

**Tannousis v Christoffersen**

2010 NY Slip Op 32288(U)

August 25, 2010

Supreme Court, Richmond County

Docket Number: 101821/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

**Calendar No.: 485 - 003  
1107 - 004  
Index No.: 101821/08**

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**ANTONAKIS TANNOUSIS, a/k/a TONY TANNOUSIS and  
KATINA TANNOUSIS,**

*Plaintiffs*

*against*

**DECISION  
HON. JOSEPH J. MALTESE**

**ALLAN CHRISTOFFERSEN, a/k/a ALAN  
CHRISTOFFERSEN, INDIVIDUALLY and  
DOING BUSINESS AS RELIABLE ROOFING,**

*Defendants*

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The following papers numbered 1 to 5 were fully submitted on the 14<sup>th</sup> day of May, 2010.

	Papers Numbered
Notice of Motion of Plaintiffs to Dismiss Answer and Counterclaim, with Supporting Papers and Exhibits, (dated February 1, 2010) .....	1
Notice of Cross Motion for Summary Judgment of Defendants, with Supporting Papers and Exhibits, (dated March 24, 2010) .....	2
Plaintiffs' Reply Affidavits in Support of Motion to Dismiss and in Opposition to Defendants' Cross Motion for Summary Judgment, with Plaintiffs' Affidavit and Exhibits, (dated April 6, 2010) .....	3,4
Reply Affidavit of Defendants in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motion to Dismiss, (dated April 12, 2010) .....	5

Upon the foregoing papers, plaintiffs' motion (No. 485) for summary judgment and dismissal of defendants' amended answer and counterclaim is granted to the extent that defendants' fourth and sixth affirmative defenses are dismissed; the balance of the motion is denied. Defendants' cross motion (No. 1107) for summary judgment is granted to the extent that (1) any causes of action pleaded on behalf of plaintiff KATINA TANNOUSIS and (2) plaintiffs' cause(s) of action for specific performance are severed and dismissed as hereinafter provided; the balance of the cross motion is denied.

Plaintiffs ANTONAKIS and KATINA TANNOUSIS commenced this action for specific performance and/or money damages against defendants ALLAN CHRISTOFFERSEN, individually, and doing business as RELIABLE ROOFING (hereinafter RELIABLE) for the alleged breach of a contract to perform renovations to plaintiffs' residence. To the extent relevant, plaintiffs allege that pursuant to said contract, they agreed to pay defendants \$100,000 for the subject renovations; they have already paid defendants the sum of \$85,000, and have refused to pay the balance of \$15,000 due to defendants' failure to complete the promised work. According to plaintiffs, defendants abandoned the premises in an unfinished and hazardous condition. As a result, plaintiffs claim that they were forced to hire another contractor to complete the renovations at additional cost.

In their answer, defendants allege, *inter alia*, that it was plaintiff ANTONAKIS TANNOUSIS (hereinafter plaintiff) who failed to pay the amount due under the contract, thereby relieving RELIABLE of its contractual obligation to complete the renovations. Hence, any damages that plaintiff may have incurred are his own responsibility. Defendants also claim that since plaintiff KATINA TANNOUSIS was not a party to the contract, the absence of any privity between herself and RELIABLE renders her an improper party to the action against it. In addition, defendants argue that plaintiffs have failed to state a viable cause of action for specific performance inasmuch as they have hired other contractors to complete the work. In this regard, defendants claim that these other contractors are necessary parties to the subject action since plaintiffs have included a claim for defective workmanship and already paid these contractors to remediate same.

For his part, RELIABLE's owner, ALLAN CHRISTOFFERSEN, argues that he was never properly served in his individual capacity, and that the description of him in the affidavit of service is materially incorrect. In addition, CHRISTOFFERSEN argues that he did not personally contract with plaintiff to perform the subject renovations, but in his capacity as the principal of RELIABLE ROOFING. Thus, he cannot be held personally liable.

Finally, defendants have asserted a counterclaim for damages incurred through the performance of "extra work" at plaintiff's request that was not included in the original contract, and for which RELIABLE has not been paid.

In the current application, plaintiffs seek the dismissal of defendants' amended answer and counterclaim, and/or an award of summary judgment in their favor. According to plaintiffs, defendants have failed to allege any conduct on their part which would relieve defendants of their duty to complete performance under the contract. Plaintiffs also contend that privity exists between themselves and defendants, and have submitted in support thereof a copy of an executed contract signed by plaintiff ANTONAKIS TANNOUSIS and defendant ALLAN CHRISTOFFERSEN. Finally, plaintiffs contend that they have sufficiently pleaded a cause of action for breach of contract, and that defendants have yet to name those additional parties which they contend are necessary for the action to proceed.

With regard to the liability of the individual defendant, plaintiffs contend that CHRISTOFFERSEN can be held personally liable, as "RELIABLE ROOFING" is not a separate entity but merely the name under which he was doing business. On the matter of defendant's purported defective performance, plaintiffs have submitted the affidavit of an engineer, Alphonse J. Calvanico, who concluded, after inspecting the property, that RELIABLE demonstrated questionable construction practices and used "short cuts" that affected the quality of the work. In particular, the expert opined that "the beams were cut more than they should have been without proper compensation by the contractor" to maintain the integrity of the building (*see* Plaintiff's Exhibit M, paragraph 8). Plaintiffs have also submitted a copy of a report by Coull Building

Inspections Inc. which delineates problems with the foundation and framing of the new addition.

In support of their claim for damages, plaintiffs allege that they were required to hire another contractor to correct the foundation problem, as well as complete the items which defendants failed to finish. It is further alleged that the roof was constructed improperly, as defendants failed to install ice and snow shields on all of the valleys and at the perimeter. These purported omissions also needed to be corrected. Finally, plaintiffs maintain that the siding on three sides of the house was installed improperly, and have submitted copies of the proposal and itemized bills submitted by the contractor who performed the necessary repairs and completed the unfinished work. According to plaintiffs, all of this proof sufficiently establishes defendants' breach of the contract between them to warrant either the dismissal of defendants' amended answer and counterclaim, or an award of summary judgment in their favor.

In the cross motion to dismiss the complaint, and for summary judgment on RELIABLE's counterclaim for compensation for the "extra work" allegedly performed at plaintiff's request, defendants contend that (1) plaintiff KATINA TANNOUSIS, did not sign the contract, and is not a proper party to this action, (2) it was plaintiffs who breached the subject contract by failing to pay defendants according to its terms, (3) this conduct on the part of plaintiffs contributed to their damages, (4) the cause of action for specific performance is without merit, and (5) plaintiffs' claim damages arising from defective workmanship renders the subcontractors who performed this work necessary parties to the action.

Defendants also claim that ALLAN CHRISTOFFERSEN was not properly served, as he is incorrectly identified in the affidavit of service as having brown hair, being over 50 years old, and six feet tall. In his individual affidavit, CHRISTOFFERSEN avers that he was 46 years of age at the time of the purported service, and is only 5'9" tall. In addition, CHRISTOFFERSEN claims that the server's failure to ask whether he was in the military renders the non-military affidavit false. He also argues that the subject contract was between plaintiff and RELIABLE ROOFING, and that he cannot be held personally liable thereunder.

With regard to RELIABLE's counterclaim for "extra work", defendants describe the additional work that was agreed to by the parties and the cost of such work, which it places at \$25,700. Defendants also note that plaintiffs have conceded that defendants performed work outside the "four corners" of the contract, and that they never paid for these services.

With regard to plaintiffs' motion for summary judgment, defendants contend that it should be denied, since it is clear that plaintiff defaulted under the terms of the contract by failing to pay the agreed-upon price of \$100,000.

In response to plaintiffs' claim of defective performance, defendants submit an affidavit by their own expert, Daniel Ryan, a licensed architect, who disputes the claim that the floor joists in the extension were improperly installed. In his opinion, the extension is structurally sound and was constructed in accordance with the approved plans. Accordingly, defendants maintain that plaintiffs' claim for structural repair to the extension is unwarranted. Defendants further contend that any claim regarding roof installation is lacking in evidentiary support, as plaintiff is not qualified to render an opinion thereon. In addition, defendants contend that any claimed leak in the roof was the result of a break in the roof seal caused by plaintiff's removal and replacement of the chimney, which occurred after it had left the job site. Furthermore, defendants dispute plaintiffs' claim that the house was not fully insulated. According to defendants, the only areas excepted from insulation were known to plaintiffs at the time of the installation. Defendants also contend that the original plans for the second-story rear deck were inadequate insofar as the installation of only a single steel supporting post was indicated. When it was later determined that the job required eight steel supports, the cost was placed at \$15,000 and plaintiffs agreed to the additional charge.

Finally, defendants question the qualifications of John P. Murphy, the individual who plaintiff hired, *inter alia*, to "correct" the alleged deficiencies in their work. According to defendants, Murphy is neither a home improvement contractor, nor licensed as such by the New York City Department of Consumer Affairs. Defendants also maintain that Murphy (1) failed to provide any professional support for his assessment of the purported deficiencies, (2) inflated the

price of the work performed, and (3) included work that was not a part of the original contract in his bills. Thus, it is claimed that defendants can not be held responsible for the cost of his work.

The cross motions are decided as follows:

With regard to those branches of the motion and cross motion which seek summary judgment, it is well settled that the proponent of a motion for summary judgment must establish its cause of action sufficiently to warrant judgment in its favor as a matter of law, and must do so by submitting proof establishing that there are no material issues of fact which require a trial (*see Zuckerman v. City of New York*, 49 NY2d 557, 562). Here, it is the opinion of this Court that neither party has established its entitlement to judgment as a matter of law with regard to the others' alleged breach of contract. At a minimum, the contrary opinions of, *inter alia*, their respective experts, necessitates a trial. In view of this and other highly contested issues bearing upon, *e.g.*, the necessity of corrective work and whether defendants are entitled to payment for the work they allegedly performed which was not included in the contract, summary judgment must be denied.

With regard to the prayer for dismissal of defendants' amended answer, plaintiffs are entitled to dismissal of the fourth and sixth affirmative defenses. As to the fourth, this Court is of the opinion that the contractors subsequently hired by plaintiff, *e.g.*, to complete the work allegedly abandoned by defendants, are not necessary parties, and need not be joined in order to provide "complete relief" (CPLR 1001[a]; *cf.* CPLR 1003). Defendants at bar were clearly entitled to assert claims against these other parties, to cross examine or call them as witnesses, and/or to raise defenses based, *inter alia*, on (1) alleged defects in defendants' performance, (2) the necessity of the repairs they performed, and (3) their alleged over-charging. Nevertheless, the action may proceed in their absence. Plaintiff is also entitled to dismissal of defendants' sixth affirmative defense, *i.e.*, lack of jurisdiction over individual defendant, since defendant CHRISTOFFERSEN failed to challenge the manner of service in a motion to dismiss the complaint against him within 60 days after raising it in his answer (CPLR 3211[e]; *Bennardo v. DelMonte Caterers*, 274 AD2d 489 ). However, in view of the aforementioned highly contested issues of fact regarding the purported breach of contract, the

balance of plaintiffs' motion must be denied.

As for that branch of defendants' cross motion which seeks dismissal of so much of the complaint as is against defendant CHRISTOFFERSEN, personally, the motion is denied. It is well settled that a contract entered into by the agent of a disclosed principal, *e.g.*, a corporate officer acting in his or her official capacity on behalf of the corporation, will not be held personally liable for the breach thereof unless there is a clear indication and explicit evidence of the agent's intention to be bound (*see* Walz v. Todd & Honeywell, 195 AD2d 455). Here, however, the contract at bar was executed by plaintiff "ANTONAKIS TANNOUSIS" and "ALLAN CHRISTOFFERSEN of RELIABLE ROOFING", a trade name under which CHRISTOFFERSEN was doing business rather than a separate jural entity. In such circumstances, the unincorporated "business" is merely the alter ego of the individual, who remains personally liable for any breach of the agreement (*see* General Business Law §130[1][a],[b]; Walkovsky v. Carlton, 18 NY2d 414, 417, 419; *cf.* We're Assoc. Co. v. Cohen, Stracher & Bloom, P.C., 65 NY2d 148; Dan R. Enters v. Kuglers Serv Sta, Inc., 2 AD3d 1256; Rothermel v. Ermiger, 161 AD2d 1016). In contrast, plaintiff KATINA TANNOUSIS was not a party to the contract, and thus has no right to sue thereunder.

Finally, plaintiffs' claim for specific performance has been rendered moot since plaintiffs have hired another contractor to complete the renovations.

Accordingly, it is hereby:

ORDERED that the plaintiffs' motion is granted to the extent that defendants' fourth and sixth affirmative defenses are severed and dismissed; and it is further

ORDERED that the balance of their motion is denied; and it is further

ORDERED that the defendants' cross motion is granted to the extent that (1) the claims asserted on behalf of plaintiff KATINA TANNOUSIS and (2) plaintiffs' cause of action for specific performance are each severed and dismissed; and it is further

ORDERED that the balance of defendants' cross motion is denied; and it is further

ORDERED that the Clerk enter judgment accordingly.

All parties shall appear in DCM Part 3 on **September 27, 2010 at 9:30 a.m.** for a pre-trial conference.

ENTER,

DATED: August 25, 2010

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Joseph J. Maltese  
Justice of the Supreme Court