

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D27076
C/hu

_____AD3d_____

Argued - March 15, 2010

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2009-05141

DECISION & ORDER

Love Drywall, Inc., etc., respondent, v Harbor Light
Development Corp., d/b/a Point of Woods Homes,
Inc., et al., appellants.

(Index No. 21482/06)

Calvin E. Rafuse, Jr., Smithtown, N.Y., appellant pro se and for appellants Harbor
Light Development Corp., d/b/a Point of Woods Homes, Inc., Brant Rafuse, Andrew
Rafuse, and Jack Skolnick.

Marshall M. Stern, P.C., Huntington, N.Y. (Judith Donnenfeld of counsel), for
respondent.

In an action, inter alia, to enforce a trust under article 3-A of the Lien Law, the
defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk
County (Tanenbaum, J.), dated April 8, 2009, as denied their motion to dismiss the complaint
pursuant to CPLR 3211(4) and (5).

ORDERED that the order is affirmed insofar as appealed from, with costs.

Under the circumstances of this case, we find no reason to disturb the Supreme
Court's denial of that branch of the defendants' motion which was to dismiss the complaint pursuant
to CPLR 3211(a)(4), based upon the pendency of another action to enforce a trust under article 3-A
of the Lien Law brought against three of the defendants in this action by a different plaintiff (*see Atlas
Bldg. Sys. v Rende*, 236 AD2d 494, 495; *cf. Premier Elec. Const. Corp. v Security Natl. Bank of*

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d/b/a POINT OF WOODS HOMES, INC.

Long Is., 39 AD2d 967, 968; see also *Donaldson Acoustics Co., Inc. v Sutton Ease Associates #88*, NYLJ, Dec. 4, 1991, at 23, col 3), especially since the two actions were subsequently joined for trial. Notably, the complaint here seeks recovery not only pursuant to the Lien Law, but also under the parties' underlying contract as an independent claim (see *International Assn. of Heat & Frost Insulators & Asbestos Workers Local No. 26 Welfare Fund, Pension Fund & Annuity Fund v Hebert Indus. Insulation*, 234 AD2d 930; *South Carolina Steel Corp. v Miller*, 170 AD2d 592, 594; *Matter of A. D. Walker & Co. v Shelter Programs Co.*, 84 AD2d 536; *Matter of Merv Blank, Inc. v Dwyer*, 50 AD2d 563).

Moreover, the Supreme Court did not err in concluding that the question of when final payment became due for the plaintiff's services "so as to commence the running of the statute of limitations is one of fact to be determined at trial" (*Matter of Grosso*, 9 BR 815, 822; see *Dittmar Explosives v A.E. Ottaviano, Inc.*, 20 NY2d 498, 503; *Utica Sheet Metal Corp. v Myers-Lane Corp.*, 45 AD2d 116, 119). Accordingly, the Supreme Court also properly denied that branch of the motion to dismiss which was pursuant to CPLR 3211(a)(5).

RIVERA, J.P., ANGIOLILLO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court