Hook v Hampton Deck LLC
2018 NY Slip Op 30801(U)
April 30, 2018
Supreme Court, Suffolk County
Docket Number: 20358/2015
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 20358/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 11/06/17
Motion Conf Held: 05/25/17
Motion Seq 001 MG

THOMAS J. HOOK & ELIZABETH I. HOOK,

Plaintiffs,

-against-

HAMPTON DECK LLC d/b/a NEW YORK ROOFSCAPES, INC.,

Defendants.

PLAINTIFF'S COUNSEL:
Braxton Hook, PLLC
By: Elizabeth I. Hook, Esq.
4 Bay Woods Drive
Hampton Bays, New York 11946

DEFENDANT'S COUNSEL:
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Westhampton Beach, NY 11978

On plaintiff's motion to amend the complaint pursuant to CPLR 3025 to add an additional causes of action, join additional party defendants, and to amend their *ad damnum* clause, the following was considered by the Court:

1. Notice of Motion, Affirmation in Support & Memorandum of Law in Support dated October 13, 2017 and supporting papers;
2. Affirmation in Opposition dated October 26, 2017;
3. Reply Memorandum of Law in Further Support dated November 15, 2017; it is

Plaintiffs husband and wife Thomas J. and Elizabeth I. Hook own a summer residence located at 4 Bay Woods Drive in Hampton Bays, Town of Southampton, County of Suffolk. They contracted with defendant Hampton Deck, LLC. for the demolition of an existing deck and construction of a composite desk and fence to enclose their pool area. On defendant's recommendation, the project further entailed erection of an 8-foot deer fence, and the securing of municipal permitting or certificates of occupancy from the Town of Southampton. Further, plaintiffs claim that they sought installation of the decking on the existing substructure, to the extent that it was adequate and feasible for such a purpose. At any rate, plaintiff's sought installation of a particular brand of composite decking which bore a 30-year manufacturer's warranty.

The parties conferred and agreed on a construction project budget of $54,000.00. Plaintiffs received a proposed agreement from defendant calling for a down payment of $18,000.00 which they tendered along with a signed copy of the agreement. Defendant

tendered a general liability insurance policy covering the project.

During the course of the project, defendant by its principal David Salerno, sought plaintiffs to tender their first progress payment to New York Roofscapes, Inc., on the basis that it would be the successor in interest by merger with Hampton Deck. It was plaintiffs' understanding that Hampton Deck, LLC would cease operations and existence and that Roofscapes would continue on as a going concern to complete their project. Therefore, plaintiffs did as requested and made their progress payments payable to Roofscapes. On taking over the project, Roofscapes tendered a general liability insurance policy covering the remainder of the project in its name. Hampton Deck, LLC. officially dissolved in 2015. However, by June 2013, municipal approval had not yet been obtained by defendants, although plaintiff's deck had been installed and the fencing completed.

This litigation commenced with plaintiffs' filing of their summons and complaint seeking recovery of damages for breach of contract by their summons and complaint filed on November 24, 2015. Defendant joined issue filing an answer with affirmative defenses on January 28, 2016. The parties appeared at a Preliminary Conference which was held on June 13, 2016. The matter has since appeared several times for discovery compliance conferences before this Court.

Presently, plaintiffs seek leave to amend their pleadings to join as additional party defendants the principals of both Hampton Deck and Roofscapes; to add as additional causes of action negligence and fraud against the defendants; and to increase the *ad damnum* in the complaint to $80,000.00 to commensurate with additional costs to cover. Defendant has opposed plaintiff's request in its entirety.

CPLR 3025(b) provides that courts may grant leave to parties to amend or supplement their pleadings, and, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (***Tirpack v 125 N. 10, LLC***, 130 AD3d 917, 919, 14 NYS3d 110, 113 [2d Dept 2015]).

The decision to allow or disallow an amendment is committed to the court's sound discretion, the exercise of which should not be lightly disturbed (*see* ***Edenwald Contr. Co. v City of New York,*** 60 NY2d 957, 959, 471 NYS2d 55; ***Castagne v Barouh***, 249 AD2d 257, 671 NYS2d 283)Generally speaking, in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (***Postiglione v Castro***, 119 AD3d 920, 922 [2d Dept 2014]; *see also* ***TD Bank, N.A. v 250 Jackson Ave., LLC***, 137 AD3d 1006, 1007–08 [2d Dept 2016][motion court should grant leave to amend where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and the defendants would not be prejudiced by the proposed amendment]).

On a motion for leave to amend, "[t]he burden of establishing prejudice is on the party opposing the amendment." In this regard, the asserted prejudice must be more than "the mere exposure of the [opponent] to greater liability" and must indicate that the opponent "has been hindered in the preparation of [its] case or has been prevented from

taking some measure in support of [its] position" (***Garafola v Wing Inc.***, 139 AD3d 793, 794 [2d Dept 2016][internal citations omitted]).

Although plaintiff may delay in making the motion for leave to amend, mere lateness is not a barrier to the amendment-it must be lateness coupled with significant prejudice to the other side (***Ciminello v Sullivan***, 120 AD3d 1176, 1177 [2d Dept 2014]).

The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt. Moreover, leave should be freely granted where, as here, a plaintiff seeks to amend a complaint merely to add a new theory of recovery, without alleging new or different transactions (***Sample v Levada***, 8 AD3d 465, 467–68 [2d Dept 2004]).

Here, plaintiffs seek to add claims for negligence and fraud into the case. Plaintiffs base this request on the basis that defendants will not be prejudiced or taken by any unfair surprise. Concerning fraud, plaintiffs claim that they justifiably relied on defendant Hampton Deck and its principal David Salerno's recommendation concerning the adequacy of its substructure for composite deck installation, the height of its fencing, and the manufacturer's warranty for the composite decking material. More specifically, plaintiffs claim that their deck suffered from warping after installation, which defendants stated was usual and customary for the product. On follow up with the manufacturer, plaintiffs contend that they were advised that the defect was due to inadequate substructure, and would not be warranted due to negligent installation. Thus, plaintiff argue that defendant as its contractor breach its professional duty of care to install in a nonnegligent fashion. Additionally, plaintiffs argue that during discovery it was revealed that plaintiffs would not be able to obtain necessary municipal approval for their fence as it did not comply with Town Code 6 foot requirements. Plaintiff claim that defendant misrepresented the adequacy of the existing deck's substructure and its ability to bear the decking installation to plaintiff's detriment. At the time of the project's completion, plaintiffs maintain that they were Yonkers, New York residents and did not reside on premises or otherwise supervise the project on a day-to-day basis. Thus, plaintiffs contend they relied on defendant's experience and expertise in these matters.

Plaintiff also seeks inclusion of husband and wife, principals of both Hampton Deck and Roofscapes, Melissa and David Salerno as party defendants to the extent that their deposition testimony established that Roofscapes merged with Hampton Deck. Therefore, plaintiffs argue the successor entity in interest, Roofscapes, should bear responsibility for Hampton Deck's contractual and tort liabilities. Moreover, plaintiffs seek to pierce the corporate veil as against the Salernos individually on grounds that their testimony established they did not follow corporate formalities. For instance, plaintiff cites testimony that the Salernos held corporate board meetings at dinner out and discussed business matters. Further, plaintiffs claim corporate bank account records reveal that Hampton Deck's funds were used to satisfy personal expenses. Lastly, plaintiffs argue that Hampton Deck at the time it dissolved and ceased operation in 2015, had run down its corporate account leaving no funds or assets on hand to satisfy any potential judgment or recovery as alleged in this matter.

To prevail on a negligence claim, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages. (***Luina v Katharine Gibbs School New York, Inc.***, 37 AD3d 555, 556, 830 NYS2d 263, 264 [2d Dept 2007]).

The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages. General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a cause of action sounding in fraud. However, a misrepresentation of a material fact which is collateral to the contract and serves as an inducement to enter into the contract is sufficient to sustain a cause of action sounding in fraud (***Introna v Huntington Learning Centers, Inc.***, 78 AD3d 896, 898, 911 NYS2d 442, 445 [2d Dept 2010]). Generally, "a cause of action premised upon fraud cannot lie where it is based on the same allegations as the breach of contract claim." Thus, where a claim to recover damages for fraud is premised upon an alleged breach of contractual duties, and the allegations with respect to the purported fraud do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie (***Fromowitz v W. Park Assoc., Inc.***, 106 AD3d 950, 951, 965 NYS2d 597, 599 [2d Dept 2013]).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff (***E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.***, 66 AD3d 122, 126, 884 NYS2d 94, 98 [2d Dept 2009], *affd,* 16 NY3d 775, 944 NE2d 1135 [2011]). Put somewhat differently, New York courts have permitted application of the doctrine where the owners exercised complete domination of the corporation in respect to the transaction attacked; and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (***Mistrulli v McFinnigan, Inc.***, 39 AD3d 606, 607, 834 NYS2d 271, 272 [2d Dept 2007]). The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" (***Ventresca Realty Corp. v Houlihan***, 28 AD3d 537, 538, 813 NYS2d 196, 197 [2d Dept 2006]; *see also* ***Agai v Diontech Consulting, Inc.***, 138 AD3d 736, 737, 29 NYS3d 441, 442 [2d Dept 2016][applying doctrine where it was shown that defendant did not adhere to any corporate formalities such as holding regular meetings and maintaining corporate records and minutes, that the appellants used corporate funds for personal purposes, and stripped the entity of assets as they wound down the business, leaving it without sufficient funds to pay its creditors]).

Here, this Court cannot say that plaintiff's proposed amendments as to parties, claims or damages patently lack merit. While on such a motion it is not this Court's duty to probe the merits of each claim, based on the evidence submitted plaintiffs have adequately sustained their burden demonstrating that each proposed amendment bears merit at this stage of the litigation. In support of their motion, plaintiffs have supplied the Court with portions of deposition testimony by both Salernos indicating that proposed additional defendant Tamara Salerno was an owner of Roofscapes, the entity which merged with defendant Hampton Deck and survived as the successor in interest and

which completed plaintiff's project. Further, plaintiff has established for purposes of this motion, that both Tamara and David Salerno met in public and discussed business affairs along with personal issues such as childcare at dinner on a regular basis, thus not observing corporate formalities.

Further, additional evidence exists on which a rational factfinder could find both negligence and fraud claims existing as against the defendants. While it is true that plaintiff has not supplied the Court with a signed writing, defendant has not persuaded this Court that the proposed additional individual party defendants lack privity with plaintiffs here. Rather, the motion record evidence belies a suggestion that either lacked knowledge or involvement with the underlying transaction. "[A] contract implied-in-fact contemplates not assurances or promises but conduct (***Zimmer v Town of Brookhaven***, 247 AD2d 109, 114, 678 NYS2d 377, 381 [2d Dept 1998]). The law therefore may create a contract implied-in-fact, that is "an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience [that party] ought not to retain and that belongs to another" ***Charlie's at Fair, LLC v State***, 135 AD3d 1042, 1044, 23 NYS3d 411, 413–14 [3d Dept 2016]). A cause of action for money had and received is one of quasi-contract or of contract implied-in-law." Retention of monies rightfully belonging to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise" (***Goel v Ramachandran***, 111 AD3d 783, 789–90, 975 NYS2d 428, 436 [2d Dept 2013]).

Here, plaintiff has submitted ample proof that mutual assent and understanding existed between the parties as to the key and material elements of an agreement: price of the anticipated project with a construction budget of $54,000 as well as date, time and location for performance. Moreover, plaintiff has established for this motion that approximately $40,700.0 of a total $58,700.00 was paid by them to defendants on the project.

More importantly, while defendant argues that plaintiff has not adequately plead their proposed fraud claim with the requisite specificity, on this motion it is not the Court's role to delve so deeply into the proposed amendments merits to grant or deny it as the Court would as a matter of law on a motion to dismiss or summary judgment. To the contrary, plaintiffs have presently made out a case for all material elements but for knowledge or intent by defendants to deceive, materially omit or mislead. Discovery may bear this out or it may not, and thus defendants will not be foreclosed from pursing dispositive motion practice in the future. But for present purposes, plaintiffs have sustained their burden of demonstrating that the proposed amendments do not patently on their face lack merit.

The addition of successor entity Roofscapes as an independent party defendant also is supported in this instance. The Second Department's guidance on this is clear:

> A purchaser of a corporation's assets ordinarily does not, as a result of the purchase, become liable for the debts of its predecessor. ... However, there are four exceptions to this rule. Generally, the buyer is not liable for the liabilities of the seller unless: "(1) [the buyer] expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the

purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations"

hallmarks of a de facto merger are the "[c]ontinuity of ownership; cessation of ordinary business and dissolution of the predecessor as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, a continuity of management, personnel, physical location, assets, and general business operation" ... These factors are analyzed in a flexible manner that disregards mere questions of form and asks whether, in substance, it was the intent of the successor to absorb and continue the operation of the predecessor

(*AT & S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 752, 803 NYS2d 118, 120 [2d Dept 2005][internal citations omitted])

Here for purposes of their motion to amend the pleadings, plaintiff has satisfactorily shown that ownership of Hampton Deck and Roofscapes was related or in common and Roofscapes affirmatively undertook Hampton Deck's obligations accepting payment for plaintiff's construction project.

Therefore, in view of all of the above, plaintiffs' motion to amend the pleadings pursuant to CPLR 3025 to add additional parties, add additional causes of action and to increase their request for money damages, having been fully considered, is **granted.**

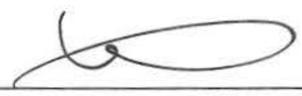
Accordingly, it is

ORDERED that plaintiff's counsel serve a copy of this decision and order with notice of entry on defendant's counsel by overnight mail delivery; and it is further

ORDERED that plaintiff serve a copy of the proposed First Amended Complaint on the additional party defendants by personal service, or on their counsel if any exists and is presently retained, **no later than 30 days from entry of this decision and order.**

The foregoing constitutes the decision and order of this Court.

Dated: April 30, 2018
Riverhead, New York



WILLIAM G. FORD, J.S.C.

_______ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**