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SHORT FORM ORDER

COPY

INDEX No. 09-36080

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 4-25-13 (#002)
MOTION DATE 5-29-13 (#003)
ADJ. DATE 6-26-13
Mot. Seq. # 002 - MD
003 - XMD

METTE P. LARSEN, Plaintiff, -against- DOUGLAS W. McGAHAN, DAVID W. McGAHAN, BAY CREEK BUILDERS, LLC, BAY CREEK BUILDERS, INC., BAY CREEK BUILDERS, Defendants.	CHRISTOPHER MODELEWSKI, P.C. Attorney for Plaintiff 44 Elm Street, Suite 18 Huntington, New York 1743 GOGGINS & PALUMBO Attorney for Defendants 13235 Main Road P.O. Box 65 Mattituck, New York 11952

Upon the following papers numbered 1 to 29 read on this motion for partial summary judgment; and this cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 20 - 27; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 28 - 29; Other memoranda of law 18; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment as to the liability of the defendants Douglas W. McGahan and David W. McGahan or, in the alternative, for an order compelling the defendants to produce certain discovery 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 and pursuant to CPLR 3016 (b) dismissing the complaint is denied.

This is an action to recover damages for allegedly poor workmanship and the failure to complete construction of a single-family residence on the plaintiff's property located at 2248 Roanoke Avenue, Riverhead, New York (the premises). It is undisputed that the plaintiff entered into a contract for a newly constructed home late in 2007, that work was commenced in early 2008, and that the defendants

stopped work on or about December 23, 2008. The parties strongly disagree as to which defendant or defendants entered into the aforesaid contract, and whether the individual defendants bear any liability for the alleged deficiencies in the construction, and the alleged failure to fully perform the contract obligations. In her complaint, the plaintiff alleges, among other things, that the failure of the individual defendants to properly identify the business entities which undertook the construction, and the use of a "lapsed corporation" in dealing with the plaintiff, makes the individual defendants personally liable for damages to the plaintiff.

It is undisputed that the defendants Douglas W. McGahan and David W. McGahan (collectively the brothers) operated their construction business and incorporated as the defendant Bay Creek Builders, Inc. (INC) in 1986, and that INC was dissolved in 1992. It is also undisputed that the brothers continued to operate the business as Bay Creek Builders (Bay Creek) after INC was dissolved, and that they formed the defendant Bay Creek Builders, LLC (LLC) on February 29, 2000.

The plaintiff now moves for partial summary judgment as to the personal liability of the brothers for any damages proven at trial, and to "pierce the corporate veil" of LLC or, in the alternative, to compel certain discovery. In support of her motion, the plaintiff submits, among other things, the pleadings, the bid proposals and contract documents exchanged between the parties, her deposition, and the depositions of the brothers. The Court notes that the deposition transcripts submitted are certified but unsigned, and that the plaintiff has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). Nonetheless, the unsigned transcripts of the plaintiff's deposition testimony may be considered herein as it has been adopted by the party deponent (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]). In addition, the Court may consider the brothers' unsigned deposition transcripts submitted in support of the motion as the parties have not raised any challenges to their accuracy (***Rodriguez v Ryder Truck, Inc.***, *supra*; ***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]).

At her deposition, the plaintiff testified that she hired "Bay Creek Builders" in a meeting with her architect and the builders, and that they went through a revision to the contract proposals. She stated that she was uncertain if anything was signed, that "[w]e were waiting for a revised contract from them," and that she did not recall the agreed price for the construction. When directed to Exhibit 4 attached to the complaint, the plaintiff indicated that the price of $694,000 shown on the subject "Revised bid for completion" appeared to be accurate, and that said price included labor and materials. The plaintiff further testified that construction started in January 2008, and that, with the exception of certain items that she was to complete, Bay Creek Builders was responsible to construct the residence "[s]tart to finish, soup to nuts, everything. I should be able to walk in there and have a perfect house when I walked in there." She indicated that there were multiple issues with, and defects in, the construction, that she was unhappy with the progress of the construction, and that "Bay Creek Builders and McGahan" stopped work when she continued to complain about certain issues and asked them to finish their work.

The defendant Douglas W. McGahan (McGahan) was deposed on October 21, 2011, and his testimony was continued on February 8, 2012. He testified that he and his brother started their business in 1986, that they have used the same phone number and address since they started the business, and that his current business card includes his name, the aforesaid phone number and address, and indicates that the name of the business is "Bay Creek Builders." He stated that INC was formed on May 14, 1986, that he and his brother were the sole shareholders and officers of the corporation, and that the corporation was not capitalized. He indicated that, although he did not recall the date, the corporation was dissolved. He further testified that LLC was formed on February 29, 2000, and that he and his brother did business between the dissolution of INC and the formation of LLC as Bay Creek. McGahan further testified that the first two pages of the bid proposal for this construction, dated September 21, 2007, indicate that it is from "Douglas W. McGahan, David W. McGahan, Bay Creek Builders," and that it does not indicate that it is from a corporation or LLC. He stated that pages three through six of the subject proposal appear under the heading "Bay Creek Builders, LLC," and that subsequent bid proposals reflected the same headings as the first two pages and following pages of the proposal dated September 21, 2007. He acknowledged that invoices from one of the subcontractors hired to work at the premises indicated "Bill to Bay Creek Builders, Doug McGahan."

At his deposition, the defendant David W. McGahan testified that INC was incorporated in 1986, that he has no recollection that it was dissolved, and that if it was dissolved "it has nothing to do with work. We never went out of business." He stated that INC was not capitalized, and that he and his brother continued the business between 1992 and 2000, or the "apparent end of [INC] and the commencement of [LLC]," as Bay Creek Builders. He indicated that the assets of INC were not sold, and that no transfer documents for the assets were created. David W. McGahan further testified that INC had a bank account at Southold Savings Bank which became North Fork Bank, that Bay Creek had a bank account at North Fork Bank, and that LLC has an account at North Fork Bank. He did not recall if, after the dissolution of INC, he went to the bank to sign anything with respect to opening a new account, or if "we used the same checkbook." He declared that he believes that between 1992 and 2000 the business filed taxes as a partnership, and that the business has always used the same phone number and address. He stated that LLC currently has two trucks and various tools to conduct its business operations.

A review of the plaintiff's submission reveals that there are, at a minimum, issues of fact regarding which entity entered into the agreement with the plaintiff to construct the residence, and the plaintiff's knowledge whether she was dealing with LLC, the brothers in an individual capacity, or the brothers as representatives of a non-existent corporation. The plaintiff submits a document entitled "Proposal and Contract" dated November 8, 2007, which indicates that it is from INC, and is signed by McGahan as "Contractor." It is undisputed that said document references "contract notes" which are set forth on LLC letterhead, and attaches a "progress and payment schedule" which indicates that it is from LLC.

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., LLC v Loupolover***, 44 AD3d 1016, 845 NYS2d 110 [2d Dept 2007]; ***Shisgal v Brown***, 21 AD3d 845, 801 NYS2d 581 [1st Dept 2005]). In addition, "[t]he 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]; *see also* ***Millennium Constr., LLC v Loupolover***, *supra*; ***Matter of Goldman v Chapman***, 44 AD3d 938, 844 NYS2d 126 [2d Dept 2007]). "Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution" (***First Bank of Ams. 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]).

In addition, the doctrine of "piercing the corporate veil" requires that the corporate entity has an underlying obligation to the plaintiff (***Matter of Morris v New York State Dept. of Taxation and Fin.***, *supra*; ***ARB Upstate Communications LLC v R.J. Reuter, LLC***, 93 AD3d 929, 940 NYS2d 679 [3d Dept 2012]; ***Matter of Moak***, 92 AD3d 1040, 938 NYS2d 648 [3d Dept 2012]). Here, the plaintiff has not established her entitlement to summary judgment that LLC is liable in damages to her as a matter of law. Moreover, the plaintiff has failed to establish that LLC, even if liable in damages to the plaintiff, was the instrument of fraud or wrongful or inequitable consequences (***TNS Holdings, v MKI Sec. Corp.***, 92 NY2d 335, 680 NYS2d 891 [1998]; ***Cobalt Partners, L.P. v GSC Capital Corp.***, 97 AD3d 35, 944 NYS2d 30 [1st Dept 2012]; ***Colonial Sur. Co. v Lakeview Advisors, LLC***, 93 A.D.3d 1253, 941 N.Y.S.2d 371[4th Dept 2012]; *see also* ***Damianos Realty Group, LLC v Fracchia***, *supra*; ***Millennium Constr., LLC v Loupolover***, *supra*).

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 demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing 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, that branch of the plaintiff's motion which seeks partial summary judgment as to the brothers' liability is denied.

The plaintiff also seeks an order compelling the defendants to answer one question posed at McGahan's deposition, and further respond to her notice for discovery and inspection dated November 28, 2012. Summary denial of this branch of the motion is mandated as it was made without any affirmation of good faith as required by 22 NYCRR 202.7 [a] (***Matos v Mira Realty Management Corp.,*** 240 AD2d 214, 658 NYS2d 880 [1st Dept 1997]). 22 NYCRR §202.7 [c] of the Uniform Rules for the Trial Courts, states that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (*see* Uniform Rules for the Trial Courts [22 NYCRR] §202.7 [c]). Here, the plaintiff has not supported her motion with an affirmation of good faith. Therefore, summary denial of this branch of the plaintiff's motion is required (*see* ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]; ***Matos v Mira Realty Mgt. Corp.***, *supra*; ***Vasquez v G.A.P.L.W. Realty***, 236 AD2d 311, 654 NYS2d 16 [1st Dept 1997]). Considering the Court's findings with regard to the motion and cross motion herein, the parties are strongly encouraged to make a determined effort to resolve their discovery disputes expeditiously and without additional motion practice.

The defendants cross move for summary judgment dismissing the complaint on the grounds that the plaintiff cannot pierce the corporate veil as a matter of law, and that the complaint fails to allege facts sufficient to sustain a cause of action against the brothers. The Court finds that there are issues of fact which preclude the grant of summary judgment to the defendants including, but not limited to, whether the brothers contracted with the plaintiff as partners or as representatives of a non-existent corporation.[1] In addition, a review of the complaint reveals that it sets forth allegations which adequately put the brothers on notice that the plaintiff is seeking to hold them personally liable for the alleged defects in construction and the failure to complete the obligations of the subject contract. Finally, the brothers' testimony indicates that there are issues of fact regarding the possibility that they did not adhere to corporate formalities, that assets were commingled, and that LLC may have been undercapitalized. With regard to the latter issue, this is especially true as counsel for the defendants directed McGahan not to answer that very question at his deposition.

Here, the defendants have failed to establish their prima facie entitlement to summary judgment, or that the plaintiff has failed to properly plead a cause of action against the brothers. Accordingly, the cross motion is denied.

Dated: 27 Sept. 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

[1] The defendants have not submitted the pleadings in this action, which would otherwise require the Court to deny the motion without prejudice to renewal upon proper papers (***Sendor v Chervin***, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]). Under the circumstances, the issue is academic.