SHORT FORM ORDER

Index Number: 05618-2009

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Dates: 09-23-2009; 11-12-2009
Motion Submit Date: 11-12-2009
Motion Sequence No's.: 001 MOTD
002 MOTD
003 MG

X

ET DUCT, INC.,

Plaintiff,

-against-

ALLSTATE MECHANICAL INC., ALLSTATE MECHANICAL SERVICES INCORPORATED, ALLSTATE HEATING & COOLING CORP, ENERGYSTAR HEATING AND COOLING CORP, TODD M. DARIENZO and STEPHEN RENZI,

Defendants.

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The Court is considering herein the following three (3) motions:

1. Motion by plaintiff (motion sequence number 001) to add a party defendant and to amend the caption;

2. Cross-Motion (motion sequence number 002) by defendants, Todd Darienzo, Allstate Mechanical, Inc., Allstate Mechanical Services, Inc., and Jen-Air, Inc., to vacate defaults, permit the service of an Amended Answer with cross-claims, and partial summary judgment and dismissal; and

3. Motion by defendant Todd Darienzo (motion sequence number 003) to dismiss the 8th, 9th, 10th and 11th causes of action of the Verified Complaint.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, ET Duct, Inc., commenced this action against the named defendants by the filing of

a Summons and Verified Complaint on or about March 5, 2009 seeking recovery under theories of account stated, successor liability, breach of contract, and piercing the corporate veil. Issue was joined as to defendant Todd Darienzo ("Darienzo") by the service of a Verified Answer dated April 13, 2009. Defendants Allstate Mechanical, Inc. ("Allstate") and Allstate Mechanical Services, Inc., ("Services") failed to answer or otherwise move with respect to the Verified Complaint and a default judgment was entered against those entities on or about April 20, 2009. Defendants Allstate Heating and Cooling Corp. ("Heating"), Energystar Heating and Cooling Corp. ("Energystar") and Stephen Renzi ("Renzi") entered into a Stipulation of Settlement which was so-ordered by the Court (PINES, J.) on or about June 19, 2009.

The gravamen of the action is that plaintiff, supplied goods and materials to defendants Allstate, Services and Heating, respectively, and that these defendants failed and refused to pay for such goods and services. Plaintiff alleges that Services is a successor in interest to Allstate and liable for its outstanding obligations and further, that defendants Darienzo and Renzi are personally liable to the plaintiff for the debts under a piercing the corporate veil theory.

THE MOTIONS

Plaintiff's Motion to Add a Party Defendant and Amend Caption

Plaintiff moves, by Notice of Motion, for an Order adding Jen-Air, Inc. ("Jen-Air") as a party defendant. In support of the motion, plaintiff submits an affidavit by Timothy Barton ("Barton"), the president, sole shareholder and sole director of plaintiff corporation, an affirmation of counsel, a copy of the pleadings and a copy of the aforementioned Stipulation of Settlement. Barton alleges that subsequent to the commencement of the within action, he learned that Jen-Air is a successor in interest to defendant Services, and that since Services is a successor in interest to defendant Allstate, that Jen-Air is responsible for the debts and obligations of both entities. Specifically, Barton states that while Allstate owed plaintiff the sum of $136,757.82, it ceased doing business and transferred its assets to Services, which owed plaintiff $8,063.89. He asserts that Services then ceased doing business and transferred its assets to Jen-Air. Barton notes that these three corporations all share the same operating address, the same telephone number and the same employees and further serve the same customers, use the same furniture, equipment, computers and vehicles. Moreover, Barton claims that the three entities have the same officers, shareholders and directors, transferred contracts between themselves in succession and maintain bank accounts with the same financial institutions. Barton states that he was not aware of the foregoing when he originally commenced the action, and thus, Jen-Air was not included as a party defendant.

Therefore, it seeks an Order granting leave to add Jen-Air as a party defendant and to serve a supplemental summons and amended verified complaint. Plaintiff also seeks to amend the caption to remove the settling defendants therefrom.

Cross-Motion to Vacate Defaults and Amend Answer

Defendant Darienzo opposes the motion and cross moves to set aside the defaults of Allstate and Services, in the event the Court grants plaintiff's motion to add Jen-Air as a party. Darienzo also seeks to amend his Answer to interpose cross-claims against Heating, Energystar and Renzi, and moves for partial summary judgment and dismissal of the third cause of action. Finally, Jen-Air moves for partial summary judgment and dismissal of the sixteenth cause of action of the proposed Amended Verified Complaint. Darienzo submits an affidavit wherein he states that he is the owner of Jen-Air and was also the owner of Allstate and Services while they were still operating. He states that Allstate was a heating and air conditioning installation business formed in 1993 by non-party Anthony Darienzo (Darienzo's brother) and Darienzo became the sole shareholder in or about June of 2002. Darienzo further explains that he started Services, a heating and air conditioning repair, maintenance and replacement company which did not perform installations. He admits that Allstate and Services operated out of the same location, but that they were different businesses with different telephone numbers, vehicles, equipment, computer files, advertising, employees and customers. Darienzo states that Allstate's business declined in late 2007 and early 2008 and it was not able to collects its receivables and pay its overhead and thus ceased doing business. Darienzo denies that Allstate transferred its assets and liabilities to Services, but rather argues that Allstate transferred its assets to Heating, also a heating and air conditioning installation business, which was incorporated by defendant Renzi in 2008. Darienzo states that Renzi is the sole shareholder of Heating, which later changed its name to Energystar. Darienzo claims that he and Renzi had an unsigned written agreement (a copy of which is annexed to the cross-motion) wherein he agreed to transfer Allstate's vehicles and equipment to Heating and in exchange Heating would employ him as a salesperson. He states that Heating took over Allstate's telephone number, location, some computers, telephones and employees. Darienzo further argues that Heating agreed to take on Allstate's debt to plaintiff. Darienzo claims he worked as an employee for Heating from April 2008 through November 2008. Allstate was thereafter formally dissolved on January 9, 2009 but Darienzo continued to operate Services.

Darienzo claims that he ceased working for Heating in the fall of 2008 and Heating vacated the warehouse which had previously been occupied by Allstate. In February of 2009, Services also stopped doing business (although the dissolution papers have not been filed) and Darienzo states that

at that time, it owed plaintiff $8,063.00. Darienzo states that after Services ceased operating, he started a new business, Jen-Air, which performs solely repairs, maintenance and replacements of heating and air conditioning systems and does not do installations. Jen-Air was incorporated February 27, 2009 and began business in June of 2009. Darienzo argues that Jen-Air is not the same operation as Allstate, and does not employ any of Allstate's former employees except Darienzo. Moreover, Darienzo argues that Jen-Air is not a continuation of Services but rather a brand new business that obtained new insurances. He claims that there are three former Services' employees who work for Jen-Air and that the company uses three desks, a few filing cabinets and three telephones that belonged to Services. Based on the foregoing, Darienzo requests that plaintiff's motion to add Jen-Air as a party be denied.

In the alternative, Darienzo argues that if Jen-Air is added as a party defendant, the defaults of Allstate and Services should be vacated. Here, Darienzo asserts that if Jen-Air is found to be a successor of either of these entities, that is should be permitted to answer on their behalf since it would have technically been the corporation which defaulted. Thus, Darienzo claims there is a reasonable excuse for the default and moreover, since it challenges the successor in interest theory, he argues he has a meritorious defense to the action and the defaults should be vacated.

Additionally, Darienzo argues that if the Court vacates the default against Services, then the Court should grant summary judgment and dismiss the causes of action which allege that Services is a successor in interest to Allstate. Here, Darienzo reiterates that Services is not a successor in interest of Allstate, but rather all of Allstate's assets were transferred to Heating. Therefore, Darienzo urges the Court to dismiss the claims against Jen-Air for Allstate's and Services' debts to plaintiff.

Finally, Darienzo seeks leave to amend his answer to add cross-claims against Heating, Energystar and Renzi for breach of contract and unjust enrichment. He argues that there will be no prejudice resulting from any such amendments and these defendants should not be released from the caption.

Plaintiff opposes the cross-motion and challenges Darienzo's claim that Services never performed installations by submission of an affidavit of Barton and Kathea Belmonte. Plaintiff further argues that the unexecuted agreement between Darienzo and Renzi lacks probative value. Plaintiff asserts that none of the causes of action should be dismissed because further discovery is necessary.

With regard to the request to vacate the defaults of Allstate and Services, plaintiff argues that it would be unfair to excuse the defaults at this stage where the judgments were entered and enforcement steps have been taken. Moreover, plaintiff notes that Allstate and Services did not annex a proposed Answer to the papers. Plaintiff also objects to Darienzo's request to amend his Answer to add cross-claims against Heating and Energystar on the grounds that it would be prejudicial in that those defendants already settled with plaintiff and Darienzo delayed in asserting such claims. Therefore, plaintiff asks the Court to grant its motion to add Jen-Air as a party defendant and amend the caption and deny Darienzo's cross-motion in its entirety.

Darienzo's Motion to Dismiss

Darienzo moves by separate Notice of Motion to dismiss the 8th, 9th, 10th and 11th causes of action of the Verified Complaint as they are asserted against him. Darienzo states that although he was the sole shareholder of Allstate and Services, which purportedly owed $136,757.82 and $8,063.89, respectively to plaintiff, he did not personally guarantee either obligation or debt. Additionally, he argues that plaintiff cannot meet the requirements to pierce the corporate veil of this corporations and hold him personally liable for their debts. Moreover, he states that he never had any ownership interest in Heating or Energystar and therefore, any claims for debts of these corporations must be dismissed.

Darienzo argues that plaintiff has failed to satisfy the specificity pleading requirements of CPLR §3013 to sustain his corporate veil piercing claims. He argues that the conclusory allegations of domination and control and wrongdoing are insufficient to withstand scrutiny and these causes of action must be dismissed.

Plaintiff opposes the motion to dismiss and argues that the Complaint meets the criteria of CPLR §3013 in that it put Darienzo on notice of the allegations against him and pled the material elements. Specifically, the Complaint alleged Darienzo caused the respective corporations to be undercapitalized, misrepresented the ability to make payments, was the alter ego of the corporations, disregarded corporate formalities, and improperly transferred assets. Plaintiff argues that these allegations are sufficient to withstand the motion to dismiss and since discovery has just commenced and no depositions have occurred, dismissal would be premature.

DISCUSSION

CPLR §3025(b) provides that "A party may amend his pleading, or supplement it by

setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." It is well settled that such should be freely granted unless the amendment sought is palpably improper as a matter of law or unless prejudice or surprise directly results from the delay. ***Uliano v. Entennann's Inc.,*** 148 AD2d 604, 539 NYS2d 70 (2d Dept. 1989). Whether to grant or deny leave to amend is committed to the discretion of the Supreme Court. ***Edenwald Contracting Co., Inc. v. City of New York,*** 60 NY2d 957,471 NYS2d 55 (1983). The merits of a proposed amendment will not be examined on a motion to amend unless the insufficiency or lack of merit is clear and free from doubt. ***Sievert v. Morlef Holding Co.,*** 220 AD2d 403, 631 NYS2d 774 (2d Dept. 1995); ***Noanjo Clothing v. L & M Kids Fashions,*** 207 AD2d 436, 615 NYS2d 747 (2d Dept. 1994).

In the instant case, leave to amend the complaint to add Jen-Air as a party defendant is proper. The allegations of the proposed amended complaint demonstrate that the additional causes of action against Jen-Air are related to those set forth in the main action. Although Darienzo urges the Court to recognize that Jen-Air is not a successor corporation to either Allstate or Services, at this juncture, without benefit of further discovery, the Court cannot say that this amendment is "palpably improper". ***Uliano, supra.*** Therefore, the motion for leave to amend the summons and complaint to add Jen-Air as a party defendant is granted. Plaintiff shall serve the supplemental summons and amended complaint within twenty (20) days from the date of the decision and Order herein.

Turning to Darienzo's motion to vacate the default of Allstate and Mechanical, CPLR §5015(a) states in relevant part:

> The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 1. excusable default, if such made motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry;

To vacate the default however, the Courts have held that defendant must demonstrate both a reasonable excuse for the default and a meritorious defense to the action. ***Westchester Medical Center v. Hartford Casualty Insurance Co.,*** 58 A.D.3d 832, 872 N.Y.S.2d 196 (2d Dept. 2009); ***Weiss v. Croce,*** 58 A.D.3d 832, 872 N.Y.S.2d 196 (2d Dept. 1990).

Here, since plaintiff argues that Jen-Air is the successor in interest to Allstate and/or

Services, both admittedly defunct and dissolved corporations, the Court agrees with Darienzo that vacatur of the defaults against these entities is appropriate. The default judgment is therefore vacated and of no further force and effect. On the other hand, the Court denies Darienzo's request to amend his answer to add cross-claims against Heating and Energystar. Darienzo has failed to submit a proposed amended Verified Answer with cross-claims and moreover, since those defendants settled with plaintiff, prejudice would result from this late filing of cross-claims.

Finally, Darienzo's motion to dismiss the 8th, 9th, 10th and 11th is granted. Initially, with regard to the 10th and 11th causes of action asserting veil piercing claims regarding Heating and Energystar, Darienzo states, and plaintiff does not dispute, that Renzi was the principal and sole shareholder of those corporations and Darienzo did not have any ownership interest in those entities. Therefore, the 10th and 11th causes of action are dismissed. In the 8th and 9th causes of action, plaintiff asserts veil piercing claims against Darienzo with regard to Allstate and Services. The Verified Complaint merely alleges that Darienzo exercised dominion and control over the corporations, inadequately capitalized the corporations, disregarded corporate formalities and improperly transferred assets. The Second Department has recently reaffirmed the general principle that a corporation exists independent of its owners who are not personally liable for its obligations. ***East Hampton Union Free School District v. Sandpebble Builders, Inc.,*** 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009). In that case, the Court recognized that:

> The concept of piercing the corporate veil is an exception to this general rule, permitting in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation. A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff.

Id. In this case, as in ***Sandpebble,*** plaintiff has failed to assert that Darienzo acted other than in his capacity as principal owner of Allstate and/or Services. In fact, the allegations of the Complaint that Darienzo "caused Allstate to contract with plaintiff" and "received plaintiff's invoices", demonstrate that Darienzo was acting in his corporate capacity on behalf of those entities.

Based on the foregoing, Darienzo's motion to dismiss the 8th, 9th, 10th and 11th causes of action is granted in its entirety.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 12, 2010
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.