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

PRESENT: EILEEN BRANSTEN PART 3
Justice

Donkov Realty, LLC,

- v -

RADJB Realty, Inc.

INDEX NO. 603095/05
MOTION DATE 10/4/07
MOTION SEQ. NO. 001
MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	

Cross-Motion: Yes X No

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

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

FILED
JUL 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7-8-08

HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

----------X

DONKOV REALTY, LLC,

Plaintiff,

-against-

RADJB REALTY INC.; JUERG BECHER, individually; RALPH DOSCH, individually; and COLLECTION DOBE FINE ARTS, LTD.,

Defendants.

----------X

Index No. 603095/05
Motion Date: 10-4-07
Motion Seq. No.: 01

PRESENT: EILEEN BRANSTEN, J.

Defendants RADJB Realty, Inc. ("RADJB"), Juerg Becher ("Becher"), Ralph Dosch ("Dosch"), and Collection Dobe Fine Arts, Ltd. ("Dobe") move pursuant to CPLR 3211 to dismiss the complaint or for summary judgment pursuant to CPLR 3212. In the alternative, defendants move for summary judgment limiting damages. Plaintiff Donkov Realty, LLC ("Donkov") opposes the motion. As the parties have submitted evidence in connection with this motion, the Court will treat it as one for summary judgment.

For the reasons below, defendants' motion is granted as to the second, third, fourth, and fifth causes of action and is denied as to the first and sixth breach of contract claims, seventh and eighth claims for negligence, and the veil-piercing claim.

Background

In September 2002, Donkov allegedly entered into an oral contract with corporate defendants RADJB and Dobe for construction management and design services for the renovation of real

property located at 25 East 37th Street, New York, NY ("Renovation Contract") (Amended Complaint, ¶16). Defendants Becher and Dosch allegedly are each corporate officers, shareholders, and employees of both RADJB and Dobe (Amended Complaint, ¶¶ 4-15).

Donkov commenced this action in 2005. In its complaint, Donkov asserts three breach of contract claims as well as claims for breach of warranty, breach of implied warranty, and negligence as against the corporate defendants. Donkov also alleges that defendants' corporate veil should be pierced and liability imposed on the individuals. Donkov further alleges that Becher and Dosch individually are liable for negligence.

Analysis

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]; *see Hook v Village of Ellenville*, 46 AD3d 1318, 1319 [2007]). "[T]he party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do . . . " (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

I. First Cause of Action against RADJB and Dobe for Breach of Construction Management and Design Services Contract

Plaintiff alleges that RADJB and Dobe breached the Renovation Contract by failing to complete work; violating laws, codes, rules, and regulations; performing unsatisfactory work; and supplying unsuitable, inferior, or defective materials (Amended Complaint, ¶¶19 & 24).

A. Accord and Satisfaction

Defendants contend that the doctrine of accord and satisfaction bars Donkov's breach of contract claim because: (1) the parties' mutual obligations were allegedly discharged when they agreed that plaintiff would pay defendants a final installment of $2500 instead of the originally agreed upon sum of $15,000 and (2) plaintiff's $2500 check states in the memo section, "payment in full services 25 E. 37th St NYC."

"An agreement whereby one party undertakes to give or perform, and the other to accept in settlement of an existing or matured claim, something other than that which he believes himself entitled to, is an accord, and the execution of such an agreement is a satisfaction. An accord, when followed by a satisfaction[,] is a bar to the assertion of the original claim . . ." (*Braun v C. E. P. C. Distribs., Inc.*, 77 AD2d 358, 360 [1st Dept 1980], *lv denied* 52 NY2d 704 [1981]). "The theory is that the parties have made a new contract discharging all or part of their obligations under the original contract" (*Merrill Lynch Realty, Carll Burr, Inc. v Skinner*, 63 NY2d 590, 596 [1984]).

For accord and satisfaction to act as a bar to a claim, however, that claim must have been existing or mature at the time of the accord and satisfaction (*Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993] ["An accord is an agreement that a stipulated performance will be accepted, in the future, in lieu of an existing claim"]); *see also Werking v Amity Estates, Inc.*, 2 NY2d 43, 51 [1956]; *Reilly v Barrett*, 220 NY 170, 172-73).

