

Bullrock Concrete Corp. v Mario's Constr. Inc
2012 NY Slip Op 31232(U)
April 2, 2012
Sup Ct, Nassau County
Docket Number: 002040/11
Judge: F. Dana Winslow
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SHORT FORM ORDER**SUPREME COURT - STATE OF NEW YORK****Present:****HON. F. DANA WINSLOW,****Justice****BULLROCK CONCRETE CORP.,****TRIAL/IAS, PART 3
NASSAU COUNTY****Plaintiff,****MOTION DATE: 2/6/12****-against-****MOTION SEQ. NO.: 002
INDEX NO.: 002040/11**

**MARIO'S CONSTRUCTION INC., VAR HOME
IMPROVEMENTS INC., VAR HOME
IMPROVEMENTS, ANTHONY VAGLICA and
PETRINA VAGLICA,
Defendants.**

The following papers read on this motion (numbered 1):

Notice of Motion.....1

Pursuant to this Part's Rule, namely I(B), the Court automatically adjourns all motions that are submitted without opposition for one month, to determine whether or not there was either an administrative delay or excusable neglect. Such adjournment is made without prejudice to the moving party to have the merits of such an adjournment considered in the event that there is a subsequent submission.

Plaintiff commenced this action by filing the Summons and Complaint on February 10, 2011. The Complaint asserts causes of action for a sum certain under the **Debtor and Creditor Law**, breach of contract, failure to pay for goods and services, quantum meruit, unjust enrichment, and contains allegations of personal liability on the part of defendant ANTHONY VAGLICA ("A. VAGLICA"), owner of MARIO'S CONSTRUCTION INC. ("MARIO'S"), VAR HOME IMPROVEMENTS and VAR HOME IMPROVEMENTS, INC. (collectively, the "VAR defendants"). Plaintiff seeks damages in the amount of \$48,418.32 against the VAR defendants and A. VAGLICA individually, to collect on a Judgment obtained against MARIO'S. Plaintiff also seeks damages in the amount of \$14,295 against A. VAGLICA and his wife PETRINA VAGLICA ("P. VAGLICA") for work done on their residence for breach of contract, unjust enrichment and quantum meruit. By Order, dated September 13, 2011 (the "Prior Order"), the Court denied plaintiff's motion for a default judgment with leave to renew

pursuant to **CPLR §3215** on the grounds that plaintiff failed to include a copy of the judgment reflecting plaintiff's claim for \$48,418.32, or any agreements or contracts with respect to plaintiff's claim for \$14,295 arising out of work done by plaintiff on the residence of A. VAGLICA and P. VAGLICA. Plaintiff now seeks to renew its motion for default judgment. As adjourned, the motion is submitted without opposition and is determined as follows.

The Prior Order determined that plaintiff presented proof of service of the summons and complaint, as well as demonstrated satisfaction of the additional notice requirement set forth in **CPLR §3215(g)(3) and (4)**. Plaintiff also submitted an affirmation of plaintiff's counsel as to the failure of defendants to appear or answer.

With respects to the merits of its claim, in support of the prior motion, plaintiff proffered the affidavit of Alan Silverman ("Silverman"), corporate officer of plaintiff, sworn to on May 12, 2011, which set forth the facts constituting the claim, and the amount due. In support of the within motion for renewal, plaintiff proffers an additional affidavit of Silverman, sworn to on November 30, 2011.

Plaintiff's first and second causes of action to collect on the Judgment

The underlying facts, according to plaintiff, are as follows: In 2005, plaintiff commenced an action against MARIO'S seeking payment for concrete work plaintiff provided to MARIO'S. Plaintiff proffers (i) a stipulation, dated March 15, 2007, whereby MARIO'S consented to the entry of judgment in the amount of \$39,260, together with interest, costs and disbursements; and (ii) a judgment entered in the County Clerk on April 13, 2007 in favor of plaintiff and against MARIO'S in the amount of \$48,418.32 (the "Judgment").

In plaintiff's first cause of action herein, plaintiff seeks to collect the Judgment against the VAR defendants alleging that after plaintiff placed MARIO'S account into collection, MARIO'S ceased conducting business, closed its bank accounts, and transferred its business, accounts, and interest in equipment and vehicles to the VAR defendants for no consideration with the intent to hinder, delay and defraud plaintiff as a creditor of MARIO'S in violation of **Debtor and Creditor Law**. The Court notes that plaintiff fails to specify which sections of the **Debtor and Creditor Law** the VAR defendants and A. VAGLICA allegedly violated.

Even if plaintiff had properly alleged causes of action under **DCL §§273, 275 or 276**, the Court finds that plaintiff has not offered sufficient factual proof. A conveyance is fraudulent if it is made with actual intent to "hinder, delay or defraud either present or

future creditors". **DCL §276**. When such intent is shown, no inquiry into the adequacy of consideration or solvency of the transferor is required. **Grumman Aerospace Corp. v. Rice**, 199 AD2d 365; **Wall Street Assoc. v. Brodsky**, 257 AD2d 526. Constructive fraud, on the other hand, requires no proof of intent to defraud. A conveyance is deemed fraudulent if it is made without fair consideration and either (i) the transferor is insolvent at the time of the transfer or will thereby be rendered insolvent [**DCL §273**] or (ii) at the time of transfer, the transferor intends or believes that he will become insolvent [**DCL §275**].

The Court finds that plaintiff fails to provide a factual basis for its allegations of fraudulent transfer other than Silverman's conclusory assertions in his affidavits that he was informed by A. VAGLICA that A. VAGLICA had opened bank accounts under various business names because one of his business accounts was frozen by a creditor of MARIO'S due to his transfer of trucks and other equipment owned by MARIO'S to his new businesses. This assertion is insufficient to establish that fraudulent transfers were made to the VAR defendants. The checks made out to plaintiff and issued by VAR HOME IMPROVEMENTS, INC., is not sufficient proof of a fraudulent transfer between MARIO'S and the VAR defendants.

Plaintiff offers no support for its second cause of action which seeks to recover the Judgment against A. VAGLICA based on the doctrine of piercing the corporate veil. On the record presented, the Court cannot impose personal liability upon A. VAGLICA. "While the law permits the incorporation of a business for the very purpose of escaping personal liability ... equity will intervene to pierce the corporate veil and permit the imposition of personal liability in order to avoid fraud or injustice" **Shkolnik v. Krutoy**, 65 AD3d 1214, 1215, *quoting Ventresca Realty Corp. v. Houlihan*, 28 AD3d 537 [internal quotation marks and citations omitted]. "A party seeking to pierce the corporate veil 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 the plaintiff's injury" **Millennium Constr., LLC v. Loupolover**, 44 AD3d 1016, *quoting Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141. "[P]recedent is clear that courts will pierce the corporate veil only to prevent fraud, illegality or to achieve equity. This is true even in situations ... where the corporation is controlled or dominated by a single shareholder" **Treeline Mineola, LLC v. Berg**, 21 AD3d 1028, 1029 [internal citation omitted].

In the case at bar, plaintiff alleges that A. VAGLICA had complete dominion and control over MARIO'S and the VAR defendants, disregarded the separate identity of the VAR defendants, undercapitalized said defendants and created, operated, maintained said

defendants for the purpose of and with the intent of defrauding its customers [Complaint ¶¶ 29 -36]. The only evidence in support of this claim are the assertions by Silverman which may indicate that A. VAGLICA had control over the corporate defendants, but there is no evidence that he used his control over the corporate defendants to defraud his customers, or otherwise to commit an illegality or injustice against them. In any event, to the extent that plaintiff's second cause of action only seeks to pierce the corporate veil, the Court notes that NY "does not recognize a separate cause of action to pierce the corporate veil." **Hart v. Jassem**, 43 AD3d 997, 998 *quoting* **Fiber Consultants, Inc. v. Fiber Optek Interconnect Corp.**, 15 AD3d 528, 529.

Plaintiff's causes of action for work completed at the residence of A. Vaglica & P. Vaglica

Plaintiff also alleges that between December 2, 2009 and June 10, 2010, plaintiff at the request of A. VAGLICA, provided materials and labor in the form of concrete work at the VAGLICA residence known as 3 Gerard Ave., New Hyde Park, NY 11040 (the "Gerard residence"). Plaintiff claims that A. VAGLICA paid plaintiff \$19,600 toward the agreed price of \$33,895 leaving an unpaid balance of \$14,295. Plaintiff asserts causes of action against A. VAGLICA for breach of contract, and against A. VAGLICA and P. VAGLICA for unjust enrichment and quantum meruit. The only evidence in support of these claims is a work order on plaintiff's letterhead, covering work on the Gerard residence setting forth its address as the project location and naming A. VAGLICA in the contact. Plaintiff fails to proffer a signed contract. The affidavit of Silverman attaching various checks purportedly evidencing partial payment to plaintiff are issued by VAR HOME IMPROVEMENTS, INC., not A. VAGLICA, and the signatures on the checks are illegible.

The Court recognizes that a defendant who defaults is deemed to have admitted all of the factual allegations contained in the complaint and any inferences to be drawn from them. **Woodson v. Mendon Leasing Corp.**, 100 NY2d 62, 71; **Lius Group International Endwell, LLC, v. HFS International, Inc.**, 2012 WL 662177. Nonetheless, the plaintiff must allege enough facts, based upon his or her own personal observations, to permit a determination that a viable cause of action exists. **Id.** Here, that burden has not been met.

Based upon the foregoing, it is

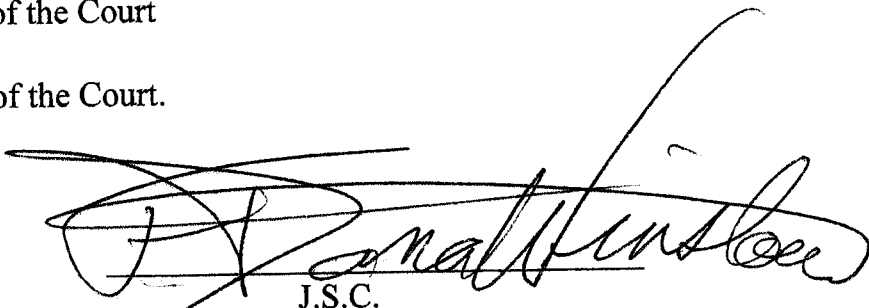
ORDERED, that plaintiff's motion for a default judgment pursuant to **CPLR §3215** is **denied without prejudice**. Plaintiff shall serve a copy of this Order as follows: (i) upon all individual defendants pursuant to **CPLR §308(1)** or **(2)**, and if pursuant to

subsection (2), the affidavit of service shall fully identify the person of suitable age and discretion, with respect to his or her full name, description and relationship to the defendant; and (ii) upon all corporate defendants, pursuant to CPLR §311(a)(1), except that service shall not be made upon corporate defendants by delivery to the Secretary of State or a registered agent. Plaintiff shall file proof of such service with any subsequent application to the Court; and it is further

ORDERED, that all parties in this action, by their counsel if represented, shall appear for a conference on **May 22, 2012 at 11:00 a.m.** in Part 3, Supreme Court, 100 Supreme Court Drive, Mineola New York. The parties or their counsel are directed to contact the Court in the afternoon of the business day immediately preceding the conference date, or any duly authorized adjournment thereof, to confirm the appearance of the parties and the availability of the Court

This constitutes the Order of the Court.

Dated: April 2, 2012



J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**