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Prelim Conf 11-17-09 (AAF)

To commence the 30 day Statutory time period for Appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this Decision & Order, with notice of Entry, upon all parties.

SUPREME COURT OF THE STATE of New York
COUNTY OF ORANGE

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NORTHEAST STEEL PRODUCTS, INC.

Plaintiff,

-against -

JOHN LITTLE DESIGNS, INC., THE TUCKER DEVELOPMENT GROUP, LLC, JOHN LITTLE III and JOHN LITTLE, JR.,

Defendant.

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DECISION & ORDER

Index No.12237/08

Motion Date:9/11/09

LUBELL, J.

The following papers numbered 1 to 3 were considered in connection with this CPLR §3215 motion by plaintiff for an ORDER granting a default judgment against defendants and defendants' cross-motion for an Order granting leave pursuant to CPLR 2005 and 3012(d) to serve their answer to the verified complaint and to vacate their default in answering:

PAPERS	NUMBERED
Motion/Affirmation/Exhibits 1-4	1
Cross-Motion/Affidavit/Exhibits A-E	2
Reply Affirmation	3

Plaintiff brings this action against defendants asserting eight causes of action: breach of contract; quantum meruit; an account stated; fraudulent inducement; fraud and misrepresentation; piercing of the corporate veils; breach of oral guarantee; and unjust enrichment.

The propriety of the effectuation of service upon each defendant is not at issue. As such, all defendants were personally served with the summons and complaint as of December 8, 2008, with their answers due by December 28, 2008, yet not served. These motions follow.

This action arises out of a written agreement dated January 30, 2007 between plaintiff Northeast Steel Products, Inc., as subcontractor, and defendant John Little Designs, Inc. ("JLD"), as contractor, (the "Agreement") pursuant to which plaintiff agreed to supply structural steel, steel joists, a floor deck and roof deck in connection with improvement to certain real property located at 16 Jersey Avenue, Port Jervis, New York, (the "Premises"). The Premises is owned by defendant The Tucker Development Group, LLC ("Tucker"). John Little, Jr. ("John Jr.") and John Little III ("John III") are shareholders of JLD and members of Tucker. John III is the all president of JLD.

The contract price, as revised, is $332,940.00, of which plaintiff contends $308,380.00 is currently due and owing as per a statement of account dated July 11, 2007, among other things.

Among the contentions advanced in the complaint are plaintiff's assertions that, prior to entering the Agreement, plaintiff, through its president, met with John III and John Jr. during which John III and John Jr. assured plaintiff that they had the necessary funding to complete the intended improvement of the Premises and, if necessary, John Jr. would refinance a property he owned in New Jersey. In addition, notwithstanding alleged repeated promises to pay the bill in full, plaintiff asserts that payment has yet to be made. In fact, plaintiff contends that after "defendants" had forwarded a check to plaintiff in April 2008 in the amount of $207,000.00, defendants stopped payment. A similar occurrence allegedly took place in July 2008, this time for the full amount of the outstanding bill, $308,380.00. This action ensues.

Upon defendants' default in answering the complaint, plaintiff seeks a default judgment against defendants for $303,380.00 plus interest, costs and counsel fees as follows: on the first and third causes of action against JLD (breach of contract and an account stated); on the second cause of action against JLD and Tucker (quantum meriut); on the fourth and fifth causes of action against all defendants (fraudulent inducement, fraud and misrepresentation); on the sixth cause of action as against all defendants (piercing of the corporate veils); on the seventh cause of action against John III (breach of oral guarantee); and, finally, on the eighth cause of action against all defendants (unjust enrichment).

In response, defendants now cross-move for leave to serve their proposed verified answer as appears as an exhibit to their motion.

Since public policy favors the resolution of cases on the merits, this Court is vested with the discretionary authority to allow late service of an answer where there is a showing of a reasonable excuse for the delay coupled with a showing that there is a meritorious cause of action or defense (Huckle v. CDH Corp., 30 A.D.3d 878, 879 [3d Dept., 2006] citing CPLR 3012[d]; Amodeo v. Gellert & Quartararo, P.C., 26 A.D.3d 705, 706 [3d Dept., 2006]; Loris v. S & W Realty Corp., 16 A.D.3d 729, 730 [3d dept., 2005]; Aabel v. Town of Poughkeepsie, 301 A.D.2d 739, 739 [3d Dept. 2003]). "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (Harcztark v. Drive Variety, Inc., 21 A.D.3d 876, 876-877 [2d Dept., 2005]).

