

**NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK: PART 57**

PRIME 135 NYC, LLC,

Plaintiff,

v.

MAJOR CONSTRUCTION CO., INC., and
JOSEPH MENDLER

Defendant.

Index No.: 651966/2017

Hon. Shawn T. Kelley

MSQ No.: 005

AFFIRMATION IN SUPPORT

ZACHARY G. MEYER, ESQ., an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the truth of the following under the penalties of perjury pursuant to CPLR § 2106(a):

1. I am a partner of SUTTON SACHS MEYER PLLC, attorneys for plaintiff PRIME 135 NYC, LLC (“Plaintiff”) in the above-captioned matter against defendant MAJOR CONSTRUCTION CO., INC. (“Defendant”), and as such, I am fully familiar with the facts and circumstances therein based upon my review of the file and an investigation into the matter.

2. I respectfully submit this affirmation in support of Defendant’s MSQ No. 005, for an Order, pursuant to CPLR § 1003, for leave to add non-party JOSEPH MENDLER (“Mendler”) as party to this action, pursuant to CPLR § 103(c) and New York Business Corporation Law (“BCL”) Art. 10, converting the instant action into a special proceeding for this Court’s supervision of Defendant’s dissolution and liquidation, pursuant to CPLR § 305(c), for leave to serve a supplemental summons, and pursuant to CPLR § 3025(b), for leave to serve a proposed second amended verified complaint upon the following grounds:

- a. By virtue of Mendler’s August 5th, 2019 non-judicial corporate dissolution of Defendant in the midst of the instant litigation, BCL § 1008(a) and CPLR § 103(c) dictate the instant matter’s conversion into a special proceeding for this Court’s continued supervision of

Defendant's dissolution and liquidation, wherefore Mendler may be found personally liable to Plaintiff;

- b. As such, pursuant to CPLR § 1003, this Court should Order Mendler joined as a CPLR § 1001(a) necessary party as to accord complete relief amongst the parties, since Mendler is Defendant's director, officer, shareholder, distributee, and trustee of Defendant's assets for the benefit of creditors and contingent liabilities;
- c. Accordingly, this Court should grant CPLR § 305(c) leave to serve a supplemental summons and CPLR § 3025(b) leave to serve the proposed second amended verified complaint proffered herewith;
- d. Likewise, Plaintiff's MSQ No. 005 requested relief is neither collaterally estopped nor barred by the "law of the case" doctrine as a result of this Court's disposition under MSQ No. 003, as the issues raised thereunder are markedly different from the instant issues, which have never been adjudicated; and
- e. Upon such other and further grounds as this Court deems just and proper.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

3. For a complete recitation of this matter's procedural posture and underlying factual circumstances, Plaintiff respectfully incorporates by reference the entirety of Plaintiff's summons and first amended verified complaint annexed hereto as "**Exhibit A**".¹

4. In relevant part, under MSQ No. 003, Plaintiff sought leave to join Mendler as a co-defendant under a veil-piercing theory of liability, which was denied by Decision & Order of this Court dated April 25th, 2019 upon, *inter alia*, finding Plaintiff's plead factual allegations at the time of MSQ No. 003 did not warrant a veil-piercing remedy, as all actions undertaken were corporate in nature, and otherwise discoverable by due diligence upon public records. A true copy of this Court's MSQ No. 003 oral argument transcript and decision on the record has been annexed hereto as "**Exhibit B**".

¹ Summarily, Plaintiff's claims against Defendant – Plaintiff's general contractor – alleged under Plaintiff's first amended verified complaint sound in Defendant's myriad breaches of contract, fraud, unjust enrichment, breach of implied warranty, breach of implied covenant of good faith and fair dealing, careless contractual work, duress, and intentional interference with prospective economic advantage. *See* Ex. A.

5. Subsequently, on August 5th, 2019, Mendler engaged in a non-judicial dissolution of Defendant by filing a certificate of dissolution; a true copy of Defendant's N.Y.S. Department of State: Division of Corporations' database entry has been annexed hereto as "**Exhibit C**", and a certified copy of Defendant's certificate of dissolution has been annexed hereto as "**Exhibit D**".

6. Indeed, as listed on Defendant's certificate of dissolution, Mendler is Defendant's sole director, shareholder, and officer, and thus, the sole distributee of Defendant's assets; accordingly, upon Defendant's dissolution, Mendler is a trustee and personal distributee of such assets for the benefit of Defendant's creditors and contingent liabilities as set forth in Point I(A), *infra*. See Ex. C-D; see Ex. E, at ¶¶ 46-49, 88-98; see Point I(A), *infra*.

7. Moreover, Defendant's certificate of dissolution lists Mendler's service of process address as "15 Heron Pond Road, Essex, CT 06426". See Ex. C-D.

8. As such, pursuant to CPLR § 3025(b), a "clean" version of Plaintiff's proposed supplemental summons and proposed second amended verified Complaint has been annexed hereto as "**Exhibit E**", whereas a "marked-up" version of such documents has been annexed hereto as "**Exhibit F**".

ARGUMENT

I. CPLR § 1003 & BCL § 1008(a) DICTATE MENDLER'S PERSONAL JOINDER & CONVERSION INTO A SPECIAL PROCEEDING.

9. Plaintiff respectfully submits that this Court should grant CPLR § 1003 leave for Mendler's joinder as a CPLR § 1001(a) necessary party to the instant action by virtue of Mendler's August 5th, 2019 non-judicial dissolution of Defendant during the pendency of this matter – which was filed without due regard to Defendant's retention of assets for the payment, satisfaction, or compromise of Plaintiff's claims, as required by BCL § 1008 *et seq.* – whereupon this Court should grant a CPLR § 103(c) conversion of this matter to a special proceeding, grant CPLR § 305(c) leave to serve a supplemental summons, and CPLR § 3025(b) leave to serve an amended pleading.

Compare Ex. A, with Ex. C-D, and BCL § 1008(a); see CPLR § 103(c); see CPLR § 305(c); see CPLR § 1001(a); see CPLR § 1003; see CPLR § 3025(b).

A. Mender is Personally Liable to Defendant’s Creditors under BCL § 1008(a).

10. As the New York State Court of Appeals and other such state and federal Courts within the territorial jurisdiction of the State of New York have repeatedly held, pursuant to BCL § 1008(a), upon a corporate dissolution, individual directors, officers, and shareholders may be held personally liable to creditors of such dissolved corporation, since:

“directors in dissolution have been classified as trustees of a trust fund created by operation of law for the benefit of the creditors... the property of a corporation (dissolved) is a trust fund in the hands of its directors for the payment of its debts has long been settled... the trustees could not transfer the funds in their hands in disregard of the rights of their *cestuis*, no matter how honest their motives be... the liability of the directors is predicated upon... violation of a duty”.

See In re Baldwin Trading Corp., 8 NY2d 144 (1960); *see Rodgers v. Logan*, 121 AD2d 250 (1st Dep’t 1986) (“after dissolution... the creditor can maintain an action directly against the directors or shareholders, even though no judgment has been obtained”) (joining directors in their personal capacity as necessary defendants); *see J.F. Tapley Co. v. Keller*, 133 AD 54 (1st Dep’t 1909); *see WorldCom, Inc. v. Sandoval*, 182 Misc.2d 1021 (Sup. Ct. N.Y. Cnty., Nov. 24, 1999) (“Under New York law, the individual shareholders and officers of a corporation are legally responsible for contractual obligations... after the corporation was dissolved”); *accord Hatch v. Morosco Holding Co., Inc.*, 50 F.2d 138 (2d Cir. 1931) (“where corporate property is distributed to the shareholders and the corporation is dissolved... a creditor may sue the shareholders without first reducing his claim to a judgment, nor does it matter that the dissolution occurred after the assets were distributed”); *accord In re Hartley*, 479 B.R. 653 (S.D.N.Y. 2012) (“plaintiff may avoid the futility of first proceeding against a dissolved corporation by joining individual officers and directors to whom assets have been distributed”); *accord Flute v. Rubel*, 682 F.Supp. 184

(S.D.N.Y. 1988) (“where it is impossible or futile to obtain a judgment against a defunct corporation, the creditor can maintain an action directly against the directors or shareholders”); accord *Plastic Contact Lens Co. v. Frontier of Northeast, Inc.*, 324 F.Supp. 213 (W.D.N.Y. 1969) *aff’d* 441 F.2d 67 (2d Cir. 1971) (“[BCL §] 1005(a)(3) directs that, upon dissolution of a corporation, provision must be made for the payment of liabilities before the distribution of assets to the shareholders” whom “hold the assets they received in trust for the benefit of creditors”); see also *Pennsylvania Bldg. Co. v. Schaub*, 14 AD3d 365 (1st Dep’t 2005); see also *Keystone Mech. Corp. v. Conde*, 309 AD2d 627 (1st Dep’t 2003); see BCL § 1005(a); see BCL § 1008(a).^{2,3}

11. Indeed, a trustee is liable to trust beneficiaries where such trustee breaches a standard of care owed, proximately causing a trust beneficiary’s loss. *Id.*; see *Matter of Hahn*, 62 NY2d 821 (1984); see *Gramercy Co. v. Beneson*, 223 AD2d 497 (1st Dep’t 1996).

12. Likewise, BCL § 1008 vests this Court broad authority to “make all such Orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of a corporation”, including, converting an active matter to a special proceeding under CPLR 103(c), to, *inter alia*, determine the validity of any claims presented against the corporation under

² Under BCL § 1008(a) [*Jurisdiction of Supreme Court to Supervise Dissolution & Liquidation*], “at any time after the filing of a certificate of dissolution under this article, the Supreme Court... in a special proceeding... in a situation approved by the Court... [may] continue the liquidation of the corporation under the supervision of the Court and may make all such Orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation... without limitation of the generality thereof, in respect of the following: ... (3) the determination of the validity and amount... of any claims which have been presented to the corporation ... (5) **the determination and enforcement of the liability of any director, officer, [or] shareholder**... [and] (6) the payment, satisfaction or compromise of claims against the corporation, the retention of assets for such purpose, and the determination of the adequacy of provisions made for payment of the liabilities of the corporation. See BCL § 1008(a) (emphasis added).

³ Under BCL § 1005(a) [*Procedure after Dissolution*]: “After dissolution... the corporation shall proceed to wind up its affairs with power to... collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business. After paying or adequately providing for the payment of its liabilities... **after paying or adequately providing for the payment of its liabilities, the corporation**... may distribute any remaining assets, in cash or in kind or partly each, among its shareholders according to their respective rights”. See BCL § 1005(a) (emphasis added).

BCL § 1008(a)(3), to determine the liability of an officer for the liabilities of a corporation under BCL § 1008(a)(5), and to make Orders with respect to the payment, satisfaction, or compromise of claims against the corporation under BCL § 1008(a)(6). *Id.*; accord *Town of Amherst v. Hilger*, 106 AD3d 120 (4th Dep’t 2013) (converting plenary action to special proceeding under CPLR § 103(c) and BCL § 1008(a) where officers of dissolved corporation were joined as parties in their personal capacity to adjudicate their personal liability to creditor); see *Port Chester Elec. Constr. Corp. v. Atlas*, 40 NY2d 652 (1976); see *Matter of First Nat’l City Bank v. City of N.Y. Fin. Admin.*, 36 NY2d 87 (1975) (“Under CPLR § 103(c), Courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for proper prosecution”); see e.g. *Matter of Schmidt*, 97 AD2d 244 (1st Dep’t 1983); accord e.g. *Chase v. Wells Fargo Bank, N.A.*, 135 AD3d 751 (2nd Dep’t 2016); accord *Hodges v. Beattie*, 68 AD3d 1597 (3rd Dep’t 2009); see CPLR § 103(c); see BCL § 1008(a).

13. Here, Mendler’s August 5th, 2019 non-judicial dissolution of Defendant during the pendency of this matter requires this Court to convert the instant action to a BCL § 1008(a) special proceeding pursuant to CPLR § 103(c), for this Court’s supervision of Defendant’s dissolution and liquidation, as, upon information and belief, Mendler failed to make provisions for the payment of Defendant’s contingent liabilities to Plaintiff – Defendant’s creditor – before the distribution of Defendant’s assets, and holds Defendant’s assets personally. *Id.*; compare Ex. C-D, with Ex. E, at ¶¶ 46-49, 88-98, and BCL § 1005(a), and BCL §§ 1008(a).

14. As such, pursuant to CPLR § 103(c) and BCL § 1008(a), this Court should convert the instant action into a special proceeding, as to adjudicate Mendler’s personal liability. *Id.*

B. Leave should be Granted to Join Mendler Personally, to Serve a Supplemental Summons, & to Serve an Amended Pleading.

15. By virtue of the foregoing, Plaintiff respectfully submits that this Court should grant CPLR § 1003 leave to join Mendler as a co-defendant, CPLR § 305(c) leave to serve a supplemental summons, and CPLR § 3025(b) leave to serve a proposed second amended verified complaint. *See* CPLR § 305(c); *see* CPLR § 1003; *see* CPLR § 3025(b).

16. Pursuant to CPLR § 1003 and BCL § 1008(a), this Court may grant leave to join parties at any stage of a litigation – and *sua sponte* – as well as determine whether there is non-joinder of necessary parties, Order them joined, and grant leave to serve a supplemental summons and amended pleading. *Id.*; *see* BCL § 1008(a); *see* *Perez v. Paramount Commc'ns, Inc.*, 92 NY2d 749 (1999); *see* *Matter of Lezette v. Bd. of Ed., Hudson City Sch. Dist.*, 35 NY2d 272 (1974); *see* *Gerschel v. Christiansen*, 128 AD3d 455 (1st Dep't 2015).

17. Likewise, it is well settled that leave to amend may be sought at any time and should “be freely given upon terms as may be just” absent significant prejudice or surprise, wherefore mere lateness is not a ground for denial of an amendment motion. *See* CPLR § 3025(b); *see* *Edenwald Contracting Co., Inc. v. City of N.Y.*, 60 NY2d 957 (1983); *see* *McCaskey, Davies & Assocs., Inc. v. N.Y.C. Health & Hosps. Corp.*, 59 NY2d 775 (1983); *see* *Fahey v. Ontario Cnty.*, 44 NY2d 934 (1978).

18. The term “prejudice” in this context does not mean that amendment will defeat a cause of action; rather, the Court of Appeals has defined “prejudice” to arise where a party has been hindered in the preparation of their case, such as opening new factual issues whereafter discovery has been completed. *See* *Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18 (1981); *see* *Norwood v. City of N.Y.*, 203 AD2d 147 (1st Dep't 1994); *see* *Barbour v. Hosp. for Special Surgery*, 169 AD2d 385 (1st Dep't 1991); *accord* *Broadway Warehouse Co. v. Buffalo Barn Bd., LLC*, 143 AD3d 1238 (2nd Dep't 2016).

19. Moreover, a CPLR § 3025(b) movant need not demonstrate the merits of the proposed new allegations, and leave should be granted whereupon proposed amended pleadings are proffered in marked-up form. *See* CPLR § 3025(b); *see e.g. MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499 (1st Dep't 2010).

20. Here, for all the reasons set forth in Point I(A), *supra*, Mendler is a necessary party requiring his joinder by virtue of his August 5th, 2019 non-judicial corporate dissolution of Defendant without making provisions for Defendant's contingent liabilities to Plaintiff. *See* CPLR § 1003; *see* BCL § 1008(a); *see* Ex. C-D; *see* Point I(A), *supra*.⁴

21. Likewise, here, no prejudice will inure to Defendant since the matter has sat largely dormant since MSQ No. 003, due to the COVID-19 pandemic and ongoing issues between Plaintiff and Plaintiff's former counsel, wherefore no significant discovery has been undertaken as the parties are barely beyond the pleading stage and, *a fortiori*, discovery is not nearly complete and no serious trial preparation has been undertaken by either party. *Id.*; *see* NYSCEF Dkt., *passim*.

22. Furthermore, in full compliance with CPLR §§ 305(a)-(c), and CPLR § 3025(b), Plaintiff has proffered a proposed supplemental summons and proposed second amended verified complaint in both "clean" and "marked-up" form herewith. *See* Ex. E-F.

23. Accordingly, Plaintiff respectfully submits that this Court should grant all leave requested under MSQ No. 005. *Id.*

C. Plaintiff's Relief Requested under MSQ No. 005 is Not Barred by MSQ No. 003.

24. While Defendant and/or Mendler may prospectively argue that the preclusion doctrines of collateral estoppel and/or the "law of the case" doctrine under MSQ No. 003 bar

⁴ Likewise, leave to amend should be freely granted to conform to the evidence pursuant to CPLR § 3025(c), so long as no prejudice inures to the non-movant under the CPLR § 3025(b) standard set forth herein. *See* CPLR § 3025(c); *see Kimso Apts., LLC v. Gandhi*, 24 NY3d 403 (2014); *see Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18 (1981); *see Murray v. City of N.Y.*, 43 NY2d 400 (1977); *accord DiSario v. Rynston*, 138 AD3d 672 (2nd Dep't 2016); *see Rizzo v. Kay*, 79 AD3d 1001 (2nd Dep't 2010); *accord 715 Ocean Parkway Owners Corp. v. Klahsbrun*, 74 AD3d 1314 (2nd Dep't 2010).

Plaintiff's MSQ No. 005 requested relief, such contentions would be meritless and a factual impossibility, since the issues are not identical, as the issues presented to this Court under MSQ No. 003 – argued April 25th, 2019 – predate Mendler's August 5th, 2019 non-judicial corporate dissolution of Defendant. *Compare* Ex. B, *with* Ex. C-D.

25. As this Court well knows, the doctrine of collateral estoppel precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. *See Ryan v. N.Y. Tel. Co.*, 62 NY2d 494 (1984). Collateral estoppel applies to issues that were necessarily decided in a prior action, even if decided in the context of a different cause of action, and determinative of a disputed issue in the present action. *Id.*; *see Schwarz v. Pub. Admin.*, 24 NY2d 65 (1969).

26. Indeed, collateral estoppel bars re-litigation of an issue where four conditions are satisfied: (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding against the party or their privies; and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. *See Conason v. Megan Holding, LLC*, 25 NY3d 1 (2015); *see Gersten v. 56 7th Ave. LLC*, 88 AD3d 189 (1st Dep't 2011). Moreover, collateral estoppel is an equitable doctrine based upon the concept of fairness and is therefore not rigidly applied. *See Gilberg v. Barbieri*, 53 NY2d 285 (1981).

27. Here, collateral estoppel cannot bar relief under MSQ No. 005 as the issues hereunder are markedly disparate from the issue raised under MSQ No. 003 – wherein this Court declined to join Mendler in his personal capacity upon a veil-piercing theory of liability – which is patently distinguishable from Mendler's post-MSQ No. 003 August 5th, 2019 non-judicial corporate dissolution of Defendant and personal liability inuring from Mendler's violation and

abdication of his duties as a trustee for the benefit of Defendant's creditors in receiving Defendant's assets while failing to set aside funds for Defendant's contingent liability to Plaintiff, as set forth in Point I(A), *supra*. *Compare* Ex. B, at p. 13:12-14 ("there is no such specified claim [that] would satisfy a claim of piercing the corporate veil in order to reach the individual Joseph Mendler") (Ordered April 25th, 2019, *with* Ex. D (dated August 5th, 2019), *and* Point I(A), *supra*.

28. To wit, Mendler's post-MSQ No. 003 August 5th, 2019 non-judicial dissolution of Defendant is further distinguishable as Defendant's corporate veil no longer exists to pierce. *Id*.

29. Moreover, the preclusion doctrines of collateral estoppel and the "law of the case" are factual impossibilities which would not preclude relief hereunder, as Defendant's dissolution was effectuated nearly four (4) months after MSQ No. 005, rendering it a factual circumstance which cannot have been argued under MSQ No. 003. *Id*.

30. Similarly, the "law of the case" doctrine "generally operates to preclude successive motions by the same party upon the same proof" but does not apply where new facts or circumstances are presented. *See Ruiz v. Anderson*, 96 AD3d 691 (1st Dep't 2012); *see Aspen Specialty Ins. Co. v. RLI Ins. Co., Inc.*, 194 AD3d 2006 (1st Dep't 2021); *see Delgado v. City of N.Y.*, 144 AD3d 46 (1st Dep't 2016); *see also Martin v. City of Cohoes*, 37 NY2d 162 (1975); *see also Grullon v. City of N.Y.*, 297 AD2d 261 (1st Dep't 2002); *see also Baldasano v. Bank of N.Y.*, 199 AD2d 184 (1st Dep't 1993).

31. Here, MSQ No. 005 is not interposed upon the "same proof" by virtue of Defendant's changed circumstance of Mendler's August 5th, 2019 non-judicial dissolution of Defendant, thereby rendering the "law of the case" doctrine an inapplicable bar to relief. *Id.*; *compare* B, at p. 13:12-14 ("there is no such specified claim [that] would satisfy a claim of piercing the corporate veil in order to reach the individual Joseph Mendler") (Ordered April 25th, 2019, *with* Ex. D (dated August 5th, 2019).

32. Accordingly, no MSQ No. 003 preclusion doctrine arguments prospectively advanced by Defendant and/or Mendler bars Plaintiff's relief requested under MSQ No. 005. *Id.*

CONCLUSION

WHEREFORE, Plaintiff respectfully submits this Court should grant Plaintiff's MSQ No. 005, converting this matter to a special proceeding, granting leave to join Mendler as a defendant, as well as leave to serve the supplemental summons and second amended verified complaint, as well as for such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 3rd, 2021

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22 NYCRR § 202.8-b CERTIFICATION

ZACHARY G. MEYER, ESQ.. hereby certifies in reliance upon the word count function of the word processing system used to prepare this document, that this document complies with the word count limitations set forth in 22 NYCRR § 202.8-b insofar as it contains three thousand six hundred thirty-six (3,636) words, inclusive of footnotes.

/s/ Zachary G. Meyer, Esq.