

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

D33987
Y/prt

_____AD3d_____

Submitted - January 23, 2012

PETER B. SKELOS, J.P.
JOHN M. LEVENTHAL
PLUMMER E. LOTT
ROBERT J. MILLER, JJ.

2010-02448

DECISION & ORDER

Phillip Young, doing business as Affordable Paving,
respondent, v Destaso Funding, LLC, et al., appellants,
et al., defendant.

(Index No. 6735/09)

Daniel E. Bertolino, P.C., Upper Nyack, N.Y., for appellants.

James R. McCarl, Montgomery, N.Y., for respondent.

In an action to foreclose a mechanic's lien and to recover damages for breach of contract, the defendants DeStaso Funding, LLC, and Stepmc Corp. appeal, as limited by their brief, from so much of an order of the Supreme Court, Dutchess County (Pagones, J.), dated March 2, 2010, as denied those branches of their motion which were to vacate the note of issue and certificate of readiness and for summary judgment dismissing complaint insofar as asserted against them.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying that branch of the appellants' motion which was to vacate the note of issue and certificate of readiness and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the appellants.

On November 20, 2009, four days after the appellants served a verified answer to the complaint, the plaintiff's counsel filed a note of issue and certificate of readiness affirming that "[d]iscovery proceedings now known to be necessary completed," "[t]here are no outstanding requests for discovery," and "[t]here has been a reasonable opportunity to complete the foregoing proceedings."

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The plaintiff's certificate of readiness incorrectly stated that discovery proceedings known to be necessary were completed and that there had been a reasonable opportunity to complete discovery proceedings. Because these were misstatements of material fact, the filing of the note of issue was a nullity, and should have been vacated (*see* 22 NYCRR 202.21[e]; *Gaskin v Ilowitz*, 69 AD3d 563; *Gregory v Ford Motor Credit Co.*, 298 AD2d 496; *Hyman & Gilbert v Greenstein*, 138 AD2d 678; *48-48 Assoc. v Solow*, 97 AD2d 742; *Empire Mut. Ins. Co. v Moore Bus. Forms*, 88 AD2d 819).

The evidence submitted by the appellants in support of their motion for summary judgment dismissing the complaint insofar as asserted against them failed to eliminate any triable issue of fact with respect to whether the appellants owed the plaintiff's decedent any additional money for the work that he performed (*see* CPLR 3212[f]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851). Since the appellants failed to meet their prima facie burden, it is unnecessary to determine whether the submissions in opposition to that branch of the motion raised a triable issue of fact (*see Poverud v Kwartler*, 90 AD3d 729). Accordingly, the Supreme Court properly denied that branch of the appellants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.

SKELOS, J.P., LEVENTHAL, LOTT and MILLER, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court