

**Vincent J. Bono Plumbing & Heating Corp. v Bono
Plumbing & Reliable Heating, Inc.**

2009 NY Slip Op 31902(U)

August 13, 2009

Supreme Court, Nassau County

Docket Number: 23114/08

Judge: Ute W. Lally

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

mod,mg,mod

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

VINCENT J. BONO PLUMBING & HEATING CORP.,

Plaintiff(s),

MOTION DATE: 5/22/09

INDEX No.:23114/08

-against-

MOTION SEQUENCE NO:1,2,3

CAL. NO.:

BONO PLUMBING & RELIABLE HEATING, INC.,
et al.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Notice of Cross Motion.....	4-7
Notice of Motion.....	8-11
Answering Affidavits.....	12-15
Replying Affidavits.....	16-19
Briefs:	20-21a

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order granting summary judgment pursuant to CPLR 3212 in favor of plaintiff against defendants based upon defendants default on a promissory note and guaranty in the amount of \$396,026.00 together with interest from December 2008, attorney's fees and the costs and disbursements of this action, is denied as to defendants Bono Plumbing & Reliable Heating Inc., Richard Santoro and Michael Geller and is granted against defendant William Hirsch.

Cross-motion by defendants Bono Plumbing & Reliable Heating, Inc., and Richard Santoro, Jr. for an order pursuant to CPLR 3025 permitting defendant leave to serve and file an amended answer is granted.

Cross motion by defendant Michael Geller for an order pursuant to CPLR 3025 permitting defendant leave to serve and file an amended answer and for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint herein is granted in part and denied in part.

This action arises out of the sale of plaintiff's plumbing business located at 119 Lakeville Road, New Hyde Park, New York to defendant Bono Plumbing and Reliable Heating, Inc., pursuant to an Asset Purchase Agreement executed on September 18, 2006. A note was executed by the corporate defendant in August 2006 in the sum of \$400,000 with interest of eleven percent per annum (subject to increase in the event of a default) to be paid in the amount of \$5,500 per month for a total of one hundred and twenty payments. A guaranty was executed by defendants Richard Santoro, Michael Geller and William Hirsch in August, 2006. Defendants have allegedly been in default of said note and guaranty since July 2008.

Plaintiff moves for summary judgment in its favor. In order "to grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination, is the key to the procedure" (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404).

A plaintiff moving for summary judgment pursuant to CPLR 3212 based on a promissory note "establishes prima facie entitlement to judgment as a matter of law by submitting proof of the defendant's execution of the note and the defendant's default in making payments pursuant to the note. Once the plaintiff establishes its prima facie entitlement to judgment as a matter of law, the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue with respect to a bona fide defense" (Cutter Bayview Cleaners, Inc. v Spotless Shirts, Inc., 57 AD3d 708, 709-10).

Plaintiff's motion for summary judgment is supported by the promissory note, guaranty and an affidavit of plaintiff corporation's president averring that defendant Bono Plumbing and

Reliable Heating, Inc., has been in default of note since July 2008 and that defendants Santoro, Geller and Hirsch are in default of their guaranty. Plaintiff has therefore established a prima facie entitlement to judgment as a matter of law and the burden now shifts to defendants to establish the existence of a triable issue of fact.

Defendant Santoro, President of defendant corporation, claims in his affidavit that corporate defendant is not in default of the note. Defendant Santoro claims that payments for the months of August, September, October and November 2008 were made in cash at plaintiff's request.

In addition, he claims that payments have been made to a variety of third parties at the direction and for the benefit of the plaintiff and that it was understood between plaintiff and defendant that said payments would be applied towards sums due and owing under the note. The total amount allegedly paid by defendant corporation on behalf of plaintiff is \$59,754.90. Defendant Santoro annexes to his papers a schedule of all such payments, including dates, payees, amounts and check numbers for each payment and bank statements evidencing many of those payments in support of his claims. These alleged payments are sufficient to raise a triable issue of fact herein.

Furthermore, the Asset Purchase Agreement states at Section 4, "Representations and Warranties" Part J that "there will be no creditors as of the date of closing". However, there was an outstanding debt of \$25,764.74 owed to Yellow Book USA by plaintiff at the date of closing. A copy of invoice is annexed to defendants' opposition papers. It is alleged that, as a result of this material misrepresentation by plaintiff, defendant corporation was unable to advertise with Yellow Book USA and this caused a significant drop in business. These allegations, together with the submitted invoice, raise a triable issue of fact.

The issue of whether a material misrepresentation has occurred is an issue more properly left to the jury to resolve (Texaco Inc. v Synergy Group, Inc., 171 AD2d 788).

It should also be noted that defendant Santoro further alleges

in his affidavit that defendant corporation completed a job that plaintiff had begun and was paid for at a cost to defendant of \$25,000 in labor and materials. Defendant submits that this should be properly applied to sums due and owing under the note. However, defendant submits no proof of such expenditure on the part of the defendant and no evidence that such a job even existed. Therefore, this portion of the claim is unsubstantiated and cannot be said to raise a triable issue of fact.

In addition to the payments owing on the note, plaintiff also seeks attorneys fees in the amount of 25% of any settlement or judgment awarded. Part 8 of the Promissory Note states in relevant part:

"In the event of default Payee shall be entitled to recover all costs incurred in connection with enforcement of Makers obligations hereunder including but not limited to reasonable attorneys' fees and Court costs."

It is well settled that "the award of an attorneys' fee based solely on the fixed rate set forth in [an] agreement and guarantee [is] improper. An award of attorneys' fees pursuant to such a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered" (Kamco Supply Corp. v Annex Contr. Inc., 261 AD2d 363, 365). Therefore, attorney's fees are an issue of fact which must be determined at trial.

On the basis of the above analysis, plaintiff's motion for summary judgment against corporate defendant is denied.

Corporate defendant seeks leave to amend its answer to include a counterclaim for fraudulent misrepresentation. "Leave to amend pleadings shall be 'freely given' in the absence of prejudice or surprise to the opposing party" (Public Administrator of Kings County v Hossain Construction Corporation, 27 AD3d 714, 716). Based thereon, leave to amend answer is granted herein.

Defendant Michael Geller also seeks leave to amend his answer to include a claim of misrepresentation on the basis that (a) the underlying obligation was modified by the primary obligor and

