

**Schwing Elec. Supply Corp. v Infinity Power Elec.
Contr. Inc.**

2013 NY Slip Op 31337(U)

June 18, 2013

Sup Ct, Suffolk County

Docket Number: 10-42353

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-7-13
ADJ. DATE
Mot. Seq. # 001 - MotD

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SCHWING ELECTRICAL SUPPLY CORP.,	ROBERT & ROBERT, PLLC
	Attorney for Plaintiff
Plaintiff,	150 Broad Hollow Road, Suite 314
	Melville, New York 11747
- against -	
INFINITY POWER ELECTRICAL	RONALD S. COOK, P.C.
CONTRACTING INC., IPEC ELECTRICAL	Attorney for Defendants
CONTRACTING INC., DAVID DUPRE, JON	222 Middle Country Road, Suite 206
DUPRE, ROBERT DUPRE and DONNA	Smithtown, New York 11787
DUPRE,	
Defendants.	
-----X	

Upon the following papers numbered 1 to 20 read on this motion to amend the caption and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 18 ; Replying Affidavits and supporting papers 19 - 20 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by the plaintiff for an order (I) amending the caption to reflect that the action is being discontinued as against defendants David Dupre and Jon Dupre, and (ii) pursuant to CPLR 3212, granting summary judgment in its favor and against the remaining defendants on its first, second, third, and sixth causes of action, is granted to the extent of discontinuing the action against David Dupre and Jon Dupre and amending the caption by deleting their names, and granting summary judgment in favor of the plaintiff and against defendant IPEC Electrical Contracting, Inc. on its first cause of action, and in favor of the plaintiff and against defendant Infinity Power Electrical Contracting, Inc. on its second and third causes of action, and is otherwise denied.

This is an action to recover damages in the amount of \$50,408.79 based on the defendants' failure to pay for electrical supplies sold and delivered to defendant IPEC Electrical Contracting, Inc. (IPEC) through the use of a line of credit opened by the plaintiff on behalf of defendant Infinity Power Electrical

Contracting Inc. (Infinity). David Dupre and Jon Dupre are brothers who formed both IPEC and Infinity. Robert Dupre and Donna Dupre are the parents of David and Jon and are officers of Infinity and IPEC. The plaintiff claims in part, that IPEC and the individual defendants fraudulently used the line of credit to obtain the supplies after Infinity had been “shut down” due to tax problems.

In the complaint, the plaintiff asserts six causes of action. The first cause of action is for goods sold and delivered, the second is for breach of contract, the third is for an account stated, the fourth is to recover the sum of \$50,408.79 based on defendant David Dupre’s personal guaranty of Infinity’s debts, the fifth is for misappropriation of funds, and the sixth seeks to pierce the corporate veil to hold the individual defendants personally liable. As to the first three causes of action, each is pleaded only against Infinity.

David Dupre testified at his deposition that Infinity was formed in 2003. He was the president and his father, Robert Dupre and his brother, Jon Dupre were officers of Infinity. After Infinity was incorporated, he applied for and obtained a line of credit from the plaintiff. In 2009, he was advised by his accountant that they had to dissolve Infinity due to tax liability debt. In an effort to continue the business, he formed IPEC under the name of his mother, Donna Dupre. He stopped actively doing business under Infinity’s name. IPEC stopped doing business in 2010. Today both corporations are active only for New York State tax purposes but neither is actively doing business. When Infinity stopped actively doing business, it had a zero balance with the plaintiff. He never informed the plaintiff that Infinity stopped actively doing business because he felt that Infinity and IPEC “were one [and] the same.” IPEC accrued a new debt with the plaintiff after it was formed. Toward the end of the summer of 2010, IPEC was having difficulty paying the plaintiff because contractors were not paying what they owed to IPEC.

According to Peter Schwing, the plaintiff’s president, on November 25, 2004, David Dupre requested a line of credit from the plaintiff for Infinity. David signed a credit application for that company as its president and signed a personal guaranty for Infinity’s debts. Infinity’s account presently has an outstanding balance of \$50,408.79 for supplies provided by the plaintiff from April 2, 2010 to May 25, 2010. Sometime after David signed the credit application, he formed another company called IPEC. The plaintiff was not informed of the formation of this company, nor did anyone advise the plaintiff that Infinity had to stop doing business because of tax liabilities that the company owed to the State of New York. IPEC never applied for a line of credit from the plaintiff. The plaintiff never found out about the tax liabilities that Infinity owed until after the electrical supplies were provided to the defendants. At some point, IPEC ordered and received electrical supplies from the plaintiff using Infinity’s line of credit. After IPEC was formed, the plaintiff continued to mail invoices to Infinity for the supplies that the plaintiff had unknowingly provided to IPEC. The plaintiff also mailed to Infinity statements summarizing the amounts owed to the plaintiff for past due invoices. Nobody from Infinity or IPEC ever contacted the plaintiff to reject any invoice that the plaintiff sent for being sent to the wrong address or being billed to the wrong party. In addition, no electrical supplies were ever rejected by any of the defendants as non-conforming or defective.

The plaintiff now moves for an order amending the caption to reflect that the action is being discontinued as against defendants David Dupre and Jon Dupre, and for summary judgment in its favor against the remaining defendants on its first, second, third, and sixth causes of action.

The plaintiff indicates that it intends to discontinue the action against David Dupre and Jon Dupre, as both defendants filed for Chapter 7 bankruptcy and were granted a discharge of all of their debts on June 28, 2011 and July 26, 2011. Since the defendants do not oppose the relief sought, the court considers that branch of the motion as one for an order pursuant to CPLR 3217 (b) discontinuing the action against David Dupre and Jon Dupre and amending the caption accordingly; as such, and to that extent, the motion is granted.

Turning to that branch of the plaintiff's motion which is for summary judgment, it is well settled that summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp.*, *supra*).

With respect to the first cause of action for goods sold and delivered, the court notes that it is asserted against only Infinity, notwithstanding that it is IPEC which is claimed to have ordered and received the supplies. Generally, a party may not obtain summary judgment on an unpleaded cause of action (see *Weinstock v Handler*, 254 AD2d 165, 679 NYS2d 48 [1st Dept 1998]). However, where, as here, the proof supports a cause of action and the opposing party is not misled or prejudiced, the court may deem that the pleadings are amended to conform with the proof and grant summary judgment on that cause of action (see *Deborah Intl. Beauty v Quality King Distribs.*, 175 AD2d 791, 573 NYS2d 189 [2d Dept 1991]). Since David Dupre acknowledged at his deposition that it was IPEC which purchased the supplies from the plaintiff, albeit while using the line of credit established for Infinity, the court deems that the pleadings are amended to conform with the proof and that the first cause of action is asserted against IPEC as well. In addition, the court finds that the plaintiff has established its entitlement to judgment as a matter of law against IPEC on its first cause of action. Specifically, the plaintiff demonstrated through documentary evidence, the affidavit of Peter Schwing, and the deposition testimony of David Dupre that it sold and delivered electrical supplies to IPEC for which it remains unpaid (see *Marjam Supply Co., Inc. v Drywall Surgeon Specialists, Inc.*, 78 AD3d 908, 910 NYS2d 679 [2d Dept 2010]).

In opposition, the defendants failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, *supra*). The affirmation of their attorney was insufficient to raise a triable issue of fact, as he has no personal knowledge of the facts (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, the plaintiff is entitled to summary judgment on its first cause of action against IPEC.

As to the second cause of action, in order to establish a cause of action for breach of contract, a plaintiff must demonstrate the existence of an agreement between the parties, consideration, performance by the plaintiff, the defendant's failure to perform, and resulting damage (*see Furia v Furia*, 116 AD2d 694, 498 NYS2d 12 [2d Dept 1986]). Since IPEC was never a party to the contract signed by David Dupre on behalf of Infinity for a line of credit with the plaintiff, IPEC cannot be held liable for any breach of that contract (*see Black Car & Livery Ins. v H&W Brokerage*, 28 AD3d 595, 813 NYS2d 751 [2d Dept 2006]). However, the plaintiff established its entitlement to judgment as a matter of law against Infinity by demonstrating, through the affidavit of Peter Schwing, the contract signed by David Dupre on behalf of Infinity, the invoices mailed by the plaintiff to Infinity, and the deposition testimony of David Dupre, that Infinity entered into a contract with the plaintiff for a line of credit whereby it agreed to pay each invoice for supplies purchased from the plaintiff, and that Infinity breached the contract by failing to pay the invoices. Specifically, the contract provided that "[p]ayment is due in accordance with terms of sale as shown on invoice" and that a "service charge of 1 ½ percent per month will be imposed on all past due invoices," and the invoices stated both the amount due and the date on which payment was due. Since the defendants failed to raise a triable issue of fact, the plaintiff is entitled to summary judgment on its second cause of action against Infinity.

Turning to the third cause of action, an account stated is an agreement between the parties to an account based upon prior transaction between them with respect to the correctness of the account items and balance due (*see Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 600 NYS2d 790 [3d Dept]). The agreement may be express or implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances (*id.*). Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible (*see Legum v Ruthen*, 211 AD2d 701, 621 NYS2d 649 [2d Dept 1995]). Here, the plaintiff demonstrated its entitlement to judgment as a matter of law on its third cause of action for an account stated against Infinity by submitting evidence, including copies of the invoices and statements sent, the affidavit of Mr. Schwing, and the deposition testimony of David Dupre, that Infinity received and retained, without objection, the invoices that the plaintiff sent to it seeking payment for unpaid supplies (*see Law Offs. of David J. Sutton, P.C. v NYC Hallways & Lobbies, Inc.*, 105 AD3d 1010, 963 NYS2d 392 [2d Dept 2013]). Since the defendants failed to raise a triable issue of fact, the plaintiff is entitled to summary judgment on its third cause of action against Infinity.

As to the sixth cause of action, which seeks to pierce the corporate veil to hold Robert and Donna Dupre personally liable, it is well settled that "piercing the corporate veil requires a showing that the individual defendants exercised complete dominion and control over the corporation and used such dominion and control to commit a fraud or wrong against the plaintiff which resulted in injury" (*Flushing Plaza Assoc. #2 v Albert*, 102 AD3d 737, 738-739, 958 NYS2d 713, 715 [2d Dept 2013]). Here, there has been no such showing. Robert Dupre testified at his deposition that in 2003, his sons, David and Jon Dupre, started Infinity to conduct electrical contracting services. He was the secretary of Infinity but he only ran errands for Infinity and would occasionally sign checks for his sons. In addition, David Dupre testified that his mother, Donna Dupre, assisted him in the incorporation of IPEC but that she was not involved at all in

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the business. Thus, since the plaintiff has failed to establish that Robert Dupre and Donna Dupre exercised complete dominion and control over Infinity or IPEC, the plaintiff is not entitled to summary judgment on its sixth cause of action.

Accordingly, the plaintiff's motion is granted to the extent of discontinuing the action against David Dupre and Jon Dupre and amending the caption by deleting their names, and granting summary judgment in favor of the plaintiff and against defendant IPEC on its first cause of action and against defendant Infinity on its second and third causes of action.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: June 18, 2013


J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION