

**Crescent Elec. Supply Co., Inc. of N.Y. v MF Elec.
Serv. Co., Inc.**

2012 NY Slip Op 33985(U)

July 27, 2012

Supreme Court, Bronx County

Docket Number: Index No. 21209/2011E

Judge: Alexander W. Hunter, Jr.

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA23A**

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Crescent Electric Supply Company, Inc. of New York,

Index No.: 21209/2011E

Plaintiff,

Decision and Order

-against-

MF Electrical Service Co., Inc.,

Defendant.

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HON. ALEXANDER W. HUNTER, JR.

The motion by plaintiff for an order pursuant to C.P.L.R. §3025(b) granting leave to file a supplemental summons and amended complaint to add Albert Faella and causes of action against him, is denied. The request to add a cause of action for violation of trust fund against defendant MF Electrical Service Co., Inc., only is granted.

In this cause of action for breach of contract, plaintiff seeks a judgment in the amount of \$25,677.64 plus agreed upon interest at the rate of 1.5% per month from May 31, 2011. Plaintiff further alleges causes of action for unjust enrichment and breach of contract for goods sold and delivered and for reasonable attorney’s fees and costs.

Plaintiff previously filed a summary judgment motion which was denied by this court in a decision and order dated December 27, 2011. Plaintiff contends that in opposition to the summary judgment motion, Albert Faella from defendant MF Electrical Service Co., Inc., submitted an affidavit admitting to defrauding plaintiff. Specifically, plaintiff asserts that in his affidavit, at paragraphs 4 and 5, Mr. Faella stated that he had no intention of being bound by the written agreement between plaintiff and defendant concerning the goods he was to order and receive on credit. Plaintiff alleges that Mr. Faella signed the written agreement and that plaintiff relied upon said agreement when issuing goods on credit to defendant. As such, plaintiff argues that Mr. Faella fraudulently induced plaintiff to enter into the written agreement since had no intention to be bound by its terms at the time he signed it.

Plaintiff contends “upon information and belief” that Mr. Faella is the sole owner of defendant and has complete control of defendant. His sworn admissions show that he is using defendant’s corporate form to insulate himself from personal liability for the fraud he committed against plaintiff. As such, plaintiff seeks to amend the complaint to add Mr. Faella as a defendant and assert causes of action against him for fraud, unjust enrichment, fraudulent inducement, piercing the corporate veil and violation of trust fund under New York’s Lien Law section 77. Plaintiff further seeks to add a cause of action against defendant for violation of trust fund.

Defendant opposes the motion and submits an affidavit from Mr. Faella wherein he states that he completed an application on behalf of defendant to open a credit account with plaintiff. He states that he did not realize at that time that it was a contract as it stated “Application for Open Account Privilege” and he thought it was a credit application for the purpose of granting defendant the credit line it requested. Mr. Faella states that nowhere in the application does it

indicate that any individual is guaranteeing the credit line for which defendant was applying. He claims that he signed the application in his capacity as president of defendant. Mr. Faella claims that he began doing business with plaintiff on credit. However, in mid-2010 due to the country-wide slow down in real estate construction, defendant had difficulty paying certain bills from plaintiff. At the same time, he began personally reviewing past and current bills submitted by plaintiff and noticed that defendant was being charged for items that were never ordered and defendant was charged taxes where taxes were not payable. Moreover, items were being charged at incorrect prices and defendant was double billed for certain invoices and was charged for items it never received.

Mr. Faella claims that he discussed billing errors with plaintiff's sales representative, Scott Reifscheider, who agreed that the sum owed was \$20,574.40. Scott Reifscheider was subsequently fired and plaintiff's management refused to reduce the agreement to writing. Defendant then placed its last order with plaintiff on November 10, 2010 and further agreed to enter into a payment plan to pay the arrears. However, plaintiff refused to agree to terms for a payment plan and insisted on defendant paying the entire incorrect total.

Defendant argues that venue was improperly placed in Bronx County as he does not reside in the Bronx. Moreover, Mr. Faella claims that even though C.P.L.R. §3025 should be liberally applied, it is not automatic as plaintiff implies and plaintiff has failed to allege a cause of action against him personally. Defendant further asserts that denial of leave to serve a supplemental pleading is appropriate when the new material is clearly insufficient to state a cause of action. Defendant argues that plaintiff's claim that the application he signed implicitly makes him liable as guarantor is erroneous in that NYS General Obligations Law requires that any guaranty be clearly in writing. Since there is no evidence that such a written guaranty exists, then there is no valid cause of action against Mr. Faella.

Mr. Faella further contends that plaintiff is late in requesting the amendment to the complaint as no new information has been presented for which plaintiff is basing his new claims. Plaintiff has allowed approximately one year to pass since filing its initial summons and complaint on approximately July 1, 2011 and also made a motion for summary judgment before filing the instant motion. Therefore, the motion to amend is untimely.

Additionally, Mr. Faella states that the statements he made in his affidavit cannot be construed to mean that he intended to defraud plaintiff. He asserts that he did not realize the purpose of the agreement he signed and thought it was a mere credit application. He claims that nowhere in said affidavit did he express any intention to defraud plaintiff. Therefore, there can be no fraud if there is no falsehood or misrepresentation.

Mr. Faella further contends that plaintiff's arguments with respect to piercing the corporate veil to establish liability against him is capricious and unsupported. The allegation of fraud is unsupported by any evidence and, further, it takes substantially more than alleging corporate control to pierce a corporate veil. Defendant argues that in the case at bar, the parties' accounts are in dispute, no judgment has been established in plaintiff's favor and there is no claim in equity that plaintiff will be harmed if Mr. Faella is not personally included in the lawsuit.

Finally, defendant asserts that the claims pursuant to Section 77 of the Lien Law are

subject to a one year statute of limitations. Since the last purchase made by defendant was on September 29, 2010, the invoices became payable in October 2010 and the statute of limitations expired by November 2011. Therefore, that cause of action against Mr. Faella and defendant cannot be added.

In reply, plaintiff asserts that there are no causes of action against Mr. Faella based on a personal guaranty as defendant contends. Plaintiff reiterates that it seeks to add Mr. Faella as a defendant based upon his fraud. Plaintiff contends that all causes of action against Mr. Faella are sufficiently pled in the proposed amended complaint. Additionally, since defendant does not argue that it is surprised or prejudiced by the amendments, then defendant has not met the standard for opposing a motion under C.P.L.R. §3025(b). Plaintiff further argues that the causes of action under Lien Law section 77 are sufficient in that the projects to which the goods were delivered have not yet been completed and payment was due by May 31, 2011. Therefore, those causes of action are timely. Finally, plaintiff contends that defendant's assertion that he should not be liable for his fraud based upon not having read the contract, has no merit. Plaintiff claims that it is clear that Mr. Faella signed the agreement and had no intention to have defendant abide by the terms contained therein.

C.P.L.R. §3025 states that, "a party may amend his pleadings...at any time by leave of court...leave shall be freely given upon such terms as may be just." This leave shall be granted, "absent prejudice or surprise resulting from the delay." **Davis & Davis, P.C. v. Morson**, 286 A.D.2d 584 (1st Dept. 2001). "The matter of allowing an amendment is committed 'almost entirely to the court's discretion to be determined on a sui generis basis'..." **Murray v. City of New York**, 43 N.Y.2d 400, 404-405 (1977).

Courts have also determined that, "A motion to amend a pleading to add a claim that is patently without merit should be denied to avoid the possibility of needless litigation" (citations omitted). **General Motors Acceptance Corp. v. Shickler**, 96 A.D.2d 926 (2nd Dept. 1983). Moreover, in **Walker & Rosen, Inc. v. Pollack**, 101 A.D.2d 734 (1st Dept. 1984), the court stated that, "A motion for leave to amend calls upon the court to review the validity of any causes of action sought to be added" (citations omitted). **Id.** at 735. In **Board of Managers of Executive Plaza Condominium v. Jones**, 251 A.D.2d 89 (1st Dept. 1998), the court denied appellants motion to amend his pleadings for "lack of an evidentiary showing of merit and because the proposed amended pleading was not placed before the court until five months after the prior motion practice had been adjudicated" (citations omitted). **Id.** at 90.

In the case at bar, plaintiff failed to make an evidentiary showing of merit for its proposed amendments to the complaint and to add Mr. Faella as a defendant. Plaintiff contends that it seeks to add Mr. Faella as a defendant and add causes of action against him as a result of his admitted intent to defraud plaintiff. Specifically, plaintiff claims that Mr. Faella admitted in his affidavit that he had no intention of being bound by the terms of the written agreement he signed. However, a plain reading of Mr. Faella's affidavit does not support plaintiff's assertion. Nowhere in Mr. Faella's affidavit does he claim that he had no intention of abiding by the terms of the "Application for Open Account Privilege."

The fourth paragraph in Mr. Faella's affidavit to which plaintiff refers simply states that Mr. Faella did not realize that said agreement was a contract but rather, he thought it was a credit application. The fifth paragraph of his affidavit states that on the application, he indicated that

written purchase orders were required for all valid orders and that he required internet access to his account and monthly statements to be delivered. He received none of those services and no purchase orders were made or signed by authorized members of defendant. Those statements do not support plaintiff's assertion that Mr. Faella intended to defraud plaintiff. Since the only basis by which plaintiff seeks to add Mr. Faella as a party defendant and assert causes of action against him based upon fraud, unjust enrichment and violation of trust fund were the statements made in Mr. Faella's affidavit, the motion for leave to file a supplemental summons and amended complaint to add him as a direct defendant to assert those cause of action against him, is denied.

Additionally, plaintiff has not provided this court with any proof that would support its contention that Mr. Faella is using defendant corporation to insulate himself from personal liability for any fraud. Therefore, there is no reason to add a cause of action for piercing of the corporate veil. See, Matter of Morris v. New York State Department of Taxation and Finance, 82 N.Y.2d 135 (1993); Worthy v. New York City Housing Authority, 21 A.D.3d 284 (1st Dept. 2005).

Finally, the request to add a cause of action for violation of trust fund is granted solely as against defendant. The parties are in dispute as to the date when payment for the goods delivered became due. Therefore, that cause of action may be added as against defendant corporation. However, since the request to add Mr. Faella as a party defendant has been denied, the request to add that cause of action against him individually, is denied.

Movant is directed to serve a copy of this order with notice of entry upon defendant and file proof thereof with the clerk's office.

This constitutes the decision and order of the court.

Dated: July 27, 2012



J.S.C.

ALEXANDER W. HUNTER JR