

13Thirty Group, LLC v Kehoe Corp.
2024 NY Slip Op 35105(U)
December 12, 2024
Supreme Court, Dutchess County
Docket Number: Index No. 2024-51489
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

13THIRTY GROUP, LLC,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2024-51489

KEHOE CORP. and JOSEPH KEHOE,

Motion Sequence: 3

Defendants.

The following papers were read and considered on the motion of Defendant Joseph Kehoe (“Mr. Kehoe”) to dismiss the complaint as asserted against him:

<u>Document:</u>	<u>NYSCEF Doc. No(s):</u>
NOTICE OF MOTION.....	25
AFFIRMATION IN SUPPORT	26
AFFIDAVIT IN SUPPORT.....	27
 AFFIRMATION IN OPPOSITION.....	 33
 COMPLAINT	 23

This is an action for alleged breach of contract and related causes of action arising out of a contract for the construction of a single-family home. As alleged in the complaint, on or about February 18, 2022, Plaintiff entered into a pre-construction contract of sale with two individuals (not parties to this action) to construct and then sell the home to them, on premises then owned by Plaintiff at 361-377 Plattekill Road, Marlboro, New York. In or about April 2022, Plaintiff entered into a written contract with Defendant Kehoe Corp. (“Defendant Corporation” or “Kehoe Corp.”) to construct the home for a contract price of \$466,500.00. Mr. Kehoe was the principal of the Defendant Corporation and Plaintiff’s primary contact. Plaintiff alleges that Defendants failed to complete the construction of the home, and that much of the work they performed was defective and required remediation. Plaintiff further alleges that it paid Defendants \$400,151.00 of the contract price before Mr. Kehoe stated in a text message on June 9, 2023 that he was “walking away from this job.” Plaintiff further alleges that it subsequently paid \$206,436.00 to a new contractor to correct code-deficient work and complete the construction. Finally, Plaintiff alleges

that Defendants have been using its proprietary design plans for the home to market and sell other homes without Plaintiff's permission.

Plaintiff commenced this action by filing a summons with notice on April 8, 2024. On June 7, 2024, Plaintiff moved for a default judgment against the Defendant Corporation only. In response, the Defendant Corporation moved to compel Plaintiff to accept a late demand for complaint and for an extension of time to respond to any pleadings. The Court denied the motion and granted the cross-motion by Decision and Order dated August 26, 2024, which directed Plaintiff to file and serve a complaint on the Defendant Corporation via NYSCEF not later than September 16, 2024. Plaintiff duly filed its complaint that day, asserting six causes of action against Defendants collectively: (1) breach of contract; (2) fraud in the inducement; (3) conversion; (4) negligence; (5) unjust enrichment; and (6) declaratory judgment with respect to the alleged misuse of Plaintiff's proprietary design plans.

The Defendant Corporation filed an answer on October 7, 2024, and also filed the instant motion on behalf of Mr. Kehoe seeking to dismiss the complaint as asserted against him individually for failure to state a cause of action (CPLR 3211[a][7]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), this Court "must give the complaint a liberal construction, accept the allegations as true, and, providing plaintiffs with the benefit of every favorable inference, examine the adequacy of the pleadings" (*Moore Charitable Found. v PJT Partners, Inc.*, 40 NY3d 150, 153 [2023]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Id.*), and the Court's function is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

In support of his motion, Mr. Kehoe submits an affidavit asserting "that at all relevant times in connection with the claims made by [Plaintiff], [he] acted solely as a representative and principal of Kehoe Corp., and not in [his] personal or individual capacity." Mr. Kehoe further asserts that "all actions cited [by Plaintiff in the complaint], including the project management and communications, were conducted by [him] in [his] professional role as the principal of Kehoe Corp." Based on these assertions, Mr. Kehoe argues that he is, in effect, shielded from liability by the Defendant Corporation (*e.g.*, *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 [2d Dept 2006]).

In opposition, Plaintiff concedes that its first cause of action for breach of contract is asserted only against the Defendant Corporation, and not against Mr. Kehoe individually. Accordingly, Mr. Kehoe is entitled to dismissal of that cause of action insofar as asserted against him.

Plaintiff argues, however, that its remaining causes of action sounding in tort (fraud in the inducement, conversion, and negligence), unjust enrichment, and for declaratory judgment are properly alleged against Mr. Kehoe. Regardless of whether a plaintiff is seeking to pierce the corporate veil, corporate officers may be held individually liable for tort and unjust enrichment if the officer was personally engaged in the underlying misconduct (*see Am. Exp. Travel Related Services Co., Inc. v N. Atl. Resources, Inc.*, 261 AD2d 310, 311 [1st Dept 1999] [fraud in the

inducement]; *Gorelik v K & G Gekon, Inc.*, 188 AD3d 1010 [2d Dept 2020] [conversion]; *Aguirre v Paul*, 54 AD3d 302 [2d Dept 2008] [negligence]; *L.I. City Ventures LLC v Sismanoglou*, 158 AD3d 567 [1st Dept 2018] [unjust enrichment]). In its complaint, Plaintiff alleges that it dealt primarily with Mr. Kehoe; that Mr. Kehoe misrepresented Defendants' ability to perform the obligations under the contract; that Mr. Kehoe withheld payments from Plaintiff and failed to pay one or more subcontractors; that Mr. Kehoe performed work on the project negligently; that Mr. Kehoe misappropriated Plaintiff's design plans for Defendants' marketing and use on other projects; and that Defendants were overpaid for the work that was performed. These allegations are sufficient at this early stage of the litigation to properly sustain all of the foregoing causes of action, per the authorities just cited. As to Plaintiff's sixth cause of action for a declaratory judgment, Plaintiff sufficiently alleges that Mr. Kehoe was personally involved in improperly using and profiting from Plaintiff's proprietary design plan for the home, thereby raising a justiciable controversy (CPLR 3001). In light of these allegations, Mr. Kehoe's conclusory assertions of having acted solely as the principal of the Defendant Corporation merely raise a factual dispute that is not appropriate for resolution on a CPLR 3211 motion to dismiss (*see N. Shore Architectural Stone, Inc. v Am. Artisan Const., Inc.*, 153 AD3d 1420, 1422 [2d Dept 2017]; *Damianos Realty Group*, 35 AD3d at 344).

Based on the foregoing, it is hereby

ORDERED that Mr. Kehoe's motion is granted to the extent that Plaintiff's first cause of action for breach of contract is dismissed insofar as asserted against him, and the motion is otherwise denied; and it is further

ORDERED that Mr. Kehoe shall file and serve an answer to the complaint via NYSCEF within twenty (20) days of the date hereof.

This matter remains scheduled for an in-person discovery compliance conference on January 15, 2025 at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: December 12, 2024
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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