

**Yorizzo v Maplecorp, LLC**

2021 NY Slip Op 34022(U)

July 12, 2021

Supreme Court, Westchester County

Docket Number: Index No. 70216/2017

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK  
IAS PART WESTCHESTER COUNTY  
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X  
JACK YORIZZO, RONALD ELETTO, JALO  
REALTY, INC. and MAPLEWOOD COURT, INC.,

DECISION & ORDER

Plaintiffs,

Index No: 70216/2017

-against-

Motion Sequence Nos. 6 and 7

MAPLECORP, LLC, ROBERT VALENTI, AMELIA  
VALENTI and 1906-08 AMETHYST  
CONSTRUCTION CORP.,

Defendants.  
-----X

The following papers (NYSCEF document nos. 118-195) were read on (1) the motion by the defendants for an order: (a) pursuant to CPLR 3126, precluding plaintiffs from offering any evidence on the issue of the costs to repair and complete construction on the condominium units and/or striking plaintiffs' complaint for spoliation of evidence; (b) pursuant to CPLR 3212, granting defendants' summary judgment dismissing plaintiffs' claim for costs associated with additional financing as barred by the principle of accord and satisfaction; and (c) pursuant to CPLR 3212, granting the individually named defendants, Robert Valenti and Amelia Valenti, summary judgment dismissing the complaint insofar as asserts a cause of action against them (sequence no. 6); and (2) the motion by the plaintiffs for an order: (a) pursuant to CPLR 3212, granting plaintiffs' summary judgment for an accounting, and compelling and directing defendants to account so that a full and accurate tax filing can be made to the IRS, New York State Department of Finance, and any other taxing authority; (b) severing and bifurcating the trial as to plaintiffs' damages which pertain to tax liabilities, penalties, assessments, fines, and levies assessed by the IRS, New York State Department of Finance, and any other taxing authority; (c) granting plaintiffs leave to conduct further discovery on the issue of damages which pertain to tax liabilities or, in the alternative, for an order, severing and removing said claims from the trial calendar and remanding for further proceedings; (d) declaring that all of the rights and obligations of the parties as set forth in the Joint Venture Agreement dated January 30, 2014, remain in full force and effect and are in no way amended, altered, superseded, changed, by any and all subsequent, contracts of the parties including, but not limited to the September 30, 2016 Agreement, the October 21, 2016 Agreement, and the January 13, 2017 Deed of Conveyance; and (e) granting plaintiffs' summary judgment over and against defendants' Amethyst Construction Corp. and

Maplecorp, LLC, for plaintiffs' claimed damages for all costs associated with plaintiffs' additional financing and expenditures made.<sup>1</sup>

Motion Sequence No. 6

Notice of Motion-Affirmation-Affidavits (2)-Exhibits (A-Z)

Affirmation in Opposition-Affidavits (2)-Exhibits (A-E; A-D)-Memo of Law

Reply Affirmation-Exhibit (A)

Motion Sequence No. 7

Notice of Motion-Affirmation-Exhibits (A-E)-Affidavit (and corrected)-Exhibits (A-I)-

Memo of Law

Affirmation in Opposition-Affidavit-Exhibits (A-F)

Reply Affirmation-Exhibit (A)-Memo of Law-Affidavit-Exhibits (A-B)

Upon reading the foregoing papers, it is

ORDERED the motion by the defendants is denied (sequence no. 6); and it is further

ORDERED the motion by the plaintiffs is denied (sequence no. 7); and it is further

ORDERED this matter is hereby referred to the Settlement Conference Part for a settlement conference. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

The plaintiff, Maplewood Court, Inc. (Maplewood), was organized pursuant to a joint venture agreement to develop and build a ten-unit condominium project (Project). Pursuant to the joint venture agreement, Maplewood is equally owned by the plaintiff, Jalo Realty, Inc. (Jalo), and the defendant, 1906-08 Amethyst Construction Corp. (Amethyst). The owners of Jalo are the plaintiffs, Jack Yorizzo and Ronald Eletto. The owners of Amethyst are the defendants, Robert Valenti and Amelia Valenti.

As part of the joint venture, plaintiffs agreed to convey certain parcels of land owned by Jalo located at 83, 85, and 87 Maple Street, Scarsdale (Town of Eastchester) and Amethyst agreed to construct the condominium units and associated site improvements. Amethyst also agreed to contribute \$950,083.40 for its interest in the project which was

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<sup>1</sup> In addition, although not specifically requested in the plaintiffs' notice of motion, plaintiffs additionally move for an order granting summary judgment dismissing defendants' two counterclaims. Notwithstanding the lack of reference in the notice of motion, the court has, nonetheless, considered such relief insofar as the parties have briefed the court on this issue.

placed into a joint bank account with Country Bank to be utilized to finance the construction of the Project.

A number of problems arose during the development and construction of the Project prompting the present litigation. Plaintiffs allege that defendants breached their obligations under the joint venture agreement by failing to complete the job in a workmanlike manner in accordance with industry standards, causing delays to the project by making fraudulent misrepresentations to the Attorney General, intentionally deviating from the products and material as specified by the plans resulting in defendants' monetary gain, exceeding the construction budget, and/or failing to contribute the additional financing needed to complete the job, and converting funds from the joint account.

Plaintiffs seek damages including costs to repair the defective and uncompleted work on the Project; the differential in the cost of the materials used as opposed to the cost of the materials called for by the joint agreement specifications; costs associated with the additional financing including principal and interest; additional carrying costs caused by defendants' unworkmanlike construction, deviation from the approved plans, and fraudulent misrepresentations to the Attorney General; tax penalties incurred by plaintiffs as a result of defendants' refusal to provide an accounting of costs and expenses which prevented plaintiffs from filing timely tax returns; all money withdrawn from the joint account by defendants which defendants cannot demonstrate was used on the Project, and the difference in the sales price between the units if constructed as per the plan specifications as opposed to the units as they were actually constructed.

The complaint sets forth thirteen causes of action against the various parties. By order dated and filed July 5, 2018, the court granted a pre-answer motion by the defendants, Alan Singer and Welby Brady and Greenblatt, LLP, dismissing so much of the complaint—the seventh, eighth, ninth, tenth, and eleventh causes of action—that asserted a cause of action against them pursuant to CPLR 3211 (a) (1) and (a) (7). The remaining causes of action asserted in the complaint allege breach of contract, breach of the implied covenant of good faith, fraud, breach of fiduciary duty, unjust enrichment, account stated, piercing the corporate veil, and conversion.

Issue was joined by defendants with service of an answer wherein defendants, *inter alia*, denied the material allegations of the complaint and asserted two counterclaims for, in essence, breach of contract as a result of: (1) plaintiffs' alleged failure to arrange for, secure, and pay for all financing, mortgages, and loans necessary for the development and construction of the Project; and (2) plaintiffs' alleged failure to compensate defendants for labor, services, and materials provided to complete and install certain upgrades relating to the condominium units. By virtue of the foregoing breaches, defendants allege that they are owed \$1,250,000.00. Thereafter, plaintiffs interposed a reply to the counterclaims wherein they denied knowledge and information sufficient to form a belief as to the allegations contained therein.

Following joinder of issue, and prior to the completion of discovery, the defendants moved for, among other things, an order granting the individually named defendants, Robert Valenti and Amelia Valenti, summary judgment dismissing so much of the complaint that asserts a cause of action against them pursuant to CPLR 3212. By order dated December 21, 2018, and filed December 24, 2018, the court denied defendants' motion. The court found that:

“Defendants failed to establish as a matter of law that defendants, Robert Valenti and Amelia Valenti, did not exercise such control and domination over 1906-08 Amethyst Corp., or commingle the funds of such corporation with their personal funds, so as to commit a fraud upon the plaintiffs. Thus, the branch of the motion which seeks summary judgment dismissing the cause of action seeking to pierce the corporate veil is denied.”

Now, following the completion of discovery, plaintiffs and defendants each move for, among other things, an order granting summary judgment pursuant to CPLR 3212 (sequence nos. 6 and 7).

Motion by Defendants  
Sequence No. 6

Defendants move for an order: (a) precluding the plaintiffs from offering any evidence on the issue of the costs to repair and complete construction on the condominium units and/or striking plaintiffs' complaint for permitting spoliation of evidence; (b) granting summary judgment dismissing plaintiffs' claim for costs associated with the additional financing including principal and interest as barred by the principle of accord and satisfaction; and (c) granting summary judgment dismissing the complaint insofar as asserted against the individually named defendants, Robert Valenti and Amelia Valenti. For the reasons that follow, each branch of defendants' motion is denied.

The court first addresses that branch of defendants' motion seeking sanctions in accordance with CPLR 3126. CPLR 3126 provides, in relevant part, that:

“If any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

“(1) an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

(2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, . . . or from using certain witnesses; or

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

The determination of the nature and degree of the sanction to be imposed pursuant to CPLR 3126 is entrusted to the court’s sound discretion (*see Giraldo v Highmark Ind., LLC*, 175 AD3d 654, 654 [2d Dept 2019]). However, “[b]efore a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739 [2d Dept 2012]).

Here, contrary to defendants’ contention, plaintiffs’ failure to exchange supporting documentation for the ledger entries has not been demonstrated to be willful or contumacious so as to warrant the sanctions sought herein (*see Pinnock v Mercy Med. Ctr.*, 180 AD3d 1086, 1087 [2d Dept 2020]; *cf. Giraldo*, 175 AD3d at 655). On September 30, 2020, and October 1, 2020, plaintiffs proffered good faith affidavits describing the search they conducted for the supporting documents for the ledger entries and confirming that no such documents exist. As the court previously noted in its order dated and filed August 17, 2020, “[t]o the extent that plaintiffs are not in possession of certain responsive documents, it is axiomatic that they can only be required to produce those items which are in their possession, custody or control.” To the extent that defendants now argue that the affidavits are insufficient insofar as they omit certain information concerning plaintiffs’ record retention policy, it was incumbent upon defendants to move, prior to the completion of discovery, to compel a more responsive answer (*see* CPLR 3124) or to move to vacate the note of issue (*see* 22 NYCRR § 202.21 [e]). Defendants, however, did not so move. Accordingly, insofar as the court has determined that plaintiffs’ failure to exchange the aforesaid supporting documentation has not been demonstrated to be either willful or contumacious, the imposition of sanctions is not warranted.

The court next addresses that branch of defendants’ motion seeking summary judgment dismissing plaintiffs’ claim for costs associated with the additional financing including principal and interest as barred by the principle of accord and satisfaction. It is generally well settled that acceptance of a check in full satisfaction of a disputed unliquidated claim operates as an accord and satisfaction discharging the claim (*see Huimin Sun v Cai*, 146 AD3d 760, 762 [2d Dept 2017]; *Trans World Grocers v Sultana Crackers*, 257 AD2d 616, 617 [2d Dept 1999]). “The party asserting the affirmative defense of accord and satisfaction must establish that there was a genuine dispute regarding an unliquidated claim between the parties which they mutually resolved through a new contract discharging all or part of their obligations under the original contract. A genuine dispute requires that

the debtor give notice of the dispute prior to tendering a partial payment in full satisfaction. *The finding of a genuine dispute is a question of fact* (*Trans World Grocers*, 257 AD2d at 617 [internal citations omitted] [emphasis added]).

Here, whether or not a valid accord and satisfaction was accomplished by virtue of the parties' agreement dated October 21, 2016, is a material issue of fact that cannot be determined as a matter of law on the papers submitted. Accordingly, summary judgment dismissing plaintiffs' claim for costs associated with the additional financing secured for the Project is denied.

Last, the court addresses that branch of the defendants' motion seeking summary judgment dismissing the complaint insofar as asserted against the individually named defendants, Robert Valenti and Amelia Valenti. "Generally, 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 the plaintiff's injury" (*Matter of Arben Corp. v Durastone, LLC*, 186 AD3d 599, 600 [2d Dept 2020]). "The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances. Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (*Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344, 344 [2d Dept 2006] [internal quotation marks and citation omitted]).

Here, the papers submitted raise triable issues of material fact as to whether the individually named Valenti defendants exercised such control and domination over Amethyst, or commingled the funds of such corporation with their personal funds, so as to commit a fraud upon the plaintiffs. Accordingly, this branch of the motion is denied.

#### Motion by Plaintiffs

##### Sequence No. 7

Plaintiffs move for an order: (a) granting plaintiffs summary judgment for an accounting and compelling and directing defendants to account so that a full and accurate tax filing can be made to the IRS, New York State Department of Finance, and any other taxing authority; (b) severing and bifurcating the trial as to plaintiff's damages which pertain to tax liabilities, penalties, assessments, fines, levies, assessed by the IRS, New York State Department of Finance, and any other taxing authority; (c) granting leave to conduct further discovery on the damages which pertain to tax liabilities or, in the alternative, for an order, severing and removing said claims from the trial calendar and remanding for further proceedings; (d) declaring that all of the rights and obligations of the parties as set forth in the Joint Venture Agreement dated January 30, 2014, remain in full force and effect and are in no way amended, altered, superseded, changed, by any and all subsequent, contracts of the parties including, but not limited to the September 30, 2016 Agreement, the October 21, 2016 Agreement, and the January 13, 2017 Deed of

Conveyance; (e) granting plaintiffs' summary judgment over and against defendants' Amethyst Construction Corp. and Maplecorp, LLC, for plaintiffs' claimed damages for all costs associated with plaintiffs' additional financing and expenditures made, and for summary judgment dismissing defendants' two counterclaims. For the reasons that follow, each branch of plaintiffs' motion is denied.

The court first addresses that branch of plaintiffs' motion seeking summary judgment for an accounting and compelling and directing defendants to account so that a full and accurate tax filing can be made to the IRS, New York State Department of Finance, and any other taxing authority. The papers submitted raise triable issues of material fact as to whether defendants provided plaintiffs with a full and complete accounting of the funds used or expended on the Project. The competing affidavits proffered by the plaintiff, Ronald (Ron) Eletto, and the defendant, Robert Valenti, on this issue render the award of summary judgment inappropriate.

The court next addresses that branch of the plaintiffs' motion for an order severing and bifurcating the trial as to the issue of plaintiffs' damages which pertain to tax liabilities, penalties, assessments, fines, levies, assessed by the IRS, New York State Department of Finance, and any other taxing authority. This branch of the motion is denied, without prejudice, with leave to renew before the trial court if necessary. Trials are ordinarily bifurcated in Westchester County. Plaintiffs may renew their application before the trial court in the event the trial court is inclined not to bifurcate the trial.

The court next addresses that branch of the plaintiffs' motion for an order granting leave to conduct further discovery on the issue of damages which pertain to tax liability or, in the alternative, to sever said claims and remand for further proceedings. This branch of the motion is denied. On November 25, 2020, plaintiffs filed a note of issue and certificate of readiness for trial indicating, among other things, that discovery was complete and that the case was ready for trial. If plaintiffs did not think the case was ready for trial or that discovery remained outstanding, it was incumbent upon plaintiffs to move to vacate the note of issue in accordance with 22 NYCRR 202.21 (e). Plaintiffs failed to so move. As such, the request for leave to conduct additional discovery is denied (*cf. Rizzo v Balish & Friedman*, 153 AD3d 869, 870 [2d Dept 2017]). Plaintiffs' alternative request for severance is denied. The grant or denial of a request for severance is entrusted to the court's sound discretion (*see Quiroz v Beitia*, 68 AD3d 957, 960 [2d Dept 2009]). "[S]everance is inappropriate where there are common factual and legal issues and the interests of judicial economy and consistency of verdicts will be served by having a single trial" (*Zili v City of New York*, 105 AD3d 949, 950 [2d Dept 2013]). Here, inasmuch as there are common factual and legal issues presented, the court finds that the interests of judicial economy and consistency of verdicts would be best served by having a single trial.

The court next addresses that branch of the motion by the plaintiffs for an order declaring that all of the rights and obligations of the parties as set forth in the Joint Venture

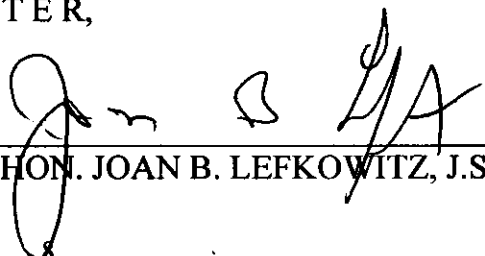
Agreement dated January 30, 2014, remain in full force and effect and are in no way amended, altered, superseded, changed, by any and all subsequent, contracts of the parties including, but not limited to the September 30, 2016 Agreement, the October 21, 2016 Agreement, and the January 13, 2017 Deed of Conveyance. The papers submitted raise triable issues of material fact as to whether the Joint Venture Agreement dated January 30, 2014, was modified by the agreements of September 30, 2016, and October 21, 2016 (2016 Agreements), and the performance by the parties in relation thereto. More specifically, triable issues of fact remain as to whether subsequent performance by the parties in accordance with the 2016 Agreements, including the plaintiffs' payment of an additional \$295,000.00 in principal and interest under the mortgage—a sum over and above that required in the Joint Venture Agreement dated January 30, 2014—coupled with plaintiffs' conveyance of one-half of the condominium units to Amethyst Corp., amounted to conduct that modified the Joint Venture Agreement of January 30, 2014, and which may be considered partial performance so as to come within the exception to the Statute of Frauds (see *Pinkava v Yurkiw*, 64 AD3d 690, 692-693 [2d Dept 2009]; cf. *Barretti v Detore*, 95 AD3d 803 [2d Dept 2012]). Accordingly, this branch of the motion is denied.

Last, the court addresses that branch of the motion by the plaintiffs for an order granting plaintiffs' summary judgment over and against defendants' Amethyst Construction Corp. and Maplecorp, LLC, for plaintiffs' claimed damages for all costs associated with plaintiffs' additional financing and expenditures made and for summary judgment dismissing defendants' two counterclaims. Inasmuch as the court has already determined that triable issues of fact exist as to whether the principle of accord and satisfaction bars plaintiffs' claim for costs associated with additional financing, this branch of plaintiffs' motion is denied. Regarding defendants' counterclaims, the papers submitted, including the competing affidavits proffered by the parties, raise triable issues of material fact precluding the award of summary judgment. Specifically, as to the first counterclaim, there are triable issues of fact as to whether plaintiffs' own actions caused the Country Bank loan to go into default which, consequently, allegedly caused defendants to incur additional expenses in order to refinance the loan. As to the second counterclaim, there are triable issues of fact as to whether there was an oral agreement between the parties whereby plaintiffs allegedly agreed to pay defendants one-half of the costs and expenses for labor, material and services purportedly expended by defendants for upgrades to the condominium units.

Based on the foregoing, the motion by the defendants and the motion by the plaintiffs are denied, and the parties shall appear for a settlement conference as directed above.

ENTER,

Dated: White Plains, New York  
July 12, 2021

  
HON. JOAN B. LEFKOWITZ, J.S.C.