Secondly, there must be a dispute over that claim (*Horn Waterproofing Corp. v Bushwick Iron & Steel Co.*, 66 NY2d 321, 324-35 [1985] ["It has long been the general rule in this State that

'if a debt or claim be disputed or contingent at the time of payment, the payment, when accepted, of a part of the whole debt is a good satisfaction and it matters not that there was no solid foundation for the dispute'"]; *Manley v Pandick Press, Inc.*, 72 AD2d 452, 455 [1st Dept 1980] [the "tendered . . . check represented commissions on work which was not disputed by the parties; thus plaintiff's negotiation of that check, representing only commissions undisputedly earned, cannot constitute an accord and satisfaction of the disputed claim"]).

There is also a requirement that the party performing less than originally agreed in the contract must make clear that the lesser performance "'is offered only on condition that it is taken in full [satisfaction]' of the disputed claim" (*Manley*, 72 AD2d at 455-56; *see also Merrill Lynch Realty/Carll Burr, Inc.*, 473 NY2d at 596). Indeed, "the parties' intent governs the scope of the accord" (*Denburg*, 82 NY2d at 384-85 [noting that plaintiff, in agreeing to an alleged accord regarding the amount plaintiff owed to defendant, did not intend to surrender his right to challenge the validity of the contractual clause itself that required plaintiff to pay defendant]; *see also Werking*, 2 NY2d at 52).

In addition, accord and satisfaction may result "[w]hen a creditor accepts a check in a lesser amount than the debt he claims to be owed," and "such acceptance would be 'tortious except on the assumption of a taking in full satisfaction'" (*Odyssey Intl. Ltd. v Reebok Intl. Ltd.*, 715 F Supp 116, 118 [SD NY 1989] [discussing New York law]). Acceptance is tortious "in circumstances leaving no room for a reasonable belief that [the accepting party] is entitled to cash it without discharging the entire debt" (*Odyssey Intl. Ltd.*, 715 F Supp at 118).

In opposition, Donkov argues that the only claims that the purported accord and satisfaction could bar are claims related to work for which the $2500 final installment was paid. It contends that its breach of contract claim falls outside the scope of the accord and satisfaction because the work that is the subject of its claim was allegedly completed in the early stages of defendants' performance and was paid for by earlier installment payments. In support of this argument, plaintiff submits defendants' $15,000 invoice for "Final Payment for assistance and supervising for work executed by German workmen as per agreement" (Hurwitz Aff., Ex. B) and refers to the deposition testimony of Donkov's managing member, David Horowitz ("Horowitz"), in which he recounts a discussion with defendant Dosch regarding the final invoice, wherein Dosch informed him that he did not wish to complete the job (Plaintiff's Opp. Memo of Law, at pp. 3-4). Plaintiff also points to the memo section of the $2500 check, which only states, "payment in full services rendered" and does not mention damages from defendants' prior work. Plaintiff further contends that defendants have not established that the damages it seeks are exclusively for work performed in connection with the final installment.

From the parties' submissions, it is unclear whether all of the claims that are the subject of the breach of contract cause of action existed and matured at the time of the $2500 final payment. Even if all of the claims did exist at the time of the $2500 payment, there is a question of fact as to the parties' intent when they agreed to reduce the final payment to $2500. Specifically, there is a question of fact as to whether that $2500 payment was meant to settle all potential claims or merely

those connected to the final payment. Defendants therefore have not made a *prima facie* showing that accord and satisfaction entitles them to judgment as a matter of law.

Moreover, Donkov's acceptance of defendants' lesser, incomplete performance does not trigger application of accord and satisfaction. It is possible that acceptance of lesser performance was in exchange for an obligation to make a lesser payment, not for a discharge of the contractual obligations in their entirety. Thus, defendants' motion for summary judgment on the breach of contract claim on the ground of accord and satisfaction is denied.

B. No Meeting of the Minds; Agreement is too Vague and Ambiguous

Defendants alternatively argue that the court must dismiss the breach of contract claim because: (1) there was no meeting of the minds as to a construction management agreement or (2) the agreement is too vague and ambiguous to be enforceable.

To plead a cause of action for breach of contract, a plaintiff must "set[] forth the existence of a valid contract, plaintiff's performance of his obligations thereunder, defendant's breach . . . , and resulting damages . . . " (*Morris v 702 East Fifth Street HDFC*, 46 AD3d 478, 479 [1st Dept 2007]). In the absence of a written contract, "determination as to the existence of a contractual agreement and its terms depends, not upon the subjective intent of either of the parties . . . , but rather upon 'the objective manifestations of the intent of the parties as gathered by their expressed words and deeds'" (*P.J. Carlin Const. Co. v Whiffen Elec. Co.*, 66 AD2d 684, 684 [1st Dept 1978]). "It is necessary that the totality of all the acts of the parties, their relationship and their objectives be considered in

order to determine whether they entered into an oral agreement . . ." (*P.J. Carlin Const. Co.*, 66 AD2d at 684).

Defendants contend that plaintiff has not sufficiently defined the scope of the parties' agreement, including the terms, duties, and time frame. In an effort to distance themselves from the project and show that there never was an agreement between themselves and Donkov, defendants submit letters and invoices sent from contractors directly to plaintiff that allegedly show that plaintiff maintained control over the contractors (Matejka Aff., Ex. 15). Defendants also submit, however, cashed checks reflecting payment from plaintiff to defendants for expenses, materials, and defendants' invoices and defendants' itemizations of their expenses. In an affidavit, Dosch describes the nature of defendants' arrangement with Donkov as follows:

> "It was our vision, ideas, specialized knowledge/information obtained from the European craftsmen, coupled with our own research, ideas and suggestions, which we were requested to, and which we did impart to plaintiff at plaintiff's request.
>
> We ultimately consented to liaison between the European craftsman and plaintiff in order that the language barrier would not prevent plaintiff from utilizing their services if plaintiff chose to do so.
>
> Plaintiff agreed to provide us compensation in the sum of $45,000 USD in three installments of $15,000 apiece. Plaintiff agreed as well to reimburse out-of-pocket expenses incurred by defendants during the course of plaintiff's construction work such as travel from our home . . . to the premises, meals and the like"

(Dosch Aff., ¶¶ 7, 8 & 9). Indeed, some of the letters that defendants submit to support its argument are written in a foreign language (Matejka Aff., Ex. 15). Defendant Becher also testified that he "showed [the general contractor] what has to be done," that the general contractor then faxed a

written proposal to him, and that when he informed Horowitz of the proposal, "Mr. Horowitz was asking [him], 'Do you think this is outrageous? Is this correct? Is this good?' And [Becher] said, 'To my opinion, yes, it makes sense'" (Becher Aff., p. 146-50).

Rather than establishing that the agreement was too vague to be enforceable or that the parties lacked a meeting of the minds, defendants' evidence actually elucidates the role that they played in renovation of the property and demonstrates objective manifestations of the arrangement that the parties intended to have.

Plaintiff's submissions of, among other things, invoices and correspondence also provide an indication of each party's role in the renovation and their intentions. Taken together, the invoices and correspondence suggest that the parties may have entered into an oral agreement that defendants would assist plaintiff's renovation of the property in exchange for $45,000. Defendants' contention of vagueness therefore altogether fails.

The cases that defendants cite in support of summary judgment are readily distinguishiable in that they involved written agreements with missing material terms (*see Cobble Hill Nursing Home, Inc. v Henry & Warren*, 74 NY2d 475, 478-79 [1989] ["The legal question at the core of this human drama is whether an option permitting plaintiff to purchase a nursing home is so indefinite in its price term as to preclude enforcement by the courts"]; *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 108 [1981] [holding that a provision in a real estate lease that stated "that the rent for a renewal period was 'to be agreed upon'" but did not reference a formula or any other mechanism for the parties to calculate the renewal rent rate was unenforceable]).

This case, in contrast, concerns an oral contract, which contains a definite price term and even payment specifications–it is undisputed that plaintiff originally agreed to pay defendants $45,000 in three installments of $15,000. In exchange for such payment, defendants allegedly were to provide assistance with renovations of the property. Based on the totality of the parties' conduct, the evidence demonstrates that they may have had an oral agreement; therefore, defendants have not shown an absence of material issues of triable fact regarding the existence of this contract or its terms. Defendants' motion for summary judgment dismissing the breach of contract claim because of vagueness or a lack of a meeting of the minds is therefore denied.

II. Second Cause of Action Against RADJB and Dobe for Breach of Warranty

Plaintiff alleges that RADJB and Dobe breached warranties that: (1) the work would be performed substantially in accordance with the plans and specifications; (2) the work would be performed in compliance with laws, codes, rules, and regulations; and (3) there would be no construction defects[1] (Amended Complaint, ¶¶ 30, 32 & 33). In support of its claim, plaintiff submits two letters from Becher to Horowitz's real estate attorney dated October 1, 2002 and December 20, 2002, wherein Becher states that he "can guarantee that the [paint] job will be done perfectly" and "the entire house will be finished and ready for the painters to work" (Hurwitz Aff., Exs. D & N). Citing the statute of frauds, defendants argue that Donkov's claim is barred absent a writing signed by one of the defendants.

[1] Though in the pleading, plaintiff suggests that there are other warranties besides those listed above, the court limits its analysis to the warranties that are in the record.

Typically, "[w]arranties are limited to sales of goods. No warranty attaches to the performance of a service [internal citation omitted]" (*Aegis Prods., Inc. v Arriflex Corp. of Am.*, 25 AD2d 639, 639 [1st Dept 1966]; *see Dobisky v Rand*, 248 AD2d 903, 905 [3d Dept 1998] ["[T]his State does not recognize a cause of action in breach of warranty for the performance of services . . ."]). However, if it is shown that at the outset of a services contract either the parties had an agreement for a higher standard of care or the party rendering services expressly bound itself to provide perfect results, the court will enforce that promise (*Milau Assocs. v North Ave. Dev. Corp.*, 42 NY2d 482, 486-87 [1977] [discussing the viability of plaintiff's claims for negligence and breach of implied warranty of fitness for a particular purpose against a contractor and subcontractor that installed a sprinkler system that burst and caused damage to plaintiff]).

The alleged warranties–namely, that: (1) the work would be performed substantially in accordance with the plans and specifications; (2) the work would be performed in compliance with laws, codes, rules and regulations; and (3) there would be no construction defects–do not constitute an agreement or promise for "perfect results" or a "higher standard of care" (*see Milau Assocs.*, 42 NY2d at 487 ["Of course, where the party rendering services can be shown to have expressly bound itself to the accomplishment of a particular result, the courts will enforce that promise . . ."]). Significantly, Becher's letters, which contained representations about the paint job, were sent months after the parties entered into their agreement and thus were not a basis of their bargain.

Because plaintiff has not shown that defendants at the outset obligated themselves to a higher standard other than that of "reasonable care and competence owed generally by practitioners in the

particular trade or profession," the second cause of action for breach of warranties is dismissed and the statute of frauds argument need not be addressed (*Milau Assocs.*, 42 NY2d at 486).

III. Third Cause of Action Against RADJB and Dobe for Breach of Implied Warranty

In its third cause of action, plaintiff alleges that RADJB and Dobe breached an implied warranty of workmanship and materials (Amended Complaint, ¶¶ 37 & 38). Defendants again argue that plaintiff's claim is barred absent a writing signed by one of the defendants.

Though certain express warranties may apply to service contracts, New York courts rarely read implied warranties into service contracts (*see Milau Assocs.*, 42 NY2d at 489 ["[W]e can find no reasonable basis in policy or in law for reading what would amount to a warranty of perfect results into the [contract for services created by the parties]"]; *Arrow Elecs., Inc. v Stouffer Corp.*, 117 Misc 2d 554, 556 [Sup Ct, NY County 1982] [dismissing implied warranty claims against a provider of services and denying dismissal of express warranty claims]).

The alleged agreement here was for construction management services. Defendants did not urge plaintiff into relying on their ability to provide perfect workmanship or materials. Thus, there is no reasonable basis to read a warranty of perfect results into the contract, and the claim is dismissed without any need to address the statute of frauds (*see Milau Assocs.*, 42 NY2d at 488 ["Given the predominately service-oriented character of the transaction, neither the code nor the common law of this [s]tate can be read to imply an undertaking to guard against economic loss stemming from the nonnegligent performance by a construction firm which has not contractually bound itself to provide perfect results"]).

IV. Fourth Cause of Action Against RADJB and Dobe for Negligence

Plaintiff alleges that the negligence of corporate defendants RADJB and Dobe caused construction defects to the property resulting in depreciated market value, repair and replacement costs, and other expenses (Amended Complaint, ¶¶ 40-42). Defendants argue that the Court must dismiss this claim because plaintiff cannot transform a breach of contract claim into a tort claim.

"Generally, a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action, particularly where . . . both seek identical damages" (*Reade v SL Green Operating Partnership*, 30 AD3d 189, 190 [1st Dept 2006]). There are, however, certain circumstances where a claimant may permissibly bring an action sounding in both tort and contract (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551-553 [1992]). In setting forth "guideposts" for determining when a plaintiff may bring both a breach of contract and tort claim, the Court of Appeals in *Sommer* explained that: (1) there must be a breach of a legal duty distinct from the contract and (2) "the nature of the injury, the manner in which the injury occurred and the resulting harm" are pertinent considerations (*Sommer*, 79 NY2d at 551-553). The more the harm from the purported negligence differs from that allegedly caused by a breach of contract, the greater the likelihood that the claim for negligence will survive (*see Sommer*, 79 NY2d at 552 [allowing a breach of contract and negligence claim against a fire alarm company where plaintiff sought damages for an uncontrollable fire and was not merely seeking the benefit of its contractual bargain]; *Oppman v IRMC Holdings, Inc.*, 14 Misc 3d 1219(A), *11-12 [Sup Ct, NY

County 2007] [dismissing negligence claim because plaintiffs' injury was merely the lost value of their investment]).

The damages Donkov alleges resulted from negligence–market depreciation, repair and replacement costs, and other related expenses–are purely economic and do not result from an "abrupt, cataclysmic occurrence" or differ from those damages allegedly sustained as a result of breach of contract (*Sommer*, 79 NY2d at 552). Thus, Donkov may not bring a negligence claim in addition to its breach of contract claim (*Sommer*, 79 NY2d at 553). Defendants' motion for summary judgment dismissing the fourth cause of action against RADJB and Dobe is therefore granted.

V. Fifth Cause of Action against RADJB and Dobe for Breach of Contract to Correct and Repair Construction Defects and Complete Work

Plaintiff alleges that upon being notified that there were construction defects at the property and that the work was incomplete, RADJB and Dobe agreed to correct and complete the work but failed to do so (Amended Complaint, ¶¶ 46-53).

Like the first cause of action for breach of contract, defendants argue that this claim must be dismissed because the alleged agreement is too vague and ambiguous to be enforced. Defendants contend that: (1) the Amended Verified Complaint, Verified Bill of Particulars, and other documents and testimony do not identify the parties to the agreement or any consideration relating to the alleged agreement and (2) plaintiff has not alleged when the agreement was made, the alleged defects and incomplete work defendants agreed to repair and complete, or when and how defendants were notified that there was work that allegedly needed to be completed.

Plaintiff has not opposed defendants' contentions or provided any evidence that would allow the court to analyze "the totality of all the acts of the parties, their relationship and their objectives" in order to determine whether the parties entered into a valid oral agreement (*P.J. Carlin Const. Co.*, 66 AD2d at 684). Given plaintiff's failure to rebut defendants' argument or show that there are material issues of fact concerning the existence and definiteness of this alleged agreement, defendants' motion to dismiss this cause of action is granted (*see Zuckerman*, 49 NY2d 557, 560 [1980]).

VI. Sixth Cause of Action against RADJB and Dobe for Breach of Contract Resulting in Loss of Rental Income

Plaintiff alleges that the Renovation Contract required the renovations to be completed within a reasonable time frame and that RADJB and Dobe's failures caused delays that resulted in a loss of rental income to plaintiff (Amended Complaint, ¶¶ 57-61).

Defendants argue that this claim must be dismissed because it is duplicative of plaintiff's first cause of action for breach of contract and because plaintiff does not allege or provide admissible evidence regarding when the alleged construction management agreement was to be completed or when the parties agreed that the rental apartments would be available for occupancy. In addition, defendants argue that plaintiff has not made a showing of any alleged loss of rental income.

Though this cause of action, like the first one, alleges that RADJB and Dobe breached the Renovation Contract, the first claim concerns damages from an inferior product, whereas this claim concerns damages from excessive delay. Though Donkov could have sought to recover all of its damages under one cause of action, its failure to do so does not warrant dismissal of this claim for

lost rental income (*Sipos v Fastrack Healthcare Sys., Inc.*, 8 Misc 3d 1028(A), *3 [Sup Ct, Nassau County 2005] [denying dismissal of plaintiff's four causes of action seeking damages for different breaches of the same contract and explaining that "[w]hile [plaintiff] might have alleged . . . a single cause of action containing all of the alleged breaches of his contract, this is not required"]). Furthermore, defendants have failed to show that there are no triable issues of fact concerning the expected time frame for completion of the renovation or RADJB and Dobe's role in the alleged delays. The court therefore denies defendants' motion to dismiss this cause of action.

