

Broccoli v Absolute Plus Corp.
2019 NY Slip Op 31542(U)
April 11, 2019
Supreme Court, Richmond County
Docket Number: 153373/2018
Judge: Jr., Orlando Marrazzo
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

RALPH BROCCOLI and TINA BROCCOLI,

DECISION/ORDER

DCM PART 21

HON. ORLANDO MARRAZZO, JR.

Plaintiffs,

Index No.: 153373/2018

-against-

Motion No. 1

**ABSOLUTE PLUS CORP., dba ABSOLUTE PLUS
KITCHEN AND GRANITE and ADAM SOBOLEWSKI**

Defendants.

The following numbered 1 through 5 were marked submitted on February 19, 2019

	Papers Numbered
Notice of Motion to Dismiss, dated December 18, 2018.....	1
Affirmation in Support, with Exhibits, dated December 18, 2018.....	2
Affidavit in Support of Motion to Dismiss, dated December 21, 2018.....	3
Affirmation in Opposition, dated January 7, 2019.....	4
Reply Affirmation, dated January 22, 2019.....	5

Defendant Adam Sobolewski (“Sobolewski”) moves to dismiss Plaintiffs’ Complaint against him in his individual capacity, alleging that Plaintiffs should not be able to pierce the corporate veil. Sobolewski also moves to dismiss Plaintiffs’ third cause of action for negligence and fourth cause of action for fraud against all Defendants, arguing that these claims arise from the same allegations set forth in Plaintiffs’ claims for breach of contract. Defendant Sobolewski’s Motion is hereby granted.

Sobolewski is the president of Defendant Absolute Plus Corp. and is also named as a defendant in this case in his individual capacity. Defendant Sobolewski asserts that Plaintiffs and Absolute Plus Corp. entered into a contract on January 14, 2017 (“Agreement”), under which Defendant Absolute Plus Corp. agreed to provide work and materials at the premises located at 34 Wycliff Lane, Staten Island, New York 10312. Specifically, Absolute Plus Corp. was to perform a kitchen renovation, which included performing demolition, plumbing, electric, installation and painting services. Plaintiffs allege that in breach of the Agreement, Defendants failed to perform the scope of work to industry standards and that as a result, Plaintiffs have been damaged in the amount of \$91,419.00. Plaintiffs claim they needed the entire first floor gutted and the entire job redone to cure a defect in the tile installation conducted by Defendants. Plaintiffs also allege causes of action for breach of warranties, negligence and fraud.

Dismissal of the Complaint Against Sobolewski

In his motion, Sobolewski argues that the entire complaint should be dismissed against him individually since Plaintiffs have not pled facts sufficient to pierce the corporate veil. Specifically, Sobolewski states that the Complaint lacks allegations that he failed to adhere to corporate formalities, inadequately capitalized, commingled assets or personally used corporate funds. According to Sobolewski, all of his acts were consistent with the purpose and nature of the corporate entity and his role as President. Plaintiffs oppose, stating that the list of factors offered by Defendant Sobolewski are not exhaustive, but rather they are merely factors to be considered in asking the overall question that: is the owner of the corporation using the corporate form to further a fraud or inequity? According to Plaintiffs, the facts alleged in the complaint, assumed true for the purposes of this Motion, clearly show that Defendant Sobolewski used the company to perpetrate a fraud upon Plaintiffs and other customers. Plaintiffs’ counsel writes in

his affirmation that “the fact that Defendant has made a practice of laying title without the proper mortar bed is not a fact that counsel for the Defendant can dispute considering counsel conceded in a pre-litigation conversation with the undersigned that Defendant ‘does this all the time’ and has never been sued.” Plaintiffs request that the Court allow the cause of action to remain and let a jury decide whether the corporate veil should be pierced under the circumstances.

The Court finds that Plaintiffs should not be permitted to pierce the corporate veil. A review of the Agreement clearly shows that Defendant Sobolewski did not sign the Agreement in his individual capacity and that he signed the Agreement as Project Manager on Absolute Plus Corp.’s behalf. Furthermore, the Agreement is between Plaintiff and Absolute Plus Corp., which is listed as the Contractor. The Court further determines that the elements required to pierce the corporate veil are not present.

It is well established that a plaintiff who wants to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury. *See Conason v Megan Holding, LLC*, 25 N.Y.3d 1, 18, 29 N.E.3d 215, 225, 6 N.Y.S.3d 206, 216 (2015). *See also Town-Line Car Wash, Inc. v Don's Kleen Mach. Kar Wash, Inc.*, 2019 N.Y. App. Div. LEXIS 1393, *3, 2019 NY Slip Op 01443, 1-2, 2019 WL 943837 (App. Div. 2d Dept., 2019); *Love v. Rebecca Dev., Inc.*, 56 A.D.3d 733, 733, 868 N.Y.S.2d 125, 126 (App. Div. 2d Dept., 2008). As the Court of Appeals explains, “an attempt . . . to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners.” *Cortlandt St. Recovery Corp. v Bonderman*, 31 N.Y.3d 30, 47, 96 N.E.3d 191, 203, 73 N.Y.S.3d 95, 107 (2018). Defendant

cites to *Grammas v. Lockwood Assoc., LLC*, which states “factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds.” *Grammas v Lockwood Assoc., LLC*, 95 A.D.3d 1073, 1075, 944 N.Y.S.2d 623, 626 (App. Div. 2d Dept., 2012). While Plaintiffs correctly point out that this list of factors is not exhaustive, they are factors used to aide courts in determining whether a plaintiff should be able to pierce the corporate veil. See *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127, 884 NYS2d 94 (2009), *affd* 16 NY3d 775, 944 NE2d 1135, 919 NYS2d 496 (2011); *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016, 845 NYS2d 110 (App. Div. 2d Dept., 2007).

Absent from Plaintiffs’ Complaint and their Opposition to Defendant Sobolewski’s Motion are any circumstances that persuade this Court to allow Plaintiff to pierce the corporate veil and bring this action against Sobolewski in his individual capacity. In the Complaint, Plaintiffs allege that Defendant Sobolewski exercised complete domination of Absolute Plus Corp. and that he used such to perpetrate a fraud upon Plaintiffs, while simultaneously shielding himself from liability under the corporate form. Despite these statements, Plaintiffs’ Complaint merely groups its allegations against Absolute Plus Corp. with those against Sobolewski and do not provide any claims that Sobolewski exercised the requisite level of control. The allegations against Sobolewski are the same as those against Absolute Plus Corp. and while an independent cause of action is not required under *Cortland St. Recovery Corp. v. Bonderman*, Plaintiffs have failed to assert facts and circumstances that persuade this Court to impose the corporate obligations on its owners. Under the factors listed in *Grammas v. Lockwood Assoc., LLC*, Plaintiff has not asserted that Sobolewski did not adhere to corporate formalities, comingled

assets or personally used corporate funds. While these factors are not determinative, Plaintiffs have still failed to show that Defendant Sobolewski exercised complete domination of the corporation in respect to the transaction attacked and that he used it to commit a fraud or wrong against them. Therefore, Plaintiffs are not permitted to pierce the corporate veil. Defendant Sobolewski's Motion to dismiss the Complaint against him in its entirety is hereby granted.

Claims of Fraud and Negligence Against All Defendants

The Court also finds that the claims of fraud and negligence against all Defendants should be dismissed, as they are duplicative of Plaintiffs' breach of contract claim. In the case of *Junger v. John V. Dinan Assoc., Inc.*, the Second Department upheld the Supreme Court's granting of defendants' motion for summary judgement dismissing the causes of action alleging breach of duty and fraud. The Court found that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" and therefore the cause of action alleging breach of duty was duplicative of the breach of contract claim. *Junger v. John V. Dinan Assoc., Inc.*, 164 A.D.3d 1428, 1431, 84 N.Y.S.3d 574, 578 (App. Div. 2d Dept., 2018) (quoting *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 390, 51 N.E.2d 190, 521 N.Y.2d 653 (1987)). In the instant action, the Court similarly finds that Plaintiffs have not alleged that a legal duty independent of the contract itself has been violated. Plaintiffs' sole claim for negligence is that Defendants owed a duty to Plaintiffs to exercise due care in performing under the Agreement and that they breached such duty. Without any further allegations regarding breach of duty, Plaintiffs' claim for negligence is duplicative of their claim for breach of contract and is hereby dismissed against all Defendants.

The Court in *Junger* further determined that the claim for fraud lacked the requisite specificity and that "generally, a cause of action alleging breach of contract may not be

converted to one for fraud merely with an allegation that the contracting party did not intend to meet its contractual obligations.” *Junger v John V. Dinan Assoc., Inc.*, 164 A.D.3d 1428, 1431, 84 N.Y.S.3d 574, 578 (App. Div. 2d Dept., 2018) (quoting *Refreshment Mgt. Servs., Corp. v. Complete Off. Supply Warehouse Corp.*, 89 A.D.3d 913, 914, 933 N.Y.S.2d 312, 314 (App. Div. 2d Dept., 2011)). See *Orchid Constr. Corp. v Gonzalez*, 89 A.D.3d 705, 707-708, 932 N.Y.S.2d 125, 127-128 (App. Div. 2d Dept., 2011) (explaining that under CPLR 3016(b), the circumstances of the fraud must be stated in detail, including specific dates and times). In *Fromowitz v. W. Park Assocs.*, the Second Department similarly held that “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 Assocs., Inc.*, 106 A.D.3d 950, 951, 965 N.Y.S.2d 597, 599 (App. Div. 2d Dept., 2013). The Court further stated that “general allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support a claim of fraudulent inducement . . . or fraud.” *Fromowitz v. W. Park Assocs., Inc.*, 106 A.D.3d 950, 951, 965 N.Y.S.2d 597, 599 (App. Div. 2d Dept., 2013) (quoting *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318, 662 NE2d 763, 639 NYS2d 283 (1995)). See *Refreshment Mgt. Servs., Corp. v Complete Off. Supply Warehouse Corp.*, 89 AD3d 913, 914, 933 NYS2d 312 (App. Div. 2d Dept., 2011); *Marlowe v Ferrari of Long Is., Inc.*, 61 AD3d 645, 646, 876 NYS2d 165 (App. Div. 2d Dept., 2009); *WIT Holding Corp. v Klein*, 282 AD2d 527, 528, 724 NYS2d 66 (App. Div. 2d Dept., 2001).

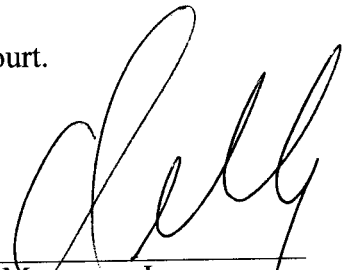
Plaintiffs in the instant action allege that Defendants made material representations and omitted material facts when communicating to Plaintiffs regarding the work that was to be done

pursuant to the Agreement. According to Plaintiffs, they relied on such misrepresentations when they entered into the Agreement and their reliance on the material misrepresentations and omissions was justifiable. The Court finds that Plaintiffs' claim is premised upon an alleged breach of contractual duties and the allegations do not concern representations that are collateral or extraneous to the terms of the Agreement. The Court finds that the Plaintiffs' claims for fraud are general allegations that the Defendants entered into the Agreement without the intent to perform it and are insufficient to support Plaintiffs' claim for fraud. Therefore, Plaintiffs' claim for fraud is dismissed against all Defendants.

It is ordered that (1) the Action is dismissed against Defendant Sobolewski in its entirety and (2) the claims for negligence and fraud are dismissed against all Defendants.

This constitutes the final decision and order of this Court.

Dated: April 11, 2019
Staten Island, New York



Orlando Marrazzo, Jr.,
Justice, Supreme Court
Hon. Orlando Marrazzo, Jr.
Acting Supreme Court Justice