs v Wellington Mercantile Servs,*** *supra*, at 533; ***Handy v Geften Realty,*** 129 AD2d 556, 557; ***Conway v Bayley Seton Hosp,*** 104 AD2d 1018, 1019)."

Since this Court has previously determined that Plaintiffs failed to demonstrate proper grounds in support

of piercing the corporate veil and therefore maintaining an action against former Defendant MELI, an herein denies leave to renew or reargue said determination, the amendment sought by Plaintiffs in the instant second application is palpably improper or insufficient as a matter of law, lacks any new evidence upon which to conform the Complaint, nor terms as may be just, as further supported by the above cited Second Department case.

The parties are further directed to the following relevant citations regarding the issue of what is requisite in order to prevail in piercing the corporate:

In ***State of New York v Robin Operating Corp***, 3 AD3d 769, 773 NYS2d 137 [3 Dept 2004], the Appellate Division set forth the elements necessary to prevail in such an action, stating that, generally, a party seeking to pierce the corporate veil must show that: (1) the owners of the corporation exercised complete domination thereof with respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the complaining party which resulted in their injury (*See:* ***Morris v New York State Dept of Taxation & Fin***, 82 NY2d 135, 603 NYS2d 807, 623 NE2d 1157 [1993]; ***Island Seafood Co v Golub Corp***303 AD2d 892, 759 NYS2d 768 [2003]).

In ***Treeline Mineola, LLC v Bergi***, 21 AD3d 1028, 801 NYS2d 407 [2 Dept 2005], the Appellate Division stated that, while the Courts are empowered to pierce the corporate veil in appropriate circumstances, in view of the well established fact that a business can be incorporated for the very purpose of enabling its proprietor to escape personal liability, said corporate form is not lightly to be disregarded, and indeed the precedent is clear that the Courts will pierce the corporate veil only to prevent fraud or illegality, or to achieve equity, even in situations where the corporation is controlled or dominated by a single shareholder (*See:* ***Bowles v Errico***, 163 AD2d 771, 558 NYS2d 734; ***New York Assn for Retarded Children, Montgomery County Ch v Keator***, 199 AD2d 921, 606 NYS2d 784). As in the instant situation, Plaintiff therein failed to establish that the sole shareholder/proprietor, through his control and domination over the corporation, perpetuated a wrong or injustice against Plaintiff such that a Court of equity would intervene (*See:* ***Morris v New York State Dept of Taxation & Fin***, *supra*; ***Weiss v Marjam of Long Island***, 270 AD2d 455, 705 NYS2d 76; ***Kopec v Hempstead Gardens***, 264 AD2d 714, 696 NYS2d 53; ***Palisades Off Group v Kwilecki***, 233 AD2d 490, 650 NYS2d 990).

The record herein is devoid of such proof, and therefore leave to amend the Complaint must be denied.

As to that portion of Plaintiffs' second application to compelling Defendant JM BUILDERS to provide proper responses to Plaintiffs' Notice of Discovery and Inspection and Demand for Interrogatories, it is without doubt that said relief must be granted.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Plaintiffs(004) for an Order for leave to reargue and/or renew this Court's Order dated July 5, 2006 (dismissing all causes of action against former Defendant MELI and amending the caption remove his name), is hereby denied in all respects; and it is further

ORDERED, that the portion of the application of Plaintiffs (005) for an Order granting leave to amend the Complaint to conform it to the evidence, or granting leave to amend the Complaint on such terms as may

be just, is hereby denied in all respects; and it is further

ORDERED, that the portion of the application of Plaintiffs (005) for an Order compelling Defendants JM BUILDERS and MELI to provide proper responses to Plaintiffs' Notice of Discovery and Inspection and Demand for Interrogatories, is denied as to MELI, who is no longer a Defendant in this action, and granted as to Defendant JM BUILDERS, who is hereby directed to comply with said demands within 60 days of service of a copy of this Order, as set forth herein below; and it is further

ORDERED, that all parties are hereby directed to use the proper Caption for this action in all future proceedings; and it is further

ORDERED, that Counsel for Plaintiffs is hereby directed to serve a copy of this order, with Notice of Entry, upon all parties and upon the Calendar Clerk of this Court and the Suffolk County Clerk within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

Dated: **Riverhead, New York**
June 29, 2007

HON. JEFFREY ARLEN SPINNER, J.S.C.

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Somer & Heller LLP
Attorneys for Plaintiffs
2171 Jericho Turnpike, Suite 350
Commack, New York 11725

Mark A. Billhimer, Esq.
Attorney for Defendant J.M. BUILDERS
Attorney for former Defendant MELI
385 West John Street, 2nd Floor
Hicksville, New York 11801

Mazzei & Blair, Esqs.
Attorney for Defendant s FM 2 MARTUSCIELLO
9B Montauk Highway
Blue Point, New York 11715