Here, plaintiff moved within two weeks of defendants' default for the entry of a default judgment in response to which defendants' cross-moved for leave to serve a late answer. Thus, the period of delay is brief and, given that period, among other things, the Court is not persuaded that plaintiff will be prejudiced if the Court were to grant the cross-motion. Finally, upon review of the instant papers, it is readily apparent that defendants did not intend to abandon any defenses to the action, either individually or collectively.

Thus, the Court is inclined to grant defendants leave to file a late answer but only to the extent that defendants have come forward with a meritorious defense to the various allegations in the complaint. Such an approach is consistent with the standard to be employed upon consideration of whether to allow the entry of a default judgment against a defaulting defendant, i.e., not only must there be a showing of a default in answering, but the movant must also, in the first instance, present the Court with sufficient showing in proper form of the facts establishing a prima facie case (see CPLR 3215[f]; Gagen v. Kipany Prods., 289 A.D.2d 844, 845, 735 N.Y.S.2d 225 [2001]).

With all of that in mind, the Court now rules as follows in connection with the respective causes of action against the respective defendants.

The First and Third Causes of Action

The first and third cause of action, breach of contract and an account stated, are brought only as against defendant JLD.

As to the claim for breach of contract, the Court denies JLD's cross-motion for leave to serve a late answer upon the Court's finding that JLD has not come forward with a meritorious defense to this cause of action, and grants plaintiff's motion for a default

judgment in that the Court is satisfied that plaintiff has come forward with an adequate showing for the relief demanded in this complaint in this regard.

The motion for a default judgment against JLD on an account stated basis is denied, however, there being no assertion in the complaint or otherwise that the subject matter of the contract was delivered to JLD (see, Neuman Distributors, Inc. v. Falak Pharmacy Corp., 289 A.D.2d 310 [2d Dept., 2001][plaintiff presented, inter alia, itemized invoices, credit memos, and corresponding signed delivery receipts in support]).

The Second Cause of Action against JLD and Tucker

By way of its second cause of action, plaintiff seeks recovery against defendants JLD and Tucker on a quantum meriut basis.

Where there exits a valid and enforceable written contract governing the subject matter of the dispute, recovery in quasi contract for events arising therefrom is generally precluded (Clark-Fitzpatrick, Inc. v. Long Island R. Co. , 70 N.Y.2d 382, 388 [1987] citing Blanchard v Blanchard, 201 N.Y. 134, 138). Here, the Court finds no justifiable basis upon which to deviate from that general rule. Since there exists a valid and enforceable contract between plaintiff and JLD, JLD's cross-motion to interpose a late answer to this cause of action is granted.

Defendants' cross-motion is also granted as to Tucker, the Court being satisfied that a meritorious defense exists. In any event, plaintiff's motion for a default judgment against Tucker on this cause of action would have been denied since plaintiff has failed, in the first instance, to have come forward with an adequate factual showing against Tucker.

The Fourth and Fifth Causes of Action

As its fourth and fifth causes of action, plaintiff seeks relief as against all defendants for asserted fraudulent inducement and fraud and misrepresentation.

> In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.

(Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 421 [1996], citing Channel Master Corp v. Aluminum Ltd. Sales, 4 N.Y.2d 403, [1958]).

While, in the first instance, the Court finds that plaintiff has come forward with a sufficient showing as against all

defendants, the Court denies the application for a default judgment against defendant JLD on these causes of action. Where, as is the case against JLD, the asserted fraud relates to a breach of contract (Logan-Baldwin v. L.S.M. Gen. Contrs., Inc., 48 A.D.3d 1220, 1221), such a cause of action cannot be sustained.

As against the remaining defendants, however, the Court finds that such causes of action have been adequately advanced and defendants have not come forward with a meritorious defense to same.

Thus, the motion for a default judgment as against all defendants, except JLD, is hereby granted.

The Sixth Cause of Action

Through its sixth cause of action, plaintiff seeks to hold all defendants liable upon a theory of piercing the corporate veil of JLD and Tucker.

> Generally, a party seeking to pierce the corporate veil must establish 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 the plaintiff's injury" (Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157; see Old Republic Natl. Title Ins. Co. v. Moskowitz, 297 A.D.2d 724, 725, 747 N.Y.S.2d 556; Hyland Meat Co. v. Tsagarakis, 202 A.D.2d 552, 552, 609 N.Y.S.2d 625). The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil (see Matter of Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 141-142, 603 N.Y.S.2d 807, 623 N.E.2d 1157; Damianos Realty Group, LLC v. Fracchia, 35 A.D.3d 344, 825 N.Y.S.2d 274).

(Goldman v. Chapman, 44 A.D.3d 938, 939-940 [2d Dept., 2007]).

Here, the Court is not satisfied that plaintiff has advanced anything other than conclusory and unsupported assertions in support of this cause of action. Thus, the cross-motion is granted and plaintiff's application for a default judgment regarding same is hereby denied.

The Seventh Cause of Action

Breach of oral guarantee is the basis for plaintiff's seventh cause of action which is asserted only as against John III.

> An oral promise to guarantee the debt of another is barred by the Statute of Frauds (General Obligations Law § 5-701). However, the oral promise may be taken out of the Statute of Frauds if two requirements are met. First, the promise must represent an independent duty of payment, irrespective of the liability of the principal debtor, and second, the promise must be based upon new consideration which moves the promisor and is beneficial to him (Martin Roofing v Goldstein, 60 N.Y.2d 262).

(Karl Ehmer Forest Hills Corp. v. Gonzalez, 159 A.D.2d 613[2d Dept., 1990]).

Here, the Court is not persuaded that John III's asserted oral guarantee is anything other than secondary to that of the corporate defendant, JLD. As such, the Court finds that JLD has come forward with a viable defense to same such that the cross-motion should be granted in this regard.

The Eighth Cause of Action

Finally, plaintiff seeks recovery from all defendants upon a theory of unjust enrichment.

"To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor" (Nakamura v. Fuji, 253 A.D.2d 387, 390 [2nd Dept., 1998]), citing Tarrytown House Condominiums v. Hainje, 161 A.D.2d 310, 313 [1st Dept., 1990]; Lake Erie Distribs. v.. Martlet Importing Co., 221 A.D.2d 954, 956 [4th Dept.,1995]). "To prevail on a claim of unjust enrichment, a plaintiff must establish that the defendant benefitted at the plaintiff's expense and that equity and good conscience require restitution." (Whitman Realty Group, Inc. v. Galano, 41 A.D.3d 590, 592-593 [2nd Dept.. 2007], citing Kaye v. Grossman, 202 F.3d 611, 615-616 [2nd Cir., 2000]; City of Syracuse v. R.A.C. Holding, 258 A.D.2d 906, 906 [4th Dept., 1999]).

Here, not only is there a valid enforceable contract barring such recovery (see, Whitman Realty Group, Inc. v. Galano, supra, at p. 593, citing Samiento v. World Yacht, Inc., 38 A.D.3d 328, 329 [1st Dept., 2007], aff'd as mod. 10 N.Y.3d 370 [2008]), the complaint fails to reveal in what fashion the respective defendants have allegedly been unjustly enriched. Among other things, there is no assertion that any of the defendants ever came into possession of the items over which this law suit rests.

Therefore, the cross-motion is also granted as to the eighth cause of action.

Based upon the foregoing, it is hereby

ORDERED, the defendants' cross-motion is denied as to the first cause of action and a default judgment is hereby granted as to same in favor of plaintiff and against JLD; and, it is further

ORDERED, that defendant's cross-motion is granted as to the third cause of action and the motion is denied with respect to same; and, it is further

ORDERED, that defendants' cross-motion is granted as to the second cause of action and plaintiff's motion is hereby denied; and, it is further

ORDERED, that, as to the fourth and fifth causes of action, defendants' cross-motion is granted as to defendant JLD and is denied as to the remaining defendants, and plaintiff's motion for a default judgment is hereby granted as to all defendants except JLD; and, it is further

ORDERED, that, as to the sixth cause of action, defendants' cross-motion is granted and plaintiff's application for a default judgment regarding same is hereby denied; and, it is further

ORDERED, that, as to the seventh cause of action, defendants' cross-motion is hereby granted and plaintiff's motion is denied; and, it is further

ORDERED, that, as to the eighth cause of action, the cross-motion is granted and the motion is denied; and, it is further

ORDERED, that, any inquest required by this determination and the entry of judgment thereon or one any other cause of action in connection with which a default judgment has been granted herein shall be held in abeyance pending the trial of the remaining causes of action; and, it is further

ORDERED, that, to any further extent, the motion and cross-motion are denied; and, it is further

ORDERED, that defendants shall serve and file an amended verified answer to the complaint to the extent herein allowed so as to be received by plaintiff and the Court by November 6, 2009; and, it is further

ORDERED, that, the parties are directed to appear before the Court at 9:30 a.m. on November 17, 2009 for a Preliminary Conference on all surviving causes of action.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: Goshen, New York
October 20, 2009

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