

**Century Bldg. Materials, LLC v True Harbor Holding Corp.**

2013 NY Slip Op 31710(U)

July 17, 2013

Sup Ct, Suffolk County

Docket Number: 08-42442

Judge: Denise F. Molia

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INDEX No. 08-42442  
CAL No. 12-01694CO

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 1-29-13  
ADJ. DATE 3-1-13  
Mot. Seq. # 007 - MotD

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CENTURY BUILDING MATERIALS, LLC,	PINKS, ARBEIT & NEMETH, ESQS.
	Attorneys for Plaintiff
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- against -	
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TRUE HARBOR HOLDING CORP., PAUL ANIBOLI and JANE HAMBURGER,	JANE HAMBURGER, Pro Se
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Upon the following papers numbered 1 to 51 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 26 - 49; Replying Affidavits and supporting papers 50 - 51; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendants True Harbor Holding Corp. and Paul Aniboli for summary judgment dismissing the complaint against them is granted to the extent set forth herein, and is otherwise denied.

In 2001, Albert Ferrante, Vice President of plaintiff Century Building Materials, LLC, allegedly entered into an oral agreement with defendant Paul Aniboli for the purchase of building materials. According to Ferrante, Aniboli, an attorney and real estate developer, agreed to purchase all of the building materials used for various upcoming construction projects from Century Building Materials in exchange for a discount on the building materials used in the construction of single-family homes in a new residential development located south of Montauk Highway in West Islip, New York. Aniboli, who allegedly had a long-standing personal relationship with the family that owns Century Building Materials, was the majority shareholder of the owner and developer of the West Islip property, defendant True Harbor Holding Corp. Century Building Materials alleges that under the terms of the agreement with Aniboli, a credit in the amount of 5% of the cost of the building materials purchased by corporations owned by Aniboli would be

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applied to the cost of the building materials used in the construction of new homes at the West Islip property developed by True Harbor Holding Corp. Aniboli allegedly requested at a later date that the amount credited under the 5% discount be applied to the cost of the building materials for lot 7 and lot 14 of the residential development being built by True Harbor Holding Corp. It is noted that the new home constructed on lot 14 at the development is owned by Aniboli, who took title to the property in August 2001, and that the new home constructed on lot 7 was owned by defendant Jane Hamburger. Hamburger allegedly worked for a separate corporation that oversaw the construction of the True Harbor development in West Islip.

During the time period from 2001 through 2007, Aniboli allegedly executed Century Building Materials credit applications and agreements containing personal guarantees on behalf of various companies in which he had an ownership interest, namely Oak Creek Partners, LLC, Mat Bridge Holding Corp., Broadway Partners Development Group, LLC, and Bedford Realty Group, Inc. During that same time period, Century Building Materials allegedly delivered \$3,626,776 in building materials under an open account arrangement to various companies in which Aniboli had an ownership interest, including True Harbor Holding Corp., Sayville Development, Broadway Partners Development Group, and Bedford Realty Group, Inc. Century Building Materials alleges that more than \$300,000 of the total amount was for materials purchased in connection with the construction of the homes built for Aniboli and Hamburger, and that, while invoices were provided, no payments were made by defendants for such materials. Sometime in 2007, corporations controlled by Aniboli allegedly stopped making purchases from Century Building Materials. When Ferrante allegedly went to Aniboli's office in August 2008 seeking payment of the amount owed for the building materials delivered for lots 7 and 14 at the True Harbor development, Aniboli allegedly refused to pay for the materials and stated he never intended to pay for them.

Subsequently, on December 2, 2008, Century Building Materials commenced this action to recover the money allegedly owed for the building materials allegedly purchased by defendants in connection with the construction of the homes on lot 7 and lot 14 in the True Harbor development. The first cause of action is against True Harbor Holding Corp. and seeks to recover the sum of \$307,592 allegedly due for materials purchased on an open account. The second cause of action is against Aniboli, and seeks to recover the sum of \$206,061 on the legal theory that Aniboli was unjustly enriched by the failure to pay for the building materials supplied by Century Building Materials and used in the construction of his home on lot 14. More specifically, it alleges that Aniboli paid no consideration to True Harbor Holding Corp. for the building materials, and that he refused to pay Century Building Materials for such goods. The third cause of action asserts an unjust enrichment claim against Aniboli and Hamburger based on their alleged failure to pay for the building materials delivered to lot 7. The fourth and fifth causes of action seeks damages against Aniboli for fraud and for fraudulent transfer of the building materials supplied to True Harbor Holding Corp.

True Harbor Holding Corp. and Aniboli now move for summary judgment dismissing the complaint against them, arguing, among other things, that the causes of action alleging breach of contract and unjust enrichment are time barred, as the building materials used in connection with the construction of Aniboli's and Hamburger's houses in West Islip were delivered from December 2001 through May 2003. They argue an invoice for a delivery allegedly made to True Harbor Holding Corp. in September 2005 was, in fact, for building materials used in the construction of a house in the development for Joseph DiCioccio, a business associate of Aniboli and a minority shareholder of True Harbor Holding Corp, and that the amount owed under such invoice was paid in full by a corporation owned by DiCioccio. They also argue that the causes

of action alleging fraud fail to meet the pleading requirements of CPLR 3106 (b), and that there is no basis to hold Aniboli personally liable for the debt allegedly owed by True Harbor Holding Corp. Evidence submitted in support of the motion includes copies of the pleadings; an affidavit of Aniboli; transcripts of the deposition testimony of Ferrante, who appeared on behalf of Century Building Materials, and Aniboli; and copies of Century Building Materials invoices addressed to True Harbor Holding Corp.

Century Building Materials opposes the motion, arguing, in part, that the action is timely, as goods were purchased by and delivered to True Harbor Holding Corp. in September 2005, and that the breach did not occur until 2007, when corporations controlled by Aniboli stopped purchasing materials for construction projects. It also argues invoices show the materials delivered to lots 7 and 14, and that Aniboli testified at his deposition that he did not know whether or not the materials were paid for. In addition, Century Building Materials asserts the cause of action for fraud is timely, as it did not learn until 2007, when Aniboli allegedly advised Ferrante that he did not intend to pay for the building materials delivered to lots 7 and 14, and that Aniboli's deposition testimony raises a triable issue as to whether he "transferred the building materials to himself" with the fraudulent intent. It also asserts that the Court should pierce the corporate veil and impose personal liability against Aniboli, who "[a]pparently disregarded corporate formalities and personally used corporate assets for his own benefit."

The application by True Harbor Holding Corp. and Aniboli for summary judgment dismissing the first cause of action on the ground it is time barred is denied. A cause of action for breach of contract accrues at the time of the breach (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402, 599 NYS2d 501 [1993]). Generally, a six-year limitations period governs claims for breach of contract, except when the contract is for the sale of goods, in which case the four-year statute of limitations period provided by UCC 2-725 governs (see CPLR 213; see *Wuhu Import & Export Corp. v Capstone Capital, LLC*, 39 AD3d 314, 834 NYS2d 129 [1st Dept 2007]; *Matter of Village of Scarsdale v New York City Water Bd.*, 33 AD3d 1011, 824 NYS2d 325 [2d Dept 2006]). Here, the four-year statute of limitations period applies to the first cause of action, as the alleged agreement between plaintiff and Aniboli was for the sale of goods, not the rendition of services (see *QK Healthcare, Inc. v Insource, Inc.*, \_\_ AD3d \_\_, 965 NYS2d 133 [2d Dept 2013]; *Wuhu Import & Export Corp. v Capstone Capital, LLC*, 39 AD3d 314, 834 NYS2d 129; *Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168, 743 NYS2d 471 [1st Dept 2002]; *Hull v Moore's Mobile Homes Stebra*, 214 AD2d 923, 625 NYS2d 710 [3d Dept 1995]).

However, contrary to the conclusory assertions by defense counsel, the evidence submitted in support of the motion is insufficient to establish a prima facie case that no sales were made by Century Building Materials to True Harbor Holding Corp. within the four-year period prior to the December 2, 2008 commencement of this action (cf. *Bokara Rug Co., Inc. v Kapoor*, 93 AD3d 583, 941 NYS2d 81 [2d Dept 2012]). In addition to failing to demonstrate prima facie that Century Building Materials' time within which to commence an action for breach of contract had expired, moving defendants' submissions reveal triable issues regarding the terms of the subject agreement. Further, the allegation by True Harbor Holding Corp. and Aniboli that the oral contract is not enforceable is rejected, as the Statute of Frauds is applicable only to executory, not executed, contracts (UCC 2-201[3][c]; *L. Fatato, Inc. v Decrescente Distrib. Co.*, 86 AD2d 600, 601, 446 NYS2d 120 [2d Dept 1982]; see *Winston Am. Transp. v Motorola Communications & Elecs.*, 229 AD2d 1033, 645 NYS2d 185 [4th Dept 1996]; *Tip Top Farms v Dairylea Coop.*, 114 AD2d 12, 497 NYS2d 99 [2d Dept 1985], *aff'd* 69 NY2d 625, 511 NYS2d 227 [1986]).

The application for summary judgment dismissing the causes of action for unjust enrichment is denied. To succeed on a claim for unjust enrichment, a plaintiff must establish that the defendant was enriched at the plaintiff's expense, and that "it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, 334 NYS2d 388 [1972], *cert. denied* 414 US 829, 94 S Ct 57 [1973]; see *Whitman Realty Group v Galano*, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]; *Cruz v McAneney*, 31 AD3d 54, 816 NYS2d 486 [2d Dept 2006]). Recovery for unjust enrichment, though, is barred if there is a valid and enforceable contract between the parties (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 521 NYS2d 653 [1987]; *Whitman Realty Group v Galano*, 41 AD3d 590, 838 NYS2d 585; *Stark v City of New York*, 31 AD3d 530, 818 NYS2d 281 [2d Dept 2006]). As triable issues exist regarding the enforceability of the oral agreement, summary judgment dismissing the causes of action for unjust enrichment is denied (see *Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 944 NYS2d 36 [1st Dept 2012]; see also *Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 869 NYS2d 125 [2d Dept 2008]; *IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 829 NYS2d 10 [1st Dept 2007]).

The application for summary judgment in favor of True Harbor and Aniboli on the fourth and fifth causes of action, however, is granted. As to the fourth cause of action, the essential elements of an action seeking damages for actual fraud are a representation or an omission as to a material fact made by the defendant that was false and known to be false, made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance by the plaintiff on the misrepresentation or material omission, and injury suffered as a result of such reliance (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 [2009]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 646 NYS2d 76; *Lunal Realty, LLC v DiSanto Realty, LLC*, 88 AD3d 661, 930 NYS2d 619 [2d Dept 2011]; *IndyMac Bank, F.S.B. v Vincoli*, 105 AD3d 704, 962 NYS2d 624 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]; *Ozelkan v Tyree Bros. Envtl. Servs., Inc.*, 29 AD3d 877, 815 NYS2d 265 [2d Dept 2006]). Additionally, pursuant to CPLR 3016, "the circumstances constituting the wrong shall be stated in detail" in a complaint seeking recovery for fraud (see *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 860 NYS2d 422 [2008]; *IndyMac Bank, F.S.B. v Vincoli*, 105 AD3d 704, 962 NYS2d 624; *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 897 NYS2d 723 [2d Dept], *lv denied* 14 NY3d 713, 904 NYS2d 695 [2010]).

As to the fifth cause of action, under section 276 of New York's Debtor Creditor Law, a conveyance of property, including real property, is fraudulent if it is made with the actual intent to "hinder, delay or defraud" present or future creditors (see *Bradley v Kraemer*, 191 AD2d 408, 594 NYS2d 308 [2d Dept 1993]). The statute does not require proof of unfair consideration or insolvency, and a pleader may rely upon "badges of fraud," i.e., "circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent,'" to establish its case (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529, 684 NYS2d 244 [1st Dept 1999]; see *Miller v Miller*, 276 AD2d 758, 715 NYS2d 70 [2d Dept 2000]; *Grumman Aerospace Corp. v Rice*, 199 AD2d 365, 605 NYS2d 305 [2d Dept 1993]). Circumstances supporting a claim of fraudulent transfer include a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not made in the regular course of business; inadequate consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and the transferor's retention of control of the property after the conveyance (see *Dempster v Overview Equities*, 4 AD3d 495, 773 NYS2d 71 [2d Dept 2004]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 684 NYS2d 244;

*see also NPR, LLC v MetFin Mgt., Inc.*, 63 AD3d 1128, 882 NYS2d 253 [2d Dept 2009]; *Cadle Co. v Organes Enters., Inc.*, 29 AD3d 927, 815 NYS2d 732 [2d Dept 2006]).

True Harbor Holding Corp.'s and Aniboli's submissions are sufficient to demonstrate entitlement to judgment in their favor on the fourth and fifth cause of action. A party to a contract may be liable in tort "when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316, 639 NYS2d 283 [1995]; *see North Shore Bottling Co. v C. Schmidt & Sons*, 22 NY2d 171, 292 NYS2d 86 [1968]; *D'Ambrosio v Engel*, 292 AD2d 564, 741 NYS2d 42 [2d Dept], *lv denied* 99 NY2d 503, 753 NYS2d 806 [2002]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 690 NYS2d 17 [1st Dept 1999]). Both a breach of contract claim and a fraud claim may be maintained where the defendant misrepresented a material fact collateral to the contract, and such misrepresentation was the inducement for the contract (*see Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 176 NYS2d 259 [1958]; *Fresh Direct v Blue Martini Software*, 7 AD3d 487, 776 NYS2d 301 [2d Dept 2004]; *WIT Holding Corp. v Klein*, 282 AD2d 527, 724 NYS2d 66 [2d Dept 2001]).

Thus, a cause of action to recover damages for fraud may not be maintained when the only fraud alleged relates to a breach of contract (*see Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 965 NYS2d 597 [2d Dept 2013]; *Lee v Matarrese*, 17 AD3d 539, 793 NYS2d 457 [2d Dept 2005]). Where a claim to recover damages for fraud "is premised upon an alleged breach of contractual duties, and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie" (*McKernin v Fanny Farmer Candy Shops*, 176 AD2d 233, 234, 574 NYS2d 58 [2d Dept 1991]; *see Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 892 NYS2d 105 [2d Dept 2009]; *Halliwell v Gordon*, 61 AD3d 932, 878 NYS2d 137 [2d Dept 2009]; *Sforza v Health Ins. Plan of Greater N.Y.*, 210 AD2d 214, 619 NYS2d 734 [2d Dept 1994]). Here, the bare and conclusory allegations set forth in the fourth cause of action relate only to Aniboli's alleged breach of the agreement to pay for the building materials delivered to lots 7 and 14 at the True Harbor development (*see Stein v Doukas*, 98 AD3d 1024, 951 NYS2d 173 [2d Dept 2012]; *Halliwell v Gordon*, 61 AD3d 932, 878 NYS2d 137; *Gibraltar Mgt. Co., Inc. v Grand Entrance Gates, Ltd.*, 46 AD3d 747, 848 NYS2d 684 [2d Dept 2007]). "A general allegation that the opposing party entered into the contract while lacking the intent to perform is insufficient to state a cause of action to recover damages for fraud" (*McGee v J. Dunn Const. Corp.*, 54 AD3d 1010, 1010, 864 NYS2d 553 [2d Dept 2008]; *see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 [1995]; *Stangel v Zhi Dan Chen*, 74 AD3d 1050, 903 NYS2d 110 [2d Dept 2010]; *L. Fatato, Inc. v Decrescente Distrib. Co.*, 86 AD3d 600, 446 NYS2d 120).

Similarly, the fifth cause of action alleges simply that Aniboli "caused a fraudulent transfer of the building materials sold to True Harbor to himself and defendant Hamburger with the intent of hindering, delaying and defrauding the plaintiff, a creditor of True Harbor." Absent from the pleading are allegations detailing the fraudulent scheme (*see CPLR 3016; Menaker v Alstaedter*, 134 AD2d 412, 521 NYS2d 35 [2d Dept 1987]; *cf. Marine Midland Bank v Zurich Ins. Co.*, 263 AD2d 382, 693 NYS2d 552 [1st Dept 1999]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529, 684 NYS2d 244) or a basis for piercing the corporate veil (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 919 NYS2d 496 [2011]; *Mondone v Lane*, 106 AD3d 1062, 966 NYS2d 164 [2d Dept 2013]; *Lofstad v S & R Fisheries*,

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*Inc.*, 45 AD3d 739, 846 NYS2d 283 [2d Dept 2007]; *Kok Choy Yeen v NWE Corp.*, 37 AD3d 547, 830 NYS2d 265 [2d Dept 2007]; *see generally Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 603 NYS2d 807 [1993]). In addition, the one conclusory allegation supporting the fifth cause of action is insufficient to demonstrate Aniboli had an actual intent to defraud Century Building Materials (*see Wildman & Bernhardt Constr. v BPM Assoc.*, 273 AD2d 38, 708 NYS2d 400 [1st Dept 2000]; *Menaker v Alstaedter*, 134 AD2d 412, 521 NYS2d 35).

Accordingly, the motion by True Harbor Holding Corp. and Aniboli for summary judgment in their favor is granted only as to the fourth and fifth causes of action, and is otherwise denied.

Dated:

July 17, 2013

**Hon. Dante P. Molis**

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A.J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION