SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

TRITON CONSTRUCTION COMPANY, LLC, Individually and in a Representative Capacity Under Article 3-A of the Lien Law on Behalf of All Other Beneficiaries of Certain Trust funds, including but not limited to BAY END CONSTRUCTION CORP., BRETON STEEL CORPORATION, C.M. RICHEY ELECTRICAL CONTRACTING INC., LIB SEWER & DRAINAGE CORP., NEW YORK PRECAST LLC and PROTON CONSTRUCTION CORP.,

Plaintiffs,

-against-

NEW CENTRAL AVENUE LLC, DAVID NEUBERG, MALKIE NEUBERG, AARON ORLOFSKY and "JOHN DOE ONE" THROUGH "JOHN DOE TEN",

Defendants.

INDEX No. 13512/09

MOTION DATE: Jan. 11, 2010
Motion Sequence #001, 002, 003

The following papers read on this motion:

Notice of Motion..... X
Order to Show Cause..... X
Cross-Motion..... X
Affirmation in Support..... X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

Defendants, David Neuberg, Malkie Neuberg and Aaron Orlofsky, move for the following forms of relief: [1] an order staying or dismissing the within action, until the occurrence and conclusion of contractually required conditions precedent to the within litigation; i.e., submission of the disputes to the Architect and then, if necessary, to mediation;[2] or, *in the alternative*, for an order pursuant to CPLR§3211(a)(8), dismissing the action on the basis that service of process was not properly effectuated;[3] or, *in the alternative*, for an order pursuant to CPLR §3211 (a)(1) and (a)(7), dismissing the Fifth, Sixth and Seventh Causes of Action, as asserted against them individually. (Sequence #001); and plaintiff, Triton Construction Company, LLC [hereinafter Triton] moves pursuant to CPLR §306-b, for an order extending the time in which to serve the Summons and Verified Complaint upon defendants, David Neuberg, Malkie Neuberg and Aaron Orlofsky, for sixty days *nunc pro tunc*. (Sequence # 002); and the plaintiffs cross-move pursuant to CPLR §3025 (b) for an order granting leave to amend the within complaint. (Sequence #003), are **all** determined as hereinafter set forth.

Plaintiff, Triton, is a New York LLC in the business of construction. Defendant New Central Avenue, LLC [hereinafter New Central], is the owner of the premises located at 260 Central Avenue, Lawrence, New York. Individual defendant David Neuberg is a member of New Central. Defendant Malkie Neuberg is the wife of David Neuberg, and is identified in the as a Principal in New Central. Defendant Orlofsky is similarly identified as Principal in New Central.

In or about August 2008, Triton entered into a contract with New Central, whereby Triton was to serve as "construction manager" for the construction of residential condominiums on the aforementioned parcel owned by New Central. As the job progressed, Triton submitted applications for payment to New Central and was in fact remunerated in accordance therewith, until such time of the dissolution of New Central's lender, Lehman Brothers, which occurred in September 2008. Triton alleges that subsequent to the dissolution, defendant, David Neuberg, frequently visited the construction site and "urged Triton to work on the Project until another lender could be secured and - - on his handshake - - promised that, 'if it doesn't work out, I'll pay you personally.'" (Reich Aff. at ¶¶8,9). Triton alleges that on October 3, 2008 it received a wire transfer in the sum of $600,000 which originated from the personal account of Malkie Neuberg and thereafter on October 29, 2008, it received $1,000,000 from KJH Holdings Co. Inc., of which defendant Aaron Orlofsky is purportedly an officer, manager or director.

In or about July 2009, due to an outstanding balance due on the contract, the within

action was thereafter commenced by Triton, and contains eight causes of action. Of particular relevance to the within application are the Fifth, Sixth and Seventh, the dismissal of which is sought by the moving defendants herein. The Fifth cause of action is asserted against all three individual defendants and alleges that during the course of the project they "made substantial payments to Triton" via the use of their own personal funds, and in so doing, "evidenced intent" to "disregard the legal existence of New Century [sic]" and thus assumed personal liability for the debts owed by New Central to Triton (Schneider Affirmation in Support at ¶¶47,48,49,50,51).

The Sixth cause of action, also asserted against all three individual defendants, alleges the plaintiff performed the construction work at the "specific instance and request" of the individual defendants and accordingly they are each liable to the plaintiff (*id.* at ¶¶53,55). Finally, the Seventh cause of action is asserted solely against defendant David Neuberg and alleges an account stated in the amount of $3,457,317.47 (*id.* at ¶¶57,58).

In support of the within application, counsel for the moving defendants initially argues the entire action should be either dismissed or stayed as Triton has failed to satisfy a condition precedent to commencing and maintaining the within action. Specifically, counsel argues that, in accordance with the express conditions as contained in the contract executed by and between Triton and New Central, prior to commencing the within action Triton was required to submit its claims arising out of the contract to the architect and then, if necessary, to a mediator.

Counsel relies, ***inter alia***, upon sections 4.4.1 and 4.5.1 of the contract, which provide the following, in relevant part:

> §4.4.1 Decision of the Architect. Claims, including those alleging an error or omission by the Architect * * * shall be referred initially to the Architect for decision. An initial decision by the Architect shall be required as a condition precedent to mediation or litigation between the Contractor and Owner arising prior to the date final payment is due, unless 30 days have passed after the Claim has been referred to the Architect with no decision having been rendered by the Architect. The Architect will not decide disputes between the Contractor and persons or entities other than the Owner."

> "§4.5.1 Any claim arising out of or related to the Contract * * * shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to the institution of legal or equitable proceedings by either party."

Counsel posits that, as Triton has failed to submit the claims comprising the within complaint to the Architect or Mediator, the underlying action must be dismissed. With particular regard to the applicability of the condition precedents to the individual defendants, neither of whom are signatories to the contract, counsel argues that as the plaintiff's claims against the moving defendants arise out of the contract between Triton and New Central, Triton is still required to satisfy the conditions precedent prior to commencing an action against them.

In addition to the foregoing, counsel argues, in the alternative, that if this Court declines to dismiss the within action, then dismissal of the Fifth, Sixth and Seventh causes of action asserted against the individual defendants remains warranted. As to the Fifth cause of action which seeks to pierce the corporate veil, counsel asserts that same must be dismissed as Triton has failed to allege, with particularity, that any of the individual defendants dominated New Central, vis a vis the contractual transactions, and that such domination was the instrument through which a fraud or other wrong was visited upon Triton.

As to the Sixth Cause of Action, same seeks to impose liability upon the individual defendants on the basis that the work performed by Triton was done so at the specific behest of said defendants. In arguing for dismissal thereof, counsel posits that of the three individual defendants, only David Neuberg signed the contract, and only in his capacity as "member" of New Central, and accordingly cannot be held personally liable to Triton.

Finally, as to Seventh Cause of Action which alleges the existence of an Account Stated against defendant, David Neuberg, counsel seeks dismissal on several bases. Initially, counsel argues that defendant, David Neuberg, is not the debtor under the contract executed by and between Triton and New Central, and is thus is not in contractual privity with Triton. Additionally, counsel argues that any alleged oral guaranty on the part of David Neuberg would be unenforceable as being in contravention of the Statute of Frauds.

In opposing the defendants' application, as to the Fifth Cause of Action, counsel for

the plaintiff argues that the above-referenced personal guaranty made to Triton by David Neuberg, coupled with the payments subsequently made by defendants Malkie Neuberg and Aaron Orlofsky, evince a clear intent upon all of the individual defendants, to assume personal liability for the corporate debts of an"inadequately capitalized" New Central (*see* Plaintiff's Memorandum of Law at pp. 4-11). Counsel asserts that said defendants assumed such personal liability so as to induce Triton to continue to perform its obligations under the construction contract for the sole benefit of New Central, an entity the defendants knew was unable to financially compensate Triton for the services rendered. Counsel further asserts that, having induced the plaintiff to perform, the moving defendants cannot now seek to eschew their assumed obligations by cloaking themselves behind the corporate entity and accordingly the fifth cause of action should not be dismissed.

With respect to the Sixth Cause of Action, counsel contends that the record, as adduced herein, contains sufficient evidence that the moving defendants assumed an obligation to pay for the goods and services provided by the plaintiff. Finally, as to the Seventh Cause of Action, counsel contends that New Central received and accepted Triton's invoices and payment application, none of which were rejected by any of the moving defendants and thus an account stated has been sufficiently plead.

DECISION

The Court initially addresses that branch of the defendants' application which seeks a stay or dismissal of the within complaint based upon Triton's purported failure to satisfy various conditions precedent. Having carefully reviewed the relevant documentary submissions, this Court hereby **denies** the defendants' application.

"[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" (***Vermont Teddy Bear Co. Inc v 538 Madison Realty Co.***, 1 NY3d 470 [2004] quoting ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157,162, 1990). "Where the language chosen by the parties has 'a definite and precise meaning,' there is no ambiguity" (***Riverside South Planning Corp. v CRP/Exlell Riverside***, *L.P.*, 13 NY3d 389, 2009 quoting ***Greenfield v Phillies Records***, 98 NY2d 562, 2002). When the Court is presented with a contract which is unambiguous, it is required, "in the absence of a showing that the contract is voidable on grounds such as mistake, fraud, duress, undue influence, or the like, . . . to give effect to the contract as written" (11 Williston on Contracts §30:6, [4th ed]).

In the instant matter, the condition precedent as embodied in Section 4.4.1 and upon which the defendants rely, expressly provides that " The Architect will not decide disputes between the Contractor and persons or entities other than the Owner." Here, the Owner is quite clearly identified in the contract as New Central Avenue, LLC and not individual defendants, David Neuberg, Malkie Neuberg or Aaron Orlofsky. Additionally, Section 4.3.1 defines a claim as " . . . disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." Again, none of the individual defendants are denominated as Owner in the governing contract.

Thus, based upon the plain and precise language in the contract, the condition precedents which Triton is required to satisfy are with respect to claims commenced against the owner, New Central, and not with respect those instituted against the individual defendants herein named (***Riverside South Planning Corp. v CRP/Exlell Riverside, L.P.***, 13 NY3d 389, 2009, ***supra***). Accordingly this branch of the defendants' application is **denied**.

The Court now addresses that branch of the defendants' application which seeks dismissal of the plaintiffs Fifth, Sixth and Seventh Causes of Action pursuant to CPLR §3211(a)(1) and (a)(7).

"A party seeking dismissal on the ground that its defense is founded on documentary evident under CPLR 3211(a)(1) has the burden of submitting documentary evidence that 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'"(***Sullivan v State of New York***, 34 AD3d 443, 2d Dept., 2006; quoting ***Nevin v Laclede Professional Products Inc***., 273 AD2d 452, 2d Dept., 2000).

With respect to an application interposed pursuant to CPLR §3211(a)(7), the complaint is to be liberally construed and the facts as alleged therein are to be accepted as true and the plaintiff afforded every favorable inference which may be drawn therefrom (***Leon v Martinez***, 84 NY2d 893 [1984]). In entertaining such an application, the function of the motion court is only to determine whether the facts as alleged fall within a cognizable legal theory (*id.*). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*id.;* ***Rovello v Orofino Co.***, 40 NY2d 633, 1976). When an affidavit is presented for the court's review "the criterion is whether the proponent of a pleading has a cause of action, not whether he has stated one" (***Guggenheimer v Ginzburg***, 43 NY2 268, 1977).

The party seeking to pierce a corporate veil is required to show that "the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury" (***Damianos Realty Group, LLC v Fracchia***, 35 AD3d 344, 2d Dept., 2006; ***Goldman v Chapman***, 44 AD3d 938, 2d Dept., 2007). Additionally, a plaintiff praying for such relief "must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction in 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" (***East Hampton Union Free School District v Sandpebble Builders, Inc.***, 66 AD3d 122,126, 2d Dept., 2009).

In the instant matter, the plaintiff's complaint does not allege that the any of the individual defendants exerted the requisite dominion and control over the transactions in issue (*id;* ***Goldman v Chapman***, 44 AD3d 938, 2d Dept., 2007, ***supra***). Moreover, even fully crediting as true the allegations in the complaint, and affording same every favorable inference, the supporting affidavit proffered herein by Frank Reich, President of Triton, clearly demonstrates that the plaintiff did not suffer injury as a consequence of the actions of the individual defendants, but rather, in fact, received the sum of 1.6 million dollars therefrom (*id.*).

Accordingly, the plaintiff's Fifth Cause of Action is **dismissed**.

The Sixth Cause of Action seeks to impose liability upon all of the individual defendants because the contract work performed was done at their specific request. "[W]here one party to a written contract is known to the other to be in fact acting as agent for some known principal, he does not become personally liable whether he signs individually or as agent" (***Ell Dee Clothing Co. v Marsh***, 247 NY 392,1928). Here, the contract under which Triton provided labor and services was *only* signed by defendant, David Neuberg, and was clearly done so in his capacity as member of New Central. Accordingly, the Sixth Cause of Action is **dismissed** (*id.*; CPLR §3211[a][1]).

"An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of . . . the account, and the balance due" (***Chisholm-Ryder Company, Inc. v Sommer & Sommer***, 70 AD2d 429, 4th Dept., 1979). Such an account "assumes the existence of some indebtedness between the parties, or an agreement to treat the statement as account stated." (***Ryan Graphics, Inc. v Bailin***, 39 AD3d 249, 1st Dept., 2007; quoting ***M. Paladino, Inc. v J. Lucchese & Sons Contracting***

Corp., 247 AD2d 515, 2d Dept., 1998). Stated differently, a party asserting an account stated "must prove that the account was presented, that by mutual agreement it was accepted as correct, and that the debtor promised to pay the amount stated" (1 NY Jur 2d, Accounts and Accounting §31).

In the matter *sub judice*, the Seventh Cause of Action is asserted solely against defendant, David Neuberg, and alleges that "invoices and statements" were sent to and received by him without objection. However, the record herein is devoid of any evidence that an agreement existed by and between Mr. Neuberg and Triton as to indebtedness. Upon review of the payment applications submitted by plaintiff, same were sent to New Central and not to David Neuberg (*id.*). Moreover, as noted by counsel for the defendants, any oral promise by Mr. Neuberg to assume the debts of New Central would be unenforceable due to the Statute of Frauds.

The Statute of Frauds as embodied in General Obligations Law §5-701[a][2], provides the following, in relevant part:

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . is a special promise to answer for the debt, default or miscarriage of another person".

An oral promise can be taken outside the statute where such oral promise is supported by new consideration flowing to the promisor and where the promisor intends to become the principal debtor and thus primarily liable to the plaintiff (***Concordia General Contracting v Peltz***, 11 AD3d 502, 2d Dept., 2004). "The new consideration must be both tangible and directly beneficial to the promisor in order to satisfy this exception" (***Carey & Associates v Ernst***, 27 AD3d 261, 1st Dept., 2006).

In the case at bar, the new consideration is purportedly the continuation by Triton of the work on the construction project. However, said consideration directly benefitted New Central and not defendant, David Neuberg (*id.*). Moreover, the allegations as recited in the complaint and supplemented in the Reich Affidavit do not indicate an intent on the part of

Mr. Neuberg to be primarily liable to Triton (***Concordia General Contracting v Peltz***, 11 AD3d 502, 2d Dept., 2004, ***supra***; *see also,* ***Martin v Roofing, Inc.***, 91 AD2d 1065, 2d Dept., 1983). Rather, in the Reich affidavit is it clearly averred that defendant, David Neuberg, guaranteed the debt of New Central "only in the event a new lender could not be secured." (*id.*). Thus, the exceptions to the statute, which would allow the alleged oral promise to be enforced, are inapplicable to the circumstances herein (*id.*).

Accordingly, based upon the foregoing, the Seventh Cause of Action in **dismissed**.

Plaintiff's Cross-Motion seeking leave to Amend the Complaint

"Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment" (***Adams v Jamaica Hospital***, 258 AD2d 604,2d Dept.,1999; ***Maloney Carpentry, Inc. v Budnik***, 37 AD3d 558, 2d Dept., 2007). In the instant matter, the plaintiff has not presented this Court with a proposed amended complaint and it is unclear from the plaintiff's application, exactly what portions of the complaint it seeks to amend. Rather in the supporting affirmation, counsel for Triton requests that "if the Court should determine pleading deficiencies exist in Triton's complaint" that leave to replead or amend be granted (*see* Schulman Affirmation at ¶25).

A review of the Reich Affidavit appears to suggest that the plaintiff is seeking to amend the pleading so as to add a cause of action asserting personal liability against the three individual defendants, separate and apart from piercing the corporate veil, but which is similarly predicated upon the personal guaranty allegedly made by David Neuberg and purportedly ratified by the payments made by Malkie Nueberg and Aaron Orlofsky. However, for the reasons set forth hereinabove, the oral guaranty by David Neuberg is unenforceable pursuant to the statute of frauds and accordingly a cause of action predicated upon same would be insufficient as a matter of law and therefore the application is **denied** (***Maloney Carpentry, Inc. v Budnik***, 37 AD3d 558, 2d Dept., 2007, ***supra***).

This constitutes the Decision and Order of the Court,

All applications not specifically addressed are **denied**.

A Preliminary Conference has been scheduled for May 24, 2010 at 9:30 a.m. in

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Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated 5 March '10

Stephen A. Bucaria
J.S.C.

ENTERED
MAR 10 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE