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SHORT FORM ORDER

INDEX NO.: 5308/12
SUBMIT DATE: 1-2-2013
MTN. SEQ.#: 001

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present: **HON. JOHN J.J. JONES, JR.**
Justice

MOTION DATE: 10-10-2012
MOTION NO.: MD

MICHAEL SPANO and DONNA SPANO,

Plaintiffs,

-against-

AM SUTTON, ARCHTECT, P.C.,
ALFRED M. SUTTON, RA, ADVANCED
CONSTRUCTION AND MANAGEMENT
CORP., ROBERT MCGRATH, JR.,
LAURA MCGRATH, LONG ISLAND
MILLWORK INC., GUANGA MASONRY,
INC., MID ISLAND STEEL CORP., J.S.
CONTRACTING, INC. and TRESCOTT
CONSTRUCTION, INC.,

Defendants.
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Russo, Karl, Widmaier & Cordano, LLC
Attys for Plaintiffs
400 Town line Road, Suite 170, Hauppauge, NY 11788

Law Offices of Jeffrey B. Hulse, Esq.
Attys for Defendants AM Sutton Architect & Sutton
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Faust Goetz Schenker & Blee LLP
Attys for Defendants Advanced Construction & McGrath
2 Rector Street, New York, NY 10005

Marshall Conway & Bradley, P.C.
Attys for Defendant, Long Island Millwork
45 Broadway, New York, NY 10006

**Congdon, Flaherty, O'Callaghan, Reid,
Donlon, Travis & Fislinger**
Attys for Defendant, Guanga Masonry
333 Earle Ovington Blvd.- 502, Uniondale, NY 11353

Hardin, Kundla, McKeon & Poletto
Attys for Defendant, Mid Island Steel
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Atty for Defendant J.S. Contracting
80 Glen Cove Road, Greenvale, NY 11548

Trescott Construction, Inc.
390 Old Hauppauge Road, Smithtown, NY 11788

Upon the following papers numbered 1 to 15 read on this application for an order dismissing the plaintiff's complaint against Long island Millwork and Stair Builders, Inc. s/h/a Long Island Millwork, or alternatively for summary judgment; Notice of Motion/Order to Show Cause and supporting papers ___; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16-32; Replying Affidavits and supporting papers 33-46; Other ___; it is

ORDERED that the application by the defendant, Long Island Millwork & Stair Builders, Inc., s/h/a/ Long Island Mill Work, Inc. [“Millwork”], for an order dismissing the complaint of the plaintiffs, Michael Spano and Donna Spano [“the plaintiffs” or “Spano”], or alternatively, for summary judgment in Millwork’s favor dismissing the plaintiffs’ complaint in its entirety, is denied.

This action for money damages was commenced on March 1, 2012. Millwork served an Answer to the complaint dated April 13, 2012. A preliminary conference was apparently conducted on February 6, 2013. It does not appear that any discovery has taken place in the action. The following facts are taken from the allegations in the complaint, assumed to be true for the purposes of Millwork’s motion to dismiss (*see generally Guido v. Orange Regional Medical Center*, 102 A.D.3d 828, 832 [2d Dept. 2013]).

Plaintiffs are the owners of property designated as 90 Garner Lane in Bay Shore, New York [“the subject premises”]. In approximately April of 2005, the plaintiffs hired the defendant, Advanced Construction and Management Corporation [“Advanced”], to act as construction manager and general manager for a renovation project at the subject premises. Plaintiffs and Advanced entered into a Construction Management Agreement. Ultimately the renovation project evolved into the design and construction of a 14,000 square foot custom home.

Defendant Robert McGrath, Jr. [“McGrath”], is the principal of Advanced. His wife, Laura, works for Advanced and does Advanced’s billing. McGrath is also the owner of Millwork where Mrs. McGrath likewise serves as bookkeeper. McGrath supervised all aspects of the work and the subcontractors and acted as a general contractor. The complaint further alleges that as a result of the negligence, breach of contract and breach of warranty by the defendants collectively, the plaintiffs suffered millions of dollars of property damage to their home due to water infiltration and structural defects that continue to be discovered by the plaintiffs to the present.

In support of the relief sought, Millwork provided an affidavit by McGrath dated September 11, 2012 [“the McGrath affidavit”]. According to McGrath’s affidavit, he is the principal of Millwork, a New York corporation, incorporated in February of 2005. He is also the principal of Advanced, incorporated in 2000. McGrath maintains that each entity performs different work billed under separate invoices, and each is insured under a separate policy of insurance.

According to the McGrath affidavit, Millwork’s involvement with the construction project was limited to providing finished carpentry products including moldings, stairs, kitchen cabinetry and bathroom vanities. Millwork was also responsible for the installation of the staircases at the subject premises but no other installation. Specifically, McGrath contends that Millwork had no part in the installation or design of the structure of the property or the plumbing and drainage. Invoices for Millwork’s work were annexed to the moving papers.

The plaintiffs’ complaint alleges that Millwork is the alter ego of Advanced. The Fifth, Sixth and Seventh causes of action of the complaint allege that McGrath, Mrs. McGrath, Advanced and

Millwork collectively breached their agreement with the plaintiffs, were negligent and performed in an unworkmanlike manner, and breached express and implied warranties that the construction of the plaintiffs' home would be performed in a skillful and workmanlike manner, respectively.

Millwork argues that the complaint fails to state a cause of action against it based on the extrinsic evidence presented, i.e., McGrath's affidavit and Millwork's invoices, demonstrating that Millwork is a separate corporate entity and not Advanced's alter ego as alleged in the complaint. Millwork urges that the plaintiffs have made no allegations regarding the relationship or qualifications for alleging alter ego or justifying a piercing of the corporate veil. Thus, Millwork argues, the complaint against Millwork must be dismissed as Spano has failed to state a cause of action against it.

Millwork's dismissal motion based on *CPLR* 3211 (a)(7) is denied. "When a party moves to dismiss a complaint pursuant to *CPLR* 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Sokol v Leader*, 74 A.D.3d 1180, 1180-1181 [2010]; see *Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 [1977]). "In considering such a motion, the court must 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" (*Sokol v Leader*, 74 A.D.3d at 1181 [internal quotation marks omitted]; see *Nonnon v City of New York*, 9 N.Y.3d 824, 827 [2007]; *Leon v Martinez*, 84 N.Y.2d at 87-88). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Sokol v Leader*, 74 A.D.3d at 1181, quoting *EBCI, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]).

Applying these principles here, the allegations set forth in the complaint, construed liberally, state a valid cause of action against Millwork to recover damages for breach of contract and negligence. The plaintiffs alleged that a contract existed between Advanced and Spano, that there was consideration for the contract, that Spano performed under the contract and Advanced breached the contract by failing to abide by the terms of the contract by performing its work in an improper and unworkmanlike manner, and that Spano was damaged as a result (see *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 A.D.3d 804, 806 [2011]; *JP Morgan Chase v J.J. Elec. of N.Y., Inc.* 69 A.D.3d 802 [2010]; *Furia v Furia*, 116 A.D.2d 694 [1986]). In ¶ 191, Spano alleges that Millwork is the alter ego of Advanced.

Likewise, the complaint alleges that the defendants collectively (including Millwork) owed a duty of care to the plaintiffs and breached that duty by the failure to exercise due care in the performance of their work at the subject premises.

In opposition to Millwork's motion, the plaintiffs submitted the affidavit of plaintiff Michael Spano sworn to on December 14, 2012 ["the Spano affidavit"]. According to the Spano affidavit, at McGrath's request, the plaintiffs paid a single labor bill on a weekly basis to either McGrath or his wife, encompassing the labor performed by both Advanced and Millwork. Plaintiffs wrote checks to the McGraths and made payments made out to cash in an amount of approximately \$300,000 for labor, services, and material provided by both Millwork and Advanced.

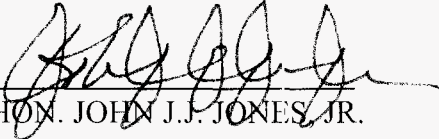
According to the Spano affidavit, Mrs. McGrath was the bookkeeper for both companies and the plaintiffs personally paid Mrs. McGrath \$15,000. Both Advanced and Millwork shared the same office and McGrath's assistant sent the plaintiff faxes from both corporations. Both corporations operated out of the same address with the same fax and phone number. McGrath used the same crew of workers for all of the work performed by both Millwork and Advanced. McGrath met with the plaintiffs and discussed business involving both Millwork and Advanced.

The Spano affidavit controverted McGrath's contention that Advanced and Millwork were two entirely separate, discreet corporate entities. The fact that on reply, a second affidavit authored by McGrath dated December 26, 2012, challenged some of the statements in Spano's affidavit, only served to highlight that there are issues of fact as to whether Millwork was indeed the alter ego of Advanced which must await discovery in this action.

Thus, because both of Millwork's motions turn on issues of fact, and because both **CPLR** 3211 (d) and 3212 (f) contemplate a denial of the motion pending discovery of facts within the exclusive knowledge of the moving party, Millwork's motion to dismiss the complaint against it based on **CPLR** 3211(a) (7) or alternatively, **CPLR** 3212, are denied, without prejudice to renew, upon the completion of discovery (*Evangelista v. Kambanis*, 74 A.D.3d 1278, 903 N.Y.S.2d 243 [2d Dept. 2010] ["[a] party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated"] [citations omitted]; cf. *Fernbach, LLC v. Calleo*, 92 A.D.3d 831, 939 N.Y.S.2d 501 [2d Dept. 2012]).

Finally, Millwork argues that in any event, Spano's breach of warranty claim must be dismissed because warranty claims are limited to the sale of goods, not the performance of services. *See generally*, 2 NY PJI 3d 4:40, at 987 (2012). Neither party has adequately addressed whether the plaintiffs' claims are limited to allegations challenging services provided by the defendants as opposed to goods and materials provided by them. In any event, in the absence of discovery, it is premature to dismiss a warranty claim where it is as yet undetermined whether any of plaintiffs' damages resulted from a defect in the goods and materials supplied by the defendants.

DATED: 7 March 2013


HON. JOHN J. JONES, JR.
J.S.C.

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