

**Louie v Chiu**

2008 NY Slip Op 31966(U)

July 3, 2008

Supreme Court, New York County

Docket Number: 0602756/2005

Judge: Shirley Werner Kornreich

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.

PRESENT: **HON. SHIRLEY WERNER KORNREICH**

PART 54

Index Number : 602756/2005

**LOUIE, DAVID**

vs.

**CHIU, TOMMY**

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 3/6/08

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

is motion to/for 13

PAPERS NUMBERED

1-2

3

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 IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**FILED**

JUL 14 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/3/08

**HON. SHIRLEY WERNER KORNREICH**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
DAVID LOUIE and ASA LOUIE,

Plaintiffs,

-against-

TOMMY CHIU, SANDY CHIU,  
and GORDON HOMES INC.,

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

INDEX NO. 602756/2005  
DECISION ORDER

**FILED**  
JUL 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Motion sequences 002 and 003 are hereby consolidated for disposition.

This is an action by plaintiff homeowners, David Louie and Asa Louie, seeking damages for fraud, misrepresentation, breach of warranty, breach of contract, indemnity and negligence. Defendants are a real estate developer, Gordon Homes, Inc. (Gordon Homes), and its owners, Tommy Chiu and Sandy Chiu. Plaintiff's complaint alleges that the Certificate of Occupancy (CO) obtained by defendants for plaintiffs' home was fraudulent and/or invalid.

Defendants move in motion sequence 002 for dismissal of all claims, pursuant to CPLR 3211, due to the failure of plaintiff's counsel to appear for scheduled mediation. In motion sequence 003, defendants move for summary judgment, pursuant to CPLR 3212, on the ground that the New York City Department of Buildings (DOB) was the culpable party because it issued the same CO number to two properties. In addition, defendants argue that it was the architect's responsibility to obtain the CO.

*Background*

In 1989, plaintiffs purchased a home located at 27 Christine Court, Staten Island,

NY, from Gordon Homes, which was owned and operated by defendants Tommy and Sandy Chiu. The home is part of a five-house development that was constructed by Gordon Homes on Christine Court.

Pursuant to Paragraph 16 of the contract of sale, Gordon Homes was obligated to obtain a CO. Paragraph 16 provides that:

Sellers agree to deliver a Certificate of Occupancy for the dwelling, but title closing shall not be adjourned for lack of same, it being understood and agreed that the sum of \$5,000.00 from Seller's money will be held in escrow by the Lending Institution or Seller's attorney pending production and delivery of such Certificate. Purchasers agree to cooperate in the obtaining of a Certificate of Occupancy in the subject premises after closing has occurred and will refrain from taking any action or making any alteration or improvement which would interfere with or delay the issuance of the Certificate of Occupancy. This paragraph shall survive title closing and deed delivery and Purchasers shall be liable to Seller for any delays caused by the actions mentioned herein above.

In 1989, defendants gave plaintiffs a copy of a temporary CO. Plaintiffs moved into the home in 1989 following the completion of construction and the installation of a swimming pool by a contractor other than Gordon Homes. Plaintiffs aver that they spoke with the Chius several times about the issuance of a final CO after they moved into the home and they assured them that it had been obtained. Asa Louie states that both Chius told her that the final CO had been issued and taken care of, but that they would have to wait. The Chius did not clarify why plaintiffs had to wait to receive the CO.

In 1992, plaintiffs attempted to refinance the home, and were informed that a final CO had never been issued. Plaintiffs requested and received a final CO from the defendants. In 2004, plaintiffs sought to sell their home. After entering into contract with the buyer, plaintiffs were notified by the buyers' mortgage insurance company that the final CO was not on file with the DOB. The CO number on the document provided by defendants in 1992

corresponded to a different property. All five homes on Christine Court had similar problems with their final CO. Plaintiffs now assert that the final CO given to them by defendants was illegitimate.

Defendants claim that they hired John Buday, the original architect, to obtain the temporary and final COs for all the homes in the development. Defendants also claim that Theresa Buday, John Buday's daughter, who worked as an expeditor in his office, organized and submitted the paperwork to obtain a CO for plaintiffs' home. Mr. Buday disputes the assertion that he was hired and paid by defendants to obtain the COs for plaintiffs' home and the other homes on Christine Court. Mr. Buday states that while Mr. Chiu consulted with him about the process of obtaining the CO for 27 Christine Court, Mr. Buday was never retained by defendants to obtain and never filed any paperwork for a CO for plaintiffs' home. Theresa Buday never appeared as a deposition witness and has not submitted an affidavit on this motion. Defendants also argue that plaintiffs admitted at their depositions that the CO was not forged or fake.

Mr. Buday explained that he was aware of the DOB issuing the same CO number to two different homes in previous situations, through mix-ups in the DOB office. Mr. Buday also explained that a corruption investigation was being conducted around the time the application for the final CO was issued and the folder for 27 Christine Court was taken as part of this investigation. As a result, the folder containing the information relevant to plaintiffs' home needed to be re-submitted to the DOB.

Plaintiffs were required to obtain a new CO for the contract for the sale to proceed, which took several months. Plaintiffs hired Mr. Buday to obtain the new CO from the DOB. Plaintiffs had already purchased another home, in anticipation of the sale of the Christine

Court home, and were required to pay for both homes while waiting for the DOB to issue a new CO.

*Motion to Dismiss for Failure to Appear at Mediation*

Defendants' attorney avers that plaintiffs' counsel failed to appear for two court-scheduled mediation meetings. The affirmation of plaintiffs' counsel denies that he willfully failed to appear for mediation sessions. He avers that he received no notice of the first two mediation dates and had mis-calendared the third.

The failure to appear for status conferences is not a sufficient ground for dismissing the action. *American Audio Serv. Bur. Inc. v. AT&T Corp.*, 33 A.D.3d 473, 477 (1<sup>st</sup> Dept. 2006). There is no ground for dismissal when there is no pattern of delay and counsel failed to appear because he mis-calendared the date. *Travelers Ins. Co. v. Abelow*, 14 A.D.3d 395, 395 (1<sup>st</sup> Dept. 2005). Further, if the party or counsel is unaware of the mediation date, then dismissal is not justified. *Jones v. New York City Tr. Auth.*, 293 A.D.2d 322, 322 (1<sup>st</sup> Dept. 2002).

*Motion for Summary Judgment*

*Standard of Review*

Summary judgment may only be granted when it is clear that there is no issue of triable fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The moving party bears the burden of making a *prima facie* showing of entitlement to judgment as a matter of law by submission of evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). Once such a showing is made, the burden shifts to the opposing party to provide sufficient evidence to demonstrate a material triable issue of fact. *Alvarez, supra*, 68 N.Y.2d

at 324. When evidence necessary to defeat the motion is in the sole possession of the moving party, the summary judgment motion can and should be denied. *Pank v. Village of Canajoharie*, 275 A.D.2d 508, 509 (3<sup>rd</sup> Dept. 2000). Additionally, the court must consider all papers submitted in the light most favorable to the non-moving party. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1<sup>st</sup> Dept. 1997). In doing so, the court must not assess credibility. *Capelin, supra*, 34 N.Y.2d at 341. If there is any question about the existence of an issue of material fact, the motion for summary judgment must be denied. *Phillips v. Kantor & Co.*, 31 N.Y.2d 307 (1972).

### *Conclusions of Law*

#### *1. Breach of Contract*

In searching the record, the court finds that plaintiffs are entitled to summary judgment on their breach of contract claim against Gordon Homes. The construction of a plain and unambiguous contract is for the court and circumstances extrinsic to the agreement will not be considered when the intention of the parties can be gathered from the instrument itself. CPLR 3212(b); *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, 25 N.Y.2d 535, 540 (1969). Here, the contract unambiguously provided that Gordon Homes was required to produce a valid CO, and the evidence that Gordon Homes delegated that duty to the architect is extrinsic, at variance from the contract terms and cannot be considered. Defendants' contention that the fault lies with the DOB is unavailing. The purpose of contract law is to allocate the risk involved in the performance of the terms of the contract and to excuse performance only in extreme cases. *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (1987). Generally, a party that enters into a contract must perform or respond in damages for the failure to perform even if unforeseen circumstances make the

performance more difficult or impossible. *Id.* If there were a mistake by the DOB in issuing an incorrect CO number, that risk was allocated to Gordon Homes under the contract. Hence, plaintiffs have as established as a matter of law that Gordon Homes breached the contract and plaintiffs are entitled to summary judgment on the fourth cause of action.

However, in searching the record, the court finds that the individual defendants are entitled to summary judgment dismissing the breach of contract claim. CPLR 3212(b). A business can be incorporated for the express purpose of avoiding personal liability. *Bartle v. Home Owners Cooperative, Inc.*, 309 N.Y. 103, 106 (1955). A court may pierce the corporate veil where necessary to prevent fraud or to achieve equity. *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152, 163 (1980). Disregard of the corporate form requires evidence that the corporation is used for personal rather than corporate purposes. *Walkovsky v. Carlton*, 18 N.Y.2d 414 (1966). Here, there is no such evidence and the sole contracting party was Gordon Homes. Therefore, the breach of contract claim against the individual defendants must be dismissed.

## 2. *Fraud*

There are issues of fact that require denial of defendants' motion for summary judgment on the first cause of action for fraud. A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform the contract. *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1<sup>st</sup> Dept. 1988). By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. *Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107, 118 (1<sup>st</sup> Dept. 1998). For example, if a plaintiff alleges

that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim. *RKB Enters. v. Ernst & Young*, 182 A.D.2d 971, 972-973 (3<sup>rd</sup> Dept. 1992). Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty. *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954, 956 (1986). Intent to deceive and detrimental reliance are elements that must be proven in addition to a material representation of fact. *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 528 (2<sup>nd</sup> Dept. 2001); *Securities Inv. Protection Corp. v. BDO Seidman*, 95 N.Y.2d 702, 709 (2001); see also, *Brackett v. Griswold*, 112 NY 454 (1889), *Warren v. Forest Lawn Cemetery & Mausoleum*, 222 AD2d 1059 (4<sup>th</sup> Dept. 1995). Finally, it must be shown that defendant's misrepresentation was the cause of plaintiff's loss. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 30 (2000).

In this case, there is evidence that plaintiff's detrimentally relied on the invalid CO defendants provided and suffered losses as a result of their inability to close on the sale of their home. In addition, there is an issue of fact as to whether defendants had the requisite intent to deceive. An inference of deceit could arise from the provision of an invalid CO in 1992, the fact that Gordon Homes failed to get a CO for plaintiffs' home, as well as all the other homes in the same development, and the architect's denial of defendants' contention that he was responsible. The intentional provision of an invalid CO, if proven, is a breach of duty separate from the breach of the contract and can give rise to a finding of fraud.

The court disagrees that plaintiffs admitted at their depositions that defendants did

not commit an intentional fraud. When pressed to support the allegation in the complaint that the temporary and final COs were “fake,” David Louie testified that they were “illegitimate” and then clarified that “[f]ake is not legitimate” and “[a]lso false.” David Louie EBT, pp. 7-8. Asa Louie, stated that “[f]ake is not true... I don’t use the word false. That’s not the true paper... We cannot use this paper to close the house,” and ‘we cannot close because the Certificate of Occupancy is not legit.’” Asa Louie, pp. 8-10. The court rules that this is sufficient to raise an issue of fact as to intent to deceive, a fact which almost always must be established by circumstantial evidence.

