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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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FIREMAN'S FUND INSURANCE COMPANY on its own behalf and as subrogee of DAVID ROSEN,

Plaintiff(s),

Index No. 8357/09

Motion Submitted: 8/8/11
Motion Sequence: 001

-against-

LARUCCIA CONSTRUCTION INC.,

Defendant(s).
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LARUCCIA CONSTRUCTION INC.,

Third-Party Plaintiff(s),

-against-

RICHARD H. MORRELL and RICHARD H. MORRELL PLUMBING & HEATING, INC.,

Third-Party Defendant(s).
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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Third party defendants Richard H. Morrell and Richard H. Morrell Plumbing & Heating, Inc. move this Court for an Order pursuant to CPLR § 3212 dismissing the third-party complaint.

Prior to February of 2007, the plaintiff, Fireman's Fund Insurance Company ["Fireman's"], issued a homeowner's policy to its insured, David Rosen, who resides in Plandome, New York. While the policy was in effect, Rosen entered into a home improvement contract with the defendant Laruccia Construction, Inc. ("Laruccia"), pursuant to which Laruccia performed certain renovations at Rosen's home.

Thereafter, in 2005, Laruccia hired third-party defendant Richard H. Morrell Plumbing & Heating, Inc. ("Morrell Plumbing"), to perform certain plumbing work and/or heating renovations at Rosen's home. Neither the main contract nor any written subcontract, however, has been attached to the parties' respective moving papers.

The relevant work, as evidenced by certain change orders, included modifying the heating system in Rosen's sunroom by, *inter alia*, installing a new system and removing existing radiators. However, some two years after the work was completed, *i.e.*, on or about February 2, 2007, there was a flood at the premises, which occurred when an uninsulated, existing ceiling supply pipe froze and burst, causing damage in the sunroom. The freezing condition apparently occurred because supply line pipes leading to the sunroom were allegedly capped in an improper location.

Rosen's previously existing sunroom heating system was a "gravity fed" system, as opposed to "forced fed." Insofar as relevant, the record indicates that in the case of a "gravity fed" system, capping the pipes in the crawl space area would have trapped standing water in the supply line, as opposed to a "forced fed" type system, where this problem would not likely exist. At the time when Morrell originally capped the pipes, both Laruccia and Richard Morrell apparently believed (mistakenly) that the heating system in the sunroom was forced fed. Larucccia was also unaware that there was an existing supply line pipe in the ceiling. Had Laruccia known that the system was gravity fed, and/or that the ceiling supply line existed, he would have directed Morrell to cap the pipes in a different location and insulated the ceiling pipe.

Morrell claims, however, that after discussing his concerns about the capping process, Paul Laruccia affirmatively directed him to cap the pipes without opening the walls for further inspection, which inspection would allegedly have clarified whether the system was actually "gravity fed" or "force fed." Significantly, at Paul Laruccia's deposition, a change order was introduced as an exhibit which, *inter alia*, required that Laruccia "disconnect existing . . . radiators." Larrucia testified that as he understood it, the foregoing work order did not require him to open up walls, which would have increased the scope and cost of the work.

In February of 2008, Fireman's instituted an arbitration proceeding as against the carriers for both Morrell and Laruccci seeking recovery of some $83,884.96. By decision dated February 5, 2009, the arbitrator ruled that Laruccia was 90% responsible for the damage while Morrell was 10% responsible. The arbitrator also rejected an affirmative defense interposed by Laruccia's carrier, by which it alleged that it had properly disclaimed coverage in the matter.

On arbitration appeal, however, another arbitrator reversed the original decision to the extent that it now upheld the disclaimer defense asserted by Laruccia's carrier. The arbitrator did, however, sustain the division of liability as between Laruccia and Morrell and awarded Fireman's the sum of $8,388.50 as against Morrell's carrier, State Farm (decision dated April 13, 2009).

Thereafter, in mid-July of 2009 Fireman's entered into a settlement with Morrell Plumbing and State Farm releasing them from any liability in connection with the subject claim upon the payment of $20,971.24.

Upon paying Rosen's insurance claim, Fireman's then became subrogated to Rosen's rights as against third parties and later commenced the within action, as against Laruccia. Laruccia then instituted a third-party action against Morrell Plumbing and Richard H. Morrell, individually.

In sum, the third-party complaint avers, *inter alia*, that Richard Morrell (individually) "was and still is doing business under and pursuant to the trade name 'Richard H. Morrell Plumbing & Heating.'" The complaint further alleges that Laruccia entered into a contract with both Morrell and Morrell Plumbing to perform work at Rosen's home. According to the third-party complaint, both defendants Morrell individually and Morrell Plumbing, thereafter collectively failed to perform the agreed-upon work in a proper fashion by, *inter alia*, improperly "disconnect[ing] the heating system in the sunroom . . . ."

Based upon these averments and others, the third-party complaint interposes two causes of action, the first sounding in breach of contract and a second alleging negligence for which indemnity and/or contribution have been demanded.

Morrell and Morrell Plumbing have answered, denied the material allegations of the third-party complaint and interposed various affirmative defenses, including a defense based upon the release issued previously by Fireman's to Morrell Plumbing.

Discovery has been conducted and Morrell now moves for summary judgment dismissing the third-party complaint. In support of its application, Morrell contends, *inter*

alia, that: (1) based on the prior settlement with Fireman's, GOL § 15-108[b] mandates dismissal of Larrucia's third-party claims; and (2) that, in any event, since the subject work was performed by Morrell Plumbing, a corporate entity, there is no basis on which to impose personal liability upon Richard H. Morrell individually.

General Obligations Law § 15–108 provides, *inter alia*, that a release given by the injured party to one of several tortfeasors relieves the settling tortfeasor "from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules" (***General Obligations Law § 15–108[b]*** *see,* ***Giglio v. NTIMP, Inc.***, 86 A.D.3d 301, 311, 926 N.Y.S.2d 546 (2d Dept., 2011); ***Boeke v. Our Lady of Pompei School***, 73 A.D.3d 825, 827, 901 N.Y.S.2d 336 (2d Dept., 2010); ***Hoogland v. Transport Expressway, Inc.***, 72 A.D.3d 1026, 1027, 898 N.Y.S.2d 892 (2d Dept., 2010); ***McNally v. Corwin***, 30 A.D.3d 482, 819 N.Y.S.2d 271 (2d Dept., 2006); ***Cover v. Cohen***, 113 A.D.2d 502, 510, 497 N.Y.S.2d 382 (2d Dept., 1985).

In light of the foregoing, the Court agrees that the prior release given by Fireman's Fund to Morrell Plumbing now precludes any affirmative recovery as against Morrell Plumbing. Notably, Laruccia has not opposed that branch of Morrell's motion which is to dismiss the third-party complaint based on the release insofar as interposed against Morrell Plumbing (*cf.,* ***Kermanshachi v. Kermanshachi***, 931 N.Y.S.2d 528, 2011 N.Y. Slip Op 07612 [2d Dept., 2011]).

In any event, the release is plain in its import and meaning relative to the settlement of all claims arising out of the incident as to Morrell Plumbing. Notably, "[a] release which is clear and unambiguous will be fully enforced . . . and the court may not look to extrinsic evidence to determine the parties' intent" (***Koufakis v. Siglag***, 85 A.D.3d 872, 973, 925 N.Y.S.2d 204 (2d Dept., 2011).

Nevertheless, the release does not make any reference to individual officers or directors of Morrell Plumbing. Rather, and without mentioning Richard H. Morrell, as an individual, the release merely refers generically to the "heirs executors, administrator, successor or assigns." Significantly, although a broad general release will be given effect regardless of the parties' unexpressed intentions, "a release may not be read to cover matters which the parties did not desire or intend to dispose of" (***Cahill v. Regan***, 5 N.Y.2d 292, 299, 157 N.E.2d 505, 184 N.Y.S.2d 348 (1959) *see,* ***Kaprall v. WE: Women's Entertainment, LLC***, 74 A.D.3d 1151, 904 N.Y.S.2d 721 (2d Dept., 2010); ***Perritano v. Town of Mamaroneck***, 126 A.D.2d 623, 624, 511 N.Y.S.2d 60 [2d Dept. 1987]).

However, that branch of the motion which is to dismiss the complaint against Richard H. Morrell in his individual capacity is granted upon the alternative grounds asserted, *i.e.*,

that Laruccia's contract was with Morrell Plumbing not Morrell individually.

More specifically, the record indicates that "Richard H. Morrell Plumbing & Heating, Inc." exists as a corporate entity; that its function and purpose at the time in question was to perform plumbing and heating work; and that, according to Richard Morrell, the subject work was in fact performed by Morrell Plumbing in its corporate capacity (*see generally*, ***Village Auto Ctr., Inc. v. Haimson***, 72 A.D.3d 805, 806, 898 N.Y.S.2d 479 [2d Dept., 2010]).

The opposing allegation that Morrell entered into the contract in his individual capacity, despite the undisputed existence of the corporate entity, "Richard H. Morrell Plumbing & Heating, Inc," fails to generate an issue of fact with respect to the claim that Morrell himself directly contracted with Laruccia.

Laruccia's claims to the contrary are unpersuasive, namely, its claims that, *inter alia*, that Morrell never told Paul Laruccia he was operating as a corporation; that certain written proposals utilized by Morrell for other jobs (and his plumbing license as well), contain the heading "Richard H. Morrell Plumbing and Heating," but omit reference to the corporate form; that most of the contracts Laruccia entered into with Morrell were oral; that the written proposals utilized by Morrell did not have a signature line for his (Morrell's) signature; and that Laruccia did not know where the checks he gave Morrell were being deposited. With respect to the latter claim Morrell testified that the checks he received from Laruccia, irrespective of how drafted by Laruccia , were deposited into Morrell Plumbing's corporate account. (***Retropolis, Inc. v. 14th Street Development LLC***, 17 A.D.3d 209, 210-211, 797 N.Y.S.2d 1 [1st Dept., 2005]).

Nor is there anything in either the complaint, or in the Larucccia's opposing submissions, which alternatively supports a piercing of the corporate veil – a theory not pleaded or raised in the third-party complaint (*cf.*, ***Sigal v. Brokaw***, 71 A.D.3d 865, 866, 895 N.Y.S.2d 862 [2d Dept., 2010]). More particularly, Laruccia has not sustained its "heavy burden" of establishing that Morrell "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" against Laruccia "such that a court in equity will intervene" (*see*, ***TNS Holdings v. MKI Sec. Corp.***, 92 N.Y.2d 335, 338-339, 703 N.E.2d 749, 680 N.Y.S.2d 891 (1998); ***Matter of Morris v. New York State Dept. of Taxation & Fin.***, 82 N.Y.2d 135, 141, 623 N.E.2d 1157, 603 N.Y.S.2d 807 (1993); ***Superior Transcribing Service, LLC v. Paul***, 72 A.D.3d 675, 676, 898 N.Y.S.2d 234 (2d Dept., 2010); ***Gateway I Group, Inc. v. Park Ave. Physicians, P.C.***, 62 A.D.3d 141, 145-146, 877 N.Y.S.2d 95 (2d Dept., 2009) *see also*, ***Sigal v. Brokaw, supra***.

It is settled "that a business can be incorporated for the very purpose of enabling its proprietor to escape personal liability" and that the corporate "form is not lightly to be disregarded" (***Treeline Mineola, LLC v. Berg***, 21 A.D.3d 1028, 1029, 801 N.Y.S.2d 407 (2d Dept., 2005); ***Bowles v. Errico***, 163 A.D.2d 771, 773, 558 N.Y.S.2d 734 (3d Dept., 1990) *see,* ***Matter of Goldman v. Chapman***, 44 A.D.3d 938, 939, 844 N.Y.S.2d 126 [2d Dept., 2007]). Moreover, "precedent is clear that courts will pierce the corporate veil only to prevent fraud, illegality or to achieve equity" and this is so even where the involved corporation is controlled or dominated by only a single shareholder (***New York Assn. for Retarded Children, Montgomery County Ch. v. Keator***, 199 A.D.2d 921, 922, 606 N.Y.S.2d 784 (3d Dept., 1993) *see,* ***Sigal v. Brokaw, supra; Matter of Goldman v. Chapman, supra***.

Laruccia's assertion that its third-party complaint does not plead or rely on the corporate veil doctrine, but rather, advances only a "direct" cause of action as against Richard Morrell, does not preclude Morrell from relying on the doctrine in an attempt to defeat any claims of individual liability (***Lockwood v. Layton***, 79 A.D.3d 1342, 1344, 916 N.Y.S.2d 243 (3d Dept., 2010); ***Alizio v. Perpignano,*** 67 A.D.3d 833, 835, 889 N.Y.S.2d 100 [2d Dept., 2009]).

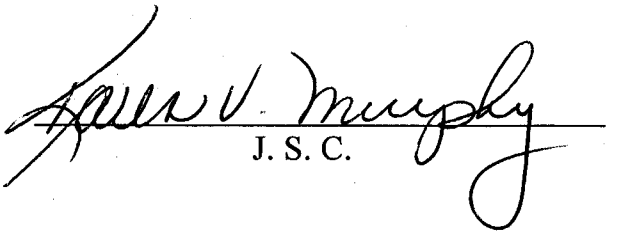
The Court has considered Laruccia's remaining contentions and concludes that they are insufficient to defeat the movants' application for summary judgment dismissing the third-party complaint.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR §3212 by the third-party defendants Richard H. Morrell and Richard H. Morrell Plumbing & Heating, Inc. for an order dismissing the third-party complaint, is granted.

The foregoing constitutes the Order of this Court.

Dated: November 30, 2011
Mineola, N.Y.



J. S. C.