

**Basilico v ADB LLC**

2008 NY Slip Op 30046(U)

January 8, 2008

Supreme Court, New York County

Docket Number: 0108773/2006

Judge: Barbara Kapnick

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT **BARBARA R. KAPNICK**  
Index Number : 108773/2006 **J.S.C.**  
**BASILICO, STEFANO**

PART 12  
108773/06

vs  
**ADB LLC**  
Sequence Number : 002  
**DISMISS**

TE \_\_\_\_\_  
Q. NO. \_\_\_\_\_  
AL. NO. 002

The following papers, numbered 1 to \_\_\_\_\_ were \_\_\_\_\_ for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/8/08 

**BARBARA R. KAPNICK** J.S.C.  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
STEFANO BASILICO and JANET KRAYNAK,

Plaintiffs,

- against -

ADB LLC, DESIGN BUILD LLC, and  
THOMAS MACGREGOR, individually,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 108773/06  
Motion Seq. No. 002

**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

In this action, plaintiffs Stefano Basilico and Janet Kraynak seek to recover damages allegedly arising under contracts they entered into with defendants ADB LLC as designer, and Design Build LLC, as builder (collectively, "the LLC defendants"), for renovations to the cooperative apartment they own at 127 Willoughby Avenue in Brooklyn.

The agreed upon price for all labor and materials was apparently \$320,000.00. Plaintiffs allegedly remitted payments totaling \$270,000.00 over a six-month period. In or around September 2005, plaintiffs terminated the agreement based on defendants' alleged failure to adequately provide the labor and materials outlined in their agreement.<sup>1</sup>

---

<sup>1</sup> Plaintiffs claim to have expended an additional \$267,692.49 to properly complete the project and remedy the allegedly sub-standard work.

Plaintiff learned after the commencement of this action that both of the LLC defendants had been dissolved. The individual defendant, Thomas MacGregor, was the sole member of each of the LLC defendants.

Defendant MacGregor then moved, under motion sequence number 001, to dismiss the original Complaint against him on the grounds, inter alia, that he was not a party to either of the agreements upon which this action is based.

In a Decision/Order dated March 22, 2007, this Court noted as follows:

There is no dispute that defendant MacGregor was not a party to the subject agreements.

Plaintiffs argue that defendant MacGregor may, nonetheless, be held individually liable on a theory of successor liability and/or alter ego liability based on the alleged stripping of the corporate assets. Alternatively, plaintiffs argue that defendant MacGregor may be held liable because he allegedly made certain fraudulent misrepresentations in connection with the pricing of the project and the labor and materials furnished.

However, this Court found that the original Complaint failed to set forth plaintiffs' claims of fraud with the requisite

particularity required by CPLR §§ 3016(b), and dismissed the Complaint as against defendant MacGregor with leave to replead.<sup>2</sup>

The Amended Complaint, which was subsequently served, sets forth causes of action for: (i) breach of contract (first cause of action); (ii) unjust enrichment (second cause of action); (iii) conversion (third cause of action); (iv) fraudulent misrepresentation (fourth cause of action); (v) fraudulent conveyance (fifth and sixth causes of action); and (vi) piercing the corporate veil (seventh cause of action).

Defendant MacGregor now moves for an order pursuant to CPLR § 3211(a)(1) and (7) dismissing the Complaint in its entirety based on documentary evidence (i.e., the agreements which establish that he was not a party to the contracts) and for failure to state a cause of action for which relief can be granted against him.

Specifically, defendant MacGregor argues that the first cause of action for breach of contract must be dismissed since this Court has already determined that he was not a party to the subject agreements.

---

<sup>2</sup> In the same Decision/Order, this Court granted on default plaintiffs' cross-motion for a default judgment against the LLC defendants, and directed that damages be assessed against them at the time of trial of plaintiffs' claims against defendant MacGregor.

Although plaintiffs will seek to enforce any judgment they obtain against the LLC defendants against defendant MacGregor based on their claims for fraudulent conveyance and piercing the corporate veil, plaintiffs have clarified in their opposing papers and on the record on October 17, 2007, that they have asserted the first cause of action solely against the LLC defendants.

Accordingly, this branch of defendant's motion is denied.

Defendant next argues that the second cause of action for unjust enrichment must be dismissed because (i) plaintiffs' allegations stem from valid written agreements, and (ii) all of plaintiffs' payments were for work actually performed and materials actually furnished.

Plaintiffs, however, contend that there are factual issues as to whether they made any payments which were not applied to labor and/or materials furnished, and as to whether defendant MacGregor personally benefitted from the funds plaintiffs remitted.

Based on the papers submitted and the oral argument held on the record on October 17, 2007, this Court finds that plaintiffs have at least set forth a claim for unjust enrichment against

defendant MacGregor. Therefore, this branch of defendant's motion is denied.

Defendant next argues that the third cause of action for conversion must be dismissed because it is duplicative of the breach of contract action and because the documentary evidence establishes that all payments were for work and materials actually furnished and performed.

Plaintiffs, however, contend that a party is entitled to plead in the alternative. Further, plaintiffs argue that any monies applied to labor and/or materials which were not furnished are funds in which they have a 'possessory right or interest', and they contend that said funds were transferred to defendant MacGregor.

This Court finds that plaintiffs have at least set forth a claim for conversion against defendant MacGregor. Therefore, this branch of defendant's motion is also denied.

Defendant next argues that the fourth cause of action for fraudulent misrepresentation must be dismissed on the ground that it merely restates plaintiffs' claim for breach of contract (see, First Bank of Ams. v. Motor Car Funding, 257 A.D.2d 287 [1<sup>st</sup> Dep't

1999]) because the Amended Complaint, like the original complaint, fails to set forth specific allegations of misrepresentations or concealments as to work unperformed, materials unfurnished, construction defects or any other omissions, with sufficient particularity.

However, plaintiffs claim that defendant MacGregor affirmatively represented to them that defendants performed certain labor and furnished certain materials which were in fact not performed and/or furnished, "with the intention of inducing Plaintiff to remit funds which far exceed the value of labor performed and/or materials furnished."<sup>3</sup>

Therefore, this branch of defendant's motion is denied as premature.

Defendant next argues that plaintiffs' fraudulent conveyance claims (i.e., the fifth and sixth causes of action), which are

---

<sup>3</sup> Plaintiffs have annexed an Affirmation sworn to by Richard Andrews, a construction consultant, who represents that he visited the property numerous times to determine the amount of labor actually performed and materials actually furnished. According to Mr. Andrews, there were "significant discrepancies between the labor purported to have been performed and materials furnished and the labor actually performed and the materials actually furnished." He also claims that "a substantial amount of labor ... was not performed according to the specifications and/or was simply performed improperly."

based on the dissolution of the LLCs, must be dismissed, because MacGregor did not withdraw assets of the LLCs thereby rendering them insolvent. Rather, defendant contends that the LLCs were dissolved as a result of their failure to produce and maintain profits, and that neither of the LLCs had any assets at the time of their dissolution.

However, the Amended Complaint specifically alleges that assets of ADB and Design Build, "including but not limited to office equipment, computers, trade secrets, customer lists, contracts, funds, etc., were transferred to Defendant MacGregor and/or a new entity limited liability company filed by Defendant MacGregor with the New York Secretary of State on or about May 30, 2006 entitled 'Thomas MacGregor, LLC'."

The Amended Complaint further alleges that defendant MacGregor dissolved the LLC defendants and transferred said assets, without any consideration and with knowledge of plaintiffs' claims which are the subject of this action, with the specific intent to defraud past and future creditors by rendering the LLC defendants judgment proof.

In addition, plaintiffs claim that defendant MacGregor has continued to operate the same design and construction business

under the auspices of "Thomas MacGregor Studio",<sup>4</sup> and is specifically utilizing the corporate shields of all corporate defendants to insulate himself from any liability.

It is well settled that "[a] conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration (Debtor and Creditor Law § 273)." CIT Group/Commercial Services, Inc. v. 160-09 Jamaica Ave. Ltd. Partnership, 25 A.D.3d 301, 302 (1st Dep't 2006).

Therefore, this Court finds that plaintiffs have sufficiently pleaded claims for fraudulent conveyances. The papers submitted merely raise factual issues to be explored during discovery. See, Madison Hudson Associates v. Neumann, 4 A.D.3d 257 (1st Dep't 2004) which held that "the determination of insolvency, or what constitutes fair consideration under Debtor and Creditor Law § 273, is generally one of fact to be determined by the circumstances of a particular case (citation omitted)."

Thus, this branch of defendants' motion is denied.

---

<sup>4</sup> According to plaintiffs, the Studio's website ([www.thomasmacgregor.com](http://www.thomasmacgregor.com)) lists design and construction projects performed by the LLC defendants.

Finally, defendant argues that plaintiffs' seventh cause of action which seeks to pierce the corporate veil must be dismissed because the Amended Complaint does not contain any particularized statements detailing fraud or other corporate misconduct (see, Hartej Corp. v. Pepsico World Trading Co., 255 A.D.2d 233 [1<sup>st</sup> Dep't 1998]).

Generally, "piercing the corporate veil requires a showing that: (1) the owners exercised complete dominion 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 Department of Taxation and Finance, 82 N.Y.2d 135, 141 (1993). See also, TNS Holdings, Inc. v. MKI Securities Corp., 243 A.D.2d 297 (1st Dep't 1997).

The Amended Complaint alleges that defendant MacGregor "controlled the activities of Defendants ADB and Design Build without regard for corporate formalities, and inadequately capitalized said corporate defendants, commingling corporate defendants funds with his own."

In addition, the Amended Complaint alleges that ADB and Design Build "did not hold any corporate meetings or adhere to any

corporate formalities. No memoranda regarding corporate matters were ever created, nor is Plaintiff aware of the existence of any corporate by-laws."


Therefore, this Court finds that plaintiffs have sufficiently alleged a claim for piercing the corporate veil. This branch of defendants' motion is accordingly denied as well.

Defendant MacGregor shall serve an Answer to the Amended Complaint within 20 days of service of a copy of this order with notice of entry.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on March 5, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: January 8, 2008

  
\_\_\_\_\_  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.  
**FILED**  
JAN 11 2008  
NEW YORK  
COUNTY CLERK'S OFFICE