

**Spartan Restoration, Inc. v Global Restoration Servs.,  
Inc.**

2024 NY Slip Op 34890(U)

September 18, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 605589/2024

Judge: Maureen T. Liccione

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This opinion is uncorrected and not selected for official publication.

Short Form Order

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SUPREME COURT – STATE OF NEW YORK  
PART 78 – SUFFOLK COUNTY

**P R E S E N T:**

**Hon. Maureen T. Liccione**

Justice Supreme Court

-----x  
SPARTAN RESTORATION, INC.,

Plaintiff,

-against-

GLOBAL RESTORATION SERVICES, INC., KEN  
CALDERONE and AMANDA CALDERONE,

Defendants.

-----x

Mot. Seq. No. 001 – MG  
Orig. Return Date: 05/17/2024  
Mot. Submit Date: 06/26/2024

**PLAINTIFF’S ATTORNEY**

J.S. FRITZSON LAW FIRM  
1979 Marcus Ave., Suite 210  
Lake Success, NY 11042

**DEFENDANTS’ ATTORNEY**

LONG TUMINELLO  
120 Fourth Avenue  
Bay Shore, NY 11706

Upon the e-filed documents numbered 8 to 21 and due deliberation, it is

**ORDERED** that defendants’ Ken Calderone and Amanda Calderone motion to dismiss plaintiff’s complaint as against the individual defendants Ken Calderone and Amanda Calderone pursuant to CPLR 3211 (a) (7) is granted; and it is further

**ORDERED** that complaint is dismissed as against the individual defendants Ken Calderone and Amanda Calderone only; and it is further

**ORDERED** that the caption of this action shall be amended to reflect the dismissal of the individual defendants Ken Calderone and Amanda Calderone and shall be the following:

-----x  
SPARTAN RESTORATION, INC.,

Plaintiff,

-against-

GLOBAL RESTORATION SERVICES, INC.,

Defendant.

-----x

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**ORDERED** that the parties shall appear for a preliminary conference on **October 31, 2024 at 9:30 a.m. at the Alan D. Oshrin Supreme Court Building, One Court Street, Court Annex Part 78, Riverhead, New York 11901.**

Plaintiff Spartan Restoration, Inc. filed a summons and complaint on March 4, 2024 against defendants Global Restoration Services, Inc. (Global), Ken Calderone, and Amanda Calderone for unjust enrichment and breach of contract. In the complaint, plaintiff alleges that on or about April 20, 2022, “Plaintiff and Defendants entered into an agreement whereas Plaintiff was to provide labor on a number of Defendants jobs,” that per the agreement, plaintiff “was entitled to fifty percent (50%) of the amount Defendants were paid and reimbursement for Plaintiff’s labor costs,” that plaintiff provided labor on nine jobs, that “Defendants have refused to pay Plaintiff for Plaintiff’s labor on the Jobs,” that defendants were paid a total of approximately \$465,041.62 for those jobs, and that plaintiff is due \$232,520.81 for the labor provided on the nine jobs. Global filed its answer with counterclaims.

The individual defendants Ken Calderone and Amanda Calderone now move pursuant to CPLR 3211 (a) (7) to dismiss plaintiff’s complaint as against them. In support of their motion to dismiss, defendants provide the affidavits of Ken Calderone and Amanda Ferguson, sued as Calderone, and, inter alia, the contracts entered into by homeowners and Global for the “jobs” referred to by plaintiff in its complaint (collectively Jobs Contracts). Defendants’ motion papers identify Ken Calderone as the president and sole shareholder of Global, and Amanda Ferguson, sued as Calderone, as the office manager of Global. Plaintiff opposes the motion.

In considering a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction and the court must “accept the allegations as true and accord the plaintiff[ ] every possible favorable inference” (*Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021], quoting *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016]; *Aristy-Farar v State*, 29 NY3d 501, 509 [2017]). Giving plaintiff the benefit of all favorable inferences which may be drawn from the pleading, the court determines only whether the alleged facts “fit within any cognizable legal theory” (*Sassi*, 37 NY3d at 239; *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]; see *Recine v Recine*, 201 AD3d 827, 830 [2d Dept 2022]). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be

drawn from them do not allow for an enforceable right of recovery (*Connaughton*, 29 NY3d at 142; *Pinnacle Cap., LLC v O'Bleanis*, 214 AD3d 913, 915 [2d Dept 2023]).

#### **Dismissal of defendant Ken Calderone**

Defendants argue that pursuant to CPLR 3211 (a) (7) all causes of action must be dismissed as against defendant Ken Calderone as he was at all times acting in his corporate capacity and therefore cannot be held personally liable. The issue is whether, under the doctrine of piercing the corporate veil, the complaint contains allegations sufficient to state a cause of action holding Ken Calderone personally liable for the actions he took as Global's president and sole owner.

"Generally, a plaintiff seeking to pierce the corporate veil must show 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" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018]; *Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015]; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; *TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135, 1136 [2d Dept 2019]). Plaintiff has the burden to establish that the defendants "through [their] domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Morris*, 82 NY2d at 142; see *Cortlandt St. Recovery Corp.*, 31 NY3d at 47-48; *Americore Drilling & Cutting, Inc. v EMB Contracting Corp.*, 198 AD3d 941, 944 [2d Dept 2021]). The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their "alter ego," without more, will not suffice to support the equitable relief of piercing the corporate veil (*Goldman v Chapman*, 44 AD3d 938, 939 [2d Dept 2007]; see *TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). "While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required" (*Morris*, 82 NY2d at 141-42). Conversely, plaintiff must do more than merely allege that the defendants engaged in improper acts or acted in bad faith while representing the corporation (*Tabchouri v Hard Eight Rest. Co., LLC*, 219 AD3d 528, 531 [2d Dept 2023]).

The concept of piercing the veil is equitable in nature and the "decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" (*Ventresca*

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*Realty Corp. v Houlihan*, 41 AD3d 707, 708 [2d Dept 2007]; *Damianos Realty Grp., LLC v Fracchia*, 35 AD3d 344, 344 [2d Dept 2006]).

Here, having construed the complaint liberally, deeming the factual allegations as true, and having granted plaintiff the benefit of every possible favorable inference, the Court finds that the complaint did not include any facts or allegations specifically about Ken Calderone and did not even assert Ken Calderone's capacity as the president and sole owner of Global. Throughout the complaint, "defendants" are referenced with no designation as to whether either an individual defendant or Global undertook the actions complained of. As the complaint is devoid of any allegations that Ken Calderone exercised complete domination of Global and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury, the complaint fails to allege a cause of action against Ken Calderone under the theory of piercing the corporate veil.

The Court rejects plaintiff's argument that dismissal of the complaint against Ken Calderone is inappropriate at this stage inasmuch as evidence may eventually be discovered that would justify piercing the corporate veil. "The policy inherent in allowing individuals to conduct business in the corporate form so as to shield themselves from personal liability would be seriously threatened were [the court] to allow an insufficient cause of action to survive, at least to the summary judgment stage, merely on the plaintiff's hope that something will turn up" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 128–29 [2d Dept 2009], *affd.*, 16 NY3d 775 [2011]).

#### **Dismissal of defendant Amanda Calderone**

Defendants argue that pursuant to CPLR 3211 (a) (7) all causes of action must be dismissed as against defendant Amanda Ferguson, sued as Calderone, as she was at all times acting as an agent of Global and therefore cannot be held personally liable. Amanda Ferguson is an employee of Global and its office manager.

"Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), and such proof is considered but the motion has not been converted to one for summary judgment, 'the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it ... [,] dismissal should not eventuate' " (*MJ Lilly Assocs., LLC v Ovis Creative, LLC*,

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221 AD3d 805, 807 [2d Dept 2023]; *Marinelli v Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715–16 [2d Dept 2022], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, having considered the evidentiary materials submitted by Amanda Ferguson, sued as Calderone, including her affidavit and the Jobs Contracts, the Court determines that the moving defendants demonstrated that the plaintiff’s allegation that it had entered into an agreement with Ms. Ferguson and that Ms. Ferguson was paid for the jobs was “not a fact at all” (*see Kalmon Dolgin Affiliates, Inc. v Tonacchio*, 110 AD3d 848, 850 [2d Dept 2013]). Specifically, in her affidavit, Ms. Ferguson affirmed that that she was not a party to the agreement between plaintiff and Global for the sharing of the proceeds of certain construction jobs, that all of the “jobs” that the plaintiff seeks payment for herein were entered into by the respective homeowners and Global, that the scope of her employment duties with Global included communicating with customers and/or business associates of Global, that she never acted in her personal capacity in connection with any of the jobs that are the subject of this action, that pursuant to the Jobs Contracts she was not contracted to perform construction services in her personal capacity and never received payments in her personal capacity. The Jobs Contracts submitted by moving defendants are all between different homeowners and Global and do not mention Amanda Ferguson, sued as Calderone. In opposition, plaintiff provided no evidentiary materials to dispute Ms. Ferguson’s statements from her affidavit. Accordingly, plaintiff has no cause of action for breach of contract and unjust enrichment against the individual defendant Amanda Ferguson, sued as Calderone.

The parties’ remaining contentions either are without merit or need not be addressed in light of this determination.

Accordingly, defendants’ Ken Calderone and Amanda Calderone motion to dismiss plaintiff’s complaint as against the individual defendants Ken Calderone and Amanda Calderone pursuant to CPLR 3211 (a) (7) is granted.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: September 18, 2024  
Riverhead, NY

  
HON. MAUREEN T. LICCIONE, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION