Marshall v Everett Constr. Co., LLC
2007 NY Slip Op 33125(U)
September 25, 2007
Supreme Court, New York County
Docket Number: 0604342/2005
Judge: Michael D. Stallman
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[* 1]
SCANNED ON 10/1/2007

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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 604342/2005

MARSHALL, JEREMY

vs

EVERETT CONSRUCTION

Sequence Number : 006

AMEND SUPPLEMENT PLEADINGS

INDEX NO. 604342/05

MOTION DATE 6/7/07

MOTION SEQ. NO. 006

MOTION CAL. NO. 66

The following papers, numbered 1 to 4 were read on this motion to/for leave to amend

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion **"is determined in accordance with the annexed memorandum decision and order."**

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

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 9/25/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

---X

JEREMY MARSHALL and JENNIFER MARSHALL,

Plaintiffs,

-against-

Index No. 604342/05

Decision and Order

EVERETT CONSTRUCTION COMPANY, LLC,

Defendant.

---X

FILED OCT 01 2007 COUNTY CLERK'S OFFICE NEW YORK

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiffs, a married couple, seek to recover damages arising from a construction project in which their two residential apartments were to be joined to create one larger apartment. In this motion, sequence number 6, plaintiffs seek leave to amend and supplement their complaint, pursuant to CPLR 3025, to add new causes of action, facts and theories, and to add defendant Everett Construction Company, LLC's (Everett) alleged managing member, Anthony Piscionere, as a defendant.

Background

In the original complaint (Original Complaint), filed in December 2005, plaintiffs allege that they reside at the two apartments they own in a Manhattan co-op (the Apartments). In May 2005, plaintiffs hired Everett, a New York limited liability company with offices in Mamaroneck, New York, as the contractor to combine the Apartments into a single residence (the Project). Prior to commencing work on the Project, plaintiffs claim that Everett, with the intention to deceive, represented to plaintiff Jeremy Marshall that it operated in accordance with New York City law. Thereafter, in November 2005, within two weeks before they filed the Original Complaint, plaintiffs

allege that Everett walked off the job and refused to continue, and they discovered that Everett was not licensed as a home improvement contractor under the Administrative Code of the City of New York (Administrative Code).[1] Plaintiffs state that they would not have hired Everett had they known that it did not have a home improvement license (the License), and that "upon information and belief," although unlicensed, Everett has repeatedly engaged in renovations and improvements to New York City residences.

Plaintiffs also claim that from June through October 2005, they paid to Everett $344,000, relying upon its representations that the fair value of work done for them by Everett exceeded that amount, and that Everett was in compliance with the laws and regulations of the City of New York. Plaintiffs further allege that Everett's work was shoddy, done in an unsuitable manner with defective materials, and not done as specified by their architect.

Despite that Everett was unlicensed, plaintiffs contend that it demanded an additional $42,000 from them, and possesses, but has not released to them, items specifically constructed for the Apartments. The Original Complaint contains five causes of action for money damages grounded in various theories, including breach of contract and fraudulent inducement, and seeks a declaration that Everett was not entitled to recover additional funds, as well as specific performance for turnover of the custom-made items for the Apartments.

In January 2006, Everett served an answer and counterclaims seeking to recover additional sums on the contract, and for quantum meruit. By order dated March 28, 2006, plaintiffs were granted summary judgment, dismissing Everett's counterclaims, because Everett was not licensed

[1]Administrative Code § 20-387 (a) provides that "[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesperson from an owner without a license therefor."

as a home improvement contractor.[2]

Discussion

In support of their motion to amend and supplement the complaint, plaintiffs, through their attorney, state that after filing their Original Complaint, they finished the construction on the Apartments, repaired the defective work done by Everett, and tallied up the final costs of the Project, and their delay damages. Plaintiffs also state that through discovery in the action, information, either not previously known, or not alleged in the complaint, "came to light," including that Everett: (1) gave plaintiffs a list of references that included projects it had not actually done; (2) subcontracted nearly the entire job to an individual for 25% of what it billed plaintiffs; (3) made no effort to verify its requisitions for payment through backup documentation; and (4) did not tell plaintiffs that it did not have a home improvement contractor's license (Elliott Aff., § 8).

Everett opposes the motion generally, characterizing plaintiffs' attempt to amend the Original Complaint as an improper attempt to add legally unsustainable claims, increase their damages demand, and to pierce Everett's veil to reach Piscionere. Everett also claims that it will be prejudiced if it is forced to commence discovery anew, including conducting the depositions of all parties on the new allegations.

Absent prejudice or surprise, "[l]eave to amend pleadings . . . is to be freely given" (*Cherebin v Empress Ambulance Serv., Inc.*,--- AD3d ----, 2007 WL 2445129 [1st Dept 2007]). "Where there is 'extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion'" (*id.*, quoting *Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 398-399 [2d Dept 1995] [motion to amend made after start

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[2]The motion was granted by order of the Honorable Faviola A. Soto.

of trial and approximately 10 years after action's commencement]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position,'" and mere delay is insufficient to defeat an amendment in the absence of prejudice (*id.*, quoting *Loomis v Civetta Corrino Constr. Corp.*, 54 NY2d 18, 23 [1981]).[3]

"The party opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th St., LLC,* 42 AD3d 82, 86 [1st Dept 2007]). Where a court concludes, however, that an application for leave to amend a pleading clearly lacks merit, fails to state a cause of action, or is palpably insufficient as a matter of law, leave is properly denied (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]; *Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]). The determination of whether to allow amendment is within the court's discretion (*Peach,* 42 AD3d at 86).

In the first through fifth causes of action of the Proposed Complaint, plaintiffs seek money damages for various alleged breaches of the parties' agreement, including defective work, over-billing, repairs of defective work, and completion of the Project. As there is significant overlap between the Original Complaint and the first five causes of action of the Proposed Complaint, with the proposed pleading providing more detail, Everett's claim of prejudice rings hollow. Consequently, plaintiffs' motion for leave to amend is granted as to the first five causes of action,

[3]Although plaintiffs, in their reply, request application of the CPLR 3211 (a) (7) standard, arguing that the allegations of the Proposed Complaint must be taken as true, this is not the standard on a motion to amend a pleading (*see Non-Linear Trading Co. v Braddis Assoc.*, 243 AD2d 107, 116 [1st Dept 1998]).

except as to paragraph 17 (M) of the Proposed Complaint, to the extent that plaintiffs seek recovery because Everett reaped an "an unconscionable profit," as no cause of action lies for such a claim.

In the sixth cause of action of the Proposed Complaint, plaintiffs allege that Everett breached the implied covenant of good faith and fair dealing. Specifically, plaintiffs allege that Everett prevented other parties from releasing custom-ordered materials made for the Project, did not have the License, and hid from plaintiffs that it lacked the License in order to induce them to hire it.

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance," a covenant that encompasses the promises that a reasonable person would be justified in understanding were included in the contract (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). A cause of action for breach of the implied duty of good faith and fair dealing, however, cannot be maintained where the alleged breach is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320 [1st Dept 2004], quoting *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]).

The allegations of the sixth cause of action concerning the releasing of materials and supplies and Everett's lack of a home improvement license repeat the allegations of plaintiffs' contract claims (*see* Proposed Complaint, 18 [K], [L], [N]). Plaintiffs make no distinction as to the damages arising from the sixth cause of action and the contract claims, and the claim is duplicative (*see Pludeman v Northern Leasing Sys.*, 40 AD3d 366 [1st Dept 2007] [upholding dismissal of cause of action for breach of covenant of good faith and fair dealing where allegations of overcharges sufficiently stated in contract cause of action]).

Furthermore, plaintiffs' allegation that Everett hid that it was not licensed in order to induce

plaintiffs to enter into the contract does not state a claim because the allegation describes conduct that preceded the existence of a contract, when no implied covenant could have existed. Accordingly, leave to amend the complaint to add the sixth cause of action of the Proposed Complaint is denied.

In the seventh cause of action of the Proposed Complaint, plaintiffs allege that, in order to induce them to enter the contract, Everett misrepresented to them that it performed "high end" residential construction projects and had the skill and manpower to perform the Project. Plaintiffs contend that these representations imply that Everett possessed all of the necessary licenses. Plaintiffs also allege that Everett provided to them a reference list of New York City residential projects it had performed, when it had not performed all of the projects on the list. Stating that they reasonably relied on these representations and would not have hired Everett had they known the truth as to its licensing status and prior work experience, plaintiffs seek damages of the amount they paid to Everett, $344,154.16.

To sustain a claim for fraudulent inducement, there must be a knowing misrepresentation of material fact, which is intended to deceive another party and to induce them to act upon it, causing injury (*Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 (1958); *Smalley v Dreyfus Corp.*, 40 AD3d 99, 104 [1st Dept 2007]). It is well established that a simple breach of contract does not give rise to an action in tort (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 392 [1987]). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract, and not merely a misrepresented intent to perform" (*Hawthorne Group, LLC,* 7 AD3d at 323-324 [citation omitted]; *Krantz v Chateau Stores of Canada*,

256 AD2d 186, 187 [1st Dept 1998]; *see also New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]).

Everett argues that the Proposed Complaint fails to allege tort liability, or a breach of duty that is distinct from, or in addition to, the breach of contract claim, and that any reliance allegation is defeated by plaintiffs' failure to contact the listed references or, in the case of the License, the New York City Department of Consumer Affairs (DCA). In reply, plaintiffs counter that customers should be able to rely on what they are told, and object to what they characterize as Everett's suggestion that they should have vetted its qualifications. Plaintiffs also assert that their breach of contract and fraud claims do not rely on the same facts, theories, or damages, in that their contract claim is based on Everett abandoning its defective work, and their fraud claim on Everett's billing and misrepresentation of its experience.

There can be no showing of justifiable reliance to support a claim of fraud where one to whom an alleged misrepresentation is made has means to discover the truth by the exercise of ordinary intelligence (*Peach,* 42 AD3d at 87 at 176; *see also Shao v 39 College Point Corp.*, 309 AD2d 850 [2d Dept 2003]; *Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 99 [1st Dept 1997]). Plaintiffs do not allege, and it is undisputed, that they did not contact the references provided by Everett, and thus may not claim reliance based on the reference list.

The remaining fraudulent inducement allegations in the Proposed Complaint concern plaintiffs' allegation that Everett implied that it was licensed when it stated that it performed "high end" residential construction projects, and had the skill and manpower to perform the Project. There is a difference between having skill and manpower and being licensed, and plaintiffs do not state

facts to support a reasonable inference of active concealment concerning the License.[4] Plaintiffs also do not claim that they inquired as to whether Everett was licensed and, in essence, their claim is based on no more than their assumption that Everett was licensed.[5]

To the extent that fraud is based on allegations that Everett misrepresented that it had the skill and manpower required to perform the work, plaintiffs have not alleged the element of falsity with particularity. Plaintiffs do not allege in what manner Everett's skill and manpower were inadequate, so that Everett has notice of the facts that plaintiffs claim Everett misrepresented. Moreover, by itself, the alleged representation "constitute[s] mere opinion or puffery, were not actionable representations of fact" (*Reich v Mitrani Plasterers Co.*, 268 AD2d 256, 256 [1st Dept 2000]). Therefore, leave to amend to add the proposed seventh cause of action is denied.

In the eighth cause of action of the Proposed Complaint, plaintiffs allege that Everett submitted applications for payment, in which it knowingly misrepresented the percentage of work completed on, and the materials and supplies that had been ordered for, the Project. Everett also allegedly misrepresented that it supplied the labor for the Project, when it was provided by third parties at a fraction of the cost billed to plaintiffs, and thus obtained what plaintiffs assert was an unconscionable profit. For this cause of action, plaintiffs seek, in an amount to be proven at trial, return of payments they made for work they allege was not done.

Plaintiffs' allegations concerning Everett's billing merely duplicate the breach of contract

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[4]Plaintiffs make no such allegations despite that they have been conducting discovery in this case for some time, and party depositions have already been held. In addition, plaintiffs no longer allege that Everett represented to plaintiff Jeremy Marshall that it had the appropriate license.

[5]The Court also notes that case law supports the proposition that, where the claim of fraud is predicated on concealment, there can be no relief if the fact not disclosed was a matter of public record (*Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38 (1st Dept 2000), and that DCA is required, pursuant to Administrative Code § 20-104, to keep and make available to the public records of licensed contractors.

misdemeanor pursuant to Administrative Code § 20-401. That would improperly substitute a civil action, with its lower standard of proof, for a criminal action, with its higher standard of proof (which is properly brought only by the District Attorney in a court of competent criminal jurisdiction).

Moreover, plaintiffs' request for a declaration ordering DCA's commissioner to grant specific relief pursuant to Administrative Code § 20-401 (3) ignores that the provision specifically accords discretion to the commissioner, not a court, to grant that relief.[6] In addition, the motion must also be denied because the commissioner is not a named party, and thus would not would not be bound by a decision in this action; moreover, procedurally, this action has not been brought pursuant to Article 78 of the CPLR.

Also in the ninth cause of action, plaintiffs seek a declaration that Everett cannot enforce its contract with them, or be awarded any recovery against them, whether under a theory of breach of contract, quantum meruit, or setoff, and must return the $344,154.16 they paid to it. As previously discussed, Everett interposed counterclaims, in which they sought compensation for work on the Project, which have been dismissed on the merits. Furthermore, a court will not entertain such an action when whatever decree it might issue will become effective only upon the occurrence of a future event that may never occur (*see Employers' Fire Ins. Co. v Klemons*, 229 AD2d 513, 514 [2nd Dept 1996]). Finally, plaintiffs state nothing to suggest that money damages would not be an adequate and complete remedy.

In the tenth cause of action, denominated "interference with contract," plaintiffs allege that

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[6]Administrative Code § 20-401 (3) provides that, under certain circumstances, "the commissioner may order the contractor to pay to the owner an amount which shall not exceed three times the actual amount of any damages sustained by the owner" resulting from violation of that subchapter.

Everett prevented suppliers from releasing to them materials which were already paid for that plaintiffs need to continue with the Project. "Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v Smith Barney.*, 88 NY2d 413, 424 [1996]). This cause of action is duplicative of the breach of contract claim (*see* Proposed Complaint, ¶ 17 [K]), and as plaintiffs do not allege that *they* had a contract with a third party with which Everett interfered, a claim for tortious interference with contract is not stated as a matter of law.

The eleventh cause of action of the Proposed Complaint concerns the type and measure of damages plaintiffs claim that they are owed, including, inter alia, out-of-pocket expenses, their payments to Everett, payments to third parties to repair or complete Everett's work, delay damages, and punitive damages for fraudulent misrepresentation and willful operation in violation of law (Proposed Complaint, ¶ 86). As such demands do not constitute a cause of action, but merely concern damages, an issue not before the Court at this time, and are duplicative of certain requests for damages associated with the causes of action of the complaint, plaintiffs' request is denied without prejudice to their seeking damages in connection with each of the causes of action stated in the Proposed Complaint.[7]

In their twelfth cause of action, plaintiffs allege that the parties' contract is a consumer-oriented transaction under GBL § 349 and Administrative Code §§ 20-700 to 20-703, and that

[7]Administrative Code § 20-396 provides for recovery of damages and an additional five hundred dollars to those induced to contract for home improvements in reliance on false or fraudulent representations or statements knowingly made by contractors or their employees, provided that the damages are sustained because of those representations or statements.

