

**Y & B Light. & Elec. Supplies., Inc. v JYC Elec.
Contr. Inc.**

2014 NY Slip Op 30089(U)

January 16, 2014

Sup Ct, New York County

Docket Number: 151477/13

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

Y & B LIGHTING AND ELECTRICAL SUPPLIES, INC.,

Plaintiff,
-against-

INDEX NO. 151477/13
MOTION DATE 12-11-2013
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

**JYC ELECTRIC CONTRACTING INC., 14 LLC f/k/a
14 COMPANY, M & T REAL ESTATE TRUST,
successor in interest by merger to M & T REAL
ESTATE INC., TAOCON, INC., BRUCE SNYDER,
CONSTRUCTION LIEN CONSULTANTS
CONNECTICUT, LLC, "JOHN DOES"
and "JANE DOES," said names being fictitious, parties
intended being possible tenants or occupants of
premises, and corporations, other entities or persons
who claim, or may claim, a lien against the premises,**

Defendants.

The following papers, numbered 1 to 8 were read on this motion to/for to dismiss and cross-motion to extend time to serve :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 8</u>
Replying Affidavits _____	

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that CONSTRUCTION LIEN CONSULTANTS CONNECTICUT, L.L.C. and BRUCE SNYDER's motion to dismiss pursuant to CPLR §3211[a] [1],[7] and [8], is denied. Plaintiff's cross-motion pursuant to CPLR 306 [b] to extend the time to serve the defendants with a Supplemental Summons and Amended Complaint, is granted only as to CONSTRUCTION LIEN CONSULTANTS CONNECTICUT, L.L.C. .

Construction Lien Consultants Connecticut, LLC (hereinafter referred to as "CLCC") and Bruce Snyder (collectively hereinafter referred to as "defendants") seek to dismiss this action, pursuant to CPLR §3211[a] [1],[7] and [8], based on documentary evidence, failure to state a cause of action and failure to obtain jurisdiction over defendant Bruce Snyder.

Plaintiff opposes the motion and cross-moves to pursuant to CPLR 306 [b] to extend the time to serve the defendants with a Supplemental Summons and Amended Complaint for sixty days past entry of an order.

A motion to dismiss pursuant to CPLR §3211[a][1], requires that the party seeking dismissal produce documentary evidence that "utterly refutes plaintiff's factual

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

allegations, conclusively establishing a defense as a matter of law.” (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, supra).

Unjust enrichment is a quasi-contract claim that only applies in the absence of an express written agreement (Zolotar v. New York Life Ins. Co., 172 A.D. 2d 27, 576 A.D. 2d 850 [N.Y.A.D. 1st Dept., 1991] and Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y. 2d 382, 516 N.E. 2d 190, 521 N.Y.S. 2d 653 [1987]). The plaintiff may assert a claim for both breach of contract and for unjust enrichment where the defendant prevented performance of a contract or money is owed outside the scope of the agreement (Loheac, P.C. v. Children’s Corner Learning Center, 51 A.D. 3d 476, 857 N.Y.S. 2d 143 [N.Y.A.D. 1st Dept., 2008]).

A cause of action for liability based on piercing the corporate veil is equitable relief granted because a corporation is the alter ego of another entity which abused the corporate form for purposes of perpetrating, “...a wrong or injustice against the party asserting the claim..”(Tap Holdings, LLC v. Orix Finance Corp., 109 A.D. 3d 167, 970 N.Y.S. 2d 178 [N.Y.A.D. 1st Dept., 2013]). A cause of action for piercing of the corporate veil is not independent of the claim against the corporation, it is permitted by the Court to prevent fraud and generally piercing of the corporate veil requires, “...a showing 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 (Morris v. New York State Dept. of Taxation and Finance, 92 N.Y. 2d 135, 623 N.E. 2d 1157, 603 N.Y.S. 2d 807[1993]).

A corporate officer or director is personally liable only where his actions are taken for personal reasons and not to benefit the corporation’s interests (Hoag v. Chancellor, Inc., 246 A.D. 2d 224, 677 N.Y.S. 2d 531 [N.Y.A.D. 1st Dept., 1998]). A cause of action seeking to hold a corporate officer personally liable, requires particularized allegations of the corporate officer’s motivation for personal gain or the manner in which he acted outside the scope of employment (Petkanas v. Kooyman, 303 A.D. 2d 303, 759 N.Y.S. 2d 1 [N.Y.A.D. 1st Dept., 2003]).

A motion to dismiss pursuant to CPLR §3211[a],[8], is based on lack of jurisdiction over the defendant. In opposing a motion to dismiss pursuant to CPLR §3211[a][8], the plaintiff is only required to demonstrate that there are facts that may exist to establish there is personal jurisdiction (Peterson v. Spartan Industries, 33 N.Y. 2d 463, 310 N.E. 2d 513, 354 N.Y.S. 2d 905 [1974] and Cornely v. Dynamic HVAC Supply, LLC, 44 A.D. 3d 986, 845 N.Y.S. 2d 797 [N.Y.A.D. 2nd Dept., 2007]).

Pursuant to CPLR §311, personal service upon a corporation is made by delivering the summons and complaint to, “...an officer, director, managing or general agent or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service...” (McKinneys, Cons Laws of NY, Book 7B, CPLR §311). Jurisdiction is not obtained over a corporation based on substituted service, including “leave and mail” or “nail and mail” on an agent of the corporation (Lakeside Concrete Corp. v. Pine Hollow Bldg. Corp., 104 A.D. 2d 551, 479 N.Y.S. 2d 26 [N.Y.A.D. 2nd Dept.

1984] and *Napic, N.V. v. Fverfa Investments, Inc.*, 193 A.D. 2d 549, 597 N.Y.S. 2d 707 [N.Y.A.D. 1st Dept., 1993]).

Pursuant to CPLR § 308[4], when service of process cannot be made with due diligence, by personal service or upon a person of suitable age and discretion, it can be made, "... by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode..." (McKinneys, Cons Laws of NY, Book 7B, CPLR §308). Pursuant to CPLR § 313, there is no distinction made for service pursuant to any section of CPLR § 308, for service on an out of state resident (*Morgenthau v. Avion Resources Ltd.*, 11 N.Y. 3d 383, 898 N.E. 2d 929, 869 N.Y.S. 2d 886 [2008]). CPLR § 313, permits service pursuant to CPLR § 308, on out of state residents subject to jurisdiction under CPLR § 301 or CPLR § 302 (*Bossuk v. Steinberg*, 88 A.D. 2d 358, 453 N.Y.S. 2d 687 [N.Y.A.D. 1st Dept., 1982]).

Pursuant to CPLR §302[a][1], proof of a single transaction taking place in New York, is sufficient to exercise personal jurisdiction over a person, pursuant to CPLR §302[a][1], even if a defendant never enters New York (*Deutsche Bank Securities, Inc. v. Montana Bd. of Investments*, 7 N.Y. 3d 65, 850 N.E. 2d 1140, 818 N.Y.S. 2d 164 [2006]). In order to establish that an individual is transacting business pursuant to CPLR 302[a][1], there must be some "purposeful activities" in the state and a relationship to the transaction sued upon (*SPCA of Upstate New York, Inc. v. American Working Collie Ass'n*, 18 N.Y. 3d 400, 963 N.E. 2d 1226, 940 N.Y.S. 2d 525 [2012]).

Defendants contend that service of process was defective and the plaintiff has not obtained jurisdiction over them. They claim that pursuant to CPLR §311, the substituted service in the form of "nail and mail" on CLCC is invalid. Defendants claim that plaintiff cannot establish that Bruce Snyder an out of state resident had contacts with New York; acted in his individual capacity; or that he is individually liable, and there is no jurisdiction over him. They also claim that CPLR § 308[4] does not apply to service on out of state residents. Defendants contend that plaintiff has not stated causes of action for piercing the corporate veil or for unjust enrichment, which are equitable and quasi-contract claims that are not independent of the cause of action for breach of contract. Defendants further contend that the contracts signed by plaintiff do not have any provisions for approval prior to their settlement of the claim and were not breached.

The Court has discretion to determine whether pursuant to CPLR §306[b], in the interest of justice, plaintiff should be granted an extension of time to serve the amended pleadings. The Court is required to balance competing interest and make a careful analysis of relevant factors including, the expiration of the statute of limitations; prejudice to the defendant; the merits of the claim; length of the delay and promptness of the request for an extension (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y. 2d 95, 761 N.E. 2d 1018, 636 N.Y.S. 2d 291 [2001]). Notice of the lawsuit and service of an answer prior to the expiration of the statute of limitations in addition to the potential merit of the plaintiff's claims are a basis to extend the time for service (*Bruno v. 3 West 35th Company, LLC*, 88 A.D. 3d 612, 931 N.Y.S. 2d 501 [N.Y.A.D. 1st Dept., 2011]).

Plaintiff contends that this action should not be dismissed and its time to serve the defendants should be extended in the interest of justice another sixty days after entry of this order. Plaintiff also contends that the statute of limitations has not

expired; the defendants had notice of this action within the 120 day period; defendants have answered the pleadings; and would not be prejudiced by the extension of time for service. Plaintiff claims that there was no substantial delay in the relief sought and in any case that Bruce Snyder was properly served at his place of business.

This Court finds that defendants have sufficiently established a basis to dismiss the causes of action asserted against Construction Lien Consultants Connecticut, LLC pursuant to CPLR §3211[a],[8], for lack of jurisdiction but that plaintiff has stated a basis to extend the time for service pursuant to CPLR §306[b], in the interest of justice.

Bruce Snyder has not established that plaintiff failed to obtain jurisdiction over him. Mr. Snyder did not state whether the address where the papers were served is his residence or that service could have otherwise been obtained by due diligence pursuant to CPLR §308 [1], [2].

The plaintiff has stated potentially meritorious causes of action against both defendants. Defendants have not established that the contracts "utterly refute" plaintiff's factual allegations concerning breach of contract. The causes of action for unjust enrichment and to pierce the corporate veil are sought as alternate relief to plaintiff's claims of breach of contract and are potentially meritorious as stated.


Accordingly, it is ORDERED that CONSTRUCTION LIEN CONSULTANTS CONNECTICUT, L.L.C. and BRUCE SNYDER's motion to dismiss pursuant to CPLR §3211[a] [1],[7] and [8], is denied, and it is further,

ORDERED, that plaintiff's cross-motion pursuant to CPLR 306 [b] to extend the time to serve the defendants with a Supplemental Summons and Amended Complaint, is granted only as to CONSTRUCTION LIEN CONSULTANTS CONNECTICUT, L.L.C. , and it is further,

ORDERED that, within sixty (60) days of service of a copy of this Order with Notice of Entry the plaintiff shall serve the Supplemental Summons and Amended Complaint on CONSTRUCTION LIEN CONSULTANTS CONNECTICUT, L.L.C., and it is further,

ORDERED, that the remainder of the relief sought in plaintiff's cross-motion is denied.

ENTER: MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ,
J.S.C.

Dated: January 16, 2014

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE