STATE OF NEW YORK
SUPREME COURT GREENE COUNTY

SCOTT BRANDI,

Plaintiff,

DECISION & ORDER

- against -

Index No.: 2019-0374

JEREMIAH DIXON and CATSKILL MOUNTAIN BUILDERS, INC.,

Defendants.

PRESENT: HON. LISA M. FISHER:

APPEARANCES:

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Counsel for Plaintiff
Roemer, Wallens, Gold & Mineaux, LLP
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FISHER, J.:

This is a breach of contract and negligent construction matter, wherein Plaintiff contracted with Defendant Catskill Mountain Builders, Inc. (hereinafter "CMB"), a domestic business duly formed by Defendant Jeremiah Dixon (hereinafter "Dixon"), for the framing and finishing of Plaintiff's residence per the architectural design of the subject dwelling. The facts are not well developed in the record other than the pleadings and rote attachment of the depositions. The matter appears to have been handled by several different Plaintiff's attorneys, and the present attorney is not the initial attorney who commenced this action.

Defendants timely move for summary judgment pursuant to CPLR R. 3212 seeking an order: 1) dismissing the action against Defendant Dixon; 2) dismissing the complaint for failure to join a necessary party; 3) awarding summary judgment for failure to state a cause of action; 4) in support of summary judgment for Defendants on the counterclaims; and 5) any such other relief as the Court deems appropriate. Plaintiff submits opposition, and Defendant submits supplemental

affirmation[1] and reply affirmation. After the reply, Plaintiff withdrew one ground for denying the motion.

Legal Analysis

Initial Issue Regarding the Standard and Burden

Defendants argue that they are entitled to summary judgment on the grounds that the Complaint fails to state a cause of action as there is a lack of specificity of claims. Initially, the Court notes that the confusion between standards of a CPLR R. 3211 motion to dismiss for a failure to state a cause of action, and the summary judgment standard of CPLR R. 3212 where there are no material issues of fact.

Specifically, a motion to dismiss under CPLR R. 3211 for a failure to state a cause of action requires that the Complaint "is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994], citing CPLR § 3026 ["Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."]). "On a motion to dismiss a complaint we accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory" (*Morone v Morone*, 50 NY2d 481, 485 [1980] [citations omitted]). The courts "accord plaintiffs 'the benefit of every possible favorable inference'" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 327 [2002], quoting *Leon*, 84 NY2d at 87; *see also EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] ["Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss."]). Therefore, "[i]f [the court] find[s] that the plaintiff is entitled to a recovery upon any reasonable view of the stated facts, [the court's] judicial inquiry is complete and [the court] must declare the plaintiff's complaint to be legally sufficient" (*219 Broadway Corp. v Alexander's Inc.*, 46 NY2d 506, 509 [1979]).

More specifically, "[i]n assessing a motion under CPLR 3211(a)(7), . . . 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*Leon*, 84 NY2d at 88, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977], citing *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 635–36 [1976] [citations and quotations omitted]). Thus, "'[t]he question to be determined is whether the plaintiffs actually have a cause of action' (*Fields v Leeponis*, 95 A.D.2d 822 [2d Dept 1983] [citation omitted]), "not whether the cause of action can be proved" (*Paul v Hogan*, 56 A.D.2d 723 [4th Dept 1977]), and the 'pleading is deemed to

[1] Regarding the unsigned depositions.

allege whatever cause of action can be implied from its statement by fair and reasonable intendment' (*Lupinski v Village of Illion*, 59 A.D.2d 1050 [4th Dept 1977])" (*Ressis v Herman*, 122 AD2d 516, 516 [3d Dept 1986] ["For defendants to succeed on a motion to dismiss, they must show conclusively that plaintiff has no cause of action."]).

Whereas the standard for summary judgment under CPLR R. 3212 has been well-settled by the Court of Appeals that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *accord Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700 [3d Dept 2003]). To establish a *prima facie* entitlement to judgment as a matter of law, a moving party must present proof in admissible form to demonstrate the absence of any triable issues of fact as to each and every allegation in the complaint and bill of particulars. (*See Alvarez*, 68 NY2d at 320; *Hollis*, 302 AD2d at 700.) Such "burden may not be met by pointing to gaps in plaintiff's proof" (*DiBartolomeo v St. Peter's Hosp. of City of Albany*, 73 AD3d 1326 [3d Dept 2010]; *accord Dow v Schenectady County Dept. of Social Servs.*, 46 AD3d 1084 [3d Dept 2007].)

Once the movant has made such a showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. (*See Zuckerman*, 49 NY2d at 562 ["mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient."].) "[I]n deciding a motion for summary judgment, the trial court must view all evidence in the light most favorable to the party against whom such judgment is sought and, where there is any doubt as to the existence of a triable issue of fact, it should deny the motion since the goal is issue finding rather than issue determination" (*Swartout v Consolidated Rail Corp.*, 294 AD2d 785, 786 [3d Dept 2002] [citations omitted]; *see also Oritz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]; *Greco v Boyce*, 262 AD2d 734, 734 [3d Dept 1999] [holding courts are "to view the evidence in light most favorable to the nonmoving party, affording that party the benefit of all reasonable inferences, and to ascertain whether a material, triable issue of fact exists."]). It has been well established that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]; *Sternbach v Cornell Univ.*, 162 AD2d 922, 923 [3d Dept 1990].)

Therefore, at the outset, it must be noted that several of the arguments raised by Defendants fail to dispel triable issues of fact or credibility by the very virtual of using the wrong standard and submitting the wrong proof.

Branch of Motion to Dismiss Against Defendant Dixon

Defendant Dixon argues that he is entitled to summary judgment on the grounds that Plaintiff cannot pierce the corporate veil to hold him personally accountable. Specifically, Defendant Dixon contends that he formed Defendant CMB approximately three and a half years before the instant dispute and held himself out as the corporate business at all relevant times. Defendant Dixon argues that Plaintiff knew he was hiring Defendant CMB, not himself personally, and Plaintiff knew that another individual named Charlie Knopp was associated with Defendant CMB. Although Defendants never formalized the agreement in a written contract, the parties exchanged proposed contracts and Plaintiff's drafted proposal was between Defendant CMB and himself. From the deposition testimony, Defendant Dixon highlights that Plaintiff paid Defendant CMB and not Defendant Dixon. While Plaintiff opened an account at Williams Lumber that only Defendant Dixon had access too, this was for materials. Therefore, Defendant Dixon contends that he did not abuse the corporate form and Plaintiff cannot pierce the corporate veil to hold him liable.

Plaintiff opposes the application, arguing that Defendant Dixon wanted the Williams Lumber account because Defendant Dixon "did not want money to flow through his business," allegedly to avoid sales tax. Plaintiff further relies on the fact that Defendants did not materialize their agreement in a contract other than a series of emails. Plaintiff concludes that the case law establishes piercing the corporate fail is a "fact laden" matter that is best suited for resolution at trial, not as a matter of law.

The Court of Appeals has succulently stated that "a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporate 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" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]). Further, a plaintiff bears a "heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise results in wrongful or inequitable consequences" (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). "Whether to pierce the corporate veil involves a scrutiny of

various considerations, including 'the overlap in ownership, officers, director and personnel, the capitalization of the corporation, any commingling of assets and the presence, or absence, of the formalities that attend the corporate form'" (*Supreme Energy, LLC v Martens*, 145 AD3d 1147, 1151 [3d Dept 2016], quoting *Kain Dev. LLC v Kraus Props., LLC*, 130 AD3d 1229, 1235 [3d Dept 2015]).

Here, Defendant Dixon meets his moving burden and Plaintiff has failed to raise a triable question of fact or credibility warranting denial of summary judgment. While the question of whether the "complete domination" element is met cannot be found to weigh in Defendant Dixon's favor, there is simply no proof or supported allegation that such domination was used to commit a fraud or wrong against Plaintiff. The gravamen of the Complaint is that Defendants' work was negligently done and failed to comply with the good and accepted construction standards, as well as failed to meet certain code requirements. The Complaint does not allege fraud against solely Defendant Dixon, but against both Defendants on the grounds that Defendants made various representations to Plaintiff about the propriety of the work *after* it had been completed. Although Plaintiff argues that Defendant Dixon did not want funds to flow into his business to avoid sales tax which is why Defendant Dixon had Plaintiff open an account at Williams Lumber, the purpose for such account is nothing more than speculation. Nor could this fact be used to prove a fraud or wrong against Plaintiff, as Plaintiff is not a taxing authority and Plaintiff knowingly opened the account. If anything, it demonstrates both parties worked together to avoid paying taxes—subjecting *each* of them to possible liability.

Moreover, Plaintiff has offered no competent proof to establish that Defendant Dixon's actions were done in any way other than through the corporate form. It simply cannot be said that Plaintiff has met his "heavy burden" of showing that Defendant Dixon's domination on the transaction was the instrument of fraud or inequitable consequences other than that Defendant Dixon's business was allegedly negligent in the work it performed. Therefore, the branch of Defendants' motion for summary judgment to dismiss the action against Defendant Dixon must be **GRANTED**, and the Complaint is **DISMISSED** against Defendant Dixon only.

Branch of Motion for Failure to Name a Necessary Party

Defendants argue that they are entitled to summary judgment for Plaintiff's failure to join a necessary party, his wife, who is the fee owner of the subject property. They are wrong.

A party's presence in an action has no bearing on whether there is a question of fact or credibility warranting summary judgment un CPLR R. 3212. To the extent that Defendants rely on a motion to dismiss under CPLR R. 3211 (a) (10), the realize on this ground "is a little misleading, because the plaintiff's mere failure to name a necessary party does not automatically mean that the action will be dismissed" (CPLR R. 3211, Practice Commentaries, C3211:32). This is particularly true when the missing party is not a defendant, but another plaintiff. It appears herein Defendants are making attenuated efforts as an aegis to liability.

While Defendants are correct that Plaintiff's wife is a necessary party under CPLR § 1001 (a) as she "might be inequitably affected by a judgment in the action," it is clear that [w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order [her] summoned" (CPLR § 1001 [b]). Indeed, this has been the case for almost 60 years. "When enacted in 1963, the CPLR eliminated the Civil Practice Act's distinction between 'indispensable' and 'conditionally necessary' parties, *affording the courts greater discretion* in permitting cases to go forward after weighing the interests of the litigants, the absent party and the public" (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards & Appeals*, 5 NY3d 452, 459 [2005] [internal citations omitted; emphasis provided]).

Therefore, inasmuch as it is the proper procedure to add Plaintiff's wife, Susan Brandi (also known as Patricia Susan Brandi), to this action rather than dismissing it (*see* CPLR § 1001 [b]; *see also*, *Nemeth v K-Tooling*, 163 AD3d 1143, 1144–45 [3d Dept 2018]), Plaintiff shall have 30 days from entry to amend the caption to add Susan Brandi also known as Patricia Susan Brandi as a named Plaintiff in the caption.

Branch of Motion for Failure to State a Cause of Action

Defendants allege that Plaintiff "has failed to provide any relative objective evidence as to the specificity of Plaintiff's claims[]" in the bill of particulars, a supplemental bill of particulars, the deposition where Plaintiff "rambles and guesses", the lack of an expert report "despite being asked multiple times," an "absurd" expert witness response, and that Defendants' expert "found no credibility to Plaintiff's general and speculative assertions." Defendants' narrative highlights repeated attempts and requests which have been unfruitful. Defendants alleged that Plaintiff has "never provided any specificity as to what he is claiming is wrong with the house."

Hyperbole is not grounds for summary judgment—or to dismiss a complaint, whichever grounds is being relied on. Plaintiff's verified bill of particulars does make it exceptionally clear that the issues with the home include a failure to properly install and seal the roof from water instrusion, including through the roof peaks, from installing an ice water shield barrier, due to denting and damaging the roof, from failing to properly install drywall or otherwise seal the ceiling, from using substandard edging, and otherwise improperly installing and constructing the roof to as to allow moisture and pest infiltration in Plaintiff's home due to negligent or improper workmanship. The Court finds these allegations sufficient to dispel the allegations that Plaintiff "never" provided what is wrong with the house.

To the extent that Defendants attack the sufficiency of same, moving to dismiss for a failure to state a cause of action or for summary judgment is improper. The failure to respond or to comply with a demand for bill of particulars is governed by CPLR R. 3042 (c), which requires a showing of willfulness to impose penalties under sub (d) and CPLR R. 3126. However, Defendants fail to establish any inadequately—let alone willful, deliberate, or contumacious conduct—inasmuch as the demand for a bill of particulars has not been presented and the response bill of particulars reveals an objection on the grounds that the demand was "palpably improper and seeks evidence as opposed to a proper amplification of the proceedings." It is axiomatic that the Court cannot evaluate the sufficiency without the demand. Nor does the bill of particulars serve as a disclosure device that it appears Defendants' papers seem to believe it is, but rather a bill of particulars is a limited device meant to amplify a pleading—not to give a party everything he or she seeks through disclosure. (*See Northway Engineering, Inc. v Felix Industries, Inc.*, 77 NY2d 332, 335–36 [1991] [comparing the broad reach of disclosure under article 31, to article 30 which is "[a] bill of particulars, on the other hand, is a more limited device, designed simply to amplify or supplement a pleading * * * [which was subject of legislative debate whether to abolish or note, but ultimately] the Legislature retained the bill of particulars, not as a disclosure device (CPLR art. 31), but in its traditional and limited role as a means of amplifying a pleading (CPLR 3041 *et seq.*)."] [internal citations omitted].)

As it relates to Defendants' argument regarding Plaintiff's expert response that was served on October 1, 2020, Defendants' application seeking to dismiss or for summary judgment is not the proper procedural vehicle at this juncture. Which, according to the Rules of the Third Judicial District, Defendants' application is also untimely inasmuch as Defendants were required to move

against such expert disclosure within 45 days of service. The instant motion was not made until December 29, 2020. This is more than 45 days. In the absence of good cause for the delay, this Court denies this argument as untimely. (*See Brill v City of New York*, 2 NY3d 648 [2004].)

Therefore, this branch of Defendants' motion for summary judgment must fail.

Branch of Motion for Summary Judgment on Unanswered Counterclaims

Defendants claim that Plaintiff failed to respond to the counterclaims and, therefore, they should be granted in their entirety. Plaintiff opposes the relief, arguing that Defendants failed to timely move for a default judgment on the counterclaims and such counterclaims must now be dismissed. The Complaint was amended once via stipulation, with the last date for Plaintiff to serve a reply being October 13, 2019. Pursuant to CPLR § 3215 (a), a party has 1 year from the date of default to move for a default judgment. Defendants' time to move for a default expired on October 13, 2020. The instant motion was not made until service was effected on December 31, 2020. "When a defendant asserting counterclaims fails to seek leave to enter a default judgment within one year after the default on the counterclaims has occurred, the counterclaims are deemed abandoned pursuant to CPLR 3215(c)" (*Wells Fargo Bank, N.A. v Chaplin*, 107 AD3d 881. 882 [2d Dept 2013] [affirming *sua sponte* dismissal of defendant's counterclaims as abandoned after not being brought within one year]; *see also*, CPLR § 3215, Practice Commentaries, C3215:11, heading, ["Year applies to D's time to enter default against P for failure to serve reply to D's counterclaim, which ends up barred by D's laxity."]). Defendants have not moved or otherwise claimed an excuse for lateness, nor does one seem appropriate as Defendants argue Plaintiff had "two bites" to reply, which Defendants equally had two bites to so move. As such, this branch of Defendants' motion for summary judgment is denied, and Defendants' counterclaims are **DISMISSED**, as abandoned, and all relief sought therein is **DENIED**.

Conclusion

To the point that it is further necessary given the inconsistencies in the type of motion filed, the Court finds it necessary to note that this case is ripe with questions of fact or credibility as to the propriety of Defendants work on the subject property. Even Defendants' expert report acknowledges "water staining effects" in the areas where Defendant performed work, but somehow concludes that the work done was not improper, damaged, deteriorating, or otherwise negligent. For instance, Defendants' expert report creates its own question of fact by providing "[t]he timing of the water effect [on the ceiling] could not be ascertained from simple viewing.

And while the presumed source of the water effect was through the roof system, that is not entirely clear either: it could be due to prolonged interior condensation conditions. In conclusion regarding these two water effect areas, their ultimate cause could not be known with certainty by direct observation looking up at them" (Defendants' Exhibit, M, page 16). This finding hardly dispels the allegations in the Complaint on a summary judgment motion under CPLR R. 3212, as "any doubt as to the existence of a triable issue of fact, [the court] should deny the motion since the goal is issue finding rather than issue determination" (*Swartout*, *supra*, 294 AD2d at 786). Nor can it be used to satisfy the standard under CPLR R. 3211 for a failure to state a cause of action, also relied on by Defendants, as the facts in the Complaint are accepted as true—here, not even Defendants' expert can controvert the damage.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that the branch of Defendant Dixon's motion for summary judgment is **GRANTED**, and all allegations asserted against Defendant Dixon **ONLY** are **DISMISSED**, and all other relief requested therein against **ONLY** Defendant Dixon is **DENIED**; and it is further

ORDERED that the branch of Defendants' motion for summary judgment on the grounds of necessary party is **DENIED**, in its entirety; and it is further

ORDERED that Plaintiff is ordered to amend the Complaint to add Susan Brandi, also known as Patricia Susan Brandi, as a named party in the caption pursuant to CPLR § 1001 (b); and it is further

ORDERED that the branch of Defendants' motion for summary judgment on "the grounds of failure to state a cause of action" are **DENIED**, in their entirety; and it is further

ORERDED that the branch of Defendants' motion for summary judgment on the counterclaims is **DENIED**, as untimely and abandoned, and all counterclaims are **DISMISSED**, in their entirety, as untimely and abandoned; and it is further

ORDERED that all other relief not specifically mentioned is **DENIED**, in its entirety.

This constitutes the Decision and Order of the Court. Please note that a copy of this Decision and Order along with the original motion papers are being filed by Chambers with the County Clerk. The original Decision and Order is being returned to the prevailing party (Defendant Dixon's attorney), to comply with CPLR R. 2220. Counsel is not relieved from the applicable provisions of this Rule with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: April 22, 2021
Catskill, New York

E N T E R :

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

1) Notice of motion, filed December 31, 2020; attorney affirmation in support of Defendant's omnibus motion, Sarah M. Schneider, Esq., with annexed exhibits, filed December 31, 2020; affidavit in support, of Jeremiah Dixon, filed December 31, 2020; affidavit of Jordan Valdina, filed on December 31, 2020; memorandum of law, filed December 31, 2020;
2) Affirmation supplemental affirmation, of Sarah M. Schneider, Esq., with annexed exhibit, filed on February 3, 2021;
3) Affidavit in opposition, of Matthew J. Kelly, Esq., with annexed exhibits, filed February 8, 2021; affidavit of Scott Brandi, filed on February 8, 2021; affirmation of Michael Brandi, Esq., filed on February 8, 2021; affidavit of Kelly Phillips, filed on February 8, 2021; affidavit of Jess Walker, filed on February 8, 2021; and
4) Attorney affirmation in reply, of Sarah M. Schneider, Esq., with annexed exhibits, filed February 8, 2021;