

Scan

SHORT FORM ORDER

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

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

BORN TO BUILD, LLC,

Plaintiff,

INDEX NO.: 002345/2011

MOTION DATE: 5/16/11

- against -

SEQUENCE NO.: 03

**IBRAHIM SALEH, a/k/a Abraham Saleh, a/k/a
Kamel Saleh, a/k/a Kamel Y. Saleh, a/k/a Kamel
Youssef Saleh, a/k/a Yaakoub Saleh, a/k/a Yaakoub
Y. Saleh, a/k/a Yaakoub Youssef Saleh, 1141
REALTY, LLC, KARIM BIN TALEB, a/k/a Karim
Bentelab, BORN TO BUILD CONSTRUCTION
CORP., SARITA VASWANI, BANCO POPULAR
OF NORTH AMERICA, EDMUND A. NAHAS,
ZRAICK, HAHAS & RICH, and JOHN DOES 1 — 10
(such parties being persons or entities who have
possession of plaintiff's tools and equipment, or who
own or control the places where such tools and
equipment are stored),**

Defendants.

The following documents were read on this motion:

- Amended Order to Show Cause for Default Judgment 1.**
- Affirmation in Partial Opposition on behalf of defendants
Edmund A. Nahas, and Zraick, Nahas and Rich 2.**
- Reply Affirmation of Stuart L. Sanders, Esq. 3.**

PRELIMINARY STATEMENT

Plaintiff moves by Order to Show Cause for entry of a default judgment against defendant Ibrahim Saleh, or alternatively, scheduling the matter for Inquest.

BACKGROUND

Plaintiff is a general contractor which was retained to provide construction services under three separate contracts of construction. The projects include the construction of a three-story building at 30-63 Steinway Street, Astoria, New York; the demolition and reconstruction of a home at 38-16 220th Street, Bayside, New York; and the demolition of an existing building at 1141 Broadway, New York, New York, and the construction of a hotel on the premises. The third agreement was allegedly with a company named 1141 Realty, LLC, a company controlled by Saleh. Plaintiff asserts that Saleh subsequently promised to be personally and primarily liable in order to induce plaintiff to commence the project without the benefit of completed blue prints or plans.

The general contracting fee promised on the three projects were \$72,000, \$160,000, and \$1,200,000 respectively. In addition, plaintiff claims a bonus of \$250,000 from Saleh in the third project was completed withing two years of commencement.

Saleh allegedly breached the first and second agreements by failing to pay the promised general contractor fees, for which plaintiff claims damages of \$72,000 and \$160,000 respectively. Plaintiff claims to have completed approximately 95% of the work on the third project before they were terminated without cause. Defendant Saleh allegedly failed to pay the \$1,200,000 fee, reimburse plaintiff for \$940,000 for materials, labor and services, or pay the promised bonus of \$250,000. Plaintiff claims that they would have completed the project within the two-year period were it not for the termination.

Plaintiff asserts additional causes of action beside breach of contract. Certain defendants, are accused of fraud in that he required that plaintiff open an account in a Banco Popular branch in California, in which the wife of one of Saleh's friends was employed. Beginning in November 2007, Saleh deposited, or caused to be deposited

\$2,500,000 into the account. Plaintiff's records with respect to the bank account, including the check book were stolen from their on-site office at 1141 Broadway. Aside from George Hourani, the principal of plaintiff, only Saleh and his assistant, Karim Bin Taleb, had keys to the office.

When plaintiff ceased receiving statements on the account, he made inquiry, and ascertained that the address on the account had been changed to the office of a law firm affiliated with Saleh. When plaintiff reviewed the account statements, he learned that large unauthorized wire transfers had occurred. Among the recipients of funds from the account were a steel contractor, which Saleh was supposed to pay directly, Scottrade, US Bank, companies located in China, and Vijay Associates, owned by defendant Sarita Vaswani's husband. Ms. Vaswani is the bank employee at Banco Popular. Additional electronic payments were made from the account into an American Express Account in the name of Bin Taleb. The total amount of unauthorized wire transfers was \$1,450,525.97.

There were also a series of unauthorized checks, but plaintiff is not presently able to specify the precise amount, claimed to be because of the cost of reproduction of all the unauthorized checks. Nevertheless, plaintiff asserts that the account in their name had been fully depleted, and had a negative balance as of March 2009.

Additional elements of the alleged fraudulent conduct on the part of Saleh and Bin Taleb, include the creation of a corporation entitled Born to Build Corp. to facilitate transfers of money from the Banco Popular account.

In or about November 2008, the New York City Department of Buildings issued a stop work order for the 1141 Broadway project. In or about January 2009 employees of plaintiff went to the project to retrieve construction tools and equipment which had been left on site. They were prevented from accessing the equipment, and plaintiff's principal has been advised that the tools and equipment had been moved at the direction of Saleh and Bin Taleb, and stored in the basement of an empty home in Bayside owned by Saleh's brother, and in a warehouse at 260 Adams Blvd., Farmingdale, New York. Plaintiff places

a value of \$200,000 on the tools and equipment.

Further efforts to communicate with Saleh have been fruitless, and a representative of the Federal Bureau of Investigation has advised that Saleh has failed to appear in connection with criminal proceedings against him, and that there is an outstanding warrant for his arrest.

DISCUSSION

Plaintiff has adequately alleged a breach of contract action against Saleh with respect to the first and second construction projects. The contract for the third project, however, was with 1141 Realty, LLC. There has been no evidence submitted which would warrant the imposition of individual liability against Saleh for the breach of contract by the limited liability company.

The law permits the creation of corporations, limited liability companies, and limited liability partnerships for the conduct of business so as to shield its proprietors personal liability. But this privilege is not without its limits, and the courts will disregard the corporate form, or “pierce the corporate veil”, whenever necessary “to prevent fraud or achieve equity”. *Waldovszky v. Carlton*, (18 N.Y.2d 414, 417 [1966]). The Court there determined that while the complaint alleged that there were ten separate corporations, each of which had as its sole asset two taxi cabs, with the statutory minimum liability insurance, and from which funds were regularly and systematically removed by the Defendant and his associates, and, further, that the corporations were operated without formality, and solely to suit their immediate convenience, was insufficient to warrant the imposition of personal liability on the individual stockholders. *Id.* at 421.

There is a corollary of the traditional “veil-piercing” process, which holds the corporate shareholders, or other corporations, responsible for corporate obligations. That is a claim 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. *Solow v. Domestic Stone Erectors, Inc.*, (269 A.D.2d 199 [1st Dept. 2000]).

Defendant Saleh has not appeared in the action and is in default. Plaintiff is entitled to a judgment against him for \$72,000 and \$120,000 with respect to the first and second projects. While plaintiff asserts a promise by Saleh to be personally liable for the obligations of 1141 Broadway, including the \$1,120,000 general contracting fee, the \$940,000 for expenditures for material and labor, and the \$250,000 bonus for completion of the project within two years, no written documentation of this promise has been provided.

An oral promise to be responsible for the debt, default or miscarriage of another is unenforceable. General Obligations Law § 5-701 (a)(2). Moreover, an oral contract which by its terms cannot be completed within one year, is barred by the Statute of Frauds. It may well be that defendant would be equitably estopped from relying on the Statute of Frauds where plaintiff can establish reliance on the oral promise, and conduct undertaken by plaintiff to their economic detriment at the behest of defendant's promises. (*Swerdloff v. Mobil Oil Corp.*, 74 A.D.2d 258, 268 [2d Dept.1980]). While this may be a valid claim against 1141 Broadway, it does not overcome the insulation from personal liability in the absence of grounds for breaching the corporate veil.

Plaintiff has enumerated specific acts by Saleh such as to constitute fraud and misappropriation of funds. All of the money deposited in the Born to Build, LLC account in Banco Popular was intended to be payment for services and repayment for expenditures in conjunction with the 1141 Broadway project. Defendant Saleh has defaulted in answering the complaint, and plaintiff is entitled to a judgment in the amount of \$2,500,000, the former balance in the now depleted account.

Plaintiff is also entitled to judgment in the sum of \$200,000, representing the claimed value of the tools and equipment allegedly confiscated by Saleh and his associate.

CONCLUSION

Plaintiff is entitled to a judgment against defendant Ibrahim Saleh in the combined sum of \$2,732,000, representing the sums due on the first and second projects, and the sums deposited in the account of Banco Popular which have been diverted by defendant Saleh and others.

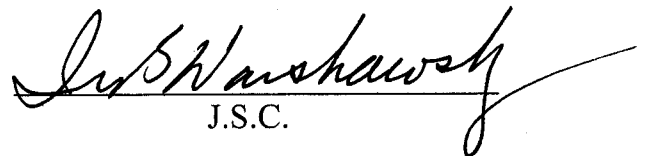
Counsel for defendants Nahas and Zraick, Hahas & Rich, an attorney and his law firm, do not object to the entry of judgment by default against Saleh, but object to the immediate determination of damages, claiming that this would be unduly prejudicial to them in the absence of an opportunity for discovery. This claim is without merit. No determination of damages against defendant Saleh is on the merits, nor is it binding against other defendants. Mr. Saleh has made himself scarce, and may well have fled the jurisdiction of the Courts of New York and of the United States. Handing plaintiff a Pyrrhic victory would compound the damage they have sustained.

The actions against all defendants other than Ibrahim Saleh are severed. The determination of liability and damages against Sale shall not constitute law of the case or collateral estoppel against the other defendants, since it does not constitute a determination on the merits. (*Holt v. Holt*, 262 A.D.2d 530 [2d.Dept.1999]; *Woodson v. Mendon Leasing Corp.*, 259 A.D.2d 304 [1st Dept.1999]). The remaining defendants are free to conduct discovery and litigate the action on the merits.

Submit Judgment.

This constitutes the Decision and Order of the Court.

Dated: May 18, 2011


J.S.C.

ENTERED
MAY 23 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE