

**Braha v Sticks & Stalks, Inc.**

2013 NY Slip Op 32527(U)

October 15, 2013

Supreme Court, Suffolk County

Docket Number: 30608/2012

Judge: Joseph Farneti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 30608/2012

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

---

DONNA BRAHA and PETER IZAAK,

Plaintiffs,

-against-

STICKS AND STALKS, INC., JASON  
 WILHOITE personally and in his capacity as  
 an officer and director of STICKS AND  
 STALKS, INC., DAVID HORNUNG,  
 personally and in his capacity as an officer  
 and director of STICKS AND STALKS, INC.,  
 LEWIS FRANCISCO, JOSEPH SCOTT  
 CONSULTING, LLC and JOSEPH  
 FISCHETTI, P.E.,

Defendants.

---

ORIG. RETURN DATE: JANUARY 19, 2013  
 FINAL SUBMISSION DATE: JANUARY 31, 2013  
 MTN. SEQ. #: 001  
 MOTION: MOT D

**PLTF'S/PET'S ATTORNEY:**

KUSHNICK PALLACI PLLC  
 445 BROAD HOLLOW ROAD - SUITE 124  
 MELVILLE, NEW YORK 11747  
 631-752-7100

**ATTORNEY FOR DEFENDANTS****STICKS AND STALKS, INC., JASON  
 WILHOITE AND DAVID HORNUNG:**

TARBET, LESTER & SCHOEN PLLC  
 P.O. BOX 2635  
 524 MONTAUK HIGHWAY  
 AMAGANSETT, NEW YORK 11930  
 631-907-3500

**ATTORNEY FOR DEFENDANT****JOSEPH SCOTT CONSULTING, LLC:**

JOHN D. KERN, ESQ.  
 295 NORTH SEA ROAD  
 SOUTHAMPTON, NEW YORK 11968  
 631-287-6500

**ATTORNEY FOR DEFENDANT****JOSEPH FISCHETTI, P.E.:**

KRIEG ASSOCIATES, P.C.  
 FIVE HEATHER COURT  
 DIX HILLS, NEW YORK 11746  
 631-499-8409

**SELF-REPRESENTED DEFENDANT:**

LEWIS FRANCISCO  
 230 BIG FRESH POND ROAD  
 SOUTHAMPTON, NEW YORK 11968

10-16-13  
*JK*

Upon the following papers numbered 1 to 7 read on this motion \_\_\_\_\_

**TO DISMISS**

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation and supporting papers 6, 7; it is,

**ORDERED** that this motion by defendants STICKS AND STALKS, INC., JASON WILHOITE and DAVID HORNUNG (collectively "defendants"), for an Order, pursuant to CPLR 3211 (a) (1) and (7), dismissing: (1) the Second cause of action as to defendants JASON WILHOITE and DAVID HORNUNG; and (2) the Fourth, Fifth and Eighth causes of action as to defendants, upon the grounds that a defense is based upon documentary evidence, namely the contract annexed to the complaint, and upon the grounds that plaintiffs fail to state a cause of action, is hereby **GRANTED** to the extent set forth hereinafter. The Court has received opposition hereto from plaintiffs DONNA BRAHA and PETER IZAAK.

This breach of contract action was commenced on or about October 3, 2012, by the filing of a summons and verified complaint. The action arises from a contract entered into by plaintiffs and defendant STICKS AND STALKS, INC. in or about April of 2012 ("Contract"), relating to the renovation of plaintiffs' premises located at 9 Bull Path Close, in East Hampton, New York. Plaintiffs allege that defendants performed work that was "deficient and defective"; that defendants failed to remedy such deficiencies; and that defendants ultimately abandoned the project.

Defendants have now filed the instant application to dismiss portions of plaintiffs' complaint. Initially, defendants seek dismissal of the Second cause of action entitled, "Breach of Contract – Wilhoite & Hornung, individually," alleging that the Contract was executed solely by the corporate defendant, STICKS AND STALKS, INC., and that plaintiffs do not allege otherwise. Defendants inform the Court that defendant STICKS AND STALKS, INC. is a valid Delaware corporation, and although it may not have authority to do business in New York, plaintiffs may not invalidate the Contract and hold the individual defendants personally liable (see Business Corporation Law § 1312 [b]).

Next, defendants allege that the Fourth, Fifth and Eighth causes of action fail to state a cause of action. Defendants argue that the Fourth cause of action for unjust enrichment must fail, as such a cause of action is only viable in

the absence of an express agreement. With respect to the Fifth cause of action for fraud, defendants argue that no cause of action to recover damages for fraud arises when the only fraud charged relates to a breach of contract. Finally, defendants contend that the Eighth Cause of action alleging that misrepresentations were made to induce plaintiffs into entering the Contract must similarly fail, as such allegations do not create an independent basis for a fraud cause of action.

Regarding that branch of defendants' motion to dismiss pursuant to CPLR 3211 (a) (1), where a defendant moves to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437 [2002]; see *Del Pozo v Impressive Homes, Inc.*, 29 AD3d 621 [2006]; *Montes Corp. v Charles Freihofer Baking Co.*, 17 AD3d 330 [2005]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2003]). Here, as will be more fully discussed, *infra*, the Court finds that the documentary evidence submitted, to wit: the Contract, resolves the factual issue as to whether the Contract was entered into by the corporate or individual defendants.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true in determining whether the complaint states any legally cognizable cause of action (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether the plaintiffs have a cause of action and not whether they may ultimately be successful on the merits (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]).

With respect to that branch of defendants' application seeking to dismiss the Second cause of action for breach of contract asserted against the individual defendants, the Court notes that the Contract annexed to plaintiffs' complaint was between plaintiffs and the corporate defendant. In order to pierce the corporate veil, a showing must be made that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiffs which resulted in plaintiffs' injury (*TNS Holdings Inc. v MKI Sec. Corp.*,

92 NY2d 335 [1998]; *Matter of Goldman v Chapman*, 44 AD3d 938 [2007]). In this matter, plaintiffs have pleaded neither of the foregoing elements. Rather, plaintiffs allege that the individual defendants made misrepresentations as to the corporate status of defendant STICKS AND STALKS, INC., which constituted a breach of contract, and therefore they should be held personally liable under the Contract. The Court finds that under the circumstances presented, the Second cause of action cannot survive the instant motion to dismiss.

Next, the Fourth cause of action for unjust enrichment must be dismissed on the ground that plaintiffs have alleged a valid and enforceable written contract exists between the parties, thereby precluding recovery on a theory of unjust enrichment (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382 [1987]; *Cornhusker Farms, Inc. v Hunts Point Coop. Mkt., Inc.*, 2 AD3d 201 [2003]).

Regarding the Fifth cause of action for fraud and the Eighth cause of action for fraudulent inducement, an alleged breach of contract cannot be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract (see *Rich v New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382 [1882]; *Riffat v Continental Ins. Co.*, 104 AD2d 301 [1984]). The essential elements of a claim of fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308 [1995]; *Orlando v Kukielka*, 40 AD3d 829 [2007]; *Ross v DeLorenzo*, 28 AD3d 631 [2006]). A fraud claim does not lie where the only fraud alleged arises from the breach of a contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud (*Selinger Enters., Inc. v Cassuto*, 50 AD3d 766 [2008]). However, a misrepresentation of a material fact, which is collateral to a contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud (*Selinger Enters., Inc. v Cassuto*, 50 AD3d 766, *supra*; *Mendelovitz v Cohen*, 37 AD3d 670 [2007]).

Here, plaintiffs' fraud and fraudulent inducement allegations concern defendants' alleged statements that they "were capable, authorized and licensed to design and construct the subject Project," which were allegedly false when

they were made, were known by defendants to be false, and were intentionally made to plaintiffs in order to induce plaintiffs to enter into the Contract. As such, the Court finds that plaintiffs have sufficiently alleged misrepresentations of material facts collateral to the Contract and that allegedly served as an inducement for the Contract, which support causes of action for fraud and fraudulent inducement (see *Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896 [2010]).

Therefore, upon favorably viewing the facts alleged (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiffs "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether plaintiffs will ultimately be successful on the merits, the Court finds that plaintiffs have sufficiently pleaded causes of action for fraud and fraudulent inducement.

In view of the foregoing, this motion by defendants to dismiss is **GRANTED** to the extent that plaintiffs' Second and Fourth causes of action are hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: October 15, 2013

  
\_\_\_\_\_  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION