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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 604320/2006
GARDNER, MICHAEL
VS.
FAIRWAY INTERIOR WORKS
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5, 6
Replying Affidavits	3, 4

Cross-Motion: ✓ Yes No

Upon the foregoing papers, it is ordered that this motion + cross-motion for summary judgment are decided in accordance with the attached memorandum decision.

FILED
JUN 30 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 6/26/09

J.S.C.

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

Check one: FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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MICHAEL GARDNER, LYNDA GARDNER, and PARK 91 LLC,

Plaintiffs,

-against-

FAIRWAY INTERIOR WORKS, INC., LJM INTERIOR SERVICES GROUP, L.J.M. INTERIOR SERVICES GROUP, LTD., JOHN MCDONALD and LAURA MCDONALD,

Defendants.

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Index № 604320/06

Motion Seq. No.: 005

DORIS LING-COHAN, J.:

Defendants John McDonald and Laura McDonald move for an order pursuant to CPLR 3212, granting them summary judgment of dismissal of the complaint as asserted against each of them individually. Plaintiffs Michael Gardner, Lynda Gardner, and Park 91 LLC, who seek to pierce the corporate veil in order to recover from John McDonald and Laura McDonald in their individual capacities as well as from their corporate entities, oppose defendants' motion, and cross-move for an order granting them summary judgment and dismissing defendants' counterclaim for account stated.

It is undisputed that plaintiffs Michael Gardner and Lynda Gardner, at some unspecified time, purchased a townhouse located at 1145 Park Avenue, New York, New York, and formed plaintiff Park 91 LLC to represent certain of their interests, including an ownership interest in the townhouse. According to plaintiffs, they terminated their initial contractor, non-party Gryphon Construction Corp., due to its failure to perform extensive renovation and repair work on a timely and cost-effective basis. On the recommendation of a friend, Michael Gardner and Lynda Gardner spoke with Laura McDonald, shareholder and employee of defendants LJM Interior

Services Group (LJM Group), and L.J.M. Interior Services Group, Ltd. (L.J.M. Ltd.), and then decided to hire Fairway Interior Works, Inc. (Fairway), the construction company of her father John McDonald, to complete the work. A written contract between "91 Park LLC[1] c/o Michael Gardner" as owner, and Fairway as contractor, was executed on April 24, 2006 (the Contract). John McDonald signed the Contract on behalf of Fairway. It is printed on Fairway's letterhead and states in relevant part:

> The undersigned hereby offers to furnish all plan[s], labor, material, supplies, equipment and other facilities and things necessary or proper for or incidental to all construction work as required by and in strict accordance with the applicable provisions of Plans and Specifications entitled:
> Alterations to: GARDNER RESIDENCE RENOVATION
> 1145 Park Avenue
> And all of the addenda issued by the Owner, Architect and received by undersigned, as listed under 'Addenda List Received', for the total sum of [$1,095,000.00] [h]erein after called the CONTRACT PRICE.

Fairway began working on the townhouse in April 2006 and continued through October 2006. According to plaintiffs, during those six months, the parties made adjustments both to the work and to the estimate, and plaintiffs made multiple payments to Fairway and to subcontractors totaling in excess of $500,000.00. Plaintiffs allege that, during the course of the work, weekly meetings were held between themselves and John McDonald and/or his daughter Laura McDonald, during which the McDonalds made numerous, fraudulent representations regarding the work performed and the progress made. When, on or about November 1, 2006, plaintiffs realized that they were paying for work which had either been performed in a shoddy and/or defective manner, or for work which had not been performed at all, they terminated defendants and immediately commenced this action for damages.

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[1]Defendants transposed "Park 91 LLC" as "91 Park LLC".

In their complaint, plaintiffs assert five causes of action: breach of contract, fraud, fraud in the inducement, unjust enrichment, and negligence. Except for fraud in the inducement, which is asserted only against Laura McDonald, the complaint charges all defendants with the remaining four causes of action. The parties pursued discovery including depositions and the exchange of documentary evidence, and the note of issue was filed on August 13, 2008. In their joint notice of motion, John McDonald moves for a summary dismissal of the four claims asserted against him in his individual capacity, and Laura McDonald moves for a summary dismissal of all five causes of action against her in her individual capacity.[2] Plaintiffs oppose all aspects of defendants' motion.

In deciding a motion for summary judgment, a motion court may, pursuant to CPLR 3212 (b), search the record and grant summary judgment in favor of any party who is entitled to such relief regardless of whether they moved for summary judgment relief (CPLR 3212 (b); *Maheshwari v City of New York*, 2 NY3d 288, 293 [2004]; *Merritt Hill Vineyards Inc. v Windy Hgts. Vineyard Inc.*, 61 NY2d 106, 111 [1984]). Based on the facts of the case and for the following reasons, summary judgment is granted to the extent of dismissing plaintiffs' second, third, fourth, and fifth causes of action against any and *all defendants*, and dismissing the first cause of action only as against John McDonald, Laura McDonald, LJM Group, and L.J.M. Ltd; plaintiffs' cross-motion is granted to the extent of dismissing defendants' counterclaim for an account stated.

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[2]Due to additional discovery pursued by both parties after the filing of the note of issue, including the parties' need for deposition transcripts, and certain other, relatively minor, procedural irregularities, the current motion was not served within the 120-day period. Good cause having been shown, the court will address the merits of the motion (*Brill v City of New York*, 2 NY3d 648 [2004]).

Upon an examination of the record, it is evident that plaintiffs' lawsuit sounds solely in breach of contract, the gravamen of which is that defendants breached the Contract to renovate plaintiffs' townhouse by failing to provide appropriate materials and supplies, and by failing to furnish all work, labor, and services in a good and workmanlike manner. Stated in the alternative, plaintiffs allege that defendants used defective or inadequate materials which created multiple difficulties including moisture, electrical, and structural problems. As a result, plaintiffs were caused to terminate defendants on or about November 1, 2006, and endure the time and expense of removing most of defendants' work and of hiring additional contractors to finish the job.

It is undisputed that the Contract was executed with specific reference to the proposed renovation and repair work to plaintiffs' townhouse. The Contract clearly defines the relationship between the parties, spelling out the work to be performed, including masonry and materials such as glass block and ceramic tile, and electrical work including new sub panels, fixtures and lamps, together with the attendant fees and costs. Accordingly, plaintiffs' cause of action for unjust enrichment, which is a quasi contract claim, must be dismissed as "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1st Dept 1989]).

Plaintiffs' tort claims for fraud, fraud in the inducement, and negligence must also be dismissed as

[i]t is a well-established principle that a simple breach of contract is not to be a

> considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract

(*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d at 389 [internal citations omitted]). Central to plaintiffs' fraud claim is the assertion that defendants committed this tort by making numerous misrepresentations at their weekly meetings regarding the quality and progress of their work, the payments they made to subcontractors, and the permits they obtained. Central to plaintiffs' fraud in the inducement claim is that Laura McDonald induced them into hiring her father's company, Fairway, by knowingly and intentionally misrepresenting the ability and capability of Fairway to perform the work. Where, as here, the alleged misrepresentations underlying both the fraud and the fraud in the inducement claims concern the very same conduct (performance of the renovation/repair work) which underlies plaintiffs' breach of contract claim and seek the very same damages, the two fraud-based causes of action must be dismissed (*Albstein v Elany Contr. Corp.*, 30 AD3d 210 [1st Dept 2006]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d at 389).

Plaintiffs' tort claim charging defendants with performing the required work in a negligent, careless, and reckless manner, must also be dismissed. Plaintiffs, like those in *Clark-Fitzpatrick*, fail to allege a violation of a legal duty independent of their contractual duty to perform the renovation and repair work in a good and workmanlike manner pursuant to the terms of the Contract. Plaintiffs' list of negligently performed tasks ranges from improper windows, to insufficient structural support, to incorrect electrical wiring. Should plaintiffs, ultimately, demonstrate that the work performed by defendants was inadequate, defective, and/or otherwise

contrary to the their obligation to perform "all construction work as required by and in strict accordance with the applicable provisions of Plans and Specifications" (Contract, p.1), then plaintiffs would be entitled to judgment on their breach of contract claim, rather than a negligence claim.

It is undisputed that the only entity with whom plaintiffs executed a written contract was Fairway. Nevertheless, plaintiffs named John McDonald, his daughter Laura McDonald, LJM Group and L.J.M. Ltd. as co-defendants based on their contention that John McDonald and Laura McDonald were the principals and sole owners of Fairway, LJM Group, and LJM Ltd., and that the co-defendants functioned as the instrumentalities and alter egos of the McDonalds and of each other. The McDonalds dispute these contentions and assert that Fairway, which is an S corporation as defined under section 1361 (a) (1) of the Internal Revenue Code (26 USC 1361 [a] [1]), exists as a separate legal entity, operating independently of its owners. Moreover, New York has repeatedly recognized that, generally, "it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" and that owners and principals cannot be held individually liable for the debts of the corporation (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). Accordingly, John McDonald and Laura McDonald seek an immediate dismissal of the claims against them in their individual capacities.

Under New York law, the burden rests with plaintiffs, as the party seeking to pierce the corporate structure, to come forward with evidence entitling them to do so, and recover from defendants in their individual capacities (*see TNS Holdings, Inc. v MKI Securities Corp.*, 92 NY2d 335, 339 [1998]). Piercing the corporate veil requires a showing that the owners exercised complete domination of the corporation with respect to the transaction attacked, and that such

domination was used to commit a fraud or wrong against the plaintiffs which resulted in plaintiffs' injury (*id.*). While no one factor is determinative of the issue, the factors to be considered include adherence to corporate formalities, commingling of assets use of corporate funds for personal use, and adequate capitalization (*Shisgal v Brown*, 21 AD3d 845, 848-49 [1st Dept 2005]).

In their effort to establish the complete domination of Fairway by John McDonald and/or Laura McDonald, plaintiffs assert that: (1) the McDonalds are father and daughter and sole proprietors and officers of Fairway; (2) the McDonalds work out of their home residences; (3) co-defendants LJM Group and L.J.M. Ltd. are acronyms for Laura McDonald; (4) the McDonalds frequently used cash to pay salaries and subcontractors; (5) they commingled business and personal funds; and (6) they do not follow proper corporate formalities. Plaintiffs offer a lengthy list of transactions, a number of which were acknowledged by John McDonald at his deposition, to establish the prohibited commingling of business funds between Fairway and the LJM entities, and the commingling of business and personal funds between Fairway and John McDonald in his personal capacity. John McDonald's explanation, that much of it was due to cash-flow problems caused by plaintiffs' checks which did not clear on a timely basis, does not justify the commingling.

However, plaintiff provides no evidence that the sporadic commingling or intermingling of funds, in amounts ranging from several dollars to several thousand dollars, was purposeful, extensive, or caused the allegedly shoddy work and resulting damages (*WorldCom, Inc. v Prepay USA Telecom, Corp.*, 294 AD2d 157 [1st Dept 2002]). Moreover, not only do plaintiffs fail to allege that Fairway was undercapitalized, but their submissions are devoid of evidence that the

purpose of the McDonalds' intermittent shuffling of funds was due to undercapitalization, or for the purpose of rendering uncollectible any money judgment ultimately rendered against Fairway (*Rebh v Rotterdam Ventures, Inc.*, 252 AD2d 609, 611 [3rd Dept 1998]; *Matter of Superior Leather Co. v Lipman Split Co.*, 116 AD2d 796, 797 [3rd Dept 1986]; *Matter of Island Seafood Co. v Golub Corp.*, 303 AD2d 892, 895 [3rd Dept 2003]).

In addition, and despite plaintiffs' assertions to the contrary, the fact that John McDonald and his daughter Laura McDonald work in tandem does not de-legitimize their respective businesses or corporate status. Their use of home offices, and/or their habit of making cash business payments does not constitute prohibited behavior, and their use of an acronym for a company name is not suspect. Finally, plaintiffs offer no proof, that their injuries resulted from the McDonalds' purported dominance of Fairway. Inasmuch as New York permits the incorporation of a business for the purpose of enabling its proprietors to escape personal liability, the courts will only disregard the corporate form when necessary to prevent fraud or to achieve equity. Here, plaintiffs have not made this showing (*See Walkovszky v Carlton*, 18 NY2d 414, 417 [1966]; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 140).

Plaintiffs cross-move for summary judgment dismissing defendants' counterclaim for account stated. Defendants assert five counterclaims: the first and second sound in breach of contract; the third is for account stated in the amount of $149,657.00 plus interest; the fourth is for unjust enrichment in the amount of $300,412.00; and the fifth counterclaim is to foreclose on the mechanic's lien filed against the property in the amount of $149,657.00.

The counterclaim for account stated alleges that, on or about November 7, 2006, Fairway sent plaintiffs a statement of account showing a balance due in the amount of $149,657.00, which

plaintiffs retained, without objection either to it or to any item contained in it. Plaintiffs assert that they are entitled to a dismissal of this counterclaim because they made a timely protest to the monies sought in the account statement by locking defendants out of the townhouse (which is acknowledged by defendants), and by commencing the instant lawsuit which includes a demand for the recovery of funds already paid to defendants.

It is well settled that "while the mere silence and failure to object to an account stated cannot be construed as an agreement to the correctness of the account, the factual situation attending the particular transactions may be such that, in the absence of an objection made within a reasonable time, an implied account stated may be found" (*Interman Indus. Prods. Ltd., v R. S. M. Electron Power Inc.*, 37 NY2d 151, 154 [1975]).

The undisputed evidence is that plaintiffs expressed their displeasure and objection both to Fairway's work and to paying for Fairway's work by firing and locking Fairway out of the townhouse in or about November 1, 2006, and by immediately commencing the instant action, by service and filing of a summons and complaint on or about December 18, 2006. Plaintiffs' expressions of protest to the proffered statement is found to have been prompt based on the facts of this case (*id.*; *Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st 2002]). Accordingly, plaintiffs have made a prima facie showing of entitlement to judgment as a matter of law dismissing the counterclaim for account stated and defendants have failed to offer competent evidence to rebut this show (*Winegrad v New York Univ. Med. Ctr., 64 NY2d* 851, 853 [1985]).

As stated above and based on the facts of this case, it is appropriate to search the record and grant summary judgment in favor of any party entitled to such relief regardless of whether they moved for summary judgment or whether they sought summary judgment on a particular

cause of action or counterclaim (CPLR 3212 (b); *Maheshwari v City of New York*, 2 NY3d at 293; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d at 111). Accordingly, based upon the submissions, the counterclaim for unjust enrichment must be dismissed. The counterclaim, which is based on work Fairway performed for plaintiffs' benefit under the Contract, may not be maintained because a written contract (the Contract) exists between the parties covering the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d at 388; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d at 283). Additionally, the allegations underlying the unjust enrichment counterclaim mirror those contained defendants' breach of contract counterclaims, and the amount defendants claim is owed to them, is also the subject of defendants' counterclaim to foreclose on the mechanic's lien filed against the property.

Accordingly, it is

ORDERED that the motion for summary judgment by defendants John McDonald and Laura McDonald is granted to the following extent:

(a) plaintiffs' first cause of action sounding in breach of contract is dismissed only as against defendants John McDonald, Laura McDonald, LJM Interior Services Group, and LJM Interior Group, Ltd.;

(b) plaintiffs' second, third, and fourth causes of action, sounding in fraud, fraudulent inducement, and unjust enrichment, respectively, are severed and dismissed as against all named defendants; and it is further

ORDERED that plaintiffs' cross motion for summary judgment is granted to the extent that defendants' third and fourth counterclaims sounding in account stated and unjust enrichment, are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that within 30 days of entry of this order, movants shall serve a copy upon all parties with notice of entry.

Dated: 6/26/09

Hon. Doris Ling-Cohan, J.S.C.

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