

Ess & Vee Acoustical Contractors, Inc. v Tuck

2007 NY Slip Op 34262(U)

December 28, 2007

Supreme Court, New York County

Docket Number: 0600073/2007

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
ESS & VEE ACOUSTICAL CONTRACTORS, INC.,

Plaintiff,

- v -

FRED TUCK a/k/a FREDERICK TUCK

Defendant.
-----X

INDEX NO. 600073/2007

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	<u>PAPERS NUMBERED</u>
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 is decided in accordance with the accompanying Decision and Order.

Dated: December 29, 2007

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KARLA MOSKOWITZ J.S.C.

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Check if appropriate: DO NOT POST REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
ESS & VEE ACOUSTICAL CONTRACTORS, INC.,

Plaintiff,

Index No. 600073/2007

- v -

DECISION and ORDER

FRED TUCK a/k/a FREDERICK TUCK,

Defendant.

-----X
MOSKOWITZ, J.:

This lawsuit arose from an agreement between the plaintiff, Ess & Vee Acoustical Contractors, Inc. ("Ess & Vee" or "plaintiff"), and non-party FTCO a/k/a/ Fred Tuck and Company, Inc. ("Corporation"), of which defendant Fred Tuck a/k/a Frederick Tuck ("Tuck" or "defendant") is the sole shareholder. The agreement provided that Ess & Vee would furnish labor and materials as a subcontractor to the Corporation on a project to improve a premises in 3 World Financial Center, New York, New York ("project").

BACKGROUND

Plaintiff's current action against defendant Tuck arises out of a judgment in an action titled *Ess & Vee Acoustical Contractors, Inc. v American Express Co., American Express Bank, et al and FTCO a/k/a Fred Tuck and Company, Inc.* (Index No. 604214/2005) that is still pending before me. Plaintiff brought that action against the Corporation ("Corporation Action") to foreclose upon the Mechanic's Lien that plaintiff filed for unpaid work on the project. In the Corporation Action, by order dated May 31, 2006, when this court relieved its attorney of record, I directed defendant Corporation to appear in Part 03 on July 6, 2006 with a new lawyer to oppose plaintiff's motion to strike the corporation's answer or the court would strike the

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defendant's answer. The Corporation failed to appear, and accordingly, by an order dated July 6, 2006, I granted judgment of \$145,461.76 plus interest from June 21, 2005 and costs and disbursements against the Corporation for plaintiff's work, labor and services on the project. The Clerk of the Court entered judgment on July 19, 2006 for a total amount due plaintiff of \$160,211.74. Because the Corporation did not satisfy the judgment, plaintiff instituted this action against Tuck personally to recover from him the \$160,211.74 that the Corporation owes to plaintiff.

Plaintiff's first cause of action against defendant is for conversion and the second is for piercing the corporate veil. Plaintiff requests \$160,211.84 for each claim.

Defendant asserts three counterclaims against plaintiff. The first counterclaim seeks damages of \$500,000 plus legal fees and costs because plaintiff allegedly did not work in a "workmanlike manner" resulting in additional expenses and damages and defendant's ultimate loss of the project. The second counterclaim seeks \$500,000 in damages plus legal fees and costs because plaintiff's conduct allegedly damaged defendant's reputation. The third counterclaim seeks \$1 million plus legal fees and costs because plaintiff allegedly has no basis for this action but to malign defendant.

Plaintiff moves (mot. seq. no. 001) for summary judgment pursuant to CPLR 3212 on the basis that: (1) there is no issue of fact regarding plaintiff's entitlement to judgment on the complaint and (2) the doctrines of res judicata and collateral estoppel bar defendant's counterclaims.

For the reasons discussed below, the court grants plaintiff's motion for summary judgment on both of its claims and dismisses defendant's counterclaims.

DISCUSSION

First Cause of Action: Conversion

Plaintiff alleges that Tuck, in exercising authority and control of the Corporation and its accounts, violated the duty of trust under which the Corporation held sums due plaintiff and converted the sums to his own use.

Defendant argues that plaintiff cannot establish as a matter of law that defendant knowingly caused or participated in diversion of trust assets. Defendant relies on *All Star Leasing, Inc. v Joseph Davis, Inc.*, 17 AD3d 1061(4th Dept 2005) in making this argument.

All Star Leasing, however, is inapplicable to this case. In that case, the plaintiff, in moving for summary judgment for a claim against individual defendants for diversion of trust assets, attempted to rely on an order granting plaintiff's motion for summary judgment against the corporate defendant. However, the *All Star Leasing* Court had stated in an earlier decision that it granted summary judgment against the corporate defendant as to all of plaintiff's claims except the claim for diversion of trust assets. Because the record only established that plaintiff billed for materials and received partial payment, the court concluded that the plaintiff had not met its burden on the motion for summary judgment against the individual defendant because plaintiff failed to establish, as a matter of law that defendant knowingly, caused or participated in a diversion of trust assets in violation of Article 3-A of the Lien Law. (17 AD3d at 1062).

Unlike the plaintiff in *All Star Leasing*, plaintiff here meets its burden on its motion for summary judgment against Tuck for the conversion claim.

“Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights Money, if specifically

identifiable, may be the subject of a conversion action [citations omitted].” (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 883-84 [1st Dept 1982]; *Hoffman v Unterberg*, 9 A.D.3d 386, 388 [2d Dept 2004] [“Money may be the subject of conversion if it is specifically identifiable and there is an obligation to return it or treat it in a particular manner.”]).

“In order to establish a cause of action for conversion it must be proven by a fair preponderance of the credible evidence that (1) plaintiff had legal ownership or an immediate superior right of possession to specific identifiable personal property, and (2) defendant exercised unauthorized dominion over the property to the exclusion of the plaintiff's rights.” (*Aetna Cas. & Sur. Co. v. Glass*, 75 AD2d 786, 786 [1st Dept 1980]).

1. Ownership or a Superior Right of Possession

Plaintiff has ownership over the funds that defendant owes it. Plaintiff and defendant had an agreement, dated March 7, 2005, that stated “we herewith propose to furnish and install all labor and material as necessary to complete the following for the sum of \$100,125.00” followed by a list of the scope of work and additional sums that defendant would owe plaintiff in the event that plaintiff had to perform certain additional work. Plaintiff performed all of the work required but did not receive \$145,461.76 of the monies that defendant owed plaintiff for this work. After filing a Mechanic’s Lien to collect this unpaid sum, plaintiff commenced an action to foreclose on the lien and obtain a money judgment against several defendants, including the Corporation. This court then ordered entry of a judgment in favor of plaintiff for \$145,461.76 plus interest, leading to a total of \$160,211.74 due plaintiff from Corporation.

The money that plaintiff seeks in this case is specifically identifiable so as to support the conversion claim.

Under Section 70 of New York Lien Law, “the funds received by a contractor or subcontractor and the rights of action with respect thereto, under or in connection with each contract or subcontract, shall be a separate trust and the contractor or subcontractor shall be the trustee thereof.” “[T]he contractor is a trustee (Lien Law ss 70, 72) for the benefit of subcontractors, laborers and materialmen (Lien Law s 71), who necessarily, therefore, become . . . beneficiaries of such trusts. The plaintiff should, thus, have the normal rights of a trust beneficiary except insofar as specific provisions of Article 3-A declare or at least indicate to the contrary.” (*Frontier Excavating, Inc. v. Sovereign Const. Co.*, 30 A.D.2d 487, 489 [4th Dept 1968]).

The owner of the building involved in the project, Brookfield Property, paid monies to the Corporation for the entirety of the work on the project, including plaintiff’s work as subcontractor. Brookfield Properties is holding back 10%, the issue remaining in the Corporation lawsuit. The Corporation was the contractor on the project and had an obligation to keep the funds that it received as payment for plaintiff’s work on the project in a separate account for the benefit of the plaintiff, as subcontractor and trust beneficiary. Defendant as the sole shareholder of the corporation was responsible for that money. Plaintiff thus can prevail against defendant on the conversion claim. Defendant fails to raise any issue of fact or cite any law to defeat the claim

2. Unauthorized Dominion Over the Money to the Exclusion of Plaintiff

In the related case, the court granted judgment in favor of plaintiff against the Corporate defendant. As explained below, circumstances warrant piercing the corporate veil, and defendant, as sole shareholder of the Corporation, exercised unauthorized dominion over these

monies by not paying to plaintiff the monies owed from the trust fund.

The court therefore grants Plaintiff's motion for summary judgment on the conversion claim.

Second Cause of Action: Piercing the Corporate Veil

Plaintiff alleges that Tuck exercised complete domination of the Corporation with respect to the transaction complained of, used his domination to commit the conversion of that portion of the funds that the Corporation received as payment for the project that is attributable to the work that plaintiff completed. In addition, plaintiff alleges that Tuck knew when he converted the funds that he would thereby leave the Corporation without sufficient capitalization to satisfy its obligation to plaintiff.

“[P]iercing the corporate veil requires a showing 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 [citations omitted].” (*Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-42 [1993]).

Here, Tuck is the sole shareholder of the Corporation and the party in control of its income and expenditures. Defendant's counsel on oral argument did not contest the first prong of the cause of action. (Transcript, June 12, 2007, P. 24).

Plaintiff contends that Tuck used his position in the Corporation to convert the funds the corporation owed to plaintiff's subcontractor. First, plaintiff admittedly had finished the job. Second, the corporation had received full payment on its contract except for the standard 10% hold back. Third, the corporation did not pay the subcontractor for its completed work. Fourth,

the corporation has not satisfied the judgment of \$160,211.74. Fifth, the individual defendant has sole control of the Corporation's funds. Tuck's domination of the Corporation caused it to use the trust fund payment for other purposes, leaving the Corporation without any assets to pay plaintiff either before or after the judgment against the Corporation.

These unrefuted facts warrant piercing the corporate veil. Defendant is therefore responsible for the amounts that the Corporation owes to plaintiff.

Defendant's Arguments and Counterclaims

In opposition, defendant disputes the amount of damages, raises new defenses and contends that several other issues of fact exist so as to require a trial and denial of plaintiff's summary judgment motion. The doctrines of collateral estoppel and res judicata, however, bar defendant from raising these issues at this time.

"It is fundamental that a judgment in a prior action is binding not only on the parties to that action but on those in privity with them [citation omitted]." (*Sterling Doubleday Enterprises, L.P. v. Marro*, 238 A.D.2d 502, 503 [2d Dept 1997]). "Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding [citation omitted]." (*Green v. Santa Fe Industries, Inc.*, 70 N.Y.2d 244, 253 [1987]).

Defendant argues that the 1930 Court of Appeals case *McClelland v. Climax Hosiery Mills*, 252 NY 347, 351 [1930], stating that a defaulting defendant admits all traversable allegations except allegations as to damages, precludes application of the doctrines of res judicata and collateral estoppel. Defendant further argues that he is therefore entitled to give proof of amounts owed to plaintiff at trial.

However, the default judgment in this case does not involve damages, but rather, sums owed on a construction contract and as a result of an action for foreclosure on a Mechanic's Lien. Because of the Corporation's failure to contest the plaintiff's motion to strike the Corporation's answer, the court struck the Corporation's answer and entered a default judgment in favor of plaintiff for the amount of the Mechanics' Lien plus interest. The defendant Corporation is therefore bound by the default judgment.

Moreover, defendant was the sole shareholder of the Corporation. As sole shareholder, he was in control of the representation of the Corporation's interests and his own in the Corporation Action. The \$160, 211.74 judgment against the Corporation is therefore binding on both the Corporation and defendant. The defendant cannot now challenge the judgment in that action or raise new issues or defenses.

For the same reason, the court grants plaintiff's motion for summary judgment dismissing defendant's counterclaims. Defendant had a full and fair opportunity to litigate these issues in the Corporation Action and instead opted to allow the Corporation to default. As sympathetic as the court is to defendant's personal circumstances, the court cannot allow defendant to re-open that case at this time.

Further, defendant, given the opportunity to flesh out his counterclaims on the motion has failed to come forward with any evidence or law in their support.

Accordingly, it is

ORDERED that Ess & Vee Acoustical Contractors, Inc.'s motion for summary judgment on its complaint and dismissing Fred Tuck a/k/a Frederick Tuck's counterclaims is granted and the Clerk of Court is directed to enter judgment in favor of plaintiff and against defendant Fred

Tuck a/k/a Frederick Tuck in the amount of \$160,211.74.

Dated: December 18, 2007

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J.S.C.

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