

**Lattarulo v Industrial Refrig., Inc.**

2018 NY Slip Op 32423(U)

May 22, 2018

Supreme Court, Nassau County

Docket Number: 607915/17

Judge: Thomas Feinman

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**  
Justice

\_\_\_\_\_  
WILLIAM LATTARULO and BARBARA  
LATTARULO,

Plaintiffs,

- against -

INDUSTRIAL REFRIGERATION, INC. and  
STEVEN ROSTKOWSKI,

Defendants.

TRIAL/IAS PART 6  
NASSAU COUNTY

INDEX NO. 607915/17

MOTION SUBMISSION  
DATE: 4/10/18

MOTION SEQUENCE  
NO. 2

The following papers read on this motion:

Notice of Motion and Affidavits.....	<u>  X  </u>
Memorandum of Law in Support of Motion.....	<u>  X  </u>
Affirmation in Opposition.....	<u>  X  </u>
Reply Affirmation.....	<u>  X  </u>

RELIEF REQUESTED

The defendants move for an order dismissing this matter against defendant, Steven Rostkowsky, ("Rostkowski"), pursuant to CPLR §3211(a)(1) on the grounds that a defense is founded upon documentary evidence, dismissing this matter against defendant, Rostkowsky, pursuant to CPLR §3211(a)(7) in that the pleading fails to state a cause of action, dismissing the second and third causes of action for unjust enrichment as duplicative of the first cause of action for breach of contract, dismissing the fourth cause of action for fraud as duplicative or the first cause of action for breach of contract and for failing to state a cause of action pursuant to CPLR §3211(a)(7), dismissing the fourth cause of action for fraud against defendants pursuant to CPLR §3016(b) for failing to plead allegations of fraud with specificity, and extending defendants' time to interpose an answer until thirty (30) days following resolution of this motion. The plaintiffs submit opposition. The defendants submit a reply.

BACKGROUND

The plaintiffs initiated this action sounding in breach of contract, unjust enrichment, and fraud. The plaintiffs' complaint provides that the plaintiff, William Lattarulo, was approached to develop a certain parcel of real estate into an ice distribution facility by a non-party, who recommended that the development be done by the defendant, Industrial Refrigeration, Inc.,

(hereinafter referred to as "Industrial"). The complaint provides that the defendant, Rostkowski, represented that the development would cost approximately one hundred thirty thousand and 00/100 dollars, (\$130,000.00), the plaintiffs delivered two checks to the defendants in the sum of one hundred thirty thousand and 00/100 dollars, (\$130,000.00), the proposed development fell apart, plaintiffs demanded reimbursement and defendants have failed to do so.

#### APPLICABLE LAW

A motion for failure to state a cause of action "will fail if from [the] complaint's four corners, [its] factual allegations are discerned which taken together manifest any cause of action cognizable of law, regardless of whether the plaintiff will ultimately prevail on the merits." (*Gruen v. County of Suffolk*, 187 AD2d 560).

However, while the criteria in determining whether a complaint will withstand a motion pursuant to CPLR §3211(a)(7) is whether the pleadings state a cause of action discerned from the four corners of the pleadings, (*Guggenheimer v. Ginsburg*, 43 NY2d 268), when the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, and not whether the proponent has merely stated a cause of action. (*Meyer v. Guinta*, 262 AD2d 463). The test to be applied is whether the complaint "gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, and whether the requisite elements of any cause of action known to our law can be discerned from its averments." (*Moore v. Johnson*, 147 AD2d 621).

"[I]n considering a motion to dismiss pursuant to CPLR §3211 (a) (7), the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Sinensky v. Rokowsky*, 22 A.D.3d 563, quoting *Leon v. Martinez*, 84 NY2d 83; *Simos v. Vic-Armen Realty, LLC*, 92 AD3d 760).

In accepting the allegations contained in the complaint as true, and affording every favorable inference, this Court finds that the plaintiff has sufficiently set forth a cause of action against the defendants sounding in negligence.

It is well settled that in order to state a valid claim for breach of contract, the plaintiff must allege (1) the existence of a contractual right, (2) due performance of the contract by the party alleging breach, (3) breach, and (4) damages suffered as a result of the breach. (*Furia v. Furia*, 116 AD2d 694, 228 AD2d 633; *NY Pattern Jury Ins.* §4:1). In order to plead a breach of contract claim, a complaint must allege the provisions of the contract upon which the claim is based. (*Atkinson v. Mobile Oil Corp.*, 205 AD2d 719). The complaint must do more than merely recite the elements, in that the plaintiff must set forth specific allegations in the complaint identifying (a) the agreement between the parties, (b) the terms of that agreement, (c) what provisions of the agreement were breached, and (d) the actual damages that were sustained. These facts must be articulated with sufficient particularity so as to give the adverse party actual notice of the transaction in dispute and all the elements of the cause of action. The elements cannot be too vague, indefinite, or conclusory. (*Sud v. Sud*, 211 AD2d 423; *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 AD2d 598). While the Court will generally accept factual allegations in the complaint as true, (*Holly v. Pennysaver Corp.*, 98 AD2d 570), under a motion to dismiss pursuant to CPLR §3211, and the complaint is afforded a liberal construction, (*Leon v. Martinez*, 84 NY2d 83), vague and conclusory allegations

are generally insufficient to sustain a claim. (*Fowler v. American Lawyer Media, Inc.*, 306 AD2d 113; *DiMauro v. Metropolitan Suburban Bus Authority*, 105 AD2d 236). CPLR §3013 provides that statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, and the material elements of each cause of action. Failure to meet such requirements warrant a dismissal of the claim. (*Murrin v. Ford Motor Co.*, 303 AD2d 475).

A corollary of the traditional “veil-piercing” process holds the corporate shareholders, or other corporations, responsible for corporate obligations. (*Winchester Global Trust Company Limited v. Donovan*, 22 Misc3d 1119(A)). That corollary is that “all defendants, individuals and corporations should be treated as a single personality by reason of domination and control by the individual over the corporations to transfer assets from the debtor corporations to other corporations so as to inhibit or prevent the honoring of the obligation”. (*Id.*, citing *Solow v. Domestic Stone Erectors, Inc.*, 269 AD2d 199). “Whether or not the court will elect to pierce the corporate veil is fact-dependent and there is no hard and fast rule. (*Id.*)

Generally, factors considered in determining whether a corporation is dominated by others include whether the corporation is a mere instrumentality, agent or alter-ego of others, whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or the absence of separate paraphernalia that are part of the corporate form. (*Island Seafood Company Inc. v. Golub Corporation*, 303 AD2d 892; and *John John LLC v. Exit 63 Development, LLC*, 35 AD3d 540). The Court in *Old Republic National Title Insurance Company v. Moskowitz*, 297 AD2d 724, found that there was no basis for plaintiff to pierce the corporate veil as and against the wife of one of the principals in corporation when the wife was not an owner, director or shareholder in corporation. “When a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator’s business instead of its own and can be called the other’s alter ego, the corporate form may be disregarded to achieve an equitable result. (*Austin Powder Co. v. McCullough*, 216 AD2d 825).

CPLR §3016 requires particularity in the pleading of fraud and breach of trust and the circumstances constituting the wrong must be stated in detail. (*Briarpatch Ltd. v. Frankfurt, Garbus, Klein & Selz*, 13 AD3d 296). Dismissal of plaintiff’s claim for fraud was warranted as plaintiff failed to set forth the time and place of the alleged misrepresentation. (*Orchid Constr. Corp. v. Gottbetter*, 89 AD3d 708).

It is well settled that an action predicated on fraud must be particularly pled whereby the circumstances constituting the wrong shall be stated in detail. (CPLR §3016; *Wildman & Bernhardt Constr. Inc. v. BPM Assocs, LP*, 273 AD2d 38). The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury. (*Orlando v. Kukielka*, 40 AD3d 829). Each element of fraud must be supported by factual allegations sufficient to satisfy CPLR §3016(b). (*Menaco v. New York University Medical Center*, 213 AD2d 167). “Bare conclusory allegations of fraud are insufficient to sustain a cause of action sounding in fraud.” (*Glassman v. Catli*, 111 AD2d 744). A complaint devoid of any facts to support the allegation that the brokers knowingly misrepresented or omitted material facts to induce insureds to purchase an insurance policy from them failed to state a fraud claim. (*Elsky v. KM Ins. Brokers*, 139 AD2d 691).

DISCUSSION

Here, the complaint fails to state a cause of action for fraud. The complaint lacks the requisite elements of fraud and lacks the alleged material representation of act or omission. The plaintiff has already pled a cause of action for breach of contract, and has not alleged a duty distinct and separate from the defendants' contractual obligations, and has not plead sufficient facts to assert a cause of action sounding in fraud. It is well established that a party may not recover in *quantum meriut or unjust enrichment* where the parties have entered into a contract which governs the subject matter. (*Cox v. NAP Constr. Co., Inc.*, 10 NY3d 592). Additionally, the complaint fails to set forth sufficient allegations to pierce the corporate veil. The subject contract is between the plaintiff and Industrial, not Rotkowski. The complaint is devoid of allegation or factors to support a claim to pierce the corporate veil.

CONCLUSION

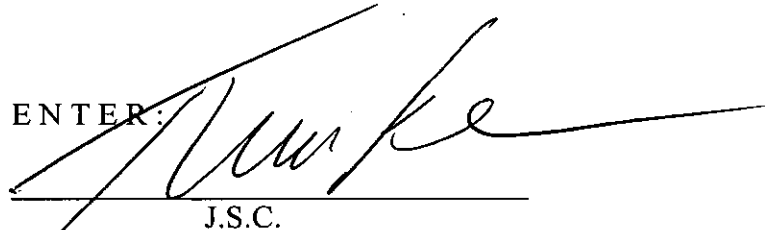
Upon the foregoing, it is hereby

ORDERED that branch of the defendants' motion seeking an order dismissing plaintiffs' causes of action, with the exception of breach of contract, is granted, and it is hereby further

ORDERED that branch of the defendants' motion seeking an order discontinuing plaintiffs' causes of action, as and against the defendant, Steven Rostkowski, is granted, and it is hereby further

ORDERED that branch of the defendants' motion seeking an order extending the defendants' time in which to interpose an answer to thirty (30) days from the date of this order is granted.

ENTER:



J.S.C.

Dated: May 22, 2018

ORIGINAL

**ENTERED**  
MAY 24 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE