

**Crescent Elec. Supply Co., Inc., of N.Y. v Innovative  
Elec. Servs. LLC**

2019 NY Slip Op 31943(U)

July 3, 2019

Supreme Court, New York County

Docket Number: 650121/2018

Judge: Tanya R. Kennedy

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 63

----- X  
CRESCENT ELECTRIC SUPPLY COMPANY, INC., OF  
NEW YORK, individually and Behalf of Itself and All  
Others Similarly Situated,

Index No.: 650121/2018

Motion Sequence Numbers:  
001 and 002

Plaintiff,

-against-

INNOVATIVE ELECTRICAL SERVICES LLC a/k/a  
INNOVATIVE ELECTRICAL SERVICES, INC.,  
ANTHONY BARTOLOMEO, and CHEZ DEGENNARO,

Defendants.

----- X  
HON. TANYA R. KENNEDY, J.S.C:

Anthony Bartolomeo (“Bartolomeo”) moves, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the complaint, which asserts causes of action for breach of contract (first), account stated (second), unjust enrichment (third), goods sold delivered and accepted (fourth), piercing of the corporate veil (fifth), violations of Article 3-A of the Lien Law (sixth and seventh), and for costs of collection and attorneys’ fees (eighth) (motion sequence 001)<sup>1</sup>.

Crescent Electric Supply Company, Inc., of New York (“Crescent or Plaintiff”) moves for entry of a default judgment, pursuant to CPLR 3215, against Defendants, Innovative Electrical Services LLC a/k/a Innovative Electrical Services, Inc., (“Innovative”) and Chez DeGennaro (“DeGennaro”) (motion sequence 002). The Court held oral argument on motion sequence 001. Both motions are consolidated for disposition and decided in accordance with the following.

<sup>1</sup> The Court will limit its analysis to dismissal pursuant to CPLR 3211(a)(7), as dismissal under CPLR 3211(1) and (5) are inapplicable and, thus, denied.

### FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff “was in the business of selling electric supplies, materials and equipment” (Complaint, ¶ 7). Innovative entered into a contract with Synergy Construction, Inc. (“Synergy”), the general contractor, to provide certain construction, including electrical, work on the construction project for the property located at 156 William Street a/k/a 73-85 Ann Street a/k/a 51-55 Beekman Street a/k/a 156-162 William Street, New York, NY 10038 (“William Construction Project”) (*id.*, ¶¶ 9, 10). The subcontracts between Innovative and Synergy totaled \$292,348.00 (*id.*, ¶ 18). Plaintiff alleges that Synergy, through its representatives, Teresa Gomez, Frank Piperno and Paul Piperno, advised Plaintiff that Synergy made all required payments to Innovative for the William Construction Project (*id.*, ¶ 17).

Plaintiff alleges that as of November 30, 2017, it was owed the sum of \$92,236.13, plus late charges due in the amount of 1.5% per month from the date of the invoices, plus attorneys’ fees, in connection with the William Construction Project (*id.*, ¶ 15). Innovative also contracted with Plaintiff to supply various construction supplies and materials for other construction projects (*id.*, ¶ 23). Plaintiff further alleges that as of November 30, 2017, it was owed the sum of \$188,645.39, plus interest/service charges at the rate of 1.5% per month and attorneys’ fees, in connection with the other projects (*id.*, ¶ 24).

Plaintiff commenced this action against Innovative, its former Vice-President and President, Bartolomeo and Chez DeGennaro, respectively, to recover monies owed on the construction projects.

### ARGUMENTS

Bartolomeo argues, among other things, that the complaint must be dismissed because there is no basis to assert personal liability against him. Bartolomeo maintains that he did not enter

into any written agreement with Plaintiff or execute a personal guaranty. He further argues that he neither exercised dominion or control over Innovative, nor disregarded corporate formalities for Plaintiff to pierce the corporate veil.

Further, Bartolomeo argues, *inter alia*, that the Article 3-A claims must be dismissed because the complaint fails to allege how DeGennero diverted trust funds or participated in Innovative's diversion of such funds. Bartolomeo contends that claim for attorney's fees must be dismissed because there is no contract between Bartolomeo and Plaintiff for the recovery of such fees.

In opposition, Plaintiff argues, among other things, that Bartolomeo may be held personally liable under Article 3-A of the Lien Law. Plaintiff has submitted a copy of a Final Lien Waiver, dated July 20, 2017, which Bartolomeo signed in his corporate capacity, indicating that Innovative paid all subcontractors and suppliers (Smith Affidavit, Exhibit F). Plaintiff also submits affidavits from Teresa Gomez, Synergy's Office Director, Frank Piperno, Synergy's Principal and President, and Paul Piperno, Synergy's Principal and Vice-President, where each person averred in paragraph seven of their respective affidavits that:

"Synergy dealt with Anthony Bartolomeo and Chez DeGennaro and both were directly involved in the dealings with Synergy and both of these persons were entrusted with payments made by Synergy and such entrustment included making payments to their suppliers and sub-contractors" (*id.*, Exhibits C-E).

### **DISCUSSION**

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211(a)(7), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference" (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016] citing *Goshen v Mutual Like Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Initially, the Court notes that Plaintiff conceded during oral argument that Bartolomeo did not execute a personal guaranty and that Plaintiff was not asserting any claim with respect to a guaranty (Transcript, p. 5, lines 22-24). Therefore, the Court's analysis to dismiss is predicated upon whether Plaintiff has stated a cause of action to pierce the corporate veil regarding the first through fifth and eighth causes of action.

A party seeking to pierce the corporate veil must establish 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" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The factors for a court to consider in determining whether to pierce the corporate veil include "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use" (*Millennium Constr. LLC v Loupolover*, 44 AD3d 1016, 1016-1017 [2d Dept 2007] [internal citations omitted]).

Where, as here, a complaint which is devoid of allegations regarding "evidence of self-dealing, commingling of funds, lack of corporate formalities or other veil-piercing indicia," dismissal is required (*Hartej Corp. v PepsiCo Trading Co.*, 255 AD2d 233, 233 [1st Dept 1998], see also *Sound Communications, Inc. v Rock and Roll, Inc.*, 88 AD3d 523, 524 [1st Dept 2011]; *Prichard v 164 Ludlow Corp.*, 49 AD3d 408, 409 [1st Dept 2011]; cf. *International Credit Brokerage Co. v Agapov*, 249 AD2d 77, 78 [1st Dept 1998]). The Court notes that the affidavits from Synergy representatives annexed to the opposition papers fail to cure this deficiency.

Therefore, the causes of action for breach of contract, account stated, unjust enrichment, goods sold delivered and accepted, to pierce the corporate veil, and recovery of attorneys' fees as asserted against Bartolomeo are dismissed pursuant to CPLR 3211(a)(7).

Article 3-A of the Lien Law creates “trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction” (*Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512 [1968]; *see also Aspro Mechanical Contracting, Inc. v Fleet Bank, N.A.*, 1 NY3d 324, 328 [2004]; Lien Law §§ 70, 71).

As a corporate officer, Bartolomeo may be held personally liable for trust funds which he converted for his own use (*see Edgewater Const. Co., Inc. v 81 & 3 of Watertown*, 1 AD3d 1054, 1057 [4th Dept 2003] [internal citation omitted]). Further, Bartolomeo may also be held personally liable for trust funds which Innovative wrongfully diverted, if he knowingly participated in such diversion (*id.*).

Here, the complaint alleges that “Bartolomeo and DeGennaro received trust assets/and or diverted trust assets in violation of Article 3-A of the Lien Law” (complaint, ¶¶83, 96). However, the complaint fails to state with any specificity how Bartolomeo converted the funds for his own use, or that he knowingly participated in Innovative’s alleged diversion of funds. Therefore, the Court dismisses the sixth and seventh causes of action, and grants Plaintiff leave to serve an amended complaint to replead these claims.

Plaintiff has submitted proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of Innovative’s failure to answer or appear (*see CPLR 3215(f); Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 70-71 [2003]).

However, under the Servicemembers Civil Relief Act, 50 USC §3931(b)(1), a party seeking a default judgment against an individual defendant must submit proof that the defendant was not in military service at the time of default. Here, Crescent failed to submit an affidavit attesting to DeGennaro’s non-military status at the time of the default. Therefore, the branch of

Plaintiff's motion for entry of a default judgment against DeGennaro is denied without prejudice, with leave to renew upon proof on DeGennaro's non-military status at the time of default.

Accordingly, it is

ORDERED that the motion of Defendant Anthony Bartolomeo to dismiss is granted to the extent that the first through fifth and eighth causes of action are dismissed as asserted against him pursuant to CPLR 3211(a)(7) (motion sequence 001); and it is further

ORDERED that Plaintiff is granted leave to serve and file an amended complaint to replead the sixth and seventh causes of action 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 the branch of the motion by Plaintiff Crescent Electric Supply Corp. for entry of a default judgment (motion sequence 002) is granted to the extent of entering judgment in favor of Plaintiff and against Defendant Innovative Electrical Services LLC a/k/a Innovative Electrical Services, Inc., in the sum of \$188,645.39, plus interest and service charges from November 30, 2017 at the rate of 1.5% per month, plus costs and disbursements to be taxed by the Clerk, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cause of action for attorneys' fees against the Defendant Innovative Electrical Services LLC a/k/a Innovative Electrical Services, Inc. is severed and the issue of the amount of attorneys' fees that Plaintiff may recover against said defendant is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for Plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website); and it is further

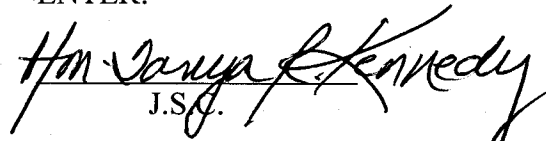
ORDERED that the remaining branch of the motion by Plaintiff Crescent Electric Supply Corp. for entry of default judgment against defendant Chez DeGennaro is denied without prejudice to renew; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
July 3, 2019

ENTER:



J.S.C.

**HON. TANYA R. KENNEDY**