

**Pizzarotti, LLC v X-Treme Concrete Inc.**

2019 NY Slip Op 31233(U)

April 16, 2019

Supreme Court, New York County

Docket Number: 655471/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

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

-----X  
PIZZAROTTI, LLC,

Plaintiff,

-against-

X-TREME CONCRETE INC., a/k/a XTREME  
CONCRETE INC., and MICHAEL FALCO,

Defendants.

-----X  
FRANK P. NERVO, J.S.C.

DECISION AND ORDER

Index Number

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Plaintiff moves to compel defendants to comply with plaintiff's interrogatories, pursuant to CPLR § 3124, and for a self-executing order precluding defendants from offering evidence at trial related to matters in plaintiff's discovery demands, should defendants fail to respond to those demands, pursuant to CPLR § 3126.

Defendants cross-move to dismiss plaintiff's second and third causes of actions for trust fund diversions and piercing the corporate veil, respectively, pursuant to CPLR §§ 3211(a)(7) and 3212. Defendants also seek to strike plaintiff's interrogatories and notice of discovery pursuant to CPLR § 3103. Finally, defendants contend that plaintiff's motion, in its entirety, is improper as plaintiff has failed to meet the good-faith requirements of 22 NYCRR § 202.7(a).

As an initial matter, defendants would place requirements on the letter of good faith not found in the statute (22 NYCRR § 202.7(a)). Plaintiff's letter of good faith advised defendants of their default in failing to respond to plaintiff's discovery demands, provided a period for defendants to respond, and defendants failed to respond to this letter or file responses to discovery demands. Consequently, the letter of good faith is sufficient (*Id.*), and defendants' claims to the contrary are without merit.

**PLAINTIFF'S MOTION TO COMPEL**

CPLR § 3101(a) provides for full disclosure of all matters material and necessary to the prosecution and defense of an action. Likewise, CPLR § 3124 provides that a party seeking disclosure may move to compel compliance or a response if the responding party fails to respond or comply with a proper request, notice, interrogatory demand or question pursuant to Article 31 of the CPLR. Under CPLR § 3126, a party's nondisclosure, including persons controlled by a party, is sanctionable. Subsection three provides that the Court may strike a pleading, stay proceedings, dismiss an action, or enter a default judgment when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed (*Id.*). This remedy is drastic and should only be imposed when the movant has "clearly shown that its opponent's nondisclosure was willful, contumacious or due to

bad faith” (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]; see also *Siegman v. Rosen*, 270 AD2d 14 [1st Dept 2000]).

Here, plaintiff served its discovery demands on October 31, 2018, and defendants’ response was due November 21, 2018, pursuant to CPLR § 3122(a). Defendants failed to respond to the demands, and plaintiff sent a good faith letter on December 6, 2018 advising defendants of their default. Defendants, again, failed to respond. The failure to raise an objection or move for a protective order within the 20-days set forth in CPLR § 3122(a) constitutes a waiver and generally limits the Court’s inquiry to privilege under CPLR § 3101 (*Anonymous v. High School for Envtl. Studies*, 32 AD3d 353, 358-59 [1st Dept 2006]). “The burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege” (*Id.*; see *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 NY2d 371, 377 [1991]). To the extent that defendants claim the documents sought by plaintiff are privileged, such claims amount to boilerplate claims of privilege and are insufficient as a matter of law (*New York State Elec. & Gas Corp. v. Lexington Ins. Co.*, 160 AD2d 261 [1st Dept 1990]). Consequently, defendants have failed to meet their burden to establish the documents sought are privileged. Furthermore, and contrary to defendants’ contention that plaintiff is engaging in a “fishing expedition,” each document sought by plaintiff in its discovery demands are supported by the allegations in the complaint.

#### **DEFENDANTS’ CROSS-MOTION TO DISMISS**

Defendants’ cross-motion, to the extent it seeks to strike the interrogatories, is denied, as it is untimely and the inquiry is thus limited to privilege, and is otherwise without merit (see plaintiff’s motion to compel, *supra*). Although defendants repeatedly characterize the instant matter as a breach of contract action, plaintiff also contends defendant Falco used defendant X-Treme as an alter ego and intentionally undercapitalized it to render it judgment proof. Plaintiff also alleges defendants misappropriated funds under the Lien Law, thus the instant action is not solely for breach of contract. Consequently, interrogatories 1 through 19 seeking information relating the parties’ sub-contract are proper, as are interrogatories 20 through 36, which seek financial and operational management records of X-Treme.

On a CPLR § 3211(a)(7) motion to dismiss, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, “when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists,” and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Here, providing the plaintiff the benefit of every possible inference, the complaint's second cause of action validly asserts a claim for diversions of trust funds. Defendants incorrectly characterize this cause of action as an improper attempt to recover under Lien Law Article 3-A and § 79-a, which do not provide for civil liability. Instead, plaintiff's second cause of action contends that due to X-Treme's failure to pay its subcontractors, notwithstanding plaintiff's payments to X-Treme, plaintiff was subrogated to the rights of the beneficiaries of X-Treme's Article 3-A trust fund, and therefore seeks recovery pursuant to Lien Law § 77. An Article 3-a trust may be "enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim" (Lien Law § 77[1]). "[I]t is well-settled that if a party is a subrogee of a trust beneficiary, it may assert a claim pursuant to Article 3-A of the Lien Law for trust fund division, even if it is not itself a beneficiary of the trust" (*Vanguard Const. & Dev. Co., Inc. v. B.A.B. Mech. Servs., Inc.*, 2015 NY Slip Op 31794(U) [N.Y. Sup. Ct, Kern, J.]). This liability extends to corporate officers when trust funds are applied to personal or non-trust uses with the knowledge of the officers (*South Carolina Steel Cop. v. Miller*, 170 AD2d 592 [2d Dept 1991]). Therefore, plaintiff has alleged a cause of action cognizable at law sufficient to defeat defendants' motion.

Plaintiff's third cause of action attempts to pierce the corporate veil. It therefore attempts to impose liability against Michael Falco, individually, as an owner/officer of X-Treme. However, piercing the corporate veil is not a valid separate cause of action, instead it represents a theory of recovery (*Open Door Foods, LLC v. Pasta Machs., Inc.*, 136 AD3d 1002 [2d Dept 2016]). Consequently, plaintiff's third cause of action must be dismissed. However, plaintiff is permitted to amend its complaint to allege, as a theory of recovery and not as a separate cause of action, personal liability against Michael Falco under the doctrine of piercing the corporate veil.

#### **DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

On a motion for summary judgment, the burden rests with the moving party to make a prima facie showing that they are entitled to judgment as a matter of law and demonstrate the absence of any material issues of fact (*Friends of Thayer lake, LLC v. Brown*, 27 NY3d 1039 [2016]). Once met, the burden shifts to the opposing party to submit admissible evidence to create a question of fact requiring trial (*Kershaw v. Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). A failure to make a prima facie showing requires the Court to deny the motion, regardless of the sufficiency of opposing papers (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see also *JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]). A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts fails to establish the proponent's prima facie burden (*JMD Holding Corp.*, 4 NY3d at 384; see e.g. *Vermette v. Kenworth Truck Co.*, 68 N.Y.2d 714 [1986]).

Here, to the extent that defendants' cross-motion can be deemed to seek summary judgment, defendants fail to make any showing that they are entitled to judgment as a matter of law and likewise fail to demonstrate absence of any material issue of fact. Consequently, their motion must be denied.

Accordingly, it is

ORDERED that plaintiff's motion to compel, pursuant to CPLR § 3124, is granted to the extent of requiring defendants to produce to plaintiff the documents and materials requested in plaintiff's discovery demands dated October 31, 2018 and plaintiff's interrogatories dated October 31, 2018 within 20 days of entry and service of this Decision and Order; and it is further

ORDERED that plaintiff's motion for a self-effectuating order, pursuant to CPLR § 3126, precluding defendants from offering at trial any evidence concerning matters raised in plaintiff's discovery demands and interrogatories, is denied without prejudice to seeking the same relief by further motion should defendants fail to comply with this Decision and Order; and it is further

ORDERED that defendants' motion to dismiss is granted solely to the extent of dismissing the third cause of action, and otherwise denied; and it is further

ORDERED that the third cause of action of the complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to serve and file an amended complaint in which the third cause of action, alleging piercing the corporate veil, shall be pleaded as a theory of liability in the first two causes of action, and not a separate cause of action; and it is further

ORDERED that the amended complaint shall be served and filed within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that plaintiff fails to serve and file an amended complaint in conformity with the deadline set forth herein, leave to replead shall be deemed denied and the third cause of action shall be dismissed; and it is further

ORDERED that, to the extent defendants' cross-motion seeks summary judgment, it is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated April 16, 2019

ENTER:

  
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J.S.C.  
**HON. FRANK P. NERVO**