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SHORT FORM ORDER

INDEX No. 09-42861

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 7-14-11 (#001)
MOTION DATE 9-22-11 (#002)
ADJ. DATE 1-5-12
Mot. Seq. # 001 - MD
002 - XMD

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MATTHEW R. FOSTER and THERESA A. FOSTER,

Plaintiffs,

- against -

ISLAND ESTATES AT SHOREHAM, INC., LENNARD AXINN, HARVEY GESSIN, GERALD FRIEDMAN and DAVID WASSERMAN,

Defendants.

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Upon the following papers numbered 1 to 32 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers 20 - 24 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 25 - 27, 28 - 32 ; Other memoranda of law 19, 23 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor and holding the individual defendants jointly and severally liable for the outstanding judgment debt that is owed to the plaintiffs is denied; and it is further

ORDERED that this cross motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This is an action to "pierce the corporate veil" of the defendant Island Estates at Shoreham, Inc. (IES), and to hold the individual defendants personally liable for the payment of an unsatisfied judgment granted to the plaintiffs against IES in 2003. On or about March 13, 1998, the plaintiffs entered into a written contract of sale (contract) with IES for the purchase of a newly constructed home in a

subdivision known as Island Estates at Shoreham (subdivision), containing approximately 140 homes. Pursuant to the contract, IES provided the plaintiffs with a written warranty in addition to the implied warranties for new construction contained in the New York General Business Law. On or about October 1, 1998, the closing of title on the plaintiffs' new home took place. Thereafter, the plaintiffs submitted a warranty claim in writing to IES alleging various defects in the construction of their home. On July 21, 2000, the plaintiffs commenced an action for damages based on the failure of IES to satisfy its obligations under the subject warranties. After trial, in a Memorandum Decision dated June 6, 2003, the Court (Kitson, J.) found, among other things, that the plaintiffs were entitled to damages based on a breach of contract by IES.

On August 21, 2003, a judgment in the amount of $28,690 was entered against IES in favor of the plaintiffs. Thereafter, the plaintiffs levied on a bank account owned by IES, and collected approximately $5,290 Despite further collection efforts, the plaintiffs have not been able to locate any other bank accounts or assets in the name of IES, and IES has not paid anything towards the outstanding judgment debt. Pursuant to subpoena, Lennard Axinn (Axinn) appeared as a representative of IES on September 26, 2007, for a deposition regarding the activities of the corporation.

The plaintiffs move for summary judgment on the grounds that Axinn's testimony establishes that there are no triable issues of fact regarding their right to "pierce the corporate veil." In support of their motion, the plaintiffs submit, among other things, the pleadings, the contract and written warranty for their new home, and the transcript of Axinn's deposition. The Court notes that Axinn's deposition is certified but unsigned, and that the plaintiffs have not submitted proof that the transcript was forwarded to the witness for his review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcript submitted in support of the motion as the defendants have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In order to prevail in an action to pierce the corporate veil, a plaintiff must show that the individual defendants (1) exercised complete dominion and control over the corporation, and (2) used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury (*see* ***Matter of Morris v New York State Dept. of Taxation and Fin.***, 82 NY2d 135, 141, 603 NYS2d 807

[1993]; ***Seuter v Lieberman***, 229 AD2d 386, 644 NYS2d 566 [2d Dept 1996]). The mere claim that the corporation was completely dominated by the defendants, 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 (*see* ***Matter of Morris v New York State Dept. of Taxation and Fin.***, *supra* at 141-142; ***Abelman v Shoratlantic Dev. Co.***,153 AD2d 821, 545 NYS2d 333 [2d Dept 1989]). It is well established that a business can lawfully be incorporated for the very purpose of enabling its proprietor to avoid personal liability (***Seuter v Lieberman***, *supra*). Absent a showing that "control and domination was used to commit wrong, fraud, or the breach of a legal duty, or a dishonest and unjust act" New York will not allow a piercing of the corporate veil (*see* ***Electronic Switching Indus., Inc. v Faradyne Elec. Corp.***, 833 F2d 418, 424 [2d Cir 1987]). Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (*see* ***Millennium Const. v Loupolover***, 44 AD3d 1016, 845 NYS2d 110 [2007]; ***Shisgal v Brown***, 21 AD3d 845, 801 NYS2d 581 [1st Dept 2005]). In addition, "The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances" (***Weinstein v Willow Lake Corp.***, 262 AD2d 634, 635, 692 NYS2d 667 [2d Dept 1999]). "Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (***First Bank of Americas v Motor Car Funding***, 257 AD2d 287, 294, 690 NYS2d 17 [1st Dept 1999]; *see also* ***Damianos Realty Group, LLC v Fracchia***, 35 AD3d 344, 825 NYS2d 274 [2d Dept 2006]; ***First Capital Asset Mgt., Inc. v. N.A. Partners, L.P.***, 300 AD2d 112, 755 NYS2d 63 [1st Dept 2002]).

At his deposition, Axinn testified that IES was dissolved in February, 2005, that he was the president of IES from its formation until its dissolution, and that he was appearing on behalf of said corporation. He stated that he and the defendants Harvey Gessin (Gessin), Gerald Friedman (Friedman) and David Wasserman (Wasserman) were all shareholders, officers and directors in IES before its dissolution. He indicated that there were a number of entities created to further the Island Estates business, and that he was currently the president of Island Estates Management, Inc., which is not related to IES. He named a number of entities, including Island Estates, LLC, in which he is a member, and Island Estates at Yaphank, LLC, Island Estates at Mount Sinai Home Owners Association, and Island Estates at Miller Place, Inc., all of which are not related to IES. Axinn further testified that IES was incorporated for the purpose of entering into contracts with the purchasers of homes in the subdivision, and hiring subcontractors and material suppliers to build the homes. IES had no employees other than the shareholders and Jean Friedman (Jean), the wife of Friedman. Most of the administrative work was done by employees of Gessin Contracting Corp. (GCC), which was then reimbursed by IES. GCC shared space with IES, and he, Gessin and Friedman owned GCC. IES operations were funded through bank loans, and he did not recall whether or not there were other infusions of capital into the corporation. He stated that the land in the subdivision was owned by GLH Development, Inc. (GLH), and that he, Gessin and Friedman had an ownership interest in GLH "when it was an operating entity." Axinn acknowledged that IES was not intended to make a profit, and that he did not know if a reserve was kept to fund warranty claims. He stated that, if a valid warranty claim was made, "[IES] may have had to get money from the partners or GLH, if there was a shortfall in the account," and that the business plan regarding warranties was "to the extent that the assets were no longer in that company, to have the partners contribute from their personal or other corporations that they own." He did not know what percentages or amounts of money went to GLH or GCC regarding their work, or if there are documents

which would contain the information. Axinn also did not recall whether there were formal shareholder or directors meetings, although he did indicate that meetings took place. He did not recall many other details regarding corporate formalities, although he indicated that the corporate "kit" should indicate that information.

Here, viewing the competing interests of the parties in a light most favorable to the defendants, the plaintiffs have failed to demonstrate their entitlement to summary judgment in this action. Initially, the Court notes that Axinn's testimony is equivocal on many salient points, and that he appears to lack knowledge on many other relevant issues. The lack of any documentary evidence makes a determination about credibility of a witness, better left to a trier of fact, critical in this instance. Regardless, the Court notes that there are multiple issues of fact requiring a trial in this action including, but not limited to, whether the parties adhered to corporate formalities, whether the corporation was adequately capitalized, and whether IES was actually a "shell" being used by the individual shareholders to advance their own "purely personal rather than corporate ends" (***Port Chester Elec. Constr. Corp. v Atlas***, 40 NY2d 652, 656-57, 389 NYS2d 327 [1976]; ***Walkovszky v Carlton***, 18 NY2d 414, 276 NYS2d 585 [1966]). In addition, a review of the record reveals that the plaintiffs have failed to address the issues raised in the defendants' answer. CPLR 3212 (b) provides in pertinent part: "A motion for summary judgment shall be supported by affidavit ... and by other available proof ... and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." The plaintiffs have failed to demonstrate the absence of triable issues of fact on every issue raised by the pleadings (***Aimatop Restaurant, Inc. v Liberty Mut. Fire Ins. Co.***, 74 AD2d 516, 425 NYS2d 8 [1st Dept 1980]; *see also* ***Stone v Continental Ins. Co.***, 234 AD2d 282, 650 NYS2d 772 [2d Dept 1996]). The plaintiffs' failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the plaintiffs' motion for an order granting summary judgment and holding the individual defendants liable for the subject judgment debt is denied.

The defendants cross move for summary judgment dismissing the complaint on the grounds of res judicata, that the plaintiffs' claims are barred by the statute of limitations and/or laches, and that the complaint fails to state a cause of action. Here, res judicata is not a bar to the plaintiffs' claim; even if issue of the defendants' personal liability could have been raised and determined in the prior action, it need not have been, as this action is not predicated on the same facts or the same transactions which formed the basis of the prior action (*see* ***Silberstein, Awad & Miklos v Spencer, Maston & McCarthy***, 43 AD3d 902, 841 NYS2d 623 [2007], *lv dismissed* 10 NY3d 805, 857 NYS2d 34 [2008]; *see generally*, ***O'Brien v City of Syracuse***, 54 NY2d 353, 445 NYS2d 687 [1981]; ***Matter of Reilly v Reid***, 45 NY2d 24, 407 NYS2d 645 [1978]).

Nor do the statute of limitations or the doctrine of laches aid the defendants in their attempt to dismiss the complaint. The defendants aver that the first action against IES was based on a claim of breach of contract, which has a six year statute of limitations (CPLR 213), and that the time to bring this action against the individual defendants has expired. However, it is clear that this is not an action for breach of contract, and the defendants' submission does not address the question of the relevant

limitations period in an action such as this by a judgment creditor seeking to pierce the corporate veil. In addition, there is an issue of fact relative to when this action accrued for the purposes of the statute of limitations. A defendant seeking to dismiss the complaint insofar as asserted against it as time-barred has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see* ***Morris v Gianelli***, 71 AD3d 965, 897 NYS2d 210 [2d Dept 2010]; ***Lessoff v 26 Court Street Assoc., LLC***, 58 AD3d 610, 872 NYS2d 144 [2nd Dept 2009]; ***Sabadie v Burke***, 47 AD3d 913, 849 NYS2d 440 [2d Dept 2008]). Further, the defendants have failed to establish their right to a dismissal of the complaint based on the doctrine of laches. The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party (***Markell v Markell***, 91 AD3d 832, 938 NYS2d 117 [2d Dept 2012]; ***Skrodelis v Norbergs***, 272 AD2d 316, 707 NYS2d 197 [2d Dept 2000]). Mere lateness is not a barrier to the prosecution of a claim. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine (***Markell v Markell***, *supra*; ***Denaro v Denaro***, 84 AD3d 1148, 924 NYS2d 453 [2d Dept 2011]; ***Skrodelis v Norbergs***, *supra*). Here, the defendants have failed to establish that the plaintiffs unreasonably and inexcusably delayed bringing this action and, more importantly, that they were significantly prejudiced by that delay. The only support for this branch of the defendants' motion is Axinn's affidavit which states that "Upon information and belief, the plaintiffs purposely created such a delay, so as to prevent the other shareholders and I from having the evidence necessary to properly defend the action ..." This conclusory statement on behalf of the defendants is not sufficient to establish their entitlement to summary judgment on this issue.

Lastly, the defendants contend that the complaint fails to state a cause of action. The Court notes that the defendants sole argument in this regard appears to be their assertion that "New York does not recognize a separate cause of action to pierce the corporate veil." The defendants cite to authority which indicates that an attempt to pierce the corporate veil does not constitute a cause of action separate from that against the corporation (***Rosen v Kessler***, 51 AD3d 761, 856 NYS2d 861 [2d Dept 2008]; ***Hart v Jassem***, 43 AD3d 997, 843 NYS2d 121 [2d Dept 2007]; ***Fiber Consultants, Inc. v. Fiber Optek Interconnect Corp.***, 15 AD3d 528, 792 NYS2d 89 [2d Dept 2005]). However, each of the cited cases are based on the plaintiff's improperly pleading a separate cause of action in an underlying case against a corporation, with leave to serve an amended complaint. There is authority that a party may bring a second action to pierce the corporate veil in an attempt to enforce its rights as a judgment creditor of the corporation (*see eg.* ***Wm. Passalacqua Builders, Inc. v Resnick Developers South, Inc.***, 933 F2d 131 [2d Cir 1991] (after partially recovering on a judgment against the corporation, plaintiffs instituted an action in federal court to, among other things, pierce the corporate veil); ***Klein v Loeb Holding Corp.***, 24 Misc 3d 899, 878 NYS2d 876 [Sup Ct, New York County 2009] (having secured a money judgment, the judgment-creditor commenced an action seeking to pierce the corporate veil); *see also* ***Miller v Cohen***, 93 AD3d 424, 939 NYS2d 424 [1st Dept 2012]; ***Commissioners of State Ins. Fund v Ramos***, 80 AD3d 447, 915 NYS2d 241 [1st Dept 2011]; ***Island Seafood Co. v Golub Corp.***, 303 AD2d 892, 759 NYS2d 768 [3d Dept 2003]; ***Solow v Domestic Stone Erectors, Inc.***, 269 AD2d 199, 703 NYS2d 94 [1st Dept 2000]).

In viewing the defendants' contentions, set forth as affirmative defense in their answer, in a light most favorable to the plaintiffs, it is determined that the defendants have failed to establish their entitlement to summary judgment in this action. The defendants' failure to make a prima facie showing

of entitlement to summary judgment requires a denial of the cross motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the cross motion by the defendants for an order granting summary judgment dismissing the complaint is denied.

Dated: 2/10/12

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**