

**Fuller and D'Angelo, P.C. v Cornerstone Hospitality
Advisors**

2011 NY Slip Op 32458(U)

August 2, 2011

Sup Ct, NY County

Docket Number: 111607/2009

Judge: Lucy Billings

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

PRESENT: LUCY BILLINGS
J.S.C. Justice

PART 46

Index Number : 111607/2009
FULLER AND D'ANGELO, P.C.
VS.
CORNERSTONE HOSPITALITY ADVISORS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

1 this motion to/for _____

PAPERS NUMBERED

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

1-2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

FILED

Cross-Motion: Yes No

SEP 15 2011

Upon the foregoing papers, it is ordered that ~~this motion~~: NEW YORK

The court grants plaintiff's motion for summary judgment on its first claim, for breach of contract against Cornerstone Hospitality Advisors, and tenth claim, for an account stated against Blackstar Development, Inc.; but otherwise denies plaintiff's motion; and grants defendant's cross-motion for partial summary judgment dismissing plaintiff's third, fourth, and fifth claims, for breach of contract against Spahr and Caspi, pursuant to the accompanying decision. C.P.L.R. § 3212 (b) and (c).

Dated: 8/2/11

Lucy Billings

LUCY BILLINGS 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):

-----x
FULLER and D'ANGELO, P.C., ARCHITECTS Index No. 111607/2009
and PLANNERS,

Plaintiff

- against -

DECISION AND ORDER

CORNERSTONE HOSPITALITY ADVISORS,
BLACKSTAR DEVELOPMENT, INC., JOSHUA
CASPI, and ARYN SPAHR,

Defendants

FILED

SEP 15 2011

-----x
LUCY BILLINGS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

I. BACKGROUND

Plaintiff sues to recover damages for breach of a contract entered August 27, 2008, executed by defendant Spahr as a member of Cornerstone Hospitality Advisors. Since plaintiff, at Spahr's request, sent its invoices to defendant Caspi of defendant Blackstar Development, Inc., plaintiff also claims an account stated against Blackstar Development, as well as quantum meruit and unjust enrichment against each of defendant entities. While plaintiff performed the contracted work from August to October 2008, defendants never paid under the contract or pursuant to plaintiff's invoices.

Plaintiff moves for summary judgment on the complaint's first claim, for breach of contract against Cornerstone Hospitality Advisors; the complaint's tenth claim, for an account stated against Blackstar Development; and an account stated claim against Caspi. C.P.L.R. § 3212(b) and (e). Plaintiff conceded

at oral argument, however, that the complaint does not claim an account stated against Caspi. Defendants cross-move for summary judgment dismissing the complaint's third and fourth claims, for breach of contract against Spahr, and fifth claim, for breach of contract against Caspi. The court grants plaintiff's motion to the extent set forth and grants defendants' cross-motion, for the reasons explained below.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If the moving parties satisfy this standard, the burden shifts to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the motion and cross-motion for summary judgment, the court construes the evidence in the light most favorable to the opponents. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

Further, a "motion for summary judgment shall be supported . . . by a copy of the pleadings." C.P.L.R. § 3212(b) (emphasis

added). Where the moving parties, in support of their summary judgment motions, fail to include the pleadings, denial of the motions is warranted for that reason alone. State of New York v. Metz, 241 A.D.2d 192, 198 (1st Dep't 1998); Matsyuk v. Konkalipos, 35 A.D.3d 675, 676 (2d Dep't 2006); Kyung Mi Lee v. Musso, 30 A.D.3d 1089 (4th Dep't 2006); Sted Tenants Owners Corp. v. Chumpitaz, 5 A.D.3d 663 (2d Dep't 2004).

Defendants point out that plaintiff failed to support its summary judgment motion with the pleadings. Plaintiff's omission was simply an inadvertent failure to attach them to the affirmation in support of the motion by its attorney, who refers to the complaint and answer as exhibits I and J. Since defendants presented the complaint and answer in support of their cross-motion, Breytman v. Olinville Realty, LLC, 46 A.D.3d 484, 485 (1st Dep't 2007), the court disregards the omission from plaintiff's motion. C.P.L.R. § 2001; Rodriguez v. Ford Motor Co., 62 A.D.3d 573, 574 (1st Dep't 2009). See Tagliaferri v. Weiler, 1 N.Y.3d 605, 606 (2004); Caceres v. Motor Veh. Acc. Indem. Corp., 37 A.D.3d 215 (1st Dep't 2007).

III. PLAINTIFF'S CLAIMS

As set forth above, the complaint includes 10 claims against defendants for breach of contract, an account stated, quantum meruit, and unjust enrichment, but plaintiff seeks summary judgment on specified breach of contract and account stated claims only. The complaint claims both that Cornerstone Hospitality Advisors, Blackstar Development, and Spahr breached

the contract and that Spahr and Caspi are liable for the breach of contract under a theory of piercing the corporate veil. Plaintiff's motion, however, seeks summary judgment only that Cornerstone Hospitality Advisors and Spahr are liable for breach of contract and that Blackstar Development and Caspi are liable for an account stated.

A. Breach of Contract

To establish breach of a contract, plaintiff must show a contract, that plaintiff performed and defendants breached it, and that defendants' breach caused plaintiff to sustain damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007). Plaintiff must plead the specific terms of the agreement that defendants breached. Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003).

Plaintiff satisfied its initial burden of demonstrating entitlement to judgment on its breach of contract claim against Cornerstone Hospitality Advisors through the affidavit of Joseph Fuller Jr., plaintiff's executive vice president. He authenticates its contract dated August 27, 2008, with Cornerstone Hospitality Advisors and attests to plaintiff's performance and the default in payment under the contract. 225 Fifth Ave. Retail LLC v. 225 5th, LLC, 78 A.D.3d 440, 441-42 (1st Dep't 2010); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355,

357-58 (1st Dep't 2006); Bell Atl. Yellow Pages Co. v. Padded Wagon, 292 A.D.2d 317, 318 (1st Dep't 2002). Since Spahr was Cornerstone Hospitality Advisors' sole member, his signature on its behalf bound the entity to the contract, Goldston v. Bandwidth Tech. Corp., 52 A.D.3d 360, 361-62 (1st Dep't 2008); Korff v. Corbett, 18 A.D.3d 248, 251 (1st Dep't 2005); Cointech, Inc. v. Masaryk Towers Corp., 7 A.D.3d 376, 381 (1st Dep't 2004); Edge Mgt. Corp. v. Crossborder Exch. Corp., 304 A.D.2d 422, 423 (1st Dep't 2003), but not him individually. Matias v. Mondo Props. LLC, 43 A.D.3d 367, 368-69 (1st Dep't 2007); Diaz v. Siegel, 23 A.D.3d 251 (1st Dep't 2005).

Because no evidence indicates Spahr's authority to bind Blackstar Development, his signature did not bind this entity, even though Cornerstone Hospitality Advisors is deleted from the contract's first page and Blackstar is written in its place. Similarly, no evidence demonstrates Spahr's authority to act for Caspi. Therefore Blackstar Development and Caspi, as nonsignatories to the contract, are not liable to plaintiff for breach of the contract. Hampton Hall Pty Ltd. v. Global Funding Servs., Ltd., 82 A.D.3d 523, 524 (1st Dep't 2011); Haskin v. Denver, 250 A.D.2d 458, 459 (1st Dep't 1998). An email of December 8, 2008, in which Caspi acknowledges that Blackstar Development contracted with plaintiff, is parol evidence, which may not be considered unless the contract is ambiguous, South Rd. Assoc., LLC v. International Bus. Machs. Corp., 4 N.Y.3d 272, 278 (2005); R/S Assoc. v. New York Job Dev. Auth., 98 N.Y.2d 29, 33

[* 7]

(2002); Unclaimed Prop. Recovery Serv., Inc. v. UBS Paine Webber Inc., 58 A.D.3d 526 (1st Dep't 2009); Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 60 A.D.3d 61, 66 (1st Dep't 2008), and therefore may not be used to imply provisions not stated in this unambiguous contract. Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199 (2001).

Defendants' evidence opposing plaintiff's motion fails to raise any factual issues regarding plaintiff's breach of contract claim against Cornerstone Hospitality Advisors. Spahr's affidavit merely admits that he is the sole member of Cornerstone Hospitality Advisors, a Florida limited liability company (LLC), and that he signed the contract with plaintiff on the LLC's behalf.

B. Account Stated Claim

The key element of a prima facie account stated claim is transmission of an invoice to defendants, forming the predicate for defendants' failure to object to the invoice within a reasonable time. RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d 618, 619 (1st Dep't 2009); Miller v. Nadler, 60 A.D.3d 499 (1st Dep't 2009); Rothstein & Hoffman Elec. Serv., Inc. v. Gong Park Realty Corp., 37 A.D.3d 206, 207 (1st Dep't 2007); Ferraioli v. Ferraioli, 8 A.D.3d 163, 164 (1st Dep't 2004). See Bartning v. Bartning, 16 A.D.3d 249, 250 (1st Dep't 2005); Federal Express Corp. v. Federal Jeans, Inc., 14 A.D.3d 424 (1st Dep't 2005); Morrison Cohen Singer & Weinstein, LLP v. Waters, 13 A.D.3d 51, 52 (1st Dep't 2004);

8]

Mulitex USA, Inc. v. Marvin Knitting Mills, Inc., 12 A.D.3d 169, 170 (1st Dep't 2004). Failure to object constitutes an assent to pay the invoice. Morrison Cohen Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dep't 2005). See RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Henry Loheac, P.C. v. Children's Corner Learning Ctr., 51 A.D.3d 476 (1st Dep't 2008); Public Broadcast Mktg. v. Trustees of Univ. of Pa., 216 A.D.2d 103 (1st Dep't 1995).

Plaintiff's evidence that plaintiff sent invoices totaling \$28,310.50 to Caspi at Blackstar Development and that neither objected to them demonstrates a prima facie account stated claim. RPI Professional Alternatives, Inc. v. Citigroup Global Mkts. Inc., 61 A.D.3d at 619; Miller v. Nadler, 60 A.D.3d 499; Rothstein & Hoffman Elec. Serv., Inc. v. Gong Park Realty Corp., 37 A.D.3d at 207; Ferraioli v. Ferraioli, 8 A.D.3d at 164. Caspi's acknowledgment of an agreement between plaintiff and Blackstar Development in his email December 8, 2008, responding to an email from plaintiff's executive vice president Fuller demanding payment of \$28,310.50, further supports its account stated claim. Raj Jewelers v. Dialuck Corp., 300 A.D.2d 124, 126 (1st Dep't 2002); Morrison Cohen Singer & Weinstein v. Ackerman, 280 A.D.2d 355, 356 (1st Dep't 2001); Moses & Singer v. S&S Mach. Corp., 251, A.D.2d 271 (1st Dep't 1998); Reid & Priest v. Realty Asset Group, 250 A.D.2d 380 (1st Dep't 1998).

Defendants contend that payment was conditioned on closing a

9]

particular transaction involving non-party investors. The terms of the letter embodying the agreement of August 27, 2008, however, do not so provide. Caspi's email also does not condition payment to plaintiff on closing the transaction, but merely refers to it in explaining the delay in payment. Nor does Caspi deny receiving plaintiff's invoices or that they were sent to the correct address; he does not even claim anyone objected to them. While plaintiff conceded at oral argument that the complaint claims no account stated against Caspi, defendants fail to raise factual issues regarding an underlying relationship between plaintiff and Blackstar Development or any of the elements necessary for an account stated claim against the corporation. Risk Mgt., Planning Group, Inc. v. Cabrini Med. Ctr., 63 A.D.3d 421 (1st Dep't 2009). See Unclaimed Prop. Recovery Serv., Inc. v. UBS Paine Webber Inc., 58 A.D.3d 526; Ryan Graphics, Inc. v. Bailin, 39 A.D.3d 249, 251 (1st Dep't 2007).

C. Piercing the Corporate Veil

Plaintiff claims Spahr is liable for Cornerstone Hospitality Advisors' actions and Caspi for Blackstar Development's actions. The doctrine of piercing the corporate veil applies to LLCs. Matias v. Mondo Props. LLC, 43 A.D.3d at 368; Retropolis, Inc. v. 14th St. Dev. LLC, 17 A.D.3d 209, 210 (1st Dep't 2005). To hold the individual defendants liable for actions of an LLC or a corporation, plaintiff must show that, as a member or a manager or as a shareholder or an officer, they completely dominated the

LLC or corporation, abusing the privilege of doing business under the corporate form, to commit a wrong or injustice injuring plaintiff. East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc., 16 N.Y.3d 775, 776 (2011); Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d 135, 142 (1993); Stewart Tit. Ins. Co. v. Liberty Tit. Agency, LLC, 83 A.D.3d 532, 533 (1st Dep't 2011); Fantazia Intl. Corp. v. CPL Furs N.Y., Inc., 67 A.D.3d 511, 512 (1st Dep't 2009).

Plaintiff fails to point out any factors indicating misuse of the corporate form. Morris v. New York State Dept. of Taxation & Fin., 82 N.Y.2d at 143-44; Do Gooder Prods., Inc. v. American Jewish Theatre, Inc., 66 A.D.3d 527, 528 (1st Dep't 2009). See Shisgal v. Brown, 21 A.D.3d 845, 848 (1st Dep't 2005). Even had plaintiff demonstrated such factors, to pierce the corporate veil plaintiff must demonstrate further that that misuse involved the individual defendants availing themselves of the LLC or corporation as a vehicle for their own personal business. Do Gooder Prods., Inc. v. American Jewish Theatre, Inc., 66 A.D.3d at 528; Shisgal v. Brown, 21 A.D.3d at 848; Brito v. DILP Corp., 282 A.D.2d 320, 321 (1st Dep't 2001); Shimamoto v. S&F Warehouses, 257 A.D.2d 334, 240 (1st Dep't 1999).

Plaintiff's only claim of wrongdoing is that Spahr fraudulently executed the contract on Blackstar Development's behalf when he lacked authority to do so. Yet the evidence demonstrates that Spahr signed on Cornerstone Hospitality Advisors' behalf, not Blackstar Development's behalf. Neither do

[* 11]

Spahr's instructions to send invoices to Blackstar Development, with which plaintiff simply complied, without questioning or requiring proof of his authority for such an instruction, undermine the undisputed evidence that Spahr signed the contract on Cornerstone Hospitality Advisors' behalf.

This plain evidence of the entity Spahr was contracting for renders any reliance by plaintiff on Spahr's representations of authority to bind Blackstar Development both unreasonable and inconsequential. The lack of reasonable and detrimental reliance in turn defeats any claim of Spahr's fraud. Arfa v. Zamir, 76 A.D.3d 56, 59 (1st Dep't 2010); Leslie Dick Worldwide, Ltd. v. Macklowe Props., Inc., 50 A.D.3d 596, 597 (1st Dep't 2008); Buechner v. Avery, 38 A.D.3d 443 (1st Dep't 2007); Water St. Leasehold LLC v. Deliotte & Touche LLP, 19 A.D.3d 183, 185 (1st Dep't 2005). Without support for fraudulent conduct, the sole basis for plaintiff's claim of piercing the corporate veil fails. Do Gooder Prods., Inc. v. American Jewish Theatre, Inc., 66 A.D.3d at 528; Morningside Fuel Corp. v. Associated Fuel Oil, Inc., 34 A.D.3d 299 (1st Dep't 2006); Sheridan Broadcasting Corp. v. Small, 19 A.D.3d 331, 332 (1st Dep't 2005). See Horizon Inc. v. Wolkowicki, 55 A.D.3d 337, 338 (1st Dep't 2008); Teachers Ins. Annuity Assn. of Am. v. Cohen's Fashion Opt. of 485 Lexington Ave., Inc., 45 A.D.3d 317, 318 (1st Dep't 2007).

IV. CONCLUSION

For the above reasons, the court grants plaintiff's motion for summary judgment on its first claim, for breach of contract

12]

against defendant Cornerstone Hospitality Advisors, and on its tenth claim, for an account stated against defendant Blackstar Development, Inc., but denies the remainder of plaintiff's motion. The court also grants defendants' cross-motion for summary judgment dismissing plaintiff's third, fourth, and fifth claims, for breach of contract against defendants Spahr and Caspi. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order.

DATED: August 2, 2011

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

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NEW YORK
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