Gordon v Nisnewitz
2005 NY Slip Op 30593(U)
January 7, 2005
Supreme Court, New York County
Docket Number: 103622/04
Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ALLAN S. GORDON, INDEX NO. 103622/04

Plaintiff,

-against-

CRAIG M. NISNEWITZ, ESQ., FEINSTEIN & NISNEWITZ, P.C. and STORE KRAFT MANUFACTURING COMPANY

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JOAN A. MADDEN, J.:

In this action for declaratory relief and monetary damages, based on an allegedly improper and invalid mechanic's lien, plaintiff moves for an order dismissing defendants' affirmative defenses and counterclaims, and granting plaintiff partial summary judgment as to liability on its second, third, fourth and fifth causes of action. Defendants oppose the motion and cross-move for an order pursuant to CPLR 3211(a)(7) dismissing the complaint in its entirety for failure to state a cause of action.

The following facts are not disputed. Plaintiff Allan S. Gordon is the owner of the building located at 22 Greenwich Avenue in Manhattan, which contains a retail store at street level. In April 2003, plaintiff leased the store to defendant Access Artisans for use as a housewares and gift shop. Section 41 of the rider to the lease provides that any trade fixtures placed on the premises would remain the property of the tenant and may be removed, unless they were so affixed to the property that their removal would damage the property. Defendant Access Artisans subsequently ordered custom designed and manufactured trade fixtures from co-defendant Store Kraft Manufacturing Company, which is located in Beatrice, Nebraska. The

total cost of the fixtures was $25,221.19 and $10,957.00 was paid before shipment. On June 29, 2003, the fixtures were delivered to defendant Access Artisans' store, and Store Kraft sent an invoice for the balance due of $14,263.69. A disputed subsequently arose as to the payment of the balance, with Access Artisans objecting that the fixtures were delivered late, and that several items were damaged, incomplete or defective.

When Store Kraft did not receive payment by the end of February 2004, it hired a law firm in Illinois to file a mechanic's lien for the amount due, and defendant Feinstein & Nisnewitz, P.C. was retained as local counsel to file the mechanic's lien. The mechanic's lien was filed on March 1, 2004, and was signed by defendant Craig M. Nisnewitz, Esq. as agent and attorney for defendant Store Kraft. The payment dispute was subsequently resolved pursuant to a settlement agreement dated March 26, 2004, by which Store Kraft agreed to accept $12,000 as payment in full, in two separate installments. After Store Kraft received the $12,000, it filed a Satisfaction of Mechanic's Lien on June 2, 2004, which was also signed by defendant Craig M. Nisnewitz, as attorney and agent for Store Kraft.

Meanwhile, on March 9, 2004, eight days after Store Kraft filed its mechanic's lien, plaintiff commenced the instant action against Craig M. Nisnewitz, Esq., Feinstein & Nisnewitz, P.C. and Store Kraft Manufacturing Company. The complaint asserts five causes of action seeking a declaratory judgment that the mechanic's lien is invalid and void, and damages and attorney's fees based on claims of slander of title, tortious interference with title and ownership of property, perjuious fraud, and violation of the Lien Law. The Court agrees with defendants that the complaint should be dismissed.

The first cause of action seeks a declaration that the mechanic's lien is invalid and determining the rights of the parties with respect to the lien. Any issue as to the invalidity of the lien, however, is moot, as the lien has been discharged, so any decision as to the validity of the lien would have no practical effect on the rights of the parties. See Saratoga Chamber of Commerce, Inc. v. Pataki, 100 NY2d 801, 810-811, cert denied 540 US 1017 (2003); Dmitra v. City of New York, 8 AD3d 110 (1st Dept 2004). Under section 19(6) of the Lien Law, the Court is authorized to issue an order summarily discharging a mechanic's lien "[w]here it appears from the face of the notice of the lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed." Although plaintiff alleges that the trade fixtures that Access Artisans purchased from Store Kraft do not qualify as "improvements" under the Lien Law, the Court need not determine whether the lien is valid pursuant to section 19(6), as the lien has already been discharged as a result of the Satisfaction of Mechanic's Lien that Store Kraft filed on June 2, 2004. Plaintiff's assertion that it is nevertheless entitled to a declaration as to defendants' unauthorized and improper acts in filing the lien, and determining the rights of the parties with respect to the lien, is not persuasive, as plaintiff has failed to show that such declaration would have the practical effect of providing him with some actual relief available under the law. To the contrary, since the mechanic's lien against plaintiff's property no longer exists, plaintiff's cause of action for a declaration invalidating the lien would serve absolutely no practical purpose, and as such, is moot.

The second cause of action alleges that Store Kraft's filing of the $14,263.69 mechanic's lien against plaintiff's property, constitutes slander of title. The three elements of slander of title are: 1) a communication falsely casting doubt on the validity of complainant's title, 2) reasonably

calculated to cause harm, and 3) resulting in special damages. Brown v. Bethlehem Terrace Assocs., 136 AD2d 222 (3rd Dept 1988). "Special damages must be alleged with sufficient particularity to identify actual losses and related causally to the allegedly tortious acts." Zausner v. Fotochrome, Inc., 18 AD2d 649 (1st Dept 1962); see also Ansonia Tenants' Coalition, Inc. v. Collazo, 251 AD2d 163 (1st Dept 1998).

Here, the second cause of action alleging that "plaintiff has been damaged in an amount to be determined," fails to plead special damages with sufficient particularity to identify actual losses, as is necessary to support a claim for slander of title. Also, plaintiff's papers in opposition to the cross–motion, make no attempt to remedy this defect. Compare Rosenbaum v. City of New York, 5 AD3d 154 (1st Dept 2004). Thus, absent adequate allegations as to special damages, the second cause of action must be dismissed. See Carnival Co. v. Metro-Goldwyn-Mayer, Inc., 23 AD2d 75 (1st Dept 1965).

The third cause of action for tortious interference with title and ownership of property, is likewise facially defective for failing to allege special damages. See Modulars By Design, Inc. v. DBJ Development Corp., 174 AD2d 885, 887 (3rd Dept 1991).

The fourth cause of action denominated "perjurious fraud," must be dismissed as not pleaded with the specificity required by CPLR 3016(b). CPLR 3016(b) provides that where a cause of action is based on fraud, "the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b); Linden v. Moskowitz, 294 AD2d 114, 115 (1st Dept 2002), lv app den, 99 NY2d 505 (2003). Here, the cause of action for fraud merely alleges that the "false, fraudulent, perjurious and deceitful misrepresentations of material fact contained in the Notice [of Mechanic's Lien] were made willfully, creating a colorable legal basis for filing the Notice to

create a lien against the Property and thereby attempt to harass, intimidate and coerce plaintiff to pay the debt of another and/or to cause plaintiff, as Access Artisans' landlord, to force Access Artisans to pay Store Kraft amounts, which, in fact, upon information and belief, may not be properly due and owing in whole or part." As plaintiff fails to allege that he relied upon such misrepresentations to his detriment, the fraud claim must be dismissed. Id.

In the fifth cause of action, plaintiff seeks damages based on allegations that the filing and recording of the mechanic's lien violated the Lien Law. The complaint fails to identify the specific statutory provision on which plaintiff is relying, and plaintiff's opposition papers provide no further clarification. At best, as discussed above, the allegations in the complaint regarding the validity of the lien, appear to fall under Lien Law §19(6). The remedy provided in that section, however, is limited to the Court's summary discharge of an invalid lien; section 19(6) does not provide for an award of damages or attorney's fees. Although Lien Law §39-a does authorize an award of damages and attorney's fees, that is only where a mechanic's lien has been declared to be void on account of willful exaggeration. See Pyramid Champlain Co. v. R.P. Brosseau & Co., 267 AD2d 539, 542 (3rd Dept 1999), lv app den 94 NY2d 760 (2000); Westbury S & S Concrete, Inc. v. Manshul Construction Corp., 212 AD2d 596, 597-598 (2nd Dept 1995). Thus, as plaintiff's fifth cause of action for damages based on violation of the Lien Law, is not supported by any provision in the Lien Law, it must be dismissed.

In light of the foregoing determination, defendants' cross-motion to dismiss the complaint in its entirety is granted, and plaintiff's motion is denied. That portion of defendants' cross-motion for an award of sanctions, is denied.

Accordingly, it is hereby

ORDERED that defendants' cross-motion to dismiss is granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendants' motion for the imposition of sanctions, is denied; and it is further

ORDERED that plaintiff's motion is denied.

DATED: January 7, 2005

ENTER:

J.S.C.