Accumanage, LLC v Yin
2014 NY Slip Op 30804(U)
March 7, 2014
Sup Ct, Suffolk County
Docket Number: 13-5004
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX No. 13-5004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MD
002 - XMotD

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ACCUMANAGE, LLC,

Plaintiff,

- against -

YUSONG YIN and WEI YIN,

and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to plaintiff, the person or persons intended being the persons or parties, if any, having or claiming an interest or lien upon the liened premises described in the complaint,

Defendants,

AND ADDITIONAL PARTY WHICH DEFENDANTS, YUSONG YIN AND WEI YIN COUNTERCLAIM AGAINST PURSUANT TO CPLR§3019,

- and -

CASTRENZE BALSANO,

Counterclaim Defendants.

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Upon the following papers numbered 1 to 52 read on these motions to dismiss and amend ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 42 ; Answering Affidavits and supporting papers 43 - 48 ; Replying Affidavits and supporting papers 49 -52 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Yusong Yin and Wei Yin for an order dismissing plaintiff's first cause of action pursuant to Lien Law §§ 19 (16) and 39, and granting defendants' fourth counterclaim in the amended verified answer is denied; and, it is further

ORDERED that the portion of the cross motion by plaintiff for an order pursuant to CPLR 3212 dismissing each counterclaim interposed against Castrenze Balsano in his individual capacity and dismissing the second counterclaim is granted; that the portions of the cross motion which seek an order pursuant to CPLR 3126 striking defendants' counterclaim and answer for failing to comply with plaintiff's notice for discovery and inspection, pursuant to Lien Law § 12-a amending plaintiff's notice of lien, and pursuant to CPLR 305 (c) amending the caption of this action and the notice of pendency are determined as follows.

Plaintiff, a limited liability corporation, commenced this action for a mechanic's lien, breach of contract, and to recover for work, labor, and services it performed with regard to the construction of a home on property owned by defendants Yusong Yin and Wei Yin ("defendant homeowners"). Defendant homeowners counterclaimed against plaintiff as well as Castrenze Balsano, in his individual capacity, alleging seven causes of action. The first counterclaim is for breach of contract, the second for breach of fiduciary duty, the third for return of monies paid by mistake, the fourth for declaratory judgment, the fifth, sixth, and seventh causes of action for breach of a trim contract, a window seat contract, and a deck contract, respectively. The parties do not dispute that they entered into a written Construction Management Agreement on April 21, 2011 ("the agreement"), Castrenze Balsano executed it on behalf of plaintiff which, in part, set forth a payment schedule and essentially provided that plaintiff would manage the construction of a 9000 square foot custom residential dwelling on property owned by defendant homeowners. Additionally, there is no question that plaintiff and defendant homeowners entered into sub-contracts for trim work and the installation of doors, frames, windows, and molding, the construction of window seats, the construction of three rooms in the basement, and the installation and construction of three exterior decks.

Pertinent portions of the agreement provide as follows:

> This Construction Management Agreement ("the Agreement"), made and entered into as of the 21st day of April, 2011 by and between Accumanage LLC a New York limited liability company, (the "Manager") ... and Yusong Yin and Wei Yin (collectively the "Owner")...
>
> ... in consideration of the mutual promises and obligations set forth in this Agreement, the parties mutually agree as follows:
>
> 1. **Description of Work.**
>
> (a) Manager agree to manage and supervise all materialmen, laborers, contractors and subcontactors ("Trades") with respect to all labor, materials, supplies, equipment, services, machinery, tools and other facilities of every kind and description required for the prompt and efficient construction of the improvements according to the approved Final Plans and scheduled specifications...
>
> (b) The Manager agrees to ensure that the Project is constructed in accordance with the requirements as to materials and workmanship of the Building Department of the Town of Brookhaven and all other applicable federal, state, and local laws, rules, and regulations (including but not limited to Building, Fire, and Environmental

Codes), and when completed, Project will be in accordance with the Plans as filed with the Building Department or as otherwise agreed in writing between the parties. The passing of the final inspection with the Town of Brookhaven shall mean that the Improvements are substantially complete. Upon substantial completion, Manager shall complete a mutually agreed punchlist of all outstanding items, which shall be completed by Manager within 90 days from the date of the passing of the final inspection performed by the Town of Brookhaven, weather permitting.

(c) The work shall be done in accordance with the Plans and Specifications, or as otherwise agreed in writing between the parties. The parties have agreed to a (i) timeline of the Project which is attached hereto as Exhibit B, (ii) Specification manual which is attached hereto as Exhibit C, and (iii) Project budget which is attached hereto as Exhibit D. Exhibits A through D are incorporated herein by reference.

...

11. **Contract Price.**

a) Total compensation due to Manager for Management Services shall be One Hundred Seventy Five Thousand Dollars ($175,000.00) ("Project Management Fee"). The Owner shall pay the Project Management Fee to Manager as follows:

i. As of Commencement Date, Eleven Thousand ($11,000.00) Dollars monthly for a period of twelve (12) consecutive months.

iii.[1] Within five (5) days of the passing of the final inspection by the Town of Brookhaven, Owner shall pay Manager the sum of Twenty One Thousand Five Hundred ($21,500.00) Dollars.

iv. Upon completion of all mutually agreed punchlist items outstanding after the payment described in Section 11 (a(iii) above, Owner shall pay Manager the sum of Sixteen Thousand Five Hundred ($16,500.00) Dollars.

v. Upon receipt by Owner of the Certificate of Occupancy, Owner shall pay to Manager the remaining sum of Five Thousand Dollars ($5,000.00).

iv. Owner shall pay to Manager any pre-approved and documented out of pocket expenses of Manager advanced by Manager in furtherance of the Project including but not limited to permit and application fees, printing, mailing and copying expenses.

v. All payments from Owner for Manager's services shall be paid to Accumanage, LLC or as otherwise directed by Accumanage, LLC. ...

v. Payments are due and payable on the fifteenth day of the month.

...

15. **Work Commencement Date and Completion.** It is anticipated between the parties that the Commencement Date of construction under this contract shall be

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[1]The agreement does not contain a paragraph "ii" under section 11. Contact Price and contains two sections of paragraph numbered "iv" and three sections of paragraph numbered "v".

> April 21, 2011 ("Commencement Date"). Parties acknowledge that the Building Permit has been issued. As this is a contract for the construction of a **new custom home**, it is difficult to ascertain an actual completion date due to Force Majeure events. The expected completion date shall be fourteen (14) months from Commencement Date, provided, that it may take an aggregate of sixteen (16) months due to Force Majeure events. Nothwithstanding the indication of an approximate completion date in this matter, Manager shall not be held accountable or liable in any fashion for the failure of the custom home to receive a Certificate of Occupancy or other comparable municipal approval by the completion date or any reasonable time thereafter unless caused by Manager's negligence or intentional misconduct.
>
> 16. **Entire Agreement.** This Agreement states the entire understanding of the parties and the Manager shall not be bound by any oral representations and/or agreements made by Owner, his agents, or representatives.
> ...
>
> 18. **Miscellaneous.** All obligations imposed by this Agreement and the rights and remedies available hereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.
> ...
> (b) In the event of any litigation arising out of this Agreement, the substantially prevailing party shall be entitled to recover in addition to all damages, its reasonable attorney's fees and court costs in the prosecution or defense of any such action.
> ...
> (e) This Agreement contains the entire understanding of the parties. It may not be changed orally but only by an Agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought.

Plaintiff contends that the commencement date of the project was April 21, 2011, that the "expected" completion date was June 21, 2012, and that the "outside" completion date was August 21, 2012. It maintains that substantial delays in the construction of the home were a result of defendant homeowners' conduct. Plaintiff asserts that defendant homeowners continually threatened to and did terminate contracts with sub-contractors, interfered with plaintiff's performance under the terms of the agreement by bringing "new" sub-contractors to the project (without notice to plaintiff and without proof that the "new" sub-contractors were licensed or insured), failed to remit timely payments or to make payment to sub-contractors, and failed to timely select construction contractors and tiles and plumbing fixtures for eight bathrooms as well as doors and windows. Plaintiff claims that the time frame for the completion of the project was increased due to the delays caused by the conduct of defendant homeowners and that as a result thereof, additional supervisory work was required of it. Plaintiff argues that it began the work on the premises months prior to the agreement date (without compensation) and that because it completed all of the work required of it by the terms of the agreement within twelve (12) months of the April 12, 2011 start date, the supervisory services provided at the project until August 21, 2012 (an additional four [4] months) were additional services not contemplated by the agreement for which

additional compensation is due. Additionally, plaintiff maintains that defendant homeowners' failure to pay an electrician resulted in that sub-contractor's refusal to issue an electrical underwriter's certificate which is a pre-requisite for the final inspection and issuance of a certificate of occupancy by the town. Plaintiff also claims that defendant homeowners failed to complete site improvements required by the town and that they violated the town code with regard to the site improvements, thus preventing the issuance of a certificate of occupancy by the town, and that defendant homeowners failed to provide a "punchlist" to plaintiff. Thus, plaintiff posits that it is entitled to be paid for the full amount stated in the agreement because it completed all of the work required of it and that the "benchmarks" for payments of $21,500.00, $5,000.00, and $16,500.00 (totaling $43,000.00) were not met as a result of defendant homeowners' conduct and not by plaintiff's failures or omissions.

Defendant homeowners allege that plaintiff "willfully and maliciously filed a mechanics lien" against their premises for $113,550.00 "despite the fact that [plaintiff] had been paid all monies owed to it under [the agreement]...and is not entitled to any additional monies under the clear and unambiguous terms of the Agreement." They contend that the payment of certain sums was conditioned upon the happening of specific events which were not accomplished due to the "mismanagement of the Project by [plaintiff]" and that plaintiff "walked off" the project without having completed same. Defendant homeowners argue that plaintiff willfully filed a false and exaggerated lien, caused significant delays with respect to the completion of the project, obstructed their ability to obtain a certificate of occupancy, and caused them to incur monetary damages.

Defendants now move to dismiss plaintiff's first cause of action (which is to adjudge the priority of liens, declare its mechanic's lien valid, and to sell the premises and pay the lien amount) pursuant to Lien Law §§ 19 (6) and 39, and to grant them summary judgment on their fourth counterclaim which seeks a judgment declaring that plaintiff willfully and knowingly exaggerated the lien amount, that the lien is null and void, and that they are entitled to damages, costs, and attorneys fees as a result thereof. Plaintiffs cross move requesting the court to dismiss the counterclaims interposed against the individual, Castrenze Balsano for failure to state a cause of action, to dismiss the second counterclaim (for breach of fiduciary duty) for failure to state a cause of action, to strike defendants' answer and counterclaims for failing to comply with discovery and inspection requests, to amend the notice of lien, to amend the caption and notice of pendency, and for costs and attorneys' fees.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223 [1978]; Andre v Pomeroy, 35 NY2d 361 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (S.J. Capelin Assocs., Inc. v Globe Mfg. Corp., 34 NY2d 338 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (Benincasa v Garrubbo, 141 AD2d 636, 637 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see Alvarez v Prospect Hosp., supra).

Pertinent portions of Lien Law § 9 state: "The notice of lien shall state: ... 4. The labor performed or materials furnished and the agreed price or value thereof... 5. The amount unpaid to the lienor for such labor or materials." Lien Law § 23 states: "[t]his article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same." Lien Law § 39 provides "[i]n any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon." However, the "burden is upon the opponent of the lien to show that the amounts set forth were intentionally and deliberately exaggerated" (Garrison v All Phase Structure Corp., 33 AD3d 661, 662 [2d Dept 2006] internal citations omitted). The fact that a lien may contain improper charges or mistakes does not, in and of itself, establish that a lienor willfully exaggerated the lien, "particularly ... in light of the requirement that Lien Law § 39-a [which permits the recovery of damages and attorney's fees by the owner or contractor against whom a voided lien on account of a willful exaggeration was found] must be strictly construed in favor of the party against whom the penalty is sought to be imposed" (Capogna v Guella, 41 AD3d 522, 523 [2d Dept 2007]; see Park Place Carpentry & Builders, Inc. v DiVito, 74 AD3d 928 [2d Dept 2010]; Minelli Constr. Co., Inc. v Arben Corp., 1 AD3d 580 [2d Dept 2003]; East Hills Metro, Inc. v J.M. Dennis Constr. Corp., 277 AD2d 348 [2d Dept 2000]). The question of whether certain charges are valid, including those for "standby time" and any dispute regarding the validity of the lien, as opposed to a defect upon the face of the lien, are to be determined by a trier of fact or by a summary judgment motion, and not on a motion to vacate the lien (Bryan's Quality Plus, LLC v Dorime, 80 AD3d 639 [2d Dept 2011]; Care Systems, Inc. v Laramee, 155 AD2d 770 [3d Dept 1989]; see also NDL Assoc., Inc. v Villanova Heights, Inc., 99 AD3d 450 [1st Dept 2012]).

Here, where plaintiff's lien and itemized statement of lien claim set forth the amount it claims was unpaid under the agreement (*i.e.* a total of $102,550.00) and specifies the alleged days added to the completion of the project due to various "change orders", the amount charged for each day and the manner in which that charge is calculated, along with materials consisting of "shoe moldings" worth $700.00, defendant homeowners have failed to show a *prima facie* entitlement to judgment as a matter of law on their fourth counterclaim for a declaratory judgment. In the papers provided on their motion, defendant homeowners have failed to establish that plaintiff willfully exaggerated its lien, thus, the question of whether the charges alleged by the lien are valid must be left to the trier of fact. Accordingly, the motion to dismiss plaintiff's first cause of action and to grant summary judgment on defendant's fourth counterclaim is denied.

Turning to plaintiff's cross motion to dismiss the counterclaims against the individual counterclaim defendant, Castrenze Balsano, ("defendant Balsano") the court notes that the sole allegations of defendant homeowners as to his liability are that he is the managing member and sole owner of plaintiff's limited liability corporation ("LLC"), that he exercises complete dominion and control over plaintiff's affairs (with the intention to commit wrongs against defendant homeowners), that he failed to observe any corporate formalities in the existence and operation of the LLC, that he was the "alter ego" of the LLC, and that he executed the agreement on behalf of the LLC. Other than those conclusory general allegations, no other facts are set forth as to any personal actions or grounds for liability against the individual counterclaim defendant. Generally, 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 plaintiff which resulted in plaintiff's injury" (Morris v New York State Dept. Of Taxation and Finance, 82 NY2d 135, 141 [1993]). Facts must be plead to show that the individual defendant "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against them"(James v Loran Realty V Corp., 20 NY3d 918, 919 [2012]; see Cusumano v Iota Indus., Inc., 100 AD2d 892 [2d Dept 1984]) in order for plaintiff to be successful in piercing the corporate veil. Here, defendant homeowners have failed to allege any violation of a legal duty by defendant Balsano independent of the agreement with plaintiff LLC, nor have they alleged any facts upon which personal liability could be attached by piercing the corporate veil (see Kallman v Pinecrest Modular Homes, Inc., 81 AD3d 692 [2d Dept 2011]). As the counterclaims are totally devoid of any allegations as to defendant Balsano's personal liability or his domination of the LLC with respect to the construction of their home and how that domination was used to commit a fraud or wrong against them (see Morris v New York State Dept. Of Taxation and Finance, supra), they are dismissed in their entirety as against defendant Balsano.

"A fiduciary relationship whether formal or informal, is founded upon trust or confidence reposed by one person in the integrity and fidelity of another...[and] might be found to exist, in appropriate circumstances, between close friends ... or even where confidence is based upon prior business dealings" (AHA Sales, Inc. v Creative Bath Products, Inc., 58 AD3d 6, 6 [2d Dept 2008] internal citations and quotations omitted). "A conventional business relationship, without more, is insufficient to create a fiduciary relationship. Rather, a plaintiff must show special circumstances that transformed the parties' business relationship to a fiduciary one" (Legend Autorama, Ltd. and Audi of Smithtown, Inc. v Audi of America, Inc., (100 AD3d 714, 717 [2d Dept 2012]). Plaintiff must support its assertion of a fiduciary relationship with some objective facts in order to overcome a CPLR 3211 (a) (7) motion to dismiss a complaint alleging breach of fiduciary relationship (see L. Margarian & Co., Inc. v Timberland Co., 245 AD2d 69 [1st Dept 1997]). Here, where the only allegations of a fiduciary relationship consist of generalized statements that because defendant homeowners "are laypeople inexperienced in the field of residential construction, [plaintiff and defendant Balsano] owed [them] a fiduciary duty ... beyond that of an ordinary business relationship", that a "fiduciary duty ... owed by [plaintiff] to [defendant homeowners] existed separately and in addition to any contractual obligations owed by [plaintiff]", and that "the [defendant homeowners] trusted and put their faith in [plaintiff] to act as trustworthy and loyal professionals", no special circumstance has been alleged. Defendant homeowners have set forth facts that show a business relationship existed between the parties but have failed to support their assertion that a fiduciary relationship existed. Thus, the second counterclaim alleging a breach of a fiduciary relationship is dismissed.

The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (c) provide 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." Further, 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" (Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]).

Further, while actions should be resolved on the merits whenever possible (see Ingoglia v Barnes & Noble Coll. Booksellers, Inc., 48 AD3d 636 [2d Dept 2008]; Pascarelli v City of New York, 16 AD3d 472 [2d Dept 2005]; Cruzatti v St. Mary's Hosp., 193 AD2d 579 [2d Dept 1993]), a court may strike a pleading

or impose other sanctions against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds should have been disclosed" (CPLR 3126; see Nicolia Ready Mix, Inc. v Fernandes, 37 AD3d 568 [2d Dept 2007]; Mendez v City of New York, 7 AD3d 766 [2d Dept 2004]). The penalties authorized by CPLR 3126 are designed "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof" during a civil action (Oak Beach Inn Corp. v Babylon Beacon, 62 NY2d 158, 166 [1984]). A party seeking the drastic sanctions of striking a pleading or preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (see Conciatori v Port Auth. of N.Y. & N.J., 46 AD3d 501 [2d Dept 2007]; Shapiro v Kurtzman, 32 AD3d 508 [2d Dept 2006]). Willful and contumacious conduct may be inferred from a party's repeated failure to adequately respond to discovery demands or to comply with disclosure orders, coupled with inadequate excuses for such default (see McArthur v New York City Hous. Auth., 48 AD3d 431 [2d Dept 2008]; Duncan v Hebb, 47 AD3d 871 [2d Dept 2008]; Devito v J & J Towing, Inc., 17 AD3d 624 [2d Dept 2005]).

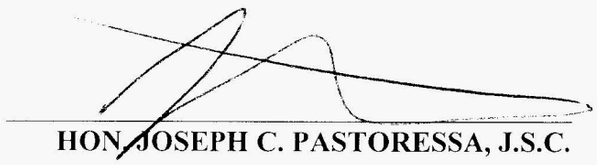
Here, plaintiff failed to support its cross motion to strike the counterclaims pursuant to CPLR 3126 with an affirmation detailing a good faith effort to resolve the dispute regarding the failure to supply all responses to demands for discovery and inspection (see Tine v Courtview Owners Corp., 40 AD3d 966 [2d Dept 2007]; Cestaro v Chin, 20 AD3d 500 [2d Dept 2005]). Accordingly, plaintiff's cross motion for an order striking the answer and counterclaims or compelling compliance is denied.

As the court found that plaintiff did not willfully exaggerate its lien, *supra*, no amendment pursuant to Lien Law §12-a is required at this time, and the request for an amendment is denied as moot.

Finally, plaintiff's request that the summons (caption) of this matter and the notice of pendency be amended pursuant to CPLR 305 (c) so that defendants are correctly named as "Yusong Yin and Wei Yin a/k/a Wei Zhao" is granted upon the consent of defendant homeowners.

Plaintiff is directed to serve a copy of this order upon the Calendar Clerk of the Court.

Dated: March 7, 2014



HON. JOSEPH C. PASTORESSA, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**