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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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BERNARD J. PERINI,

Plaintiff,

TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 002119-06
Motion Seq. No: 8
Submission Date: 12/14/09

-against-

MARY T. SABATELLI, individually and as President and sole shareholder of the Companies, P & F TRUCKING, INC., SABCO LEASING CORP. and OBHA REALTY CORP.,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits...x
Defendant's Statement Pursuant to Rule 19-A.....x
Defendant's Memorandum of Law.....x
Affirmation in Opposition and Exhibits.....x
Affidavit in Opposition.....x
Plaintiff's Statement Pursuant to Rule 19-a(b).....x
Plaintiff's Memorandum of Law.....x
Reply Affirmation and Exhibits.....x

This matter is before the Court for decision on the motion filed by Defendant Mary T. Sabatelli ("Sabatelli" or "Defendant") on November 16, 2009 on submitted December 14, 2009. The Court 1) grants Defendant's motion to the extent that the Court grants the fourth cause of action, based on the theory of piercing the corporate veil, contained in the former Queens County

Action, which was consolidated with this action; and 2) otherwise denies Defendant's motion.

BACKGROUND

A. Relief Sought

Defendant Sabatelli moves for an Order granting her summary judgment dismissing the verified complaint ("Complaint").

Plaintiff Bernard J. Perini ("Perini" or "Plaintiff") opposes Defendant's application.

B. The Parties' History

As outlined in prior Orders in this matter dated July 12, 2007 and December 16, 2008 (Austin, J.), Perini is a former commanding officer of the 109th precinct in New York City. He first met Sabatelli in 1981 and the parties thereafter developed a close personal relationship.

After her husband died in 1980, Sabatelli become the sole shareholder, director and officer of P & F Trucking, Inc.("P & F"), SABCO Leasing Corp. ("Sabco"), and OBHA Realty Corp. ("OBHA") (collectively "Companies"). The Companies primarily engaged in the business of private sanitation/refuse hauling (P & F) and/or real estate ownership.

According to Perini, prior to his involvement with Sabatelli, the Companies were being poorly and/or ineffectively managed by Sabatelli's son, Ralph Sabatelli ("Ralph"). Sabatelli allegedly suspected Ralph of misappropriating corporate funds. Perini further alleges that, at approximately the same time, the United States Attorney's Office was investigating the Companies and Ralph regarding a connection to organized crime relating to bid rigging of contracts with Con Edison.

Perini advised Sabatelli of the federal investigation. Thereafter, in September of 1983, Sabatelli hired Perini as General Manager of the Companies, in which capacity he would perform all managerial functions, including supervision of personnel. Perini, who was also co-executor of Sabatelli's will at the time, contends that his duties were far-reaching and extensive, and included managerial responsibilities performed for the Companies as well as other Sabatelli-owned entities not involved here.

Perini affirms that he was personally hired by – and worked directly for – Sabatelli in her individual and personal capacity. Perini understood the Defendant to be his employer, and allegedly discussed this fact with Sabatelli. It is undisputed, however, that the parties never

executed a written contract memorializing their agreement with respect to Perini's employment.

Perini avers that, during the ensuing ten-year period, his salary regularly increased until it reached a high of approximately $156,000.00 per annum in 1992. In early 1996, however, the Companies allegedly began experiencing serious cash flow shortages due to, *inter alia*, aggressive and increased competition in the carting business and Sabatelli's alleged disinclination to accept reductions in her own cash withdrawals from the Companies.

To maintain and preserve the financial viability of the Companies, Perini approached Sabatelli and informed her that, in light of the Companies' cash-strapped condition, the only productive alternative would be to temporarily reduce, and then defer, employee compensation, including his own, until the Companies' financial circumstances improved. Sabatelli allegedly agreed to implement this approach.

More specifically, and in accord with the parties' agreement, Perini and other key employees would voluntarily agree to substantial salary reductions as "deferrals" only. The amounts deferred would then later be repaid when the Companies were either profitable again or until they were sold. Sabatelli had allegedly discussed with Perini the option of selling the Companies.

Perini alleges that either he or Sabatelli then discussed a similar deferral arrangement with certain other employees, and assured these employees that Sabatelli had agreed that they would indeed "get their [deferred money]" later (Perini March 1, 2007 Dep., 123-128). Although Sabatelli allegedly agreed to the foregoing salary deferral plan, the parties never reduced this arrangement to written form. Thereafter, Perini's P & F/Sabco annual salary was reduced to $63,503 in 1996, and to under $3,500 in 1997.

In December of 1997, Perini resigned from his position with Sabco and P & F but continued to perform managerial duties for OBHA, a Sabatelli company that owned apartment buildings and had no involvement in the carting business.

Perini affirms that the OBHA position required his presence in the office about once a week, although he was allegedly on call 24 hours a day. With respect to his compensation, he affirms that he agreed upon a reduced salary of only $1,000.00 per week, as well as use of a car and continuation of his medical coverage.

Perini alleges that he and Sabatelli then entered into essentially the same salary reduction/deferral agreement with respect to the Perini's OBHA employment. Specifically, Perini would be properly compensated with a "fair salary" when, *inter alia*, the assets were sold. Perini concedes that, despite his alleged discussion of this issue with Sabatelli on a number of occasions, the parties never agreed what that fair salary amount should be. Perini avers that it was his understanding that Sabatelli entered into this alleged OBHA deferral agreement in her personal capacity and, therefore, that Perini could enforce this agreement against Sabatelli personally.

Perini's employment with OBHA continued until the Companies were ultimately sold in May of 2002. Sabatelli submits that, as per the deposition testimony of Sabatelli's accountant, Ernest G. Richards ("Richards") (Ex. 2 to Aff. in Opp.), 1) OBHA sold its assets for $3.5 million, consisting of a $2.6 million purchase note and $900,000,00 in cash; 2) P & F's assets were sold for $2.4 million, consisting of an approximate $1.45 million purchase note and $645,000.00 in cash; and 3) SABCO's assets were sold for $400,000.00, consisting of a $300,000 note and $100,000 in cash.

At approximately the same time, May of 2002, the New York City Trade Waste Commission recommended denial of P & F's carting/waste license. The May 30, 2002 denial was based on findings that, *inter alia,* P & F allegedly made improper "compensation payments" to a "convicted carter;" its principals had offered false application statements; and Sabatelli herself had declined to provide requested information during her testimony before the Commission (Ex. P to Aff. in Supp., Report at 12-14; 16-18).

Shortly after the Companies were sold in May of 2002, Perini requested that Sabatelli compensate him in accord with the deferral agreements into which they had previously entered, but she refused. Despite Perini's numerous written requests, in which he advised Sabatelli that he would commence litigation if payment were not soon forthcoming, Sabatelli rejected Perini's demands.

By summons and verified complaint ("Complaint") dated February 2006, Perini commenced this action against Sabatelli. The Complaint contains five (5) causes of action: 1) breach of contract, 2) *quantum meruit*, 3) unjust enrichment, 4) demand for payment of wages

pursuant to Labor Law §§ 198-A and 198-C, and 5) fraud. As amplified by the Plaintiff's Bill of Particulars and motion submissions, Plaintiff alleges that the deferred salary now due with respect to his P & F/SABAO employment is $246,946.00, while the unpaid salary attributable to his subsequent, OBHA employment, is approximately $207,000.00.

In her Answer, Defendant denied the material allegations of the Complaint and set forth four affirmative defenses, including the fourth affirmative defense predicated on the statute of frauds.

In April of 2007, Sabatelli moved for summary judgment dismissing the Complaint arguing that: (1) she never made any promise relative to deferred salary payments; (2) that if she did make a promise, it was made solely in her representative capacity and on behalf of the Companies; and (3) even assuming, *arguendo*, that she did make a promise in her individual capacity, any such promise would constitute an oral guarantee of the Companies' primary obligation to Perini – a promise allegedly barred by the statute of frauds.

By Order dated July 12, 2007, the Court (Austin, J.), granted Sabatelli's motion and dismissed the Complaint in its entirety ("2007 Order"). Justice Austin concluded that 1) Sabatelli clearly intended that payment of the deferred compensation, if any, would be made from corporate funds or funds received on the sale of the corporations or the corporate assets; 2) there was no evidence that Sabatelli undertook an independent and primary obligation to pay Perini; and 3) P & F, SABCO and OHBA were not relieved of their obligation by virtue of Sabatelli's alleged promise. Justice Austin held that, in light of the foregoing, Perini's claim was barred by the Statute of Frauds (2007 Order at 3-4).

While Plaintiff's appeal from the 2007 Order was pending, Plaintiff commenced a second, related action in the Supreme Court, Queens County, that named both Sabatelli and the Companies as party-defendants. That action was titled *Bernard J. Perini v. P & F Trucking, Inc., Sabco Leasing Corp., OBHA Realty Corp. and Mary T. Sabatelli*, Queens County Index Number 20573-07 ("Queens County Action"). The complaint in the Queens County Action ("Queens complaint") contains four(4) causes of action 1) breach of contract against the Companies, 2) *quantum meruit* against the Companies, 3) unjust enrichment against the Companies, and 4) piercing the corporate veil against Sabatelli. The Queens complaint interposes essentially the

same claims against the Companies as the Complaint interposes against Sabatelli. The Queens complaint also includes a new cause of action against Sabatelli, individually, based on the theory of piercing the corporate veil.

By decision dated June 10 2008 ("Appellate Decision"), the Appellate Division, Second Department reversed the 2007 Order and reinstated the Complaint. *Perini v. Sabatelli*, 52 A.D.3d 588 (2d Dept. 2008). Although the Appellate Decision did not comment on or disturb the finding in the 2007 Order that there was no proof of a direct promise, the Appellate Division concluded that questions of fact existed as to whether the alleged promise was potentially enforceable as a personal guarantee. The Second Department held that there was an applicable exception to the principle that enforcement of an oral promise to guarantee the debt of another is barred by the statute of frauds. That exception applies, the Court held, "where the plaintiff can prove that an oral promise to answer for the debt of another 'is supported by a new consideration moving to the promisor and beneficial to [the promisor] and that the promisor has become in the intention of the parties a principal debtor primarily liable.'" The Appellate Division cited *Martin Roofing v Goldstein*, 60 N.Y.2d 262, 265 (1983), *cert. den.* 466 U.S. 905 (1984) in support of its holding.

The Second Department held that Plaintiff had raised a triable issue of fact as to whether "the alleged oral agreement was supported by new consideration flowing to the defendant and beneficial to her personally, and, if so, whether the defendant, in making the agreement, intended to become primarily liable for the debt. " *Perini*, 52 A.D.3d at 589.

By Order of Justice Austin dated December 16, 2008, the Nassau and Queens County Actions were consolidated for trial in Nassau County. In granting Plaintiff's consolidation application, Justice Austin rejected Defendant's argument that consolidation was inappropriate because the pleadings set forth alternative and conflicting theories of recovery. Justice Austin concluded that consolidation was appropriate in light of the facts that 1) there are common issues of law and fact relating to Plaintiff's relationship with Sabatelli and the Companies, and 2) consolidation would avoid unnecessary duplication of proceedings, save unnecessary costs and expense and prevent the injustice that would result from potentially divergent decisions based on the same facts. Justice Austin also ordered that the caption be amended to read *Bernard J. Perini*

v. Mary T. Sabatelli, individually and as President and sole shareholder of the Companies, P & F Trucking, Inc., Sabco Leasing Corp. and OBHA Realty Corp., Index Number 2119-06.

Discovery is now complete and Plaintiff filed his Note of Issue in November of 2009. As reflected in this Court's September 1, 2009 Certification Order, this matter was scheduled for trial on February 22, 2010, and both parties reaffirmed that discovery was completed, except for the continued deposition of the Plaintiff, which has since been concluded.

C. The Parties' Positions

Defendant submits that any promise and obligation to pay deferred compensation to Plaintiffs rests with the Companies, not Sabatelli individually. In support thereof, Defendant notes that the complaint in the Queens action alleges that Plaintiff entered into an agreement with the Companies, and not Sabatelli. Thus, Defendant argues, the Court should dismiss the first four causes of action in the Complaint because Sabatelli is an improper party. Defendant again moves for summary judgment dismissing the consolidated action in its entirety. The defendant has also conditionally requested permission to amend her Answers in the event that the Court denies her motion.

Defendant also argues that the fifth cause of action, based on fraud, does not lie because it is, in essence, a breach of contract claim. Specifically, as the alleged misrepresentation or false statement is Defendant's failure to perform pursuant to the parties' alleged agreement, the Court should dismiss the fifth cause of action based on fraud.

Defendant next argues that the second cause of action in the two complaints, based on *quantum meruit*, may not be maintained because 1) the alleged contract between Defendant and Plaintiff precludes an action based on this theory; and 2) the claims on which this cause of action is based are indistinguishable from those on which the causes of action for unjust enrichment are based.

Defendant also contends that, in light of the applicable six (6) year statute of limitation, 1) the second, third and fourth causes of action in the Complaint should be limited to all services that Plaintiff allegedly rendered after February 2000; and 2) the claims for *quantum meruit* and unjust enrichment in the second complaint against the Companies are limited to services rendered after August 2001.

