SHORT FORM ORDER

INDEX No. 17-603395
CAL. No. 19-01491OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

**ORIGINAL**

***PRESENT:***

Hon. WILLIAM J. CONDON
Justice of the Supreme Court

MOTION DATE 11-26-19 (001)
MOTION DATE 1-9-20 (002)
ADJ. DATE 2-6-20
Mot. Seq. # 001 - MotD
# 002 - MotD

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PETER MAY,

Plaintiff,

- against -

STEVE'S MARINE SERVICE WEST, INC., d/b/a STEVE'S MARINE SERVICE and STEVEN STAVRACOS,

Defendants.

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Upon the following papers read on this motion for summary judgment : Notice of Motion and supporting papers by plaintiff, dated November 6, 2019; Notice of Cross Motion and supporting papers by defendants, dated December 24, 2019; Answering affidavit by plaintiff, dated January 20, 2020; it is, Replying Affidavit by defendants, dated January 29, 2020 ; it is,

***ORDERED*** that the motion by plaintiff for summary judgment on his cause of action for conversion, *inter alia*, is granted to the extent set forth herein, and is otherwise denied; and it is further.

***ORDERED*** that the cross motion by defendants to dismiss the complaint, *inter alia*, is granted to the extent set forth herein, and is otherwise denied.

This action arises out of work performed on the engine of plaintiff's boat, and on the boat itself, by defendant Steve's Marine Service West, Inc. (Steve's Marine).

In April 2013, plaintiff brought the vessel to the Steve's Marine boatyard to be repaired, as it was not reaching maximum speed; the engine, which should have been performing at 3,600 or 3,800 revolutions per minute (rpm), was performing at 2,600 rpm. The parties offer differing versions of their agreement. According to plaintiff, defendants guaranteed that repairs and adjustments to two

components, the riser and the turbocharge, would fix the problem. According to defendants, no guarantee was made. They observed that the riser and turbo were in need of repair and adjustment, and they claim their undertaking was to repair them, to which plaintiff agreed. Defendants also aver they made those repairs, and that the boat was reaching maximum speed when plaintiff took the boat. Plaintiff was billed $4,700.83, which he paid on April 23, 2013. According to the complaint, at that time defendants represented and warranted to plaintiff that the boat's mechanical issues were resolved, that no further work was required, and the vessel was in good working order and fit for him to use, a statement which defendants deny making in its entirety.

Approximately eleven months later, in March 2014, plaintiff returned, reporting that the engine was not repaired, and that it continued to underperform. He left his boat for defendants to work on, where it remains to this day. Plaintiff alleges that when he left the boat with defendants on this occasion, he and Mr. Stavracos, who is both a shareholder and the president of Steve's Marine, agreed that any "additional work" would have to have "an estimate and a signed work order."

Defendants acknowledge in their answering pleading that plaintiff wanted a written estimate. Thereafter, Mr. Stavracos prepared a paper on the letterhead of Steve's Marine Service West, Inc., captioned "Scope of Work" and dated September 29, 2014, outlining the work he believed was necessary. In part, it reads: "At this time we feel removing and sending out the injection pump and injectors for rebuilding should solve the issues." No prices appear on the work outline, but it contains the following language: "Parts list and labor enclosed. This is an estimate. We will keep all parties informed as we go . . . If work is to be done we will do it as winter work there will be no charge for storage [sic]." This is the only express agreement concerning storage that the parties made. Defendants note that on or about January 2015, plaintiff raised an objection to their alleged failure to properly store the boat, and appear to find in that objection an agreement to pay for storage. However, given the context in which plaintiff raised this objection, specifically the representation of free storage in the September 29, 2014 "Scope of Work" outline, plaintiff's objection is capable of only one interpretation, a complaint that the promise to store the boat without charge was not being honored. It was not an agreement to pay for storage. The amount of the estimate attached to the September 29 outline is not clear from the record, but at his EBT Mr. Stavracos testified to beginning an estimate on an invoice form dated October 14, 2014, and adding to it over time. He could not recall whether he started the repairs before presenting the invoice to plaintiff. The court notes the record actually contains two invoice forms dated October 14, one numbered 604 and the other 605. Whether either one of these invoices is the enclosed parts list and labor estimate referenced in the September 29 outline is unclear.

Little work, if any at all, was done on the boat that winter, several absences throughout 2015 keeping Mr. Stavracos away from the business for nearly 10 months. Most of the work for which plaintiff eventually was billed was not done until after March 25, 2015. The project remains incomplete, and the boat unrepaired, and plaintiff has paid nothing beyond the $4,700.83 he paid in 2013. A sharp disagreement arose between the parties about whether plaintiff owed anything for the 2015 work. The court observes, however, that in a statement dated June 17, 2015, plaintiff wrote, with respect to one item, the removal and replacement of engine mounts, that "It was agreed that they would be paid for." The court also notes defendants' position that at least one repair, the replacement of two bilge pumps, became necessary to remove water from the boat.

Defendants claim a garagekeeper's lien on the boat (*see* Lien Law § 184 [1]). Their computation of the amount of the lien is confusing. On or about November 17, 2015, plaintiff received a statement from Steve's Marine dated November 1, 2015 in the amount of $14,653.34, for "Inv # 604 due 10/14/2014. Orig. Amount $11,705.48 – 2014 Summer Service Novice." Another November 1 invoice, numbered FC 63, identifies the remaining $2,947.86 as "Finance charges on overdue balance. Invoice # 604 for 11,705.48 on 10/14/2014." Thereafter, in August 2016, a notice of lien and sale was sent to plaintiff (*see* Lien Law § 200), with a sale date of September 2, 2016, although the sale was never held. At his EBT, Mr. Stavracos indicated the signature on the notice looked like his signature. The dollar figure of the lien on the notice is $18,784.30, which exceeds by about 50% the $11,705.48 billed on Invoice # 604 as the original amount. Defendants have broken this figure down into summer service and storage in the amount of $11,705.48, the November 2015 service charges of $2,947.86, a December 2015 service charge of $3,178.76, a February 2016 service charge of $477.20, and a $475.00 lien fee. The $11,705.48 item is the amount claimed to be due for all the work allegedly done on plaintiff's boat. At his EBT, defendant Mr. Stavracos identified the remaining four items as charges imposed for November, December, and February as interest, and the $475.00 lien fee as the charge of the lien company. Mr. Stavracos also acknowledged at his EBT that the $11,705.48 included storage, but he did not know how much was for storage, and the invoice itself does not contain a discrete storage item. Following plaintiff's receipt of the notice and sale, his attorney sent defendants a letter dated August 15, 2016. This appears to be the last communication between the parties before the commencement of this action some five months later, in January 2017.

In addition to the conversion cause of action which is the subject of the instant motion, plaintiff has interposed five other causes of action. The first, third, fifth, and sixth are contractual, and the second sounds in fraud. Defendants' counterclaims, both sounding in contract, are for the amounts due for their work, which is the subject of the first counterclaim, and for storage, which is the subject of the second.

Plaintiff now moves, and defendants cross-move, for summary judgment.

A party moving for summary judgment "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, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiencyof the opposing papers" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 503 [2012]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations are insufficient" to raise a triable issue (***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). In deciding a summary judgment motion, a court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 340 [2011]).

To recover on a cause of action for conversion, a party must show (1) legal ownership or an immediate right to possession on the part of claimant, and (2) exercise of dominion over the subject property to the exclusion of claimant's right (***Giardini v Settanni***, 159 AD3d 874, 875 [2d Dept 2018]; *see* ***Colavito v New York Organ Donor Network, Inc.***, 8 NY3d 43, 49-50 [2006]). Plaintiff's ownership

of the boat is not disputed, and so the court focuses on the second requirement. The gravamen of plaintiff's conversion cause of action is that defendants' invocation of Lien Law §§ 184 (1) and 200 resulted in their unlawful exercise of dominion of his boat to his exclusion as a matter of law. Pursuant to Lien Law § 184 (1), a person who keeps a place "for the storage, maintenance, keeping, or repair" of motor boats, and who in connection therewith repairs any motor boat "at the request or with the consent of the owner," has a lien upon such boat "for the sum due for such . . . repairing" and may detain such boat until such sum is paid. Because the statute is in derogation of common law, its provisions are strictly construed (***Santander Consumer USA, Inc. v A-1 Towing, Inc.***, 163 AD3d 1330, 1331 [3d Dept 2018]). Departures from its requirements constitute conversion as a matter of law (***Ingram v Machel & Jr. Auto Repair***, 148 AD2d 324, 325 [1st Dept 1989]). Although the computation of the lien amount is confusing, the undisputed facts establish that the lien here was improper in at least one respect. The notice of lien included amounts, more than a third of the total sum in the notice, that were not for the maintenance or repair of plaintiff's boat. On the basis of this departure from the requirements of the Lien Law alone, plaintiff has established his conversion cause of action as a matter of law.

Defendants take the position that the conversion claim is a reiteration of the contractual claim interposed in the first cause of action, which alleges a breach of the contractual obligation to repair, and must be dismissed on this basis. Without more, a conversion claim cannot be based on a breach of contract (*see* ***MBL Life Assur. Corp. v 555 Realty Co.***, 240 AD2d 375, 376 [2d Dept 1997]). However, the same conduct that constitutes a breach of contract may also be a breach of a separate obligation which, although arising out of the contractual relationship, is independent of both that relationship and of the contract itself, and which obligation can give rise to a claim for conversion (*see* ***Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp***, 64 AD3d 85,112-113 [2d Dept 2009]). The facts here present breaches of a separate obligation independent of the contractual relationship. The contract, if proven, defines the obligation of Steve's Marine to repair plaintiff's boat and its right to payment. It also gives rise to, and defines, its independent statutory right to retain the vessel and limits that right to the garagekeeper's lien for the value of the repairs. Consequently, both contractual and conversion causes of action may be maintained.

Defendants also assert that defendant Stavracos cannot be liable in conversion because he acted only in his capacity as officer of Steve's Marine, but caselaw demonstrates that a corporate officer, although acting for the benefit of a corporation, can be held personally liable for a conversion if he or she participated in it (*see* ***Starr Indem. & Liab. Co. v Global Warranty Group, LLC***, 165 AD3d 1308, 1309 [2d Dept 2018]). Mr. Stavracos prepared the notice of lien and signed it. He participated in the conversion. As imposition of liability on him personally for the conversion is proper, the motion to dismiss the fourth cause of action with respect to him is denied.

Plaintiff's motion for summary judgment against both defendants on his fourth cause of action on the issue of liability is granted. The court next addresses his demands for the imposition of costs against Steve's Marine for interposing what he characterizes as two frivolous counterclaims pursuant to CPLR 8303-a, and for the assessment of punitive double damages, insurance costs, and attorney's fees for the conversion. CPLR 8303-a applies to claims for "damages for personal injury, injury to property, or wrongful death, or an action brought by the individual who committed a crime against the victim of the

crime." The only potential qualifying basis for costs here is "injury to property." However, that term is defined as "an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract" (General Construction Law § 25-b). Since both counterclaims are contractual, the statute is inapplicable. Consequently, plaintiff's request for an assessment of costs for interposing these counterclaims is denied, and those demands are dismissed.

With respect to the demand for punitive double damages, no statute authorizes double damages for a conversion based on the violation of the garagekeeper's lien. In a proper case, punitive damages can be awarded in the absence of an authorizing statute. The New York State Court of Appeals has offered the following guidelines for the imposition of punitive damages in a tort action:

> [T]he defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations . . . [P]unitive damages may be sought when the wrong was deliberate and has the character of outrage frequently associated with crime . . . The misconduct must be exceptional as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . has engaged in outrageous or intentional misconduct or with reckless or wanton disregard of safety of rights.

(***Ross v Louise Wise Servs., Inc.***, 8 NY3d 478, 489 [2007] [internal quotation marks and citations omitted]).

The gravamen of the conversion is the assertion of a garagekeeper's lien in an excessive amount and the retention of plaintiff's boat. Such conduct does not meet the standards outlined to warrant an award of punitive damages. Consequently, the demand for punitive double damages on the fourth cause of action for conversion is denied, and that demand is dismissed.

Plaintiff's demand for insurance costs also is dismissed, as his obligation to insure his boat is not a consequence or incident of the conversion. Attorney's fees are not recoverable unless an award is expressly authorized by agreement between the parties, by statute, or by court rule (***Hooper Assoc., Ltd. v AGS Computers, Inc.***, 74 NY2d 487, 491 [1989]). Conversion being a tort, fees have not been authorized by agreement of the parties. They are not authorized by statute or court rule in an action for conversion such as the one plaintiff has brought either. Consequently, plaintiff's demand for attorney's fees is dismissed.

A hearing will be scheduled to determine all other damages issues (*see* CPLR 3212 [c]). The hearing is to be held in abeyance pending resolution of the parties' contractual claims.

Turning to that portion of defendants' cross motion in which they demand dismissal of the complaint for failure to state a cause of action (CPLR 3211 [a] [7]), or in the alternative for summary judgment, the issue whether the complaint states a cause of action is addressed first. In evaluating a motion to dismiss for failure to state a cause of action, a court must treat the facts as alleged in the

complaint as true, give the pleader the benefit of every possible favorable inference, and determine only whether the facts fit within any possible legal theory. On a motion made pursuant to CPLR 3211 (a) (7), the burden never shifts to the nonmoving party to rebut a defense. If evidentiary material is considered, the criterion becomes whether the pleader has a cause of action, not merely whether he or she has stated one, and unless the moving party has shown that a material fact in the pleading is not a fact at all and that no significant dispute exists regarding it, the claim should not be dismissed (***E & D Group, LLC v Vialet***, 134 AD3d 981, 982 [2d Dept 2015]).

Dismissal of the conversion claim effectively has been denied with respect to the fourth cause of action by the grant of plaintiff's motion for summary judgment with respect to it. However, the cross motion is granted to the extent of dismissing the second cause of action in its entirety, dismissing the first, third, fifth, and sixth causes of action, which sound in contract, against defendant Stavracos, and dismissing the plaintiff's demands that his damages on the remaining contractual claims include an award for punitive double damages, the cost of his boat insurance, and attorney's fees, plus costs pursuant to CPLR 8303-a.

The first, third, fifth, and sixth causes of action actually plead a single cause of action sounding in contract, with each specifying a different theory of the breach. "The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance pursuant to the contract, (3) the defendant's breach of its contractual obligations, and (4) damages resulting from the breach" (***Arnell Constr. Corp. v New York City Sch. Constr. Auth.***, 144 AD3d 714, 715 [2d Dept 2016]). Plaintiff pleads the existence of a contract between Steve's Marine and himself, his performance of his obligations, the breach by Steve's Marine of its alleged obligation to repair his boat, and damage. These claims state all the elements of a contractual cause of action. To the extent defendants seek summary judgment dismissing them on the ground that they lack merit, defendants have failed to establish their entitlement to judgment as a matter of law. Critical questions of fact, including the terms of the agreement of the parties and to what extent the parties satisfied those terms, are in dispute; consequently, the motion to dismiss the contractual causes of action against Steve's Marine in its entirety is denied.

With respect to defendant Stavracos, as noted earlier, he is a shareholder and the president of Steve's Marine. None of the allegations in plaintiff's papers reflect that Mr. Stavracos was a party to the alleged agreement between Steve's Marine and plaintiff. The contracting parties were plaintiff and Steve's Marine. With respect to the contracts of a corporation, "there is generally no individual liability for principals of a corporation for actions taken in furtherance of the corporation's business" (*see* ***Victory State Bank v EMBA Hylan, LLC***, 169 AD3d 963, 966 [2d Dept 2019]). The party seeking the imposition of liability against corporate principals for breach of the corporation's contract must show that the corporation is a sham—a shell used by the principals to conduct their own personal business—and that they exercise complete dominion and control over it (***Katz v N.Y. Tint Taxi Corp.***, 213 AD2d 599 [2d Dept 1995]). Such an evidentiary showing often includes, for example, proof that the corporation lacks a board of directors or shareholders, or corporate minutes, books, records, or bank accounts (*see* ***Maggio v Becca Constr. Co., Inc.***, 229 AD2d 426, 427-428 [2d Dept 1996]). Plaintiff has submitted no proof reflecting that Steve's Marine is a sham corporation. He had the opportunity to

question Mr. Stavracos on the point at the EBT, as well as to explore the issue through other forms of discovery, yet he did not do so. The only record evidence does not support his position. For example, the April 23, 2013 check he wrote is made out to Steve's Marine Service. The endorsement is a stamp consisting of three lines. The top line is "For Deposit Only." The line below it reads "Steve's Marine Service West," and the bottom line is an account number. In addition, the September 29, 2014 outline Mr. Stavracos wrote is on the letterhead of Steve's Marine, as are the invoices. The record establishes plaintiff only did business with Steve's Marine Service West, Inc., not Mr. Stavracos. Consequently, the cross motion to dismiss the complaint with respect to him, except for the fourth cause of action, is granted.

Plaintiff's second cause of action sounds in fraud. The allegations in this portion of the complaint are that defendants represented to plaintiff that the repairs had been done and his boat was in good working order, that based on these allegations plaintiff paid defendants the repair price, that the representations of defendants were false, that defendants knew they were false, and that plaintiff relied on these representations, resulting in damage. A cause of action for fraud may not be maintained when the fraudulent statement duplicates the alleged breach of contract. To maintain a separate cause of action sounding in fraud, the fraudulent statement must be collateral or extraneous to the terms of the agreement forming the basis of the contract claim (***Genovese v State Farm Mut. Auto. Ins. Co.***, 106 AD3d 866,867 [2d Dept 2013]). Here, the allegedly fraudulent representation is not collateral or extraneous to the agreement. The alleged misrepresentation in the fraud cause of action was that plaintiff's boat was repaired. The contract cause of action is for the breach of defendant's duty to repair that boat, and the alleged fraud is based on plaintiff's nonperformance of the contractual duty to repair the boat. Consequently, the cross motion to dismiss the second cause of action is granted with respect to both defendants.

Steve's Marine has interposed two counterclaims. It has failed to establish its entitlement to summary judgment on either of them. As noted earlier, both counterclaims are contractual. In the first, Steve's Marine alleges a contract existed with plaintiff whereby it was to perform work, labor and services consisting of mechanical work and materials for a specified price, that it performed its obligations under the contract, that plaintiff breached his contractual obligation to it by failing to make full payment, and that it has been damaged to the extent it has not been paid for its services. As the court observed in denying defendants' motion to dismiss plaintiff's contractual claims, critical questions of fact, including the terms of the agreement and the extent to which the parties satisfied those terms, are in dispute.

The second counterclaim is for the costs of storage of plaintiff's boat. The allegations in the counterclaim are that Steve's Marine stored the boat at the request of defendant, and plaintiff has not paid for the storage, and $9,000 is due. However, despite these allegations, in making out his conversion claim, plaintiff established the fact that he never agreed to pay a storage fee. As noted earlier, the only reference to storage was in the September 29, 2014 writing outlining the repairs plaintiff's boat needed, and it was to the effect that Steve's Marine would not charge plaintiff for storage if the work were done over the winter. No express agreement was made thereafter pursuant to which plaintiff agreed to be liable for storage fees if the work was not done then. The notice of lien reflects that the $11,705.48 item

included storage. Absent an express agreement for storage, a garagekeeper's lien cannot be employed to recover storage charges (***BMW Bank of N. Am. v G & B Collision Ctr., Inc.***, 46 AD3d 875, 876 [2d Dept 2007]). Caselaw reflects that defendants' use of the lien to do so defeats the second counterclaim; in an action for conversion against a garagekeeper, the Appellate Division ruled that if a garagekeeper cannot recover storage charges asserted in a lien because of the absence of an express agreement, it cannot recover them in contract either (***F & N Corvette & Classics v Corvette Repairs, Inc.***, 206 AD2d 349, 350 [2d Dept 1994]). "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment" (CPLR 3212 [b]). As a matter of law, Steve's Marine cannot recover the storage fees on a contract theory, and summary judgment is granted, therefore, dismissing the second counterclaim.

To the extent Steve's Marine seeks to dismiss plaintiff's demand for the imposition of costs for what he characterizes as its interposition of frivolous counterclaims (CPLR 8303-a), its motion effectively was granted earlier by the denial of plaintiff's demand for an assessment of costs and the dismissal of that demand.

Defendant also seeks dismissal of plaintiff's demand for double punitive damages on its contract claims. Plaintiff does not base its demand on statute. Absent a statutory basis for the imposition of punitive damages, the rule is that "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights" (*see* ***Rocanova v Equitable Life Assur. Socy. of U.S.***, 83 NY2d 603, 613 [1994]). The allegations of the complaint reflect nothing more than an ordinary breach of contract, and so plaintiff may not recover punitive damages. The demand for punitive damages is dismissed.

The question of the dismissal of plaintiff's demands for his insurance costs and attorney's fees remains for consideration. The reasons for dismissal of those demands with respect to plaintiff's conversion claim apply with equal force to his contract claims. Consequently, those demands are dismissed.

Dated: 6-1-20

HON. WILLIAM J. CONDON

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**