Everett's acts and practices in engaging in residential construction without having obtained the License had a broad impact upon customers at large because Everett has many other clients who have hired it to perform construction. Plaintiffs further allege that in agreeing to perform home improvements for them without the License, Everett engaged in a materially deceptive and misleading practice, and acted maliciously and with scienter, causing plaintiffs to lose more than $400,000.

The elements of a cause of action for deceptive practices under GBL § 349 are: 1) that the defendant made misrepresentations or omissions that were likely to mislead a reasonable consumer in the plaintiff's circumstances, 2) that the plaintiff was deceived by those misrepresentations or omissions, and 3) that as a result of the deception, the plaintiff suffered injury (*Solomon v Bell Atlantic Corp.*, 9 AD3d 49 [1st Dept 2004]; *see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v Marine v*

Marine Midland Bank, 85 NY2d 20 [1995]). "Consumers" are "those who purchase goods and services for personal, family or household use" (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000]). To violate GBL § 349, a defendant must mislead a plaintiff in some material way (*see Stutman*, 95 NY2d 24, *supra*).

A party seeking to recover under GBL § 349 must allege that the defendant's acts or practices have a broad impact on consumers at large (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999]; *Oswego*, 85 NY2d at 24-25; *Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000]). "'[P]rivate contract disputes unique to the parties . . . would not fall within the ambit of the statute'" (*see New York Univ.*, 87 NY2d at 320, quoting *Oswego*, 85 NY2d at 25; *Teller v Bill Hayes, Ltd.*, 213 AD2d 141 [2d Dept 1995]).

Everett opposes plaintiffs' attempt to add a GBL § 349 claim, arguing that this is a private

contract dispute, and that plaintiffs cannot and did not plead that the alleged concealment of the fact that Everett did not have a license had a broad impact on consumers at large. Everett also argues that the conduct complained of is not consumer-oriented, and that no consumer good is involved.[8] In reply, plaintiffs dispute Everett's contentions about the applicability of GBL § 349 to them, and argue that their claim is not a private contract dispute because it is premised on Everett's misrepresentation of its qualifications and its performance of residential construction in New York City, without the License, in violation of the Administrative Code.[9]

While GBL § 349 applies to virtually all economic activity (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002]; *Karlin v IVF Am.*, 93 NY2d 282, 290 [1999]), as mentioned, it applies only where a plaintiff pleads facts of a deceptive practice that has a broad impact on consumers at large (*Gaidon,* 94 NY2d at 344 [1999]; *Oswego*, 85 NY2d at 24-25; *Cruz*, 263 AD2d at 290). This case involves an agreement for the renovations of the Apartments that is, according to plaintiffs, tailored to their specific needs, and for an agreed-on price of over a half-million dollars.[10] The gravamen of this case is a contract dispute, or as plaintiffs describe it, "a construction case" (Elliott Aff., ¶ 3).[11] Thus, this is a dispute unique to these parties, does not involve conduct

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[8]GBL § 349 limits exemplary damages "to an amount not to exceed three times the actual damages up to one thousand dollars" where a plaintiff establishes scienter (*see Cruz*, 263 AD2d at 288).

[9]In the Proposed Complaint, plaintiffs allege that Everett has many other clients who have hired it to perform construction (Proposed Complaint, ¶ 89).

[10]Although plaintiffs state in the Proposed Complaint that the parties signed a "standard American Institute of Architects form of construction contract" (Proposed Complaint, ¶ 6), clearly the transaction, according to the plaintiffs, involves substantial construction, including customer-ordered materials fabricated especially for them (*id.*, ¶¶ 4, 8, 12, 50).

[11]Everett argues that the allegations of the twelfth cause of action do not confer on plaintiffs a private right or cause of action under subchapter 22 of the Administrative Code. Plaintiffs do not cite to subchapter 22 of the Administrative Code in that cause of action, but to "Article 22-A of the New York General Business Laws" (Proposed Complaint, ¶¶ 88, 93), which is GBL § 349, and Administrative Code §§ 20-700 to 20-703, that is, subchapter 1. Plaintiffs contend that defendant's argument that GBL § 349 does not confer a private right of action on citizens is wrong, but defendant's argument is not directed at that statute. In any event, as they make clear in their

that affects the public at large, and "was not the 'modest' type of transaction the statute was intended primarily intended to reach" (*New York Univ.*, 87 NY2d at 321). Accordingly, leave to amend the Original Complaint to add the twelfth cause of action is denied.

On another note, Everett objects to plaintiffs' demands for damages "in an amount to be proven at trial" as insufficient. Everett also argues that the motion should be denied because plaintiffs have submitted only an attorney's affirmation in support, and have not demonstrated a reason for their delay in making the application, or set forth facts to show that the increase in damages they seek has only recently come to their attention.

Plaintiffs allege that Everett improperly walked off the job midstream, and state that they discovered additional defects while construction on the Project was being completed, presumably during the duration of this action, which was commenced shortly after the parties parted ways. There have been no extended delays (*see e.g. Cherebin v Empress Ambulance Serv., Inc.*,—AD3D ----, 2007 WL 2445129, *supra* ["the delay itself was short (3 years after the alleged malpractice, 2 years after filing the original bill of particulars and prior to setting a trial date"]), and no note of issue has been filed in this case.[12] In addition, Everett has been on notice of the bulk of the allegations of the Proposed Complaint, as they overlap those of the Original Complaint. In light of such overlap,

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reply and the Proposed Complaint, plaintiffs seek to recover pursuant to GBL § 349, which does provide a private right of action to any person who has sustained an actual injury causes by a business's deceptive act or practice (GBL § 349 [h]).

[12]In *Osborne v Miller* (38 AD2d 298 [1st Dept 1972]), cited by Everett, a personal injury case, the Court, finding prejudice, reversed the trial court's order granting the plaintiff's motion for leave to amend her ad damnum clause where the plaintiff made the motion on the eve of trial, which was granted only after the jury had brought in a liability verdict in her favor, and where the plaintiff's injuries were known over five years before she made the motion. That case is not analogous to the circumstances here.

Everett's argument of prejudice is not persuasive.[13]

The Court agrees, however, that Everett should be apprised of the amount of damages demanded for each of the causes of the Proposed Complaint (*see e.g. Automobile Coverage, Inc. v American Intl. Group, Inc.*, 42 AD3d 405 [1st Dept 2007] [granting the plaintiff leave to amend its breach of contract cause of action, but finding the claim insufficiently pleaded pursuant to CPLR 3013, and directing that amended pleading set forth, inter alia, the amount sought on each commission claim). As CPLR 3025 provides that a motion to amend and supplement "shall be freely given upon such terms as are just," where they have not already done so, plaintiffs are directed to provide the amount of damages sought for each claim for which they are granted leave.

Finally, plaintiffs also seek to add Everett's managing member as a defendant, arguing that Piscionere should be subject to suit in this case where Everett gave fraudulent references and misrepresented its qualifications. Everett opposes the motion, stating that the agreement was only between it and plaintiffs and arguing that the relief plaintiffs seek is barred by Limited Liability Company Law § 609 (a) (LLCL § 609 [a]).

Pursuant to LLCL § 609 (a), members and managers of a limited liability company are expressly exempt from personal responsibility for the obligations of such company, unless a plaintiff successfully pierces the corporate veil (*see Collins v E-Magine*, 291 AD2d 350 [1st Dept 2002]).

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[13]Although there is support for Everett's assertion that certain eve-of-trial motions to amend must be supported by an affidavit demonstrating the reasons for the delay and that the increase is warranted by facts which have recently come to the attention of the plaintiffs (*see Griffin v New York City Transit Authority*, 1 AD3d 141 [1st Dept 2003] [denying motion to amend where defendants would have been prejudiced by the addition of the wrongful death claim because, where the action concerned the plaintiff's fall from a ladder, defendants had not been previously made aware of any potential cancer-related claim by way of a bill of particulars or otherwise]; *Dolan v Garden City Union Free School Dist*, 113 AD2d 781, 784-85 [2d Dept 1985]). This case is distinguishable from those as plaintiffs' motion was *not* made on the eve of trial, and the Original Complaint made clear that plaintiffs would likely claim that additional damages would accrue during the course of the action (*see e.g.* Elliott Aff., Exh. A [Original Complaint], ¶ 11 ["(i)t will cost many thousands of dollars to attempt to repair the shoddy unlicensed construction of Everett"]; ¶ 12 ["(a)s a further result of Everett's defective, delayed and shoddy unlicensed construction the completion of the job has been delayed by several months . . ."]).

In order to pierce the veil of a limited liability company, a plaintiff bears "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" (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]).

The sole allegation in the Proposed Complaint concerning Piscionere is that he was, and is, Everett's managing member and as such, exercised control and supervision over Everett's actions (Proposed Complaint, ¶ 3). Such conduct, however, is not inconsistent with the role of a managing member, or indicative of wrongdoing. Plaintiffs do not, in even a conclusory manner, provide factual allegations in the Proposed Complaint regarding Piscionere's domination and control of the company which was used to commit a fraud or wrong, or describe wrongful acts on Piscionere's part.[14] Piscionere cannot be held liable for the Everett's obligations by mere virtue of his status as a member thereof (*see Albstein v Elany Contr.*, 30 AD2d 210 [1st Dept 2006] [stating that where gravamen of the amended complaint was breach of contract for substandard performance and/or incomplete work, claims against the corporation's owner in personal capacity based on allegations that owner "'oversaw' and 'orchestrated' the renovation of plaintiff's apartment" claims were properly dismissed by the lower court]; *Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209 [1st Dept 2005]). While plaintiffs argue that whether Everett's veil should be pierced to reach Piscionere involves factual issues for trial, their argument is unpersuasive where they have not pleaded allegations in their Proposed Complaint to support a claim for piercing, and leave to amend the complaint to add Piscionere as a defendant is denied.

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[14] In support of their motion to add Piscionere as a defendant, plaintiffs state only that Piscionere testified that he personally supervised the administration of plaintiffs' construction and supervised preparation of Everett's payment requisitions, which plaintiffs allege were fraudulent, and without backup documentation. Plaintiffs were not permitted to amend and supplement their complaint to state a fraud claim based on this conduct, however, and do not otherwise discuss Piscionere.

Conclusion

Accordingly, it is

ORDERED that plaintiffs' motion for leave to amend and supplement the Original Complaint herein is granted, in part, to the extent that leave shall be granted to amend the first, second, third, fourth, and fifth causes of action; and it is further

ORDERED that plaintiffs shall serve upon defendant, within 20 days of receipt of a copy of order with notice of entry, an amended complaint containing only those causes of action for which this decision has granted plaintiffs leave to amend (and any causes of action remaining unamended from the original complaint), and plaintiffs shall included in the amended complaint an amount of damages demanded for the first, second, fourth, and fifth causes of actions; and it is further

ORDERED that leave to amend the Original Complaint is denied with respect to the proposed sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action, and paragraph "17 M" of the first cause of action; and it is further

ORDERED that leave to amend the Original Complaint to add Anthony Piscionere as a defendant is denied; and it is further

ORDERED that the defendant shall answer the amended and supplemented complaint within 20 days from the date of said service.

Dated: 9/25/07
New York, New York

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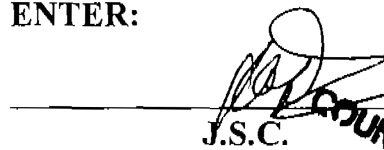

J.S.C.

HON. MICHAEL D. STALLMAN

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