Next, Defendant submits that Plaintiff's claims based on *quantum meruit*, unjust enrichment and piercing the corporate veil, which are equitable in nature, are barred by the doctrine of laches. In support thereof, Defendant notes that Plaintiff initially raised his claim via correspondence to Plaintiff in 2002, but did not file a lawsuit until 2006, and then the Queens Action in 2007. Defendant submits that Plaintiff's delay prejudiced Defendant in several ways, including 1) Defendant is now in poor health; 2) certain witnesses have moved or died, and those that are available will have less recollection of pertinent events; and 3) the delay has adversely affected Plaintiff's ability to amass proof of Plaintiff's liability for his alleged mismanagement of the Companies.

Defendant also argues that Plaintiff's allegations regarding the oral agreement lack sufficiency regarding certain components, including 1) what Plaintiff's base salary would be; and 2) how the deferred compensation would be calculated. Thus, Defendant submits, the Court should dismiss contract claims for compensation deferred from 1998-2002.

Defendant also contends that all of Plaintiff's claims for deferred compensation lack sufficient definition. Specifically, Defendant argues, Plaintiff alleges that his payment was to be deferred pending certain contingencies, including a return to profitability and a sale of the assets, but does not adequately define those terms.

Finally, Defendant submits that Plaintiff has failed to allege sufficient facts establishing that Sabatelli was the alter ego of the Companies. Therefore, Defendant contends, the Court must dismiss the fourth cause of action in the Queens complaint based on the theory of piercing the corporate veil.

Plaintiff opposes Defendant's motion, submitting, *inter alia*, that 1) the Court may not consider, on this motion, arguments that Plaintiff failed to make in her initial motion for summary judgment, which was based solely on the theory that the claims in the Complaint were barred by the Statute of Frauds; 2) the Appellate Division implicitly rejected Defendant's argument that the allegations against Sabatelli personally should be dismissed because she did not make a personal promise to Perini; 3) Perini has alleged facts in support of his allegation that Sabatelli made representations in the context of a personal, rather than corporate, relationship; 4) the fraud claim is viable, and not duplicative of the breach of contract claim, because it is

based on fraud in the inducement; 5) the *quantum meruit* and unjust enrichment claims are viable, alternative theories in the event that the Court concludes that there was no express contract; 6) the *quantum meruit* and unjust enrichments claims are not time-barred because a) the quantum meruit claim did not accrue until May 2002, the last date that service was rendered; and b) the unjust enrichment claim did not accrue until June 2002, the date that Defendant allegedly failed to pay Perini the promised deferred compensation; and 7) the breach of contract claim is specific enough as demonstrated, *e.g.*, by the fact that Richards was able to determine exactly how much each employee was owed in retroactive pay, pursuant to the parties' agreement, after the sale of the Companies' asserts.

RULING OF THE COURT

A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Sabatelli is a Proper Party in the Complaint

Preliminarily, the Court cannot dismiss the action upon the theories that Sabatelli made the alleged promise exclusively as a corporate officer and/or that she is therefore an "improper party" to the action. Defendant previously raised this corporate agent theory – now raised again using identically worded point headings – before both this Court and the Appellate Division. Although the Appellate Division did not comment upon this factual assertion, its reversal was based on particular factual issues with respect to the Defendant's individual liability as a potential guarantor. *See Ramos v. City of New York*, 51 A.D.3d 753, 755 (2d Dept. 2008) (defendant's motion to dismiss complaint precluded pursuant to single motion rule in light of defendant's delay in alerting court that branch of prior motion still pending). In light of the

Appellate Division's determination that Sabatelli is a proper party to the Nassau County Complaint, as well as Defendant's delay in raising this issue following the Appellate Decision, the Court denies Defendant's motion to dismiss the causes of action against her personally, with the exception of the cause of action based on piercing the corporate veil, as outlined *infra*.

C. Plaintiff Properly Asserted Claims against Sabatelli and the Companies

The Court also rejects Plaintiff's argument that, because the Queens complaint demands direct relief on the alleged promise as against both Sabatelli and the corporate entities, Plaintiff has necessarily conceded as a matter of law that he has no claim for the same direct relief against Sabatelli. A party may plead and or rely upon alternative theories of recovery, even when predicated upon allegations that are ostensibly contradictory or which are incompatible. CPLR §§3014 and 3017(a); *Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 218 (1984). Moreover, Justice Austin already considered and rejected this argument when he granted Plaintiff's consolidation motion.

Additionally, the Court concludes that most of Sabatelli's current applications, as applied to her individual liability in the Complaint, are foreclosed by the strong policy precluding successive and fragmented summary judgment applications. *Baron v. Charles Azzue, Inc.*, 240 A.D.2d 447, 449 (2d Dept. 1997). Successive motions for summary judgment are disfavored and improper where the ensuing motion is based upon grounds and factual assertions which could have been raised in connection with a movant's prior application for judgment. *Ramos v. City of New York, supra*; *Capuano v. Platzner Intern. Group, Ltd.*, 5 A.D.3d 620, 621 (2d Dept. 2004). Defendant could have, but did not, raise in her first motion for summary judgment the theories she now propounds with respect to her individual liability, specifically that 1) the alleged oral contract is fatally indefinite and/or unsupported by adequate evidence; 2) the fraud cause of action is defective as insufficiently distinct from the contract claim; and 3) the unjust enrichment/quantum meruit and/or Labor Law claims are time-barred or precluded by the doctrine of laches. *See Soto v. City of New York, supra*, 37 A.D.3d 589 (2d Dept. 2007) (defendant violated rule against filing successive summary judgment motions as evidence and grounds could have been submitted on original motion). The argument point headings, briefs and papers submitted by Sabatelli on the prior motion and the ensuing appeal do not support

Defendant's assertion that these dismissal claims were raised on the prior motion, but simply never addressed by this Court or the Appellate Division. Accordingly, dismissal of the causes of action against Sabatelli for breach of contract, *quantum meruit*, unjust enrichment, Labor Law §§ 198-A and 198-C, and fraud is inappropriate.

D. The Allegations Regarding the Parties' Agreement are Sufficiently Definite

The Court rejects Defendants' argument that the alleged terms of the deferral agreement relied upon are so indefinite and uncertain as to be incapable of judicial enforcement. Although a contract cannot be enforced if its material terms are lacking in reasonable certainty, *Express Industries and Terminal Corp. v. New York State Dept. of Transp.*, 93 N.Y.2d 584, 590 (1999), the applicable standard is necessarily flexible and varies with the subject of the agreement, its complexity, the purpose and circumstances under which it was made, and the relation of the parties. *Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp.*, 74 N.Y.2d 475, 482 (1989).

Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear. *Id.*, citing 1 Williston Contracts § 47 at 153-156 (3d ed. 1957). While impenetrable vagueness and uncertainty will not do, *Martin Delicatessen v. Schumacher*, 52 N.Y.2d 105, 109 (1981), striking down a contract as indefinite and in essence meaningless is at best a last resort. *166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp.*, 78 N.Y.2d 88, 91 (1991), quoting *Cohen & Son v. Lurie Woolen Co.*, 232 N.Y. 112, 114 (1921).

Here, the Court cannot conclude as a matter of law that the agreement was too indefinite to be enforceable. Plaintiff's P & F contract/deferral claim is based on an identifiable, pre-existing base salary that was later reduced by a discrete and specific sum from which the claimed, deferral amounts can be generally extrapolated. Moreover, the alleged triggering continency allegedly applicable here, *i.e.*, the sale of the Companies, is not fatally indefinite or lacking in certainty as a matter of law.

It is not fatal to Plaintiff's action that Plaintiff's subsequent, OBHA employment lacks the "base" salary component present in the P & F portion of his deferral claim. The fact that the

Plaintiff's salary was never reduced from an existing annual sum does not mean that the parties did not, or could not, have agreed to defer salary amounts as alleged. The Plaintiff contends in this respect that a "fair" salary figure can be objectively fleshed out by, *inter alia*, reference to, and comparison with, relevant and contemporaneous salaries earned by several other OBHA/Sabatelli employees. A contract does not necessarily lack all effect merely because it expresses the idea that something is left to future agreement. *Four Seasons v. Vinnik*, 127 A.D.2d 310 (1st Dept. 1987).

Plaintiff's allegation that he and Sabatelli reached an agreement that Perini would be paid a fair salary is sufficiently definite to permit the inference that Sabatelli would pay Perini reasonable compensation. Courts have found an agreement to pay reasonable compensation sufficiently definite, when supplemented by relevant extrinsic evidence, to support a breach of contract cause of action. *See Catlin v. Manilow*, 170 A.D.2d 357, 358 (1st Dept. 1991) (complaint alleging that defendants promised to pay plaintiffs reasonable compensation not too indefinite to be enforced). Extrinsic or parol evidence, together with evidence illuminating the parties' course of dealing, may be considered as a means of attributing certainty and meaning to a disputed contract term.

Defendant has repeatedly denied the existence of an agreement, and alternatively argued that if it did exist, it is unenforceable as a matter of law. Defendant's submission of certain accounting records and employee affidavits, including an affidavit submitted by the Defendant's son Ralph, do not warrant dismissal as a matter of law. Rather, these submissions generate factual issues that cannot be resolved as a matter of law on the motion. Accordingly, the Court denies the motion to dismiss the breach of contract claims.

E. The Quantum Meruit and Unjust Enrichment Causes of Action are Viable

Dismissal of the *quantum meruit* and unjust enrichment causes of action is also inappropriate. The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. *Clark-Fitzpatrick, Inc., v. Long Is. R.R.*, 70 N.Y.2d 382, 388-389 (1987). Where, however, there is a bona fide dispute as to the existence of a contract, a plaintiff may proceed upon a theory of quasi-contract as well as breach of contract and will not be required to

elect his or her remedies. *AHA Sales, Inc. v. Creative Bath Products, Inc.*, 58 A.D.3d 6, 20 (2d Dept. 2008), *quoting Hochman v. LaRea*, 14 A.D.3d at 654-655.

In light of the foregoing, the Court denies Defendant's motion to dismiss the *quantum meruit* and unjust enrichment causes of action, concluding that since they are both viable in light of, *inter alia*, the parties' dispute as to the existence of the alleged contract.

F. Plaintiff's Action is not Foreclosed by the Statute of Limitations

A cause of action for *quantum meruit* begins to run when the final service has been performed. CPLR § 213(2); *GSGSB, Inc. v. New York Yankees*, 862 F. Supp. 1160, 1171 (S.D.N.Y. 1994). The Court concludes that Plaintiff's causes of action are timely because the final service was performed in May 2002, which is before the expiration of the Statute of Limitations.

G. Plaintiff's Action is not Barred by the Doctrine of Laches

In *Blinds To Go v. Times Plaza*, 45 A.D.3d 714 (2d Dept. 2007), the Second Department held that "[t]he doctrine of laches, 'which bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered recovery inequitable, has no application in actions at law [citations omitted].'" *Id.* at 715. Thus, the Second Department concluded that the lower court had erred in granting defendant's motion to dismiss the amended complaint, in which plaintiff sought to recover damages for breach of a commercial lease, on that ground. *Id.*

Moreover, Plaintiff's correspondence to Defendant in which he demanded payment and advised her of his intention to institute litigation vitiates Defendant's claim that Plaintiff did not provide effective notice of his intent to sue. Accordingly, the Court concludes that the doctrine of laches is inapplicable to the matter at bar.

H. The Court Dismisses the Cause of Action for Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 884 N.Y.S.2d 94, 98 (2d Dept. 2009), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability

on owners for the obligations of their corporations. *East Hampton*, 884 N.Y.S.2d at 98, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton,* 884 N.Y.S.2d at 98, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton,* 884 N.Y.S.2d at 99, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

The Court concludes that Plaintiff has not made the requisite showing to sustain this cause of action, and dismisses the fourth cause of action in the Queens complaint based on piercing the corporate veil.

I. The Court Denies Defendant's Motion to Amend her Answers on the Eve of Trial

Finally, Defendant has conditionally sought leave to amend her Answers to add counterclaims and/or affirmative defenses alleging that Plaintiff breached his employment duties while in the Companies' employ by, *inter alia*, mishandling cash and mismanaging the Companies.

Although leave to amend is freely given where the application is not prejudicial, unduly belated or palpably lacking in merit, CPLR § 3025(b); *Edendale Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983), where, as here, leave is sought after the action has been certified for trial, judicial discretion is exercised sparingly. *Velez v. South Nine Realty* Corp., 57 A.D.3d 889 (2d Dept. 2008).

The Defendant has failed to demonstrate that the claims she now raises could not have been interposed prior to, *inter alia*, the completion of discovery and filing of the note of issue. In light of the procedural posture of this action, and in the exercise of its discretion, the Court denies Defendant's motion to amend.

This constitutes the decision and order of the court.

All matters not decided herein are hereby denied.

The Court reminds counsel and their parties of their required appearances at the trial scheduled before the Court on February 22, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

February 9 , 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.