SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CIVIL TERM, PART 6
HON. JAMES G. STARKEY

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ALEXANDER SUDANO and DOREEN SUDANO, Index No. 10618/07

Plaintiffs,

- against -

NAYCI CONTRACTING ASSOCIATES, LLC and
AYHAN NAYCI, Individually,

Defendants,

----------x Dated: July 3, 2008.

APPEARANCES OF COUNSEL

For the Plaintiff(s):

PIAZZA, D'ADDARIO & FRUMIN, ESQS.
824 Manhattan Avenue
Brooklyn, New York 11222

For the Defendant(s):

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SUDANO vs. NYACI **Index No. 10618/2007**

FACTS AND PROCEDURAL BACKGROUND

By notice of motion dated November 26, 2007, plaintiffs Alexander Sudano and Doreen Sudano (hereinafter "Sudano") move pursuant to CPLR §3212 seeking summary judgment on the issue of liability. Alternatively, Sudano seeks an order pursuant to CPLR §3126 precluding defendants Nayci Contracting Associates, LLC (hereinafter "NCA") and Ayhan Nayci (hereinafter "Nayci") from offering certain evidence at trial. Defendants, by notice of cross-motion dated January 16, 208, seek an order: 1) pursuant to CPLR §3025 (b) granting them leave to amend their answer so as change an admission to a denial and add a counterclaim against plaintiffs; 2) an order pursuant to CPLR §1003, dismissing all claims against Nayci, and 3) an order pursuant to 22 N.Y.C.R.R. §130-1.1 awarding defendants fees and costs in connection with plaintiffs' motion.

This action arises out of a contractual dispute between the parties for renovation partially performed at plaintiffs' two-family residence located 37 Hausman Street, Brooklyn, New York. The contract – dated June 19, 2006 – obligated NCA to perform certain construction and/or renovations at the Sudano residence, for the total sum of $105,000. Sudano paid NCA $95,000.00 towards this balance between July 11, 2006 and December 22, 2006, however Sudano claims that minimal work has been performed by defendants, that it was performed in an unworkmanlike manner, and that substantial improvements for which defendants were obligated have not been performed. As a result, on or about March 8, 2007, plaintiffs commenced an action against NCA and its president Nayci for, among other things, breach of contract and fraud.

On or about April 25, 2007, defendants' former counsel served an answer to the

complaint interposing three counterclaims for unpaid services rendered and for unpaid invoices. Defendants' answer also admitted that the parties entered into the contract for the construction/renovation services and that "said services were to be performed in a good and workmanlike manner and in accordance with the agreement of the parties." In the counterclaims, defendants alleged that plaintiffs breached their duties and obligations under the contract and that plaintiffs failed to pay certain "costs and damages incurred by defendants arising out of delays caused by plaintiff[s] at the Project."

Defendants' former counsel also served a Notice to Take Deposition Upon Oral Examination of each plaintiff, designating the date of June 29, 2007 for the depositions. However, the parties appeared before the court for a preliminary conference on that date, and the following discovery schedule was ordered by the court:

> (1) Note of issue filing deadline: May 12, 2008;
> (2) Next compliance conference hearing date: March 7, 2008;
> (3) Examinations before trial of all parties to be held on September 17, 2007;
> (4) Plaintiffs to provide their bill of particulars and other written discovery responses within 45 days after the date of the order;
> (5) Defendants to provide their bill of particulars as to their affirmative defenses within 45 days after the date of the order;
> (6) Insurance information to be provided by defendants by no later than July 30, 2007; and
> (7) Defendants to provide invoices, bills, receipts relative to materials and time sheets of employees performed on subject job. (No deadline was stated for compliance with number 7.)

While the preliminary conference order provided that, in the event of non-compliance therewith, "costs or other sanctions may be imposed," it contained no specific warning pursuant to CPLR §3126 that failure to comply with discovery would result in an order of preclusion. On July 18, 2007, plaintiffs served a response to defendants' discovery demands and defendants

never objected to these responses.

On or about August 10, 2007, defendants discharged their attorney who had prepared the answer and appeared for the preliminary conference. On or about September 12, 2007, defendants' incoming counsel obtained the entire case file – with the exception of a copy of the preliminary conference order – from outgoing defense counsel, including a letter dated September 7, 2007, wherein plaintiffs' counsel advised defendants' former attorney that defendants had failed to respond to plaintiffs' discovery demands and bill of particulars as per the preliminary conference order. Further, plaintiffs' counsel warned that "appropriate motion practice including counsel fees" would ensue if the requested discovery was not provided.

On September 12, 2007, defendants' new counsel requested an adjournment of the court ordered depositions "in order to allow our office time to review the file and answer discovery." The depositions were therefore not held on September 17, 2007. By a handwritten facsimile message dated October 4, 2007, plaintiffs' counsel warned defendants' attorney that she would move for sanctions, which prompted a reply dated October 10, 2007, in which defendants' counsel advised that the delay in producing the records was defendants' accountant's fault. On October 23, 2007, defendants served a bill of particulars with respect to their counterclaims, together with written discovery responses.

Dissatisfied with these responses, plaintiffs' attorney served and filed the instant motion. In a letter dated January 7, 2008, defendants' counsel requested that the depositions of all parties be scheduled for February 2008, which letter was not responded to by plaintiffs' counsel. On January 16, 2008, defendants served their cross motion.

In support of their summary judgment motion, plaintiffs annex an estimate dated

February 21, 2007, from a non-party construction company, indicating that the cost of the remaining contractual renovations not performed by NCA is approximately $92,000.00. Plaintiffs also annex thirty eight photographs, taken by them in November 2006 and February 2007, allegedly depicting construction or renovation to various parts of their residence as incomplete and/or performed in an unworkmanlike manner.

Plaintiffs contend that their motion should be granted because there was a contract between the parties, plaintiffs made payments under that contract (as evidenced by the copies of plaintiffs' checks submitted with the motion) and the contract was breached (as evidenced by the photographs of plaintiffs' residence which were also submitted). In addition, plaintiffs assert that defendants failed to comply with the preliminary conference order because defendants failed to adequately respond to plaintiffs' discovery demands. Plaintiffs argue that, alternatively, defendants should be precluded "from submitting any evidence at a trial herein on the issues presented."

Defendants oppose plaintiffs' motion for summary judgment on the ground that there are numerous material and triable issues of fact. In addition, defendants maintain that pursuant to CPLR 3025 (b), they are entitled to leave to amend their original answer. They allege that defendants' former counsel used "inartful pleading" in drafting the original answer, and that plaintiffs would not be prejudiced by the proposed amendment, even though this proposed amended answer would eliminate defendants' admission made in the original answer that "said [construction/ renovation] services were to be performed in a good and workmanlike manner and in accordance with the agreement of the parties." As part of the proposed amendment, defendants seek to assert a new counterclaim based upon the alleged fraud on the part of

plaintiffs. Defendants further contend that the complaint against Nayci should be dismissed pursuant to CPLR 1003 because the complaint contains no allegations against him personally. Finally, defendants assert that plaintiffs' motion is frivolous and that defendants should, therefore, be awarded counsel fees and costs pursuant to 22 N.Y.C.R.R. § 130-1.1.

LAW AND APPLICATION

Plaintiffs' Motion for Summary Judgment

Summary judgment is a drastic remedy, and should be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). The burden is upon the moving party to make a prima facie showing that the movant is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts. *Giuffrida v. Citibank*, 100 N.Y.2d 72, 760 N.Y.S.2d 397, 790 N.E.2d 772 (2003). A failure to make that showing requires the denial of the motion, regardless of the adequacy of the opposing papers. *Ayotte v. Gervasio*, 81 NY 2d 1062, 601 N.Y.S.2d 463, 619 N.E.2d 400 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez v. Prospect Hospital*, *supra,* at 324.

Accordingly, issue-finding rather than issue-determination is the key to the procedure in deciding a motion for summary judgment. See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 (1957). The evidence presented by the non-moving party must be viewed in a light most favorable to the non-moving party. See *Fleming v. Garment Ser.,* 34 A.D.3d 525, 526, 824 N.Y.S.2d 376 (2nd Dept. 2006). When there is any significant doubt as to the existence of a material triable issue of fact, or where the material issue

of fact is arguable, summary judgment must be denied. See *Salino v. IPT Trucking, Inc.*, 203 A.D.2d 352, 610 N.Y.S.2d 77 (2nd Dept. 1994). In this case, plaintiffs have failed to demonstrate their entitlement to summary judgment.

The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage. See *2 NY PJI3d 4:1, at 612 (2008);*see also*, Ascoli v. Lynch,* 2 A.D.3d 553, 769 N.Y.S.2d 567 (2nd Dept. 2003)*; Furia v. Furia,* 116 A.D.2d 694, 498 N.Y.S.2d 12 (2nd Dept. 1986). In support of their motion for summary judgment, plaintiffs submit a copy of : (1) the contract; (2) their checks made payable to NCA for a sum that is less than the total amount called for under the contract; (3) photographs of certain areas of their residence; and (4) a third party estimate for the additional construction or renovation work allegedly needed. However, plaintiffs have not submitted an affidavit from an architect or professional engineer indicating that defendants have not completed the work due under the contract, or partially performed in an unworkmanlike manner. As a result, the court cannot determine which services depicted or contracted for by plaintiffs have or have not been performed under the contract by defendants.

Moreover, plaintiffs have not demonstrated that they themselves are free from fault with respect to their obligations under the contract. See *Odysseys Unlimited, Inc. v Astral Travel Service*, 77 Misc.2d 502, 505, 354 N.Y.S.2d 88 (Nassau Coun. 1974). Viewing the evidentiary record in a light most favorable to the non-moving defendants, the court finds that a material issue of fact requiring trial exists concerning which party or parties breached the contract.

With respect to plaintiffs' remaining claims of misrepresentation, fraud, and undue

influence, they have not attempted to make any showing with respect to such claims and defendants have vigorously disputed plaintiffs' allegations. Accordingly, plaintiffs' motion for summary judgment is denied.

Plaintiffs' request for an Order of Preclusion

Plaintiffs request that the court preclude defendants from introducing any evidence in defense of this action based on defendants' failure to comply with the preliminary conference order. CPLR 3126 provides:

> "If any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, pursuant to this article, the court may make such orders with regard to the failure or refusal as are just ...."

Correspondence by defendants' counsel, which is outlined above, reasonably explains the delay resulting from the substitution of counsel. Further, it indicates defendants' good faith attempts to comply with the preliminary conference order. Nevertheless, the court understands plaintiffs' frustration with the delays in this case and their desire to proceed as expeditiously as possible. Accordingly, and in the court's discretion, defendants are directed to provide the requested disclosure within 45 days and submit to depositions within 60 days after service of a copy of this order with notice of entry. See *Negro v. St. Charles Hospital,* 44 A.D.3d 727, 728, 843 N.Y.S.2d 178 (2nd Dept. 2007). Failure to comply will expose defendant to significant sanctions including preclusion.

Defendants' Motion seeking to Amend the Answer

It is well settled that leave to amend a pleading pursuant to CPLR 3025 (b) shall be freely given and such a grant shall remain undisturbed in the absence of an abuse of discretion by the

court. Delay alone is not sufficient to deny a motion to amend unless accompanied by significant prejudice. See *Hanchett v. Graphic Technics, Inc.*, 243 A.D.2d 942, 943, 667 N.Y.S.2d 436 (3rd Dept. 1997). Prejudice means that the party opposing the amendment has been hindered in the preparation of its case or has been prevented from taking some measure in support of its position. See *Loomis v. Corinno Corp.*, 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 429 N.E.2d 90 (1981).

The original answer, served approximately fifteen months ago, admitted that "said services were to be performed in a good and workmanlike manner and in accordance with the agreement of the parties," a claimed standard of performance of defendants' work under the contract. Defendants now seek leave to amend their answer to deny the claimed standard of contractual performance. The court's inquiry is whether plaintiffs would be prejudiced by this proposed amendment, which is a change in position by defendant.

The passage of time alone, without more, is insufficient to deny leave to amend a pleading. See *Eng v. DiCarlo*, 79 A.D.2d 1018, 435 N.Y.S.2d 336 (2nd Dept. 1981). Despite the passage of more than a year since the filing of the original answer, there appears to be no prejudice to plaintiff as the parties have not engaged in prior motion practice and discovery is still in its early stages. See *Antwerpse Diamantbank v. Nissel*, 27 A.D.3d 207, 810 N.Y.S.2d 180 (1st Dept. 2006). While plaintiffs argue that such a change in position would prevent granting plaintiffs' summary judgment, and is therefore prejudicial, summary judgment has been denied based upon the original answer. Therefore, plaintiff will not suffer prejudice by the amendment.

In any event, the prior answer shall remain admissible as an informal judicial admission, the circumstances of which may be explained at trial. See *Bogoni v. Friedlander*, 197 A.D.2d

281, 292-293, 610 N.Y.S.2d 511 (1st Dept. 1994).

Defendants also seek leave to add a fourth counterclaim arising out of plaintiffs' purported breach of promise to pay for various work in connection with the contract. While leave to amend is freely given, the proposed amendment must be appear to be meritorious. See *Paolano v. Southside Hosp.*, 3 A.D.3d 524, 771 N.Y.S.2d 152 (2nd Dept. 2004); *CPLR § 3025*. It is established that the failure to perform is merely a breach of contract enforceable by an action on the contract, and a cause of action for fraud does not arise when the only fraud charged relates to the mere breach of contract. See *Sirota v. Champion Motor Inc.*, 18 Misc.3d 862, 868, 849 N.Y.S.2d 426 (Sup. Ct. Kings Cty. 2008). Here, regardless of how the fourth proposed counterclaim is framed, the only fraud charged therein relates to a breach of contract by plaintiffs. Accordingly, the court denies defendants' request to amend their answer so as to add the fourth counterclaim.

Defendant's Dismissal of Complaint Against Nayci

Pursuant to CPLR § 1003, defendants seek dismissal of the action against NCA's president, Nayci[1] as the allegations in the complaint contain no separate allegations against him. The court notes that defendants' original answer contained an affirmative defense of an improper joinder.

An agent for a disclosed principal, acting within the scope of his or her authority, will not be personally liable for a breach of contract unless there is clear and explicit evidence of the agent's intention to be personally bound. See *Weinreb v. Stinchfield*, 19 A.D.3d 482, 483, 797

[1] CPLR § 1003 provides that "[p]arties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon such terms as may be just."

N.Y.S.2d 521 (2nd Dept. 2005). Plaintiffs claim that Nayci made misrepresentations and gave false assurances that defendants would perform under the contract. If such statements were made by Nayci, he was acting as NCA's agent at the time, and not individually. Therefore, plaintiff would be required to pierce NCA's corporate veil in order to hold Nayci personally liable. See *Morris v. Dept. of Taxation*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 623 N.E.2d 1157 (1993).

In order to pierce the corporate veil, plaintiff is required to show 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. See *Morris v. Dept. of Taxation*, supra at 141. Here, plaintiffs have made no showing whatsoever of the foregoing requirements. Accordingly, the complaint against Nayci is dismissed.

Fees and Costs

Pursuant to the Rules of the Chief Administrator – 22 N.Y.C.R.R. §130-1.1 – defendants seek an award of costs, including attorney's fees. Defendants argue that plaintiffs' motion is "premature, frivolous and improper at this time." They further urge that plaintiffs have failed to attach to their motion an affirmation of good faith, which is required with any discovery-related motion pursuant to 22 N.Y.C.R.R. §202.7 (a).[2]

It is concluded that plaintiffs' conduct does not warrant the imposition of costs. Plaintiffs attempted to resolve their discovery disputes with defendants in good faith and without the necessity of motion practice. Further, it appears that defendants' eagerness to conduct

[2] This provision of the Uniform Rules for the New York State Trial Courts requires attorneys to consult with each other in good faith to resolve any discovery issues prior to bringing a motion and to include with such a motion an affirmation that such efforts were made.

depositions in February 2008 was prompted by plaintiffs' filing of the instant motion. As a result, it would appear that there was substantial compliance with the requirement of §202.7. Plaintiffs' counsel attempted, in good faith and without the need for judicial intervention, to resolve the discovery dispute by the letters which complied with § 202.7©. Therefore the failure to include an affirmation to this effect is excused pursuant to CPLR §2001 as a mere procedural irregularity, since no substantive right of defendants has been abridged.

CONCLUSION

In light of the above, plaintiff's motion for summary judgment is denied. Plaintiff's motion for a preclusion order is conditionally granted. Defendants' cross motion to amend their answer is denied. Defendant's cross motion to dismiss the complaint against defendant Ayhan Nayci is granted. Defendant's cross motion for sanctions pursuant to 22 N.Y.C.R.R. §130-1.1 is denied. This constitutes the decision of the court. Plaintiff is directed to settle order on notice in accordance with this decision.

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J.S.C.