Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Michael Ruland,	Index No.: 603555/2016E
Plaintiff,	Attorneys/Parties [See Rider Annexed]
-against-	Motion Sequence No.: 010; MD Motion Date: 11/20/19 Submitted: 11/27/19
Stacy Leibowitz, DJ Plumbing Supply Company Inc., The Builder Inc., Michael Algozzino Plumbing & Heating, Custom Modular Homes of Long Island Inc., Quality Crafted Homes, Inc. and Quality Crafted Homes of Long Island, Inc.	Motion Sequence No.: 006; MOTD Motion Date: 4/26/19 Submitted: 11/27/19
Defendants.	Motion Sequence No.: 007; MOTD Motion Date: 5/1/19 Submitted: 11/27/19
	Motion Sequence No.: 009; MOTD Motion Date: 10/15/19 Submitted: 11/27/19

Upon the **E-file document list** numbered 102 to 219 read on the application by defendant Stacy Leibowitz for an order pursuant to CPLR 3216 striking the answer of defendant Custom Modular Homes of Long Island, Inc., including its cross-claims, or in the alternative, pursuant to CPLR 3124 compelling defendant Custom Modular Homes of Long Island, Inc. to produce Barry J. Altman for his complete deposition; on the application by defendant Michael Algozzino Plumbing & Heating for an order pursuant to CPLR 3216 striking the answer and cross-claims of defendant Custom Modular Homes of Long Island, Inc., or in the alternative, pursuant to CPLR 3124 compelling defendant Custom Modular Homes of Long Island, Inc. to produce Barry J. Altman for his deposition; on the application by defendant Custom Modular Homes of Long Island, Inc. for an order granting it leave to complete the deposition of Barry J. Altman; and on plaintiff's application for an order granting leave to supplement plaintiff's summons and amend his complaint pursuant to CPLR 3025 and pursuant to CPLR 203 [b] to assert claims against and add Steven A. Graboski and Barry J. Altman as defendants; it is

ORDERED that the motions (Motion Sequences 006, 007, 009, and 010) are consolidated for purposes of a determination herein; and it is further

ORDERED that plaintiff's motion to amend the complaint to add Steven A. Graboski and Barry J. Altman as defendants is denied; and it is further

ORDERED that the motions by defendants Michael Algozzino Plumbing & Heating and Stacy Leibowitz pursuant to CPLR 3126 and 3124 and the motion by defendant Custom Modular Homes of Long Island, Inc. are granted to the extent that Barry J. Altman shall appear for his continued deposition to be held at the Courthouse, located at One Court Street, Riverhead, New York at 10:00 a.m. on February 4, 2020 at 10:00 a.m., or on a different date and/or at an alternate location, as may be agreed upon by counsel for the parties; and it is further

ORDERED that in the event Barry J. Altman does not appear for his deposition within forty-five (45) days from the date of this order, the court will entertain forthwith any appropriate application in regards to same.

This is an action seeking damages for personal injuries allegedly sustained by plaintiff in a work-related accident on December 2, 2015 at 9 Bayview Drive, Westhampton, New York. Plaintiff commenced this action by the filing of a summons and complaint on March 7, 2016. Issue was joined and thereafter on February 28, 2017, plaintiff served and filed his verified bill of particulars. Plaintiff alleges that while he was using a chalk line on the project, the nail holding the chalk line struck his unprotected eye causing a serious injury, which ultimately led to the removal of his left eye and the placement of a prosthetic eye. Plaintiff alleges that defendants and the proposed defendants failed to provide plaintiff with safety goggles, failed to properly supervise and coordinate the work site, and failed to provide plaintiff with proper training. Plaintiff brought this action against the defendants asserting claims for negligence and violations of New York Labor Law §§200, 241 [6], New York Industrial Code §23-1.8 [a] and 29 C.F.R. 1910.133 [a]. On April 22, 2019, the deposition of Barry J. Altman ("Altman") commenced but was not completed due to a concern raised by counsel for Custom Modular Homes of Long Island, Inc. ("CMH") that there may be a conflict of interest. By stipulation of the parties[1], the Altman deposition was to be continued on September 26, 2019. Thereafter, plaintiff moved to amend the complaint to add Altman and Steven A. Graboski ("Graboski") as defendants, both of whom are principals of CMH. Plaintiff asserts that the deposition testimony of Graboski indicates that Altman was the *defacto* general contractor for the job, not CMH. Plaintiff argues that the deposition of Graboski "points to Altman as the general contractor,...the free use of several corporate names under which Graboski and Altman operated,...along with the deposit of payments to CMH into the personal bank accounts of one of

[1]Stipulations, while "so-ordered", are essentially agreements which are governed by general principles of contract law (*see* ***Daibes v. Kahn,*** 116 AD3d 994, 983 NYS2d 898 [2d Dept. 2014] and cases cited therein) and thus, are to be enforced according to their terms.

these principals of the corporation." Plaintiff seeks to amend the complaint to pierce the corporate veil to hold both Altman and Graboski personally liable for plaintiff's alleged damages.

CPLR 3025 [b] provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. CPLR 1003 states in pertinent part that "parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared."

"Leave to amend a pleading should be freely granted unless the amendment is palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party" (***Trataros Constr., Inc. v. New York City Hous. Auth.,*** 34 AD3d 451, 823 NYS2d 534 [2d Dept. 2006]; *see also* CPLR 3025 [b]; ***Myung Hwa Jang v. Mang,*** 164 AD3d 803, 83 NYS3d 293 [2d Dept. 2018]; ***Maloney Carpentry, Inc. v. Budnik,*** 37 AD3d 558, 830 NYS2d 262 [2d Dept. 2007]). Whether to grant or deny leave to amend is committed to the trial court's sound discretion (***Edenwald Contracting Co., Inc. v. City of New York***, 60 N.Y.2d 957, 959 [1983]).

The deposition testimony of Altman reveals that he generated an invoice from defendant The Builder, Inc. ("Builder") for the subject project at the accident location in 2016. Builder was a company previously owned by Altman, which dissolved sometime in 2014. Altman further testified that CMH prepared a contract for the subject project which was generated solely to obtain permits from the Town and that a contractual construction management fee of $37,725.00 was a payment made to Altman personally and not to CMH. Altman deposited the $37,725.00 into his personal bank account rather than the CMH account. Altman further testified that he acted as an advisor for the home project in his individual capacity and that even though CMH was listed as the contractor for the subject project, CMH did not perform any of the work listed in the contract. Altman further testified that CMH's contracts were on his home office computer, which were not accessible through a shared network. Graboski testified that CMH did not keep meeting minutes, that there were no bylaws for CMH, that he and Altman operated other businesses exclusive of one another, and that CMH's physical office received mail and telephone calls for Graboski's personal business.

Here, there is no prejudice or surprise to Altman and Graboski by adding them as defendants, as they were aware of the claims in the complaint. They are both principals of defendant CMH and had prior knowledge of the claims being asserted against them, which arise out of the same facts underlying the original complaint (*see* ***D'Angelo v. Kujawski,*** 164 AD3d 648, 83 NYS3d 283 [2d Dept. 2018]; ***Maldonado v. Newport Gardens, Inc.,*** 91 AD3d 731, 937 NYS2d 260 [2d Dept. 2012]; ***RCLA, LLC v. 50-09 Realty, LLC,*** 48 AD3d 538, 852 NYS2d 211 [2d Dept. 2008]).

However, the claims asserted against Altman and Graboski in their individual capacities are palpably insufficient and devoid of merit (*see e.g.,* ***Vivir of L I, Inc. v. Ehrenkranz,*** 145 AD3d 834, 43 NYS3d 435 [2d Dept. 2016]; *cf.* ***Sugar Foods De Mexico v. Scientific Scents, LLC,*** 79 AD3d 1551, 914 NYS2d 352 [3d Dept. 2010]). The general rule is that corporate officers cannot be held personally responsible for the obligations of the corporation (***Westminster Const. Co., Inc. v Sherman***, 160 AD2d 867, 554 NYS2d 300 [2d Dept 1990]). "A plaintiff seeking to pierce the

corporate veil must demonstrate that a court of equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (***Vivir of L I, Inc. v. Ehrenkranz,*** 145 AD3d 834, 43 NYS3d 435 [2d Dept. 2016]; *see also* ***Morris v. New York State Dept. of Taxation & Fin.,*** 82 NY2d 135, 142, 603 NYS2d 807 [1993]; ***Flushing Plaza Assoc. #2 v. Albert,*** 102 AD3d 737, 958 NYS2d 713 [2d Dept. 2013]; ***East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.***, 66 AD3d 122, 127, 884 NS2d 94 [2d Dept 2009]). The decision whether to pierce the corporate veil "depends on the particular facts and circumstances", which may include evidence that the owner failed to adhere to corporate formalities, commingled assets, and used corporate funds for personal use (***East Hampton v. Sandpebble,*** *supra,* 102 AD3d at 739). However, the mere claim that the corporation was completely dominated by the owner will not suffice. "For a complaint to state a cause of action for piercing the corporate veil, the plaintiff cannot rely upon vague or conclusory allegations that the individual defendant abused the corporate form, but instead must articulate actual conduct by the individual that creates a nexus between it and the 'transactions or occurrences' of the complaint" (***East Hampton v. Sandpebble,*** *supra*, 66 AD3d at 132). Thus, a showing of a wrongful act or tortious conduct toward the plaintiff is required (***Vivir of L I, Inc. v. Ehrenkranz***, *supra;* ***Rothstein v. Equity Ventures, LLC,*** 299 AD2d 472, 750 NYS2d 625 [2d Dept. 2002]). Here, while Altman may have exercised significant control over CMH, plaintiff has not established any nexus between Altman's dominion and control over the corporation and the plaintiff's injury. Indeed, Altman's actions with regard to CMH are wholly separate and distinct from the conduct alleged to have caused plaintiff's injury. As there is no claim asserted herein that the alleged wrongful conduct by Altman in regards to CMH resulted in the plaintiff's injury to his left eye, plaintiff's motion to amend the complaint is denied (***Vivir of L I, Inc. v. Ehrenkranz,*** 145 AD3d 834, 43 NYS3d 435 [2d Dept. 2016]).

As to the motions to strike the answer of CMH or compel Altman to appear for his continued deposition, it is firmly established that "[t]he supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (***Mattocks v. White Motor Corp.***, 258 A.D.2d 628, 629, 685 N.Y.S.2d 764 [2d Dept. 1999]; *see also* ***Auerbach v. Klein***, 30 AD3d 451, 816 NYS2d 376 [2d Dept. 2006]). "This discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind" (***Cascardo v. Cascardo,*** 136 AD3d 729, 730, 24 NYS3d 742 [2d Dept. 2016]).

Striking a pleading for failure to provide discovery is a drastic remedy which will only be invoked where the non-movant's conduct was willful, deliberate or contumacious (*see* ***Zakhidov v. Boulevard Tenants Corp.,*** 96 AD3d 727, 945 NYS2d 756 [2d Dept. 2012]; ***Tinkleman v. Hudson Valley Winery***, 80 A.D.2d 844 [2d Dept., 1981]). When a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the trial judge's discretion to dismiss the pleadings (***Kihl v. Pfeffer***, 94 N.Y.2d 118 [1999]). However, it is always preferable to have actions decided on their merits (***Sieden v. Copen***, 170 A.D.2d 262 [1st Dept.1991]).

Here, the deposition of Altman commenced but could not be concluded due to conflict of interest concerns raised by counsel for CMH. Under these circumstances, the court cannot find willful or contumacious conduct on the part of CMH. However, CMH is cautioned that its failure to comply with this order may result in a further order pursuant to CPLR 3126 upon the submission of a proper application to the court (*see* ***Cianciolo v. Trism Specialized Carriers,*** 274 AD2d 369, 711 NYS2d 441 [2d Dept. 2000]; ***Heyward v. Benyarko,*** 82 AD2d 751, 440 NYS2d 21 [1st Dept. 1981]). In that regard, the Second Department has determined that precluding the testimony of the party at the time of trial would be the appropriate sanction for his or her failure to appear for a deposition (*see* ***Cianciolo v. Trism Specialized Carriers,*** 274 AD2d 369, 711 NYS2d 441 [2d Dept. 2000]; ***Heyward v. Benyarko,*** 82 AD2d 751, 440 NYS2d 21 [1st Dept. 1981]).

Accordingly, defendants' motions are granted to the extent set forth in the above ordered paragraphs and plaintiff's motion is denied.

The foregoing constitutes the ***Decision*** and ***Order*** of the Court.

Dated: 1/17/2020

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

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

RIDER

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