Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

DAWN M. AVILA, now known as DAWN BECHTOLD
Plaintiff,

-against-

DISTINCTIVE DEVELOPMENT CO., LLC and ALAN SCHNEEBAUM
Defendant.

Index No: 13012/10

Motion Date: 7/11/12

Motion Cal. No.: 1

Motion Seq. No.: 2

The following papers numbered 1 to 14 read on this motion by defendant, Distinctive Development Co., LLC (hereinafter the LLC) vacating the default judgment pursuant to CPLR 317 and dismissing the complaint pursuant to CPLR 3211(a)(8) or, in the alternative for a traverse hearing; and motion by defendant, Schneebaum to dismiss the amended complaint insofar as it is asserted against him pursuant to CPLR 3211(a)(5) & (7).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 5
Answering Affidavits-Exhibits.....	6 - 10
Replying Affidavits.....	11 - 14

Upon the foregoing papers it is ordered that this motion is in all respects denied.

This action arises out of the sale of a newly constructed two family home by the defendant, LLC, to the plaintiff on December 6, 2006. The plaintiff commenced this action on May 24, 2010 against the LLC to recover money damages and/or recision and restitution alleging causes of action for breach of contract, fraudulent inducement, negligence and breach of §777-a of Article 36-B of the General Business Law (GBL), regarding new home implied warranties. The defendant was served through the Secretary of State pursuant to Limited Liability Company Law (LLCL)§ 303(a) on June 2, 2010. Upon the defendant's failure to appear and answer the complaint, the plaintiff, in March, 2012, moved by Notice of Motion for leave to enter a default judgment and for leave to serve a supplemental summons and amended

complaint to join Alan Schneebaum as an additional defendant. Neither the LLC nor Schneebaum appeared or opposed the motion which was granted without opposition.

The plaintiff's verified complaint seeking recision and monetary damages against the LLC for breach of contract, fraudulent inducement, and negligent construction essentially alleged that the premises were negligently constructed using wet wood which made the premises susceptible to mold, that the negligent construction was concealed from the plaintiff and that as a result of the negligent construction the premises became infested with mold and rendered uninhabitable causing plaintiff physical injury as well as loss of property.

In addition to the factual allegations in the original verified complaint, the amended verified complaint alleges that the defendant Schneebaum actively participated in the day to day construction of the premises and allowed the premises to constructed using wet wood which he knew or should have known created a risk of mold infestation and that he concealed the defective construction from the plaintiff. However, taking the complaint as a whole together with the plaintiff's affidavit, it is apparent that the plaintiff seeks to pierce the corporate veil and hold Schneebaum personally liable for the LLC's breach of contract, fraudulent misrepresentation and fraudulent inducement.

The amended complaint alleged an additional cause of action for fraudulent inducement and negligence in the performance of the construction against Schneebaum, the managing member of the LLC. Schneebaum was served with the supplemental summons and amended complaint on April 19, 2012 pursuant to CPLR 308(2).

The defendant LLC now moves to vacate the default judgment entered against it pursuant to CPLR §3211(a)(8) lack of personal jurisdiction and CPLR 317. Defendant, Schneebaum, moves to by this preanswer motion to dismiss the complaint insofar as it is asserted against him on the ground that the action is barred by the applicable statute of limitations and fails to state a cause of action (CPLR 3211[a][5] & [7]).

Initially it is noted that the plaintiff does not oppose dismissal of so much of the complaint as is based upon an alleged violation of § 777-a of Article 36-B of the GBL, new home implied warranties. In any event, § 777-a of Article 36-B of the GBL does not apply to the subject premises since it is a two family residence (see GBL §777[5]). Accordingly, so much of the plaintiff's complaint that asserts a claim for violation §777-a of Article 36-B of the GBL is dismissed.

The branch of the LLC's motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) is denied.

The process server's affidavit of service constitutes prima facie evidence of proper service upon the defendant LLC pursuant to CPLR 311-a(a) and Limited Liability Company Law (LLCL)§ 303(a) on June 2, 2010 by delivering two copies of the summons and complaint to the Secretary of State. Service is complete and jurisdiction over the defendant is obtained upon delivery to the Secretary of State (LLCL § 303; Rubin & Rothman v. McNelis, 130 AD2d 643 [1987]). The defendant did not assert that the address on file with the Secretary of State was incorrect, and the mere denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by the affidavit of service (see Trini Realty Corp. v. Fulton Center LLC, 53 AD3d 479 [2008]). Moreover, personal jurisdiction over a defendant is not affected even if the Secretary of State fails to forward the summons to the defendant, or if it is forwarded to a wrong address or the failure of defendant to receive the summons, however, it may provide the basis for vacating a default (see generally 20 Carmody-Wait 2d § 121:18) if the non-delivery of process occurs through no fault of the defendant (see Kolonkowski v. Daily News, L.P., 94 AD3d 704 [2012]; Cascione v Acme Equip. Corp., 23 AD2d 49 [1965]).

The LLC has failed to establish its entitlement to relief pursuant to CPLR 317. Where, as here, a defendant is served by by some method other than personal delivery, the court may vacate the default pursuant to CPLR 317 if the defendant demonstrates that it did not receive notice of the action in time to defend, and that it has a meritorious defense (see Eugene Di Lorenzo, Inc. v. Dutton Lbr. Co., 67 NY2d 138, 141-142 [1986]).

In support of its motion, the LLC, submitted the affidavit from its managing member, co-defendant, Schneebaum asserting that although he is the designated agent to be served on behalf of the LLC and his home address, 69-30 185th Street, Fresh Meadows, N.Y. 11365, is on file with the Secretary of State, he was never personally served nor did he receive a copy of the summons and complaint from the Secretary of State.

The mere denial of receipt of the summons and complaint, however, is insufficient to demonstrate lack of actual notice sufficient to satisfy CPLR 317 (see Wassertheil v. Elburg, LLC, 94 AD3d 753 [2012]). This is particularly true where, as here, the evidence indicates that the alleged failure of the LLC to receive notice is due to the actions of its designated agent.

In this regard, the plaintiff submitted a letter from the Secretary of State stating that a copy of the summons and complaint was mailed to the LLC's designated agent, Alan Schneebaum, at 69-30 185th Street, Fresh Meadows, N.Y. 11365, the designated address, by certified mail, and that the mailing was returned by the Post Office with the notation "Unclaimed".

Where a letter is properly addressed and the party refuses delivery, or fails to receive notice due to his own actions, the party is deemed to have notice of the letter (see Harner v. County of Tioga, 5 NY3d 136, 140-141 [2005]; Kolonkowski v. Daily News, L.P., supra; Nunez v. Nunez, 145 AD2d 347, 348 [1988]; La Vallee v. Peer, 104 Misc.2d 943, 945 [1980], aff'd, 80 AD2d 992 [1981], lv. denied, 53 NY2d 609 [1981]). Schneebaum has not denied that he failed to claim the mailing. Schneebaum's refusal to claim the mail from the Secretary of State was the reason for his failure to receive copy of the summons and complaint. Schneebaum's additional excuse for failing to oppose the plaintiff's motion for a default judgment was also a result of Schneebaum's own actions.

Inasmuch as the LLC has failed to demonstrate that it did not receive notice of the action in time to defend, it is unnecessary to determine whether it demonstrated the existence of a potentially meritorious defense (see Wells Fargo Bank, N.A. v. Cervini, 84 AD3d 789 [2011]; Maida v. Lessing's Restaurant Services, Inc., 80 AD3d 732 [2011]).

In any event, the LLC failed to demonstrate even an arguably meritorious defense. Schneebaum's conclusory affidavit together with the proposed Verified Answer, verified by the defendant's attorney (see Brownfield v. Ferris, 49 AD3d 790 [2008]), containing only bare denials of the allegations in the complaint without any evidentiary facts, are insufficent to sustain the defendant's burden (see Marinoff v. Natty Realty Corp. 17 AD3d 412, 413 [2005]; Fekete v. Camp Skwere, 16 AD3d 544, 545 [2005]; see also Brownfield v. Ferris,supra). It is pointed out that Schneebaum admitted that his personal inspection of the premises within a year after the sale revealed the water condition and the mold infestation which plaintiff claims was caused by faulty construction.

The defendant Schneebaum's motion to dismiss the amended complaint insofar as it is asserted against him in his individual capacity pursuant to CPLR 3211(a)(5) & (7) is denied.

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must

afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Breytman v. Olinville Realty, LLC, 54 AD3d 703, 703-704 [2008]; see Leon v. Martinez, 84 NY2d 83, 87 [1994]; Smith v. Meridian Tech., Inc., 52 AD3d 685, 686 [2008]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (see Rovello v. Orofino Realty Co., 40 NY2d 633, 635-36 [1976]; Arrington v. New York Times Co., 55 NY2d 433, 442 [1982]). The motion must be denied where the facts alleged fit within any cognizable legal theory (see Leon v. Martinez, 84 NY2d 83, 87-88 [1994]).

The courts are reluctant to disregard the corporate form which is allowed under the law for the explicit purpose of avoiding personal liability (see Bartle v. Home Owners Co-op., 309 NY 103 [1955]). However, equity will intervene and permit the imposition of personal liability to avoid fraud or injustice (see Matter of Morris v. New York State Dept. Of Taxation & Fin., 92 NY2d 135 [1993]). The party seeking to pierce the corporate veil must establish that the controlling corporation or individuals "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (Peery v. United Capital Corp., 84 AD3d 1201 [2011]; see Gateway I Group, Inc. v. Park Ave. Physicians, P.C., 62 AD3d 141, 145 [2009]). A plaintiff is not required to plead or prove actual fraud in order to pierce the corporate veil; but rather, that the exercise of control was used to commit a wrong (see Lederer v. King, 21 AD2d 354 ([1995]).

Piercing a corporate veil is not a cause of action independent of the claims asserted against the corporation "rather, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (Matter of Morris v. New York State Dept. of Taxation & Fin., supra at 141 [1993]). Whether to pierce the corporate veil in any given case depends upon the particular facts and circumstances of a case and is not generally subject to resolution upon a motion to dismiss (Damianos Realty Group, LLC, 35 AD3d 344. 344 [2006], quoting First Bank of Ams. v. Motor Car Funding, 257 AD2d 287, 294 [1999]; see also Forum Ins. Co. v. Texarkoma Transp. Co., 229 AD2d 341, 342 [1996]). Before dismissal can be granted, a plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil (see First Bank of Ams., 257 AD2d at 294; Aubrey Equities v. SMZH 73rd Assoc., 212 AD2d 397, 398 [1995]) unless it is totally devoid of nonconclusory allegations

and without merit (see International Credit Brokerage Co. v. Agapov, 249 AD2d 77, 78 [1998], quoting Sequa Corp. v. Christopher, 176 A.D.2d 498, 498 [1991]; see also Whitmore Group, Ltd. v. Zurich Am. Ins. Co., 11 Misc.3d 1069[A], 2006 N.Y. Slip Op 5044 [U],[Sup Ct, N.Y. County 2006]).

In this case the plaintiff's complaint insofar as it is read to assert a claim against Schneebaum in his individual capacity based upon the doctrine of piercing the corporate veil asserts sufficient nonconclusory allegations so as to withstand a motion based upon CPLR 3211(a)(7). Moreover, although the plaintiff's motion to amend the complaint was granted without opposition, the court was required to and did consider whether the proposed amended pleading was "palpably insufficient" to state a cause of action against Schneebaum, or was patently devoid of merit (see Lucido v. Mancuso, 49 AD3d 220, 248 [2008]).

With respect to the defendant's, Schneebaum's motion to dismiss the complaint pursuant to CPLR 3211(a)(5), the expiration of the statute of limitations, it is denied. Although the amended complaint contains a negligence cause of action as against Schneebaum, the plaintiff claim as against Schneebaum is for breach of contract based upon the doctrine of piercing the corporate veil. A cause of action for breach of contract carries a six year statute of limitations (CPLR 213[2]). Since the sale of the property was completed in December, 2006, the statute of limitations in this case expires in December, 2012.

Dated: October 5, 2012
D# 47

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J.S.C.