Max Tec Constr. Inc. v The Cedarbrook Club
2011 NY Slip Op 32287(U)
August 10, 2011
Sup Ct, Nassau County
Docket Number: 001269-06
Judge: Timothy S. Driscoll
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.

[* 1]

Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

---x

MAX TEC CONSTRUCTION INC.,

Plaintiff,

-against-

THE CEDARBROOK CLUB, et al.,

Defendants.

---x

TRIAL/IAS PART: 20
NASSAU COUNTY

Nassau County
Index No: 001269-06
Motion Seq. Nos: 13, 14, 15, 16, 17
Submission Date: 7/28/11

---x

R&L WELL DRILLING LLC,

Plaintiff,

-against-

CEDAR BROOK COUNTRY CLUB, INC. et al.,

Defendants.

---x

Nassau County
Index No. 11795-07
Motion Seq. No. 1

---x

STORR TRACTOR COMPANY, INC.,

Plaintiff,

-against-

THE CEDARBROOK CLUB, INC.,

Defendant.

---x

Suffolk County
Index No. 36572-07

[* 2]

The following papers having been read on these motions:

Motion Sequence Numbers 13, 14, 15, 16 and 17, Index # 1269-06

Notice of Motion, Affirmation in Support, Affidavits in Support and Exhibits.......x
Notice of Motion, Affirmation in Support and Exhibits..x
Notice of Motion and Affirmation/Memorandum of Law in Support.....................x
Exhibits..x
Notice of Motion, Affirmation in Support and Exhibits..x
Memorandum of Law..x
Amended Notice of Motion..x
Notice of Cross Motion, Affirmation in Support/Opposition and Exhibits.............x
Memorandum of Law in Support/Opposition...x
Reply Memorandum of Law in Further Support/Opposition..................................x
Affirmation in Opposition/Further Support..x
Reply Affirmation in Further Support and Exhibits..x

Motion Sequence Number 1, Index # 11795/07:

Notice of Motion, Affirmation in Support and Exhibits..x
Affirmation in Opposition...x
Reply Affirmation/Memorandum of Law in Support and Exhibit..........................x
Reply Affirmation in Further Support...x

This matter is before the Court for decision on 1) the motion by Defendants Javad Khavarian and P. Khavarian filed on April 18, 2011, 2) the motion by Defendants J. Lavi, Parviz Lavi and Angela Mottajedeh filed on April 20, 2011, 3) the motion filed by Defendants The Cedarbrook Club, The Cedarbrook Club, Inc. and Old Cedar Development Corp. filed on April 20, 2011, 4) the motion by Defendants D. Aditbol, N. Abitbol, M. Pierre Rafiy, Said Amirian, Ayoub Moinian, Nouri (Nourollah) Sassouni and Nejatollah Sassouni on May 4, 2011 and 5) the cross motion by Plaintiff Max Tec filed on July 8, 2011, all of which were filed under Index Number 1269-06.

This matter is also before the Court for decision on the motion by Defendant Cedar Brook Country Club, Inc. filed on April 20, 2011 and submitted on July 28, 2011 under Index Number 11795-07.

These motions were submitted on July 28, 2011, following oral argument before the

Court.

For the reasons set forth below, the Court 1) grants the motion by Defendants Javad Khavarian and P. Khavarian; 2) grants the motion by Defendants J. Lavi, Parviz Lavi and Angela Mottajedeh; 3) denies the motion by Defendants The Cedarbrook Club, The Cedarbrook Club, Inc. and Old Cedar Development Corp; 4) grants the motion by Defendants D. Aditbol, N. Abitbol, M. Pierre Rafiy, Said Amirian, Ayoub Moinian, Nouri (Nourollah) Sassouni and Nejatollah Sassouni; 5) denies the cross motion by Max Tec; and 6) denies the motion by Defendant Cedar Brook Country Club, Inc.

BACKGROUND

A. Relief Sought

Defendant Cedar Brook Country Club, Inc. moves for an Order, pursuant to CPLR § 3212, granting summary judgment against Plaintiff R & L Well Drilling LLC, dismissing the complaint against Cedar Brook Country Club, Inc.

Defendants Javad Khavarian and P. Khavarian move for an Order 1) pursuant to CPLR § 3211(a)(7) dismissing the complaint against them; and 2) pursuant to CPLR § 3211, dismissing the complaint against them and directing that judgment be entered in their favor against Plaintiff Max Tec.

Defendants J. Lavi, Parviz Lavi and Angela Mottajedeh move for an Order, pursuant to CPLR § 3212, granting summary judgment dismissing the complaint against the moving Defendants.

Defendants The Cedarbrook Club, The Cedarbrook Club, Inc. and Old Cedar Development Corp. move for an Order, pursuant to CPLR § 3212, granting summary judgment to the moving Defendants against Max Tec, dismissing the complaint against the moving Defendants.

Defendants Daniel Abitbol, M. Abitbol, M. Pierre Rafiy, Said Amirian, Ayoub Moinian, Nouri (Nourollah) Sassouni and Nejatollah Sassouni move for an Order, pursuant to CPLR § 3212, granting summary judgment to the moving Defendants.

Max Tex moves for an Order granting Max Tec partial summary judgment on liability, holding all Defendants liable for any damages awarded to Max Tec.

B. The Parties' History

The background of this matter was set forth in the decision of the Court (Austin, J.) dated October 17, 2006 ("Prior Decision"), which addressed a prior motion under Index Number 1269-06. The Prior Decision outlined this action as follows:

> In this action, Plaintiff Max Tec Construction ("Max Tec") seeks to recover for breach of a contract for the remediation of soil and ground water contamination at the premises owned by Defendant Old Cedar Development Corp. ("Development") and leased to Defendant The Cedarbrook Club, Inc. ("Club"). Development entered into a purchase and lease back agreement with Club, a not-for-profit corporation which operates a golf/country club at the premises. The then president of Club, James Khavarian ("Khavarian") engaged Max Tec following notification from the Department of Environmental Conservation ("DEC") that remediation was required. Defendants contend that Khavarian did not have actual authority to retain the services of Max Tec.

Prior Decision at pp. 2-3.

C. The Parties' Positions

Cedar Brook Country Club, Inc. submits that it is entitled to summary judgment against Plaintiff R&L dismissing the complaint against it, on the grounds that 1) R&L was never in privity of contract with Cedarbrook and, therefore, may not maintain an action against and/or recover monies for work allegedly performed in accordance with R&L's contract with Storr Tractor ("Storr"); 2) R&L, as a subcontractor of Storr, may not maintain this action against Cedarbrook given that Cedarbrook never agreed to assume Storr's obligation to pay R&L for the alleged work performed; and 3) there can be no cause of action for account stated, given that there was never a contract or agreement between the parties to provide and accept goods and/or services rendered. In opposition, R&L, relying on the Affidavit in Support of Thomas Zackman ("Zackman"), a member of R&L, opposes Cedarbrook's motion. R&L submits that Zackman's affidavit, which demonstrates Cedarbrook's election to have the additional work at issue billed through the existing contract and subcontract, supports the inference that there was a "clear, implied promise" (Marino Aff. in Opp. at ¶ 6) by Cedarbrook to pay for the entire contract. In reply, Cedarbrook submits, *inter alia*, that 1) R&L has not defeated Cedarbrook's right to summary judgment, as it remains uncontested that R&L contracted with Storr, R&L billed Storr for the alleged work performed and R&L did not send a bill to Cedarbrook until three (3) years

after the work was completed; and 2) R&L's claim that Cedarbrook agreed to pay the debts of Storr is prohibited by the Statute of Frauds.

Jarad Khavarian and P. Khavarian affirm that they 1) are minority shareholders in Old Cedar Development Corp, as reflected by the stock certificate provided (Ex. C to Montesano Aff. in Supp.); 2) have no knowledge of any partnership relations among the named Defendants in this action; 3) have no knowledge of any contracts that any of the named Defendants may have entered into with Max Tec; and 4) have not entered into any contractual relationship with Max Tec, either explicitly or implicitly. They submit that in light of the foregoing, and Max Tec's failure to demonstrate that these Defendants were involved in the agreement at issue, they are entitled to judgment dismissing the complaint against them.

Defendants J. Lavi, Parviz Lavi and Angela Mottajedeh submit that The Cedarbrook Club, Inc. is a valid not-for profit corporation. As these individual Defendants are members of this not-for-profit corporation, they cannot be held individually or personally liable for any sums due Max Tec, citing Not for Profit Corporation Law § 517. Moreover, there is no basis for Max Tec's claim that a partnership was created. Thus, the first and second causes of action, based on breach of contract, are not viable because there is no privity of contract between Max Tec and these individual defendants. The third cause of action, for quantum meruit, and the fourth cause of action, for unjust enrichment, must also fail in light of the absence of any allegation that the individual defendants received any benefit.

Defendants The Cedar Brook Club, The Cedar Brook Club, Inc. and Old Cedar Development Corp. move for dismissal of the complaint against them on the grounds, *inter alia*, that 1) Max Tec's breach of contract claims must fail in light of its failure to allege its own performance under the contract; 2) Max Tec has not established the existence of a valid contract, in part because Max Tec has not established mutual assent; 3) James Khavarian lacked actual or apparent authority to bind the corporation; 4) the contract, which lacks essential terms including the scope of the work to be performed and a description of the work to be performed, is too indefinite to be enforceable; and 5) assuming, *arguendo*, that Max Tec can demonstrate that it substantially performed, the amount due must be reduced by nearly the entire contract price in light of Max Tec's concession that it did not complete the remediation.

Defendants Daniel Abitbol, N. Abitbol, M. Pierre Rafiy, Said Amirian, Ayoub Moinian,

Nouri (Nourollah) Sassouni and Nejatollah Sassouni move for dismissal of the action against them on the grounds that 1) The Cedarbrook Club, Inc. is not a partnership, and the shareholders of Old Cedar Development Corp. are not partners in The Cedarbrook Club, Inc.; 2) there is no basis for piercing the corporate veil and holding the shareholders of Old Cedar Development Corp. liable for the obligation at issue; 3) the contract at issue is "a sham" (Memorandum of Law of Abitbol *et al.* at p. 1) and, assuming *arguendo* its validity, it is not enforceable against these Defendants; and 4) there is no issue of fact that precludes summary judgment in favor of Defendants on Max Tec's claims for quantum meruit, unjust enrichment and fraudulent transfers. These Defendants note that, in the Prior Decision, Justice Austin held that "it does appear from the allegations of the complaint and the material submitted in opposition to this motion that there is no apparent support for the alleged existence of a partnership among the Individual Defendants" (Prior Dec. at p. 8).

Max Tec cross moves for partial summary judgment on liability, and opposes the numerous motions by Defendants, submitting, *inter alia*, that 1) a triable issue of fact exists as to whether a contract was formed, in light of evidence suggesting that James Khavarian acted with express or apparent authority and Defendants ratified the agreement by accepting the work following James Khavarian's departure from Cedarbrook; 2) Max Tec adequately pled that it performed under the contract; 3) Cedarbrook's argument regarding substantial performance is misplaced given that it was Defendant who prevented Max Tec from performing; 4) Max Tec's causes of action for quantum meruit, quasi contract or unjust enrichment are viable, in the event that it is determined that no contract existed; 5) a triable issue of fact exists as to whether it is Cedarbrook or Max Tec who owes damages to R&L; and 6) Max Tec should be permitted to hold Old Cedar Development Corp. and its shareholders liable for the breach of contract of The Cedarbrook Club, Inc., in part because Old Cedar Development Corp. and its shareholders have acted as the Club's alter ego, and because Defendants have operated The Cedarbrook Club, Inc. as a "*de facto* partnership" (Max Tec Memorandum of Law at p. 29).

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the

complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Summary Judgment

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

C . Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton*, 66 A.D.3d at 126, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate

form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton,* 66 A.D.3d at 126, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton,* 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

D. Apparent Authority

Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. *150 Beach 120th Street, Inc. v. Washington Brooklyn Limited Partnership*, 39 A.D.3d 722, 723 (2d Dept. 2007), citing *Standard Funding Corp. v. Lewitt*, 89 N.Y.2d 546, 551 (1997), quoting *Hallock v. State of New York*, 64 N.Y.2d 224, 231 (1984) (internal quotations omitted).

E. Relevant Contract Principles

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694, 695 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia*, *supra*.

Although the doctrine of definiteness provides that a court cannot enforce a contract if it cannot determine to what the parties have agreed, courts have not rigidly applied that doctrine. Indeed, it is well-settled that an imperfect expression of terms should not be used to defeat the underlying expectations of the parties where they have otherwise manifested an intent to be bound. *Capital District Enterprises, LLC v. Windsor Development of Albany, Inc.*, 53 A.D.3d 767, 770 (3d Dept. 2008), citing, *inter alia*, *Matter of 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 (1991), and *Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989), *reh. den.*, 75 N.Y.2d 863 (1990), *cert. den.*, 498 U.S. 816

(1990).

Generally, a subcontractor is in privity with the general contractor on a construction project and is not in privity with the owner, even if the owner benefitted from the subcontractor's work. *Hamlet at Willow Creek v. Northeast Land Dev. Corp.*, 64 A.D.3d 85, 104 (2d Dept. 2009), *lv. app. dism.*, 13 N.Y.3d 900 (2009). A landowner who has had the benefit of a subcontractor's services, pursuant to a contractual obligation with a general contractor in a construction contract, is not liable for the work done by the subcontractor unless he has, in some way, agreed to pay therefor. *Sybelle Carpet v. East End Collaborative*, 167 A.D.2d 535, 536 (2d Dept. 1990), quoting *Custer Bldrs. v. Quaker Heritage*, 41 A.D.2d 448, 451 (3d Dept. 1973).

F. Application of these Principles to the Instant Action

The Court grants the motions of 1) Defendants Javad Khavarian and P. Khavarian, 2) Defendants J. Lavi, Parviz Lavi and Angela Mottajedeh, and 3) Defendants D. Aditbol, N. Abitbol, M. Pierre Rafiy, Said Amirian, Ayoub Moinian, Nouri (Nourollah) Sassouni and Nejatollah Sassouni, and dismisses the complaint against these individuals, based on the Court's conclusion that Max Tec has not demonstrated, by admissible proof, that 1) Old Cedar Development Corp. and its shareholders have acted as the Club's alter ego; 2) the Club has, in effect, been operated as a partnership; or 3) there exists another basis on which to hold these individual Defendants personally liable.

The Court denies 1) the motion of Defendants The Cedarbrook Club, The Cedarbrook Club, Inc. and Old Cedar Development Corp., 2) the motion of Defendant Cedar Brook Country Club, Inc. and 3) the cross motion of Plaintiff Max Tec, based on the Court's conclusion that Max Tec has sufficiently pled the existence of a contract, or alternative quasi-contract causes of action in the event that it is determined that no contract was formed, and that there exist disputed issues of fact, including 1) the authority of James Khavarian to enter into the agreement on behalf of Cedarbrook, and 2) whether Cedarbrook agreed to assume Storr's obligation to pay R&L for the alleged work performed, that make summary judgment inappropriate as to these parties. The purported agreement (Ex. D to Levin Aff. in Supp.) is sufficiently definite, given that it, *inter alia*, 1) states that The Cedarbrook Club, Inc. is engaging Max Tec to "test, formulate, submit and implement a remediation plan;" and 2) sets forth an agreed-upon initial price, and payment terms.

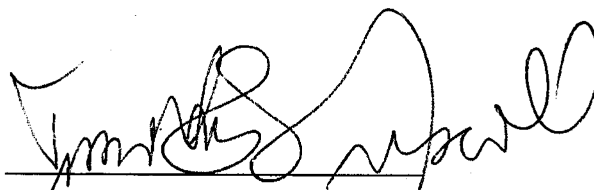
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for those parties against whom these actions have not been dismissed of their required appearance before the Court for a pre-trial conference on September 15, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
August 10, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
AUG 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE