UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GUY MORRIS and 56 WALKER, LLC,

Plaintiffs,

v.

DAVID LEE, VCD CONSTRUCTION, INC., MICHAEL HALL LOMBARDI and LOMBARDI CONSULTING

Defendants.

08 CV 6673 (LAP)

VCD CONSTRUCTION INC.,

Plaintiffs,

v.

56 WALKER LLC AND "JOHN DOE 1" through "JOHN DOE 10", inclusive, as those persons and entities having an interest in real property located at 56 Walker Street, New York, New York,

Defendants.

08 CV 6724 (LAP)

MEMORANDUM AND ORDER

LORETTA A. PRESKA, Chief United States District Judge:

I. Introduction

This case arises out of a dispute among Plaintiffs in case 08 CV 6673 ("Action 1") and Defendants in case 08 CV 6724 ("Action 2"), Guy Morris ("Morris") and his wholly-owned entity, 56 Walker, LLC ("56 Walker," and collectively, the "Owners"), and Defendants in Action 1 and Plaintiffs in Action 2, David Lee

("Lee"), VCD Construction, Inc. ("VCD"), Michael Hall Lombardi ("Lombardi"), and Lombardi Consulting (collectively, the "Contractors").[1] The dispute at issue here stems from a construction contract between general contractor, VCD, and property owner, 56 Walker, for renovations and remodeling of the property located at 56 Walker Street in New York City.

The current case began when VCD filed Action 2 in New York Supreme Court on June 2, 2008. The Owners then filed Action 1 in this Court on July 28, 2008 and on the same day, removed Action 2 to this Court pursuant to 28 U.S.C. §§ 1441, 1446. The Contractors asserted counterclaims in Action 1, making the same allegations as those made in Action 2 for the purposes of this motion. The Contractors now move for partial summary judgment [dkt. no. 44 in Action 1] on their breach of contract, interest on late payments, and account stated claims asserted in both Actions 1 and 2 and also the Owners' breach of contract claim asserted in Action 2.

[1] Lombardi and Lombardi Consulting were dismissed on consent in this action on October 6, 2010.

II. Facts[2]

In November 2003, Morris purchased the property located at 56 Walker Street in New York City through 56 Walker, a wholly-owned limited liability company. (Morris Affidavit ("Morris Aff." ¶¶ 1-3.) Morris planned to convert half of the building on the premises to condominiums and leave the remaining three floors of the building as nonresidential space to be used by Morris's television production business (construction plan hereafter referred to as the "Project"). (Id. ¶ 5.) To finance the Project, Morris secured a construction loan in early 2004. (Id. ¶ 5-6.)

Some months later, Morris began to have trouble with his first general contractor, High End Construction, LLC ("High End"). Due to these disputes, Morris terminated his contract with High End in September 2004, and in October 2004, entered

[2] As neither party has submitted a Local Rule 56.1 statement, the Court would be justified in denying the present motion. See Balut v. Loral Elec. Sys., 988 F. Supp. 339, 343 (S.D.N.Y. 1997). However, the Court is not required to do so and may, in its discretion, overlook the "technical deficiency" of a party's submission. Thaler v. Casella, 960 F. Supp. 691, 697 (S.D.N.Y.1997); Zeno v. Cropper, 650 F. Supp. 138, 139 (S.D.N.Y.1986). Thus, for the purposes of the present motion, the Court is relying solely on the Affidavits and attached exhibits submitted by the parties.

into an agreement with VCD to finish the Project ("Contract 1").[3] (Id. ¶¶ 5-6; Lee Affidavit ("Lee Aff.") Exs. C, D.) Morris then hired Lombardi Consulting as the construction manager and Joseph Pell Lombardi as architect. (Morris Aff. ¶ 6.)

On July 11, 2006, after making substantial changes to the existing plans for the Project, the parties executed a new contract ("Contract 2") for $2,168,000.00, leaving an unpaid balance on Contract 1 in the amount of $78,364. (Lee Aff. Exs. E, G.) Contract 2 provided that construction was to be substantially completed within twelve months. (Id. Ex. G § 3.3.) Additionally, Contract 2 contained a "time is of the essence" provision. (Id. Ex. G § 8.2.1.) Construction recommenced in accordance with Contract 2 in mid-July 2006. (Id. ¶ 36.)

Both parties agree that soon thereafter, serious delays in the Project occurred, however the reasons for these delays are disputed. VCD claims the delays were caused by a general lack of communication with 56 Walker, 56 Walker's failure to make timely payments to VCD, and 56 Walker's delay in securing

[3] The dispute between 56 Walker and High End Construction developed into litigation between the parties, which resulted in a jury award in favor of High End in the amount of $174,000, plus overhead and profits. (Morris Aff. ¶¶ 40-41; Lee Affidavit ("Lee Aff.") Ex. Z.)

Department of Building and landmark approvals. (Id. ¶¶ 43-47; Owners' Ex. 2 § 2.) Further, VCD claims that the delay was also due to disputes and altercations with Lenny Labanco ("Labanco"), a tenant of 56 Walker to whom Morris had given much control over the Project. (Lee Aff. ¶¶ 40-41.) 56 Walker alleges that the delays were the result of various failures by VCD such as failing to order kitchen cabinets in a timely fashion. (Morris Aff. ¶¶ 25-26.) Due to these delays, the parties reevaluated the Project's timeline. Although it is undisputed that it was extended until February 2008, the Contractors contend that the timeline was extended beyond that time. (Lee Aff. ¶ 58, Ex. S.)

Through March 2008, work continued on the Project. (Lee Aff. ¶¶ 57-60.) However, by April 2008, the Project was still not complete and continued to experience delays. (Morris Aff. ¶ 31.) In a letter dated April 11, 2008, Morris terminated Contract 2, citing VCD's delay in finishing the project as the reason for the termination. (Lee Aff. ¶ 61, Ex. S.) At that time, the Project was between eighty-two percent and eighty-five percent completed. (Id. ¶ 61; Morris Aff. ¶ 31.)

Under the terms of Contract 2, which incorporated the American Institute of Architects ("AIA") Standard Form of Agreement between Owner and Contractor, 56 Walker could

terminate the contract for good cause.[4] (Lee Aff. Ex. G § 14.2.1.) However, the contract also entitled VCD to seven days written notice prior to termination. (Id. Ex. G § 14.2.2.) Additionally, Contract 2 provides that an owner terminating a contractor for cause must obtain an architect's certificate stating that sufficient cause exists.[5] (Id.) It is undisputed that 56 Walker did not obtain an architect's certificate or give seven days written notice of termination before terminating Contract 2. (Id. ¶ 61; Morris Aff. ¶ 32.)

III. Discussion

a. Summary Judgment Standard

Summary judgment is appropriate only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); Celotex

[4] Section 14.2.1 provides:
The Owner may terminate the Contract if the Contractor:
. . . .
2. fails to make payments to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the Subcontractor.
. . . .
4. otherwise is guilty of substantial breach of a provision of the Contract Documents.

[5] Section 14.2.2 provides:
When any of the above reasons [stated in section 14.2.1] exist, the Owner, upon certification by the Architect that sufficient cause exists to justify such action, may . . . after giving the Contractor . . . seven days' written notice, terminate employment of the Contractor . . . .

Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citing language of previous Rule 56(c)). The party seeking summary judgment has the burden of demonstrating that no genuine issue of material fact exists. See Celotex, 477 U.S. at 323; see also FDIC v. Giammettei, 34 F.3d 51, 54 (2d Cir. 1994). When making this determination, a court must review the record in the light most favorable to the non-moving party and draw all reasonable inferences in his or her favor. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 253 (2d Cir. 2002). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

To survive summary judgment "the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.11 (1986) (quoting Fed. R. Civ. P. 56(e)). "Conclusory allegations, conjecture, and speculation, however, are insufficient to create a genuine issue of fact." Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998). The "mere existence of a scintilla of evidence" supporting the non-

movant's case is also insufficient to defeat summary judgment. Anderson, 477 U.S. at 252.

b. Sufficiency of Affidavits

The Contactors first contend that the affidavits submitted by Morris and Labanco in opposition to the present motion are defective and should not be considered. (Reply Memorandum ("Reply Mem." at 4.) They argue that Morris does not "testify that he has personal knowledge of the facts alleged in his affidavit" and Labanco's affidavit is defective because it states that it was executed in New York but a New Jersey notary public notarized the document. (Id. at 4-5.) Thus, the Contractors argue that Labanco's affidavit is not sworn and Morris's affidavit should be disregarded as he did not state that he had personal knowledge of the facts alleged in the affidavit. (Id.)

The Court finds these arguments without merit and thus will consider the affidavits to the extent that they comply with the requirements of Federal Rule of Civil Procedure 56(e). The Court does not rigidly construe any defect in an affidavit's form to be fatal to its validity. See, e.g., Shepard v. Frontier Comms. Servs., Inc., 92 F. Supp. 2d 279, 284-85 (S.D.N.Y. 2000); Owens-Corning Fiberglas Corp. v. U.S. Air, 853 F. Supp. 656, 663 (E.D.N.Y. 1994); Matapos Tech. Ltd. v.

Compania Andina de Comercio Ltda, 68 A.D.3d 672, 673, 891 N.Y.S.2d 394, 395 (N.Y. App. Div. 2009); Smith v. Allstate Ins. Co., 38 A.D.3d 522, 523, 832 N.Y.S.2d 587, 589 (N.Y. App. Div. 2007). Although statements in an affidavit must be made based on personal knowledge, the Contractors have failed to identify anything in Morris's affidavit that was not based on his personal knowledge. See Mathura v. Council for Human Servs. Home Care Servs., Inc., No. 96-7687, 1997 WL 62940, at *1 (2d Cir. Feb. 12, 1997); cf. Schiess-Froriep Corp. v. S.S. Finnsailor, 574 F.2d 123, 126 (2d Cir. 1978); Crowns v. Vail, 51 Hun. 204, 4 N.Y.S. 324, 325-26 (N.Y. Sup. Ct. 1889). Thus, the Court will consider both the Morris and the Labanco affidavits insofar as they comply with the requirements of Rule 56(e).

c. Contractors' Breach of Contract Claim

The Contractors claim that 56 Walker's termination of Contract 2 was wrongful because it did not give the Contractors seven days written notice of termination and it did not obtain the requisite architect's certificate stating that good cause existed for the termination. (Memorandum in Support of VCD's Motion for Partial Summary Judgment ("Supp. Mem.") at 6-7.) The Owners agree that they did not terminate VCD in "strict compliance" with the terms of the contract but maintain that "[g]ood cause for VCD{']s termination . . . existed [because] as

of April 11, 2008 VCD had already breached the contract." (56 Walker's Memorandum in Opposition to Motion for Summary Judgment ("Opp'n Mem.") at 3.)

Under New York law, where a contract provides that a party must fulfill specific conditions precedent before it can terminate the agreement, those conditions are enforced as written, and the party must comply with them.[6] See Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 518 (2d Cir. 1989) (applying New York Law); A.S. Rampell, Inc. v. Hyster Co., 3 N.Y.2d 369, 381-82 (1957). This general rule applies equally to construction agreements "whose parties cannot terminate contractors unless they follow the contractual procedures to the letter." Gulf Ins. Co. v. Fidelity & Deposit Co. of Md., 2007 N.Y. Slip Op. 51440U, 2007 WL 2162885, at *4 (N.Y. Sup. Ct. 2007). Where, as here, a construction contract gives the owner the right to terminate the contract after receiving a certificate of an architect stating there is good cause, such a provision makes the architect's certificate a condition precedent to the owner's right to terminate the contract. See Gen. Supply & Constr. Co. v. Goelet, 241 N.Y. 28, 34, 148 N.E. 778 (1925); Mike Bldg. & Contracting, Inc. v. Just

[6] The parties have assumed that New York law applies, and the Court has no reason to disagree.

Homes, LLC, 27 Misc.3d 833, 901 N.Y.S.2d 458, 469 (N.Y. Sup. Ct. 2010); 22A N.Y. Jur. 2d Contracts § 515. Even where it seems that a contractor will not cure its apparent breach or finish a project within a reasonable time, absent abandonment of the project, the contract may only be terminated according to its terms. Gen. Supply & Constr. Co., 241 N.Y. at 34.

Here, the Owners concede that they did not follow the contractual requirements regarding termination. (See Morris Aff.¶ 32; Opp'n Mem. at 3.) Instead, 56 Walker argues that good cause existed for the termination because VCD breached Contract 2 before it terminated VCD. However, such an argument is beside the point. Even if good cause existed, 56 Walker was required to obtain an architect's certificate stating that there was in fact good cause to terminate the contract. As New York courts have consistently held, this is a condition precedent that requires strict compliance. See, e.g., Gen. Supply & Constr. Co., 241 N.Y. at 34; Mike Bldg. & Contracting, 901 N.Y.S.2d at 469. As there is no allegation that VCD abandoned the Project, the Contractors' motion for summary judgment on its breach of contract claim is granted.

d. Interest on Late Payments

The Owners and Contractors both spend ample time in their motion papers itemizing their alleged damages and discussing

their adversaries' lack thereof. However, genuine issues of fact remain regarding whether, and in what amount, VCD is entitled to late payments plus interest for work completed at 56 Walker Street.

For instance, the Contractors claim that 56 Walker owes VCD $617,262 plus interest for late payments, overhead, and profits. (Lee Aff. ¶ 67.) Included in this total are payments allegedly due for various "change orders" for work that was agreed upon after Contract 2 was executed.[7] (Id. ¶¶ 67-71.) The Owners dispute VCD's calculation of its damages and assert that much of the calculation consists of change orders that 56 Walker either never approved or that VCD wrongfully submitted in the first place.[8] (Morris Aff. ¶ 37.) Further, the Owners argue that on

[7] A "change order," as Contract 2 provides, is a written document prepared by the Architect and signed by the Owner and Contractor agreeing to a change in the work and noting any adjustment in the contract's price and timeframe. (Lee Aff. Ex. G § 7.2.1.)

[8] One such change order the Owners continuously argue should not be included in VCD's damage calculation is change order number thirty-three dated December 12, 2007 in the amount of $55,513. (Owners' Ex. 4.) This change order covers the infamous sewer pipe replacement work, which the Owners vehemently argues was never needed in the first place and which they see as VCD's attempt to further stall the Project. (Morris Aff. ¶¶ 34, 37.) VCD admits that it was paid two thousand dollars on this change order but was terminated before it could finish the sewer replacement. (Lee Reply Aff. ¶ 7.) Yet the full amount of this change order is included in VCD's claimed late payment damages. (Id. ¶ 9; Lee Aff. Ex. P.)

or around March 8, 2008, VCD was paid $40,000 for appliances that were never delivered to 56 Walker and thus demand that amount be repaid to 56 Walker. (Morris Aff. ¶ 47; Lee Aff. ¶ 59.)

Viewing the facts in the light most favorable to the Owners, there are clearly issues of fact related to more than ninety thousand dollars in fees that VCD claims it is owed. As the Owners are opposing this summary judgment motion, Guy Morris's affidavit detailing his objection to those payments is sufficient to withstand a motion for summary judgment. See Fed. R. Civ. P. 56(e); ATI Telecom, Inc. v. Trescom Int'l, Inc., 95 Civ. 9749, 1996 WL 455010, at *3 (S.D.N.Y. Aug. 12, 1996). Although the amount of late payments due to VCD, if any, is still in question, if VCD successfully recovers late payments in the future, nothing in this opinion forecloses its entitlement to interest on those payments in accordance with the relevant provisions of Contract 2. (See Lee Aff. Ex. G § 13.6.1.)

e. Account Stated

VCD's final claim is for an account stated on two invoices sent to 56 Walker. (Supp. Mem. at 12.) One invoice is for the balance due at the termination of Contract 1 in the amount of $78,364. (Id.) The other is for $69,527 and is the final invoice VCD sent before 56 Walker terminated Contract 2. (Id.)

Under New York law, an account stated may be implied if "a party receiving a statement of account keeps it without objecting to it within a reasonable time" or "if the debtor makes partial payment." LeBoeuf, Lamb, Greene & MacRae, LLP v. Worsham, 185 F.3d 61, 64 (2d Cir. 1999); Rosenman Colin Freund Lewis & Cohen v. Neuman, 93 A.D.2d 745, 461 N.Y.S.2d 297, 298-99 (N.Y. App. Div. 1983). However, an account stated "assumes the existence of some indebtedness between the parties . . . . It cannot be used to create liability where none otherwise exists." M. Paladino, Inc. v. J. Lucchese & Son Contracting Corp., 247 A.D.2d 515, 516, 669 N.Y.S.2d 318, 319 (N.Y. App. Div. 1998). In other words, an account stated only determines the amount of the debt where a liability already exists. 1 N.Y. Jur. 2d Accounts and Accounting § 24.

In the present case, where questions of fact remain on the issue of damages, there can be no definite indebtedness between the parties. See supra, Part III(d); infra Part III(f). Thus, the Contractors' motion for summary judgment on their account stated claim is denied.

f. Owners' Breach of Contract Claim

The Owners have also asserted a breach of contract claim in Action 1, which the Contractors' now move to dismiss without the benefit of a notice of motion. The Owners claim that VCD

breached Contract 2 by failing to pay its subcontractors in a timely manner and to complete the Project on schedule. (Opp'n Mem. at 2-3.) The Owners contend that VCD delayed the Project by failing to order "long-lead" items, such as appliances, in a timely fashion, by refusing to cooperate with a new Project manager, and by creating unnecessary and lengthy additional work. (Labanco Aff. ¶¶ 22, 31, 34.) The Contractors argue that the Owners have not stated a claim because they have not suffered any damages. (Reply Mem. at 10-11.) For the reasons stated below, the Contractors' motion to dismiss the Owners' breach of contract claim is denied.

The Owners first claim that the Contractors breached Contract 2 by failing to pay the subcontractors in accordance with section 9.6.2 of Contract 2. (Lee Aff. Ex. G.) The Contractors have failed to respond to this allegation in their reply papers, affidavits, and supporting documentary evidence and thus their motion to dismiss fails on this ground.

Turning to the Owners' breach of contract claim based on delay, there is no dispute that the Project suffered serious delays and that the completion schedule was extended at least until February 2008. (See Lee Ex. S.) Thus, as a matter of law, VCD's alleged breach of contract could not have occurred before February 2008, even though Contract 2 specified that time

was of the essence. Lee Aff. Exs. G § 8.2.1, S; Grace v. Nappa, 46 N.Y.2d 560, 565, 389 N.E.2d 107, 109 (1979) ("When there is a declaration that time is of the essence . . . each party must tender performance on law day unless the time for performance is extended by mutual agreement.")

The Contractors, however, claim that further extensions pushed the Project's completion date beyond September 2008. (Lee Aff. ¶ 58, Ex. N.) If such extensions occurred, the Contractors would not be liable for any delay as a matter of law. However, the Contractors have failed to present evidence showing that such extensions were mutually agreed upon. See Dallas Aerospace, Inc. v. CIS Air Corp., 352 F.3d 775, 783 (2d Cir. 2003) ("'Fundamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms.'") (quoting Beacon Terminal Corp. v. Chemprene, Inc., 75 A.D.2d 350, 429 N.Y.S.2d 715, 718 (1980)). As such, there continues to be a real dispute as to whether the Contractors caused the Project's delay between the period of February and April 2008. Accordingly, the Contractors' motion to dismiss on this ground is denied. Owners, however, may only continue to seek damages for breach of contract based on delay to the extent permitted by Contract 2, for the period after February 2008.

See R.W. Granger & Sons Inc. v. City School Dist. of Albany, 296 A.D.2d 636, 637, 744 N.Y.S.2d 567, 568 (N.Y. App. Div. 2002) (holding that an agreement to extend a contract's completion date constitutes a waiver of any claim for delay occurring before the extension); 22A N.Y. Jur. 2d Contracts § 431.

Finally, the Contractors contend that the Owners' breach of contract claim fails because the Owners cannot demonstrate the damages element of that claim. (Supp. Mem. at 8.) The Contractors argue that 56 Walker has not been damaged because its cost to complete the Project was less than the balance remaining under Contract 2 at the time of termination. (Id.; Lee Aff. ¶ 77.) In reaching this conclusion, the Contractors calculate 56 Walker's completion cost by subtracting various costs the Owners incurred, which the Contractors claim were for work that was outside the scope of Contract 2 and thus should not be considered part of the completion cost. (Lee Aff. ¶¶ 74-77.) The Morris Affidavit, on the other hand, states that 56 Walker's cost to complete the Project was more than the cost remaining on Contract 2. (Morris Aff. ¶ 37.)

Under New York Law, if a contractor breaches a construction contract, the owner may recover any cost in excess of the contract price spent to have the work finished. Int'l Fidelity Ins. Co. v. Cnty. of Rockland, 98 F. Supp. 2d 400, 413 (S.D.N.Y.

2000) (applying New York law). Further, an owner may also recover "certain additional 'incidental' costs . . . incurred . . . due to a contractor's breach of the construction agreement." Id. However, expenditures which were clearly not within the scope of a contract cannot be used to inflate the completion cost. See Pratt Gen. Contractors v. Trappey, 177 A.D.2d 566, 576 N.Y.S.2d 160, 161 (N.Y. App. Div. 1991); 36 N.Y. Jur. 2d Damages § 50.

As the Contractors have failed to present any evidence detailing the scope of Contract 2, an issue of fact remains as to what work should be considered outside that scope. Moreover, even if the scope of Contract 2 appeared in the record, a question of fact remains as to whether any of the "objectionable" costs should be considered incidental expenditures that 56 Walker would be entitled to recover. Accordingly, the Contractors' motion to dismiss the Owners' breach of contract claim is denied.

g. Piercing the Corporate Veil

In a last-ditch attempt to hold Guy Morris personally liable on the account stated and breach of contract claims, the Contractors argue that 56 Walker's corporate form should be disregarded. (Supp. Mem. at 12.) They base their argument on the following:

> Morris is the sole member of 56 Walker . . . and at all times exercised exclusive control over its operations. After VCD commenced Action 2 naming only 56 Walker, instead of simply asserting 56 Walker's claims in that action, Morris commenced Action 1 and voluntarily named himself as a party, personally . . . . Many times he refers to [56 Walker and himself] as "Plaintiffs."

(Id. at 13.)

Further, pointing to the verdict in the Owners' litigation with High End wherein Morris was found personally liable for wrongfully diverting construction trust funds, the Contractors claim that Morris must have done the same to funds held in trust for VCD. (Id. at 14.) To support this accusation, the Contractors submitted the Project's trust fund ledger, which indicates that payments from the account were made to Morris personally and other businesses with which he is associated. (Id. at 14-15 & Lee Aff. Ex. AA.) However, these facts alone do not support the drastic remedy of piercing the corporate veil on a motion for summary judgment.

Under New York Law, it is well-accepted that incorporation is a legitimate means of avoiding personal liability. See Feitshans v. Kahn, 06 Civ. 2125, 2007 WL 2438411, at *3 (S.D.N.Y. Aug. 22, 2007). The "presumption of legitimacy is 'particularly strong in contract cases'" where the parties have chosen to deal with each other and can negotiate guarantees or

security arrangements. Id. Thus, courts are "extremely reluctant" to disregard the corporate form and should do so only when the corporation "primarily transacts the business of the dominating interest rather than its own." United States v. Funds Held ex rel. Wetterer, 210 F.3d 96, 106 (2d Cir. 2000) (applying New York law); William Wrigley Jr. Co. v. Waters, 890 F.2d 594, 600 (2d Cir. 1989) (applying New York law).

A plaintiff seeking to pierce a corporation's limited liability protection must meet the heavy burden of showing that (i) the corporation's owner exercised complete domination or control over the corporation so that the corporation was the owner's alter ego, (ii) through such domination, the owner perpetrated a wrong or injustice against the plaintiff and (iii) the wrong or injustice resulted in a loss or injury to the plaintiff. Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc., 933 F.2d 131, 138 (2d Cir. 1991); Matter of Morris v. N.Y. State Dept. of Taxation, 82 N.Y.2d 135, 142 (1993).

As there continues to be a dispute on the issue of damages as discussed above, the Contractors cannot show there is no genuine issue of fact on the injury element above. Moreover even if the Contractors could show they suffered an injury, they have failed to show that 56 Walker was Morris's alter ego. Although Morris was held personally liable in to High End, the

Contractors have failed to present evidence that demonstrates that the "suspect disbursements" on the trust ledger made to Morris or businesses with which he is associated were made for personal purposes and not for purposes that would further the Project. (Lee Aff. ¶ 85.) Furthermore, even if those payments were made for personal purposes, the Contractors have failed to present evidence that shows that 56 Walker "primarily transacts the business of the dominating interest" rather than its own. Funds Held ex rel. Wetterer, 210 F.3d at 106. Accordingly, the Court cannot decide, as a matter of law, that 56 Walker's corporate form should be disregarded.

IV. Conclusion

For the foregoing reasons, the Contractors' motion for partial summary judgment [dkt. no. 44] is GRANTED with respect to its breach of contract claim, and DENIED with respect to the remainder of the motion. The parties shall confer and inform the Court by letter no later than March 9, 2011 how they propose to proceed.

SO ORDERED.

DATED: New York, New York
February 24, 2011

Loretta A. Preska

LORETTA A. PRESKA, Chief U.S.D.J.