

<b>Egleston v MKL Constr. Corp.</b>
2024 NY Slip Op 35127(U)
December 5, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 002781/2020
Judge: Frank A. Tinari
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SHORT FORM ORDER

INDEX No. 002781/2020  
CAL. No. 202301924CO

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 50 - SUFFOLK COUNTY

**PRESENT:**

Hon. FRANK A. TINARI  
Justice of the Supreme Court

MOTION DATE 5/7/24 (004)  
MOTION DATE 6/4/24 (005)  
ADJ. DATE 6/25/24  
Mot. Seq. # 004 MotD  
Mot. Seq. # 005 MD

-----X  
GREGORY M. EGGLESTON, TRUSTEE,  
GME/DBP,

Plaintiff,

- against -

MKL CONSTRUCTION CORP. (also known as  
PHIL KOUFFMAN BUILDER, INC.) and  
PHILLIP D. KOUFFMAN,

Defendants.  
-----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants, filed April 9, 2024; Notice of Cross-Motion and supporting papers by plaintiff, filed May 22, 2024; Answering Affidavits and supporting papers by defendants, filed June 10, 2024; Replying Affidavits and supporting papers by plaintiff, filed June 24, 2024; Other   ; it is

**ORDERED** that defendants’ motion for, inter alia, summary judgment dismissing all causes of action against Phillip D. Kouffman is granted to the extent set forth herein, and is otherwise denied; and it is further

**ORDERED** that plaintiff’s cross motion for summary judgment on the first cause of action is denied.

Plaintiff commenced this action to recover damages for injuries allegedly sustained due to defendants’ breach of a contract for the construction of a residential home. Plaintiff contracted with defendant MKL Construction Corp. (also known as Phil Kouffman Builder, Inc.) (“MKL” herein) to

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construct the home. Phillip D. Kouffman (“Kouffman” herein) executed the contract as vice president of MKL. Plaintiff alleges, among other things, that defendants failed to perform to the terms of the contract and added additional costs to the construction project.

MKL and Kouffman now move for summary judgment dismissing all causes of action against Kouffman, and dismissing causes of action two through five against MKL. MKL contends that it has been improperly named in the instant action as “MKL Construction Corp. (also known as Phil Kouffman Builder, Inc.)” Defendants purport to move to dismiss claims against Phil Kouffman Builder, Inc. (“PKB” herein), but such entity is not an individual defendant named in this action. As such, insofar as defendants seek dismissal of claims against PKB, these branches of the motion are not properly before the court, as this entity is not a party to this action. Plaintiff opposes the motion and cross-moves for summary judgment in his favor on the first cause of action, arguing, among other things, that the corporate veil should be pierced to hold Kouffmann personally liable.

Plaintiff’s cross motion for summary judgment was filed beyond the 120-day time limit following the filing of the note of issue, making it untimely (*see* CPLR 3212 [a]). Plaintiff first filed a note of issue on December 13, 2023, which certified plaintiff’s readiness for trial. Without withdrawing or vacating the note of issue, plaintiff filed a second note of issue on January 30, 2024. The first note of issue filed is valid and controlling, and so all substantive motions needed to be filed within 120 days from the date it was filed, namely, December 13, 2023. Plaintiff’s notice of cross motion was filed on May 22, 2024, which was beyond the 120-day time limit for filing substantive motions. Plaintiff failed to demonstrate good cause for the untimely filing, and the court is therefore without discretion to entertain it (*see Bricenio v Perez*, 178 AD3d 1002, 115 NYS3d 406 [2d Dept 2019]). A court may consider an untimely cross motion where a timely motion for summary judgment was made on “nearly identical grounds,” as the identical nature of the motions can provide the requisite good cause showing for the untimely filing (*see Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]). Here, though, plaintiff’s cross motion was not made on nearly identical grounds to defendants’ motion. Plaintiff cross moves for summary judgment on the breach of contract cause of action, and details the myriad ways in which defendants allegedly breached the contract. Defendants, on the other hand, move to dismiss the breach of contract claim only insofar as there is an alleged lack of privity between Kouffman and plaintiff. The individual, substantive breaches of the contract underlying the first cause of action were not brought up in defendants’ motion, and therefore, these issues are not “properly before the court” as regards plaintiff’s untimely cross motion (*id.* at 593). The cross motion, therefore, was not made on “nearly identical grounds” and the court cannot consider it (*cf. Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615). To the extent that plaintiff’s papers have been filed in opposition to defendants’ motion, the court will consider them.

The court will first address the branch of defendants’ motion seeking dismissal of the first cause of action against Kouffman. “The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach” (*Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965, 95 NYS3d 97 [2d Dept 2019]). One cannot be held liable for breach

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of a contract to which he or she is not a party (*id.*). “An agent who enters into a contract on behalf of a disclosed principal is not personally liable unless there is clear and explicit evidence of the agent's intention to be personally bound” (*Regal Commodities v Tauber*, 225 AD3d 907, 908, 209 NYS3d 438 [2d Dept 2024] [internal quotations and citations removed]). “A principal is disclosed if at the time of a transaction conducted by an agent, the other party to the contract had notice that the agent was acting for the principal and of the principal's identity” (*id.*). “The party claiming, as an affirmative defense to liability for breach of contract, that an agency relationship existed must demonstrate that the agency relationship and the identity of the principal were disclosed” (*id.*).

Here, Kouffman demonstrated his prima facie entitlement to summary judgment dismissing plaintiff's breach of contract claim against him (*see Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 95 NYS3d 97). The subject contract and the deposition testimony demonstrate that Kouffman was not in contractual privity with plaintiff. The contract and the parties' deposition testimony demonstrate that he was acting as an agent for a disclosed principal at the time the contract was executed, and that he did not intend to be personally bound thereby (*see Regal Commodities v Tauber*, 225 AD3d 907, 209 NYS3d 438). Therefore, Kouffman demonstrated, prima facie, that he cannot be held liable for breach of the subject contract (*see Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 95 NYS3d 97).

In opposition, plaintiff failed to raise a triable issue of fact (*see East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009]). Plaintiff argues that the corporate veil should be pierced, and that Kouffman should be held liable for MKL's allegedly tortious conduct, but this theory of liability is raised improperly for the first time herein. The complaint contains no allegations that Kouffman “dominated” MKL, or “that he engaged in acts amounting to an abuse of the corporate form to perpetrate a wrong or injustice against the plaintiffs” (*Murphy v Jewell*, 228 AD3d 676, 676, 213 NYS3d 370 [2d Dept 2024]). The complaint, therefore, fails to allege the material elements of a cause of action against Kouffman under the theory of piercing the corporate veil, and plaintiff cannot now raise this argument for the first time (*East Hampton Union Free School Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 884 NYS2d 94).

The court will next consider the branches of defendants' motion seeking dismissal of the second, third and fourth causes of action. A negligence cause of action is duplicative of a breach of contract claim where the allegations underlying the negligence cause of action are “essentially identical to those in the breach of contract cause of action and [do] not allege a distinct injury or distinct damages” (*see Meserole Hub, LLC v Rosenzweig*, 223 AD3d 895, 896, 204 NYS3d 219 [2d Dept 2024]). The same is true for claims of negligent misrepresentation (*see Board of Managers of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 25 NYS3d 233 [2d Dept 2016]). Furthermore, “[a]s a general rule, the existence of a valid and enforceable contract governing a particular subject matter precludes recovery in quasi-contract on a theory of unjust enrichment for events arising out of the same subject matter” (*Incorporated Vil. of Freeport v Albrecht, Viggiano, Zurich & Co., P.C.*, 226 AD3d 658, 661, 210 NYS3d 108 [2d Dept 2024]).

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Here, the facts and allegations underlying plaintiff's second and third causes of action are essentially identical to the facts and allegations underlying the first cause of action for breach of contract. As such, defendants have demonstrated their entitlement to the dismissal of these causes of action against them (*see Meserole Hub, LLC v Rosenzweig*, 223 AD3d 895, 204 NYS3d 219; *Board of Managers of Beacon Tower Condominium v 85 Adams St., LLC*, 136 AD3d 680, 25 NYS3d 233). Additionally, a contract having existed that governed the subject matter of this action, plaintiff cannot recover in quasi-contract under a theory of unjust enrichment (*see Incorporated Vil. of Freeport v Albrecht, Viggiano, Zurich & Co., P.C.*, 226 AD3d 658, 210 NYS3d 108). Therefore, defendants demonstrated their entitlement to dismissal of the second, third, and fourth causes of action; in opposition, plaintiff failed to raise a triable issue of fact (*see Meserole Hub, LLC v Rosenzweig*, 223 AD3d 895, 204 NYS3d 219).

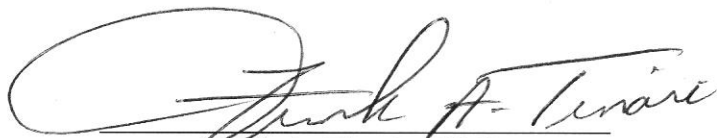
Finally, the court will address defendants' application for dismissal of plaintiff's fifth cause of action for consequential damages. "It is well settled that in breach of contract actions the nonbreaching party may recover general damages which are the natural and probable consequence of the breach ... Special, or consequential damages, which do not so directly flow from the breach, are also recoverable in limited circumstances" (*Bi-Economy Mkt., Inc. v Harleystown Ins. Co. of New York*, 10 NY3d 187, 192, 856 NYS2d 505 [2008] [internal quotations and citations omitted]). Consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted "so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting" (*Pandarakalam v Liberty Mut. Ins. Co.*, 137 AD3d 1234, 1236, 29 NYS3d 413 [2d Dept 2016]). "To determine whether consequential damages were reasonably contemplated by the parties, courts must look to the nature, purpose and particular circumstances of the contract known by the parties ... as well as what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made" (*Bi-Economy Mkt., Inc. v Harleystown Ins. Co. of New York*, 10 NY3d 187, 856 NYS2d 505).

MKL failed to establish a prima facie case of entitlement to summary judgment dismissing the fifth cause of action (*see Pandarakalam v Liberty Mut. Ins. Co.*, 137 AD3d 1234, 29 NYS3d 413). The complaint alleges that defendants were aware that the residence was being built for the primary purpose of being rented, and that the parties contemplated the alleged consequential damages. Here, Mr. Egleston testified that he, Kouffman, and John Mack, another employee of MKL, had on numerous occasions discussed that the residence was being built for the purposes of being rented out. He further testified that, prior to the making of the contract, defendants were aware of plaintiff's intention to use the home as a rental property. Therefore, MKL failed to demonstrate that the alleged consequential damages were not reasonably foreseeable or contemplated by the parties (*see id.*). Defendants argue that the contract's "time not of the essence" clause precludes recovery of consequential damages, but this supposed "limitations provision does not specifically preclude recovery for lost" rent, or other forms of consequential damages (*see Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 805, 988 NYS2d 527 [2014]). Kouffman, on the other hand, having demonstrated his entitlement to dismissal of the breach of contract claim, necessarily cannot be held liable for any consequential damages flowing from the alleged breach, and therefore the fifth cause of action must be dismissed against him.

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Accordingly, the second, third, and fourth causes of action are dismissed as against MKL. The complaint is dismissed in its entirety as against Kouffman. The remaining branch of defendants' motion is denied.

Dated: 12/5/24

  
Frank A. Tinari, J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION