

**Marlin, Inc. v Cote**

2008 NY Slip Op 31422(U)

May 12, 2008

Supreme Court, New York County

Docket Number: 0112961/2007

Judge: Judith J. Gische

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PRESENT: **JUDITH J. GISCHE, J.S.C.**

PART 10

Justice

Index Number : 112961/2007

**MARLIN, INC.**

vs.

**COTE, WILLIAM I.**

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 112961-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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

**motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of court.**

**FILED**

MAY 21 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/12/08

**JUDITH J. GISCHE, J.S.C.** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----x  
MARLIN, INC.,

Plaintiff

Index No.: 112961/07

-against-

DECISION AND ORDER

WILLIAM I. COTE, INDIVIDUALLY AND D/B/A  
HUDSON MERIDIAN CONSTRUCTION CORP.,  
HUDSON MERIDIAN CONSTRUCTION GROUP  
LLC, CENTAUR PROPERTIES, LLC,  
AND 76 MADISON PARTNERS LLC,

Defendants.

-----x  
GISCHE, J.

Pursuant to CPLR 2219(A) the following numbered papers were considered on this motion:

**FILED**  
MAY 21 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

PAPERS	NUMBERED
Notice of Motion, WIC affd., EB affirm., exhibits.....	1
HMK affirm. In Opp.....	2
Reply affirm., exhibit.....	3

Upon the foregoing papers the decision and order of the court follows:

Defendants William I cote and d/b/a/ Hudson Meridian Construction Corp. (Collectively "Cote") bring this rpe answer motion to dismiss the complaint for failure to state a cause of action and based upon documentary evidence. Plaintiff opposes the motion.

Plaintiff entered into a written subcontract for the performance of certain construction work and seeks to recover damages for the alleged breach of that contract. Plaintiff states that the total amount due under the contract was \$1,995,204.99, of which \$1,880,833.16 has been

paid, leaving an unpaid balance of \$114,371.83.

Cote maintains that the action against him personally should be dismissed because he entered into the contract in a representative rather than in an individual capacity.

FACTUAL BACKGROUND

On July 18, 2006, Plaintiff entered into a subcontract agreement which identifies the contractor as "Hudson Meridian Construction Corp.," (hereinafter "Corp.") on the cover sheet, the first page of the contract, and on the signatory page. The contract is signed by Cote as "President" of Hudson Meridian Construction Corp. On the exhibits annexed to and incorporated as part of the contract, the contractor is variously identified as "Corp." (Exhibit B) or as Hudson Meridian Construction Group ("Group") (Exhibits A, C, J, and L). Additionally, in a letter to Plaintiff from Cote on March 14, 2006 (Pl. Ex. A), the letterhead identifies the contractor as "Group," but the signatory line indicates that "Group" is an LLC. The court notes that on none of the exhibits annexed as part of the contract does "LLC" appear as a suffix to "Group"'s name.

In its opposition to this motion, Plaintiff asserts that there is no corporate entity in the State of New York called Hudson Meridian Construction Corp. and, therefore, Cote should be held individually liable as having signed in his own name using an assumed name and trade style.

In response, Cote states that after he received Plaintiff's opposition papers he realized, for the first time, that the entity for which he signed as President was misidentified as "Corp.," an entity which does not exist, rather than Group. Hudson Meridian Construction Group LLC is a legal entity registered with the New York State Department of State and was in existence at the time of the execution of the subject contract.

DISCUSSION

CPLR 3211 (a), Motion to dismiss cause of action, states that “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

- (1) a defense is founded upon documentary evidence; or...
- (7) the pleading fails to state a cause of action....

Under CPLR 3211 (a) (1) a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Leon v Martinez*, 84 NY2d 83 (1994). As stated in *Ladenberg Thalman & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243 (1<sup>st</sup> Dept 2000),

“The court’s task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.* at 88)”.

If any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a) (1) is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1<sup>st</sup> Dept 1996).

It is well-established law that an agent of a fully disclosed principal cannot be held personally liable under a contract unless the agent separately assumes individual liability. *Salzman Sign Co. v Beck*, 10 NY2d 63 (1961). However, it is also well-settled under general principles of agency law that one who assumes to contract as the agent for a non-existent principal is himself or herself personally liable on the contract in the absence of an agreement to the contrary. *Metro Kitchen Sales, LLC v Continental Cabinets, LLC*, 31 AD3d 722 (2d Dept 2006).

In the instant matter there is no question that Cote signed all documents as "President," and no evidence has been presented or proffered that he specifically assumed personal liability under the agreement. The sole question is whether the intermittent use of the name of a non-existent principal on the contract engenders individual liability for Cote when that name is close to the name of the alleged actual principal.

In *Spanerman Gallery, PSP et al. v Richard Love et al.*, 320 FSupp2d 108 (SDNY 2004), a case heavily relied upon by Cote, the federal court stated that "under New York law, a contract entered into by a corporation under a 'colloquial title' is enforceable by either party, and the 'misnomer' is held unimportant ". In *Spanerman*, the individual defendant signed on behalf of "R.H. Love Galleries" as distinguished from the company's actual name, "R.H. Love Galleries, Inc." The federal court found that under these circumstances the individual defendant was not to be held personally liable because the principal was sufficiently identified. In reaching this conclusion, the court noted other instances in which corporate entities used names deleting the corporate suffix when engaging in its everyday activities.

The documentary evidence submitted by Cote leaves unanswered the question as to who is the contractor: "Corp.," an admittedly non-existent entity; Cote, as agent for the non-existent entity; Cote acting individually under an assumed name; or "Group" as the colloquial name of a limited liability company. Because these questions remain, Cote has not conclusively established that "Corp." was a trade name for the limited liability company, thereby sustaining the premise that the contract was between Plaintiff and "Group" as an identified and existing principal. Consequently, based on general agency law as indicated above, a question exists as to whether Cote may have been acting as the agent for a non-existent principal.

Cote also proffers the argument that using "Corp." on the contract was a mere technical error that should be read in light of his use of "Group" elsewhere in the agreement. Under general principles of contract law, any error or ambiguity in a contract is construed most strongly against the party who prepared it. *See generally, Leighton's Inc. v Century Circuit, Inc.*, 95 AD2d 681 (1<sup>st</sup> Dept 1983). The agreement submitted by Cote appears to be a contract created by Cote, "Corp." or "Group," depending upon whose argument is sustained, but not by the plaintiff in this action. Consequently, in construing the agreement in a light most favorable to Plaintiff, a question still exists as to whether Cote was acting for a non-existent principal.

Additionally, pursuant to CPLR 3211 (a) (7), the questions that remain unanswered by the documentary evidence give rise to a cause of action against Cote, precluding dismissal. *See San Sung Korean Methodist Church of New York v Professional USA Construction Corp.*, 14 AD3d 501 (2d Dept 2005) (denying dismissal of a cause of action based on suing an individual for personal liability for doing business as a non-existent corporation). Therefore, the action against Cote cannot be dismissed under this subsection of CPLR 3211 (a).

#### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby:

ORDERED that defendant Cote's motion to dismiss is denied. Cote is directed to serve an answer within 20 days of the date of this decision, and it is further

ORDERED that a preliminary conference is set before this court on June 19, 2008 at 9:30 a.m, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, N.Y.  
May 12, 2008

SO ORDERED:

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JUDITH J. CASCIANO, J.S.C.

