[* 1]

SHORT FORM ORDER

INDEX No. 09-43523

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4/19/10 (#001)
MOTION DATE 5/25/10 (#002)
MOTION DATE 6/3/10 (#003)
MOTION DATE 6/15/10 (#004)
ADJ. DATE 7/6/10
Mot. Seq. #001 - MG
Mot. Seq. #002 - RRH
Mot. Seq. #003 - MotD
Mot. Seq. #004 - XMD

VIVIR OF L I, INC., f/k/a OPUS VIVIR, INC.,

Plaintiff,

- against -

JOHN EHRENKRANZ and ANDRA EHRENKRANZ,

Defendants.

PINKS, ARBEIT & NEMETH
Attorney for Plaintiff and Counterclaim Defendant
140 Fell Court
Hauppauge, New York 11788

LePATNER & ASSOCIATES LLP
Attorney for Defendants
600 Lexington Avenue, 21st Floor
New York, New York 10022

JOHN EHRENKRANZ and ANDRA EHRENKRANZ, on behalf of themselves and all other persons similarly situated as beneficiaries with claims for work and materials supplied for the project,

Counterclaim Plaintiffs,

- against -

JULIAN BOYLAN,

Counterclaim Defendant.

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants, dated March 31, 2010, and supporting papers; (2) Notice of Motion by the defendants, dated April 29, 2010, and supporting papers; (3) Notice of Motion by the plaintiff and counterclaim defendant, dated May 3, 2010, and supporting papers; (4) Notice of Cross Motion by the defendants, dated June 7, 2010, and supporting papers (including Memorandum of Law); (5) Affirmation and Affidavit

in Opposition by the plaintiff and counterclaim defendant, dated April 9 & 13, 2010; (6) Affidavits in Opposition by the plaintiff and counterclaim defendant, dated June 3, 2010, and supporting papers; (7) Affirmation and Affidavit in Opposition by the plaintiff and counterclaim defendant, dated June 22, 2010, and supporting papers; (8) Reply Affirmation by the defendants, dated April 16, 2010; (9) Reply Affirmation by the defendants, dated June 16, 2010; (10) Reply Affirmation by the defendants, dated July 1, 2010; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions and cross motion are decided as follows: it is

ORDERED that the motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants for an order pursuant to Lien Law § 76 (5) directing the plaintiff and the counterclaim defendant, individually and personally, as Lien Law trustee, to deliver to the defendants, as assignees of trust beneficiary Anderson Brothers Construction, Inc., a verified statement of books and records, as previously requested by letter dated February 4, 2010, is granted; and it is further

ORDERED that the motion by the defendants for an order pursuant to CPLR 902 and Lien Law § 77 (1) permitting their tenth counterclaim to be maintained as a class action, defining the class as all beneficiaries of Lien Law article 3-A trust funds created in connection with the project identified as 624 Butter Lane, Bridgehampton, New York, for which the plaintiff was the general contractor and the defendants were owners, directing the plaintiff to provide a list of all Lien Law article 3-A trust beneficiaries to the defendants, and determining the method of notice to members of the class, is adjourned in accordance with the following; and it is further

ORDERED that the motion by the plaintiff and the counterclaim defendant for partial summary judgment dismissing the first counterclaim as to the counterclaim defendant and dismissing the second, third, fourth, sixth, seventh, eighth, and ninth counterclaims in their entirety, is granted to the extent of granting summary judgment dismissing so much of the third counterclaim as is for breach of the statutory housing merchant implied warranty and dismissing the fourth and eighth counterclaims in their entirety, and is otherwise denied; and it is further

ORDERED that the cross motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

The claims which are the subject of this action arise from the construction of a residence at 624 Butter Lane, Bridgehampton, New York.

In or about January 2007, when the defendants were looking to purchase property in eastern Long Island, they met Julian Boylan ("Boylan"), a builder who had homes for sale in Bridgehampton, New York. At that time, Boylan was already engaged in construction activity at the subject property. It was the defendants' understanding that Boylan, who was also the owner and operator of the plaintiff, was a well known builder and owner of various properties in eastern Long Island and Westchester County. The defendants entered into negotiations with him to purchase the property and to retain the plaintiff's services

to continue construction for their use and benefit.

According to the defendants, during the course of these negotiations, Boylan made certain representations to them relative to the purchase of the property and the contemplated construction, namely, that he was the owner of the property, that he (through the plaintiff) would be solely responsible for the construction, that he had the financial wherewithal and construction acumen, experience, and expertise to complete the project, that he had constructed in a neighboring town a residence which he said was representative of the quality of his work, and that he would construct a residence for the defendants at the same level of quality or higher.

On March 23, 2007, the plaintiff, as contractor, and the defendants, as owners, entered into a contract pursuant to which the plaintiff agreed to provide general construction work, labor, services, and materials in connection with the construction of a single-family residence on the subject property, for a total contract price of $1.4 million. The plaintiff, in turn, retained Anderson Brothers Construction, Inc. ("Anderson Brothers") and other subcontractors to continue the work. The defendants closed on the property in or about May 2007.

The defendants claim that following the closing, they learned that Boylan's earlier representations were false. Specifically, they claim to have learned that Boylan was not the owner of the property but, rather, that Boylan's brother, Dimitri, was the actual owner, that Boylan had been acting as agent for his brother for the sale of the property, that Dimitri Boylan had been financially responsible for the project prior to the sale, that the plaintiff was not suited to handle the project, that the plaintiff was not responsible for the project when the contract for the purchase and sale of the property was executed, that Boylan and the plaintiff were required to accept funds from Dimitri Boylan's foreign bank accounts in order to make payments to subcontractors, that they frequently made late payments to subcontractors, thereby jeopardizing completion of the project, that neither Boylan nor the plaintiff was financially capable of completing the project, and that Anderson Brothers was, in fact, primarily responsible for the day-to-day construction.

Ultimately, in or around December 2008, the plaintiff abandoned the project. The defendants claim that although they paid the plaintiff all the amounts due under the contract, the plaintiff failed to complete the contract and walked off the job. The defendants also claim to have learned at or about this time that Boylan and the plaintiff had overcharged them for work performed on the project and had refused and failed to pay a number of subcontractors on the project, including not only Anderson Brothers but also Ron Meyers, a materialman and subcontractor who allegedly provided cabinetry and installation services, that the plaintiff had in fact retained payments made by the defendants in lieu of paying the amounts due and owing to Anderson Brothers and other subcontractors on the project, and that the lack of knowledge and expertise on the part of Boylan and the plaintiff had resulted in delays on the project and meritless and groundless change orders for which the defendants had unwittingly paid.

The plaintiff, for its part, contends that it performed its obligations under the contract and that it ceased performance only when the defendants stopped making the required payments.

In or about January 2009, the defendants and Anderson Brothers agreed to complete the project on

their own terms. The defendants advise that the project is not yet complete.

Following the commencement of this action, on January 12, 2010, Anderson Brothers executed a notice of assignment pursuant to Lien Law § 15 of its right to payment from the plaintiff in the amount of $74,916.36, the sum allegedly due and owing pursuant to eight invoices which it submitted to the plaintiff for work performed and materials supplied from August 7, 2008 through January 5, 2009. The notice of assignment was filed on January 22, 2010 (likewise pursuant to Lien Law § 15). On February 4, 2010, the defendants, as assignees of Anderson Brothers, made a written demand on the plaintiff and counterclaim defendant, pursuant to Lien Law § 76, for a verified statement setting forth the entries contained in the plaintiff's books and records relative to the Lien Law article 3-A trust funds created in connection with the project.[1] The plaintiff has not complied with the demand.

The plaintiff pleads three causes of action in its complaint. The first, ostensibly sounding in breach of contract, alleges that the plaintiff performed each of its obligations under the contract, except to the extent it was required to perform in a manner other than that contemplated by the contract and except to the extent it was impeded or prevented by the defendants from so performing. The second is to recover the fair and reasonable value of the unpaid, extra work which it performed. The third is for damages, including losses and increased costs of performance, occasioned by the defendants' active interference and obstruction in the performance of the plaintiff's work.

The defendants' answer, which names Boylan as an additional counterclaim defendant and seeks to impose personal liability on him as an officer and director of the plaintiff, sets forth ten counterclaims. The first is for breach of contract arising from the plaintiff's failure to provide its services in a good and workmanlike manner and to achieve timely completion of the project. The second is for unjust enrichment, alleging that the plaintiff overcharged and inflated requisitions and invoices, and knowingly received money for work which it never performed. The third is for breach of warranty and is based on the claims that the HVAC system which the plaintiff installed failed within one year after the installation and that the plaintiff failed to place protective insulation throughout the property as required by the contract. The fourth is for negligence, alleging that the plaintiff breached its duty to perform the contracted services timely, properly, and with the requisite level of skill and care. The fifth is for breach of an "accord and satisfaction," whereby the plaintiff is claimed to have accepted an offer by the defendants in December 2008 to complete the project

---

[1] Article 3-A of the Lien Law creates trust funds out of certain payments, including those received by a contractor in connection with a contract for an improvement of real property, to assure that subcontractors, architects, engineers, surveyors, laborers, and materialmen are paid from project funds (Lien Law §§ 70, 71; ***Aspro Mech Contr. v Fleet Bank***, 1 NY3d 324, 773 NYS2d 735 [2004]). "To effectuate that purpose, it is essential that the protected classes be fully apprised of whether [the contractor] has funds available to pay their claims as trust beneficiaries" (***Conforti & Eisele v Salzstein & Co.***, 56 AD2d 292, 294, 392 NYS2d 430, 432 [1977]). Thus, Lien Law § 76 (1) entitles any trust beneficiary, upon request, to receive a verified statement setting forth the entries with respect to the trust contained in the trustee's books and records at least once a month after his or her trust claims become payable. Lien Law § 76 (4) requires that the trustee furnish a verified statement within 10 days after service of the request, and if the trustee fails to timely comply, Lien Law § 76 (5) authorizes the trust beneficiary to apply for a court order directing that the trustee comply with the request.

in exchange for a lump sum payment of $60,000, but to have failed to complete the project. The sixth alleges that the plaintiff's use of funds paid by the defendants for personal expenses and other projects in which Boylan and the plaintiff were involved constitutes a wrongful conversion of those funds. The seventh alleges a breach of the covenant of good faith and fair dealing. The eighth is for fraud and negligent misrepresentation, based on false statements made by Boylan and the plaintiff with the intent to persuade the defendants to retain the plaintiff as contractor for the project. The ninth is for fraud in the inducement, and is likewise based on false statements made by Boylan and the plaintiff with the intent to persuade the defendants to retain the plaintiff as contractor for the project. The tenth alleges a trust fund diversion under Lien Law article 3-A and seeks relief on behalf of a class of trust beneficiaries who did not receive payment for the work they performed and the materials they supplied for the project.[2]

The defendants now move for an order pursuant to Lien Law § 76 (5) directing the plaintiff comply with their prior request to deliver to the defendants, as assignees of Anderson Brothers, a verified statement of books and records pertaining to the trust claim.

The defendants' motion is granted (*see generally* n 1 , *supra*). Contrary to the plaintiff's argument, the Court is aware of no prohibition against the assignment of a trust beneficiary's claim to the property owner. Nor is the statute of limitations a bar to the granting of the relief requested. Pursuant to Lien Law § 77 (2), no action to enforce a trust claim arising in connection with the improvement of real property "shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later * * *." The one-year limitation period begins to run when the entire improvement is completed, not when the claimant last furnishes labor and materials to the trustee (***Northern Structures v Union Bank***, 57 AD2d 360, 394 NYS2d 964 [1977]; ***Wynkoop v Mintz***, 17 Misc 2d 1093, 192 NYS2d 428 [1958]). Here, the plaintiff has failed to demonstrate that the project was completed (and, hence, that the one-year period ever began to run); notably, abandonment of the project is not tantamount to its completion for purposes of commencing the limitation period (*see* ***Putnins Contr. Corp. v Winston Woods at Dix Hills***, 72 Misc 2d 987, 340 NYS2d 317, *affd* 43 AD2d 667, 349 NYS2d 652 [1973], *affd* 36 NY2d 679, 365 NYS2d 863 [1975]). The Court further rejects, as immaterial, the plaintiff's claim that it does not owe any money to Anderson Brothers. In determining whether a trust beneficiary is entitled to receive a verified statement under article 3-A of the Lien Law, it is not the function of courts to "pretry" the merits of the underlying claim (*see* ***P. M. Excavating v Matthews Indus. Piping Co.***, 115 AD2d 464, 495 NYS2d 902 [1985]; ***Conforti & Eisele v Salzstein & Co.***, *supra*; ***Matter of Fontaine Bleau Swimming Pool Corp. v Aquarama Swimming Pool Corp.***, 27 Misc 2d 315, 210 NYS2d 634 [1961]). Finally, to the extent the plaintiff claims that the defendants' request "vastly exceeds the scope" of Lien Law § 76, the Court notes that the request accurately tracks the language of Lien Law § 75 as to what the books and records shall contain.

Accordingly, the plaintiff is hereby directed to furnish to the defendants a verified statement of books and records, as previously requested by letter dated February 4, 2010, within 10 days after service of a copy

---

[2] Lien Law § 77 (1) provides that a trust arising under article 3-A may be enforced by the holder of any trust claim in a representative action brought for the benefit of all the trust beneficiaries.

of this order with notice of its entry.

The defendants also move for an order, *inter alia*, determining whether their tenth counterclaim may proceed as a class action.

The criteria governing class action certification are set forth in CPLR 901 and 902.

> A class action may be maintained in New York only after the following five prerequisites of CPLR 901 (a) have been met: (1) the class is so numerous that joinder of all members is impracticable[3]; (2) common questions of law or fact predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the class as a whole; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) the class action is superior to other available methods for the fair and efficient adjudication of the controversy (CPLR 901 [a] [1]- [5]; *see, Matter of Colt Indus. Shareholder Litig.*, 77 NY2d 185, 194; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 90-91).
>
> Once these prerequisites are satisfied, the court must consider the factors set out in CPLR 902, to wit, the possible interest of class members in maintaining separate actions and the feasibility thereof, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action (CPLR 902 [1]-[5]; *see, Askey v Occidental Chem. Corp.*, 102 AD2d 130, 137). Plaintiff bears the burden of establishing compliance with the requirements of both CPLR 901 and 902, and the determination is ultimately vested in the sound discretion of the trial court (*supra,* at 137).

(***Ackerman v Price Waterhouse***, 252 AD2d 179, 191, 683 NYS2d 179, 188 [1998]).

The Court finds this record insufficient to demonstrate that class action treatment is warranted. Specifically, the defendants have not identified any unpaid subcontractors other than Anderson Brothers and Ron Meyers, and have not offered any competent proof to support the latter's alleged claim. A party seeking class certification bears the burden of showing not only that the prerequisites are met, but also that the class exists (***Canavan v Chase Manhattan Bank***, 234 AD2d 493, 651 NYS2d 916 [1996]). Absent an evidentiary basis at this juncture for an order certifying the class (*see* ***Katz v NVF Co.***, 100 AD2d 470, 473 NYS2d 786 [1984]; ***Chimenti v American Express Co.***, 97 AD2d 351, 467 NYS2d 357, *appeal dismissed* 61 NY2d 669 [1983]), the Court deems appropriate the holding of a "mini-hearing," preceded by limited discovery, before a determination on certification is made (*see* ***Negrin v Norwest Mtge.***, 293 AD2d 726, 741 NYS2d 287 [2002]; ***Geiger v American Tobacco Co.***, 252 AD2d 474, 674 NYS2d 775 [1998]; ***Chimenti v American Express Co.***, *supra*). The parties are directed to appear before this Court at 2:30 p.m. on November 1, 2010

---

[3] Notwithstanding the requirements of CPLR 901, Lien Law § 77 (1) provides that in an action to enforce a trust under Lien Law article 3-A, a court need not consider the element of numerosity (CPLR 901 [a] [1]) in determining whether a matter shall proceed as a class action.

in order to fashion an order allowing for expedited discovery limited to issues of class certification. Upon the completion of such discovery, any party may notice the matter for a hearing on the contested issues pertaining to class certification or, if all the parties agree, the Court may resolve the motion upon the submission of affidavits. The defendants' motion for class certification shall be held in abeyance pending the outcome of the hearing.

The plaintiff's motion for partial summary judgment dismissing the first counterclaim as to Julian Boylan and dismissing the second, third, fourth, sixth, seventh, eighth, and ninth counterclaims in their entirety, is supported only by the affirmation of its attorney and copies of the pleadings. As such, the Court deems it to relate solely to the legal sufficiency of those counterclaims. Additionally, notwithstanding the breadth of relief requested in their notice of motion, the plaintiff's arguments in support of their motion do not address the defendants' sixth counterclaim, and that branch of the motion is denied accordingly.

As to the first counterclaim, the plaintiff contends that Boylan was not a party to the contract and, therefore, that he cannot be held liable for its breach. However, the defendants claim that Boylan exercised complete dominion and control over the plaintiff and that he used such dominion and control to perpetrate a fraud or wrong against the defendants resulting in injury to them, which conduct, if proven, would justify piercing the corporate veil and permitting the defendants to seek relief against Boylan personally (*see e.g.* ***Matter of Morris v New York State Dept. of Taxation & Fin.***, 82 NY2d 135, 603 NYS2d 807 [1993]). More specifically, the defendants allege that Boylan commingled corporate funds with his own personal funds and the funds received from Dimitri Boylan's overseas bank accounts in order to demonstrate that the plaintiff was a solvent and viable corporation, when it was not, that Boylan wrongfully transferred moneys paid by the defendants in order to pay his personal debts, leaving the plaintiff unable to pay subcontractors on the project, that the plaintiff was only a shell, having no assets of its own, and that one of Boylan's purposes in creating the plaintiff was to service transfers of funds between his personal accounts with those of the plaintiff and Dimitri Boylan, so as to allow him to take advantage of the limitation of liability afforded to corporate officers and at the same time benefit personally from illicit acts. Since the defendants are entitled to necessary discovery in order to determine whether sufficient grounds exist to pierce the corporate veil (*see* CPLR 3212 [f]; ***Tom Greenauer Dev. v Burke Bros. Constr.***, 74 AD3d 1747, 902 NYS2d 461 [2010]), summary judgment is denied as premature.

Summary judgment is also denied as to the second counterclaim. A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience the party should not have obtained or possessed because it rightfully belongs to another (*see* ***Parsa v State of New York***, 64 NY2d 143, 485 NYS2d 27 [1984]). Although a party may not ordinarily proceed on a theory of implied contract where there is an express written agreement between the parties (***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 521 NYS2d 653 [1987]), it may proceed on such a theory where there is a bona fide dispute between the parties that is not covered by a provision in the contract (***Joseph Sternberg, Inc. v Walber 36th St. Assoc.***, 187 AD2d 225, 594 NYS2d 144 [1993]). By alleging that the plaintiff knowingly received money for work which it never performed and overcharged for work which it did perform, the defendants plead facts sufficiently distinct from their breach of contract claim to support a cause of action for unjust enrichment.

The plaintiff's argument relative to the third counterclaim, sounding in breach of warranty, is based on defendants' failure to give written notice of their claim pursuant to General Business Law § 777-a (4) (a), which provides that

> Written notice of a warranty claim for breach of a housing merchant implied warranty must be received by the builder prior to the commencement of any action under paragraph b of this subdivision and no later than thirty days after the expiration of the applicable warranty period, as described in subdivision one of this section. The owner and occupant of the home shall afford the builder reasonable opportunity to inspect, test and repair the portion of the home to which the warranty claim relates.

The defendants, in opposition, rely on a September 23, 2009 letter which they sent to Boylan detailing their various claims against the plaintiff. This letter, however, does not refer to a claim for breach of the housing merchant implied warranty, but rather to a claim for breach of the limited warranty provided in the parties' contract. Absent the required notice, the Court finds it appropriate to grant summary judgment dismissing the third counterclaim to the extent it pleads a cause of action for breach of the statutory housing merchant implied warranty. In any event, since General Business Law § 777-a (4) (a) is also construed as a pleading requirement, the defendants' failure to allege compliance with the condition precedent is also fatal to their claim for breach of the implied warranty (*see* ***Rosen v Watermill Dev. Corp.***, 1 AD3d 424, 768 NYS2d 474 [2003]).

The fourth counterclaim, which is for negligence, is dismissed in its entirety. The essence of the defendants' claim is that the plaintiff's work was performed in less than a skillful and workmanlike manner. As the plaintiff correctly notes, such a cause of action sounds not in negligence but in breach of contract, and does not state the breach of legal duty distinct from the plaintiff's contractual obligations (*see* ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, *supra*; ***Wiernik v Kurth***, 59 AD3d 535, 873 NYS2d 673 [2009]).

The plaintiff contends that the seventh counterclaim, alleging breach of the implied covenant of good faith and fair dealing, should be dismissed as duplicative of the defendants' counterclaim for breach of contract. While such claims are often redundant, as where the claimed breach is inseparable from the damages allegedly resulting from a breach of the contract (*see* ***Deer Park Enters. v Ail Sys.***, 57 AD3d 711, 870 NYS2d 89 [2008]), here the defendants plead that the plaintiff "affirmatively misle[d] and provid[ed] false and inaccurate information to Defendants during the pendency of the Project." A party to a contract may be found in breach of the implied duty of good faith and fair dealing when it acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits of the contract (***Jaffe v Paramount Communications***, 222 AD2d 17, 644 NYS2d 43 [1996]). Based on the defendants' allegation that they were deceived by affirmative misrepresentations as to the scope and cost of the work, the Court is constrained to deny summary judgment at this juncture (*see* ***Citi Mgt. Group v Highbridge House Ogden***, 45 AD3d 487, 847 NYS2d 33 [2007]).

With respect to the eighth (fraud and negligent misrepresentation) and ninth (fraud in the inducement) counterclaims, the plaintiff argue that these are not sufficiently stated because they are merely duplicative of the defendants' claim for breach of contract. This argument is rejected. Where, as here, the

allegedly defrauded party alleges misrepresentations of present facts that were extraneous to the terms of the contract and induced the party to enter into the contract, a fraud claim is not duplicative of a contract claim (*see* ***Selinger Enters. v Cassuto***, 50 AD3d 766, 860 NYS2d 533 [2008]). The Court notes, however, that even though these counterclaims purport to state independent and distinct claims for relief, it is evident that both seek damages for fraud in the inducement and, as such, are redundant. Summary judgment is granted, therefore, dismissing the eighth counterclaim while preserving the ninth counterclaim.

The defendants' cross motion for summary judgment dismissing the complaint is based on statements made by Boylan in his affidavit opposing the defendants' motion to compel the production of a verified statement pursuant to Lien Law § 76 (5)–in particular, his statements that Anderson Brothers "was in effect the general contractor for the project" and that "[f]or the most part, there was no contractual relationship" between the plaintiff and various tradesmen who performed the required construction services. The defendants contend that these statements directly contradict prior sworn representations describing the plaintiff's role as general contractor and warrant dismissal of the complaint under the doctrine of judicial estoppel.

The plaintiff, in opposition, attempts to explain away the apparent inconsistency by acknowledging that it was the general contractor but that it hired Anderson Brothers to assist in the role.

The Court accepts the plaintiff's proffered explanation. In any event, since there was no prior legal proceeding in which the plaintiff successfully argued that it was not the general contractor, the doctrine of judicial estoppel is not applicable (*see* ***Rosario v Montalvo & Son Auto Repair Ctr.***, ___ AD3d ___, 2010 NY Slip Op 06576 [2010]). That doctrine precludes a party who assumed a certain position in a prior legal proceeding and who obtained a ruling in his or her favor from assuming a contrary position in another action simply because his or her interests have changed (*id.*; ***Bono v Cucinella***, 298 AD2d 483, 748 NYS2d 610 [2002]; ***Ford Motor Credit Co. v Colonial Funding Corp.***, 215 AD2d 435, 626 NYS2d 527 [1995]). Accordingly, the cross motion is denied.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: 10/14/10

PETER H. MAYER, J.S.C.