

**Tri-Rail Constr. Corp v J.V. Appelbaum Constr.
Corp.**

2011 NY Slip Op 33253(U)

June 20, 2011

Supreme Court, Queens County

Docket Number: 6151/02

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

TRI-RAIL CONSTRUCTION CORP.,

Plaintiff,

-against-

J.V. APPELBAUM CONSTRUCTION CORP.,
et al.,

Defendants.

J.V. APPELBAUM CONSTRUCTION CORP.,
Third-Party Plaintiff,

-against-

CHARLES N. VENTIMIGLIA and CHARLES N.
VENTIMIGLIA, as Executor of the Estate
of NATE VENTIMIGLIA, Deceased.

Third-Party Defendants.

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Upon the foregoing papers it is ordered that this motion by defendants, J.V. Applebaum Construction ("JVA Construction"), Jack Applebaum a/k/a Jack Applebaum and Valerie Applebaum for an order granting partial summary judgment dismissing plaintiff, Tri-Rail Construction Corp.'s ("Tri-Rail") first, second, fourth, fifth, seventh, eighth, tenth, eleventh, thirteenth, fourteenth and sixteenth causes of action is hereby decided as follows:

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk*

Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

At the outset, the Court notes that the parties agree that the first cause of action seeking foreclosure on a mechanic's lien has already been dismissed by an Order of the Court dated July 7, 2003 and as such, the first cause of action is no longer viable. Accordingly, partial summary judgment is granted on the first cause of action.

Moving defendants established a prima facie case that there are no triable issues of fact with regard to plaintiff's second, fifth, eighth, eleventh and fourteenth causes of action for conversion of trust funds pursuant to New York Lien Law § 77. In support of this branch of the motion, moving defendants submit, inter alia, an affidavit of defendant Jack Applebaum, wherein he avers that: he is the president and sole shareholder of corporate defendant, JVA Construction, JVA Construction has performed construction services on various public improvement projects in the New York metropolitan area, from 1996 to 2000, JVA Construction performed five construction contracts on the City of New York for various City and State agencies, JVA Construction and the plaintiff executed "consulting agreements" with respect to four of the five projects, under these consulting agreements, plaintiff agreed to perform administrative and managerial services regarding each of the projects, such as preparing requisitions, attending meetings and monitoring the work

performed by JVA Construction, plaintiff did not agree to perform any of JVA's contract work, and never performed or provided any construction work for or on behalf of JVA Construction with regard to any of the projects, the sole purpose of the consulting agreements was to memorialize the understanding that he had with Nate Ventimiglia, the father of plaintiff's president, Charles N. Ventimiglia, Nate Ventimiglia had provided and agreed to continue to provide office management and administrative services for JVA's construction projects, Nate Ventimiglia never performed any contract work or furnished any labor or materials for the projects, and never acted as subcontractor on any of JVA Construction's projects, plaintiff did not provide any additional services under the consulting agreements other than the administrative and managerial services performed by Nate Ventimiglia, JVA Construction and plaintiff did not enter into a consulting agreement regarding the Jay Street Project, Nate Ventimiglia was paid for any administrative and managerial services her performed on that project under a separate understanding that they had reached, the four consulting agreements executed by the parties, do not mention or call for any subcontract work or services and purposely excluded the terms "subcontract" and "Subcontract Agreement", the consulting agreements specify the managerial and administrative services that were to be furnished by Nate Ventimiglia, as a consultant, and do not call for the performance of any subcontract work, none of the four consulting agreements provides for the performance of any of JVA's Construction contract work; and four written consulting agreements executed by the parties.

Under Lien Law § 2(10) a "Subcontractor" is defined as a person who enters into a contract with a contractor and/or with a subcontractor on an improvement, and agrees to "perform his contract or any part thereof". Lien Law § 77(1) provides that trust may be enforced by the holder of any trust claim, which is defined under Lien Law § 71(2) (a) as the "claims of subcontractors, architects, engineers, surveyors, laborers, and materialmen". Defendants established that plaintiff is not owed any payments listed in Lien Law § 71(2). The consulting agreements, entered into between JVA Construction and the plaintiff do not call for the performance of JVA's Construction contract work or any part of its contract work, but, rather, provide for administrative and managerial consulting services that are not encompassed within the definition of a subcontractor under Lien Law § 2(10). As a result, plaintiff does not hold, nor does it have any interest in any lien law trust claim as required under Lien Law § 71(2) and § 77(1). Defendants established that plaintiff cannot maintain a trust fund conversion action with regard to any of the managerial and

administrative consulting services Nate Ventimiglia provided to JVA Construction.

Additionally, moving defendants established that plaintiff's claims for conversion of trust funds with regard to the Jay Street Project and the 76th and 78th Precincts Projects (the eighth and fourteenth causes of action) are also barred by the applicable one-year statute of limitations. Pursuant to the affidavit of defendant Jack Applebaum, the work on the Jay Street Project was completed on January 14, 2000, the 76th and 78th Precincts Project was completed on August 29, 1999, and plaintiff did not commence this action until March 7, 2002, more than one year after the completion of these projects and more than one year after final payment became due under other Consulting Agreements pertaining to the projects. As such, both of these claims are time-barred under Lien Law § 77(2), which section governs action for the conversion of trust funds and provides, in relevant part, "No such action shall be maintainable if commenced more than one year after the completion of such improvement or in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later . . ."

Moving defendants established a prima facie case that there are no material issues of fact with regards to the fourth, seventh, tenth, thirteenth, and sixteenth causes of action to pierce the corporate veil of JVA Construction and hold defendants Jack Applebaum and Valerie Werner Applebaum personally liable for the alleged diversion of trust fund proceeds paid to JVA Construction. In the Amended Complaint, plaintiff alleges that defendant Valerie Applebaum: "wrongfully and unlawfully disregarded the separateness and independence of JVA Construction; treated JVA Construction as if it were [her] alter ego; failed to carry out the formalities of a corporation . . ., diverted, converted, misapplied and spent JVA Construction's assets and trust funds . . .and commingled JVA Construction's corporate assets and trust funds. . ." "To successfully pierce the corporate veil, a third-party must establish that : '(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'" (*Old Republic National Title Ins. Co. v. Moskowitz*, 297 AD2d 724 [2d Dept 2002][internal citations omitted]). Defendants established that plaintiff has not alleged and cannot establish the necessary elements of such claims, as plaintiff does not hold any trust fund claims and does not have any standing to maintain a trust diversion claim under Lien Law § 77(1). In support of this branch of the motion,

moving defendants submit, inter alia, the affidavit of defendant, Jack Applebaum, wherein he avers that: there is no allegation or evidence that he disregarded the corporate form to commit a fraud or other wrong against plaintiff; and the affidavit of defendant, Valerie Appelbaum, wherein she avers that: she is not and has never been an officer, director, shareholder or employee of JVA Construction, she has not had any involvement with any transaction or agreement with plaintiff, or with any of the business or financial affairs of JVA Construction, she has never had any authority to, nor did she in fact, sign checks or make any withdrawals from JVA Construction Accounts, she never had a JVA Construction corporate credit card, and has never charged any materials or services on JVA Construction's accounts, and she did not "wrongfully, unlawfully or fraudulently divert" funds, or "cause JVA Construction to divert trust funds". As moving defendants have established that Valerie Applebaum has never been an officer, director or shareholder of JVA Construction, she was not authorized to, and did not, issue checks on behalf of JVA Construction, and had no involvement with JVA Construction's finances, assets or business affairs, there is no basis to pierce the corporate veil as against her. Moving defendants established that there is no basis to pierce the corporate veil as against defendant Jack Applebaum, in that plaintiff alleges only that JVA Construction's office was located in Jack Applebaum's home, that Jack Applebaum never held corporate meetings, and that JVA Construction paid some of Jack Applebaum's credit card expenses, and such allegations are insufficient, as a matter of law, to pierce the corporate veil as against him (*Cotazino v. Basil Development Corporation*, 167 AD2d 632 [3d Dept 1990]). Furthermore, moving defendants established that while plaintiff alleges that Jack Appelbaum used JVA Construction's assets for his personal use and commingled JVA Construction's assets with his own, plaintiff fails to establish that the value of such assets exceeds what would be fair compensation for Jack Appelbaum's services to JVA Construction (see, *Ravens Metal Products, Inc., v. McGann*, 267 AD2d 527 [3d Dept 1999]). As such, a prima facie case has been made that Jack Applebaum did not disregard the corporate form to commit a fraud or other wrong against the plaintiff. Defendants established a prima facie case that there are no material issues of fact with regards to the fourth, seventh, tenth, thirteenth, and sixteenth causes of action to pierce the corporate veil of JVA Construction and hold defendants Jack Applebaum and Valerie Werner Applebaum personally liable for the alleged diversion of trust fund proceeds paid to JVA Construction.

In opposition, plaintiff and counterclaim defendants Charles Ventimiglia and the Estate of Nate Ventimiglia present triable

issues of fact. Plaintiff and counterclaim defendants Charles Ventimiglia and the Estate of Nate Ventimiglia present, inter alia, the affidavit of Charles N. Ventimiglia, wherein he avers that: he is the president of plaintiff, Tri-Rail Construction Inc. ("Tri-Rail"), upon information and belief Valerie Applebaum acted as an officer and was a signatory on one of more of JVA Construction's trust bank account(s), there is documentary evidence that she wrongfully received (and in some cases drew) approximately 121 checks drawn from the proceeds of Lien Law trust funds that were on deposit in JVA Construction's bank account, even though she performed absolutely no work, labor, or services on JVA Construction's behalf, or in furtherance of the construction projects, it is not true that Tri-Rail was JVA Construction's consultant and provided only administrative services on behalf of the projects, Tri-Rail was on each job every day and not only supervised the projects but provided JVA Construction with almost all of the labor and ordered most of the materials, Tri-Rail's own laborers were provided to JVA Construction and Tri-Rail did all of the hands on day to day construction work on JVA Construction's behalf, in all but one instance, all of the subcontractors had been fully paid with the exception of Tri-Rail, Tri-Rail was not merely JVA's consultant, Tri-Rail provided the labor and management of each and every job, virtually of the labor was provided to JVA Construction by Tri-Rail, Jack Applebaum was rarely on the job sites and had little direct input in the projects' day to day activities, Tri-Rail was an actual subcontractor that performed work on the various construction projects, all of the written agreements provided that JVA Construction would essentially handle the clerical operations supporting the projects, all of the written contracts between JVA Construction and Tri-Rail provided that Tri-Rail would handle all of the day-to-day management, supervision, operation and control of the job including "coordination, supervision, hiring workers, scheduling the work and services of all the laborers, subcontracts, materialmen, suppliers and/or consultants furnishing any work, services, material or equipment on behalf of JVA for the project", the first two pages of each contract list, Tri-Rail's duties and the fact that JVA subcontracted to Tri-Rail most of its construction related responsibilities while JVA Construction's duties were of a clerical nature, Tri-Rail was JVA Construction's subcontractor, in the summer of 2001, JVA Construction submitted to an audit in which Tri-Rail's accountant, Larry Krevat, participated, the audit revealed that JVA Construction, Jack Appelbaum and Valerie Applebaum had looted the proceeds (trust funds) of all the construction projects they had worked on together and JVA Construction was essentially left as an empty shell, Jack and Valerie Applebaum's money was used to subsidize their extravagant

personal expenses, the Lien Law provides that all subcontractors must first be paid before the contractor diverts money to any others, he is personally familiar with Valerie Appelbaum's handwriting and many of the 121 checks were made payable to her in her own hand; the affidavit of Larry Krevat, who avers that: he has been the accountant for Tri-Rail since 1996, JVA Construction and Tri-Rail were paid "on account" payments, however, JVA Construction took far more than it paid to Tri-Rail and when all of the projects were completed, JVA refused to pay Tri-Rail the difference and Tri-Rail was never fully paid, in the year 2000, he conducted an audit of all of JVA Construction's payments that JVA Construction received for each completed project and each project then in existence, defendant's "job cost breakdown was woefully incomplete, unprofessional and omitted vital information, in reviewing bank statements and cancelled checks, he observed that JVA Construction did not establish a separate bank account for each of the various projects that it was working on with Tri-Rail as its construction manager, instead all of the income from those construction projects was co-mingled, he observed that over 120 JVA Construction's checks were made payable to Valerie Applebaum, he observed that many checks were made payable directly to defendants' children, he saw several checks drawn on JVA Construction's bank account that appeared to have been drawn by Jack Applebaum, made payable to Valerie Applebaum, and were signed and endorsed by Valerie, Jack Applebaum admitted to him that the checks were unrelated to the construction projects in which Tri-Rail served as JVA Construction's construction manager, and Jack Applebaum and his family received a total of about \$1,032,753.00 and Tri-Rail received only about \$316,981.00 even though they were each entitled to an equal share; and the examination before trial transcripts of three (3) workers who worked on one or more of the construction projects, Bernard Minnax, Frank Napoli, and Peter Lamacchia, who testified that it was Tri-Rail that was on the job and running the job as the construction manager (and not as a consultant) on a daily basis and Jack Appelbaum had little input in the performance of the projects.

Plaintiff also established that its eighth and fourteenth causes of action alleging conversion of trust funds are not barred by the statute of limitations. Plaintiff maintains that payment was not due until JVA Construction accounted for all of the income and expenses on the projects, except for JVA Construction and Tr-Rail's compensation. The payroll report submitted by defendant with respect to the eighth cause of action and a letter from NYC with respect to the fourteenth cause of action do not indicate when Tri-Rail should have been paid. Also, JVA Construction made payments to Tri-Rail and the last

payment received by Tri-Rail was \$5,000.00 issued by a JVA Construction check dated June 9, 2001. Plaintiff commenced the action well within one year of receiving the last check dated June 9, 2001. Plaintiff maintains that alternatively, Tri-Rails payments for the several projects became due only upon completion of JVA Construction's final accounting of the proceeds and payment to the other subcontractors and materialmen, however no such accounting has been performed by JVA Construction to date, and thus, the final payment has technically not yet become due.

In opposition, plaintiff and counterclaim defendants Charles Ventimiglia and the Estate of Nate Ventimiglia raised triable issues of fact, regarding, inter alia, whether Tri-Rail was a subcontractor of JVA Construction, whether the corporate veil can be pierced as against Jack Applebaum, and the nature of Valerie Applebaum's relationship with JVA Construction. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, the motion for partial summary judgment is denied with regards to the second, fourth, fifth, seventh, eighth, tenth, eleventh, thirteenth, fourteenth and sixteenth causes of action and granted with regards to the first cause of action.

This constitutes the decision and order of the Court.

Dated: June 20, 2011

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Howard G. Lane, J.S.C.