

44 A.D.3d 1016 (2007)
845 N.Y.S.2d 110

**MILLENNIUM CONSTRUCTION, LLC, Respondent,
v.
BORIS LOUPOLOVER, Appellant, et al., Defendant.
LEONID GIZERSKY, Additional Respondent.**

Appellate Division of the Supreme Court of the State of New York, Second Department.

Decided October 30, 2007.

Crane, J.P., Florio, Angiolillo and Carni, JJ., concur. Ordered that the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff, Millennium Construction, LLC (hereinafter Millennium), and the additional defendant Leonid Gizersky established their *prima facie* entitlement to judgment as a matter of law dismissing the counterclaims insofar as asserted against Gizersky. The Supreme Court correctly determined that there was no basis upon which to pierce the corporate veil of Millennium in order to hold its president and sole shareholder Gizersky personally liable. A party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]; see *Old Republic Natl. Tit. Ins. Co. v Moskowitz*, 297 AD2d 724, 725 [2002]; *Hyland Meat Co. v Tsagarakis*, 202 AD2d 552 [1994]). "The party seeking to pierce the corporate veil must [further] establish that the [controlling corporation] abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 142; see *Weinstein v Willow Lake Corp.*, 262 AD2d 634, 635 [1999]; *Hyland Meat Co. v Tsagarakis*, 202 AD2d at 552). "The concept is equitable in nature, and the decision whether to pierce the corporate veil in a given instance will depend on the facts and circumstances" (*Hyland Meat Co. v Tsagarakis*, 202 AD2d at 553; see *Weinstein v Willow Lake Corp.*, 262 AD2d at 635).

Factors to be considered by a court in determining whether to pierce the corporate veil include failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use (see *Shisgal v Brown*, 21 AD3d 845, 848, 849 [2005]; *Matter of Alpha Bytes Computer Corp. v Slaton*, 307 AD2d 725, 726 [2003]; *Forum Ins. Co. v Texarkoma Transp. Co.*, 229 AD2d 341, 342 [1996]; cf. *John John, LLC v Exit 63 Dev., LLC*, 35 AD3d 540, 541 [2006]; *Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72, 78 [2004]). In opposition to the cross motion of Millennium and Gizersky, the defendant Boris Loupolover (hereinafter the appellant), failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted the cross motion for summary judgment dismissing the counterclaims insofar as asserted against Gizersky.

We do not reach the appellant's contentions concerning his motion, *inter alia*, for sanctions against Millennium for failing to comply with discovery demands because such motion was not addressed by the Supreme Court in the order appealed from and thus remains pending and undecided (see *Morris v Queens-Long Is. Med. Group, P.C.*, 43 AD3d 394, 395 [2007]; *Hill v 2016 Realty Assoc.*, 42 AD3d 432, 433 [2007]; *Lesisz v Salvation Army*, 40 AD3d 1050, 1052 [2007]; *Katz v Katz*, 68 AD2d 536 [1979]).

The appellant's remaining contentions are without merit.

146 A.D.3d 1 (2016)
2016 NY Slip Op 06903
40 N.Y.S.3d 46

**SKANSKA USA BUILDING INC., Appellant-Respondent,
v.
ATLANTIC YARDS B2 OWNER, LLC, et al., Respondents-Appellants, et
al., Defendants.**

652680/14.

Appellate Division of the Supreme Court of New York, First Department.

Decided October 20, 2016.

^{4*4} Cross appeals from the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered July 20, 2015, which, insofar as appealed from as limited by the briefs, granted defendants-respondents' motion to dismiss subparts (f) and (h) of the first cause of action and denied the motion as to subparts (a), (b), and (c) of that cause of action and as to the third cause of action, and denied plaintiff's motion to disqualify the law firm of Troutman Sanders LLP as defendants' attorneys.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 20, 2015, modified, on the law, to deny defendants Atlantic Yards B2 Owner, LLC and Forest City Ratner Companies, LLC's motion to dismiss subpart (h) of the first cause of action and to grant their motion to dismiss the third cause of action, and otherwise affirmed, without costs.

Peckar & Abramson, P.C., New York City (Bruce D. Meller and Peter E. Moran of counsel), for appellant-respondent.

Kramer Levin Naftalis & Frankel LLP, New York City (Harold P. Weinberger, Natan M. Hamerman and Kaavya Viswanathan of counsel), and Troutman Sanders LLP, New York City (Lee W. Stremba, Aaron Abraham and Kevin P. Wallace of counsel), for respondents-appellants.

Couch White, LLP, Albany (Jennifer K. Harvey and Joel M. Howard, III of counsel), for amicus curiae.

SAXE and WEBBER, JJ., concur with ACOSTA, J.P.; GISCHE and KAHN, JJ., dissent in part in an opinion by GISCHE, J.