### 3. *Negligence*

The sixth cause of action for negligence must be dismissed because it is merely a breach of contract claim plead as a tort. A tort obligation is separate from the obligations imposed by a contract. *New York Univ. v. Cont’l Ins. Co.*, 87 N.Y.2d 308, 316 (1995). When a party is seeking only to enforce a contract, there is no tort claim. *Id.*; see *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 552 (1992); *Bellevue S. Assocs. v. HRH Constr. Corp.*, 78 N.Y. 2d 282, 293-95 (1991). Further, it has been well established that a breach of contract is not a tort unless there is a separate legal duty from the contract that has been violated. *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389 (1987); accord *Meyers v. Waverly Fabrics*, 65 N.Y.2d 75, 80, n 2 (1985); *North Shore Bottling Co. v. Schmidt & Sons*, 22 N.Y.2d 171, 179 (1968).

In this case, defendants, unless defendants committed an actionable fraud, they breached no duty of care aside from the contractual obligation to obtain a CO.

### 4. *Negligent Misrepresentation*

Similarly, defendants’ motion to dismiss the second cause of action for negligent

misrepresentation must be granted because such a claim must be based upon breaches of legal duties extraneous to and distinct from the contractual obligation. *RKB Enters. Inc. v. Ernst & Young*, 182 A.D.2d 971, 972 (3<sup>rd</sup> Dept. 1992). Here, the duty to obtain a valid CO arises solely from the contract. Gordon Homes had no separate duty of care and, as noted above, the obligation did not run to the individual defendants. Hence, the second cause of action must be dismissed.

#### 5. Breach of Warranty

Defendants' motion to dismiss the third cause of action for breach of warranty must be granted because the claim does not rise out of facts collateral to the breach of contract claim. *Varo, Inc. v. Alvis PLC*, 261 A.D.2d 262, 265 (1<sup>st</sup> Dept. 1999), citing *J.E. Morgan Knitting Mills v. Reeves Bros.*, 243 A.D.2d 422, 423 (1<sup>st</sup> Dept. 1997). An assurance of the existence of a fact that induced the bargain is a warranty. *Clearview Concrete Prods. Corp. v. S. Charles Gherardi, Inc.*, 88 A.D.2d 461, 468-69 (1982). Defendants' contractual obligation to obtain a CO is the basis of the breach of contract claim brought by the plaintiffs. There is no evidence that at the time of contracting, defendants warranted the existence of any fact that would give rise to a claim for breach of warranty. Therefore, plaintiffs' third cause of action must be dismissed because it duplicates the claim for breach of contract.

#### 6. Indemnification

Plaintiff further seeks indemnification. Common law indemnification arises from an implied contract and is used to shift the loss from a vicariously liable party, who is liable without fault, to the culpable party. *Mas v. Two Bridges Assoc.*, 65 N.Y.2d 680, 690 (1990). Here, Gordon Homes' liability for breach of contract is due to its failure to perform. If

defendants are held liable for fraud, it will be as a result of defendants' culpable conduct. In either event, indemnification does not lie and the fifth cause of action must be dismissed. Accordingly, it is

ORDERED that defendants' motion to dismiss for plaintiffs' failure to appear for mediation is denied; and it is further

ORDERED that defendants' motion for summary judgment is granted solely to the extent that the second cause of action for negligent misrepresentation, the third cause of action for breach of warranty, the fifth cause of action for indemnification, and the sixth cause of action for negligence are dismissed as against all defendants, and, in searching the record, the fourth cause of action for breach of contract is dismissed as to defendants Tommy Chiu and Sandy Chiu, and in all other respects the motion is denied; and it is further

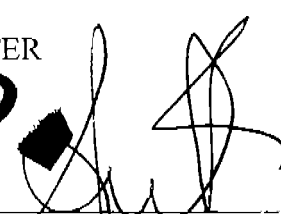
ORDERED that in searching the record, plaintiffs are granted summary judgment on the fourth cause of action for breach of contract against defendant Gordon Homes, Inc.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and to sever the remainder of the action, which shall continue; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on July 31, 2008, at 9:30 a.m., in Part 54, Room 1227 of the Courthouse located at 111 Centre Street, New York, NY.

July 3, 2008

**FILED**  
JUL 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER  
  
\_\_\_\_\_  
J.S.C.