Heuman v Brosnan
2016 NY Slip Op 32279(U)
April 22, 2016
Supreme Court, Suffolk County
Docket Number: 15-8243
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 15-8243

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 10/6/15
ADJ. DATE 2/1/16
Mot. Seq. #002 - MotD

ELLEN HEUMAN and RONALD GUTMAN,

Plaintiffs,

- against -

MICHAEL BROSNAN and BLACK DOG BUILDERS, LLC,

Defendants.

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Upon the following papers numbered 1 to 25 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 13 - 18; Replying Affidavits and supporting papers 21 - 35; Other memorandum of law 19 - 20; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order pursuant to CPLR 3211(a)(1), and (7), dismissing the plaintiffs' first cause of action as to the defendant Michael Brosnan and the second, third, fourth and fifth causes of action as to all defendants is granted to the extent that the fifth cause of action is dismissed, and is otherwise denied.

This action arises out of an agreement whereby the plaintiffs hired the defendants to perform construction work at their single-family residence located at 43 Surfside Avenue, Montauk, New York (the premises). The plaintiffs allege, among other things, that they paid for work that was not performed or completed by the defendants, and that certain work was not performed in a workmanlike manner. The complaint in this action sets forth five numbered causes of action against the defendants sounding respectively in breach of contract, unjust enrichment, breach of the implied covenant of good faith and fair dealing, property damage, and conversion.

It is undisputed that the defendants supervised the construction work performed at the premises, that the plaintiffs paid the invoices submitted by the defendants for said work, and that the defendant Michael Brosnan (Brosnan) is the sole member of the defendant Black Dog Builders, LLC (the LLC). In addition to their other complaints, the plaintiffs allege that the subject construction agreement was made with Brosnan, not the LLC, that Brosnan made certain misrepresentations to them, and that the defendants invoiced them for materials "in amounts that were far in excess of market value and/or standard industry rate."

The defendants now move for an order pursuant to CPLR 3211(a)(1), and (7) for an order dismissing the first cause of action for breach of contract as to Brosnan, and the second through fifth causes of action as to Brosnan and the LLC. Pursuant to CPLR 3211(a)(1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]; ***Vitarelle v Vitarelle***, 65 AD3d 1034, 885 NYS2d 320 [2d Dept 2009]; ***Mazur Bros. Realty, LLC v State of New York***, 59 AD3d 401, 873 NYS2d 326 [2d Dept 2009]). In support of their motion, the defendants submit, among other things, the amended complaint, copies of their invoices regarding this project and the plaintiffs' checks in payment of those invoices, an unsigned copy of a contract allegedly "tendered" to the plaintiffs, and documentation regarding the establishment of the LLC.

The gravamen of the defendants' contention that, based on documentary evidence, the first cause of action for breach of contract should be dismissed as to Brosnan is that all of the invoices were generated by the LLC, and all of the plaintiffs' checks in payment were made out to said entity. That is, that the plaintiffs do not have a cause of action against Brosnan individually. Generally, officers or agents of a corporation are not liable on its contracts if they do not purport to bind themselves individually (*see generally* ***Savoy Record Co. v Cardinal Export Corp.***, 15 NY2d 1, 254 NYS2d 521 [1964]; ***Georgia Malone & Co., Inc. v Ralph Rieder***, 86 AD3d 406, 926 NYS2d 494 [1st Dept 2011]). However, the principle that a corporation exists independently of its owners is limited by the doctrine of "piercing the corporate veil." Said doctrine is employed by those who seek to hold the owners liable for some underlying corporate obligation (***Morris v New York State Dept. of Taxation and Finance***, 82 NY2d 135, 603 NYS2d 807 [1993]).

In order to prevail in an action to pierce the corporate veil, a plaintiff must show that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see* ***Matter of Morris v New York State Dept. of Taxation and Fin.***, 82 NY2d at 141, 603 NYS2d at 810; ***Seuter v Lieberman***, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (*see* ***Millennium Const. v Loupolover***, 44 AD3d 1016, 845 NYS2d 110 [2007]; ***Shisgal v Brown***, 21 AD3d 845, 801 NYS2d 581 [1st Dept 2005]).

A review of the papers and documents submitted reveals that they do not conclusively resolve all factual issues, nor do they establish Brosnan's defense as a matter of law. The copy of the LLC's Operating Agreement submitted by the defendants names Brosnan as the registered agent for the LLC at

the same office address as that of the LLC, the invoices issued by the LLC indicate that address as its office address, and the invoices list the LLC's email address at what appears to be Brosnan's personal email address. Accordingly, that branch of the defendants' motion seeking to dismiss the complaint pursuant to CPLR 3211(a)(1) is denied.

In addition, the defendants move pursuant to CPLR 3211(a)(7) to dismiss the complaint in its entirety except as noted above and herein. In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Leon v Martinez***, *supra*; ***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). The Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi et al,*** 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

The defendants do not move to dismiss the plaintiffs' first cause of action for breach of contract against the LLC. Thus, the sole issue is whether the plaintiffs have sufficiently pled facts to indicate that the doctrine of piercing the corporate veil may entitle them to recover contract damages against Brosnan individually. It is well settled that New York does not recognize a separate cause of action to pierce the corporate veil (***Hart v Jassem***, 43 AD3d 997, 843 NYS2d 121 [2d Dept 2007]). In addition, the mere claim that the corporation was completely dominated by a defendant, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil (*see* ***Morris v New York State Dept. of Taxation and Fin.***, *supra* at 141-142; ***Abelman v Shoratlantic Development. Co.***,153 AD2d 821, 823, 545 NYS2d 333 [2d Dept 1989]). To successfully state a cause of action under the doctrine of piercing the corporate veil, the "plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation [or LLC] and 'abused the privilege of doing business in the corporate [or LLC] form to perpetrate a wrong or injustice'" (***Grammas v Lockwood Assoc., LLC***, 95 AD3d 1073, 944 NYS2d 623 [2d Dept 2012], citing ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 16 NY3d 775, 919 NYS2d 496 [2011], quoting ***Matter of Morris v New York State Dept. of Taxation & Fin.***, *supra*).

The complaint alleges, among other things, that the defendants share the same addresses, phone lines, offices, assets, personnel and bank accounts, that Brosnan broke certain promises made to them as an individual, and that the defendants failed to perform work for which they were paid and overcharged them for materials and labor. In addition, the plaintiff Ronald Gutman (Gutman) submits his affidavit in opposition to the motion wherein he swears that the unsigned copy of the alleged contract between the parties did not govern their agreement with Brosnan.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see* ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]; ***DaCosta v Trade-Winds Envtl. Restoration, Inc.***, 61 AD3d 627, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see* ***Guggenheimer v Ginzburg***, *supra*; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]). In reply, the defendants submit Brosnan's affidavit which serves only to authenticate the documents submitted in support of their motion.

Viewing the complaint in the light most favorable to the plaintiffs, it is determined that the pleading against Brosnan is sufficient to survive the defendants' motion to dismiss. Regarding the plaintiffs' allegations that Brosnan used the LLC as his corporate alter-ego, "it cannot be said that the complaint 'is totally devoid of solid, nonconclusory allegations' " (***International Credit Brokerage Co. v Agapov***, 249 AD2d 77, 78, 671 NYS2d 64, 65 [1st Dept 1998], quoting ***Sequa Corp. v Christopher***, 176 AD2d 498, 574 NYS2d 565 [1st Dept 1991]). Accordingly, that portion of the defendants' motion which seeks to dismiss the first cause of action is denied.

The defendants move to dismiss the plaintiffs' second cause of action for unjust enrichment against Brosnan and the LLC. 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], *certificate. denied* 414 US 829, 94 S Ct 57 [1973]; *see* ***Whitman Realty Group v Galano***, 41 AD3d 590, 838 NYS2d 585 [2d Dept 2007]). However, it has been held that recovery for unjust enrichment 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***, *supra*; ***Stark v City of New York***, 31 AD3d 530, 818 NYS2d 281 [2d Dept 2006]). Nonetheless, where the enforceability of the agreement is in question, or the contract does not cover the dispute in issue, a cause of action for unjust enrichment based in quasi-contract can be maintained (*see* ***McGimpsey v J. Robert Folchetti & Assoc., LLC***, 19 AD3d 658, 798 NYS2d 498 [2d Dept 2005]; *see also* ***Plumitallo v Hudson Atl. Land Co., LLC***, 74 AD3d 1038, 903 NYS2d 127 [2d Dept 2010]; ***Sterlacci v Gurfein***, 18 AD3d 229, 794 NYS2d 362 [1st Dept 2005]).

Here, the terms and conditions of the alleged agreement, as well as the boundaries of the rights and obligations of the parties, have not yet been identified. Thus, when liberally construed, the complaint states a cause of action for unjust enrichment in addition to breach of contract (*see* ***Thompson v Horowitz***, 141 AD3d 642, 2016 NY Slip Operating 05561 [2d Dept 2016]). Accordingly, that portion of the defendants' motion which seeks to dismiss the second cause of action is denied.

In moving to dismiss the third cause of action for breach of good faith and fair dealing, the defendants contend that the claim is duplicative of the plaintiffs' the cause of action for breach of contract. Every contract implies good faith and fair dealing between the parties to it (***511 West 232nd Owners Corp. v Jennifer Realty Co.***, 98 NY2d 144, 746 NYS2d 131 [2002]). The implied covenant of good faith and fair dealing is breached when "a party to a contract acts in a manner that, although not

expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (***Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce***, 265 AD2d 513, 697 NYS2d 128 [2d Dept 1999]). However, a cause of action to recover damages for breach of the implied covenant of good faith and fair dealing "cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract' " (***Deer Park Enters., LLC v Ail Sys., Inc.***, 57 AD3d 711, 712, 870 NYS2d 89, 90 [2d Dept 2008], quoting ***Canstar v Jones Constr. Co.***, 212 AD2d 452, 622 NYS2d 730 [1st Dept 1995]). Here, the plaintiffs' allege, among other things, that the defendants overcharged them for materials and work "beyond that of market and/or industry standard," and invoiced them during periods when the defendants were not performing any work at the premises.

Based on the plaintiffs' allegations that they were deceived by affirmative misrepresentations as to the scope and cost of the work and, when liberally construed, the complaint states a cause of action for breach of good faith and fair dealing in addition to breach of contract (*see e.g.* ***Citi Mgt. Group, Ltd. v Highbridge House Ogden, LLC***, 45 AD3d 487, 847 NYS2d 33 [1st Dept 2007]). Accordingly, that portion of the defendants' motion which seeks to dismiss the third cause of action is denied.

The defendants move to dismiss the plaintiffs' fourth cause of action for property damage on the ground that "a breach of contract does not give rise to tort liability unless a legal duty independent of the contract itself has been violated," a principle set forth in ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389, 521 NYS2d 653 [1987]; *see also* ***New York Univ. v Continental Insurance. Co.***, 87 NY2d 308, 639 NYS2d 283 [1995]). 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 Insurance. Co.***, 87 NY2d at 316, 639 NYS2d 283; *see* ***D'Ambrosio v Engel***, 292 AD2d 564, 741 NYS2d 42 [2d Dept]). However, the legal duty must arise from circumstances "extraneous to, and not constituting the elements of, the contract, although it may be connected with and dependent on the contract" (***Clark-Fitzpatrick, Inc. v Long Is. R.R.***, 70 NY2d at 389, 521 NYS2d 653; *see* ***Krantz v Chateau Stores of Canada***, 256 AD2d 186, 683 NYS2d 24 [1st Dept 1998]). That is, a plaintiff can maintain a separate cause of action in tort if they allege that the defendants breached a duty independent of their contractual obligations, or that they engaged in tortious conduct separate from the alleged failure to comply with the terms of the parties' agreement (*see* ***Probst v Cacoulidis***, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; ***Givoldi, Inc. v United Parcel Serv.***, 286 AD2d 220, 729 NYS2d 25 [1st Dept 2001]).

Here, the plaintiffs allege, among other things, that the defendants' negligence resulted in the "obstruction of the audio/visual security system on the Premises." Thus, it appears that the claim is for property damage to an existing system on the premises which was not installed or otherwise part of the work to be performed according to the parties' agreement. Viewing the complaint in the light most favorable to the plaintiffs, it is determined that the pleading is sufficient to plead a cognizable cause of action for property damage in addition to breach of contract. Accordingly, that portion of the defendants' motion which seeks to dismiss the fourth cause of action is denied.

In moving to dismiss the fifth cause of action for conversion, the defendants contend that the claim is duplicative of the plaintiffs' cause of action for breach of contract. That is, in line with the defendants' contention above, that a breach of contract does not give rise to the tort of conversion. Here, the plaintiffs allege that they paid a specified sum of money to the LLC "for which no services and/or materials were received." It is determined that the plaintiffs have failed to plead that the defendants breached a duty independent of their contractual obligations, or that they engaged in tortious conduct separate from the alleged failure to comply with the terms of the parties' agreement (*see* ***Probst v Cacoulidis***, *supra*; ***Givoldi, Inc. v United Parcel Serv.***, *supra*). Accordingly, that portion of the defendants' motion which seeks to dismiss the fifth cause of action is granted.

Dated: 4/22/15

A.J.S.C.

NON-FINAL DISPOSITION