

**North Shore Architectural Stone, Inc. v American
Artisan Constr., Inc.**

2016 NY Slip Op 32377(U)

January 7, 2016

Supreme Court, Richmond County

Docket Number: 151118/14

Judge: Desmond A. Green

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

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NORTH SHORE ARCHITECTURAL STONE, INC,

DCM Part 3
Present:

Plaintiff,

Hon. Desmond A. Green

-against-

DECISION AND ORDER

AMERICAN ARTISAN CONSTRUCTION, INC.,
JOHN CINA, individually, JOSEPH VITACCIO,
and PHILIP MANCUSO, as escrow agent,

Index No. 151118/14
Motion No. 2685-003

Defendants.

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The following papers numbered 1 to 3 were fully submitted on the 4th day of November, 2015:

	Pages Numbered
Notice of Motion to Dismiss by Defendants American Artisan Construction, Inc. And John Cina, with Supporting Papers and Exhibits (dated July 14, 2015).....	1
Affirmation in Opposition by Plaintiff, with Supporting Papers, Exhibits and Memorandum of Law (dated October 6, 2015).....	2
Reply Affirmation (dated November 3, 2015).....	3

Upon the foregoing papers, the motion to dismiss the complaint is granted in part, and is otherwise denied.

This is an action to recover damages for conversion, breach of contract and fraud.¹ To the extent relevant, plaintiff North Shore Architectural Stone, Inc (hereinafter "plaintiff") is in the business of supplying and installing stone for use in residential, commercial and industrial buildings (see Verified Complaint, para 8). Defendant American Artisan Construction, Inc (hereinafter "Artisan") is in the wholesale business of supplying stone (*id.* at 9). In April of 2013, plaintiff entered into an agreement with Artisan to supply a specific and unique type of limestone, which was to be installed at certain property owned by defendant Joseph Vitacco (*id.* at 11, 14). This agreement

¹Plaintiff has withdrawn its cause of action for replevin.

was subsequently amended² in January of 2014. The revisions required three additional shipments of limestone, some of which had to be “colored” and “polished” by Artisan due to Vitacco’s rejection of earlier deliveries as being nonconforming (*id.* at 23-24). Following, *e.g.*, the installation of half of the limestone, Vitacco refused to release any funds, claiming that some of the limestone was “missing” or had been “stolen” from the property (*id.* at 30).

Plaintiff re-ordered the limestone in June of 2014 and, in order to ensure that the replacement stone matched the specifications of the order and the color of the “control” sample, plaintiff paid and arranged for Artisan’s principal, John Cina, to fly to Portugal (*id.* at 31-34). However, it appears that Artisan subsequently “refused to abide by the [agreed] price schedule” and allegedly charged plaintiff “thousands of dollars more for the Replacement stone” (*id.* at 35). In total, plaintiff purportedly paid \$89,000.00 for the replacement stone (*id.* at 37). At some point thereafter, plaintiff discovered that the missing limestone had not been stolen, but that some of the stone had never been shipped (*id.* at 38).

According to plaintiff, Artisan has refused to refund the amount it paid for the replacement stone (*id.* at 39-40). In addition, it is alleged that defendants Vitacco and Artisan colluded to make plaintiff pay for the extra limestone, which was needed and used by defendant Vitacco (*id.* at 43-51). Finally, it is alleged that defendant John Cina failed to ensure that the replacement stone matched the control sample (*id.* at 53).³ Thus, it is undisputed that (1) plaintiff substantially completed the installation required under the parties’ agreement; (2) Vitacco ultimately needed the replacement stone to complete the work; and (3) plaintiff has neither been paid for its work or reimbursed for the cost of the replacement stone. As a result, plaintiff commenced the instant action asserting causes of action

²In the “Amendment Agreement”, defendant Vitacco agreed to deposit the sum of \$167,224.40 into an escrow account held by his attorney, defendant Philip Mancuso, Esq (*see* Verified Complaint, para 23). The Amendment Agreement further provided that half of the escrow amount would be released to plaintiff upon, *inter alia*, installation of half of the limestone (*id.* at 24), with the balance to be paid upon completion of the installation (*id.* at 25).

³Nevertheless, the replacement stone was allegedly re-polished by Artisan and used by Vitacco (*see* Verified Complaint, paras 54-62).

for conversion, breach of contract and fraud against defendants Artisan and Cina.⁴

Presently before the Court is defendant Cina's motion to dismiss both of the causes of action asserted against him personally, *i.e.*, conversion and fraud. In support, Cina attests that he "acted solely in [his] capacity as President of [Artisan, and a]t no time did [he]... act in a personal capacity... [To the contrary, Artisan] is [alleged to be] a separate and independent corporation and follows [all of] the formalities and procedures... [required of] a corporation" (*see* Affidavit of John Cina, paras 2,4). Hence, there is no basis on which to pierce the corporate veil. Cina further maintains that there are no allegations that he "personally benefitted from this nonsensical scheme", and that "any profit from this transaction was paid to [Artisan], and not to [him] personally" (*id.* at 14).

In order for a plaintiff to be able to state a viable claim against a shareholder of a corporation (*e.g.*, Cina) in his or her individual capacity for actions purportedly taken on behalf of the corporation, a plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice (*see Allstate ATM Corp v. ESA Holding Corp*, 98 AD3d 541, 542 [2nd Dept 2012]). Among the factors to be considered in making this determination are (1) the failure to adhere to corporate formalities, (2) inadequate capitalization, (3) the commingling of assets, and (4) the personal use of corporate funds (*id.*). Since this determination is said to be of an equitable nature, the decision of whether to pierce the corporate veil in any given instance will necessarily depend on the facts and circumstances of each case (*see Millenium Constr, LLC v. Loupolover*, 44 AD3d 1016 [2nd Dept 2007]).

Here, the Court opines that plaintiff's allegations are insufficient to demonstrate a viable claim against Cina, personally, for the causes of action predicated on conversion and fraud. In addition, plaintiff has failed to submit affidavits or other proof to remedy the defects in the complaint (*see Allstate ATM Corp v. ESA Holding Corp*, 98 AD3d at 542).

⁴The cause of action for breach of contract is asserted solely against Artisan. In addition, the action as against defendants Vitacco and Mancuso has been discontinued, with prejudice, and a stipulation to that effect was entered on August 13, 2015.

In support of its motion to dismiss the cause of action for fraud, defendant Artisan contends that the allegations therein are duplicative of the claim for breach of contract.⁵ Contrary to defendant's assertion, the Court opines that plaintiff's claim of fraud is sufficiently pleaded notwithstanding the fact that these same allegations are asserted in support of its cause of action for breach of contract (*see Wyle Inc v. ITT Corp*, 130 AD3d 438, 441 [1st Dept 2015]).

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Neckles Builders, Inc v. Turner*, 117 AD3d 923, 924 [2nd Dept 2014]).

The essential elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) plaintiff's performance in pursuance thereof, (3) defendant's breach of a contractual obligation, and (4) damages resulting from the breach (*id.* at 924). In contrast, the elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact made with knowledge of its falsity; an intent to induce reliance thereon; justifiable reliance upon the misrepresentation; and damages (*id.* at 925). Here, in addition to the sufficiency of plaintiff's cause of action against Artisan for breach of contract (which has not been challenged), the complaint sufficiently alleges that (1) defendant Artisan falsely misrepresented an existing fact to plaintiff, *i.e.*, that some of the stones were missing, (2) & (3) that plaintiff was intended to and justifiably relied on said misrepresentations when re-ordering and paying for the "missing" stone, and (4) Artisan then charged plaintiff an inflated amount for the replacement stone (*see Verified Complaint*, paras 154-177).

Based on the foregoing, the Court opines that the allegations underlying the fraud cause of action are not duplicative of the cause of action for breach of contract and, therefore, sufficient to

⁵Defendant Artisan did not move to dismiss the causes of action for conversion or breach of contract.

sustain a separate cause of action against Artisan (*cf. Financial Structures Ltd v. UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]).

Accordingly, it is

ORDERED that the motion to dismiss the complaint and any cross claims against defendant John Cina is granted; and it is further

ORDERED that all claims asserted against the above defendant are severed and dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the action shall continue as against defendant American Artisan Construction, Inc on the remaining causes of action other than replevin, which has been withdrawn; and it is further

ORDERED that the Clerk enter judgment in accordance herewith.

ENTER,


A handwritten signature in black ink, appearing to read 'D. Green', is written over a horizontal line.

J.S.C.

DATED: 1/7/16

Hon. Desmond A. Green
J.S.C.