

**Labgold v Soma Hudson Blue, LLC**

2011 NY Slip Op 32179(U)

July 29, 2011

Sup Ct, NY County

Docket Number: 150039/2010

Judge: Joan A. Madden

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCANNED ON 8/9/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HOW JOEL A. M. D.D.  
Justice

PART 11

Index Number : 110762/2010  
**LABGOLD, MARC**  
vs.  
**SOMA HUDSON BLUE, LLC**  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

**FILED**

AUG 09 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 29, 2011

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

-----X  
MARC LABGOLD,

Plaintiff,

-against-

Index No. 150039/2010

SOMA HUDSON BLUE, LLC, MICHAEL YANKO,  
CITADEL CORP., MARK ELMAN, and  
STUART FISH,

**FILED**

**AUG 09 2011**

Defendants.

-----X  
**Joan A. Madden, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

In an action to recover damages for injuries allegedly sustained by plaintiff in the purchase and ownership of a condominium unit as a result of defendant Michael Yanko's ("Yanko") alleged material misrepresentations, Yanko moves to dismiss the complaint and cross-complaint of defendants Citadel Corp., Mark Elman and Stuart Fish (together "Citadel"). Plaintiff Marc Labgold ("Labgold") opposes Yanko's motion to dismiss and cross moves for leave to amend its complaint pursuant to CPLR 3025(b). Labgold also separately cross moves for a default judgment against defendant Soma Hudson Blue LLC ("Soma").

**BACKGROUND<sup>1</sup>**

On March 2, 2007, Soma sold a condominium unit to Labgold (Proposed Amended Complaint ¶ 8). Defendant Chelsea Condos, LLC ("Chelsea") sponsored the offering plan for the apartment, but, on the day of the closing, assigned the contract of sale of the property to Soma (Id. ¶¶ 34, 35). Yanko is alleged to be the sole member of Soma and the other corporate defendants and allegedly was "the only person involved in the process" and signed all documents involved in the sale as manager of Soma (Id. ¶¶ 3, 33-37).

<sup>1</sup> Unless otherwise noted, the following facts are based on the allegations in the proposed amended complaint.

After Labgold purchased the condominium apartment unit (“apartment”), “leaks and infusions of water from the exterior of the building and through the walls and windows” entered the apartment and caused extensive damage including “warping, buckling, and destruction of the wooden floors,” rendering the apartment uninhabitable (Id. ¶ 9). All of the defendants were notified several times regarding the uninhabitable condition of the apartment but failed to address or remedy the damage caused by the leaking water (Id. ¶¶ 10-19). However, the defendants assured Labgold that steps would be taken to fix the issue and make the apartment habitable. (Id. ¶¶ 20-21, 24-27). Specifically, Yanko “assured plaintiff and the other condominium owners that he would see that it was taken care of and, furthermore, signed a stipulation agreeing to pay the owners \$60,000 for the problem and another \$65,000 to insure that he would cure the problem” (Id. ¶ 22). It is further alleged that “[s]uch assurance by Yanko and those of the other defendants went beyond the terms of the contract of sale and are not duplicative of the breach of contract claims” (Id. ¶ 23).

Labgold contends that “Yanko exercised complete domination over Soma in respect to the transaction involved, as well as over the other entities involved on the property prior to the assignment of the contract of sale to Soma, and caused Soma and the other companies to act solely for his own benefit” (Id. ¶ 38). Moreover, Labgold alleges that Yanko induced Labgold to buy the property by misrepresenting material facts regarding the construction and habitability of the apartment and that Yanko is “personally liable for any actions he took ostensibly on behalf of Soma” (Id. ¶¶ 39-40). Labgold asserts Yanko misrepresented “that the building in question was properly and appropriately constructed; that the apartment sold was and would remain habitable; that appropriate insurance covered said building; that the defendant Soma was more than a shell existing solely to enrich the defendant Yanko; that construction at the said premises complied

with Department of Building codes and regulations” (Id. ¶ 40).

According to the proposed amended complaint, Yanko knew these misrepresentations to be false and made them to induce Labgold to purchase the apartment, which caused Labgold injury (Id. ¶¶ 41-43). Furthermore, Labgold alleges that Soma and Yanko, personally, breached their obligations further by failing to obtain insurance coverage and failing “to properly file or pursue any existing coverage to address or assuage or indemnify the losses incurred by the plaintiff, notwithstanding their assurances to the contrary” (Id. ¶ 45).

The proposed amended complaint, which was filed on December 9, 2010, appears to allege causes of action for breach of contract, piercing the corporate veil, fraud and promissory estoppel.<sup>2</sup>

### DISCUSSION

Leave to amend a pleading should be ‘freely given’ (CPLR 3025(b)) as a matter of discretion in the absence of prejudice and surprise.” Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 355-56 (1st Dep’t 2005) (internal citation and quotations omitted). That being said, however, “in order to conserve judicial resources, an examination of the underlying merits of the proposed cause of action is warranted.” Eighth Ave. Garage Corp. v. H.K.L. Realty Corp., 60 A.D.3d 404, 405 (1st Dep’t), lv dismissed, 12 N.Y.3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that the proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins. Corp. v. Greystone & Co. Inc., 74 A.D.3d 499 (3rd Dep’t 2010) (citation omitted). In addition, “[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in

<sup>2</sup> The original complaint and proposed amended complaint do not specifically label the causes of action or separate the allegations relating to each of them.. However, contrary to Yanko’s position, such failure to label the causes of action does not provide a basis for dismissing the complaint or to deny the cross motion to amend since the causes of action can be discerned from the allegations of the complaint.

the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment.”

Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 A.D.3d 363, 365 (1st Dep’t 2007).<sup>3</sup> Here, as Yanko does not argue that he was prejudiced or surprised by the proposed amended complaint, the only issue is whether the proposed pleading is of sufficient merit.

Yanko first argues Labgold’s claim for breach of contract must be dismissed, as he cannot be held liable for actions of a limited liability company such as Soma, as he acted only as a member of Soma. In addition, Yanko contends that the veil piercing allegations made by Labgold are insufficient and do not provide the basis for an inference of wrongdoing. In response, Labgold alleges that Yanko is the sole member of the corporate defendants and is the alter ego of Soma.

It is well settled that an agent of a corporation “will not be personally bound [to comply with the obligations under an agreement] unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of the principal.” Mencher v. Weiss, 306 N.Y. 1, 4 (1953); Salzman Sign Co. v. Beck, 10 N.Y.2d 63, 66-67 (1961); see also, Application of Jeyemov, 129 A.D.2d 174, 176 (1st Dep’t 1987). Here, there is no contract between Labgold and Yanko as the only parties involved in the contract for sale of the condominium are Labgold and Soma. Additionally, there is no evidence of any intent by Yanko to be held personally liable under the purchase agreement.

However, a corporate officer who is not a party to a corporation’s contract may be held personally liable for its breach under a theory that officer was the alter ego of the corporation and exercised such dominion and control over the corporation that the corporate veil should be pierced. See Port Chester Electrical Construction Corp. v. Atlas, 40 N.Y.2d 652, 656-57 (1976).

---

<sup>3</sup> Since Yanko responded to the motion to dismiss by seeking to amend the complaint, the court will consider the proposed pleading under the standard for a motion to amend.

In general, to pierce the corporate veil and impose alter ego liability, a plaintiff must show that: (1) the owners of the corporation exercised complete domination of the corporation in respect to the transactions at issue; and (2) such domination was used to commit a fraud or otherwise resulted in wrongful or inequitable consequences causing plaintiff's injury. TNS v. Holdings, Inc. v. MKI Securities Corp., 92 N.Y.2d 335, 339-40 (1998), citing, Morris v. New York State Dept. of Taxation and Fin., 82 N.Y.2d at 141-42 (1993).

The theory of piercing the corporate veil involves a fact intensive inquiry that is not well suited for determination prior to discovery. See Ledy v. Wilson, 38 A.D.3d 214, 214 (1st Dep't 2007); Kralic v. Helmsley, 294 A.D.2d 234, 235-36 (1st Dep't 2002); Int'l Credit Brokerage Co., v. Agapov, 249 A.D.2d 77, 78 (1st Dep't 1998).

Here, the court finds that particularly as there has been no discovery, the proposed amended complaint sets forth sufficient allegations to establish the prima facie merit of the cause of action seeking to pierce the corporate veil. Specifically, the proposed amended complaint alleges that with respect to the sale of the apartment Yanko "exercised complete domination and control over Soma" and "caused Soma and other corporations to act for his sole benefit." Moreover, it can be inferred from the allegations of the amended complaint that Yanko used his domination and control to perpetrate a fraud on Labgold and the other condominium owners.

Furthermore, it can be inferred from the allegations in the complaint that Yanko used his personal funds to resolve complaints of the apartment owners regarding the defects in the building and such allegations support a theory that Yanko commingled his funds with Soma and did not obey corporate formalities and/or acted as the alter ego for Soma. Under these circumstances, Labgold should be permitted to amend the complaint to include both the cause of action for breach of contract and cause seeking to pierce the corporate veil. See Thompson v.

Cooper, 24 A.D.3d 203 (1st Dep't 2005) (trial court erred in refusing to permit plaintiff to amend the complaint to add allegations concerning the alter ego status of corporate defendants and the piercing of the veil of those entities).

The next issue is whether the proposed claim for fraud is of sufficient merit. "To succeed on a fraud claim, a plaintiff must demonstrate that the defendant made a false representation which was either known to be untrue or made with reckless disregard of its truth and which was made with the intent to deceive and to induce the plaintiff to part with or refrain from obtaining something of value, thereby causing injury." Melia v. Riina, 204 A.D.2d 955, 3rd Dep't 1994) (internal quotations and citations omitted).

Yanko argues Labgold's claim for fraud is as a seller's duty of disclosure is defined by regulations promulgated by the Attorney General pursuant to the Martin Act, which pre-empts any private cause of action for fraud based upon material misrepresentations in matters covered by the statutorily required disclosures. It is well established that the Martin Act does not create a private cause of action and provides that only the Attorney General can sue for violations of the act. CPC Int'l Inc. v. McKesson Corp., 70 N.Y.2d 268 (1987). Accordingly, a purchaser of a condominium "may not bring a claim for common-law fraud against the building's sponsor predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act . . . and the Attorney General's implementing regulations." Kerusa v. W10Z/515 Real Estate Limited Partnership, 12 N.Y.3d 236, 239 (2009).

However, when, as here, a defendant fails "to establish that the [plaintiff's] claim rests entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations," dismissal of the complaint is inappropriate. Caboara v. Babylon Cove Development, LLC, 82 A.D.3d 1141, 1143 (2d Dep't 2011); See also Assured Guar. (UK)

Ltd. v. J.P. Morgan Inv. Management Inc., 80 A.D.3d 293 (1st Dep't 2010). Here, allegations in the proposed amended complaint that Yanko deceptively concealed the poor construction of the apartment and made false statements regarding the existence of insurance and the habitability of the apartment do not rely wholly on omissions from the filings required under the Martin Act. Therefore, the action is not subject to dismissal based on a Martin Act preemption theory.

Yanko further argues that the fraud claims are duplicative of the breach of contract claim. It is well established that “[a] fraud based cause of action is duplicative of a breach of contract claim ‘when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.’” Manas v. VMS Associates, LLC, 53 A.D.3d 451, 454 (1st Dep't 2008), quoting First Bank of the Americas v. Motor Car Funding, 257 A.D.2d 287, 291 (1st Dep't 1999). “In order to establish a fraud claim in addition to a breach of contract claim, plaintiff must show misrepresentations that are misstatements of material fact or promises with a present, but undisclosed, intent not to perform, not merely promissory statements regarding future acts.” Mora v. RGB, Inc., 17 A.D.3d 849, 852 (3d Dep't 2005). Moreover, “a misrepresentation of a material fact which is collateral to the contract and serves as an inducement for the contract is sufficient to allege fraud.” Mendelovitz v. Cohen, 37 A.D.3d 670 (2d Dep't 2007); See also First Bank of the Americas, 257 A.D.2d at 291-92. Here, the fraud claim in the proposed amended complaint is not duplicative of the breach of contract claim as it sets forth misrepresentations collateral to the contract including the existence of insurance and that the building's construction complied with Department of Building codes and regulations and that the building was properly constructed and would remain habitable.

Furthermore, at least at this juncture, Labgold has sufficiently pleaded that Yanko's misrepresentations regarding the condition of the condominium were “the direct and proximate

cause of the claimed losses.” Laub v. Faessel, 297 A.D.2d 28, 30 (1st Dep’t 2002). The amended complaint alleges that Yanko falsely misrepresented that the apartment was habitable and constructed well, which induced Labgold to buy the apartment. It is also alleged that Yanko deliberately concealed the poor construction of the apartment, and that as a result of the considerable leakage of water and the destruction of the floors, Labgold has been forced to expend various sums to fix the damage in order for the apartment to be habitable. Accordingly, the cause of action for fraud is of sufficient merit.

In contrast, the claim for promissory estoppel cannot be sustained as Labgold has failed to allege any duty owed to him by Yanko. Hoeffner v. Orrick, Herrington & Sutcliffe LLP, 61 A.D.3d 614 (1st Dep’t 2009); Brown v. Brown, 12 A.D.3d 176, 176-77 (1st Dep’t 2004).

Next, Yanko’s motion to dismiss the cross complaint of Citadel which asserts causes of action for contribution and indemnification is denied as premature.

Finally, Labgold’s cross motion pursuant to CPLR 3215 for a default judgment against Soma based on its failure to appear and answer is denied with leave to renew on papers in compliance with CPLR 3215(f). Although plaintiff submits an attorney’s affirmation, CPLR 3215(f) requires an affidavit of facts constituting a claim against a defendant; the affidavit must be by a party who possess first-hand knowledge. Although a complaint verified by a party may satisfy CPLR 3215(f), the instant complaint verified by plaintiff’s attorney is not sufficient, since the attorney lack the requisite first-hand knowledge of the facts constituting the claim. See Joosten v. Gale, 129 A.D.2d 53 (1st Dep’t 1987).

### CONCLUSION

In view of the above, it is

ORDERED that the motion by defendant Michael Yanko to dismiss the complaint and

cross-complaint is denied; and it is further

ORDERED that the cross motion by Marc Labgold to amend his complaint is granted to the extent of permitting Labgold to amend the complaint except with respect to the proposed allegations relating to promissory estoppel, and for the purposes of clarity the amended pleading shall name the causes of action permitted by this decision and order and separate the allegations which relate to the specific causes of action; and it is further

ORDERED that within fifteen days of the date of this decision and order, Labgold shall serve an amended complaint consistent with the foregoing; and it is further

ORDERED that plaintiff Marc Labgold's cross motion for a default judgment against defendant Soma Hudson Blue, LLC is denied without prejudice to renewal upon proper papers; and it is further

ORDERED that defendants shall answer the amended complaint within 15 days of its service; and it is further

ORDERED that the parties shall appear on September 15, 2011, at 9:30 a.m., in Part 11, Room 351, 60 Centre Street for a preliminary conference.

A copy of this decision and order is being mailed by my chambers to the parties.

Dated: July 29, 2011

**FILED**

  
J.S.C.

**AUG 09 2011**

NEW YORK  
COUNTY CLERK'S OFFICE