TW Installations LLC v WC28 Realty LLC
2017 NY Slip Op 32226(U)
October 19, 2017
Supreme Court, New York County
Docket Number: 152836/2016
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 63

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TW INSTALLATIONS LLC, on behalf of itself and as a representative for all other who may be deemed beneficiaries of a certain Trust Created Pursuant to Lien Law Article 3-A,

Plaintiffs, Index No. 152836/2016

-against-

WC28 REALTY LLC, CENTAUR PROPERTIES, LLC, GREYSCALE DEVELOPMENT GROUP, LLC, HARLAN BERGER, DANIEL LAUB, BANK OF THE OZARKS, FIDEILTY & DEPOSIT COMPANY OF MARYLAND, PIZZAROTTI IBC LLC, and JOHN DOE #1 through #25, inclusive, the last names being fictitious and unknown to Plaintiff, such persons intended to be the entities, if any, having or claiming interest in or lien upon the funds described in the Complaint,

Defendants.

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Ellen M. Coin, J.:

Plaintiff, a window contractor on a construction project, asserts causes of action for foreclosure of a mechanic's lien, breach of contract, quantum meruit, account stated, unjust enrichment, violation of the Prompt Payment Act, conversion of trust funds created pursuant to Lien Law Article 3-A, promissory estoppel, breach of fiduciary duty, fraudulent inducement, violation of the Limited Liability Company Law, and alter ego liability. Defendants WC28 Realty LLC, Centaur Properties, LLC, Greyscale Development Group, LLC, Harlan Berger, and

Daniel Laub make this pre-answer motion to dismiss all claims, except plaintiff's claim to foreclose on its mechanic's lien. [1]

Factual and Procedural Background

Defendant WC 28 Realty LLC (WC28) is the owner of the premises located at 527 West 27th Street, New York, New York. The property was to be developed into high end residences, to be known as Jardim (the Jardim Project)(Affirmation of Nicholas M. David dated October 21, 2016 ¶4 at 3). Defendant Centaur Properties, LLC (Centaur) is a property management company. Defendant Greyscale Development Group, LLC (Greyscale) is a real estate firm and a member of LHB 28 LLC (Affidavit of Daniel Laub sworn to June 23, 2016 ¶¶4-5). Defendant Harlan Berger is a shareholder of HH1 LLC, which is a member of LHB 28 LLC, and Greyscale is a member of LHB 28 LLC (Affidavit of Harlan Berger sworn to June 23, 2016 ¶1 at 1). Defendant Daniel Laub is a shareholder of Greyscale (Laub Aff. at 1). Defendant Bank of the Ozarks (the Bank) provided funding for the Jardim Project, and defendant Fidelity & Deposit Company of Maryland is a surety. Defendant Pizzarotti IBC LLC (Pizzarotti) was a construction manager for the Jardim Project, and bonded plaintiff's mechanic's lien.

Plaintiff alleges that in April of 2014, prior to commencement of the construction phase of the Jardim Project, plaintiff was approached to design and fabricate windows for the Project's sales office. The sales office was to be a model condominium apartment, shown to potential buyers of the high-end residences. Berger, Laub and Centaur employee Larry Greenberg represented that Berger, Laub, Centaur, Greyscale and WC 28 were the owners of the Jardim

1 Defendant WC 28 Realty LLC seeks dismissal only of the Fourth, Ninth and Twelfth Causes of Action. While the notice of motion states that the motion is made pursuant to CPLR 3211(a)(7), the parties treated this motion as one made also pursuant to CPLR 3211(a)(1). Accordingly, the court will treat this motion as one to dismiss based on documentary evidence, as well as to dismiss for failure to to state a claim.

Project (Affidavit of Gregg D'Amato, sworn to August 22, 2016, ¶7 at 3). Although there was no written agreement for plaintiff's work for the sales office, there is no dispute that the work was requested, and performed by plaintiff.[2]

Plaintiff alleges that Laub, Berger and Greenberg repeatedly confirmed that plaintiff had been awarded the window contract for both the sales office phase and the construction phase of the Jardim Project (D'Amato Aff. ¶9 at 3). D'Amato contends that Laub and Berger controlled the financial and final decisions for the owners of the Jardim Project. Moreover, D'Amato states that both Laub and Berger indicated to him that Greenberg had the authority to speak for, and bind, them and/or the owners of the Jardim Project.

D'Amato also states that during the sales office phase, plaintiff was told that payment for its work would be deferred to the construction phase, due to bank funding issues and constraints. Plaintiff relied upon these representations and continued to work on the sales office phase.

In April 2015, after successfully completing the sales office phase, which included window design, fabrication, and installation in the sales office, the owners and Pav-Lak Contracting, Inc. (Pav-Lak), the construction manager on the Jardim Project, directed plaintiff to start work on the construction phase. During July 2015, plaintiff and the owners negotiated a contract for the window work for the construction phase. On August 3, 2015, Pav-Lak sent plaintiff an unexecuted copy of the window contract, with a cover letter indicating that plaintiff had been awarded the window contract, at a price of $5,132,000.

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2 The worked performed by plaintiff prior to and including July 31, 2015, will hereinafter be referred to as the "sales office phase." The work performed after July 31, 2015, will be referred to as the "construction phase."

On August 5, 2015, the owners notified plaintiff that Pav-Lak was no longer working on the Jardim Project, and that Pizzarotti-IBC, LLC (Pizzarotti) was the new construction manager for the Project.

On August 11, 2015, plaintiff sent WC28 an Application and Certificate for Payment for work performed to and including July 31, 2015, in the amount of $361,434.75 (Affirmation of Eric Schutzer dated 11/22/16, ex. K). At the owners' directive, on August 11, 2015, plaintiff then sent a separate invoice to Centaur, in the amount of $325,000 ($361,434.75 less a 10% retainage), for "Shop Drawing and Engineering" for the windows through July 31, 2015 (Schutzer aff, ex. F). On August 13, 2015, a Centaur employee acknowledged receipt of the invoice, via email, stating "Got it Being Processed Thanks" (Schutzer aff, ex. G). On August 17, 2015, at Centaur's request, plaintiff executed a partial waiver and release in favor of WC28 (which was identified as "Construction Manager" in the release), for the $325,000 payment.

On August 13, 2015, plaintiff received a letter from Michael Masters, of Pizzarotti, stating, among other things, "Please be advised that it is our intent to proceed with your firm for the Aluminum Windows and Glazing Work on our 527 West 27th Street Project. Your base contract value will be $5,132,000. A draft subcontract agreement will follow within five (5) business days, which, while in [Pizzarotti's] standard format, will not substantially differ from what you have previously agreed upon with the former CM Pav-Lak Contracting, Inc." (Schutzer aff, ex. L).

D'Amato alleges that in reliance on these representations, plaintiff continued to work on the construction phase of the Jardim Project, which included attending numerous meetings, performing tests, product engineering, design, shop drawings, and creating reports.

On September 2, 2015, plaintiff received the new contract from Pizzarotti. Contrary to Masters' statement that it would be substantially the same as the Pav-Lak contract, it contained several significantly different terms (D'Amato

Aff ¶ 29 at 8). Nevertheless, plaintiff continued to work on the construction phase, while it negotiated the terms of the new contract with Pizzarotti and the owners.

On September 2, Centaur mailed plaintiff a check dated August 12, 2015, drawn on WC28's Bank of Ozarks account, in the amount of $325,000 (Schutzer Aff., ex. O).

On or about September 4, 2015, Centaur directed plaintiff not to deposit the $325,000 check, claiming that WC28 had made a clerical error (D'Amato Aff. ¶33 at 8). When plaintiff inquired about a replacement check, Masters emailed plaintiff, stating, "We will see that the replacement is issued properly." (Schutzer Aff, ex. P).

On November 12, 2015, plaintiff sent Pizzarotti an Application and Certification for Payment, seeking payment of the original $361,434.75 and an additional $85,808.25 for work performed through October 31, 2015, a total of $447,243 (Schutzer Aff, ex. R). On November 13, 2015, Pizzarotti notified plaintiff that the owners were not going to pay plaintiff, and that Pizzarotti was not going to use plaintiff as its window contractor.

On February 18, 2016, plaintiff filed a mechanic's lien in the New York County Clerk's office. The notice of lien was served on defendants on February 16, 2016. On March 15, 2016, defendants Fidelity & Deposit Company of Maryland, as surety, and Pizzarotti, as bonding principal, bonded the lien.

On April 4, 2016, plaintiff commenced this action. Its amended complaint asserts 13 causes of action.

WC28, Laub, Berger, Centaur, and Greyscale (Defendants) now move to dismiss the 2nd through 13th causes of action. First, Defendants argue that throughout the complaint, plaintiff refers to WC28, Laub and Berger, Centaur and Greyscale as the "owners" of the real property. Defendants submit the July 12, 2013 deed which shows that the real property was conveyed to WC28. Defendants note that WC28 is a subsidiary of RN Realty, LLC and LHB 28 LLC. Defendants contend that Centaur is a property manager with no ownership interest in the property, and that Greyscale is a real estate firm and a member of LHB 28 LLC. Thus, all of plaintiff's claims against Laub, Berger, Centaur and Greyscale must be dismissed because they are not the owners of the premises, and they had no contract with plaintiff. With respect to individual defendants Laub and Berger, defendants argue that plaintiff failed to demonstrate that they were personally involved in the sales office phase or the construction phase of the Project, or that they intended to be personally bound by any agreements for plaintiff's window design and fabrication services. Defendants also argue that the fact that the complaint lumps all the defendants together and labels them "owners" is so misleading and confusing that it prevents them from preparing a defense to this action.

With respect to specific causes of action, defendants argue that the second cause of action alleging breach of contract fails to state a claim against Laub, Berger, Centaur, and Greyscale, because they have no privity of contract with plaintiff. Similarly, the third cause of action alleging quantum meruit and the fifth cause of action alleging unjust enrichment should be dismissed because there was no contractual or quasi-contractual relationship between plaintiff and Laub, Berger, Centaur, or Greyscale. As to the fourth cause of action for an account stated, defendants argue that WC28 objected to the $325,000 invoice by informing plaintiff not to cash

the $325,000 check. Further, since there was no agreement for payment between plaintiff and Laub, Berger, Centaur, and Greyscale, the account stated claim must be dismissed as to them.

Defendants argue that the sixth cause of action, alleging breach of General Business Law Article 35E (Prompt Payment Act), must be dismissed, because Laub, Berger, Centaur and Greyscale do not owe plaintiff any payment for the services it rendered on either the sales office phase or construction phase of the Jardim Project.

Defendants also argue that the seventh cause of action, seeking to enforce a trust pursuant to Lien Law Article 3-A, cannot be enforced against Laub, Berger, Centaur and Greyscale, because they did not receive construction loan funds. Similarly, the eighth and tenth causes of action seeking damages from Laub, Berger, Centaur, and Greyscale for converting trust funds, and for breach of fiduciary duty with respect to the trust funds, should be dismissed. Defendants urge that plaintiff's claim that "Berger and Laub knowingly caused a misappropriation of the trust funds" (D'Amato Aff. ¶43 at 10), is factually insufficient to support these claims against Laub and Berger individually.

With respect to plaintiff's eleventh cause of action, alleging fraudulent inducement, defendants contend that it is not pled with sufficient particularity.

Defendants argue that the ninth cause of action, alleging promissory estoppel, must be dismissed, because Laub, Berger, Centaur and Greyscale did not make any promises to plaintiff. Further, plaintiff has not alleged a legal duty independent of the contract terms upon which a promissory estoppel claim must be based.

Defendants claim that the twelfth cause of action, alleging violation of the Limited Liability Company Law § 409, must be dismissed as to Laub and Berger.

Defendants argue that in its thirteenth cause of action, labeled alter ego liability, plaintiff is attempting to pierce the corporate veil. However, with respect to Laub, Berger, Centaur and Greyscale, it fails to properly allege such a cause of action. Defendants note that plaintiff's allegation that "Berger and Laub are the sole and/or managing member and/or in exclusive control" of WC28, Centaur, and Greyscale (Amended complaint ¶7) is conclusory. Likewise, its allegation that "the Jardim Entities…are of such unity of action, interest and/or ownership as to constitute as one entity" (Amended cp ¶8) is not sufficiently factual to support a claim to pierce the corporate veil or for alter ego liability.

In opposition to the motion, and as an initial matter, plaintiff notes that defendants do not directly challenge most of its factual allegations: that plaintiff was hired to perform work on the sales office phase and construction phase of the Jardim Project; that it performed such work; that a check was issued for payment for the sales office phase, but payment was stopped; and that plaintiff was not paid for any of its work.

With respect to defendants' argument that all claims against Laub, Berger, Centaur, and Greyscale must be dismissed, because they are not the owners of the Jardim Project, plaintiff counters that throughout the sales office and the construction phases of the Jardim Project, Laub, Berger, Greenberg, Centaur, Greyscale, and WC28 blurred the distinction among themselves by indiscriminately using different corporate or entity names and various subsidiaries, and referring to these entities as the owners of the Jardim Project. Further, plaintiff alleges that there are issues of fact regarding whether Laub, Berger and all the other entities acted as one economic unit. Finally, plaintiff alleges that WC28, Laub, Berger, Centaur, and Greyscale guaranteed payment for its work.

Plaintiff argues that since there is no doubt that it performed work for the sales office phase, as well as for the construction phase of the Project, it sufficiently alleged its breach of contract and account stated claims, as well as quantum meruit and unjust enrichment claims, and its claim for violation of General Business Law Article 35E. Similarly, since plaintiff performed construction work for which the owners received construction loan disbursements, it properly alleged a claim of entitlement to trust funds pursuant to Lien Law Article 3-A, and for conversion of those trust funds. With respect to its fraudulent inducement claim, plaintiff argues that defendants' continuing assurances that it would be paid for the sales office phase, when defendants knew they were not going to pay plaintiff, and plaintiff's reliance on these fraudulent statements in performing work on the construction phase, sufficiently alleges a claim of fraudulent inducement.

Finally, with respect to its alter ego liability claim, since Laub, Berger, Centaur, Greyscale, and WC28 indiscriminately represented that they were owners of the project, plaintiff sufficiently alleged such a claim.

Discussion

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88 [1994] [citation omitted]). In considering a CPLR 3211(a)(7) pre-answer motion to dismiss a complaint for failure to state a cause of action, a "court must accept all of the allegations in the complaint as true, and, drawing all inferences from those allegations in the light most favorable to the plaintiff, determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated" (*see MatlinPatterson ATA Holdings*

LLC v Federal Express Corp., 87 AD3d 836, 839 [1st Dept 2011], citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634, 636 [1976]). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" *(Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

The Individual Defendants

Defendants argue that the 2nd through 13th causes of action must be dismissed because plaintiff refers to WC28, Laub, Berger, Centaur, and Greyscale collectively as the "Owner," thus not providing sufficient notice of the claims asserted against each separate defendant. While pleadings are to be given a liberal construction, a complaint must be sufficiently particular to give the court and the parties notice of the material elements of a cause of action (*see* CPLR 3013, 3024[a]*; see also Woolridge v Rosen*, 35 AD2d 714 [1st Dept 1970]).

Plaintiff's principal, Gregg D'Amato, alleges that defendants Berger, Laub and Centaur's employee Greenberg represented to him that Berger, Laub "and/or their various entities including but not limited to Centaur, [Greyscale] and [WC] were the owners of the Project" (D'Amato Aff. ¶7 at 3). In the next breath, however, he alleges that Berger, Laub and/or their employees "most consistently referred to Centaur and Greyscale as the owners of the Project" (id. ¶ 8 at 3). The Amended Complaint alleges, "When Plaintiff was hired on the Project it was represented to Plaintiff that Berger and Laub, through their Jardim Entities were the Owners of the Project" (¶ 40).

Where, as here, a plaintiff seeks to impose liability against the principals of limited liability companies by piercing the "corporate" veil, the plaintiff must meet the heavy burden of

showing that "(1) the owners exercised complete domination of the corporation in respect to the transaction at issue; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]; *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]).

In this case neither the complaint nor D'Amato's affidavit makes any factual allegations to show that individual defendants Berger and Laub dominated the defendant limited liability companies they represented by ignoring the requisite formalities or engaging in self-dealing in order to perpetrate a fraud or wrong against plaintiff (*Cerrato v Dee Corp.*, 150 AD3d 522, 523 [1st Dept 2017]; *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016]). Accordingly, the Second through Sixth and Ninth through Thirteenth Causes of Action of the amended complaint must be dismissed as against defendants Berger and Laub. The viability of the Seventh and Eighth Causes of Action as to these defendants is discussed below.

The claims against defendants Centaur and Greyscale are addressed in the court's analysis of each cause of action.

Breach of Contract – Second Cause of Action

Under New York law, the elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant, (2) performance by plaintiff, (3) defendant's failure to perform, (4) resulting damage (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425 [1st Dept 2010]; *JP Morgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802 [2d Dept 2010]).

There is no dispute that plaintiff was asked to perform window work on the sales office phase and the construction phase of the Jardim Project, that work was performed, and that plaintiff was not paid. While plaintiff has properly alleged the elements of a breach of contract claim, the question remains as to whether any defendants other than WC28 is liable for such breach.

Plaintiff alleges that it entered into a signed subcontract with the Project's first construction manager, non-party Pav-Lak Contracting, Inc. (Pav-Lak), as agent for the "Owners" (Amended Cp ¶¶ 43, 46). While plaintiff alleges various oral representations by the "Owners," it fails to plead with particularity the formation of a contract as against Centaur and Greyscale (CPLR § 3013; *New Dimension Solutions, Inc. v Spearhead Sys. Consultants (US) Ltd.*, 28 AD3d 260, 261 [1st Dept 2006]). Thus, the cause of action for breach of contract is dismissed as against Centaur and Greyscale.

Quantum Meruit and Unjust Enrichment – Third and Fifth Causes of Action

Elements of a cause of action sounding in quantum meruit are: (1) performance of services in good faith, (2) acceptance of services by person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of services rendered. (*see Evans-Freke v Showcase Contr. Corp.*, 85 AD3d 961 [2d Dept 2011]).

The elements of a cause of action to recover for unjust enrichment are "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*Mobarak v. Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain

what is sought to be recovered" (*Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007] quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972]).

As noted, there is no dispute that plaintiff performed window services for the Jardim Project. As plaintiff alleges that Centaur and Greyscale were the developers of the Project, it has adequately alleged the elements of its quantum meruit claim and its claim for unjust enrichment as against these defendants.

Account Stated-Fourth Cause of Action

"An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due." "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time...." (*American Express Centurion Bank v Gabay*, 94 AD3d 795, 795 [1st Dept 2012][citations and interior quotation marks omitted]).

Here, plaintiff offers its invoice addressed to Centaur for the sales office phase of its work and Centaur's response that the invoice was being processed. Centaur not only retained the invoice, but sent a check to plaintiff drawn on the account of WC28. Although Centaur promptly notified plaintiff not to deposit the check, it claimed that the reason was a "clerical error." While defendants now attempt to depict Centaur's notice as an objection to the invoice, the language of the notice fails to support such an interpretation. The motion to dismiss so much of this cause of action as arises from the sale office phase invoice is therefore granted as to WC28 and Greyscale, and denied as to Centaur.

However, plaintiff issued its invoice for the work performed on the construction phase of the Project only to Pizzarotti, listing WC28 as owner (D'Amato Aff., ex. K). Thus, the motion to dismiss this aspect of the account stated cause of action is granted as to all defendants.

