SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. PAUL G. FEINMAN** PART 52

Justice

Index Number : 600326/2005

B & G MECHANICAL

vs

VISTA OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 600326/2005

MOTION DATE 7/27/05

MOTION SEQ. NO. 001

MOTION CAL. NO. 32

The following papers, numbered in this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 1A
Answering Affidavits — Exhibits	2, 2A
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION/ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-3-2005

Paul G. Feinman
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X

B&G MECHANICAL CORP.,
Plaintiff,

against

VISTA OF NEW YORK, INC., 860 FIFTH AVENUE CORPORATION, NYS DEPARTMENT OF TAXATION AND FINANCE and RAGNATELLI, INC. d/b/a "Elite Woodworking," and MIDLAND CREDIT MANAGEMENT, INC.,
Defendants.
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Index Number	600326/2005
Oral Arg. Date	July 27, 2005
Mot. Seq. No.	001
Cal. No.	32

DECISION AND ORDER

For the Plaintiff:
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For Defendant 860 Fifth Ave.:
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Papers considered in review of this motion for summary judgment and/or to dismiss:

Papers	Numbered
Notice of Motion, Affidavits & Memo of Law	1, 1a
Answering Affidavits & Memo of Law.....	2, 2a
Reply Affidavits.....	3

PAUL G. FEINMAN, J.:

Defendant 860 Fifth Avenue Corporation ("860 Fifth") moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. In the alternative, it seeks summary judgment in its favor pursuant to CPLR 3212 dismissing the complaint, as well as on its first and second counterclaims. It further moves to quash the subpoenas issued to William and Avibith Oppenheim, the cooperative shareholders for Unit 11K. For the reasons set forth below, defendant 860 Fifth's motion is denied in its entirety.[1]

[1]None of the other defendants have appeared on the motion.

Factual and Procedural Background

Plaintiff is a Bronx-based corporation that supplies and installs air conditioning equipment (Scelzo Aff. ¶ 3). According to the Verified Complaint, defendant Vista entered into an agreement with plaintiff in which plaintiff was to "relocate and replace certain air conditioning equipment and related materials and services at" 860 Fifth (Not. of Mot. Ex. C, Ver. Compl. ¶ 8). Plaintiff performed the work between July 20, 2004 and September 27, 2004, "at the special instance and request of defendant Vista." (Not. of Mot. Ex. C, Ver. Compl. ¶ 9). As a result of plaintiff's work, there became due and owing from Vista, $41,850.00, which remains unpaid (Not. of Mot. Ex. C, Ver. Compl. ¶¶ 10-11). Plaintiff alleges two causes of action against Vista: breach of contract, quantum meruit, and a third cause of action against Vista and defendant 860 Fifth sounding in a mechanic's lien.

Defendant 860 Fifth's Verified Answer proffers two affirmative defenses which are also pleaded as counterclaims: first, to void the mechanic's lien based on "willful exaggeration" of the amount owed; and second, to dismiss the complaint based on plaintiff's lack of a license from the Department of Consumer Affairs. It pleads a third affirmative defense alleging that plaintiff failed to complete the work in Unit 11K in the manner and time specified and deprived the unit shareholders of use of their premises, so that no monies are due (Ver. Compl. Ex. E, Not. of App., Ver. Ans. & Counterclaim, pp. 2-3).

Legal Anaylsis

A motion for summary judgment is a drastic measure and to be used sparingly (*Wanger v Zeh*, 45 Misc 2d 93 [Sup. Ct., Albany County], *aff'd* 26 AD2d 729 [3rd Dept 1965]). Summary judgment is proper when there are no issues of triable fact. (*Alvarez v Prospect Hospital*, 68

NY2d 320, 324 [1986]). Issue finding rather than issue determination is its function (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). The evidence will be construed in the light most favorable to the one moved against (*Weiss v Garfield*, 21 AD2d 156 [3rd Dept 1963]). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." (*Daliendo v Johnson*, 147 AD2d 312 [2d Dept 1989]). Defendant argues that plaintiff was not licensed by the Department of Consumer Affairs of the City of New York to engage in home improvements pursuant to NYC Administrative Code § 20-287. As plaintiff has not alleged that it is licensed nor provided its license number, defendant is permitted to move to dismiss based on failure to state a cause of action (CPLR 3015[e]).

Under the statute, "home improvement" is defined in part as "renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place and shall include but not be limited to . . . the installation of central heating or air conditioning systems." (NYC Admin. Code § 20-386[2]). A "home improvement contract" is "an agreement. . . 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]). An unlicensed contractor may not enforce a home improvement contract against an owner or seek recovery in quantum meruit (*Blake Elec. Contr. Co. v Paschall*, 222 AD2d 264 [1st Dept. 1995], citing *B & F Bldg. Corp. v Liebig*, 76 NY2d 689 [1990]). The contract is unenforceable and void (*Mortise v55 Liberty Owners Corp.*, 102 AD2d 719, 720 (1st Dept.), *aff'd* 63 NY2d 743 [1984]). Moreover, an unlicensed contractor

performing home improvement work in New York City is guilty of a misdemeanor (*B & F Bldg. Corp. v Liebig*, 76 NY2d at 692 [1990], citing NYC Admin. Code § 20-401 [1]).

Plaintiff contends that its work was not "home improvement" as defined under the statute. It relies on *Power Cooling, Inc. v Wassong*, 5 Misc. 3d 22 (App. Term 1st Dept. 2004), in which the court held that where an unlicensed subcontractor-plaintiff installed four heating and air-conditioning units in defendant's apartment, these "noncentral air-conditioner[s]" were not a home improvement. Plaintiff argues that its contract involved installing "PTAC units" in the apartment, individual window units which are not a central air conditioning system (Scelzo Aff. in Opp. ¶ 10; Ex. D). To substantiate its argument, it includes a copy of the purchase order dated May 20, 2004 indicating that its work was to furnish and install PTAC units (Scelzo Aff. in Opp. Ex. A).[2] However, defendant proffers a subsequent proposal, signed by plaintiff's representative on July 20, 2004, to revise the work and the price to include the furnishing and installation of not only one PTAC unit, but also "(3) 2 ton central A/C Systems" (Theodosious Reply Ex. G, Letter of July 20, 2004, Kelber to Viscuso). Notably, the date of this "proposal" is the same date alleged by plaintiff to be the date its work commenced on the project.[3] Thus, although plaintiff's planned work may have originally not fallen within the rubric of the home improvement statute, the evidence tends to establish that plaintiff's actual work included

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[2]The Verified Complaint states that in "about June, 2000, defendant Vista entered into an agreement with plaintiff B&G pursuant to which B&G, for a valuable consideration, was to relocate and replace certain air conditioning equipment and related materials and services" (Not. of Mot. Ex. C, Ver. Compl. ¶ 8).

[3]The Verified Complaint states that "[i]n or about and between July 20, 2004 through September 27, 2004, plaintiff B&G . . . performed the labor required to be performed....pursuant to its agreement referred to in paragraph '8' above." (Not. of Mot. Ex. C, Ver. Compl. ¶ 9).

installation of a central air conditioning system, and Article 20 of NYC Administrative Code would appear to control.

Plaintiff also argues, however, that the tenant shareholders of Unit 11K are not actually "homeowners" as defined under the statute, and that accordingly the work is "commercial" rather than for a "home." Under the statute, "owner" is defined as "any . . . cooperative shareholder. . . or any other person who orders, contracts for or purchase home improvement services of a contractor" (NYC Admin. Code § 20-386[4]), but is further defined as being the resident of the dwelling unit in which the work is to be performed (NYC Admin. Code § 20-386 6]). Plaintiff argues that the Oppenheims live in Morristown, New Jersey, and that the apartment in New York City is an investment property or a vacation property (Sachdeva Aff. in Opp. ¶ 7). It proffers copies of printouts of various searches for the Oppenheim voter registration records, driver licenses, and electric bills from the New Jersey and New York City addresses (Aff. in Opp. Ex. G, H). The printouts indicate that Avivith Oppenheim is registered to vote from a Morristown, New Jersey address, that neither Oppenheim has a New York State driver license, and that the electric bills for the New York City apartment are a fraction of the amount billed to the New Jersey address.

Defendant points to the affidavit of Ms. Oppenheim in which she avers that the apartment has been uninhabited since the time she bought it, "due to ongoing construction," and that she and her husband intend to reside there once it is completed (Oppenheim Reply ¶ 5). She further states she has never advertised the apartment for rent to any third party and does not intend to do so (Id.). Defendant also argues that plaintiff has inconsistently argued that the premises is and is not the Oppenheim's residence, pointing to plaintiff's mechanic's lien notice which states

explicitly that it performed work "to Unit 11K, the William Oppenheimer [*sic*] and Avibith Oppenhiemer [*sic*] residence" (Not. of Mot. Ex. C, Notice under Mechanics Lien Law ¶ 4).

Here, there is a question of fact as to whether the Oppenheims are actually tenants living in the apartment being renovated, and therefore summary judgment based on NYC Admin. Code §20-386 is not appropriate, even where the contractor is not licensed (*Ayres v Dunhill Interiors, Ltd.*, 138 AD2d 303 [1st Dept. 1988]; *see also Matter of Migdal Plumbing & Heating Corp. v Dakar Developers, Inc.*, 232 AD2d 62, 66 [1st Dept. 1997], *lv denied* 91 NY2d 808 [1998]). Defendant's reliance on *Routier v Waldeck*, 708 NYS2d 270 (Dist. Ct., Nassau County 2000), which holds that the term "owner" includes people who *intend* to reside in the building once the contractor's work is complete, but not real estate investors, is not dispositive where there is a question as to what are the final intentions of the Oppenheims. Accordingly, summary judgment and dismissal of the complaint pursuant to CPLR 3212 as against 860 Fifth Avenue Corporation is not warranted, nor is dismissal pursuant to CPLR 3211(a)(7).[4] Thus, the motion to discharge the mechanic's lien must be denied as premature. The motion to quash the subpoenae duces tecum is also denied.

The motion for summary judgment as to the two counterclaims is also denied. The first counterclaim alleges a "willful" exaggeration of the reasonable value of the labor and agreed-upon price, however there is insufficient evidence before the court to make such a determination,

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[4]In assessing a motion to dismiss pursuant to CPLR 3211, the facts as alleged in the complaint are accepted as true, plaintiffs are accorded the benefit of every possible favorable inference, and the court determines only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]; *Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). The test is "whether the proponent of the pleading as a cause, not whether he has stated one." (*Leon v Martinez*, *supra*).

given that plaintiff argues that it performed a substantial amount of work at the premises before its services were terminated and that the contractors who completed the project did not need to charge for the work already completed (Scelzo Aff. in Opp. ¶ 12). The second counterclaim to expunge the mechanic's lien based on plaintiff's failure to be licensed is denied as premature, for the reasons stated above. It is

ORDERED that the motion to dismiss the complaint pursuant to CPLR 3211(a)(7) or for summary judgment and dismissal pursuant to CPLR 3212 is denied; and it is further

ORDERED that the motion for a grant of summary judgment as to the two counterclaims by 860 Fifth Avenue Corporation is denied; and it is further

ORDERED that the motion to quash the subpoenas issued to William and Avibith Oppenheim is denied; and it is further

ORDERED that if a compliance conference is not currently scheduled, the plaintiff shall promptly contact the Part 52 DCM Clerk, Ms. Doreen Gushue, to schedule same.

This constitutes the decision and order of the court. The court has mailed copies of this decision to all counsel.

Dated: October 3, 2005
New York, New York

J.S.C.