[* 1]

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

PRESENT: CAROL EDMEAD J.S.C. Justice PART 35

Replace Retail, LLC

INDEX NO. 602318/08

MOTION DATE 2/4/08

- v -

MOTION SEQ. NO. 002

Universal Renovation USA

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 ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED
APR 01 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(3) (lack of capacity), is granted without prejudice; and it is further

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(7) (failure to state a cause of action) is granted; and it is further

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(1) (documentary evidence) and CPLR 3211(a)(8) (for lack of jurisdiction), is denied; and it is further

ORDERED that defendant's motion seeking sanctions against plaintiff, pursuant to 22 NYCRR §130-1.1(a), is denied; and it is further

ORDERED defendant serves a copy of this order with notice of entry upon all parties within 20 days of entry.

The Clerk may enter judgment dismissing the Complaint accordingly.

That constitutes the decision and order of the Court.

Dated: 3/30/09

CAROL EDMEAD 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 35

----------x

REPLACE RETAIL, LLC,

Index No. 602318/08

Plaintiff,

-against-

DECISION/ORDER

UNIVERSAL RENOVATION USA CORP.
and GUY PAPICH,

Defendants.

----------x

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, plaintiff Replace Retail, LLC ("plaintiff") seeks judgment against defendants Universal Renovation USA Corp. ("Universal") and Guy Papich ("defendant") (collectively, "defendants") for $35,471.86 plus interest on the ground of conversion, $3,225 on the ground of breach of contract, and $3,225 on the ground of negligence, together with attorney's fees, interest, costs and disbursements, along with any such relief the Court shall seem just and equitable.

Defendant now moves for an order dismissing plaintiff's Complaint and causes of action as to defendant, pursuant to CPLR §3211(a)(1), (3), (7) and (8), on the grounds that defendant's defense is founded upon documentary evidence, plaintiff has no legal capacity to sue, the Complaint fails to state a cause of action as to defendant, and the Summons was not properly served upon defendant. Defendant also seeks sanctions against plaintiff, pursuant to 22 NYCRR §130-1.1(a).

Factual Background[1]

On or about August 7, 2007, defendants entered into an agreement wherein defendants were to perform renovation work for plaintiff at 11 East 22nd Street, Apartment 2, New York, New York (the "Premises") and plaintiff was to pay defendants $84,410 ("the Agreement," Complaint Exh. A). On or about September 16, 2007, the parties entered into a supplemental agreement wherein the defendants agreed to provide plaintiff with additional services at the Premises, and plaintiff was to pay defendants $3,780 ("September 16, 2007 Add-ons Scope of Work," Complaint Exh. B). On or about October 8, 2007, the parties entered into a second supplemental agreement for defendants' services at the Premises, wherein plaintiff agreed to pay defendants $15,027 ("October 8, 2007 Add-ons Scope of Work," Complaint Exh. C). On or about December 5, 2007, the parties entered into a third supplemental agreement wherein plaintiff agreed to pay defendants $2,077.16 ("December 5, 2007 Add-ons Scope of Work," Complaint Exh. D) (Complaint, ¶¶ 8-11).

On or about December 5, 2007, defendants informed plaintiff that they had completed all of the work outlined in the Agreement and supplemental agreements (Complaint, ¶ 12).

From July 30, 2007 until December 5, 2007, plaintiff made the following payments:

Date	**Payee**	**Amount**
7/30/2007	Universal	8,560.02
8/7/2007	Universal	9,481.25
8/7/2007	Universal	9,481.25
8/21/2007	Universal	9,481.25

[1]Information taken from plaintiff's Verified Complaint (plaintiff's Exh. A and defendant's Exh. A).

8/21/2007	Universal	9,481.25
9/6/2007	Universal	9,000
9/18/2007	Universal	9,000
9/18/2007	Universal	9,000
10/8/2007	Universal	9,500
10/8/2007	Universal	9,500
10/8/2007	Universal	6,027
10/18/2007	Universal	9,000
10/18/2007	Universal	9,000
10/29/2007	Universal	9,000
11/21/2007	Universal	9,000
12/5/2007	Universal	9,000
TOTAL	**143,512.02**	

On or about December 20, 2007, plaintiff discovered an overpayment to defendants in the amount of $37,417.86 (the "overpayment"). On or about December 28, 2007, Amanda Moore ("Ms. Moore"), owner of the plaintiff corporation, tried to contact defendant to discuss the overpayment by leaving voice-mails and sending e-mails (Complaint, ¶¶ 13-15).

On or about January 1, 2008, plaintiff discovered numerous examples of faulty, defective and unfinished work left by defendants at the Premises. On January 12, 2008, plaintiff hired a handyman to correct these items at a cost of $200 (Complaint, ¶ 17).

On or about January 18, 2008, plaintiff contacted defendant to discuss the overpayment. Defendant told plaintiff that he did not know of an overpayment and stated that he required copies of all cashed bank checks in order to establish that an overpayment had been made. Plaintiff informed defendant that the requested documents were forthcoming (Complaint, ¶ 18).

On or about January 21, 2008 and January 31, 2008, plaintiff provided defendant with supportive paperwork evincing the overpayment, including copies of all cashed checks signed by defendant, bank account information and summary spreadsheets detailing the overpayment (Complaint, Exh. E). During a phone conversation with Ms. Moore, defendant stated that defendants' accountant had reviewed all of the supporting information and concluded that an overpayment had indeed been made by plaintiff (Complaint, ¶ 19).

On or about January 31, 2008, defendant and Ms. Moore, in the presence of Ramie Roth, an employee of plaintiff, met with defendant in front of 611 Broadway, Suite 613B, New York, New York 10012, plaintiff's principal place of business, to discuss a repayment plan. At this meeting, defendant admitted that he owed the overpayment amount to plaintiff. Additionally, defendant stated that he did not have the monetary means to repay the debt immediately; however, defendant told Ms. Moore that the overpayment would be repaid in installments (Complaint, ¶ 20).

On or about March 20, 2008, plaintiff hired a handyman, Mario Merdidaj ("Mr. Merdidaj"), to complete items at the Premises left unfinished by defendants, at a cost to plaintiff of $1,825 (Complaint, ¶ 21).

On or about April 7, 2008, in recognition of the overpayment, defendants paid plaintiff $2,000 (Complaint, ¶ 23).

On or about May 9, 2008, plaintiff's attorney contacted defendant and requested that he make immediate payment to plaintiff. Defendant denied the existence of the overpayment and stated that no payment would be forthcoming (Complaint, ¶ 24).

On or about June 12, 2008, Mr. Merdidaj was again hired to correct defendants' work, at

a cost to plaintiff of $1,200 (Complaint, ¶ 24).

Plaintiff's Complaint

On August 8, 2008, plaintiff filed a Complaint against defendants for conversion, breach of contract and negligence.

The first cause of action alleges that plaintiff had legal ownership over $37,417.86, given to defendants in overpayment of monies due upon the Agreement and supplemental agreements (collectively, "the Agreements"). Of that $37,417.86, defendants have returned only $2,000. Plaintiff alleges that, without authority, defendants currently possess $35,471.86 owned by plaintiff, and are intentionally exercising control over the funds in such a way as to interfere with plaintiff's right of possession. Plaintiff further alleges, upon information and belief, that Universal has co-mingled the overpayment with defendant's personal funds. Therefore, defendants are liable for $35,471.86 belonging to plaintiff. Additionally, defendants' failure to promptly return the overpayment has caused plaintiff to incur $1,915.93 in fees from American Express (Complaint, ¶¶ 28-34).

The second cause of action alleges that defendants agreed to furnish numerous services throughout the Premises as indicated in the Agreements, and that defendants have been paid in full, and in excess, of what they were entitled to under the Agreements. However, defendants did not satisfy their obligations under the Agreements. As a result of the defendants' breach of their obligations, plaintiff was forced to hire others to correct the work of defendants, at a cost to plaintiff of $3,225.

The third cause of action alleges that defendants' conduct and craftsmanship at the Premises were unreasonable and fell outside of the general custom, use or practice of those in

defendants' trade. As a result of defendants' failure to reasonably repair the Premises as commissioned by plaintiff, plaintiff had to hire others to correct the work of defendants, at a cost to plaintiff of $3,225.

Defendant's Motion

First, defendant argues that, pursuant to CPLR §3211(a)(1), (3), (7) and (8), plaintiff's Complaint must be dismissed as to defendant because plaintiff has not sufficiently pled, *inter alia*, specific facts and circumstances in requisite detail to pierce Universal's corporate veil and bind defendant personally. Plaintiff offers no evidence or acceptable claim that justifies naming defendant in his individual capacity. In fact, all of plaintiff's exhibits list the contractor as Universal and all payments as being made to Universal (See Complaint, Exhs. A-E).

Defendant contends that in order to hold the owner of a corporation personally liable ("pierce the corporate veil"), a party must 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 plaintiffs injury. Defendant argues that a complaint containing conclusory allegations of corporate domination or control, without more, does not sufficiently plead a basis for piercing the corporate veil. Defendant argues that a well-pleaded veil-piercing claim must allege specific facts that justify disregarding the corporate form, and here, plaintiff's allegations as to defendant are clearly insufficient. Plaintiff fails to even allege any facts that would justify a piercing. Moreover, plaintiff offers no allegations or evidence of defendants' failure to abide by corporate formalities.

Defendant further argues that the dismissal of plaintiff's allegations as to defendant is necessary because the limited liability provided by the corporate form fosters important social

and economic policies. Through its veil-piercing jurisprudence, New York courts have made it clear that parties should not be dragged into lawsuits merely because of their corporate ownership of alleged wrongdoers. In fact, a principal attribute of, and in many cases, the major reason for, the corporate form of business is the elimination of personal shareholder liability.

Second, defendant argues that personal jurisdiction was not obtained over defendant. Defendant contends that the Summons was never properly served upon defendant. CPLR §305 states in pertinent part that a summons shall bear the index number assigned and the date of filing with the clerk. The Summons in the possession of defendant fails to bear an index number and the date of filing with the clerk; therefore, the Summons is clearly defective. Although defendant's attorney advised plaintiff's attorney of such defect, the defect was never corrected. As a result, defendant was in possession of defective papers, without knowing whether they were real or just some form of harassment. The fact that defendant was in possession of the papers is irrelevant, defendant argues. Further, plaintiff has failed to satisfy the requirements of CPLR §306(b), in that a proper Summons was not served within 120 days after the filing of the summons and complaint. In fact, to date, defendant has yet to be served with the proper papers. Accordingly, personal jurisdiction was not obtained over defendant, and where personal jurisdiction is not obtained, the complaint and all of the proceedings must be rendered nullities.

Third, defendant argues that the "alleged plaintiff" appears to not have been formed as a corporation and, accordingly, lacks capacity to sue. Defendant submits a printout of an online search of the Department of State, Division of Corporations, Corporation and Business Entity Database for "Replace Retail, LLC." The results page indicates that no business entities were found with plaintiff's name. An action must be dismissed where the entity plaintiff failed to file

proper documents with the Secretary of State before bringing its action, defendant argues.

Fourth, defendant argues that sanctions for frivolous conduct should be imposed upon plaintiff, pursuant to 22 NYCRR §130-1.1. In considering whether specific conduct is frivolous, courts also are required to examine "whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent," defendant argues, citing 22 NYCRR 130-1.1 (c). Plaintiff's complaint is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. And, plaintiff cannot maintain any cause of action as to defendant.

Plaintiff's Opposition

First, plaintiff contends that the facts alleged in its Complaint are sufficient to withstand defendant's motion to dismiss, pursuant to CPLR §3211(a)(7). Defendant fails to address the well-settled law of individual liability by corporate directors and corporate agents emanating from their tortious conduct, plaintiff argues. A corporate officer or agent is personally liable for acts that constitute a conversion of another's property, plaintiff argues. It is no defense to such liability that the act was done while the officer was acting for the corporation. Here, plaintiff has alleged that defendant knowingly misappropriated $35,471.86 belonging to the plaintiff and has refused to return these funds, in defiance of plaintiff's rights. Defendant's acts amount to tortious conversion of funds for which defendant is personally liable, plaintiff argues.

Second, plaintiff contends that defendant's argument that he was not properly served is false. Plaintiff commenced this action on August 8, 2008 with the purchasing of an index number and the filing of a Summons and Complaint in New York Supreme Court, County of New York (Exh. A). As stated in the affidavit of Bonnie Bell Smith ("Ms. Smith," Exh. B), on

August 11, 2008, Ms. Smith attempted to personally serve Universal at the address provided on Universal's New York Department of State Division of Corporations Entity Information Page: 2754 Mill Avenue, Brooklyn, NY 11234 (Exh. C). Neither defendant nor a representative of Universal could be found at that location.

As to defendant, on August 18, 2008, Ms. Moore provided plaintiff's attorney with the last known dwelling place of defendant: 1350 East 66th Street, Brooklyn, NY 11234 ("defendant's home"). On August 18, 2008, Ms. Smith was dispatched to serve the defendants at defendant's home. Ms. Smith attempted to serve defendant personally but was unable to locate him. Instead, two copies of the Summons and Complaint were given to a person of suitable age and discretion, pursuant to CPLR §308(2). The person identified herself as defendant's wife, Yael Papich ("Ms. Papich").[2]

On August 18, 2008, Ms. Papich contacted plaintiff's attorney and told him that she was in possession of plaintiff's Summons and Complaint. Thereafter, plaintiff's attorney advised Ms. Papich to obtain legal counsel. On August 20, 2008, plaintiff's attorney contacted defendant and asked whether he had obtained counsel. Defendant stated that he had not. Plaintiff's attorney then asked defendant whether he would accept service on behalf of Universal. Defendant stated that he would contact plaintiff's attorney on August 21, 2008, after speaking to an attorney.

On August 22, 2008, plaintiff's attorney received a call from John Kokolakis ("Mr. Kokolakis"), the current attorney of record for defendants. Mr. Kokolakis stated that he had spoken to defendant but had not yet been retained. He also told plaintiff's attorney that the

[2]According to plaintiff, an affidavit of service upon defendant was filed with the New York County Clerk's Office on August 21, 2008.

Summons and Complaint in his possession were missing index numbers.

Plaintiff contends that in order to ensure effective service, "two copies of the Summons and Complaint, both possessing a clearly delineated index number, were served upon defendant . . . by affixing a true copy of each to the door of defendant's home on three occasions." Plaintiff asserts that service was completed, pursuant to CPLR §308(4), by affixing the Summons and Complaint on August 22, 2008 at 2:30 p.m., August 29, 2008 at 4:30 p.m., and September 5, 2008 at 10:00 a.m. Further, a Summons and Complaint were mailed to defendant on September 12, 2008 in an envelope bearing the legend "Personal and Confidential" and not indicating on the outside of the envelope that the communication was from an attorney or concerned an alleged debt. The envelope was not returned as undeliverable by the post office. An affidavit of service upon defendant on August 22, 2008, August 29, 2008 and September 5, 2008 was filed with the New York County Clerk's Office on September 17, 2008.

In order to ensure effective service over Universal, a Summons and Complaint with a clearly delineated index number were served upon the Secretary of State on September 19, 2008. An affidavit confirming service upon Universal was filed with the Office of the New York County Clerk on October 9, 2008.

On September 12, 2008, copies of the Summons and Complaint were mailed to defendant and Universal at Universal's last known location of operation, 1350 East 66th Street, Brooklyn, NY 11234, in an envelope bearing the legend "Personal and Confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. The envelope was not returned as undeliverable by the post office.

Plaintiff argues that defendant's counsel is acutely familiar with these facts, as plaintiff

provided this information in its Motion to Dismiss.[3] The motion to dismiss was withdrawn on December 12, 2008, pursuant to a stipulation signed by both plaintiff's and defendants' attorneys. Proper service was effectuated over defendant, and defendant has not satisfied his burden of demonstrating otherwise, plaintiff contends. Accordingly, defendant's motion to dismiss, pursuant to CPLR §3211 (a)(8), should be denied.

Third, plaintiff contends that it is properly registered with the New York Secretary of State, and it is authorized to do business in the State of New York. Thus, plaintiff is fully able to commence this action, and defendant's motion to dismiss, pursuant to CPLR §3211(a)(3), must be denied. Referring to a copy of plaintiff's New York Department of State Division of Corporations Entity Information Page, plaintiff maintains that it is licensed and registered with the New York Secretary of State. Further, plaintiff argues that defendant erroneously relies on caselaw to attack plaintiff's capacity to sue. Accordingly, defendant's motion to dismiss, pursuant to CPLR §3211 (a)(3), must be denied.

Fourth, plaintiff contends that defendant's request for the imposition of sanctions is utterly inappropriate and must be denied. Defendant has offered nothing more in support of this demand for sanctions other than a recycled, boilerplate affirmation. Defendant failed to evince how these proceedings are frivolous so as to support an order for sanctions under 22 NYCRR §130-1.1. In explaining this neglect, counsel merely states that it is "for purposes of brevity." All of plaintiff's allegations against defendants, including those against defendant in his individual capacity, possess merit, are supported by law, are not designed to delay proceedings or

[3] Plaintiff refers to Exh. G for a copy of plaintiff's attorney's affirmation; however, Exh. G contains only a copy of plaintiff's New York Department of State Division of Corporations Entity Information Page.

to harass, and do not contain false material statements, plaintiff maintains. Because of defendant's failure to demonstrate or provide any factual allegations as to why plaintiff's arguments are frivolous, defendant's demand for sanctions must be denied.

Fifth, plaintiff contends that defendant has failed to address the portion of his motion to dismiss, pursuant to CPLR §3211(a)(1). Defendant makes no reference or argument that would support a motion to dismiss, pursuant CPLR §3211; nor does defendant provide any documentary evidence that might show a defense to the claims asserted by plaintiff. Therefore, ~~as defendant has not satisfied his burden of proof necessary to sustain his motion to dismiss,~~ pursuant to CPLR §3211(a)(1), defendant's motion should be denied.

Defendant's Reply

Defendant contends that plaintiff's own documentary evidence establishes that defendant is not a party to the agreement between plaintiff and Universal. It is undisputed, as plaintiff's exhibits indicate, that the contractor is Universal and that all payments were made to Universal only. It is further undisputed that plaintiff made no payments to defendant, and nothing to that effect is alleged by plaintiff. Plaintiff's own pleadings and documents are conclusive evidence that clearly demonstrate that defendant is not a party to the agreement. Therefore, plaintiff's claims must fail as a matter of law.

Defendant further contends that plaintiff is "grasping at straws in its desperate attempt to plead a cause of action" for defendant's personal liability. New York courts have made clear that parties should not be dragged into lawsuits merely because of their corporate ownership of an alleged wrongdoer, defendant argues. In the case to which plaintiff cites to support personal liability, *Fleck Roofing & Siding Co. v Perla* (40 AD2d 1069, 1070 [4th Dept 1972]), the Court

addressed the issue of receiving property knowing it to have been the subject of a trust and knowing to have been transferred in violation of the trustee's duty or power. Thus, defendant argues, such case is clearly distinguishable. Moreover, plaintiff's Complaint fails to allege that defendant had any knowledge of plaintiff's alleged overpayment at the time of the receipt of any payment. Further, the "presumption" against disregarding the corporate form is particularly strong in contract cases, in which a plaintiff has chosen the party with which it has contracted, and with which it may negotiate guarantees or other security arrangements. Plaintiff herein chose to contract with Universal and failed to negotiate any guarantees or security arrangements with defendant. Moreover, plaintiff's Complaint fails to allege specific facts that justify disregarding the corporate form.

Defendant also reiterates that a Summons was never properly served upon him. Defendant contends that the two "non-licensed individuals" who served him by "nail and mail" service, indicate that they mailed copies to defendant in unmarked envelopes, but failed to mark the envelopes containing the summons and complaint as "personal and confidential," as required by the CPLR. Defendant also notes that although the above-referenced affidavit of service states that the Summons and Complaint were affixed to the door and then mailed, the two non-licensed individuals managed to "ask the person spoken to whether Defendant was in active military service." Defendant finds it difficult to understand to whom the two individuals spoke. Notwithstanding the above, the only Summons in the possession of defendant fails to bear an index number and the date of filing with the clerk; thus, it is clearly defective. Accordingly, personal jurisdiction was not obtained over defendant, and where personal jurisdiction is not obtained, the complaint and all of the proceedings must be rendered nullities, defendant argues.

Defendant also reiterates that plaintiff lacks capacity to sue. Although plaintiff attaches an entity information page for a certain "Replace LLC" in support of its allegation that plaintiff is formed and licensed in New York State, "Replace LLC" is not Replace Retail, LLC, the named plaintiff in this action. Despite plaintiff's attempt to mislead this Court, plaintiff fails to produce any evidence that it is formed, licensed and has capacity to sue. In contrast, defendant attaches the search-results page for the Department of State, Division of Corporations, Corporation and Business Entity Database that indicates that no business entities were found with the name "Replace Retail, LLC." Moreover, New York Limited Liability Company Law §206 requires a limited liability company to publish its articles of organization or comparable specified information, in order to maintain an action in any New York court. Plaintiff fails to provide any evidence that it exists, that it has articles of organization or comparable specified information, or that the same was even published, defendant contends.

Analysis

CPLR 3211(a)(8): Lack of Jurisdiction Based on Improper Service

Defendant's argument that the only Summons "in his possession" contains no index number, is insufficient to warrant dismissal of the complaint. According to CPLR §305, a "summons shall. . . bear the index number assigned and the date of filing with the clerk of the court."

Plaintiff has clearly demonstrated that it served defendant with a corrected Summons.[4] After defendant's attorney alerted plaintiff to the fact that the Summons served upon defendant's wife at defendant's dwelling contained no index number, plaintiff subsequently, on several

[4] The Court notes that defendant did not provide an affidavit denying service of process.

occasions, served defendant with copies of the Summons bearing the index number. Plaintiff further submitted a copy of the Summons bearing the index number in its opposition papers and the affidavit, dated September 17, 2008, confirming service upon defendant of the Summons on August 22, 2008, August 29, 2008, September 5, 2008, followed by mailing of same on September 12, 2008.

Even if, as defendant maintains, defendant never received a copy of the Summons containing the index number, the failure to provide an index number on a summons is not a fatal defect, warranting dismissal of an action, absent a showing of prejudice to the defendant (*Cruz v. New York City Housing Auth.*, 269 AD2d 108, 109 [1st Dept 2000]). If subsequent papers served on a defendant contain the index number, courts are unlikely to find any prejudice to the defendant (*see Bevona v Malek*, 224 AD2d 317, *lv. denied* 88 NY2d 807 [1st Dept 1996]). In *Bevona v Malek*, the Court stated that "Since the date of purchase of the index number was given on the request for judicial intervention, which was included among the papers served upon respondents, the initial omission of that date on the notice of petition did not result in any prejudice to respondents, and dismissal of the action for noncompliance with CPLR 305 (a) is unwarranted." Likewise here, the Summons containing the index number was attached to plaintiff's response to defendant's motion.

Further, contrary to defendant's contention, the record indicates that the process servers also filed proof of service on September 17, 2008, within 20 days of such delivery or mailing, in accordance with CPLR §308(2) (September 17, 2008 affidavit).

The fact that the individuals who served the papers were "unlicensed" is of no moment. CPLR §2103(a) requires only that the individuals serving litigation papers are over the age of 18

and are not a party to the action. Accordingly, defendant's motion to dismiss the Complaint on the ground of defective service is denied.

CPLR 3211(a)(3): Legal Capacity to Sue

Pursuant to CPLR 3211(a)(3) permits a party to move for judgment dismissing one or more causes of action asserted against him on the ground that "the party asserting the cause of action has not legal capacity to sue."

Under General Business Law §130(1), no person shall "(i) carry on or conduct or transact business in this state under any name or designation other than his or its real name . . . unless:

(b) Such person, if a . . . limited liability company, shall file . . . in the office of the secretary of state a certificate setting forth the name or designation under which business is carried on or conducted or transacted, [and] its corporate, limited partnership or limited liability company name . . . ." Any such entity which fails to comply with such provisions "*shall be prohibited from maintaining any action* or proceeding in any court in this state on any contract, account or transaction made in a name other than its real name *until the certificate required by this section has been executed and filed in accordance with the provisions set forth herein.*

(General Business Law §130(9) (emphasis added).

Essentially, a limited liability company that fails to comply with the statutory requirements for conducting business under an assumed name is prohibited from maintaining any action or proceeding in any court of this state on any contract, account, or transaction made in a name other than its real name until the certificate has been executed and filed in accordance with the statutory requirements (*Effect of failure to file certificate or making of false statement --Actions barred due to noncompliance,18* Carmody-Wait 2d § 112:40).

Here, plaintiff is suing under the name of "Replace *Retail*, LLC" (*emphasis added*). However, the record fails to indicate that any certificate of doing business was filed under such name. All of the documents plaintiff provides with its Complaint, including the canceled checks to Universal, are made in the name of "RE:PLACE." In plaintiff's opposition to defendants' argument that plaintiff lacks capacity to sue, plaintiff responds by arguing that "a copy of the Plaintiffs Entity Information Page establishing that Replace is licensed and registered with the New York Secretary of State is annexed hereto as Exhibit G" (opp., ¶ 24). However, the document contains a listing only for "Replace LLC." None of the documents provided by plaintiff contain the name "Replace Retail LLC." Further, plaintiff does not provide any explanation for such a discrepancy; nor does plaintiff seek leave to amend.

Supreme Realty Assoc. Co. v Korovessis (171 Misc 2d 996, 656 NYS2d 797 [N.Y.City Civ.Ct.,1997]) is instructive. Plaintiff failed to file a certificate pursuant to GBL § 130. The court held that the use of the words "shall be prohibited from maintaining any action or proceeding" contained in GBL § 130(9) makes clear that noncompliance with the filing requirement bars a party from continuing with an action or proceeding until there is compliance. Thus, the Court granted respondent's motion to dismiss, since "petitioner's failure to file a certificate of doing business in Bronx County is a bar to maintaining this action." The Court continued, "However, petitioner may move to restore upon proof of filing of a certificate of doing business in Bronx County."

However, in *William T. Schmitt Assoc. v. Loveless*, 126 Misc 2d 480, 483 NYS2d 146 (Suffolk Dist.Ct.1984) the Court denied defendant's motion to dismiss for failure to comply with GBL 130, holding that the failure to file a certificate in accordance with GBL § 130 prior to

commencing an action was not a jurisdictional defect and that the necessary certificate may be filed at any time prior to judgment. In *William T. Schmitt Assoc*, the Court noted that plaintiff had previously moved to amend the caption from "William T. Schmitt Associates," to "William T. Schmitt." The basis for that motion was that plaintiff had inadvertently failed to file a certificate of doing business under an assumed name. In a decision dated August 14, 1984 (Honorable Martin Kerins, J., Dist Ct), the court denied that motion on the ground that subdivision 9 of section 130 of the General Business Law prohibited the action until the statute was complied with.

In response to the dismissal motion however, plaintiff submitted a copy of the proper certificate which was filed with the county clerk's office on October 19, 1984. The defendant contended that GBL 130 prohibits actions which are commenced prior to the filing of the certificate. The Court analogized GBL 130 to section 1312 of the Business Corporation Law ("BCL"), which prohibits actions by unauthorized foreign corporations unless and until they become authorized. The Court noted that the failure to obtain the authorization under the BCL was not a jurisdictional defect and that the necessary certificate may be filed at any time prior to judgment. Thus, the Court held that the language of GBL 130 (9) "should be read in the same way" and denied dismissal of the complaint.

In *Pat Pellegrini Flooring Corp. v Serota*, 2008 WL 2832133, 1 [NY Sup App Term 2008]), defendant sought dismissal of the complaint for lack of capacity to sue. Defendant claimed that he had retained "Pat Pellegrini Floors," that "Pat Pellegrini Floors" was not licensed to do business in Nassau County and did not have a certificate to do business in Nassau County. Plaintiff opposed the motion, asserting that defendant knew that it did business under the name

Pat Pellegrini Floors and that its amended complaint set forth its Nassau County license number in accordance with CPLR 3015(e). The Court held that "in the absence of a showing of an intent to defraud, the failure to file a certificate of doing business under a specific name will not prevent a plaintiff from recovering. Moreover, by pleading that it is duly licensed in Nassau County and setting forth the license number, plaintiff made a showing sufficient to oppose defendant's motion on these grounds."

This Court notes that CPLR 3015(e), on which plaintiff in *Pelligrini* relied, provides that "that where the plaintiff does not have a license at the commencement of the action the plaintiff may, subject to [CPLR 3025], *amend the complaint with the name and number of an after-acquired license* and the name of the governmental agency which issued such license or move for leave to amend the complaint . . . . The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter."

In *Eva Cohen d/b/a/ Aster Search Group,* (19 AD3d 261, 800 NYS2d [1st Dept 2005]), Eva Cohen conducted business under two names, "Aster Search" and "Aster Place Group." Plaintiff filed a certificate of doing business only under the name "Aster Search." The Court held that "There is, however, no showing of either an intent to defraud, which would prevent *her* from recovering on a contract, *or an intention to sign in a purely corporate capacity.*" (Emphasis added). The Court later acknowledged that the certificate is not jurisdictional, and may be amended prior to entry of any judgment (*see also Graham Cook Associates v Mintz*, 155 Misc 2d 273, 274 [1992] ["A failure to file a certificate of doing business is not jurisdictional and can be cured at any time prior to judgment; however, case decided under Multiple Dwelling Law]).

In *A. A. Sutain, Limited v Montgomery Ward & Co.* (22 AD2d 607, 610 [1st Dept 1965]), the trial court granted plaintiff's motion to amend the caption of the action to indicate that the name of the plaintiff was " A. A. Sutain, Ltd." instead of " A. A. Sutain, Inc." This amendment, which had the effect merely of correcting a mistake in the designation of plaintiff's name, did not result in any change in parties or in the status of the pleadings. During the trial, the president of the plaintiff corporation testified that the corporation had been dissolved in 1956. The president also testified that the corporation was engaged in business in 1960 and that the dissolution by the Secretary of State occurred through a mistake in the crediting to another corporation of the taxes paid by plaintiff; that this was cleared up. Essentially, "the corporation was always in existence. It still is in existence today." Under the circumstances, since "the defendant contracted and dealt with the plaintiff as if it were a duly existing entity . . . the defendant was estopped from questioning plaintiff's existence and its capacity as such to make the contract which was the subject of the suit."

Lastly, in *Unique Laundry Corp. v Hudson Park N.Y. LLC*, 2007 WL 2815301 [Supreme Court, New York September 18, 2007]), 55 AD3d 382 [1st Dept 2008]), a case before this Court, defendants contended "that a search of the Department of State's database revealed an entity called 'Unique Laundry Service Corp.,' which was not the named plaintiff in this action." In reply, the plaintiff stated that the "fact that the final word of the corporate name was accidentally omitted from the caption is of no consequence. . . and plaintiff is prepared to seek leave to amend the caption so as to assuage any concerns." On appeal, the First Department first found that "plaintiff is actually registered with the New York State Department of State as 'Unique Laundry Service, Inc.' It should have been permitted to amend the caption to correct its name."

The First Department later stated that the "Fact that signature block on ground lease between ground lessor and prior ground lessee referred to lessor by slightly different name than that registered with Department of State and that lessor failed to file a certificate that it was doing business under that name did not prevent lessor from recovering for breach of contract, absent any evidence that lessor intended to defraud." Continuing, the First Department "note[d] that "Unique Laundry Service" appears at the head of the contract, undermining any indication of fraud. Thus, plaintiff was permitted to maintain its action on a lease bearing a name different from its incorporated name, and was permitted to amend the caption to reflect the correct, incorporated name.

These cases indicate that the failure to file a certificate does not bar commencement of an action to recover on a contract bearing a name different from the name that is registered to do business (*see Brothers 3 Inc. v Scappaticci*, 199 AD2d 234, 604 NYS2d 965 [2d Dept 1993] [General Business Law § 130(9) which prohibits a corporate plaintiff from maintaining certain actions if it has failed to file a certificate of assumed name applies to actions commenced on a contract, account, or transaction made in an assumed name]). However, such failure bars an already commenced action from being maintained, and thus warranting dismissal, subject to either (1) restoration of the action upon the filing certificate of doing business under the name under which the party did business or (2) amendment of the caption upon motion by a party to reflect the name on the certificate already filed with the Secretary of State. If, as in the case of *Unique* and *A A Sutain Limited*, plaintiff sought leave to amend to correct a mistake in the caption, the Court would entertain such application and grant leave to amend. However, no such application was made by plaintiff in this case, and this Court is precluded from granting relief

sua sponte (*see Fergusson v Dumbacher*, 21 Misc 3d 145 [NY Sup App Term 2008]).

Here, the record demonstrates that a certificate of doing business was filed under the name "Replace LLC," and thus, Replace LLC is licensed to do business in New York State. However, plaintiff has not submitted any documents indicating that a certificate of doing business was filed on behalf of "Replace Retail LLC" and plaintiff did not move to amend the complaint to reflect the name "Replace LLC." Nor has plaintiff filed a certificate of doing business for Replace Retail LLC during the pendency of this action. Therefore, having failed to establish that it has the capacity to maintain its action against defendant, dismissal on the ground for failure to file a certificate of doing business in the name of the plaintiff is warranted, without prejudice.

Notwithstanding the above, the Court addresses the remaining arguments for dismissal.

CPLR 3211(a)(7): Failure to State a Cause of Action

In determining a motion to dismiss, the court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]).

When considering a motion to dismiss for failure to state a cause of action, the pleadings

must be liberally construed (*see* CPLR §3026). On a motion to dismiss made pursuant to CPLR §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Piercing the Corporate Veil

Here, plaintiff seeks to recover from defendant sums it expended in connection with work performed at the Premises, on theories of breach of contract, conversion, and negligence. The record clearly indicates that the work performed at the Premises under the Agreements forming the basis of plaintiff's negligence claim, was performed by Universal, and not by defendant in his individual capacity (Complaint, ¶¶ 8-13). Further, the Agreements forming the basis of plaintiff's breach of contract and conversion claims were executed by Universal, and not by defendant in his individual capacity.

As a general rule, the members, managers and agents of a limited liability company are shielded from individual liability for the contractual obligations of and torts committed by the limited liability company (*see* Limited Liability Company Law §609; *Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209 [1st Dept 2005]). The concept of piercing the corporate veil is an exception to this statutory bar (*see Retropolis* at 210; *Morris v New York State Dept. of Tax. and Fin.*, 82 NY2d 135, 140 [1993]). Piercing the corporate veil is a procedural device to secure separately existing substantive rights (*see State v Easton*, 169 Misc 2d 282, 283 [Sup. Ct. New York County, June 28, 1995]). It is used to hold corporate owners liable for the corporate wrongdoer's obligations (*see State v Easton* at 288; *Passalacqua Builders v Resnick Dev. S.*, 933

F2d 131 [2d Cir 1991]). The concept is equitable in nature, and the decision whether to pierce the corporate veil in a given instance will depend on the facts and circumstances *(see Morris* at 141). Thus, in order to state a claim against defendant in his personal capacity so as to recover the monies it seeks, plaintiff must "pierce the corporate veil."

According to the First Department, in order to pierce the corporate veil, a plaintiff bears "a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*Retropolis* at 210, *citing TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]; *see also Morris* at 142; *Guptill Holding Corp. v State of New York*, 33 AD2d 362, 365 [3d Dept 1970]; *State v Easton* at 288). "Under New York law, the 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], *citing Wm. Passalacqua Bldrs. v Resnick Developers South*, 933 F 2d 131, 139 [2d Cir]).

Here, plaintiff failed to meet its burden in demonstrating that defendant disregarded Universal's corporate form to commit wrongdoing against plaintiff. It is undisputed that Universal is a properly formed limited liability company and that defendant is the "sole owner and operator" of Universal (*see* Complaint, ¶¶ 3-4). Plaintiff further alleges, "upon information and belief," that Universal has co-mingled the overpayment with defendant's personal funds (Complaint, ¶ 31). However, plaintiff fails to offer any factual information, in either its Complaint or its opposition papers, supporting its claim that defendant co-mingled any funds (*see*

Shimamoto v S&F Warehouses, Inc., 257 AD2d 334, 340 [1st Dept 1999] ["As officers, they are protected by a corporate veil, and no effort was made to pierce that veil. Indeed, this record contains no evidence to indicate that these individual defendants used their positions for personal rather than corporate ends . . . No showing was made that they independently committed any tortious acts that would render them personally liable . . . or that they personally participated in the alleged conversion"]). Nor does plaintiff provide any evidence that defendant used his position as the owner of Universal "to commit a fraud or wrong against plaintiff, resulting in injury" (*Fisher v Zaks*, 852 NYS2d [1st Dept 2008]). Being a controlling principal alone is insufficient to establish corporate form violated (*see Port Chester Elec. Const. Co. v Atlas,* 40 NY2d 652, 657, 389 NYS2d 327, 331 [1976]).

Further, the caselaw plaintiff cites is distinguishable. In each of cases plaintiff cites,[5] the moving parties submitted sufficient evidence to justify piercing the corporate veil. Accordingly, defendant's motion to dismiss plaintiff's Complaint and causes of action against defendant, pursuant to CPLR §3211(a)(7), is granted.

CPLR 3211(a)(1): Dismissal Based on Documentary Evidence

Under CPLR 3211(a)(1), dismissal of a complaint is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" based on documentary evidence [*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1, 784 NYS2d 63 [1st Dept 2004]). The term "documentary evidence" referred to in CPLR 3211(a)(1) "typically means judicial records such as judgments and orders or out-of-court documents such as

[5] In its opposition, plaintiff cites *Fleck Roofing & Siding Co. v Perla* (40 AD2d 1069,1070 [4th Dept 1972], *citing Hinkle Iron Co. v Kohn*, 229 NY 179 [1920]), *Slavenburg Soelling Corp. v Assomull & Co.* (15 AD2d 645 [1st Dept 1962]), *Richter v Joelson* (237 AD 572, 574 [1st Dept 1933]), and *Jones v Freedman's Dairy* (283 AD 667 [2d Dept 1954]).

contracts, deeds, wills, and/or mortgages and includes '[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based'" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 (NY Ct Cl), 2003 NY Slip Op 50590(U) *citing* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20 and 7 Weinstein-Korn-Miller, NY Civil Practice, P 3211.06).

Contrary to defendant's contentions, none of the documents he provides clearly disposes of plaintiff's claims against. However, defendant prevails on other grounds. Therefore, defendant's motion to dismiss, pursuant to CPLR §3211(a)(1), is denied.

Frivolous Conduct

Pursuant to 22 NYCRR §130-1.1, a court may impose sanctions on a party if it determines that the party's conduct was frivolous. The statute defines frivolous conduct as follows:

> For purposes of this Part, conduct is frivolous if:
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) it asserts material factual statements that are false.

The statute further provides that:

> Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.
> (*id.*)

The First Department considers conduct to be frivolous where legal action "is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another, or where the party or attorney asserts material factual statements that are false" *(Yenom Corp. v 155 Wooster Street, Inc.*, 33 AD3d 67, 70 [1st Dept 2006]). A court also may consider whether a party's "conduct was continued when its lack of merit was apparent or should have been apparent, and the circumstances under which the conduct took place, including the time available for investigating the factual or legal basis of the conduct" (*id.*). However, the First Department cautions against sanctions where a party "asserts colorable, albeit unpersuasive, arguments in good faith and without an intent to harass or injure" (*id.*).

Here, the Court finds no frivolous conduct on plaintiff's part. Plaintiff's arguments for attaching liability to defendant were unpersuasive. However, upon reviewing plaintiff's Complaint and supporting papers, the court does not see any evidence of a lack of good faith, or any intent to harass or injure defendant. Accordingly, defendant's motion that the Court levy sanctions against plaintiff, pursuant to 22 NYCRR §130-1.1, is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(3) (lack of capacity), is granted without prejudice; and it is further

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(7) (failure to state a cause of action) is granted; and it is further

ORDERED that the motion of defendant Guy Papich for an order dismissing the Complaint and causes of action of plaintiff Replace Retail, LLC ("plaintiff"), pursuant to CPLR §3211(a)(1) (documentary evidence) and CPLR 3211(a)(8) (for lack of jurisdiction), is denied; and it is further

ORDERED that defendant's motion seeking sanctions against plaintiff, pursuant to 22 NYCRR §130-1.1(a), is denied; and it is further

ORDERED defendant serves a copy of this order with notice of entry upon all parties within 20 days of entry.

The Clerk may enter judgment dismissing the Complaint accordingly.

That constitutes the decision and order of the Court.

Dated: March 30, 2009

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

APR 01 2009

COUNTY CLERK'S OFFICE
NEW YORK