

**Stein Indus., Inc. v Mainland Carpentry**

2017 NY Slip Op 31149(U)

May 3, 2017

Supreme Court, Suffolk County

Docket Number: 13-7751

Judge: Peter H. Mayer

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INDEX No. 13-7751  
CAL. No. 16-01406CO

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 12-16-16 (002)  
MOTION DATE 12-20-16 (003)  
ADJ. DATE 12-23-16  
Mot. Seq. # 002 - MotD  
# 003 - XMotD

-----X  
STEIN INDUSTRIES, INC., SIX CORNERS  
DEVELOPERS and A.N.S. REALTY, INC.,

Plaintiffs,

- against -

MAINLAND CARPENTRY and MICHAEL J.  
NINIVAGGI,

Defendants.  
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants, dated November 16, 2016, and supporting papers; (2) Notice of Cross Motion by plaintiffs, dated December 6, 2016, and supporting papers; (3) Affirmations in Opposition by plaintiffs and defendants, dated December 6, 2016 and December 15, 2016, respectively, and supporting papers; (4) Reply Affirmations by plaintiffs and defendants, dated December 21, 2016 and December 15, 2016, respectively, and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion (seq. 002) by defendants Mainland Carpentry and Michael J. Ninivaggi, and the cross motion (seq. 003) by plaintiffs Stein Industries, Inc., Six Corners Developers, and A.N.S. Realty, LLC, are consolidated for purposes of this determination; and it is

**ORDERED** that the motion by defendants Mainland Carpentry and Michael J. Ninivaggi for summary judgment dismissing the complaint against them, and in their favor as to their counterclaim, is granted to the extent specified herein, and is otherwise denied; and it is further

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**ORDERED** that the cross motion by plaintiffs Stein Industries, Inc., Six Corners Developers, and A.N.S. Realty, LLC, for summary judgment in their favor is granted to the extent specified herein, and is otherwise denied.

This action was commenced by plaintiffs Stein Industries, Inc., Six Corners Developers, and A.N.S. Realty, LLC to recover damages for breach of an oral contract, breach of a lease agreement, and property damage. Specifically, plaintiffs' complaint states seven causes of action: 1) that plaintiff Six Corners Developers is owed \$5,500.00 for 11 months of delinquent rent payments for office space occupied by defendant Mainland Carpentry; 2) that plaintiff Six Corners Developers is owed \$12,000.00 for delinquent rent payments for commercial storage space occupied by defendant Mainland Carpentry from December 2010 until present; 3) that plaintiff A.N.S. Realty, LLC is owed \$12,000.00 for delinquent rent payments for vacant land occupied by defendant Mainland Carpentry from December 2010 until present; 4) that plaintiff A.N.S. Realty, LLC is owed \$2,000.00 for damage defendants negligently caused to vacant land at 56 Sprague Avenue, Amityville, New York; 5) that plaintiff Six Corners Developers is owed \$3,500.00 for damage defendants negligently caused to office space at 22 Sprague Avenue, Amityville, New York; 6) that defendants' carelessness and negligence in "executing its contractual obligations" at nonparty Vero's Restaurant in Amityville, New York, caused plaintiff Stein Industries, Inc. to suffer damages of at least \$5,000.00; and 7) that defendant Mainland Carpentry hired plaintiff Stein Industries, Inc. to perform services at Polpette Restaurant in New York, New York, and Stein Industries was underpaid in the amount of \$1,000.00.

In their answer, defendants Mainland Carpentry (Mainland) and Michael Ninivaggi assert four counterclaims: (1) that plaintiffs breached an oral barter contract with Mainland by locking it out of the rental space; (2) that, pursuant to the doctrine of quantum meruit, plaintiffs must compensate Mainland for the reasonable value of services it performed for plaintiffs; (3) that plaintiffs converted Mainland's property for their own use, without permission, in spite of demands therefore; and (4) that plaintiffs constructively evicted Mainland by depriving it of its right to exclusive and quiet enjoyment of its rented space.

Defendants Mainland and Michael Ninivaggi now move for summary judgment in their favor on the complaint, arguing that no written lease agreement exists; that defendants fully satisfied all provisions of the rental agreement between Mainland and Six Corners Developers (Six Corners); that any claims against Michael Ninivaggi personally should be dismissed, as plaintiffs have not adduced evidence sufficient to pierce Mainland's corporate veil; and that Six Corners offers no evidence of the time period when Mainland is alleged to have occupied Six Corners' property. In support of their motion, defendants submit copies of the pleadings, transcripts of the parties' deposition testimony, copies of receipts, a copy of Mainland's corporate registration, and various e-mail messages. Plaintiffs Stein Industries, Inc., Six Corners, and A.N.S. Realty, LLC (collectively, plaintiffs) cross-move for summary judgment in their favor as to their claims against defendants and for dismissal of the cross claims against them.

Andrew M. Stein was deposed on behalf of plaintiffs and testified that Stein Industries, Inc. is an architectural woodworking business. Mr. Stein indicated that he has been its principal shareholder since 2010, and that it has its base of operations at 22 Sprague Avenue in Amityville, New York. Mr. Stein

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explained that Stein Industries leases that property from Six Corners, that Stein Industries is the sole tenant at that premises, and that it remits monthly rent in the amount of \$35,000.00. Mr. Stein testified that he has been the sole owner of Six Corners since 2010, and that it owns real estate, as well as a number of limited liability companies. Questioned as to his relationship to plaintiff A.N.S. Realty, Mr. Stein stated that it is in the business of renting vacant land, including the property known as 56 Sprague Avenue, Amityville, New York, and that he is the sole member of such company.

Mr. Stein further testified that he first met defendant Michael Ninivaggi when Stein Industries worked with Mainland in 2011 or 2012 on a construction project at a restaurant named Vero's. He explained that the Vero's job entailed Stein Industries constructing the restaurant's liquor bar, and a number of the restaurant's other wooden features. He indicated that it was then Mainland's task to install all of Stein Industries' wood and metal work at the restaurant. Mr. Stein testified that Stein Industries and Mainland were each hired separately, that there was no contract between Stein Industries and Mainland regarding the construction project at Vero's, and that he is in possession of no written documentation relating to Vero's. Mr. Stein stated that Stein Industries' sixth cause of action stems from Mainland negligently "wast[ing] a lot of material" while installing Stein Industries' architectural woodwork, necessitating Stein Industries' re-manufacturing of certain items, without additional payment from Vero's, so as to maintain its good reputation.

Upon questioning regarding Stein Industries' seventh cause of action, Mr. Stein testified that it arises out of a project at a restaurant in New York, New York, named Rosaroa (or "Polpette"). Mr. Stein stated that Mainland hired Stein Industries to construct an oak veneer bar, bar shelving, a wall, a waitress station, and wall moldings for that restaurant. He indicated that Stein Industries received \$65,000.00 in payments from Mainland for the work, but that there is an outstanding balance due of \$1,000.00. Asked whether Stein Industries and Mainland ever bartered for services, Mr. Stein denied plaintiffs engaged in bartering, except in the case of legal services.

Mr. Stein testified that, at a time he could not recall, Mainland entered into an agreement with A.N.S. Realty to rent two second-floor offices and parking space from Six Corners at 22 Sprague Avenue, and one-half of a vacant lot located at 56 Sprague Avenue. Mr. Stein explained that Mainland was not given keys to the building at 22 Sprague Avenue, and was only permitted to access its two rented offices during the times when Stein Industries was open for business, generally 8:00 a.m. to 6:30 p.m. However, Mr. Stein stated that Mainland had its own lock and key for the 56 Sprague Avenue property. Mr. Stein indicated that all rental or lease agreements were verbal in nature, and that Mainland could vacate the premises at any time without penalty. He testified that he does not recall when Mainland began occupying its rented spaces, or when Mainland ceased doing so, but that it was "possible" that he had some records relating to Mainland's rental. Nonetheless, Mr. Stein, in verifying the authenticity of multiple rental invoices and rent checks, confirmed that Mainland paid Six Corners \$500.00 per month from January 2011 through October of 2011 for use of office space at 22 Sprague Avenue. Mr. Stein also testified that following the invoice dated September 18, 2011, which demanded rent for the month of October 2011, which Mainland paid, no further invoices were transmitted to Mainland. Asked if there were any invoices sent by A.N.S. Realty to Mainland requesting payment for the rental of vacant land at 56 Sprague Avenue, Mr. Stein replied that he would "need to check."

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As to plaintiffs' fourth cause of action, Mr. Stein testified that when Mainland vacated the fenced vacant land at 56 Sprague Avenue, it left garbage at the property, necessitating the use of A.N.S. Realty's employees to remove it. Mr. Stein stated that Mainland "left trailers and debris" at the 22 Sprague Avenue address as well. He indicated that one trailer remains at the premises to date "because there's garbage on it." He further testified that after Mainland vacated its office space at 22 Sprague Avenue, he discovered that the carpeting and walls were damaged. Regarding plaintiffs' business relationships with defendants, Mr. Stein denied that any of the plaintiffs entered into any contracts with Michael Ninivaggi personally, and that all invoices were made out to "MGC."

Michael Ninivaggi testified that he is self-employed by Mainland and that he, at some point in time, rented office and storage space from Andrew Stein at a rate of \$500.00 per month. Mr. Ninivaggi, who denied that there was a separate rental fee for the storage space Mainland used at 56 Sprague Avenue, stated that he stored two trucks, a trailer, and a large shipping container at the 22 Sprague Avenue address. He indicated that there was no lease agreement, that he was not provided keys to the premises, and that one of Mr. Stein's employees would have to be present for him to access the 22 Sprague Avenue property. Mr. Ninivaggi further testified that Mr. Stein "locked [Mainland] out of there years ago," and that he was unable to retrieve Mainland's trailer and shipping container, each worth approximately \$4,000.00. Mr. Ninivaggi stated that he "believes [Mr. Stein] got rid of" the shipping container containing a computer and tools, but that the trailer continues to be present at the property. He indicated that attempts to retrieve Mainland's property from plaintiffs have been fruitless. Finally, Mr. Ninivaggi listed a number of tasks he performed for Mr. Stein, such as snow removal, dumpster supply, and rent collection, as part of a bartering arrangement with him. Mr. Ninivaggi testified that he received storage and office space from Mr. Stein in exchange for performing such jobs.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Defendants have established a prima facie case of entitlement to summary judgment in their favor as to certain claims, and have failed as to others (see *Alvarez v Prospect Hosp., supra*). First, through the deposition testimony of the parties, defendants proved, prima facie, that plaintiffs did not conduct business with Michael Ninivaggi in his individual capacity, and that plaintiffs have adduced no evidence that Mr. Ninivaggi engaged in any behavior which would allow plaintiffs to pierce Mainland's corporate veil (see generally *Vivir of LI, Inc. v Ehrenkranz*, 145 AD3d 834, 43 NYS3d 435 [2d Dept

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2016)). Plaintiffs put forth no such evidence in their opposition papers and, therefore, Mr. Ninivaggi's application for dismissal of the complaint against him, personally, is granted.

To recover damages for a breach of contract, a plaintiff must prove "the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (*PFM Packaging Mach. Corp. v ZMY Food Packing, Inc.*, 131 AD3d 1029, 1030, 16 NYS3d 298 [2d Dept 2015]). To create a binding and enforceable contract "there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Carione v Hickey*, 133 AD3d 811, 811, 20 NYS3d 157 [2d Dept 2015]). Thus, a plaintiff seeking to establish the existence of a binding contract must prove "an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Kowalchuk v Stroup*, 61 AD3d 118, 121, 873 NYS2d 43 [1st Dept 2009]; see *Matter of Civil Serv. Emplys. Assn., Inc. v Baldwin Union Free School Dist.*, 84 AD3d 1232, 924 NYS2d 126 [2d Dept 2011]). For an offer to give rise to an enforceable contract, it must be sufficiently complete and definite to establish all the material terms of the proposed contract (*Schenectady Stove Co. v Holbrook*, 101 NY 45, 48, 4 NE 4 [1885]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 104, 890 NYS2d 16 [1st Dept 2009]; see *Knight v Barteau*, 65 AD3d 671, 884 NYS2d 470 [2d Dept 2009]).

Here, Mainland established a prima facie case of entitlement to summary judgment with regard to plaintiffs' first, second, and third causes of action by offering Mr. Ninivaggi's testimony that the \$500.00 monthly rent amount was all-encompassing, as well as by submitting copies of rental invoices and rent payment checks. Such evidence shows that only one rental fee of \$500.00 was required for Mainland's use of plaintiffs' property, as that was the only amount invoiced for and the only amount paid by Mainland. Mainland also established that no rental invoices were tendered for use of the office space at 22 Sprague Avenue after October 2011, supporting its argument that the formal rental agreement ceased following the final invoice.

Mainland having established a prima facie case as to plaintiffs' first, second, and third causes of action, the burden shifted to plaintiffs to raise a triable issue (see generally *Vega v Restani Constr. Corp.*, *supra*). The Court finds Six Corners and A.N.S. Realty have succeeded in doing so as to their first and third causes of action. In opposition to Mainland's motion, and in support of their cross motion, plaintiffs submit an affidavit of Andrew Stein, a copy of an electronic ledger sheet, and a copy of an invoice regarding "ARK Restaurant." In Mr. Stein's affidavit, he avers that, as a part of the oral contract with Mainland, there was a separate \$500.00 monthly rent payment required for storage at the 56 Sprague Avenue lot. Thus, Six Corners and A.N.S. Realty allege they were due monthly rent payments totaling \$1,000.00 from Mainland during the period from January 2011 through September 2012, minus the limited number of uncontested \$500.00 payments Mainland already made. Though plaintiffs' complaint asserts, as their second cause of action, that Mainland failed to pay a \$500.00 monthly rental fee for the opportunity to park its commercial vehicles at the 22 Sprague Avenue location, Mr. Stein's affidavit fails to establish that agreement. Specifically, Mr. Stein states that "[d]efendants rented space, and were tenants, at both . . . 22 Sprague Avenue and 56 Sprague Avenue. The rent for each location was \$500.00 a month." Mr. Stein continues, stating that "[d]efendants also stored their commercial vehicles at 22 Sprague . . . [and] I never received any payment for rent of the space used by the defendants to park their vehicles." Later in his affidavit, Mr. Stein states "[t]he rent

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was \$500 a month for the ability to park their commercial vehicles on my property.” The Court notes that Mr. Stein’s affidavit only specifies the month in which Mainland began occupying the office space at 22 Sprague Avenue, and makes no mention of the date Mainland began storing vehicles at either 22 Sprague Avenue or 56 Sprague Avenue. Mr. Stein’s affidavit also merely states that Mainland stored its vehicles at 22 Sprague Avenue and 56 Sprague Avenue “[a]t various times.” Six Corners and A.N.S. Realty also fail to supply a copy of an electronic ledger, or other documentary evidence to substantiate their allegations of unpaid rents for storage space. Thus, plaintiffs have not raised a triable issue of whether there was a separate, specific, rental fee for the parking of commercial vehicles at 22 Sprague Avenue, as alleged by their second cause of action. Accordingly, plaintiffs’ second cause of action, alleging the non-payment of rents for the parking of commercial vehicles at the 22 Sprague Avenue site is dismissed.

However, Mr. Stein clearly states in his affidavit that Mainland did not vacate their office space at 22 Sprague Avenue until September 12, 2012, more than 10 months after Mainland’s last documented rent payment for such office space. Mr. Stein also states in his affidavit, as noted above, that the rent “for each location [22 Sprague and 56 Sprague] was \$500.00 a month.” Therefore, plaintiffs have raised triable issues as to their first and third causes of action. Accordingly, Mainland’s application for summary judgment in its favor as to those causes of action is denied.

As to plaintiff’s sixth cause of action relating to Vero’s restaurant, Mainland established a prima facie case of entitlement to summary judgment by offering the deposition testimony of Mr. Stein, who denied that a contractual relationship existed between Mainland and Stein Industries during the pendency of that project. Rather, he stated that Mainland and Stein Industries each had its own separate contract with Vero’s. A party asserting rights as a third-party beneficiary of a contract must establish “(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost” (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336, 646 NYS2d 712 [1983]; see *State of Cal. Pub. Employees Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 718 NYS2d 256 [2000]; *Town of Oyster Bay v Doremus*, 94 AD3d 867, 942 NYS2d 546 [2d Dept 2012]). “One is an intended beneficiary if one’s right to performance is ‘appropriate to effectuate the intentions of the parties’ to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or ‘the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance’” (*Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159, 161, 521 NYS2d 165 [3d Dept 1987]). A party claiming to be a third-party beneficiary of a contract has the burden of demonstrating it has an enforceable right under such contract (see *Strauss v Belle Realty Co.*, 98 AD2d 424, 469 NYS2d 948 [2d Dept 1983]). In opposition, plaintiff Stein Industries failed to raise a triable issue. Accordingly, Mainland’s application for summary judgment dismissing plaintiffs’ sixth cause of action is granted.

As to plaintiff’s fourth, fifth, and seventh causes of action, defendant Mainland has failed to establish the absence of triable issues (see generally *Alvarez v Prospect Hosp.*, *supra*). Mr. Ninivaggi did not dispute, either at his deposition or in an affidavit, the allegations that Mainland negligently damaged the subject premises, or that \$1,000.00 remains unpaid for Stein Industries’ work on the

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Polpette restaurant project. Finally, questions of fact remain as to Mainland's four counterclaims, as the parties' testimony is in direct conflict on those claims. Accordingly, defendant Mainland's application for summary judgment dismissing plaintiffs' fourth, fifth, and seventh causes of action is denied.

The Court now turns to plaintiffs' cross motion for summary judgment in their favor. As to their first and third causes of action, plaintiffs had the burden of demonstrating, prima facie, the existence of an enforceable contract with Mainland (*see Mills v Chauvin*, 103 AD3d 1041, 962 NYS2d 412 [3d Dept 2013]; *see generally Alvarez v Prospect Hosp.*, *supra*). Plaintiffs have proved, prima facie, only that an enforceable contract existed pertaining to the 22 Sprague Avenue office space during the undisputed period from April 2011 until October 2011. However, plaintiffs failed to establish a prima facie case of entitlement to summary judgment as to Mainland's alleged holdover at the 22 Sprague Avenue office space subsequent to October 2011, and as to the alleged rental agreement for storage space at 56 Sprague Avenue. Mr. Stein's deposition testimony is devoid of any mention of separate rent payments for storage space. Also, Mr. Stein's affidavit lacks specificity as to the dates Mainland is alleged to have occupied the 56 Sprague location. Plaintiffs offer no evidence of rent invoices for any storage space, or rent invoices for the 22 Sprague office space after October 2011. Thus, plaintiffs have failed to eliminate all triable issues of material fact regarding their first and third causes of action (*see Carione v Hickey*, *supra*). Accordingly, plaintiffs' application for summary judgment in their favor as to the first and third causes of action is denied.

As to plaintiffs' fourth, fifth, and seventh causes of action, plaintiffs have established a prima facie case of entitlement to summary judgment (*see generally Alvarez v Prospect Hosp.*, *supra*). Plaintiffs' fourth and fifth causes of action allege Mainland negligently caused damage to plaintiffs' property at 22 Sprague Avenue and 56 Sprague Avenue. Such allegations are substantiated by Mr. Stein's affidavit and his deposition testimony. To recover for negligence, a plaintiff must establish defendant owed it a duty to use reasonable care, that defendant breached the duty of care, and that the breach of such duty was a proximate cause of its injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Solan v Great Neck Union Free School Dist.*, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Plaintiffs' seventh cause of action, alleging an unpaid balance of \$1,000.00 for work Stein Industries performed, at Mainland's request, for the Polpette/Rosarao's restaurant project has similarly been established, prima facie, through Mr. Stein's affidavit, Mr. Stein's deposition testimony, and by a copy of the alleged invoice. In opposition, Mainland does not deny those allegations, and offers no evidence to refute them.

Accordingly, summary judgment in plaintiffs' favor is granted as to the fourth, fifth, and seventh causes of action, but denied as to the first and third causes of action. Summary judgment is also denied as to Mainland's counterclaims.

Dated: May 3, 2017

  
PETER H. MAYER, J.S.C.