

**Weiss v Michael Taylor, Ltd.**

2011 NY Slip Op 31407(U)

May 23, 2011

Sup Ct, Suffolk County

Docket Number: 07-35268

Judge: Denise F. Molia

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**ORDERED**, that the portion of the cross motion by defendant Michael Taylor, Ltd., for an order pursuant to CPLR 3212 dismissing the Second and Fourth causes of action as set forth in the Complaint against it is granted; and it is further

**ORDERED** that the cross motion by plaintiffs for an order pursuant to CPLR 305(c) permitting them to amend the caption is denied without prejudice.

Plaintiffs Shana Weiss (“Weiss”) and Coleman Sachs (“Sachs”) commenced this action to recover damages arising from the renovation and construction of an addition at their premises located in Seaview, Fire Island, New York. Plaintiff Sachs received title to one half of the said Fire Island property in 1994. Sachs and his wife, plaintiff Weiss, bought the interest in the other half of the property from his sister and acquired a deed dated September 1, 2006 for the entire premises. By said deed they took title as “SHANA FAYE WEISS and COLEMAN R. SACHS, as Trustees of the Revocable Living Trust of Shana Faye Weiss U/A February 4, 2005”.

Plaintiffs first spoke with defendant Michael Taylor (“Taylor”) about renovations to the property in or about August 2005. They spoke again approximately one year later and discussed the repairs, renovations and additions which the plaintiffs wanted done to the premises. Plaintiffs reside in Virginia, therefore, most discussions with regard to the contract took place via telephone. On December 13, 2006, defendant Taylor sent a “Revised Construction Contract” to plaintiffs which he had executed as “Michael Taylor, Pres.” The contract stated, in pertinent part, “Terms: To start first payment \$30000. Wire Transfer info: JPMorgan Chase Bank, Routing Number 021000021, account number \*\*\* \*\*\*, Michael Taylor LTD. \*\*Progress payments \$30000 January 15, 2007 \$30000 February 15, 2007 \$30000 March 15, 2007 \$20000 April 15, 2007 \$12050 May 15, 2007 \*\* Details for progress payments will be on page 2 of this Contract....6th Payment- \$12050- All work completed except check list items.” The contract was signed by “Michael Taylor, Pres” as contractor, but was not executed by either of the plaintiffs as owner. Plaintiffs paid the first payment of \$30,000.00 some time in December 2006, and continued to make payments via wire transfers to Michael Taylor Ltd. as was required by the contract. Construction work was begun on the premises in December 2006. In October 2007, after having paid \$155,000.00 to defendant Michael Taylor, Ltd. and having paid approximately \$18,000.00 for materials, plaintiffs advised defendant to stop work on the property and to remove their tools and equipment from the premises. The addition and renovations were not completed by defendants and the instant action ensued.

Plaintiffs’ complaint sounds in negligence, breach of contract, conversion, loss of enjoyment and rental income, and fraudulent inducement. Plaintiffs allege that defendants were negligent in causing, in permitting and/or in failing to prevent damages to their furniture and possessions during the course of the renovations and addition to the premises. The breach of contract is alleged to have occurred as a result of defendants’ failure to undertake and complete the work that they had agreed to perform in a workmanlike and high quality manner, to provide the materials for which plaintiffs had paid, to make payments to subcontractors, and to obtain necessary permits and certificates as required to complete the renovations and addition to the premises. Plaintiffs allege a further breach in that they contend that defendants knew of their intent to obtain financing for the work to be done on the premises, but were unable to obtain the loan as a result of the demolition and construction begun by defendants. It is alleged by plaintiffs that defendants accepted monies from them and converted it to their own personal use thus failing to deliver materials and

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to provide labor, as had been paid for and agreed upon by the parties. The loss of enjoyment and rental income is alleged to have occurred as a result of defendants' failure to complete the construction in a timely manner, thus preventing plaintiffs from occupying or renting the premises to third parties during the months of June, July and August of 2007. Finally, plaintiffs allege that they were fraudulently induced into entering into the agreement by defendant Taylor's representations that he was experienced, that he would personally perform specialty work, that he would use experienced workers to perform work on the premises, and that he was knowledgeable in building standards and zoning requirements.

Defendant Taylor requests an order granting summary judgment dismissing the complaint as against him on the grounds that there are no triable issues of fact. He alleges that the contract and the alleged amendment(s) to same were signed by him as President of Michael Taylor, Ltd. and that a cause of action was not stated against Michael Taylor individually. Defendant Taylor maintains that he never assumed any individual liability for the work performed at the plaintiffs' premises. He testified at his pretrial deposition that he was the president, owner and sole shareholder of Michael Taylor Ltd, an "S" corporation. Defendant Taylor asserts that based upon plaintiffs' payment of the first \$30,000.00 installment and plaintiff Sachs' instructions, he commenced work on the premises in December 2006 and cannot be held liable for commencing work "too early". Finally, defendant Taylor maintains that he cannot be held liable for loss of rental income as it is outside the scope of the contract, that any delays in completing the work were the result of plaintiffs' actions, and that plaintiffs' claims of his fraudulent representations are speculative and conclusory.

Defendant Michael Taylor, Ltd. requests an order granting summary judgment dismissing the complaint as against it on the grounds that the breach of contract action is without merit, is based upon speculative evaluations, and was caused by plaintiffs' directive to stop work at the premises. It maintains that plaintiffs' allegations that defendants interfered with their ability to obtain financing, as alleged in the second cause of action, are without merit because the defendants did not undertake any type of obligation relative to plaintiffs' securing financing. Defendant Michael Taylor, Ltd. asserts that there is no evidence to support the claim posed in the third cause of action that there were any acts of defendants which constituted conversion. It posits that loss of rental income was outside the scope of the agreement, and that plaintiffs' actions and payments into September of 2007 imply that they consented to the extension of time to complete the project by May 2007. Finally, Michael Taylor, Ltd. alleges that there is no evidence of fraud or false enticement which would support plaintiffs' fifth cause of action.

Plaintiffs request an order pursuant to CPLR §305(c) permitting them to amend the caption of this action so that "Shana Weiss and Coleman Sachs, as Trustees of the Revocable Living Trust of Shana Faye Weiss" replaces "Shana Weiss and Coleman Sachs" as plaintiffs.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141[1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64

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NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

In opposition to the motion of defendant Taylor, plaintiffs maintain that defendant Taylor exercised complete domination and control over the corporate defendant; made false representations to them with regard to his knowledge of construction, architecture, and permit requirements; and falsely represented that he possessed specialized construction skills, or would hire those professionals that did, for those parts of the construction job which required detail work. It is the contention of the plaintiffs that they entered into the contract with defendant Michael Taylor, Ltd. as a result of these fraudulent inducements of defendant Taylor. Plaintiffs allege that defendant Taylor insisted that he was capable of performing the duties usually reserved for an architect and that by doing so, he became the *de facto* architect and designer, a role which was outside his role as principal of Michael Taylor, Ltd. Additionally, plaintiffs maintain that there were no “lines” between defendant Taylor and Michael Taylor, Ltd. inasmuch as little or no construction was completed without the presence of defendant Taylor. They contend that without the oversight of defendant Taylor, Michael Taylor Ltd. did not function on the job site. Pursuant to the report of the architect hired by plaintiffs subsequent to the stop work directive given by them to defendants, most of the work done by defendants was done improperly, did not meet code requirements, did not look aesthetically correct, and was not structurally sound. Plaintiffs allege that they hired a third party to complete and/or correct the work at their Fire Island premises at a cost of over \$80,000.00.

“In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice ... Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer...personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in ‘bad faith’ while representing the corporation” (*East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 16 NY2d 775, 776, 919 NYS2d 496, 497 [2011][internal citations and quotations omitted]). There is no question that defendant Taylor exercised complete domination and control over the corporate defendant, Michael Taylor, Ltd. Defendant Taylor negotiated the contract, controlled the construction, hired the subcontractors, performed construction work, and personally determined whether to, when to and how to proceed with the construction and protect furniture and/or items of personalty at or in the house. The court cannot say, as a matter of law, that defendant Taylor’s actions did not abuse the privilege of doing business in the corporate form which perpetrated a wrong or injustice upon plaintiffs. Accordingly, that portion of defendant Taylor’s motion which requests that the complaint be dismissed against defendant Taylor, individually, is denied.

Plaintiffs contend that summary judgment is not warranted with regard to their cause of action for breach of contract because the defendants failed to perform pursuant to the terms of the contract, failed to

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provide materials paid for by the plaintiffs, failed to make payments to subcontractors, and failed to obtain the necessary permits and certificates for the renovations and additions to the premises. Plaintiffs also allege that defendants' negligence caused significant damage to plaintiffs' furniture and possessions in that they permitted them to be exposed to the weather and failed to protect them from damage as a result of the construction work performed in and about the property. Defendants have not come forth with evidence sufficient to prove the absence of material issues of fact regarding these claims. Accordingly, those portions of defendants' motions for summary judgment in connection with plaintiffs' first, third and fifth causes of action sounding in negligence, breach of contract, conversion, and fraudulent inducement, are denied as there are questions of fact in connection with each of those claims.

In direct contrast to the deposition testimony of plaintiff Sachs where he stated "[a]fter receiving [the December 16, 2006 contract] we communicated to [defendant Taylor] over the phone that he should proceed with the renovations", and despite the fact that plaintiffs made a payment in December of 2006 pursuant to the contract terms which indicated that the job would start with the first \$30,000.00 payment, plaintiffs now maintain that against their express direction, the defendants began work on the premises before plaintiffs obtained financing. As such, plaintiffs have failed to show a question of fact and have failed to state a cause of action in connection with their failure to obtain financing. Accordingly, those portions of defendants' motions which request that the second cause of action be dismissed are granted.

The fourth cause of action alleged by plaintiffs seeks recovery for loss of enjoyment and loss of rental income for the premises for the months of June 2007, July 2007 and August 2007. The contract contained no provisions with regard to these items. Such recovery may be obtained as an element of damages incurred by plaintiffs, however, as plead, no cause of action has been stated properly. Accordingly, those portions of defendants' motions which request that the fourth cause of action be dismissed are granted.

Finally, plaintiffs' motion which requests the court to permit them to amend the caption pursuant to CPLR 305(c) is denied without prejudice inasmuch as plaintiffs are improperly attempting to add new parties to the action by merely amending the summons without amending the complaint (*see* CPLR 3025[b]).

Dated: \_\_\_\_\_

5/23/2011

**Hon. Denise F. Molia**\_\_\_\_\_  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION