

Brite-N-Up, Inc. v Reno
2003 NY Slip Op 30029(U)
May 5, 2003
Supreme Court, Queens County
Docket Number: 0002588/2588
Judge: Charles J. Thomas
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. THOMAS IA Part 3
Justice

	x	Index Number <u>2588</u> 2002
BRITE-N-UP, INC.		
- against -		Motion Date <u>March 19,</u> 2003
NEIKIE RENO		Motion Cal. Number <u>1</u>
	x	

The following papers numbered 1 to 13 were read on this motion by the defendant pursuant to CPLR 3211, 3212 and General Business Law § 771, to dismiss the complaint, for summary judgment dismissing the complaint and for severance of the counterclaims; and cross motion by the plaintiff, pursuant to CPLR 3211 and 3212, to strike the defenses interposed in the answer and for summary judgment dismissing the counterclaims.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits ...	5-8
Reply Affidavits	9-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

I. The Relevant Facts

The defendant Neikie Reno ("Reno") hired the plaintiff Brite-N-Up ("contractor") to renovate a Manhattan residential condominium unit which she purchased in February 2001. During the renovations, Reno continued living at a rental apartment where she paid rent of \$12,500 per month, and she alleges that the contractor was to complete the renovations by June 1, 2001. Due to a dispute over the quality of the work and the contractor's alleged failure to complete the work by June 1, 2001, Reno replaced the contractor with another contractor in September 2001.

The contractor commenced this action against Reno seeking a balance of \$93,750 based upon breach of contract, account stated and quantum meruit. The complaint alleges that the contractor is duly licensed in the City of New York and County of Westchester.

Reno interposed four affirmative defenses, namely: failure to state a cause of action; estoppel and unclean hands; failure to perform agreed-upon work in a skillful manner; and, that the contractor was seeking an amount exceeding the agreed-upon price. Reno also interposed two counterclaims asserting damages in excess of \$150,000 based upon the fact that she had to retain a different contractor to complete the work, and damages of \$50,000 based on her continued rental of an apartment past the alleged June 1 completion date.

During examinations before trial, the contractor's principal stated that in 2001, the contractor was not licensed by the Department of Consumer Affairs in the City of New York, but was licensed in Westchester County. He also stated that because he was performing work on an unoccupied apartment, the Department of Consumer Affairs did not require a license. The contractor obtained a license from the City Department of Consumer Affairs on March 25, 2002.

II. The Motion and Cross Motion

Reno now moves to dismiss the complaint and for summary judgment, asserting that the contractor was not licensed at the time he performed the work as required by the New York City Administrative Code.

The contractor opposes the motion and cross-moves to strike the affirmative defenses and for summary judgment on the counterclaims, contending that Reno did not live in the apartment undergoing renovations, the affirmative defenses lack merit or fail to give notice of the material elements of the defenses, and the parties did not contemplate consequential damages as a result of any delay. The contractor also contends that Reno's affidavit is defective, in that it has a New York venue provision but was notarized in Illinois.

Reno replies that no issue of fact exists concerning her residency or the unlicensed status of the contractor. She asks the court to cure any defect in her affidavit, nunc pro tunc, asserting that due to oversight, the venue provision on her original affidavit was not changed to Illinois when it was sent to her Federal Express by her attorney in New York.

III. Decision

The irregularity in the venue provision of Reno's original affidavit is a technical defect which will be overlooked by the court (see, Liberty Mut. Ins. Co. v Bohl, 262 AD2d 645; People ex rel. Fifth Ave. & 37th St. Corp., 261 App Div 550, affd 286 NY 628).

It is well settled that a contractor who is unlicensed in the municipality where the work is performed is barred from recovery in contract, under theories of recovery of quantum meruit and unjust enrichment, and from foreclosing on a mechanic's lien (see, B&F Bldg. Corp v Liebig, 76 NY2d 689, 691-92; Price v Close, ___ AD2d ___, 754 NYS2d 660; Callos, Inc. v Julianelli, 300 AD2d 612).

Sections 20-387[a] and 20-386 of the Administrative Code of the City of New York prohibit any person from, inter alia, selling, soliciting or performing a home improvement contract as a contractor without a license at the time the agreement is signed or when the work was performed (see, B&F Bldg. Corp. v Liebig, 76 NY2d 689, 691-92; NYC Admin. Code § 20-386).

"Home improvement" is defined to include any land or building or portion thereof which "is used or designed to be used as a residence or dwelling place" (see, New York City Administrative Code ("NYC Admin. Code") § 20-386[2]; see also, Mortise v 55 Liberty Owners Corp., 63 NY2d 743; Blake Elec. Contracting Co., Inc. v Paschall, 222 AD2d 264). The Administrative Code defines a "building" as a structure containing no more than four residences or dwelling units (see, NYC Admin. Code § 20-386[3]).

Under the relevant statute, the term "owner" includes a homeowner, cooperative shareholder or condominium unit owner who purchases the home improvement services pursuant to a "home improvement contract" (see, NYC Admin. Code § 20-386[4]). A "home improvement contract" is defined as:

"an agreement, whether oral or written, or contained in one or more documents, between a contractor and an owner, or contractor and a tenant, regardless of the number of residences or dwelling units contained in the building in which the tenant resides, provided said work is to be performed in, to or upon the residence or dwelling unit of such tenant, for the performance of a home improvement"

(NYC Admin. Code § 20-386[6]).

Thus, where a contractor alleges that the defendant is neither an owner of the premises (NYC Admin. Code § 20-387[a]), nor a resident of the premises at the time that the agreement was entered into or when the work was performed (see, Migdal Plumbing & Heating Corp. v Dakar Developers, 232 AD2d 62, 65-66, lv denied 91 NY2d 808; Ayres v Dunhill Interiors, Ltd., 138 AD2d 303), the home improvement contract may be enforceable despite the lack of a license (see, Kuchar v Baker, 261 AD2d 402; Ayres v Dunhill Interiors, Ltd., supra). A cooperative shareholder,

condominium unit owner or tenant entering into a home improvement contract will be protected by the license requirement, regardless of the number of units in a building, only if the improvement is to their residence or dwelling unit (see, Matilda Constr. Inc. v 420 E. 72nd St. Tenants Corp., 259 AD2d 374; Ayres v Dunhill Interiors, Ltd., *supra*; see also, Liberty Mgmt. & Constr. Ltd. v Wasserman, __ F Supp __, 1996 US Dist. LEXIS 4408 [SDNY 4/9/96]).

The evidence clearly reveals that the contractor was not licensed at the time of contract or at the time the work was performed. The evidence also demonstrates that although Reno owned the apartment being renovated and intended to live in it, she did not reside or dwell there at the time of the contract or the renovations, and the building in which the apartment was located contained more than four residences or dwelling units.

Nonetheless, the evidence clearly indicates that Reno intended to use the condominium unit as her residence although she could not do so during the renovations. As a result, the condominium unit was designed to be used as her residence or dwelling place, and Reno is entitled to the protection of the licensing statutes (see, Mortise v 55 Liberty Owners Corp., 102 AD2d 719, *affd*, *supra*; see also, Liberty Mgmt. & Constr. Ltd v Wasserman, *supra*; J.R. Kemp Scenic Servs., Inc. v Lucien, __ F Supp __, 1988 US Dist LEXIS 12734 [SDNY 11/15/88]). Accordingly, Reno is entitled to summary judgment dismissing the complaint.

In view of this disposition, the court need not address the contractor's contentions regarding the propriety of the affirmative defenses. With respect to that branch of Reno's motion seeking to sever the counterclaims, and that branch of the contractor's cross motion for summary judgment on the counterclaims, it is well-established that general damages are those which are the natural and probable consequence of the breach, while special damages are extraordinary in that they do not directly flow from the breach (see, American List Corp. v U.S. News & World Report, Inc., 75 NY2d 38, 42-43). Special damages are recoverable only upon a showing that they were foreseeable and within the contemplation of the parties at the time the contract was made (see, American List Corp. v U.S. News & World Report, Inc., *supra*, at 43; Atkins Nutritionals, Inc. v Ernst & Young, LLP, __ AD2d __, 754 NYS2d 320).

Here, the first counterclaim alleges damages arising from the difference between the contractor's price and the actual cost to complete the work left undone. Such breach of contract damages are permissible as general damages (see, e.g., Condello v Stock, 1 NY2d 831; Sarnelli v Curzio, 104 AD2d 552, appeal dismissed 64 NY2d 756). Accordingly, the contractor's cross motion for

summary judgment on the first counterclaim is denied, and Reno's motion to sever that counterclaim is granted.

The second counterclaim seeks damages for the continued rental costs which arose when the contractor allegedly failed to complete the renovations by June 1. The contract itself, actually in the form of a proposal, makes no mention of any June 1 completion date, of Reno's need to live elsewhere while renovations were underway, and contains no language permitting recovery of consequential damages. Thus, the contractor has demonstrated that it was neither foreseeable nor within the contemplation of the parties at the time of contract that a failure to complete renovations by June 1 would result in the contractor becoming liable for Reno's rent payments, and his cross motion for summary judgment dismissing the second counterclaim is granted (see, e.g., Martin v Metropolitan Prop. & Cas. Ins. Co., 238 AD2d 389). As a result, Reno's motion to sever the second counterclaim is denied.

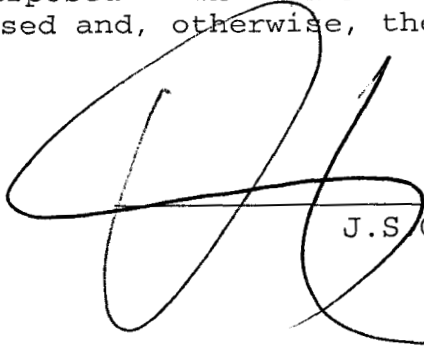
Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the motion by the defendant to dismiss the complaint, for summary judgment dismissing the complaint and for severance of the counterclaims is granted to the extent that the defendant is granted summary judgment dismissing the complaint, the complaint is dismissed, and the first counterclaim is severed and, otherwise, the motion is denied; and it is further

ORDERED that the cross motion by the plaintiff to strike the defenses interposed in the defendant's answer and for summary judgment dismissing the counterclaims is granted to the extent that the plaintiff is granted summary judgment dismissing the second counterclaim interposed in the answer, the second counterclaim is dismissed and, otherwise, the cross motion is denied.

Dated: 5/5/03



J.S.C.