VII. Seventh and Eighth Causes of Action Against Becher and Dosch for Negligence

Plaintiff alleges that individual defendants Becher and Dosch negligently participated in, managed, and supervised the work, labor, services, and materials required for the renovation (Amended Complaint, ¶¶ 65, 66, 70, 71). Defendants contend that these claims are: (1) duplicative because plaintiff cannot transform a simple alleged breach of contract into a tort claim or (2) fail to state a cause of action.

In the context of a services contract, a traditional negligence standard of conduct applies, and only reasonable expectations are ensured (*Milau Assocs., Inc.*, 42 NY2d at 486 ["[R]easonable care and competence owed generally by practitioners in the . . . trade or profession defines the limits of an injured party's justifiable demands."]). Furthermore, "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil

is pierced (internal citations omitted)" (*American Exp. Travel Related Svcs. Co. v North Atl. Resources, Inc.*, 261 AD2d 310, 311 [1st Dept 1999]).

The amended complaint, read in conjunction with the documentary evidence submitted, indicates that plaintiff has sufficiently stated a cause of action for negligence against both individual defendants (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-75 [1977] ["When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one . . ."]). Plaintiff alleges that the corporate defendants RADJB and Dobe entered into a contract to render services for plaintiff. Plaintiff further alleges that the individual defendants are corporate officers of RADJB and Dobe and that, by negligently supervising the renovation, they committed a tort that caused it damage.

Defendants' evidence does not refute plaintiff's allegations, nor does it establish that no issue of material fact exists as to the nature of the individual defendants' relationship with RADJB and Dobe, the duties the individual or corporate defendants owed to plaintiff, the quality of the individual defendants' supervision of the renovation, or the extent of the individual defendants' participation in the renovation. Additionally, as plaintiff has not brought a breach of contract claim against the individual defendants, this cause of action is not duplicative. Defendants' motion to dismiss the negligence causes of action against the individual defendants is therefore denied.

VIII. Ninth Cause of Action to Pierce the Corporate Veil of RADJB and Dobe

Plaintiff seeks to pierce the corporate veil of RADJB and Dobe, alleging that RADJB and Dobe were improperly capitalized and failed to follow required corporate formalities (Amended

Complaint, ¶¶ 74, 75, 78 & 79). Plaintiff also alleges that Becher and Dosch were the sole shareholders, directors, and officers of RADJB and Dobe and are the alter egos of the corporate defendants (Amended Complaint, ¶¶ 76, 77, 80 & 81).

Defendants contend that the ninth cause of action to pierce the corporate veil fails to state a cause of action because plaintiff does not allege fraud or other wrongdoing that would invoke the court's equity jurisdiction and because piercing the corporate veil does not constitute an independent cause of action against a corporation.

"Generally, piercing 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 . . ." (*Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). "[T]he corporate veil can be pierced where there has been, *inter alia*, a failure to adhere to corporate formalities, inadequate capitalization, use of corporate funds for personal purpose, overlap in ownership and directorship, or common use of office space and equipment" (*Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1st Dept 1996]; *see M&A Oasis, Inc. v MTM Assocs., L.P.*, 307 AD2d 872 [1st Dept 2003] [concluding that the lower court "properly refused to add [an individual defendant to the veil-piercing claim] in the absence of any allegations that [the individual] was doing business in his individual capacity, shuttling his personal funds in and out of [the company] without regard to corporate formalities and to suit his own convenience]"). However, "an attempt of a third party to pierce the corporate veil does not constitute a cause of action independent

of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

During the course of the renovations on the project, defendants corresponded with plaintiffs using various letterheads, namely, the corporate letterheads of RADJB and Dobe, as well as Becher's personal letterhead (Hurwitz Aff., Exs. B, D, E, F, G, L, M & N). Such interchangeable use of letterheads suggests that Becher and Dosch, as owners of RADJB and Dobe, may have exercised complete domination over the corporate entities. As discussed above, plaintiff's breach of contract claim survives, and it is possible that the individual defendants used their domination over RADJB and Dobe to breach the alleged contract with plaintiff, that is, to commit a wrong. Plaintiff has therefore sufficiently asserted facts and circumstances that could persuade a fact-finder to impose the obligations of RADJB and Dobe on the individual defendants (*see Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

Although defendants are technically correct–there is no separate cause of action for veil-piercing–defendants have not shown an absence of domination or wrongdoing that would entitle them to a judgment ruling out the possibility of personal liability. The court exercises its discretion to deem that plaintiff's mischaracterization of its veil-piercing allegation as a separate, ninth cause of action is not fatal to plaintiff's pursuit of personal liability against the individual defendants. Defendants' motion to dismiss this claim is therefore denied.

IX. Limit Damages

Defendants also dispute the amount of damages that plaintiff alleges, arguing that: (1) damages should be limited to the actual damages proved; (2) plaintiff has overstated damages; and (3) plaintiff is obligated to mitigate damages.

"The courts generally require the party complaining of a breach of contract to prove his actual damages and limit his recovery to the amount thereof" (*Taylor v Goelet*, 208 NY 253, 259 [1913]). "It has long been recognized that the theory underlying damages is to make good or replace the loss caused by the breach of contract [internal citation omitted]" (*Brushton-Moira Cent. School Dist. v Fred H. Thomas Assocs, P.C.*, 692 NE2d 551, 553 [1998]). "Damages are intended . . . to place the nonbreaching party in as good a position as it would have been had the contract been performed" (*Brushton-Moira Cent. School Dist.*, 692 NE2d at 553). As with a breach of contract claim, "[i]n a negligence action, *prima facie* entitlement to compensatory damages must be established by a fair preponderance of the evidence" (*Rose v Brown & Williamson Tobacco Corp.*, 10 Misc.3d 680, 705 [Sup Ct, NY County 2005]).

Defendants first contend that plaintiff is limited to foreseeable damages. In making this argument, however, defendants rely on *Swain v Schieffelin* (134 NY 471 [1892]), which is inapplicable to this case. In *Swain*, the court addressed the proper calculation of damages for breach of an implied warranty, explaining that such damages were limited to those that were foreseeable. As plaintiff's breach of implied warranty claim is dismissed, plaintiff's only potential damages are for defendants' alleged breach of contract and negligence. These breaches, if proven, entitle plaintiff

to damages that will place it in as good a position as it would have been had defendants not breached the agreement or acted negligently. Thus, defendants' argument to limit plaintiff's damages in such a manner fails.

Defendants next contend that plaintiff's damages are overstated. This contention, however, is unsupported by evidence that defendants did not cause the damages that plaintiff alleges. Defendants state that many of the invoices plaintiff produced to support the Amended Itemization of Damages "appear to be for services rendered by various venders to the plaintiff in connection with their renovation of the premises" (Defs. Memo of Law, p. 13). A finder of fact could reasonably determine, however, that the expenses for these services were due to defendants' breach of the contract or negligence. Thus, defendants' attempt to limit the damages to exclude certain expenses that plaintiff incurred fails.

Finally, defendants argue that plaintiff is obligated to mitigate its damages. Indeed, New York law does impose a duty to mitigate upon the non-breaching party (*see e.g., Losei Realty Corp. v City of New York*, 254 NY 41, 47 [1930] ["The law wisely imposes upon a party subjected to injury from the breach of a contract the active duty to make reasonable efforts to render the injury as light as possible."]). Defendants, however, do not contend, nor have they attempted to show, that plaintiff has failed to mitigate its damages.

Ultimately, defendants are correct, however, that the amount of plaintiff's damages actually recoverable shall be limited to those actually proven at trial.

Accordingly, it is

ORDERED that RADJB Realty Inc., Juerg Becher, Ralph Dosch, and Collection Dobe Fine Arts, Ltd.'s motion for summary judgment or to dismiss Donkov Realty LLC's complaint is granted as to the second cause of action for breach of warranty, third cause of action for breach of implied warranty, fourth cause of action for negligence, and fifth cause of action for breach of contract; and it is further

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended by substituting the correct spelling of the name of Juerg Becher, as co-defendant, in the place of the incorrect spelling; and it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry upon the Clerk of the Court and upon the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein.

Dated: July 8, 2008
New York, NY

ENTER:

Hon. Eileen Bransten

FILED
JUL 14 2008
COUNTY CLERK'S OFFICE
NEW YORK