

**Kin & Ann Realty Inc. v Renzulli**

2011 NY Slip Op 30705(U)

March 16, 2011

Sup Ct, Nassau County

Docket Number: 601704/2009

Judge: Ira B. Warshawsky

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SUPREME COURT : STATE OF NEW YORK

COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 7

KIN & ANN REALTY INC., a New York Corporation;  
CHEE KEUNG SIU, an Individual; and KIN LUNG SIU,  
an Individual,

Plaintiffs,

-against-

INDEX NO.: 601704/2009  
MOTION DATE: 12/20/2010  
SEQUENCE NO.: 1

MARIO RENZULLI, an Individual; NEW MILLENIUM  
HOME RENOVATION CORP., a New York Corporation;  
NICK BLANDA, an Individual; GNR DEMOLISH &  
CONSTRUCTION MANAGEMENT CORP., a New York  
Corporation; MICHAEL RENZULLI, an Individual; and  
DOES 1 through 10, Inclusive,

Defendants.

The following documents were read on this motion:

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

**PRELIMINARY STATEMENT**

Kin & Ann Realty, Inc., Chee Keung Siu and Kin Lung Siu (hereinafter, collectively  
“Kin & Ann” or “Plaintiffs”), move for a default judgment against the Defendants. There has  
been no opposition received from the Defendants.

**BACKGROUND**

This action arises from a contract between the Plaintiff and the Defendant to perform  
construction work on property owned by the Plaintiffs located at 783/785 Old Country Road in  
Plainview, New York. The terms of the contract called for the construction of a 2,400 square

foot building and included blacktop driveways, a parking lot, foundation work, walls, roofing, electric installations and plumbing installations. The Contract price was \$280,000.

Plaintiff alleges that the Defendants failed to do any of the work for which they paid and that they were forced to expend additional funds in order to have the work performed by other contractors. Plaintiffs further alleges that they suffered damages in the form of, *inter alia*, lost profits due to the delay in the completion of Plaintiffs' business. Plaintiffs allege causes of action for breach of contract, breach of fiduciary obligation, conversion, intentional misrepresentation, fraud, unjust enrichment and violation of the New York Consumer Protection and Deceptive Acts and Practices Law. Defendants have not responded.

### DISCUSSION

The decision whether to grant a default judgment is left to sound judicial discretion. (*Shah v. New York State Dep't. Of Civil Service*, 168 F.3d 610, 615 [2d Cir.1999]; *Briarpatch Ltd. V. Geisler Roberdeau, Inc.*, 513 F.Supp.2d 1, 3 [S.D.N.Y. 2007]). In considering whether a default judgment is appropriate, the Court must first consider whether service of process has been properly effectuated upon the defaulting defendant; and second, whether the unchallenged facts alleged in the complaint state a legitimate cause of action. (*Kee v. Hasty*, 2004 WL 807071 at 4 [S.D.N.Y] *citing*, 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2688 [3d ed. 1998 ]).

The plaintiff must establish by affidavit of an individual with personal knowledge, or similarly verified complaint, facts sufficient to establish the claims alleged. (*Dyno v. Rose*, 260 A.D.2d 694 [3d Dept. 1999]). Where the verified complaint is conclusory, and devoid of factual allegations, constituting the claim alleged, a motion for default judgment shall be denied. (*Celnick v. Freitag*, 242 A.D.2d 436 [1<sup>st</sup> Dept. 1997]; *Luna v. Luna*, 263 A.D.2d 470 [2d Dept. 1999]).

The next consideration which the Court must consider is the appropriate level of damages to be awarded plaintiff. By defaulting, a defendant admits to all well-pleaded allegations, except those pertaining to damages. (*Greyhound Exhibitgroup, Inc. V. E.L.U.L Realty Corp.*, 973 F.2d 155, 158 [2d Cir.1992]; *Traffic Sports USA, Inc. v. Segura*, 2008 WL 4890164 [E.D.N.Y.]). “(W)here the plaintiff has filed reasonably detailed affidavits and a memorandum of law pertaining to the damages requested . . . and the defendant has failed to make an appearance in

the case, the Court can make an informed recommendation regarding damages without an evidentiary hearing”. *Id.* at 5.

The Court is therefore compelled to undertake this three-pronged analysis.

The first cause of action alleging breach of contract is properly alleged but only as to Defendant New Millenium Home Rennovation Corp. (hereinafter “New Millenium”). In order to have a valid action for breach of contract, there must be privity between the plaintiff and the defendant. (*Seaver v. Ransom*, 224 NY 233, 237 [1918]). Here, the contract was signed by Michael Renzulli, but only on behalf of New Millenium. There is no privity between the Plaintiffs and the rest of the Defendants. Since there is no opposition and we have a signed contract and allegations of non-performance, a default judgment will be entered in favor of Plaintiffs against New Millenium.

As to the second cause of action, alleging a breach of a fiduciary obligation, this cause of action is improper. A requirement for a claim of breach of a fiduciary duty is the existence of a fiduciary relationship. (*Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 [2d Dept 2007]). A fiduciary duty does not arise out of an ordinary construction contract entered into by two parties dealing at arm’s length. Since, no fiduciary duty existed between the parties, there cannot be a claim for breach of fiduciary duty.

As to the third cause of action, alleging conversion, this cause of action was improperly alleged. . Conversion claims cannot properly be based on claims of breach of contract and must stem from a wrong independent of the breach of contract. (*Wolf v. National Council of Young Israel*, 264 A.D.2d 416, 417 [2d Dept 1999]). Here, there is nothing contained in the allegations underlying the claim of conversion that is not contained in the cause of action for breach of contract. The claim is wholly duplicative of the breach of contract and, as such, is dismissed.

Concerning the fourth and fifth causes of action, alleging “intentional misrepresentation” and fraud, these causes of action were improperly brought. Since intentional misrepresentation is an element of fraud under New York Law, these causes of action will be considered together. (*Cohen v. Koenig*, 25 F.3d 1168, 1172 [2d Cir. 1994, applying New York law]). It is well settled that a cause of action for fraud “will not lie where the only allegation of fraud relates to a breach of contract.” (*Mendelovitz v. Cohen*, 37 A.D.3d 670, 671 [2d Dept 2007]). “A mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud.”

(*Id. quoting Ross v. DeLorenzo*, 28 A.D.3d 631, 636 [2d Dept 2006]). Hence, there can be no finding of fraud based on the allegations in the complaint.

Notably included in the cause of action for fraud in the Plaintiffs' complaint is the allegation that the Defendants endorsed to themselves and their family members checks made payable to one or both of the Plaintiffs. While this alone does not add any credence to the fraud allegation, it may provide the grounds for piercing the corporate veil, an avenue that the Plaintiffs may wish to investigate.

The sixth cause of action alleges restitution and unjust enrichment. Unjust enrichment, which is the basis for restitution, is an action that lies in equity, and as such, cannot stand when recovery is also sought under a theory of breach of contract. (*See* 22A NY Jur 2d, Contracts § 528 and 1 NY Jur 2d, Actions § 20). Once it has been determined that there exists a valid, enforceable written contract, recovery in quasi contract is prohibited for matters arising out of the same subject matter. (*Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389 [1987]). Unless there is a dispute as to the existence of a contract, a Plaintiff cannot maintain an action on both contract and quasi-contract grounds. (*Sforza v. Health Ins. Plan of Greater New York, Inc.*, 210 A.D.2d 214, 215 [2d Dept 1994]). As such, any theories of recovery predicated on a quasi contract cannot stand in the face of a valid breach of contract cause of action.

The seventh cause of action, which alleges violations of the New York Consumer Protection and Deceptive Acts and Practices Law, cannot be sustained. General Business Law outlaws any “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service.” (GBL § 349). A claim under this statute requires the plaintiff to prove three things: that the act or practice in question was consumer oriented, that it was misleading and that the plaintiff suffered an injury as a result. (*Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 [2000]). The claim can be properly brought by anyone injured by the alleged wrongful action. (*Id.* at 28 – 29). The allegedly deceptive practice must have “a broader impact on consumers at large” and not merely a private contract dispute. (*Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 [1995]).

The allegations in the complaint purported under this cause of action seem to merely echo the allegations already set forth in the complaint with added vague references to “other consumers.” This alone is not enough to constitute a broader impact as required under the statute and relevant case law. Therefore, the seventh cause of action cannot stand.

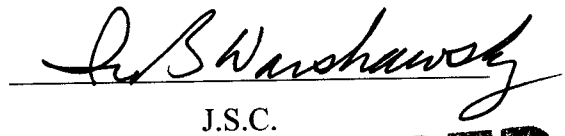
Plaintiffs are entitled to judgment against New Millenium Home Renovation Corp. for breach of contract as alleged in the first cause of action. The other causes of action are hereby dismissed.

The matter is scheduled for inquest on April 21, 2011 at 11:00 A.M. for the purpose of determining damages for the breach of contract against New Millenium Home Renovation Corp. Plaintiff is to serve a copy of this decision upon defendants by regular and certified mail. Plaintiff shall also purchase, file and serve a note of issue upon defendants by regular and certified mail within 10 days of the date of this order.

To the extent that the requested relief is not granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: March 16, 2011



J.S.C.

**ENTERED**

MAR 24 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**