

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE WILLIAM T. GLOVER IA Part 23
Justice

	x	Index Number <u>23960</u> 2002
LANGDALE OWNERS CORP.		Motion Date <u>December 18,</u> 2002
- against -		Motion Cal. Number <u>16</u>
UNITED CONTRACTING SERVICES OF NEW YORK CORPORATION, et al.	x	

The following papers numbered 1 to 14 were read on this motion by the defendants, pursuant to CPLR 3211[a][7] and CPLR 3016[b], to dismiss the first and second causes of action interposed against the defendants David Henry and William Hogan, individually, to dismiss the third cause of action based on General Business Law 349, to dismiss the fourth cause of action for failure to plead fraud with particularity and, pursuant to CPLR 7503[a], to stay all causes of action against the defendant United Contracting Services of New York Corp., d/b/a United Contracting Services Corp., on the ground that the claims are the subject of a pending arbitration proceeding; and, cross motion, by the plaintiff, pursuant to CPLR 3212 and CPLR 3211[a][1], for summary judgment on the first, second, third and fourth causes of action and based upon documentary evidence.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Notice of Cross Motion - Affidavits - Exhibits ..	5 - 9
Answering Affidavits - Exhibits	10 - 12
Reply Affidavits	13 - 14

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

In October, 2001, the plaintiff Langdale Owners Corp. ("Langdale"), entered into a contract for the removal and disposal of asbestos insulation and the reinsulation of certain areas of a

premises. Instead of delineating its name as "United Contracting Services of New York Corporation" ("United"), that defendant executed the contract in the name "United Contracting Services Corp." ("the nonexistent entity").

The contract was signed by Margaret Healy, as President of Langdale, and by Liam Hogan, as Vice President of the nonexistent entity. The contract rider between Langdale and the nonexistent entity contains the printed names of the corporations, and a signature line beneath each printed name, which was signed by Margaret Healy and Liam Hogan, without any indication of an official corporate capacity.

When a dispute arose due to the alleged failure to complete the work within a certain time, Langdale terminated the contract. Although arbitration was demanded, it did not proceed due to the failure of United or the nonexistent entity to pay its share of the arbitration fee. As a result, Langdale commenced this action against United, d/b/a the nonexistent entity, and against David Henry and William Hogan individually. In four causes of action, Langdale seeks damages jointly and severally from Henry and Hogan individually, and from United, based upon: (1) breach of contract; (2) unjust enrichment; (3) a violation of General Business Law ("GBL") section 349; and, (4) an alter ego or pierce the corporate veil theory.

The complaint alleges that because the nonexistent entity is not licensed by the State Department of Labor in violation of Labor Law 902[1], and is not registered with the Secretary of State, Henry and Hogan are personally liable under the contract. The complaint also alleges that Henry and Hogan formed the nonexistent entity for the sole purpose of fraudulently shielding assets paid to United and to evade personal liability, and operated under the name of the nonexistent entity solely to defraud Langdale. Langdale further alleges that Henry and Hogan exercised such dominion and control over United, and so depleted or secreted United assets, as to make United their alter ego and a vehicle for personal, rather than corporate ends.

To date, no answer has been interposed by United, Henry or Hogan.

II. The Motion and Cross Motion

In their motion to dismiss, Henry and Hogan assert that at all times they acted as officers of United and Langdale contracted with United, so the first and second causes of action interposed against them individually must be dismissed. The defendants urge that the cause of action based upon GBL 349 must be dismissed, as only a

private contractual dispute is at issue, and the complained-of conduct was not directed at the public generally. Finally, they contend that the fourth cause of action fails to plead fraud with particularity, and the entire action against United should be stayed pending the completion of an ongoing arbitration which was demanded pursuant to the contract.

Langdale opposes the motion asserting that Henry and Hogan are personally liable because they entered into a contract using the name of a non-existent entity and repeatedly used that name in annexed advertising and business cards, with the intent to deceive the public at large. Langdale urges that it has pleaded all causes of action with sufficient particularity, but it seeks leave to interpose an annexed proposed amended verified complaint should further particularity be required. Finally, it contends that United waived its right to proceed to arbitration by failing to pay the fee. Based upon the same facts and documents, Langdale also moves for summary judgment on all causes of action.

The defendants respond, inter alia, that Langdale's CPLR 3212 motion for summary judgment is premature as issue has not been joined. They note that the documentary evidence demonstrates that only Hogan, not Henry, executed the contract with Langdale, and Hogan did so only in an official capacity. They argue that Langdale sued United in its proper corporate name, and they urge that there was no fictitious or nonexistent corporation, only an oversight in the manner in which the corporate name appeared on contract documents. Finally, they annex a license issued to United by the State Department of Labor, and assert that a certificate for doing business for United is also on file with the Secretary of State.

Langdale replies that it contracted with the nonexistent entity, any judgment it might obtain against that entity would be worthless, and the fact that United is in good standing is irrelevant, as United did not execute the contract.

III. Decision

In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction, and the plaintiff is accorded the benefit of every possible favorable inference (see, Leon v Martinez, 84 NY2d 83, 87-88; Rovello v Orofino Realty Co., 40 NY2d 633, 634). Where, however, documentary evidence utterly refutes a plaintiff's factual allegations, and conclusively establishes a defense as a matter of law, the cause of action may be dismissed (see, Leon, supra 84 NY2d at 88).

Here, the documentary evidence clearly demonstrates that Langdale entered into a contract with a nonexistent entity and that only Hogan executed the contract on behalf of that entity. Although the defendants assert that the manner in which the contract was executed was an oversight, the documentary evidence demonstrates that the defendants repeatedly advertised under the name of the nonexistent entity, rather than in United's name, and performed work for other companies in the name of the nonexistent entity.

At this stage of the proceeding, Hogan and Henry have failed to demonstrate conclusively and as a matter of law that they cannot be individually liable on the contract (see, Fuller v Rowe, 57 NY 23; Brandes Meat Corp. v Cromer, 146 AD2d 666; Imero Fiorentino Assocs., Inc. v Green, 85 AD2d 419). As a result, the motion to dismiss the first and second causes of action interposed against the individual defendants is denied.

General Business Law 349 prohibits deceptive acts or practices in the conduct of any business trade or commerce or in the furnishing of any service in this state (see, Goshen v Mutual Life Ins. Co. of NY, 98 NY2d 314, 321). Pursuant to the statute, a prima facie case requires a showing that the defendant is engaging in an act or practice that is deceptive or misleading in a material way, with an impact on consumers at large, and that the plaintiff has been injured by reason thereof (see, Oswego Laborers Local 214 Pension Fund v Marine Midland Bank, N.A., 85 NY2d 20, 25-26; Goshen, supra at 324). The allegedly deceptive acts, representations or omissions must be misleading to "a reasonable consumer acting reasonably under the circumstances" (see, Andre Strishak & Assocs., P.C. v Hewlett Packard Co., ___ AD2d ___, 752 NYS2d 400, quoting, Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra at 26).

The third cause of action alleges only that Henry and Hogan operated under the name of the nonexistent entity for the sole purpose of defrauding Langdale. Thus, there is no allegation of an impact on consumers at large. Nonetheless, the proposed amended complaint alleges that United consistently advertised in the name of the nonexistent entity and contracted with other companies under that name, which does adequately allege an act or practice which is deceptive and misleading in a material way with an impact on consumers at large (cf., GBL 133 [making it a misdemeanor to assume a name for advertising purposes or for the purposes of trade, with intent to deceive or mislead the public as to the true identity of the corporation]). As the documentary evidence also supports these allegations, the motion to dismiss the cause of action in the original complaint is granted, and that branch of Langdale's cross motion seeking leave to amend the complaint to interpose the

sufficiently stated third cause of action is granted (see, Holchendler v We Transp., Inc., 292 AD2d 568; CPLR 3025[b]).

The fourth cause of action alleges that the defendants have informed the plaintiff that they have depleted and secreted the assets of United and that Henry and Hogan have exercised such dominion and control United, that it has become their alter ego. These allegations fail to allege an alter ego or pierce the corporate veil cause of action with sufficient particularity (see, Abelman v Shoratlantic Dev. Co., Inc., 153 AD2d 821).

Nonetheless, the allegations in the proposed amended complaint that the use of the nonexistent corporate name was intentionally misleading and false, that the defendants have never corrected their advertising or stationary and have filed forms with agencies in the nonexistent entity's name, that they have depleted and secreted corporate monies for their own purpose, and other alter ego allegations, are sufficient to state a cause of action (see, Trans Int'l Corp. v Clear View Technologies, Ltd., 278 AD2d 1; 5th & 46th Co. v Duesenberry, Ruriani & Kornhauser, Inc., 57 AD2d 791). As the documentary evidence also supports these allegations, the defendants' motion to dismiss the fourth cause of action is granted, and Langdale's cross motion seeking leave to amend the complaint to interpose the sufficiently stated fourth cause of action is granted (see Holchendler v We Transp., Inc., supra; CPLR 3025[b]).

That branch of the defendants' motion seeking to stay the action to allow the arbitration to proceed is denied, in light of the evidence that the defendants have not proceeded to arbitration by paying their share of the arbitration fee. Langdale's cross motion for summary judgment is denied, without prejudice, as premature.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the branch of the defendants' motion to dismiss the causes of action in the complaint is granted to the extent of dismissing the third and fourth causes of action, and otherwise is denied; and it is further

ORDERED that the branch of the defendants' motion seeking to stay all proceedings against the corporate defendant based upon a pending arbitration proceeding is denied; and it is further

ORDERED that the branch of the plaintiff's cross motion seeking summary judgment is denied, without prejudice; and it is further

ORDERED that the branch of the plaintiff's cross motion seeking leave to amend the complaint in order to replead and interpose the sufficiently stated third and fourth causes of action interposed therein, as well as additional factual allegations is granted, and the plaintiff's amended verified complaint is deemed to have been served on the defendants. Upon service of notice of entry of this order, the defendants shall serve their answer in conformity with CPLR 3211[f].

Dated: February 21, 2003

J.S.C.