

**IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

B.V.F. CONSTRUCTION CO. INC.	:	OCTOBER TERM, 2007
	:	
Plaintiff,	:	
	:	
v.	:	
	:	No. 2084
TURCHI, INC., JOHN TURCHI JR., WALNUT CONSTRUCTION CO., 400 WALNUT STREET ASSOCIATES, L.P., 1930-34 ASSOCIATES, LP, 1930-34 CORP., 23S23 CONSTRUCTION INC., CARRIAGE HOUSE CONDOMINIUMS, GP, INC., and CARRIAGE HOUSE CONDOMINIUMS, LP.	:	COMMERCE PROGRAM
	:	
v.	:	Control No. 13022731
	:	
HUNTER ROBERTS CONSTRUCTION GROUP, INC.,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

By: Honorable Albert John Snite, Jr.

Before the court is the partial motion for summary judgment of defendants. For the reasons set forth below, the motion is granted in part and denied in part.

FACTS AND PROCEDURAL BACKGROUND

This is a collection action by Plaintiff B.V.F. Construction Co. Inc. ("BVF"), a carpentry subcontractor, relating to its work at three separate projects, against a commercial real estate developer, John Turchi, Jr. ("Turchi"), and various entities related to the real estate development projects.

The three construction projects currently at issue are 400 Walnut Street, 1930-34 Chestnut Street, and 23 S. 23rd Street. Each real estate project was owned and developed by different single purpose entities. 400 Walnut Street was owned by 400 Walnut Associates, L.P.; 1930-34 Chestnut Street was owned by 1930-34 Associates, LP; 23 S. 23rd Street was owned by Carriage House Condominiums, L.P. Each project similarly had a related corporation, acting both as general contractor and general partner, in the limited partnerships – Walnut Construction Co., 1930-34 Corporation, and 23S23 Construction, Inc.

In each instance, defendant Turchi was the limited partner, holding a 99% interest in the limited partnership, and the corresponding corporation held the other 1% interest as general partner. Turchi was the sole shareholder of each of the construction manager corporations.

400 Walnut Street: BVF entered into a contract with Walnut Construction Company in or around August 2001 to perform work to convert an office building into apartment units. BVF claims it was never paid a balance due of \$306,687.25 for work performed on that project.

1930-34 Chestnut Street: This is another office-to-apartment conversion project, owned by 1930-34 Chestnut Associates, LP. BVF disputes with whom the contract was entered¹ (1930-34 Chestnut Associates, LP, owner, or 1930-34 Corp., general contractor) in May 2002. BVF claims that it was never paid a balance due of \$403,916.19 for work performed.

23 S. 23rd Street: BVF entered into a written contract with 23S23 Construction on June 23, 2005 to convert a multi-level parking garage into condominiums, developed by owner Carriage House Condominiums, LP. BVF claims that it was not paid a total of \$1,296,930.76 for work performed, and completed, on this project.

¹ BVF alleges that the only written document which exists is an unsigned contract between BVF and 1930-34 Associates, LP. Defendants maintain that a signed contract existed between BVF and 1930-34 Associates, LP. BVF avers that the terms of its contract were agreed to orally with 1930-34 Corp. Third Amended Complaint ¶53. All of the payments that BVF received for work performed on the project came from 1930-34 Associates. See Deposition of John F. Vernon, vice-president of BVF, Nov. 1, 2011, 149:22-150:9.

BVF brought suit by Writ of Summons on October 16, 2007. A Third Amended Complaint was filed on December 23, 2010.

The owners of 400 Walnut Street (400 Walnut Street Associates, LP) and 23 S. 23rd Street (Carriage House Condominiums, LP), and the construction manager for 23 S. 23 Street (23S23 Construction, Inc.) filed for bankruptcy during the pendency of BVF's suit.

On July 23, 2010, 400 Walnut Street Associates, LP, filed a voluntary petition for relief under chapter eleven of the United States Bankruptcy Court for the Eastern District of Pennsylvania. 400 Walnut Street Associates, LP, had its plan of reorganization confirmed on April 24, 2012, and its debts, including those to BVF at issue here were discharged. The debt on which BVF brings the instant action against 400 Walnut Street Associates, LP, was due and owing to plaintiff as of the Petition Date, and was included in the schedule of liabilities annexed to 400 Walnut Street Associates, LP's petition in bankruptcy. Accordingly, the debt on which BVF is suing here is barred as a result of the confirmation order.

On April 19, 2009, Carriage House Condominiums filed a voluntary petition for relief under chapter eleven of the United States Bankruptcy Court for the Eastern District of Pennsylvania. Carriage House Condominiums, LP, had its plan of reorganization confirmed on June 29, 2010, and its debts, including those to BVF at issue here were discharged. The debt on which BVF brings the instant action against Carriage House Condominiums, LP, was due and owing to plaintiff as of the Petition Date, and was included in the schedule of liabilities annexed to 400 Walnut Street Associates, LP's petition in bankruptcy. Accordingly, the debt on which BVF is suing here is barred as a result of the confirmation order.

On April 9, 2009, 23S23 Construction, Inc. filed a voluntary petition for relief under chapter eleven of the United States Bankruptcy Court for the Eastern District of Pennsylvania.

The 23S23 bankruptcy was converted to chapter seven liquidation when it could not get a plan confirmed. A trustee was appointed in 2010, who declared there were no assets to distribute after conducting an investigation of the company's assets. As such, the insolvent, no-asset entity's bankruptcy case was closed on September 14, 2012. The debt on which BVF brings the instant action against 23S23 Construction, Inc. was included in the schedule of liabilities annexed to 23S23 Construction, Inc.'s petition in bankruptcy.²

Currently before the court is the defendants' motion for partial summary judgment, filed on February 19, 2013.

Plaintiff filed its answer in opposition to the motion for summary judgment on March 28, 2013. Plaintiff concedes to the granting of partial summary judgment in favor of all above-referenced bankrupt entities, due to the discharge in bankruptcy court. Plaintiff does highly contest the entry of judgment against Turchi, individually, on all related counts, and for fraud and piercing of the corporate veil.

DISCUSSION

I am granting the motion for summary judgment in part, and denying it in part. After plaintiff's concession to remove the entities whose debts were discharged in bankruptcy,³ the remaining counts in the Third Amended Complaint are: Breach of Contract against 1930-34 Corp. (Count II—not implicated in the current motion); Quantum Meruit/Unjust Enrichment against Turchi individually (Counts IV, V, and VI); Quantum Meruit/Unjust Enrichment against 1930-34 Corp. and 1930-34 Associates, LP (Count V); Damages under CSPA against 1930-34

² Defendants' counsel does not represent the liquidated entity, but move to strike claims against it in this action as "unlawful, pointless and confusing". Defendants' Memorandum, pg. 9. Plaintiffs do not oppose such.

³ I need not further discuss my ruling in respect to these claims that I am dismissing. Additionally, Plaintiff concedes in its proposed order that "Defendants' Motion is granted as to all other Defendants and all other counts of the Third Amended Complaint", aside from the issues discussed further, infra.

Corp. and 1930-34 Associates, LP (Count VIII); Fraud against Turchi (Count X); and Piercing of the Corporate Veil against Turchi (Count XI).

Once the relevant pleadings have closed, any party may move for summary judgment. Pa. R.C.P 1035.2. “Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.” Rausch v. Mike-Meyer, 783 A.2d 815, 821 (Pa. Super. 2001). Further, granting summary judgment is appropriate only when the evidentiary record shows the material facts are undisputed. McCarthy v. Dan Lepore & Sons 4 Co., Inc., 724 A.2d 938, 940 (Pa. Super. 1998). The trial court must view the record in the light most favorable to the non-moving party. Rausch, 783 A.2d at 821. Rule 1035.3 of the Pennsylvania Rules of Civil Procedure provides:

The adverse party may not rest upon the mere allegations or denials of pleadings but must file a response within thirty days after service of the motion identifying:

- (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
- (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

With respect to Count XI, BVF has sufficiently pled piercing of the corporate veil against Turchi and produced evidence that supplies disputed material issues of fact. In Pennsylvania, the factors to be considered in disregarding the corporate form are undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetrate a fraud.⁴

⁴ See Fletcher-Harlee Corp. v. Szymanski and David Concrete Corp, Inc., 936 A.2d 87, 95 (Pa. Super. Ct. 2007) (citations omitted).

BVF has reviewed the financial records and tax returns of the defendants. The tax returns of the ownership entities reveal numerous transfers to and from unidentified affiliates through inter-company accounts, for which Turchi did not offer an explanation or identify to or from which affiliates these transaction were made. Additionally, in review of the general ledgers of defendant entities, BVF identified numerous inter-company accounts to and from which transfers were made with affiliates. Transfers were also identified to and from Turchi individually. Neither Turchi nor Turchi's Chief Financial Officer, Samuel Rotter, sufficiently explained such inter-company transfers. There indeed remain material issues of fact, including whether Turchi, as the individual in sole control of all the entities, intermingled funds and other factors that may be sufficient to pierce the corporate veil. As such, summary judgment is denied as to this Count XI.

Similarly, the court sees the fraud claim at Count X against Turchi intertwined with piercing of the corporate veil claim. The piercing of the corporate veil argument is based, at least in part, on the alleged fraud and thus the motion for summary judgment with respect to the fraud claim is denied.

Following the "American Rule," there may be no recovery of attorney's fees from an adverse party in the absence of express statutory allowance, or a clear contractual agreement of the parties.⁵ Here, there is no such allegation, and accordingly attorney's fees must be stricken from the demand under the fraud claim at Count X.

Turning next to the quantum meruit/unjust enrichment claims against Turchi at Counts IV, V, and VI, the court finds that there may be no claim against him personally under these theories. To prevail on an unjust enrichment claim in Pennsylvania, a plaintiff must prove: (1) a

⁵ Com. v. Smith, 602 A.2d 499, 501 (1992).

benefit conferred upon one party by another, (2) appreciation of such benefit by the recipient, and (3) that acceptance and retention of the benefit would be inequitable.⁶

Two of the relevant entities have been dissolved in bankruptcy, and all claims, including quantum meruit/unjust enrichment, have been dismissed against the entities (400 Walnut Street at Count IV, and 23 S. 23rd Street at Count VI), and thus there remains no separate claim against Turchi individually under these counts, aside from the potential piercing of the corporate veil under Count XI.

With respect the 1930-34 Chestnut Street project, there may be no individual claim against Turchi, aside from the potential piercing of the corporate veil under Count XI. As there is a dispute as to whom the contract was with (the LP or the GP), summary judgment must be denied as to 1930-34 Corp and 1930-34 Associates, LP.

Next, the Pennsylvania Contractor and Subcontractor Payment Act (CSPA), 73 P.S. § 502 et seq., provides statutory payment obligations to contractors and subcontractors. Under Count VII of the Third Amended Complaint, BVF claims that pursuant to CSPA Section 505, defendants 1930-34 Corp. and 1930-34 Associates, LP owe plaintiff \$403,916.19. BVF alleges that 1930-34 Associates, LP was the “owner” and defendant 1930-34 Corp. was the “contractor.”⁷ CSPA section 507 plainly states: “Contractor's and subcontractor's payment obligations: (a) ENTITLEMENT TO PAYMENT.-- Performance by a subcontractor in accordance with the provisions of the contract shall entitle the subcontractor to payment from the party with whom the subcontractor has contracted.” Here, as there may have been a contract between BVF and owner 1930-34 Chestnut Associates, LP, this portion of the motion for summary judgment is denied.

⁶ MetroClub Condo. Ass'n v. 201-59 N. Eighth St. Assocs., L.P., 2012 PA Super 122 (Pa. Super. Ct. 2012) (citations omitted).

⁷Third Amended Complaint ¶ 136.

Lastly, in regard to the argument raised by defendants in regard to the 400 Walnut Street project, the court feels that there is no need to address the contract statute of limitations, as this count has been dismissed.

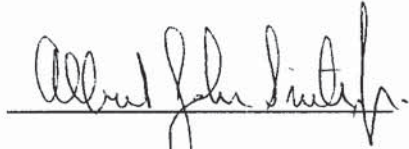
After the above-mentioned rulings, the remaining counts are: II (Breach of Contract v. 1930-34 Corp.), V (Quantum Meruit/Unjust Enrichment v. 1930-34 Corp. and 1930-34 Associates, L.P.); VIII (CSPA v. 1930-34 Associates, LP); X (Fraud v. Turchi); and XI (Piercing of the Corporate Veil v. Turchi).

CONCLUSION

For the foregoing reasons, defendants' Motion for Summary Judgment is granted in part and denied part.

BY THE COURT:

DATE: May 15, 2013

A handwritten signature in black ink, appearing to read "Albert John Snite, Jr.", written over a horizontal line.

ALBERT JOHN SNITE, JR., J.