THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JK ROLLER ARCHITECTS, LLC	:	
	:	July Term, 2002
	:	
Plaintiff,	:	No. 02778
v.	:	
	:	Commerce Program
TOWER INVESTMENTS, INC., et. al.	:	
	:	Control No. 100827
	:	
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 17th day of March, 2003, upon consideration of Defendants' Preliminary Objections to Plaintiffs' Amended Complaint, all responses in opposition, the respective memoranda, all matters of record, and in accordance with the Memorandum Opinion filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that said Preliminary Objections are **overruled in part** and **sustained in part.**

1. Defendants' Preliminary Objections relating to Defendant Bart Blatstein ("Blatstein") are **SUSTAINED**. Plaintiff's claims against Blatstein individually hereby are **DISMISSED** without prejudice. Plaintiff's will be permitted to file a Second Amended Complaint to correct the pleading deficiencies as to Blatstein within twenty (20) days from the date of entry of this Order.

2. The remainder of Defendants' Preliminary Objections are **OVERRULED.**

BY THE COURT:

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C. DARNELL JONES, J.

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MEMORANDUM OPINION

C. DARNELL JONES, J.

Before the Court are the Preliminary Objections of Defendants, Tower Investments, Inc. ("Tower"), Delaware 1851 Associates, LP ("1851"), Northern Liberties Development, LP ("NLD"), Reed Development Associates, Inc. ("RDA") and Bart Blatstein ("Blatstein"), to the Amended Complaint (the "Complaint") of Plaintiff JK Roller Architects, LLC ("JK Roller"). For the reasons fully set forth below, Defendants' Preliminary Objections are **sustained in part** and **overruled in part.**

BACKGROUND

The instant lawsuit arises out of seven (7) separate contracts for architectural services between Plaintiff and several of the Defendants. With respect to each of the foregoing contracts, Plaintiff has brought causes of action against certain Defendants for breach of contract and, alternatively, promissory estoppel and unjust enrichment. Plaintiff alleges, *inter alia*, that Defendants have failed to pay for services rendered pursuant to the foregoing agreements.

DISCUSSION

A. The Gist of the Action Doctrine Is Inapplicable At Bar

In their Preliminary Objections, Defendants assert that Plaintiff's unjust enrichment and promissory estoppel claims are barred by gist of the action doctrine. The gist of the action doctrine precludes claims for allegedly ***tortious*** conduct where the gist of the conduct sounds in contract rather than tort. Redevelopment Auth. of Cambira v. Int'l. Ins. Co ., 454 Pa. Super. 374, 391, 685 A.2d 581, 590 (1996)(emphasis added); Phico Ins. Co. v. Presbyterian Med. Services Corp., 444 Pa. Super. 221, 228, 663 A.2d 753, 757 (1995). This doctrine does not apply to alternative causes of actions based upon implied or constructive contracts, such as the claims for unjust enrichment and promissory estoppel pled by Plaintiffs.[1] Accordingly, Defendants' Preliminary Objections based on the gist of the action doctrine are **overruled**.

B. Defendants' Have Failed To State A Claim Against Blatstein Individually

Defendants have demurred to Counts I through XXI of the Complaint on the basis that Plaintiff has "improperly made Blatstein a party to the instant lawsuit." Def. Prelim. Obj. at ¶ 15-18. Among other things, Defendants argue that: 1) Plaintiff has not stated a valid basis for imposing individual liability against Blatstein; and 2) Plaintiff has failed to state a valid claim against Blatstein under a theory of alter ego liability. Id.

A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. Bailey v. Storlazzi, 1999 Pa. Super. 97, 729 A.2d 1206, 1211 (1999). For the purposes of reviewing preliminary objections asserting legal insufficiency, "all well-

[1]The Pennsylvania Rules of Civil Procedure permit causes of action to be pled in the alternative. Pa.R.C.P. 1020 (c). Unjust enrichment and promissory estoppel are proper alternative causes of action to a breach of contract claim. See e.g., Birchwood Lakes Community Ass'n, Inc. v. Comis, 296 Pa. Super. 77, 85, 442 A.2d 304, 308 (1980); Duane Morris v. Todi, 2002 WL 31053839 (Pa. Com. Pl. 2002).

pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 2000 Pa. Super. 183, 757 A.2d 938, 941-42 (2000). However, the pleader's conclusions or averments of law are not considered to be admitted as true. County of Allegheny v. Commw., 507 Pa. 360, 372, 490 A.2d 402, 408 (1985). Thus, the inquiry at bar is whether Plaintiff has set out material, relevant, well-pleaded facts which, if true, state a claim against Blatstein individually upon which relief may be granted. This court finds that Plaintiff has failed to satisfy its burden.

In the Complaint, Blatstein is defined as "an adult individual." Compl. ¶ 6. The Complaint further states: "[i]n his business dealings, Blatstein routinely and customarily holds himself out as Tower Investments and/or Tower, Investments, Inc." Id. The only other references to Blatstein individually are contained in ¶¶ 7 and 8 which state:

> 7. It is believed and therefore averred that Blatstein is the dominant owner/individual who controls Tower Investments and Tower Investments, Inc., which in turn own [*sic*] and control [*sic*] defendants Delaware 1851, Northern Liberties, and Reed, and that he uses all of these entities as his alter egos, It is further believed and therefore averred that Blatstein wholly ignores the separate status of Tower Investments and Tower Investments, Inc., Delaware 1851, Northern Liberties, and Reed and so dominates and controls the affairs of those entities that the separate existence of each is merely a sham.
>
> 8. At all relevant times herein, Blatstein orally ensured plaintiff that Tower Investments, Inc. and/or other entities acting as Blatstein's alter ego would pay plaintiff for services rendered in connection with agreements set for in paragraphs 10, 37, 63, 87, 114, 138 and 161 of this Complaint and that Roller relied upon these representations to his detriment.

Compl. ¶¶ 7, 8. Thereafter, Plaintiff makes no reference to Blatstein as an individual, but rather cryptically refers to Defendants Tower Investments, Inc. and Blatstein "collectively ...as 'Tower'" Id. at ¶ 9. This collective definition of defendants Tower and Blatstein is misleading.

Should Plaintiff wish to assert a contract or quasi-contractual claim against Blatstein, it

must do so specifically, and not lump the claims against him with those brought against the corporate entity. Plaintiff's insistence on collectively referring to Blatstein and Tower as one entity throughout the Complaint fails to satisfy Pennsylvania's requirement of fact pleading. Smith v. Wagner, 403 Pa. Super. 316, 319, 588 A.2d 1308, 1310 (1991); Santiago v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 418 Pa. Super. 178, 185, 613 A.2d 1235, 1238 (1992) ("[u]nder the Pennsylvania system of fact pleading, the pleader must define the issues; every act or performance essential to that end must be set forth in the complaint"); Sevin v. Kelshaw, 417 Pa. Super. 1, 7, 611 A.2d 1232, 1235 (1992). The purpose behind Pennsylvania's fact pleading requirement is to "give the defendant notice of what the plaintiffs' claim is and the grounds upon which it rests, thus allowing the defendant to prepare a defense." Alpha Tau Omega Fraternity v. Univ. of Pennsylvania, 318 Pa. Super. 293, 298, 464 A.2d 1349, 1352 (1983). As plead, it can not be discerned from the Complaint what conduct is being attributed to Blatstein and which is being attributed to Tower.

This case is based upon seven (7) contracts to which Blatstein was not a party. As such, the Complaint, when read as a whole, does not set forth sufficient facts to show Blatstein's individual liability, even in the most general terms. Now this court must look to whether Plaintiff has asserted a valid "alter ego" claim against Blatstein.

As a preliminary matter, it must be noted that a strong presumption exists in Pennsylvania against disregarding the corporate form. Wedner v. Unemployment Compensation Bd. of Review, 449 Pa. 460, 464, 296 A.2d 792, 794 (1972). "Piercing the corporate veil is the exception, and courts should start from the general rule that the corporate entity should be upheld unless specific, unusual circumstances call for [such] an exception." First Realvest, Inc. v. Avery Builders, Inc., 410 Pa. Super. 572, 600 A.2d 601, 604 (1991). Under Pennsylvania law, the

following factors are to be considered in determining whether to pierce the corporate veil: 1) undercapitalization; 2) failure to adhere to corporate formalities; 3) substantial intermingling of corporate and personal affairs; and 4) use of the corporate form to perpetrate a fraud. Lumax Indus. v. Aultman, 543 Pa. 38, 669 A.2d 893 (1995); Village at Camelback Prop. Owners Ass'n, Inc. v. Carr, 371 Pa. Super. 452, 461, 538 A.2d 528, 533 (1988), *aff'd* 524 Pa. 330, 572 A.2d 1 (1990).

In order to withstand a demurrer, Plaintiff must set forth the conduct which Blatstein allegedly engaged in that would bring his actions within the parameters of a cause of action based on a theory of piercing the corporate veil. Lumax, 543 Pa. at 38, 669 A.2d at 893. While it is not necessary to set forth the evidences by which facts are to be proved, it is essential that the facts the pleader depends upon to show liability be averred. Id. (*quoting* Frey v. Dougherty, 286 Pa. 45, 48, 132 A. 717, 718 (1926)).[2] The Complaint, as pled, fails to satisfy this burden. As previously stated, Blatstein's name is mentioned in only three paragraphs of the twenty-one (21) count Complaint. All the averments relating to Blatstein's alleged liability under an "alter ego" theory contained in the Complaint are conclusions of law and are not enough to sustain this cause of action.

As such, this court finds that, at this time, Plaintiff has failed to plead sufficient facts to state a claim against Blatstein under a theory of piercing the corporate veil. Accordingly, Defendants' Preliminary Objections relating to Blatstein are **sustained** and the claims against

[2]Defendants reliance upon in Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983) is misplaced. In Wicks, the Pennsylvania Supreme Court examined the differences between participation theory and piercing the corporate veil. Participation theory, in simple terms, is a theory which imposes personal liability on corporate officers or shareholders where they have personally taken part in the actions of the corporation. Id. at 621, 470 A.2d at 89-90. Plaintiff's complaint asserts no facts which would support a claim based on participation theory.

Blatstein individually are **dismissed without prejudice**. Defendants will be permitted to file a Second Amended Complaint to correct the pleading deficiencies as to Blatstein within twenty (20) days from the date of entry of this Order.

C. Paragraph 9 of the Complaint Does Not Violate Rule 1019 (i)

Finally, Defendants assert that Plaintiff has violated Rule 1019 (i) by failing to attach the "various agreements" which are referred to in ¶ 9 to the Complaint:

> 9. Roller has entered into **various agreements** for the provision of architectural services with Tower Investments, Inc. and Blatstein (collectively referred to herein as "Tower"). Through the course and conduct of these dealings, Roller has conducted business with Tower on regular [*sic*] and continuous basis for over seventeen (17) years and all conditions precedent to Roller's right to recover have been satisfied.

Compl. ¶ 9 (emphasis added). Pursuant to Rule 1019 (i):

> (i) When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.C.P. 1019 (i). Based upon the plain language of the Complaint, it is clear that Plaintiff's claims are not "based" upon the "various agreements" referred to in ¶ 9 and that such language was included solely for the purposes of background. Plaintiff has attached all the agreements at issue. Accordingly, Rule 1019 (i) is inapplicable as respects ¶ 9. As such, Defendants' Preliminary Objection is **overruled**.

CONCLUSION

For the above-stated reasons, this Court hereby finds as follows:

1. Defendants' Preliminary Objections relating to Blatstein are **sustained**. Plaintiff's claims against Blatstein individually hereby are **dismissed without prejudice**. Defendants will be permitted to file a Second Amended Complaint to correct the pleading deficiencies as to Blatstein within twenty (20) days from the date of entry of this Order.

2. The remainder of Defendants' Preliminary Objections are **overruled**.

This Court will enter an Order consistent with this Opinion contemporaneously.

BY THE COURT:

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C. DARNELL JONES, J.

Dated: March 17, 2003