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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD Justice IA Part 13

GIUSEPPA VACCARO

- against -

LUIS MARIO RAMIREZ

Index Number 7691 2001

Motion Date January 16, 2002

Motion Cal. Number 52

The following papers numbered 1 to 8 read on this motion by petitioner Giuseppa Vaccaro for an order (1) discharging and canceling the mechanics' lien pursuant to section 19 of the Lien Law; (2) dismissing the first through sixth counterclaims on the grounds of failure to state a cause of action, pursuant to CPLR 3211(a)(7); (3) dismissing the second counterclaim pursuant to CPLR 3211(a)(1); and (4) granting petitioner summary judgment on the fourth and fifth causes of action based upon respondent's alleged willful exaggeration of a mechanics' lien and setting the matter down for an inquest as to damages.

	Papers Numbered
Notice of Motion-Affidavits-Exhibits (A-G)..	1 - 4
Answering Affidavits.....	5 - 6
Reply Affidavits.....	7 - 8

Upon the foregoing papers this motion is decided as follows:

Petitioner is the owner of a two-family house known as 29-12 Hoyt Avenue, Astoria, New York. Respondent is in the business of purchasing distressed property, which he then repairs and resells. The parties entered into a contract of sale dated March 8, 2000 whereby Mrs. Vaccaro agreed to sell the property to Mr. Ramirez for the sum of $270,000. Mr. Ramirez paid a down payment of $5,000 and with the balance of the purchase price to be paid at the closing. It was agreed that Mr. Ramirez would purchase the property "as is". Mr. Ramirez alleges that he made an additional down payment of $3,000, which the owner was permitted to utilize despite the terms of the escrow agreement. The parties executed a rider to the contract on March 8, 2000, which sets forth, among other things, a mortgage contingency clause and provides for the return of the down payment in the event that Mr. Ramirez was unable to obtain

financing and demanded the return of the down payment. The terms of the rider required the purchaser to remove all violations, to restore the premises to a legal two-family use and to pay all judgments resulting from the violations. The sale was subject to tenancies, except that one apartment was to be delivered vacant, and the seller was to pay all tax arrears. The seller agreed to give the purchaser a credit in the amount of $10,000. The parties entered into an extension and modification agreement on May 11, 2000, whereby it was agreed that in consideration for the seller granting the purchaser an additional 45-day extension for securing a mortgage commitment from the date of the extension agreement, and in further consideration of the seller assuming the purchaser's obligations to remove all violations and to pay all judgments arising from the violations, the closing date was scheduled for August 31, 2000, subject to two existing tenancies, the purchaser paying the seller's monthly mortgage installment payments for May, June, July and August in the amount of $1,559.25, purchaser to pay all utilities consumed on the premises commencing May 1, 2000, and the purchaser to pay at the closing all legal fees and judgment incurred by the seller in removing the violations. The purchaser, prior to the closing, was permitted access to the premises and performed certain work and repairs upon the property in order to remove numerous violations, including the removal of an illegal dwelling at the rear of the lot, the removal of illegal partitions in the original dwelling, the complete removal and replacement of the plumbing and electrical systems, the removal of large quantities of debris and garbage, and the replacement of major structural systems in the building. Mr. Ramirez asserts that the parties separately agreed that in the event that title did not close, the owner would reimburse him for the repairs and restoration costs.

Petitioner's request to discharge the mechanics' lien is granted. Respondent Luis Mario Ramirez filed a notice of a mechanics' lien on August 11, 2000. The lien has not been extended by a court order or by the commencement of an action to foreclose on the lien, and a notice of pendency of such an action. The lien thus automatically terminated by operation of law. (See, Lien Law § 17, 19[2]; Gallo Bros. Constr. v Peccolo, 281 AD2d 811, 813; Green Elec. Contrs. v SMG Constr., 279 AD2d 287; L & M Plumbing v Decker, 219 AD2d 619, 619-620, lv denied, 87 NY2d 806; Matter of Fidelity & Deposit Co. of Maryland, 75 AD2d 707; Matter of Thirty-Fifth St. & Fifth Ave. Realty Co., 121 AD 625.) There is no need to obtain a court order to discharge the lien. Nevertheless, case law authorizes an application to vacate or cancel a mechanic's lien based on the lienor's failure to take the steps necessary to perfect it (see, Matter of Cook v Carmen S. Pariso Inc., ___ AD2d ___; 734 NYS2d 753; Matter of Kushaqua Estates v Bonded Concrete, 215 AD2d 993, 994; Matter of Onorati v Testco Inc., 204 AD2d 876; Matter of Cake Stylists v Town & Country Plumbing & Heating, 197 AD2d 687, appeal dismissed and lv denied, 83 NY2d 795; Matter of Flintlock Realty & Constr. Corp., 188 AD2d 532, 533;

Modular Steel Sys. v Avlis Contr. Corp., 89 AD2d 891; Matter of Malafsky v Becker, 255 AD 444, 445 appeal conditionally dismissed, 280 NY 685; Hanson Heating & Plumbing v Stout, 88 Misc 2d 241, 241-242.)

Petitioner's request for summary judgment on its fourth and fifth causes of action, which are based upon respondent's alleged willful exaggeration of a mechanics' lien is denied, and these causes of action are dismissed. "The remedy afforded to lienees by section 39-a of the Lien Law is available only when the lienor seeks to enforce his lien" (Matter of Tully Construction Company Inc., v United Minerals Inc., 221 AD2d 697, 698, quoting Finger v Roth Bros. Regal Rest. Supply Corp., 2 Misc 2d 944, 945-946; see also, Reeve Serv. Corp. v Raab, 64 AD2d 826; Durand Realty Co. v Stolman, 197 Misc 208; affd 280 App Div 758.) In the instant case the lienor did not seek to enforce or foreclose the lien and as petitioner moved to vacate the mechanic's lien, she is not entitled to such relief beyond vacating the lien. (See, Matter of Tully Construction Company Inc. v United Minerals Inc., supra.)

Petitioner's request to dismiss respondent's first counterclaim for specific performance of the contract of sale is denied. The court finds that the counterclaim sufficiently states a cause of action for specific performance. The contract vendee alleges that the parties entered into a written contract of sale for the subject property dated March 8, 2000, that the purchase price was $270,000, that he paid a down payment in the sum of $5,000 and an additional down payment in the sum of $3,000, and that the respondent tendered the full payment of the purchase price and in satisfaction of all of the obligations of the purchase agreement at the closing of title, and that the owner refused to accept payment of the balance of the purchase price, refused to pay certain taxes, liens and code violations in excess of the amounts the purchaser agreed to pay, refused to dispose of certain other contractual obligations, and refused to convey title to the premises. Contrary to the petitioner's allegations, as the purchaser alleges that he tendered the full purchase price at the closing, he is not required to allege that he obtained mortgage financing. The court finds that these allegations sufficiently state that Mr. Ramirez was ready, willing and able to purchase the property at the closing date, and he is not required to recite these precise words in his pleading.

Petitioner's request to dismiss the second counterclaim, which seeks to recover the costs of the repair and rehabilitation of the property, and the sums advanced to the owner for the payment of the mortgage is denied. While the sums advanced for the payment of the mortgage may have solely been in exchange for the extension of the closing date, the removal of violations which required certain repairs to the property were clearly the seller's responsibility. The contract of sale permitted the purchaser to take title to the premises subject to the violations and provided for an adjustment

in the purchase price, based upon the sums expended in removing the violations. While the parties' extension agreement provided that the owner would be responsible to remove all violations on the property, it is silent as to how this would be accomplished. The parties' thus were free to enter into a separate agreement whereby Mr. Ramirez, or his contractors, would perform the repairs. The court finds that to the extent that it is alleged that the parties' entered into a separate oral agreement as regards the payment of these expenses such an agreement does not constitute a modification of the contract of sale and does not violate the Statute of Frauds. An agreement pertaining to the repair of the property performed by the contract vendee for the benefit of the seller is not an agreement for the sale of real property, and thus is not required to be in writing.

Petitioner's request to dismiss the third counterclaim for fraud is granted. A pleading alleging fraud is required to set forth in detail "the circumstances constituting the wrong" (CPLR 3016[b]), and a complaint that fails to meet this enhanced pleading standard is subject to dismissal. However, "[a] failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. Fraud does not lie where the only fraud claim relates to a breach of contract. (See, WIT Holding Corp. v Klein, 282 AD2d 527; Non-Linear Trading Co. v Braddis Assocs., 243 AD2d 107; Gordon v De Laurentiis Corp., 141 AD2d 437; Courageous Syndicate v People-To-People Sports Comm., 141 AD2d 599, 600; Wegman v Dairylea Coop., 50 AD2d 108, 113, lv dismissed 38 NY2d 918; see also, Miller v Volk & Huxley, 44 AD2d 810.) A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud. (See, Non-Linear Trading Co. v Braddis Assocs., supra, at 118.) Conversely, a misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud. (See, Deerfield Communications Corp. v Cheesebrough-Ponds Inc., 68 NY2d 954; First Bank of the Ams. v Motor Car Funding, 257 AD2d 287.) Respondent herein alleges that he was fraudulently induced into entering an agreement to perform necessary repairs, demolitions and other work upon the subject premises in order to make the premises conform to the building code and other regulations and that the owner stated the she would credit him with the cost of such work and materials against the purchase price under the contract of sale. It is asserted that these statements were false when they were made, that the owner had no intention of conveying the property to the respondent or paying for the work and materials, and that the respondent performed labor, purchased and installed materials and expended sums, sustaining damages. These allegations state a claim for breach of contract and are insufficient to state a claim for fraud.

Petitioner's request to dismiss the fourth counterclaim for

intentional interference with an economic opportunity is granted. The elements of interference with prospective advantage are (1) the defendant must have known of the proposed contract between the plaintiff and the other party, (2) the defendant must have intentionally interfered with the proposed contract, (3) the proposed contract would have been entered into but for the defendant's interference, (4) the defendant's interference was done by wrongful means, and (5) the plaintiff suffered damage as a result. (See, NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., 87 NY2d 614; Guard-Life Corp v S. Parker Hardware Manufacturing Corp., 50 NY2d 183; Herlihy v Metropolitan Museum of Art, 214 AD2d 250; Burns Jackson Miller Summit & Spitzer v Linder, 88 AD2d 50, affd 59 NY2d 314.) Respondent's allegations that he is in the business of acquiring distressed real property, renovating and upgrading the property, and either holding the same for income or reselling the same at a substantial profit, that the petitioner reneged on her agreement to sell the property once she saw the work performed by the respondent and that the failure to convey the property to the respondent deprived him of an opportunity to realize a profit on his investment, are insufficient to state a cause of action for the intentional interference with an economic opportunity.

Petitioner's request to dismiss respondent's fifth counterclaim for money had and received is granted. A cause of action for money had and received is one of quasi-contract or of contract implied-in-law (see, Board of Education of Cold Spring Harbor Cent. School District v Rettaliata, 78 NY2d 128; State of New York v Barclays Bank, 76 NY2d 533, 540; Parsa v State of New York, 64 NY2d 143, 148). The law recognizes such a cause of action "in the absence of an agreement when one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another (Miller v Schloss, 218 NY 400, 406-407). It allows [a] plaintiff to recover money which has come into the hands of the defendant 'impressed with a species of trust' (see, Chapman v Forbes, 123 NY 532, 537) because under the circumstances it is '"against good conscience for the defendant to keep the money"' (Federal Ins. Co. v Groveland State Bank, 37 NY2d 252, 258, quoting from Schank v Schuchman, 212 NY 352, 358). *** The action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it, but it has long been considered an action at law (see, Roberts v Ely, 113 NY 128; Diefenthaler v Mayor of City of N. Y., 111 NY 331, 337)." (Board of Education of Cold Spring Harbor Cent. School District v Rettaliata, at 138, quoting Parsa v State of New York, 64 NY2d, at 148, supra.) Inasmuch as the payments of the down payment were made pursuant to the contract of sale and another agreement and the mortgage payments were made pursuant to the extension agreement, respondent may not maintain a claim for money had and received.

Petitioner request to dismiss the sixth counterclaim for

unjust enrichment is denied. The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter. (Clark-Fitzpatrick, Inc. v Long Island Rail Road Company, 70 NY2d 382; Blanchard v Blanchard, 201 NY 134, 138.) A "quasi-contract" only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment. (Parsa v State of New York, 64 NY2d 143, 148; Farash v Sykes Datatronics, 59 NY2d 500, 504; Bradkin v Leverton, 26 NY2d 192, 197; Smith v Kirkpatrick, 305 NY 66, 73; Grombach Prods. v Waring, 293 NY 609, 615; Miller v Schloss, 218 NY 400, 407.) It is impermissible to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties. (See, Clark-Fitzpatrick, Inc. v Long Island Rail Road Company, supra.) Here, it is alleged that the parties had a separate oral agreement whereby Mr. Ramirez agreed to perform the necessary repairs and renovations to the subject property, and thereby enable the seller to meet her obligations under the extension agreement. Inasmuch as the terms of this oral agreement are in dispute, the court cannot, at the pleading stage, determine whether there is a valid contract that covers the dispute between the parties. Therefore, at this stage respondent may maintain its counterclaim for breach of contract, as well as the action for unjust enrichment.

In view of the forgoing, petitioner's request to vacate the mechanics' lien is granted. Petitioner's request to dismiss the counterclaims is granted as to the third, fourth and fifth counterclaims and is denied as to the first, second and sixth counterclaims. Petitioner's request for summary judgment in its favor on the fourth and fifth causes of action is denied and these causes of action are dismissed.

Dated: April 4, 2002

J.S.C.