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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

FILED
2021 AUG 17 P 3: 54
CLERK OF COURTS
CUYAHOGA COUNTY

SARZO CONSTRUCTION LLC
Plaintiff

Case No: CV-18-903468

ANDRE HENDRIX, ET AL.
Defendant

Judge: SHANNON M GALLAGHER

JOURNAL ENTRY

83 DISP.COURT TRIAL - FINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW. O.S.J.
COURT COST ASSESSED AS DIRECTED.

PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER
PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL
PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature

Date

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SARZO CONSTRUCTION LLC)
)
Plaintiff,)
Counterclaim Defendant,)
)
-vs-)
)
ANDRE HENDRIX, et al.,)
)
Defendants/)
Counterclaim Plaintiffs/)
Third Party Plaintiffs,)
)
-vs.-)
)
RODNEY MITCHELL)
1355 Dill Road)
South Euclid, OH 44121)
)
and)
)
OHIO CASUALTY INSURANCE)
9450 Seward Road)
Fairfield, OH 45014)
)
and)
)
CUSTOM CONTRACTORS)
INSURANCE LLC)
4144 N Central Expressway #600)
Dallas, TX 75204)
)
Third Party Defendants.)

CASE NO. CV-18-903468

JUDGE SHANNON GALLAGHER

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Shannon M. Gallagher, J.:

This matter came before the court for a bench trial on June 7, 2021. Counterclaim plaintiffs Andre Hendrix, Tiffany Morgan, and Andreas Dekar Wines, Inc. appeared with attorney Erik Keister. Counterclaim defendant Sarzo Construction, LLC (“Sarzo”) and third party defendant Rodney Mitchell (“Mitchell”) failed to appear, although their attorney Samuel Smith did appear. There were no appearances on behalf of third party defendants Ohio Casualty Insurance and Custom Contractors Insurance, LLC.

Based upon the evidence presented at trial and the supporting legal authority, the court finds in favor of counterclaim plaintiffs' and against counterclaim defendant Sarzo as to count one for breach of contract and count six for lost profits. The court finds that the remaining counterclaims against Sarzo, specifically count two for breach of express warranty, count three for unjust enrichment, and count five for violations of the Ohio consumer sales practices act, fail as a matter of law. The court finds that all third party claims against Rodney Mitchell fail as a matter of law.

Counterclaim plaintiffs failed to present any evidence in support of their claims against third party defendant Ohio Casualty Insurance, and therefore these claims are dismissed with prejudice. Further, counterclaim plaintiffs never completed service on third party defendant Custom Contractors Insurance, Inc., and their claims against this party are dismissed with prejudice.

The court enters judgment in favor of counterclaim plaintiffs and against counterclaim defendant Sarzo in the amount of \$60,270.

I. Procedural History

Sarzo Construction, LLC initially filed its complaint alleging breach of contract against defendants Andre Hendrix, Tiffany Morgan, and Andreas Dekar Wines, Inc. Defendants filed a counterclaim against Sarzo and a third party complaint against Rodney Mitchell, Ohio Casualty Insurance, and Custom Contractors Insurance, LLC. Counterclaim plaintiffs alleged the following claims against Sarzo Construction and Rodney Mitchell: breach of contract, breach of express warranty, unjust enrichment, violation of the Ohio consumer sales practices act, and lost profits. Counterclaim plaintiffs alleged corporate veil piercing against Rodney Mitchell only.

Counterclaim plaintiffs alleged a breach of contract claim and breach of express warranty claim against third party defendants Ohio Casualty Insurance and Custom Contractors Insurance, LLC.

Intervening plaintiff Brittany Holmes filed an intervening complaint against Rodney Mitchell, which she dismissed without prejudice on May 31, 2021.

On April 29, 2021, plaintiff Sarzo and third party defendant Mitchell failed to appear for the final pretrial. Based upon plaintiff's failure to appear for at least three prior court events, the court dismissed plaintiff's complaint for failure to prosecute pursuant to Civ. R. 41(B)(1).

On June 7, 2021, the counterclaim plaintiffs' claims proceeded to trial. Sarzo and Mitchell failed to appear for trial and were subsequently barred from presenting a defense to the counterclaim and third party complaint. Counterclaim plaintiff Tiffany Morgan testified in support of their claims.

II. Findings of Fact

Counterclaim plaintiff Tiffany Morgan testified that she and her business partner Andre Hendrix planned to open a cigar and wine lounge in an abandoned building located at 15905 Euclid Avenue, East Cleveland, Ohio 44114 (the "Building"). The Building had been an auto parts store, and there were extensive renovations that need to take place. Mr. Hendrix contacted Sarzo Construction and they met at the building site and reviewed the blueprints together. (Morgan testimony).

Mr. Hendrix and Ms. Morgan ultimately hired Sarzo to be the general contractor and entered into a contract with Sarzo to make improvements to the Building. (Exhibit 1). The Contract was dated and signed February 26, 2018. *Id.* The parties to the Contract were Sarzo Construction as the contractor and Andre Hendrix and Tiffany Morgan as the customers. *Id.* Sarzo was to begin construction on Monday, March 12, 2018. *Id.*

In February, 2018, counterclaim plaintiffs issued a check to Sarzo for \$8,534. (Morgan testimony). Ms. Morgan and Mr. Hendrix took out a loan through their business Andreas Dekar Wines, Inc. in order to pay for the renovation. *Id.* On March 6, 2018, a check was issued directly to Sarzo Construction from Huntington National Bank in the amount of \$31,770. (Exhibit 2).

Ms. Morgan testified that on Friday, March 9, 2018, she called and left Sarzo a voicemail message to confirm the start time on March 12th. She received no response and no return call. On Monday, March 12, 2018, Ms. Morgan did speak with Mr. Mitchell and he said that he had not pulled the necessary permits to begin work. (Morgan testimony).

Ms. Morgan testified that demolition work began on or around March 26, 2018, and it was weeks until any other work was done. Sarzo ultimately only completed some of the demolition work and some of the rough-in plumbing. *Id.* Ms. Morgan testified that Mr. Mitchell did not put beams in the proper places and she and Mr. Hendrix were concerned that there would be structural problems. *Id.* The plumbing was also done incorrectly so that the drain and the sink are not properly placed. *Id.*

On Thursday, March 29, 2018, a conference call was held between all parties involved. *Id.* Mr. Mitchell informed Ms. Morgan and Mr. Hendrix that there were issues with the blueprint and the city required two furnaces and the contract only included one. *Id.* Mr. Mitchell advised that the City required two furnaces because the building was going to be used for a cigar lounge in a commercial building. *Id.*

On or around April 6, 2018, Ms. Morgan learned that the building would need a more expensive electrical box. *Id.* Mr. Mitchell estimated that there would be \$50,000 in increased costs to the project, but he was unable to provide a detailed breakdown of the increased costs for

the project. *Id.* Sarzo was ultimately unable to complete the electrical work, so Ms. Morgan and Mr. Hendrix found their own electrical subcontractor. *Id.*

Ms. Morgan testified that Sarzo would not return phone calls, and that Sarzo was rude. Around April 23, 2018, the electrical work was completed and Ms. Morgan contacted Sarzo to confirm when Mr. Mitchell would come to complete drywall work. *Id.* Mr. Mitchell would not give a date certain, so Ms. Morgan and Mr. Hendrix went to Sarzo's offices to attempt to talk to him. Although Mr. Mitchell was not at the office, they spoke with him by phone, but were unable to resolve the issue of when work would be done. *Id.*

The contract stated that the work would be completed by May 8, 2018. (Exhibit 1). Ms. Morgan testified that the business ultimately opened on August 18, 2018, and by that time they had missed out on business from holidays and the championship games for basketball. She estimated that they lost \$3,000 to \$4,000 per week due to the opening being delayed, or approximately \$20,000. (Morgan testimony). According to their business records, Andreas Dekar Cigar and Wine Lounge earned \$20,097.07 in profits from August 18, 2018 to October 21, 2018. (Exhibit 3).

At some point after May 8, 2018, Ms. Morgan and Mr. Hendrix had a telephone conversation with Sarzo and expressed their frustration about the job being neglected. (Morgan testimony). During the telephone conference Mr. Mitchell terminated the Contract. *Id.*

On May 18, 2018, Ms. Morgan sent an email to Sarzo with a demand letter, demanding the return of all monies and material purchased for the project. (Exhibit 5). On May 22, 2018, Mr. Mitchell responded indicating that he felt that Ms. Morgan and Mr. Hendrix fired Sarzo, and should be charged a 10% cancellation fee. (Exhibit 6). On the same day, Ms. Morgan responded advising

that Sarzo had breached the contract and abandoned the project. *Id.* Ms. Morgan again demanded the return of materials with receipts and funds. *Id.*

Counterclaim plaintiffs never received a refund from Sarzo. (Morgan testimony). The only materials Mr. Mitchell returned were two-by-four ceiling tiles when the contract required two-by-two ceiling tiles. (Morgan testimony, Exhibit 6 & 7).

III. CONCLUSIONS OF LAW

A. Breach of Contract and Lost Profits

A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach. *Natl. City Bank of Cleveland v. Erskine & Sons*, 158 Ohio St. 450, 110 N.E.2d 598 (1953), paragraph one of the syllabus.

Sarzo entered into a Contract with the counterclaim plaintiffs to perform renovations to the Building so that counterclaim plaintiffs could open a cigar and wine lounge. (Exhibit 1). Counterclaim plaintiffs paid Sarzo \$40,804. (Morgan testimony, Exhibit 2).

According to Ms. Morgan's testimony and the exhibits presented, Sarzo materially breached the Contract by failing to perform their obligations at all or in a timely manner, and by providing substandard work and workmanship. Counterclaim plaintiffs were damaged in the amount of \$40,804 as a result of Sarzo's breach. (Morgan testimony, Exhibit 2).

The evidence also established that counterclaim plaintiffs lost profits in the amount of \$20,097.07 due to the delay in opening the cigar and wine lounge. (Morgan testimony, Exhibit 3).

Counterclaim plaintiffs are awarded the return of all funds paid to Sarzo under the contract in the amount of \$40,804, as well as lost profits in the amount of \$20,097.07.

Counterclaim plaintiffs alleged a breach of contract action against third party defendant Ohio Casualty Insurance. However, counterclaim plaintiffs failed to present any evidence in support of a breach of contract action against third party defendant Ohio Casualty Insurance, and therefore this claim against Ohio Casualty Insurance is dismissed with prejudice.

Counterclaim plaintiffs alleged a breach of contract action against third party defendant Rodney Mitchell. However, Mr. Mitchell was not a party to the contract. Therefore, this claim against Mr. Mitchell is dismissed with prejudice.

B. Unjust Enrichment

In order to recover under a theory of unjust enrichment, a plaintiff must prove by a preponderance of the evidence: (1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant was retaining that benefit under circumstances where it would be unjust for him to retain that benefit without payment. *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183, 12 Ohio B. 246, 465 N.E.2d 1298 (1984).

Unjust enrichment is pled as an alternative cause of action to a breach of contract claim. In this case, the court has found that counterclaim plaintiffs are entitled to damages on their breach of contract claim, and counterclaim plaintiffs cannot recover under both theories. Therefore, the unjust enrichment claim is dismissed.

C. Breach of Express Warranty

To establish a claim for breach of express warranty, a plaintiff must show that: (1) a warranty existed; (2) the product failed to perform as warranted; (3) plaintiff provided the defendant with reasonable notice of the defect; and (4) plaintiff suffered injury as a result of the defect. *Litehouse Prods., Inc. v. A.M.I. Internatl., Ltd.*, 8th Dist. Cuyahoga No. 46834, 1984 WL 4539, *3 (Mar. 8, 1984).

Ms. Morgan testified that Sarzo did not install the plumbing correctly for the sink and also did not put the beams in the proper place. Ms. Morgan stated that she was concerned that there would be structural problems because the beams were not in the proper place. However, counterclaim plaintiffs did not provide any evidence of actual damages arising from these defects. Therefore, the claim for breach of express warranty against Sarzo, Ohio Casualty Insurance, and Rodney Mitchell fails as a matter of law.

D. Piercing the Corporate Veil

It is undisputed that Sarzo Construction, and not Rodney Mitchell was a party to the Contract at issue here. Only the corporation can be held liable for corporate obligations, unless a court can “pierce the corporate veil” and treat the shareholder and his corporation as a single entity. *E. S. Preston Associates, Inc. v. Preston*, 24 Ohio St. 3d 7, 11, 492 N.E.2d 441 (1986).

Under Ohio law, “[c]ourts have been reluctant to disregard the corporate entity and have done so only where the corporation has been used as a cloak for fraud or illegality or where the sole owner has exercised such excessive control over the corporation that it no longer has a separate existence.” *Id.*, citing *North v. Higbee Co.*, 131 Ohio St. 507 (1936). Absent a showing that the corporation has been used as a cloak for fraud or illegality, the corporate entity will not be pierced. *Id.*

Counterclaim plaintiffs failed to present any evidence in support of their piercing the corporate veil claim against Rodney Mitchell. Therefore, the claim for piercing the corporate veil fails as a matter of law.

E. Ohio CSPA claims

The Ohio Consumer Sales Practices Act prohibits unfair or deceptive consumer sales practices in connection with a “consumer transactions.” R.C. 1345.02(A). A “consumer

transaction” is defined as a sale or transfer of an item of goods or services to an individual for purposes that are primarily personal, family, or household. R.C. 1345.01(A). It is undisputed that the Contract at issue here was for business purposes; i.e. the opening of a cigar and wine lounge. (Morgan testimony, Exhibit 1). Therefore, the claim for violations of the Ohio CSPA fails as a matter of law.

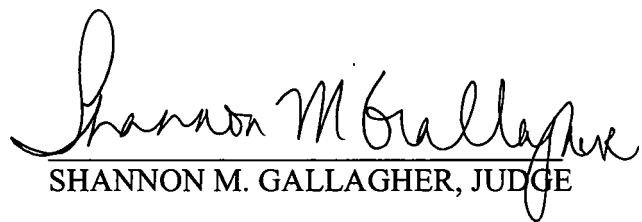
IV. JUDGMENT AND DAMAGES

Counterclaim plaintiffs Tiffany Morgan, Andre Hendrix, and Adnreas Dekar Wines, Inc. are entitled to judgment against counterclaim defendant Sarzo Construction as to their counterclaims for breach of contract and lost profits. Counterclaim plaintiffs’ claims for unjust enrichment, violations of the Ohio CSPA, and piercing the corporate veil are dismissed with prejudice. Counterclaim plaintiffs’ claims against third party defendants Rodney Mitchell, Ohio Casualty Insurance, and Custom Contractors Insurance, Inc. are dismissed with prejudice.

Counterclaim plaintiffs are awarded \$60,901.07 against Sarzo Construction, as well as interest at the statutory rate from the date of judgment, and costs of this action.

IT IS SO ORDERED.

Date:


SHANNON M. GALLAGHER, JUDGE