

<b>M. Alfonso Painting Corp. v I Labor, LLC</b>
2022 NY Slip Op 30929(U)
March 17, 2022
Supreme Court, New York County
Docket Number: Index No. 652883/2013
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

*Justice*

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M. ALFONSO PAINTING CORP.,

Plaintiff,

- v -

I LABOR, LLC, WBB CONSTRUCTION, INC., SHAYA  
BRODCHANDEL, CHAIM TESSLER

Defendants.

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INDEX NO. 652883/2013

MOTION DATE 01/03/2022,  
01/03/2022

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 130, 131, 132

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 135, 136, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152

were read on this motion to/for SUMMARY JUDGMENT.

**BACKGROUND**

Plaintiff commenced this action pursuant to a summons with notice filed in August 2013.

The dispute arises out of plaintiff's claim that defendants agreed to supply plaintiff with laborers for two construction jobs, that plaintiff paid those laborers and was supposed to be reimbursed for said payments by defendants but never was.

The complaint asserts six causes of action including breach of contract, fraud and a claim for an accounting.

### **PENDING MOTIONS**

On August 23, 2021, defendants moved for an order relieving non-party Oscar Sanabria (Sanabria) from responding to a Subpoena Duces Tecum and Notice to Take Deposition issued by plaintiff, and for a protective order in regard to same.

On September 17, 2021, defendants moved for summary judgment.

The motions are consolidated herein for determination and granted to the extent set forth below.

### **DEFENDANTS MOTION TO QUASH AND FOR A PROTECTIVE ORDER IS DENIED**

#### ***Relevant Procedural History***

Plaintiff alleges that the testimony by Sanabria is essential to its case and that until fairly late in this litigation it believed Sanabria would voluntarily appear for a deposition and cooperate with plaintiff but that turned out not to be the case.

Plaintiff alleges the parties entered into agreements where the plaintiff supplied workers to defendants for certain construction projects. Although these laborers worked for the defendants, they were on plaintiff's payroll as its employees. Plaintiff would pay the workers and then send invoices to the defendants, which were prepared and delivered by Sanabria, for its services.

Plaintiff alleges that not all of these invoices were paid and that some of these invoices were based upon inaccurate time records. Both parties agree that the only role that plaintiff's principal Manuel Alfonso (Alfonso) played was to sign the checks to pay the laborers. Everything else regarding the arrangement between the parties on the plaintiff's side was handled by Sanabria, whom plaintiff alleges acted as its agent, including but not limited to

negotiating the agreements with the defendants, collecting the workers' timesheets from the defendants, paying the workers and preparing and sending out the invoices to the Defendants.

In 2012 a federal lawsuit, [*Julio Morales, et. al. v. M. Alfonso Painting, et. al.*, Case No.11 Civ. 1263 (NRB)(SDNY), hereinafter "the federal lawsuit"] was brought against the plaintiff by laborers on its payroll, who alleged that while they were working on defendants' construction projects the plaintiff failed to pay them overtime. Sanabria supplied a declaration on MAPC's behalf in that action that addressed his role in the business relationship between MAPC and the defendants.

Although this action was commenced in 2013 and issue was joined in 2014, little activity took place until mid 2018. Sanabria had agreed to voluntarily appear for a non-party deposition which was to take place on March 17, 2021. On March 18, 2021, counsel for the parties submitted a Status Conference Order to the Court that specified Sanabria's deposition would take place on or before April 2021.

On April 8, 2021, plaintiff's counsel contacted Sanabria to schedule the deposition. Sanabria did not respond to this email. Counsel and Alfonso then followed up, leaving Sanabria several voice-mail messages, which were not returned. Alfonso did not have Sanabria's current address and was unable to obtain it, as such Sanabria's deposition did not take place by the April 22, 2021 deadline contained in the Status Conference Order.

Plaintiff determined it was therefore necessary to subpoena him. In that the Plaintiff did not have a current address for Sanabria, plaintiff engaged a skip tracer to obtain Sanabria's current address before he could be subpoenaed.

On or about April 26, 2021, the parties jointly prepared a status conference order for the conference that was scheduled for April 27, 2021. By this date all depositions except for Sanabria's had been completed.

The status conference order jointly drafted by counsel for the parties and adopted by the court stated that the deposition Sanabria had not been taken because Sanabria had become uncooperative, that plaintiff's counsel intended to subpoena Sanabria to compel his testimony, and that defendants objected to same. Once Sanabria's address was ascertained which required employing the services of a skip tracer plaintiff prepared and served a subpoena.

On June 30, 2021 Defendants' counsel moved to quash the subpoena and for a protective order. In response plaintiff's counsel agreed that the subpoena that had been served on Sanabria was in fact defective in that it did not contain the reason that Mr. Sanabria's testimony was necessary as is required by CPLR 3101(a)(4) and withdrew it.

On July 16, 2021, the second subpoena was served on Sanabria.

### *Discussion*

Plaintiff alleges the subpoena is facially deficient because it does not sufficiently state the reason Sanabria's testimony is required, and it is improperly labeled as a Subpoena Dues Tecum, which plaintiff argues is only applicable to document production. Plaintiff also argues the subpoena is issued in contravention of the last status conference orders issued in this action.

CPLR §3101(4) provides for disclosure from nonparties upon notice stating the circumstances or reasons such disclosure is sought. The court finds that the subpoena complies with this provision and given the history of this litigation and the federal lawsuit both parties and Sanabria are well aware of the reason his deposition is sought in this action, and said testimony is clear material and necessary to the issues in this action.

Defendants next argue the subpoena should be quashed because it is labeled a *Subpoena Duces Tecum*, and the additional language of *ad testificandum* was not added to the label. The court does not find this technical error is a basis to quash the subpoena given that the language of the subpoena and the accompanying notice of deposition make clear that plaintiff is seeking both Sanabria's testimony and the production of documents. Nor do defendants cite any law that provides such defect is a basis to quash the subpoena.

Finally, as to the fact that the status conference orders stated the dates were final, they also clearly reflected plaintiff's intention to try and obtain Sanabria's testimony. This court has broad discretion over the discovery process (*Rodney v. City of New York*, 192 A.D.3d 606) and finds that given the facts and procedural history of this case a post note of issue deposition of Sanabria should be allowed to proceed. The court will grant plaintiff an additional 150 days from the date of this decision to obtain Sanabria's deposition testimony.

Based on all of the forgoing, defendants' motion to quash and for a protective order is denied.

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS GRANTED IN PART**

***The action is Dismissed as to Shaya Brodchandel  
and Chaim Tessler in Their Individual Capacities***

As concerns the individual defendants, Shaya Brodchandel and Chaim Tessler, plaintiff has pointed to no evidence that defendants did anything to indicate that they were acting in their individual capacities. Generally, officials of a corporation are not personally liable for corporate obligations. *Mortimer B. Burnside & Co. v. Havener Securities Corp.*, 25 A.D. 2d 373 (1st Dept. 1966). There is no claim by plaintiff that the individuals were acting other than in a representative capacity. Accordingly, the individual defendants cannot be held personally liable.

*Joan Hansen & Co. v. Everlast World's Boxing Headquarters Corp.*, 296 A.D. 2d 103(1st Dept. 2002), and the action as against them individually is dismissed.

***The Cause of Action for An Accounting Is Dismissed***

An accounting may only be had where there is a confidential or fiduciary relationship, and a breach of the duty imposed by that relationship regarding property in which the party seeking the accounting has an interest. *Palazzo v. Palazzo*, 121 A.D.2d 261(1ST Dept. 1986); *Jacobs v. Cartalemi*, 156 A.D.3d 605 (2d Dept. 2017). In this action, there is no confidential or fiduciary relationship; nor is one alleged in the Complaint. Thus, the cause of action for an accounting is dismissed.

***The Balance of the Motion for Summary Judgment is Denied Without Prejudice to Renewal After Plaintiff has had an opportunity to secure Sanabria's Deposition Testimony***

Plaintiff has shown pursuant to CPLR §3212(f) that facts essential to opposing the motion are likely to be borne out by Sanabria's testimony. The court is exercising its discretion to grant plaintiff a limited additional opportunity to secure said testimony in this action, as set forth above.

In the event that plaintiff fails to do so, defendants may renew their summary judgment motion. In this regard the court extends the parties' time to move for summary judgment through December 31, 2022.

**CONCLUSION**

WHEREFORE it is hereby:

ORDERED that defendants' motion to quash and for a protective order is denied in its entirety; and it is further

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the third, fourth, and sixth causes of action of the complaint; and it is further

ORDERED that plaintiff has leave to take Sanabria’s deposition within 150 days of the date of this decision and order; and it is further

ORDERED that the balance of defendants’ motion for summary judgment is denied without prejudice and that the parties’ time to make dispositive motions is extended through December 31, 2022; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the 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 at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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SABRINA KRAUS, J.S.C.

3/17/2022  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: