

<b>Brandimarte v Davis Rizzo Corp.</b>
2023 NY Slip Op 35048(U)
June 5, 2023
Supreme Court, Queens County
Docket Number: Index No. 701439/2021
Judge: Joseph Risi
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI  
A. J. S. C.

IA PART 3

-----X  
LYDA BRANDIMARTE,

Index Number: 701439/2021

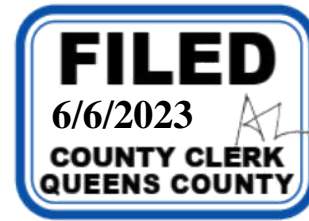
Plaintiff,

Motion Sequence #1 and #2

-against-

**DECISION/ ORDER**

DAVIS RIZZO CORP. f/k/a BRR RESTORATION CORP. d/b/a PAUL DAVIS RESTORATION OF METRO NY a/k/a PAUL DAVIS RESTORATION, PAUL DALEY INDIVIDUALLY AND OFFICER OF DAVIS RIZZO CORP. f/k/a BRRR RESTORATION CORP. d/b/a PAUL DAVIS RESTORATION OF METRO NY a/k/a PAUL DAVIS RESTORATION, and LIBERTY MUTUAL INSURANCE COMPANY,



Defendants.

-----X

The following EF numbered papers read on this motion (seq. no. 1) by the defendant Paul Daley (“Daley”), seeking dismissal of plaintiff’s third cause of action in the complaint pursuant to CPLR §3211(a)(7), and a separate motion (seq. no. 2) by Liberty Mutual Insurance Company (“Liberty”) seeking dismissal of plaintiff’s complaint pursuant to CPLR §3211(a)(1), (3), (5), and (7).

Papers  
Numbered

Notices of Motion - Affidavits - Exhibits .....	EF 28 – 30; EF 40 – 44
Answering Affidavits - Exhibits .....	EF 35 – 39; EF 47 – 52
Reply Affidavits .....	EF 46; EF 55

Upon the foregoing papers, it is ordered that these motions are consolidated for determination as follows:

This action arises out of a horrific tragedy, whereby the plaintiff’s mother, Janina L. Kiaune, the named insured and owner of the subject property, was critically injured as a result of an electrical fire in her house, ultimately resulting in her untimely death. As the rebuilding process went into effect, Liberty as the insurer and the plaintiff as the apparently de facto legal representative of her mother, the insured, contractually entered a relationship involving Liberty’s agent, and Paul Davis Restoration of Metro NY (“PDR”), one of Liberty’s listed “Guaranteed

Repair Network” contractors, so as to embark upon and complete the rebuilding of the house. The plaintiff was acknowledged to be, or at least treated as, the legal representative of her mother prior to her death, and upon her mother’s death was the sole beneficiary of her mother’s estate through the decedent’s will, as well as the named executor of the estate of the insured. Over the course of nearly three years, work was undertaken, and payments made by Liberty to PDR, and these actions and inactions are now the subject of this action.

In her complaint, the plaintiff seeks to recover damages against the defendant-contractor, allegedly operating through a number of shell companies all owned by their sole shareholder, Daley, for breach of contract and unjust enrichment arising out of construction work and services which plaintiff claims to be defective and incomplete. The plaintiff also seeks to recover damages against the insurance company, Liberty Mutual alleging, among other things, breach of contract, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty.

In support of his motion, Daley submitted, among other things, copies of assumed name certificates issued by New York State for Paul Davis Restoration of Metro NY, and Paul Davis Restoration. In opposition, the plaintiff submitted, *inter alia*, a copy of the attorney’s affirmation, a copy of the affidavit of the plaintiff Lyda Brandimarte, and copies of certain photographs of the subject property. In support of its motion, Liberty submitted, among other things, a copy of the attorney’s affirmation, and a copy of the insurance policy.

Turning to Liberty’s motion, in addition to Liberty’s general position that the plaintiff fails to state a cause of action pursuant to CPLR §3211(a)(7), Liberty seeks dismissal of the complaint pursuant to CPLR §3211(a)(3), claiming plaintiff’s lack of standing to sue since the property was transferred to her individually, and as such, allegedly not a proper party eligible for continued coverage. Further, Liberty seeks dismissal asserting that the insurance contract provides for a two year “statute of limitations” from the “date of loss”, which in this context allegedly means, the date of the fire, or March 2, 2018. Consequently, since the plaintiff brought this action more than two years from that date, Liberty asserts she is time-barred. (CPLR §3211[a][1] and [5]).

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(1), the documentary evidence must utterly refute the plaintiff’s allegations. (*See Phillips v Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017]). Such evidence must be unambiguous, authentic, and undeniable such as judicial records and documents such as a contract, the contents of which are essentially undeniable. (*Id.*) At the outset, for reasons stated herein, that branch of Liberty’s motion seeking dismissal pursuant to CPLR §3211(a)(1), is denied as the insurance contract itself does not resolve the issues of this action.

As to CPLR §3211(a)(5), asserting statute of limitations as a complete defense, a moving defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired. (*See Collins Bros. Moving Corp. v Pierleoni*, 155 AD3d 601 [2017]; *Stein Indus., Inc. v Certilman Balin Adler & Hyman, LLP*, 149 AD3d 78 [2017]). Liberty has submitted a copy of the insurance contract which states that the contractual statute of limitations is from the date of loss, meaning the date of the fire. In opposition, the defendant has raised the continuing wrong doctrine, and additionally asserting that the continuing wrongs involved actions and voluntarily assumed duties and responsibilities not strictly within the four corners of the insurance contract. The statute of limitations issue is unhelpful to Liberty as, the complained of actions and omissions dealt with the voluntary assumption and declared promises

of satisfactory completion of the project through its “Guaranteed Repair Network”, outside of the insurance contract itself. (*See Carlson v American Intern. Group, Inc.*, 30 NY3d 288 [2017]). This, plus the continuing wrong doctrine, estops Liberty from asserting the two year limitation contained in the contract. (*See Garron v Bristol House, Inc.*, 162 AD3d 857 [2d Dept 2017]).

When considering a motion to dismiss pursuant to CPLR §3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only if the facts alleged fit within any cognizable legal theory. (*See Leon v Martinez*, 84 NY2d 83 [1994]; *Travelsavers Enterprises, Inc., v Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). However, if it is shown that a material fact as claimed by the pleader is not a fact at all, dismissal is warranted. (*See Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *MJK Building Corp., v Fayland Realty Inc.*, 181 AD3d 860 [2d Dept 2020]; *Pinnacle Realty of New York, LLC, v 255 Butler, LLC*, 125 AD3d 952 [2d Dept 2015]).

The crux of the allegations is not as to the insurance contract itself, per se, but the actions taken by the insurer outside the scope of the contract. As further alleged in the complaint, PDR was part of Liberty’s advertised and marketed “Guaranteed Repair Network”. In steering the plaintiff to PDR’s services, and taking upon itself the payment to, and oversight of, the work of PDR, Liberty may have lulled the plaintiff into sleep as to whatever contractual statute of limitations might exist, but more importantly, the actions and omissions went beyond the scope of the insurance contract and are separately alleged apart from any provisions of the insurance contract. The role assumed by Liberty, and the nature of the contractual relationship created by the conduct between itself and the plaintiff, expanded the responsibilities of Liberty considerably. The plaintiff has sufficiently made a showing supporting its pleadings, that Liberty, by its course of conduct, may have assumed the responsibility of assuring that the contractor provided the services for which it was required to perform, and was then required to make payments in a responsible and prudent manner. Out of the insurance proceeds, Liberty was entrusted to manage the payments to the contractor on behalf of the plaintiff. The plaintiff further sufficiently alleged that Liberty made payments of a considerable amount out of the insurance proceeds, without transparency, without seeking the plaintiff’s consent or participation in these decisions. The manner of doling out money, how Liberty saw to quality control, and that construction proceeded according to code and plan was within Liberty’s sole province. As alleged by the plaintiff, construction to code was neglected, construction was deficient and incomplete, leaving a property requiring far more corrective construction to fulfill the purposes of the insurance itself, to rebuild the property within the policy limits.

The plaintiff further alleged that it hired its own expert to assess the damage and to describe what had to be repaired or constructed to finish the project. When confronted with this expert assessment, Liberty shut down its involvement, denied further coverage, refused to pay for any further work on the property, and then for the first time, asserted its lack of standing, and statute of limitations defenses. Liberty had already spent much of the money provided by the insurance policy in paying PDR. The complaint alleges Liberty made promises and guarantees pursuant to its marketed “Guaranteed Repair Network”, and as a public marketing plan, and manner in which it was conducted, may have constituted deceptive practices pursuant to GBL §349, which may have been, or will be relied upon by the public at large.

If all the pleadings are accepted as true as against Liberty, the plaintiff has set forth adequate allegations of fact demonstrating a course of conduct, in which Liberty assumed a

fiduciary role taking it upon itself to deal with the preferred and recommended contractor by controlling what work was to be done, how much was to be paid, and placating the insured that her interests were being properly addressed in its dealing with Daley. The plaintiff has shown many instances of Liberty's course of conduct, among other things, allegations of correspondence, phone calls, and contracts entered into between and among the plaintiff and the defendants, and the various entities involved in restoring the fire-damaged property. Additionally, allegations abound regarding payments made by Liberty out of the insurance proceeds to PDR. The allegations as stated, when assumed to be fact, may constitute not only breach of contract, but breach of covenant of good faith and fair dealing, and a breach of fiduciary responsibility to the plaintiff, as the acknowledged "insured" as Liberty took it upon itself to manage and make payments to PDR without approval or supervision of satisfactory completion of each aspect of the rebuilding of the subject house. The course of conduct of all parties continued for approximately three years from the "date of loss", up to termination of the contractor's services in November, 2020, and the declination of coverage and termination of insurance by Liberty in early February, 2021.

With regard to standing, (CPLR §3211[a][3]), although the defendant Liberty has initially shown that the plaintiff is not the insured, the plaintiff has demonstrated, as stated previously, that through its course of dealing, conduct and the continuing wrong doctrine, that Liberty is also estopped from asserting its lack of standing claim at this late date after it already immersed itself into the rebuilding project, acknowledging the plaintiff as the insured. Liberty's position as to plaintiff's lack of standing, begs the question, what then was the status of the plaintiff when Liberty continued its payments and dealings with her and Daley regarding insurance coverage beyond the statutory time limitation from the "date of loss"? The court will permit the plaintiff to amend its complaint within thirty (30) days of service of a notice of entry of this order, to add the estate as a named plaintiff, and the plaintiff as the executor of the estate.

Through these alleged breaches, of a continuing nature, the plaintiff has, albeit inartfully, made out sufficient causes of action against Liberty, including breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, negligence, negligent misrepresentation and violations of GBL §349, so as to state meritable causes of action.

In his motion to dismiss, the defendant Paul Daley, asserted that the complaint stated no proper claim to justify piercing the corporate veil and that in any event, New York State does not recognize "piercing the corporate veil", as a separate cause of action. At the outset, although the laws of the State of New York do not recognize a separate cause of action to "pierce the corporate veil." (*See Morris v New York State Dept. of Taxation and Finance*, 82 NY2d 135 [1993]), under proper circumstances, the plaintiff may pursue this equitable theory to recover monies due and may utilize discovery mechanisms in this endeavor. (*Id*; *Americore Drilling & Cutting, Inc., v EMB Contracting Corp.*, 198 AD3d 941 [2d Dept 2021]; *Allstate ATM Corp., v E.S.A. Holding Corp.*, 98 AD3d 541 [2d Dept 2012]).

Although inartfully drafted and requiring amendments in order to comply with proper legal statutory requirements for pleading, the complaint as to both Liberty and Daley does set forth facts and allegations that fit within a cognizable legal theory. (*See Leon v Martinez*, 84 NY2d 83 [1994]). Since the cause of action for piercing the corporate veil, is dismissed, plaintiff may incorporate its alleged facts against Daley, alleging that as a shareholder or member, Daley exercised complete dominion and control over the shell companies and abused the privilege of

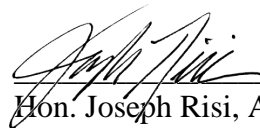
doing business in the LLC or corporate form to perpetrate a wrong or injustice. (*See DePetris v Traina*, 211 AD3d 939 [2d Dept 2022]; *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073 [2d Dept 2012]).

It must be noted that the foregoing is based upon the court's assuming the truth of the allegations, for purposes of deciding the CPLR motions to dismiss. No final decision has been made thus far, except that, the plaintiff's complaint will not be dismissed.

Accordingly, that branch of the motion seeking dismissal of the third cause of action in the complaint against Daley is granted, however, plaintiff may amend the complaint within thirty (30) days of service of a notice of entry of this order to more properly assert its allegations seeking piercing of the corporate veil. The motion by the defendant Liberty is denied in all respects, however, the plaintiff may amend the complaint within thirty (30) days of service of a notice of entry of this order to add the estate of Janina L. Kiaune, with plaintiff as the named executor of the estate, to more properly plead the causes of action against the defendant Liberty.

This is the decision and order of this Court.

Date: June 5, 2023

  
\_\_\_\_\_  
Hon. Joseph Risi, A.J.S.C.