Violation of General Business Law § 756 et seq. – Sixth Cause of Action

"It is the policy and purpose of [the Prompt Payment Act] to expedite payment of all monies owed to those who perform contracting services pursuant to construction contracts." (*see* General Business Law § 756-a).

General Business Law § 756-a (2) (a) (i) provides, in relevant part:

> "Upon delivery of an invoice and all contractually required documentation, an owner shall approve or disapprove all or a portion of such invoice within twelve business days. Owner approval of invoices shall not be unreasonably withheld nor shall an owner, in bad faith disapprove all or a portion of an invoice. If an owner declines to approve an invoice or a portion thereof, it must prepare and issue a written statement describing those items in the invoice that are not approved.

Here, plaintiff has shown that it provided its invoice to Centaur and that the invoice was not disapproved. However, plaintiff fails to state a claim under the Prompt Payment Act, because § 756(a) imposes liability only on entities that contracted with plaintiff (Gen. Bus. Law § 756-a(3)(b)(ii); *Inter Connection Elec., Inc. v VII 752 West End Owner LLC*, 2013 WL 3989029 [Sup Ct, New York County 2013]). As plaintiff's claim for breach of contract has been dismissed, this claims also falls.

Enforcement of a Lien Law Article 3-A Trust, Conversion of Trust Funds, Breach of Fiduciary Duty – Seventh, Eighth and Tenth Causes of Action

Plaintiff's Seventh Cause of Action seeks to enforce a trust pursuant to Lien Law § 77. Plaintiff alleges that it performed work for the Jardim Project for which WC28 received a construction loan advance, but for which plaintiff was not paid.

It is well settled that the individual officers of a corporate trustee may be held personally liable pursuant to Lien Law article 3-A (*Holt Const. Corp. v Grand Palais, LLC,* 108 AD3d 593, 597 [2nd Dept 2013]; *Dovin Constr., Inc. v C. Raimondo & Sons Const. Co., Inc.*, 29 AD3d 364, 365 [1st Dept 2006]; *Edgewater Const. Co., Inc. v 81 & 3 of Watertown, Inc.*, 1 AD3d 1054, 1057 [4th Dept 2003]). The allegations in the amended complaint state a cause of action against Berger and Laub for violation of Lien Law § 77 (David Aff., ex. A ¶ 7 at 3; D'Amato Aff., exs. W, AA)).

However, plaintiff's Lien Law claim as against the sponsor-defendants, Centaur and Greyscale, does not survive. They have shown that they are not the owner of the subject premises, and plaintiff fails to allege any other basis for liability under the Lien Law.

Similarly, with respect to its conversion claim, plaintiff has sufficiently alleged that it has a claim against the trust funds, and that WC28, as well as Laub and Berger individually, knowingly converted those funds in violation of Lien Law Article 3-A. Accordingly, plaintiff has properly alleged a cause of action sounding in conversion of the trust funds as against Laub and Berger (*see generally Wallkill Medical Development, LLC v Sweet Constructors, LLC,* 83 AD3d 695, 696 [2d Dept 2011][Plaintiffs entitled to assert a claim of conversion where "they established that they had ownership, possession, and control of 'specifically identifiable funds and that the defendant exercised an unauthorized dominion over such funds to the exclusion' of

plaintiff's rights"]). However, plaintiff's claim fails as against defendants Centaur and Greyscale for the reasons set forth above.

Plaintiff properly pled its tenth cause of action sounding in breach of fiduciary duty to the extent that it alleges that WC28, Laub and Berger, as trustees of the trust, owed it a duty not to misappropriate the trust funds. To state a claim for breach of fiduciary duty, a plaintiff must allege that: (1) defendant owed them a fiduciary duty; (2) defendant committed misconduct; and (3) plaintiff suffered damages caused by that misconduct. (*see Burry v. Madison Park Owner LLC,* 84 AD3d 699 [1st Dept 2011]). As Centaur and Greyscale have shown that WC28 is the owner of the Jardim Project, plaintiff's claim against them on this cause fails.

Promissory Estoppel – Ninth Cause of Action

The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (*New York City Health & Hosps. Corp. v. St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]).

Here, plaintiff has sufficiently alleged that WC28, Centaur and Greyscale made an unambiguous promise to pay for the window work performed for the Jardim Project, that it reasonably relied on that promise, and that it suffered damages by continuing to work on the Jardim Project without payment. The motion to dismiss this cause of action is denied as to Centaur and Greyscale only.

Fraudulent Inducement – Eleventh Cause of Action

The elements of a cause of action for fraud require a misrepresentation of a material fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and

damages (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 488 [2007]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Under New York law, a plaintiff may plead a fraud claim, as well as a contract claim, if it alleges "misrepresentations of present fact, not merely misrepresentations of future intent to perform under the contract" (*Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). Such misrepresentations can support a separate fraud claim where "a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts," because such misrepresentations are "collateral to the contract (though [they] may have induced the plaintiff to sign the contract) and therefore involve[] a separate breach of duty" (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 292 [1st Dept 1999]).

Here, plaintiff alleges that WC28, Centaur and Greyscale requested that plaintiff perform the window work for the sales office phase of the Project, that Centaur caused WC28 to issue a check for payment for that work, and then stopped payment. Plaintiff further alleges that thereafter WC28, Centaur and Greyscale fraudulently represented that they were going to replace the stopped check in order to induce plaintiff to continue working on the construction phase of the Project and to enter into the written construction contract with Pav-Lak.

Plaintiff has properly stated a claim for fraudulent inducement. It alleges a collateral act: the owners fraudulently representing that they would pay plaintiff for the work performed on the sales office phase, in order to induce plaintiff to work on the construction phase, and enter into the written contract. (*Wyle Inc. v ITT Corp.*, 130 AD3d at 438-439; *GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]).

Violation of Limited Liability Company Law § 409 – Twelfth Cause of Action

Plaintiff does not oppose dismissal of this cause of action.

Alter Ego Liability – Thirteenth Cause of Action

As defendants correctly note, "New York does not recognize a separate cause of action to pierce the corporate veil" (*Chiomenti Studio Legale, L.L.C. v Prodos Capital Mgt. LLC*, 140 AD3d 635, 636 [1st Dept 2016]). Accordingly, this cause of action is dismissed.

It is therefore

ORDERED that defendants' motion to dismiss the second, sixth, twelfth and thirteenth causes of action in the amended verified complaint is granted, and the second, sixth, twelfth and thirteenth causes of action are dismissed; and it is further

ORDERED that defendants' motion to dismiss the third, fifth and eleventh causes of action is granted as to defendants Harlan Berger and Daniel Laub only, and the third, fifth and eleventh causes of action are dismissed as to said defendants; and it is further

ORDERD that defendants' motion to dismiss the fourth cause of action is granted as to (1) defendants WC 28 Realty LLC, Greyscale Development Group, LLC, Harlan Berger and Daniel Laub, and the fourth cause of action is dismissed as against those defendants; and (2) defendant Centaur Properties, LLC, to the extent that it alleges a claim regarding the construction phase of the Jardim Project, and so much of the fourth cause of action that alleges an account stated for work performed on the construction phase of the project is dismissed as against defendant Centaur Properties, LLC; and it is further

ORDERED that defendants' motion to dismiss the seventh, eighth, ninth and tenth causes of action is granted as to defendants Centaur Properties, LLC and Greyscale Development

Group, LLC, and the seventh, eighth, ninth and tenth causes of action are dismissed as against said defendants; and it is further

ORDERED that defendants' motion to dismiss is denied in all other respects; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry and it is further

ORDERED that counsel are directed to appear for a discovery conference in Room 311, 71 Thomas Street on November 29, 2017, at 2:00 PM.

DATED: October 19, 2017

ENTER

Ellen M. Coin, A.J.S.C.