OPINION OF THE COURT

ACOSTA, J.P.

This case gives us the opportunity to interpret the language of Lien Law § 5, which provides that a private developer on public land must post a bond or other undertaking guaranteeing prompt payment to the contractor. We also address piercing the corporate veil in litigation involving sophisticated entities, as well as several breach of contract claims and attorney disqualification. These issues arose in the context of construction litigation between plaintiff and its affiliates, an international construction conglomerate, and defendants Atlantic Yards B2 Owner, LLC (B2 Owner) and Forest City Ratner Companies, LLC (Forest City) and their affiliates, the developers of the

Atlantic Yards project in Brooklyn. Specifically, the litigation revolved around the construction of a high-rise residential tower called "B2." B2 was to be built using innovative prefabricated modular units developed by defendant Forest City that would then be stacked together by plaintiff to form the high-rise. For the reasons stated below, we decline to adopt plaintiff's interpretation that Lien Law § 5 is satisfied by 5*5 the posting of a bond only and not a guarantee as was done here. We also find that plaintiff failed to plead a veil-piercing claim. As the facts show, both parties were very sophisticated, and negotiated in minute detail all aspects of their agreements to build B2 using innovative technology. That the project failed does not lead to a veil-piercing claim, especially since plaintiff failed to identify the alleged fraud or other wrongdoing. We also reinstate the claim based on inadequate factory and labor, and decline to disqualify one of defendants' law firms based on a conflict of interest.

Background

In July 2006, the Empire State Development Corporation (ESDC), a state actor, adopted a plan for the Atlantic Yards Land Use Improvement and Civil Project, a 22-acre mixed-use development project in Brooklyn, to be anchored by the Barclays Center sports arena. As part of this project, in March 2010, ESDC entered into an interim lease agreement with AYDC Interim Developer, LLC, an entity affiliated with defendant B2 Owner, for construction of a number of buildings near the Barclays Center sports arena.

One of these buildings, the B2 Residential Project (B2 Building), was a proposed 34-story residential building containing 350 units. The B2 Building was to be erected with innovative modular construction, i.e., assembled pre-manufactured modular units. The modular construction concept was based on proprietary technology and design developed by defendant Forest City, also an affiliate of B2 Owner.

Forest City invited plaintiff, an international construction conglomerate, to participate in establishing a factory to construct the modules near the B2 site, and then to assemble the modules into the B2 Building. In June 2012, plaintiff and FCRC Modular, LLC (a Forest City affiliate) entered into a "Contract for Module Fabrication and Testing Services" (the Testing Agreement). The Testing Agreement contemplated a joint effort by plaintiff and the Forest City entities to build and test the modular units to be used in the B2 Building, with the goal of entering into a joint venture for construction of a full-blown modular factory facility.

On October 31, 2012, affiliates of plaintiff and Forest City executed three agreements in furtherance of the B2 Project. FCRC Modular, Skanska Modular, LLC (a daughter company of plaintiff), together with (as to certain portions) plaintiff and 6*6 B2 Owner, entered into an "LLC Agreement" establishing FC+Skanska Modular, LLC (FC Skanska), to build and operate the modular factory. The LLC Agreement was, in sum, a joint venture among the parties, wherein Forest City affiliates supplied the modular unit intellectual property (including the fruits of the Testing Agreement), plus some capital, and plaintiff's affiliates supplied capital and construction know-how. The LLC Agreement made Skanska Modular the managing member for purposes of day-to-day operations.

On the same day, FCRC Modular, Skanska Modular, and FC Skanska entered into an "Intellectual Property Transfer and Development Agreement" (IP Transfer Agreement), which conveyed the modular IP and fruits of the Testing Agreement to FC Skanska.

Finally, also on October 31, 2012, plaintiff and B2 Owner entered into a "Construction Management and Fabrication Services Agreement" (the CM Agreement). The CM Agreement provided for plaintiff to enter into a subcontract with FC Skanska, under which FC Skanska would supply the modular units and plaintiff would effect the assembly, in exchange for a contract price of \$116,875,078.

Among its other provisions, the CM Agreement called for the B2 Project to be substantially completed 416 business days after B2 Owner issued a "Notice to Proceed." In the CM Agreement, plaintiff represented that it had conducted due diligence and had no reason to believe that the modular design was inadequate or would not permit construction as provided for in the CM Agreement. On the other hand, the CM Agreement recited that plaintiff could "rely upon and use" in its performance "information supplied to it by or on behalf of [B2] Owner and its [a]ffiliates." The CM Agreement further stated that plaintiff was "not responsible for defects and/or deficiencies in the Work attributable to [its] reliance upon any such information that is incorrect, inaccurate or incomplete," and provided further that plaintiff would "notify [B2] Owner promptly of any inaccuracies in such information ... so as to minimize potential delays."

The CM Agreement contemplated changes to the schedule for "Force Majeure Event[s]," "Owner-Caused Event[s]," and "Contractor-Caused Delay[s]." Plaintiff was entitled to extensions of time for force majeure and owner-caused events, but only if it gave written notice within five days of its actual knowledge of the event, followed by a second notice within 45 ~~7*7~~ days after the end of the event (or the initial notice). Moreover, time extensions were only available for events that "adversely impact[ed] activities on the critical path" of the construction schedule. The CM Agreement similarly provided for plaintiff to receive additional payment for force majeure or owner-caused events if it gave timely notice.

B2 Owner could also request or direct changes in the scope of work. Either plaintiff or B2 Owner could terminate the CM Agreement for cause. B2 Owner could also terminate the CM Agreement for convenience. B2 Owner issued the Notice to Proceed on December 14, effective December 21, 2012. The deadline for substantial completion was July 25, 2014.

By a 146-page letter dated August 8, 2014, plaintiff gave B2 Owner notice of its intent to terminate the CM Agreement on account of dozens of alleged force majeure and owner-caused events and other breaches. The letter specified 12 alleged periods of delay, each lasting between one week and as much as five months. Plaintiff attributed the delays to delays in the factory fit-out (i.e., the time to get the modular factory up and running); defects in Forest City's modular unit design technology; related negligence and failure to cooperate by B2 Owner's design professionals; and improper changes to the scope of work made by B2 Owner without the requisite change orders. Plaintiff also alleged that Forest City had breached the CM Agreement's requirement that it provide evidence of satisfactory financing for the project by, among other things, failing to post a bond required by Lien Law § 5. Plaintiff alleged that it had suffered damages in excess of \$50 million.

On August 27, 2014, plaintiff stopped work on the project and shortly thereafter notified B2 Owner that the CM Agreement was terminated.

Complaint & Dismissal Motion

Plaintiff commenced this action asserting causes of action for breach of the CM Agreement. It claimed that defendants had breached the CM Agreement by, among other things, providing a defective design for the project, including an inadequately designed modular factory facility with inadequate labor, changing the project scope without issuing change orders, and failing to provide adequate security as required by the Lien Law. Plaintiff also asserted a cause of action alleging that B2 Owner was a mere alter ego of Forest City, and seeking to pierce Forest City's corporate veil. Plaintiff sought damages of at least \$30 million.

^{8*8} Defendants moved pursuant to CPLR 3211 (a) (1) and (7) to dismiss the veil-piercing cause of action, as well as certain parts of plaintiff's breach of contract claims, including the claims that defendants violated Lien Law § 5, supplied a defectively designed modular factory and inadequate factory labor, and changed the project scope without appropriate change orders.

Plaintiff opposed the motion and cross-moved pursuant to CPLR 3211 (c) for partial summary judgment on the issue of defendants' liability on the Lien Law § 5 claim.

Attorney Disqualification Motion

Plaintiff also moved to disqualify the law firm Troutman Sanders LLP (Troutman) as defendants' attorneys, on the ground of conflict of interest, inasmuch as Troutman represented two of plaintiff's affiliates in matters in Maryland and Florida. Plaintiff added that Troutman's representation of Forest City was adverse to the interests of one of its affiliate's directors, who was a named defendant in a related action in Supreme Court, New York County, brought by FCRC Modular.

Court's Decision on the Motion

The motion court dismissed subpart (f) of the first cause of action, which alleges that defendants breached the CM Agreement by failing to post a bond required under Lien Law § 5, and subpart (h), which alleges breach of the CM Agreement based on an inadequate factory and inadequate labor (2015 NY Slip Op 31258[U] [2015]).

The motion court denied defendants' motion to dismiss subparts (a) and (b) of the first cause of action, which alleges breach of contract due to design defects, as well as subpart (c), which alleges breach of the parties' CM Agreement by improperly changing the scope of work. It also declined to dismiss the third cause of action, which seeks to pierce the corporate veil of defendants and their affiliates, and denied plaintiff's motion to disqualify Troutman.

Analysis

Lien Law § 5

Plaintiff argues that the text and legislative history of Lien Law § 5 demonstrate that Forest City Ratner Companies, LLC was required to post a bond to guarantee B2 Owner's performance under the CM Agreement. We disagree. Far from 9*9 supporting plaintiff's argument, the statute's legislative history indicates that no bond — as opposed to some other sort of "undertaking," such as a guarantee — was required to be posted here.

Lien Law § 5, entitled "Liens under contracts for public improvements," provides, in relevant part:

"Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of *the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement*" (emphasis added).

The statute dates back to the former Lien Law of 1897. Prior to 2004, the statute left a "gap," in that contractors working on projects being built by private developers, with private funds, but on public land, could not file liens against the public land or the private entity's leasehold interest (see *Matter of Paerdegat Boat & Racquet Club v Zarrelli*, 57 NY2d 966 [1982], *revg for reasons stated at 83 AD2d 444, 449-452 [2d Dept 1981, Hopkins, J., concurring in part, dissenting in part]*; *Plattsburgh Quarries v Markoff*, 164 AD2d 30, 32 [3d Dept 1990], *lv denied 77 NY2d 809 [1991]*).

In 2004, the legislature acted to fill this gap by enacting the language highlighted above. This provides for the public owner, in the case of large private development projects on public land, to "require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor ... in the prosecution of the work on the public improvement" (L 2004, ch 155, § 1).

The crux of plaintiff's position is that the guarantee provided in this case does not comply with the law because it is not equivalent to a bond or "other form of undertaking" under the statute.

A statute, however, is to be construed so as to give meaning to each word (see McKinney's Statutes § 231). Black's Law Dictionary defines an "undertaking" first as "[a] promise, ~~10*10~~ pledge, or engagement," and second as "[a] bail bond" (Black's Law Dictionary 1665 [9th ed 2009]). Similarly, the CPLR defines "Undertaking" first as "[a]ny obligation, whether or not the principal is a party thereto, which contains a covenant by a surety to pay the required amount, as specified therein, if any required condition ... is not fulfilled" (CPLR 2501 [1]). Hence, an "undertaking," as distinct from a "bond," is simply a "formal promise [or] guarantee" (Black's Law Dictionary 1665 [9th ed 2009]).

That the legislature intended the term "undertaking" in Lien Law § 5 to mean a "guarantee" is strongly supported by the statute's legislative history, which indicates that the Governor vetoed an earlier version of the 2004 amendment that added the above quoted language because the earlier version would have required the posting of a bond in every instance, disallowing "other forms of security designed to guarantee payment" (Letter from Assembly Sponsor, July 8, 2004, Bill Jacket, L 2004, ch 155 at 5). The senate sponsor of the amendment clarified that the phrase "or some other form of undertaking" was added to meet the Governor's concerns by providing "an alternative to posting a bond" (Letter from Senate Sponsor, July 15, 2004, Bill Jacket, L 2004, ch 155 at 3).

As defendants point out, ESDC met its obligations under the statute by causing a Forest City affiliate — Forest City Enterprises, Inc. — to issue a formal "Guaranty" that B2 Owner would "cause Substantial Completion of the Improvements and perform the Development Work," including "*to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work, including, but not limited to, the costs of constructing, equipping and furnishing the Guaranteed Work*" (emphasis added). This guarantee follows the letter of the statute, namely "guaranteeing prompt payment" to contractors. That there are better guarantees available, such as a letter of credit, as the dissent notes, is beside the point. ESDC, as the public owner, was satisfied with the guarantee issued by Forest City Enterprises, Inc. Certainly, if the legislature had wanted the guarantee to be on par with a letter of credit it could have said that or identified the various types of guarantees that would satisfy the statute.

Since plaintiff is seeking only to force defendants to post a bond under Lien Law § 5, we need not decide whether it would have standing to enforce the guaranty as against Forest City Enterprises, as a third-party beneficiary.

11*11 **Breach of Contract**

Factory Facility and Labor

The motion court erred in dismissing subpart (h) of the first cause of action, which alleges breach of the CM Agreement based on an inadequate factory and inadequate labor. Plaintiff plausibly argues that the CM Agreement, particularly when viewed together with the parties' related and contemporaneously executed LLC and IP Transfer Agreements (see *BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1st Dept 1985]), required B2 Owner to ensure that an adequate modular factory and factory labor force were in place before it issued the Notice to Proceed. Thus,

the allegations that the factory and labor force were inadequate, causing project delays, adequately state a claim for breach of the CM Agreement.

Modular Unit Design Defects

The motion court upheld the claim that defendants breached the CM Agreement by providing defectively designed modular unit technology. Defendants argue that this claim is refuted by documentary evidence. Defendants' argument lacks merit.

CM Agreement § 5.4 (b) (ii) defines an "Owner-Caused Event" as including "fault, neglect or other negligent or wrongful act or failure to act by [B2] Owner's ... Design Professionals." The CM Agreement makes clear that defendants designed the modular unit technology. Indeed, B2 Owner expressly represented that its professionals designed the modules and they were "sufficient for completion of the Work." Plaintiff alleges that the modular units, designed by defendants or their agents, were defective. Plaintiff thereby states a claim for breach of the CM Agreement.

Defendants' main argument is that plaintiff failed to provide timely notice as required to assert a claim for design defect under section 3.5 of the LLC Agreement, i.e., by December 7, 2012. However, the parties appear to have contemplated that such flaws could be identified after December 7, 2012. Indeed, while B2 Owner represented in the CM Agreement that the design was sufficient, it further agreed that any design defects would be "Owner-Caused Events." Certainly, there is tension between these provisions — as there is also with the disclaimers of warranties to which defendants point. However, such facial conflicts present questions of fact that are not suitable for resolution on this pre-answer motion to dismiss.

12*12 Changes to Scope of Work

The motion court upheld the claim that defendants breached the CM Agreement by changing the scope of work without issuing appropriate change orders. Defendants argue that plaintiff waived this claim by failing to comply with the CM Agreement's notice provisions governing change orders.

The parties agree that plaintiff's compliance with the change order notice provision was a condition precedent to the assertion of a claim for unauthorized changes in the scope of work. However, the CPLR does not require a party asserting a contract claim to plead compliance with a condition precedent (CPLR 3015 [a]). Instead, it is incumbent upon the party resisting the contract claim to plead the failure to comply with the condition precedent (*id.*). Given defendants' failure to plead, the motion court correctly declined to dismiss the breach of contract claims.

Piercing the Corporate Veil

Veil-piercing is a narrowly construed doctrine limiting "the accepted principles that a corporation exists independently of its owners ... and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). The party seeking to pierce the corporate veil bears the heavy burden of "showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*id.* at 141; *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]).

Here, plaintiff sets forth conclusory allegations merely reciting typical veil-piercing factors (see e.g. *Brainstorms Internet Mktg. v USA Networks*, 6 AD3d 318 [1st Dept 2004]). It does not allege any fraud or malfeasance to support its attempt to reach Forest City or other third-party defendants. It

alleges breach of contract claims against B2, but "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil" (*Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013]).

Far from alleging that Forest City used B2 Owner to perpetrate a fraud, plaintiff, a sophisticated party, admits that it knowingly entered into the CM Agreement with B2 Owner, ^{13*13} an entity formed to construct the project. Nowhere in the complaint does plaintiff allege that it believed it was contracting with or had rights vis-à-vis Forest City or any entity other than B2 Owner. Indeed, plaintiff could have negotiated for such rights. Having failed to do so, plaintiff cannot now claim that it was tricked into contracting with B2 owner only and thus should be allowed to assert claims against Forest City (see *Spectra Sec. Software v MuniBEX.com, Inc.*, 307 AD2d 835, 835 [1st Dept 2003]; *Hillcrest Realty Co. v Gottlieb*, 208 AD2d 803, 805 [2d Dept 1994]; see also *Brunswick Corp. v Waxman*, 599 F2d 34, 36 [2d Cir 1979]). Thus, the veil-piercing claim should be dismissed.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered July 20, 2015, which, insofar as appealed from as limited by the briefs, granted the motion of defendants B2 Owner and Forest City to dismiss subparts (f) and (h) of the first cause of action and denied the motion to dismiss subparts (a), (b) and (c) of that cause of action and the third cause of action, and denied plaintiff's motion to disqualify the law firm of Troutman Sanders LLP as said defendants' attorneys, unanimously modified, on the law, to deny the motion to dismiss subpart (h) of the first cause of action, and to grant the motion to dismiss the third cause of action, and otherwise affirmed, without costs.

40 N.Y.2d 652 (1976)

**Port Chester Electrical Construction Corp., Respondent,
v.
Edythe Atlas et al., as Executors of Sol G. Atlas, Deceased, et al.,
Appellants, et al., Defendants.**

Court of Appeals of the State of New York.

Argued September 9, 1976.
Decided October 26, 1976.

Miles F. McDonald and Joseph Ferraro, New York City, for appellants.

David Morgulas, New York City, for respondent.

Chief Judge BREITEL and Judges GABRIELLI, JONES, FUCHSBERG and COOKE concur; Judge WACHTLER taking no part.

653*653JASEN, J.

Until his death in July, 1973, the late Sol G. Atlas was actively engaged in the acquisition and development of real property. Atlas organized his various ownership and construction ventures into a complex network of separate corporations in which he had both a controlling interest and an active leadership role. This case involves the efforts of an independent subcontractor on an Atlas project to collect a money judgment it obtained against an Atlas controlled general contractor. Since the general contractor was virtually judgment proof due to certain financial manipulations, the subcontractor endeavored to enforce its judgment against other corporations allied with Atlas in the venture, as well as against Atlas' estate. The trial court, by piercing the corporate veil of the various corporate defendants and holding that the subcontractor was a third-party beneficiary of contracts between these Atlas corporations, granted the relief sought. The Appellate Division affirmed, placing primary reliance upon the third-party beneficiary theory. While we disagree with the theories developed by the courts below, we are in accord with the result reached. In our view, the subcontractor was entitled to enforce its money judgment against the defendant corporations and the estate of Sol G. Atlas through a special proceeding authorized by CPLR article 52. Since all necessary parties are before the court, the court may convert the plenary action into a special proceeding (CPLR 103, subd [c]; see *Kovarsky v Housing & Development Admin.*, 31 N.Y.2d 184; *Matter of First Nat. City Bank v City of New York*, 36 N.Y.2d 87) and, on 654*654 that basis, we would affirm the order of the Appellate Division.

In 1956, defendant Essex Green, Inc. (Owner), the owner of a 48-acre tract in New Jersey, entered into a written contract with defendant Essex Construction Corp. (Contractor) for the construction of an \$8,000,000 shopping center on its property. Both corporations were allied with various Atlas interests. The Contractor agreed to supply all labor and materials necessary for the work in return for a nominal fee of \$5,000. The contract further provided that the Owner should reimburse the Contractor in current funds for all costs necessarily expended or incurred in the prosecution of the work. This provision, known in the construction industry as a "cost plus a fixed fee" clause, stated that:

"5. The Owner shall reimburse the Contractor in current funds for all costs necessarily expended and or incurred for the proper prosecution of the work, such costs to include and to be limited to the following items:

* * *

"(c) Amounts of all sub-contracts;

* * *

"8. The Contractor shall, on or before the tenth day of each month deliver to the Owner a statement, sworn to if required, showing in detail and as completely as possible all moneys paid by it on account of the cost of the work during the previous month for which it is to be reimbursed under paragraph numbered 5 hereof. Such statements shall be checked by the Owner immediately upon the receipt thereof and the moneys shown to be due therein, subject to any corrections made as a result of said check, shall be paid on or before the fifteenth day of each month after the receipt of said statements by the Owner."

In 1957, the general contractor entered into a subcontract with plaintiff for performance of all electrical work on the project. The subcontract referred to certain provisions of the general contract that were to be incorporated therein. A clause provided for submission of controversies and claims to arbitration. Plaintiff completed its work in May, 1958, received a substantial amount on its contract

and made a claim of \$96,940 for extra work performed. The Contractor resisted the claim and counterclaimed for approximately \$52,000 in offsets. When the parties were unable to reach an accommodation, 655*⁶⁵⁵ plaintiff, in December, 1960, pursuant to the subcontract, demanded arbitration. The arbitration proceeding was unusually protracted. The plaintiff finally prevailed in June, 1966 and received an award of \$73,000, plus interest. The award was confirmed by the Supreme Court and judgment was entered for \$105,011 in favor of the plaintiff.

Plaintiff's efforts to collect its judgment against the Contractor were unsuccessful. As a result of certain financial manipulations directed by Atlas, the assets of the venture, the bulk of which had previously been lodged in the Owner, were transferred to Atlas and to his other allied corporations. Both the Owner and the general contractor were rendered virtually judgment proof. The plaintiff, to enforce its judgment, commenced this action against the defendant corporations which ended up with the assets, the estate of Atlas, and the Owner. In granting recovery to the plaintiff, Trial Term held that as a third-party beneficiary of the general contract, the plaintiff could enforce the Owner's obligation to pay the cost of the work performed under the electrical subcontract. The court also placed liability on the Owner by piercing its corporate veil. The Appellate Division affirmed, agreeing generally with the reasoning of Trial Term and noting particularly that plaintiff was a third-party creditor beneficiary. It also observed that the June, 1966 arbitration award, which formed the basis for the judgment under review, was never contested by any of the defendants, despite the active, personal participation of Atlas in the arbitration proceeding and the obvious right, for himself and on behalf of the other defendants, to contest.

We do not agree that the plaintiff is a third-party creditor beneficiary of the contract between the owner, Essex Green, Inc., and the general contractor, Essex Construction. It is old law that a third party may sue as a beneficiary on a contract made for his benefit. (*Lawrence v Fox*, 20 N.Y. 268; 17A CJS, Contracts, § 519 [3]; 10 NY Jur, Contracts, § 237.) However, an intent to benefit the third party must be shown (*Beveridge v New York El. R. R. Co.*, 112 N.Y. 1, 26; *Cerullo v Aetna Cas. & Sur. Co.*, 41 AD2d 1), and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts. (*Associated Flour Haulers & Warehousemen v Hoffman*, 282 N.Y. 173, 180; *Moch Co. v Rensselaer Water Co.*, 247 N.Y. 160; Simpson, Contracts, § 117.) Difficulty may be encountered, however, in applying the intent to benefit test in construction contracts because of the multiple 656*⁶⁵⁶ contractual relationships involved and because performance ultimately, if indirectly, runs to each party of the several contracts. Hence, interpretational difficulties prevalent in third-party beneficiary contracts are compounded as a result of the peculiar problems presented by construction contracts.

Generally it has been held that the ordinary construction contract — i.e., one which does not expressly state that the intention of the contracting parties is to benefit a third party — does not give third parties who contract with the promisee the right to enforce the latter's contract with another. Such third parties are generally considered mere incidental beneficiaries. (*Cerp Constr. Co. v J. J. Cleary, Inc.*, 59 Misc 2d 489, affd 31 AD2d 784; *International Erectors v Wilhoit Steel Erectors & Rental Serv.*, 400 F.2d 465; *Watson v American Creosote Works*, 184 Okla 13; see 4 Corbin, Contracts, § 779D.) The text writers have uniformly designated these third parties only as incidental beneficiaries and not infrequently have posited the situation wherein the subcontractor sues the owner as an example of an action by an incidental beneficiary. (4 Corbin, Contracts, § 779D; Restatement, Contracts, 2d, § 133, Illustration 18 [Tent Draft No. 4, 1968]; 2 Williston, Contracts [3d ed], § 402; Simpson, Promises Without Consideration and Third Party Beneficiary Contracts in American and English Law, 15 Int & Comp LQ 835, 856.)

In this case, we cannot conclude from the record before us that the Contractor and the Owner intended that their contract run to the benefit of the subcontractor. Thus, it cannot be said that the subcontractor was a third-party beneficiary of that contract and the courts below erred in predicated liability on that theory.

Nor was it appropriate, in this case, to disregard the corporate forms and pierce the corporate veils. Corporations, of course, are legal entities distinct from their managers and shareholders and have an independent legal existence. Ordinarily, their separate personalities cannot be disregarded. (*Rapid Tr. Subway Constr. Co. v City of New York*, 259 N.Y. 472, 487-488.) In a broad sense, the courts do have the authority to look beyond the corporate form where necessary "to prevent fraud or to achieve equity". (*International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 N.Y. 285, 292.) More specifically, where a shareholder uses a corporation for the transaction of the shareholder's personal business, as distinct from the corporate business, the courts have held the shareholder liable for acts of the corporation in accordance with the general principles of agency. (See *Rapid Tr. Subway Constr. Co. v City of New York, supra*; *Berkey v Third Ave. Ry. Co.*, 244 N.Y. 84, 95.) The determinative factor is whether "the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends." (*Walkovszky v Carlton*, 18 N.Y.2d 414, 418.)

Here, the external indicia of separate corporate identities were at all times maintained. (*Bartle v Home Owners Coop.*, 309 N.Y. 103, 106.) The fact that Sol Atlas was the controlling principal of these corporations is, by itself, insufficient to justify disregarding the corporate form. Since Atlas himself carefully respected the separate identities of the corporations, and each corporation was pursuing its separate corporate business, rather than the purely personal business of Atlas, we conclude that the corporate veils of the defendant corporations should not be "pierced".

All of this, of course, does not end the matter. A money judgment may be enforced against a debt which is past due or which is yet to become due. (CPLR 5201, subd [a].) Moreover, CPLR article 52 authorizes the court, upon a special proceeding brought by the judgment creditor, to compel any debtor of the judgment debtor to pay the debt, or so much of it as will satisfy the judgment, to the judgment creditor. (CPLR 5227.) Thus, in this case, the plaintiff, as a judgment creditor of the Contractor, may enforce debts or obligations owed to the general contractor by other persons or corporations.

In the general contract, the Owner promised to reimburse the Contractor for the "amount of all sub-contracts". After the arbitration award was reduced to judgment against the Contractor, the Contractor was entitled to reimbursement from the Owner for the amount of the judgment. The Contractor's right to reimbursement from the Owner may be enforced by plaintiff since plaintiff is the judgment creditor of the Contractor. In a similar fashion, plaintiff may enforce any other cause of action that the judgment debtor contractor may possess against the other defendants, to the extent of satisfying the amount of the judgment.

The record establishes that the Owner was denuded of its assets as the result of asset transfers to other corporations and to Atlas himself made prior to September 1, 1963. The trial court found that these transfers constituted "intentional 658*658 preferred payments made to ostensible creditors without taking into consideration the fact that plaintiff too was a creditor of [the Owner]." For example, during May or June of 1963, the Owner paid \$230,000 of debt it owed to Sol G. Atlas Realty, Inc., one of the defendants in this case. All of the pre-September 1, 1963 transfers were made in violation of then effective provisions of the Stock Corporation Law. Section 15 of that statute prohibited corporations that are insolvent or whose insolvency is imminent from transferring corporate property with the intent of giving a preference to particular corporate creditors. The statute also authorized a creditor of the corporation to compel both transferees and corporate officers to account for any prohibited transfers. Since assets of the Owner were transferred in a preferential fashion to other creditors, the Contractor, as a creditor of the Owner whose rights were thereby frustrated, had the right to compel Atlas and the transferee corporations to account for assets they received and to compel Atlas to account for the transfers which he authorized as an officer of the Owner. The Contractor had a cause of action against Atlas and his corporations, and the plaintiff, as a judgment creditor of Contractor, may enforce that cause of action pursuant to CPLR article 52. Since the amount of the illegal transfers is in excess of plaintiff's judgment, the plaintiff is entitled to a full

recovery from the defendants. The presentation of any potential issues with respect to the apportionment of liability between the defendants and of possible offsets that might work to reduce the amount of the causes of action which plaintiff may enforce have been waived. The defendants failed to assert such issues, even in an analogous form, at any time despite the active involvement of all defendants, particularly Atlas and his personal representatives, in all phases of this extensive litigation.

We would, therefore, affirm the order of the Appellate Division.

Order affirmed, with costs.

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2016 NY Slip Op 02953

MICHELLE CICCONE, Appellant,

v.

CITY OF NEW YORK et al., Respondents.

2015-00973, Index No. 34862/07.

Appellate Division of the Supreme Court of New York, Second Department.

Decided April 20, 2016.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Baynes, J.), dated November 14, 2014, which granted that branch of the defendants' motion which was for summary judgment dismissing the complaint.

Rivera, J.P., Leventhal, Dickerson and Miller, JJ., concur.

Ordered that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendants' motion which was for summary judgment dismissing the causes of action alleging negligent training, supervision, and retention, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, with costs to the plaintiff.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained when she was attacked by a coworker at their place of employment. The complaint asserted causes of action against the defendants alleging that they were negligent in training, supervising, and retaining the coworker. The complaint also alleged that the defendants were vicariously liable for the coworker's actions under a theory of respondeat superior.

The defendants moved for, among other things, summary judgment dismissing the complaint. The Supreme Court granted that branch of the defendants' motion. We modify.

"The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment" (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933 [1999]; see *Selmani v City of New York*, 116 AD3d 943, 943-944 [2014]). "An employee's actions fall within the scope of employment where the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business" (*Beauchamp v City of New York*, 3 AD3d 465, 466 [2004] [internal quotation marks omitted]; see *Pinto v Tenenbaum*, 105 AD3d 930, 931 [2013]). "Conversely, where an employee's actions are taken for wholly personal reasons, which are not job related, his or her conduct cannot be said to fall within the scope of employment" (*Beauchamp v City of New York*, 3 AD3d at 466; see *Pinto v Tenenbaum*, 105 AD3d at 931). "In instances where vicarious liability for an employee's torts cannot be imposed upon an employer, a direct cause of action ^{911*911} against the employer for its own conduct, be it negligent hiring, supervision, or other negligence, may still be maintained" (*Selmani v City of New York*, 116 AD3d at 944; see *Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801 [2010]).

Here, the defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the cause of action alleging vicarious liability by demonstrating that the allegedly tortious conduct of the coworker was not within the scope of her employment (see *Selmani v City of New York*, 116 AD3d at 944; *Pinto v Tenenbaum*, 105 AD3d at 931-932). In opposition, the plaintiff failed to raise a triable issue of fact as to whether the coworker was acting within the scope of her employment when she attacked the plaintiff (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 [1986]). Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging vicarious liability.

However, the defendants failed to establish their *prima facie* entitlement to judgment as a matter of law dismissing the causes of action alleging negligent training, supervision, and retention (see *Nevaeh T. v City of New York*, 132 AD3d 840, 842 [2015]; *Timothy Mc. v Beacon City Sch. Dist.*, 127 AD3d 826, 828-829 [2015]). The evidence submitted by the defendants in support of their motion reflected the existence of a triable issue of fact as to whether they had notice of the coworker's violent propensities. There are triable issues of fact as to whether an alleged prior altercation between the plaintiff and the coworker during

which the coworker threatened to kill the plaintiff with a knife, and the report of the prior incident to the plaintiff's supervisor, both orally and in writing, constituted notice to the defendants of the coworker's violent propensities (cf. *Keith S. v East Islip Union Free School Dist.*, 96 AD3d 927, 928 [2012]; *Jake F. v Plainview-Old Bethpage Cent. School Dist.*, 94 AD3d 804, 805-806 [2012]; *Velez v Freeport Union Free School Dist.*, 292 AD2d 595, 596 [2002]). Since the defendants failed to establish their *prima facie* entitlement to judgment as a matter of law dismissing the causes of action alleging negligent training, supervision, and retention, the Supreme Court should have denied that branch of their motion, regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).