SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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CJS INDUSTRIES INC.,

Plaintiff,

- v -

CURRENT LIGHTING & ELECTRIC, INC.,ALLIANCE BUILDING SERVICES, LLC,MICHAEL A. RODRIGUEZ

Defendant.

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INDEX NO. 654860/2020

MOTION DATE 05/19/2025

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion is granted in part.

Background

This motion arises out of a 2015 subcontractor agreement to install electrical equipment at the Parker Jewish Institute. CJS Industries Inc. ("Plaintiff") hired Current Lighting & Electric, Inc. ("Current") to install the equipment in hundreds of patient rooms, but eventually terminated Current from the project due to allegedly defective work. At the time, Current's chief executive officer was Michael A. Rodriguez (the "Individual Defendant" or "Rodriguez"). Plaintiff filed the underlying proceeding in October of 2020, pleading claims of breach of contract, breach of express warranty, and unjust enrichment against Current. The complaint noted that Current had an affiliate company, Alliance Building Services ("Alliance", collectively with Rodriguez and Current, "Defendants") and that Rodriguez was the CEO, but it only pled claims against Current and only Current was explicitly named as a defendant.

As of January 2019, Current had ceased operations and was not conducting business. Plaintiff obtained a default judgment in March of 2022, but Current moved to vacate that based on failure to serve, and that motion was granted on September 11, 2023. Plaintiff was sent an email with an offer of settlement and told that Current was "no longer an active corporation and does not have any assets." Shortly after that, counsel for Plaintiff responded that Current should wait to file an answer because an amended complaint would be filed in "short order." The amended complaint was not filed until April 29, 2025. The amended complaint now lists Alliance and Rodriguez as defendants and contains twelve causes of action. Meanwhile, Current had been officially dissolved on November 1, 2023. Defendants move to dismiss the amended complaint.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340, 341 [2d Dept. 2003]. 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 v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 [2017].

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]. CPLR § 3211(a)(5) states that a cause of action that violates the statute of limitations will not be maintained.

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 [1977].

Discussion

Defendants move to dismiss the amended complaint on several grounds, including 1) that it was filed without leave of court; 2) several claims are barred by the statute of limitations; 3) it fails to plead a basis for veil-piercing or successor liability; 4) the amended complaint is barred by the doctrine of laches; and 5) several claims are duplicative and should be dismissed. Plaintiff opposes the motion. For the reasons that follow, all claims against Alliance are dismissed. All claims against Rodriguez, except to the extent that Plaintiff seeks to recover from assets received during Current's dissolution, are likewise dismissed. The tenth and twelfth causes of action are dismissed in their entirety.

The Amended Complaint Was Filed as Of Right

Defendants move to dismiss the amended complaint in its entirety on the grounds that it was not filed with leave of court. Under CPLR § 3025(a), a party is permitted to amend the pleading once as of right "within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Here, there has never been an answer filed in response to either complaint. Defendants argue that regardless of whether a complaint is responded to, the ability to amend it as of right expires when

the time to respond to it expires. Plaintiff argues in response that they have the ability to amend once as of right so long as the first complaint has not yet had a response.

In *Miller*, the First Department found that leave to amend a complaint was required for a defendant who had answered but was not required for a defendant that had not answered. *Miller v. General Motors Corp.*, 99 A.D.2d 454, 454 [1st Dept. 1984]. In *Gansburg*, the court there likewise held that "[s]ince no responsive pleading had been served at the time the petition was amended, the amendment could have been made as a matter of right." *Matter of Gansburg v. Blachman*, 111 A.D.3d 935, 936 [2nd Dept. 2013]. Because the first complaint was never responded to, here Plaintiff was permitted to amend once as of right. And even if leave of the Court was required, the Court here grants such leave.

The Claims Against Alliance Are Time-Barred

In the amended complaint, Plaintiff pleads claims of breach of contract and unjust enrichment against Alliance, on the basis that it is their belief that Alliance is a successor-in-interest to Current. These claims are governed by a six-year statute of limitations. CPLR § 213. The latest alleged action that could give rise to liability here was in March of 2018, more than six years prior to the filing of the amended complaint. Plaintiff argues that the claims in question fall under the relation back doctrine and are thus timely. This doctrine applies when:

> (1) the claims arise out of the same conduct, transaction or occurrence; (2) the new party is 'united in interest' with an original defendant and thus can be charged with such notice of the commencement of the action such that a court concludes that the party will not be prejudiced in defending against the action; and (3) the new party knew or should have known that, but for a mistaken omission, they would have been named in the initial pleading. *Matter of Nemeth v. K-Tooling*, 40 N.Y.3d 405, 407 – 08 [2023].

Plaintiff argues that all three elements have been satisfied here. But the relation back doctrine does not apply when "a plaintiff intentionally decides not to assert a claim against a

party known to be potentially liable or when the new party was omitted to obtain a tactical advantage in the litigation." *Id*., at 408. Here, Plaintiff was clearly aware of Alliance and Rodriguez at the time of the original complaint, but did not attempt to plead claims against them until years later. The original complaint was clearly pled against Current as the sole defendant. Only Current was served with the original complaint. It is plain that the omission of Alliance and Rodriguez was intentional and not a pleading error. Because all the claims pled against Alliance accrued more than six years ago, they are dismissed as time barred.

The Claims Pled Against Rodriguez on A Veil-Piercing Theory Are Dismissed

The seventh through eleventh claims in the amended complaint are pled against Rodriguez on the grounds that he is personally liable for Current's obligations 1) through the alter ego theory; 2) as the business's owner; and 3) as a *de facto* trustee following Current's dissolution in November of 2023. Defendants argue that the amended complaint failed to plead any valid basis for piercing the corporate veil and holding Rodriguez personally liable. Plaintiff failed to address this argument in their papers.

When a plaintiff fails to oppose dismissal of a claim during motion practice, the claim should be dismissed as abandoned. *See, e.g.*, *Brown v. Z-Live Inc.*, 2025 N.Y. App. Div. LEXIS 3293, *2 [1st Dept. 2025]. Therefore, to the extent that the claims pled against Rodriguez are based on a veil-piercing theory, they are dismissed. The tenth cause of action, which specifically seeks to pierce the corporate veil as to Rodriguez, must be dismissed for the further reason that piercing the veil is not an independent cause of action. *See, e.g.*, *PK Rest., LLC v. Lifshutz*, 138 A.D.3d 434, 436 [1st Dept. 2016]. Plaintiff did oppose the motion to dismiss the claims based on a de facto trustee theory, however, and because those claims are based in and could not accrue

until Current's dissolution in 2023, they are not time-barred. For the same reason, those claims would not be barred by the doctrine of laches due to a lengthy delay.

As a Pre-Dissolution Claimant, Plaintiff Can Seek to Recover Corporate Assets from Rodriguez

The amended complaint pleads claims against Rodriguez arguing that he should be held liable for Current's obligations pursuant to New York Business Corporation Law § 1006 and 1007. BCL § 1007 permits a corporation to give notice of dissolution to creditors. BCL § 1006(b) states that the "dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution." Although they largely cite to non-binding federal and trial level cases, Plaintiff does cite to one First Department case in support of the proposition that Rodriguez can be held personally liable for the obligations of Current post-dissolution.

In *Rodgers*, the First Department noted that "where it is impossible or futile to obtain such judgment, the creditor can maintain an action directly against the directors or shareholders, even though no judgment has been obtained." *Rodgers v. Logan*, 121 A.D.2d 250, 253 [1st Dept. 1986]. They adopted a lower court's holding that "the directors, who had dissolved the corporation without ascertaining, providing for, or paying corporate liabilities, were allowed to be added as defendants in an action for recovery of damages for breach of contract by the defendant corporation." *Id*. The Third Department interpreted *Rodgers* as standing for the proposition that in the case of futility or impossibility, a creditor can maintain an action against the "directors or shareholders to the extent that they received from or continue to hold assets which were the corporation's." *Wells v. Ronning*, 269 A.D.2d 690, 692 – 93 [3rd Dept. 2000]; *see also Somer & Wand, P.C. v. Rotondi*, 219 A.D.2d 340, 344 [2nd Dept. 1996] (holding that

creditors could seek to recover corporate assets from shareholders that were distributed after dissolution).

While Defendants deny that Rodriguez received any assets of Current after dissolution, that is a factual question that cannot be resolved on a motion to dismiss. Therefore, to the extent the amended complaint seeks to maintain an action against Rodriguez for assets received from Current during dissolution, the claims are properly pled. To the extent, however, that the Plaintiff seeks to recover from Rodriguez for other assets not received from Current during dissolution, Plaintiff has not pled any valid claim that would permit such recovery. *See Somer & Wand*, at 345 (holding that the creditor could not seek to recover assets that were "not shown to be, or to be derived from, a former corporate asset"). And finally, Defendants argue that the quasi-contract claims in the amended complaint are duplicative of the breach of contract claims. But a party is permitted to plead quasi-contract in the alternative and is not required to elect between them at the motion to dismiss stage. *On the Level Enters., Inc. v. 49 E. Houston LLC*, 104 A.D.3d 500, 501 [1st Dept. 2013]. Accordingly, it is hereby

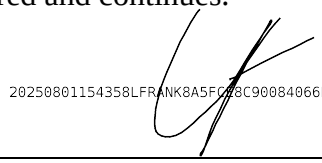
ADJUDGED that the motion to dismiss the amended complaint is granted is granted in part; and it is further

ORDERED and ADJUDGED that all claims are dismissed as pled against defendant Alliance Building Services, LLC; and it is further

ORDERED and ADJUDGED that all claims are dismissed as to defendant Michael A. Rodriguez to the extent that they are pled on a veil-piercing theory or seek to recover assets not received from defendant Current Lighting & Electric, Inc. during dissolution; and it is further

ORDERED and ADJUDGED that the tenth and twelfth causes of action are dismissed entirely; and it is further

ORDERED that the remainder of the action is severed and continues.



8/1/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**