

Kabrawala v Venus Design Servs., Inc.

2010 NY Slip Op 30964(U)

April 22, 2010

Supreme Court, Nassau County

Docket Number: 19257/09

Judge: F. Dana Winslow

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SWAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 5
NASSAU COUNTY**

**PRATIBHA KABRAWALA,
BALVANT C. KABRAWALA and
the KABRAWALA TRUST,**

Plaintiffs,

**MOTION DATE: 12/24/09
MOTION SEQ. NO. 001**

- against -

INDEX NO.: 19257/09

**VENUS DESIGN SERVICES, INC. and
KOSTAS GEORGIADIS,**

Defendants.

The following papers read on this motion (numbered 1):

Notice of Motion for Default Judgment.....1

In this action for breach of a construction contract, plaintiffs move for a default judgment pursuant to CPLR §3215.

Plaintiffs' unrefuted account of the facts is as follows: On or about January 19, 2009, plaintiffs entered into a written contract with defendant VENUS DESIGN SERVICES, INC. ("VENUS") to perform specified construction work in the kitchen of plaintiffs' single family home for a price of \$14,665.00 (the "Kitchen Contract"). On or about February 16, 2009, plaintiffs entered into a written contract with VENUS to perform specified construction work in connection with an extension of the back portion of the home for a price of \$18,000 (the "Extension Contract," collectively, the "Contracts"). Plaintiffs paid a total of \$25,900.00. VENUS never performed on the Kitchen Contract, and only partially and inadequately performed on the Extension Contract. On or about May 15, 2009, VENUS abandoned work on the home.

Plaintiffs commenced this action by filing the Summons and Complaint on September 22, 2009. The Complaint asserts causes of action sounding in breach of

contract and conversion, and contains allegations of personal liability on the part of defendant KOSTAS GEORGIADIS (“GEORGIADIS”), President of VENUS, on the theory known as “piercing the corporate veil.” Plaintiffs seeks actual damages in the amount of \$25,900.00, consequential damages in the amount of \$75,000.00 and punitive damages in excess of \$250,000.00.

The Summons and Complaint were served on October 6, 2009, upon GEORGIADIS in his individual capacity, by personal delivery pursuant to CPLR §308(1), and upon VENUS by delivery to GEORGIADIS as managing agent, pursuant to CPLR §311. Neither defendant has answered, moved, or otherwise appeared in this action, and the statutory time period within which to do so has elapsed.

In support of their motion for a default judgment, plaintiffs submit: (i) a copy of the Summons and Complaint; (ii) Affidavits of Service attesting to service of the Summons and Complaint as described above; (iii) the Affirmation of plaintiffs’ counsel attesting to, among other things, the failure of defendants to answer, appear or move in response to the Summons and Complaint; (iv) the affidavit of plaintiff BALVANT C. KABRAWALA sworn to on November 25, 2009 (“Plaintiffs’ Affidavit”) attesting to the facts constituting the claim, as outlined above; (v) the Affidavit of Service upon GEORGIADIS pursuant to CPLR §3215(g)(3); (vi) copies of the Contracts and (vii) copies of cancelled checks evidencing payments to GEORGIADIS in the total amount of \$25,900.00.

The Court finds that plaintiffs have established a *prima facie* cause of action for breach of contract. Plaintiffs also have demonstrated payment of consideration in the amount of \$25,900.00, which they assert as the measure of their actual damages. Damages for breach of a construction contract, however, are generally not measured by the amount of consideration paid, particularly insofar as that measurement fails to take into account the work performed.

“[T]he theory underlying damages is to make good or replace the loss caused by the breach of contract. Damages are intended to return the parties to the point at which the breach arose and to place the nonbreaching party in as good a position as it would have been had the contract been performed.” **Brushton-Moira Cent. School Dist. v. Fred H. Thomas**, 91 N.Y.2d 256, 261 (internal citations omitted). “In general, the proper measure of damages for breach of a construction contract is the cost to either repair the defective construction or complete the contemplated construction.” **Haber v. Gutmann**, 64 A.D.3d 1106. In this case, plaintiffs have not demonstrated actual damages in accordance with applicable legal standards.

Plaintiffs have not demonstrated entitlement to consequential damages in the amount of \$75,000. The conclusory assertion that plaintiffs have incurred “unnecessary and significant expenses, hardship inconvenience and various types of pecuniary loss” [Plaintiffs’ Affidavit, ¶13] is insufficient to justify such an award.

Plaintiffs also fail to demonstrate a cause of action for conversion. Plaintiffs base their claim on the fact that a subcontractor filed a mechanics lien against the property in the sum of \$13,338.42, the unpaid amount owed by VENUS for building materials. “By failing to pay its supplier....,” plaintiffs allege, “and retaining the money paid to it by Plaintiffs, as set forth above, Venus has converted the money paid to it by Plaintiffs for its own use and benefit.” [Complaint ¶23]

“A ‘conversion’ takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.” **Colavito v. New York Organ Donor Network, Inc.**, 8 N.Y.3d 43, 49-50. The facts alleged by plaintiffs do not demonstrate a violation of a possessory interest in property belonging to the plaintiffs. The consideration paid to defendants pursuant to the Contracts is not property belonging to plaintiffs, and they have no right to its outright return. If anything, they are entitled to contractual damages based upon the failure of the agreed upon performance.

Further, “a cause of action to recover damages for conversion cannot be predicated on a mere breach of contract.” **Schmidt v. Lorenzo**, 2010 WL 459813, *quoting Wolf v. National Council of Young Israel*, 264 A.D.2d 416, 417. *See Hochman v LaRea*, 14 A.D.3d 653, 655. **D’Ambrosio v. Engel**, 292 A.D.2d 564, lv denied 99 N.Y.2d 503. Plaintiffs’ conversion cause of action is nothing more than an attempt to recast its breach of contract claim as a tort in order to support punitive damages. It does not stem from a wrong which is independent of the alleged breach. *See Wolf, supra*. The injury to plaintiffs resulted from VENUS’s breach of its agreement to perform construction work, which included an agreement to provide the materials at its own expense. To the extent that VENUS’s breach resulted in the imposition of a mechanics lien, any loss incurred thereby is an element of plaintiffs’ contractual damages.

The Court rejects plaintiffs’ claim for punitive damages. “[P]unitive damages are not recoverable in an ordinary breach of contract case, as their purpose is not to remedy private wrongs but to vindicate public rights. Punitive damages are only recoverable where the breach of contract also involves a fraud evincing a high degree of moral turpitude, and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally.” **Tartaro v. Allstate Indem. Co.**, 56 A.D.3d 758. In this case, the conduct alleged by plaintiffs

amounts to ordinary breach of contract. It does not reflect the level of moral turpitude or public importance warranting punitive damages.

On the record presented, the Court cannot impose personal liability upon GEORGIADIS. “While the law permits the incorporation of a business for the very purpose of escaping personal liability ... equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice” **Shkolnik v. Krutoy**, 65 AD3d 1214, 1215, *quoting Ventresca Realty Corp. v. Houlihan*, 28 AD3d 537 [internal quotation marks and citations omitted]. “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” **Millennium Constr., LLC v. Loupolover**, 44 AD3d 1016, *quoting Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141. “[P]recedent is clear that courts will pierce the corporate veil only to prevent fraud, illegality or to achieve equity. This is true even in situations ... where the corporation is controlled or dominated by a single shareholder” **Treeline Mineola, LLC v. Berg**, 21 AD3d 1028, 1029 [internal citation omitted].

In the case at bar, plaintiffs allege, upon information and belief, that GEORGIADIS had complete dominion and control over VENUS, disregarded the separate identity of VENUS, undercapitalized VENUS and used VENUS as a conduit or instrumentality for the transaction of his own business, with the intent of defrauding its customers [Complaint ¶¶ 18 -20]. The only evidence in support of this claim is (i) that the checks were made payable to GEORGIADIS, individually, and not to VENUS [Motion Exh. D], and (ii) that the Contracts were written on two different letterheads, indicating two different corporate entities with the same address and phone number, and GEORGIADIS as principal [Motion Exh. C]. Although there are indications that GEORGIADIS may have controlled VENUS and disregarded certain corporate formalities, there is no evidence that he used his control over the corporation to defraud his customers, or otherwise to commit an illegality or injustice against them. As stated above, the conduct alleged amounts to a breach of contract. There is no evidence of misrepresentation or other wrongdoing apart from the failure to perform the work promised.

The Court recognizes that plaintiffs are at a disadvantage to prove facts relating to the financing and operation of VENUS and other businesses by GEORGIADIS, without the aid of the discovery available in a defended action. Accordingly, the Court’s determination that it will not “pierce the corporate veil” at this time is without prejudice

to plaintiffs' renewing its application in the event that the post-judgment enforcement process reveals evidence in support thereof.

Based upon the foregoing, it is

ORDERED, that plaintiffs' motion for a default judgment is **granted in part**, to the extent that VENUS is adjudged to be liable to plaintiffs for breach of contract; and it is further

ORDERED, that plaintiffs shall submit, on notice to defendants, a proposed judgment, together with an application for an award of damages [see 22 NYCRR 202.46] including: (1) an affirmation of counsel setting forth the calculation of plaintiffs' claim for actual and consequential damages, including authority for the formula or standard applied to measure actual damages, as well as authority for the award of consequential damages in the circumstances of this case; (2) plaintiffs' affidavit itemizing the costs or losses that were used as a basis for the calculation of damages; (2) documentation substantiating the costs or losses claimed; and (3) any other factual and documentary evidence necessary to apply the appropriate measure of damages, such as any paid invoices for work done to complete or correct defendants' work. Such application must be received by the Court within 60 days after entry of this Order, or any duly authorized adjourned date; and it is further

ORDERED, that in the alternative to the written application described above, plaintiffs may place the matter on the trial calendar for the assessment of damages by filing a Notice of Inquest, together with a copy of this Order, within 60 days of entry of this Order; and it is further

ORDERED, that in the event that plaintiffs fail to file a proposed judgment or Notice of Inquest in accordance with the foregoing, the action will be deemed abandoned, and will be dismissed without further order of the Court, unless good cause is shown for the delay.

This constitutes the Order of the Court. Plaintiffs shall serve a copy of this Order upon defendants within 15 days of entry and shall file proof of such service with any subsequent submission.

Dated: 3/19/10

[Signature]
J.S.C.

ENTERED
APR 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE