Nifco v D.C.B.E., Inc.

2005 NY Slip Op 30619(U)

September 30, 2005

Supreme Court, New York County

Docket Number: 113075/2004

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

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ILAN NIFCO,

Plaintiff, Index No.: ~~111043/2004~~ 113075/2004

-against-

D.C.B.E., INC., JOHN CONNELLEY,
and THOMAS MORRIS

Defendants.

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FRIED, J.:

In a decision dated March 24, 2005, and filed on March 28, 2005, I converted plaintiff's motion to dismiss defendants' counterclaims into one for summary judgment pursuant to CPLR 3211(c). The parties were directed to submit supplemental papers in connection with the conversion, which they did, and oral argument was help on the submissions. As discussed below, plaintiff motion for summary judgment dismissing defendants' counterclaims is granted.

Plaintiff's action is based on defendants' alleged breach of a contract entered into by defendant DCBE, under which DCBE was to perform "certain renovations and improvements" to the plaintiff's residence. In their answer, the defendants admit, *inter alia*, that on or about July 8, 2003, plaintiff entered into a written contract with DCBE (attached as Ex A to the Complaint), pursuant to which DCBE agreed to perform "certain renovations and improvements"at plaintiff's residence. (Complaint ¶ 11; Answer ¶ 11). It is further

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admitted that defendants did not posses a home improvement license issued by the New York City Department of Consumed Affairs. (Id., at ¶ 40). Nonetheless, defendants assert two counterclaims seeking to recover for plaintiff's alleged breach of the July 2003 Contract and for the "value of work, labor and services rendered" under a quantum meruit theory.

On its motion to dismiss, plaintiff moved to dismiss defendants counterclaims on the grounds that defendants violated NYC Administrative Code § 20-387, for contracting to do "home improvement" without having the necessary license. Therefore, plaintiff urges that the counterclaims should be dismissed in accordance with CPLR 3015(e), which provides that defendants failure to plead that it is duly licensed (which they in fact affirmatively admit they did not posses), is grounds for dismissal, citing, Chosen Constr. Corp. V. Syz, 138 AD2d 284 (1st Dept., 1988) and Mortise v. 55 Liberty Owners Corp., 102 AD2d 719 (1st Dept., 1994).

Defendants acknowledge that if the contract and the work completed were classified as "home improvement" then dismissal is warranted in light of the statute. However, defendants argue against dismissal, claiming that a license was not required since the work was not "home improvement" as defined under the statute. First, defendants assert that "the broad scope of [defendants'] work [did not] merely consist of home improvement, to the contrary, [defendants'] work consisted of complete construction of a new home." In support of this conclusion, defendants argue that "[f]or example, [defendants] transformed a storage site into two bedrooms and reconstructed the walls to support the new configuration of

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rooms." Thus, the argument runs, that the work falls under the statutory exemption in NYC Code § 20-386(2)(i), which provides that "the construction of a new home..." is not considered "home improvement," and therefore the lack of a license does not warrant dismissal.

Defendants also contend that dismissal is not warranted because "substantial portions of the work performed by [defendants] are not 'home improvements.'" To buttress this conclusion, defendants assert that "[w]ork performed by [defendants] such as masonry, plumbing and electric panels ... fall outside the litany of items included in the City Code ... [since] the City intended to exclude anything not provided for," citing Power Cooling, Inc. v. Wassong, 5 Misc.3d 22 (N.Y. Sup. App. Term, 2004). Additionally, defendants assert that "much of the work performed" was "decorative additions not included under the definition of home improvement," citing Raywood Associates, Ltd. v. Seibel, 172 A.D.2d 154 (1st Dept., 1991). Particularly, defendants insist that their installation of "many of the kitchen appliances" and "all of the bathroom fixtures" was decorative in nature. Thus, defendants conclude that "[m]uch of the structural work and carpentry work was required as a result of the new bathroom installations and may therefore be considered incidental to the bathroom work [which would] not trigger the licensing requirement."

On the motion to dismiss, I concluded that the issue of whether the work involved in this case falls within the statute, was more properly a question for summary judgment. Therefore, I converted the motion to dismiss to one for summary judgment, and directed the

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parties to submit supplemental papers.

In support of the summary judgment dismissal of the counterclaims, plaintiff submits an affidavit and, attached as an exhibit, the construction documents which were incorporated as part of the contract under which defendants were to perform "certain renovations and improvements" to the plaintiff's residence.[1] Plaintiff identifies these "renovations and improvements" as listed in the construction documents as: (1) demolition of the existing kitchen and bathroom, and other demolition within the residence needed in order in order to perform the contemplated renovations; (2) the construction of a new kitchen (including construction of cabinets, installation of counters, installation of electrical fixtures and receptacles, installation of plumbing and plumbing fixtures, and installation of appliances); (3) the remodeling and renovation of the bathroom (including the installation of bathroom fixtures, installation of tile, and installation of plumbing and plumbing fixtures); (4) incorporating a prior storage area into the apartment (including the installation of structural steel in order to create a bedroom and a second bedroom loft); (5) the installation of two staircases (one up to the new loft area and a second to an exiting loft area); (6) the installation of lighting and electrical receptacles throughout the apartment; and (7) the construction and installation of custom closets in the bedrooms; and the construction and installation of custom closets and cabinetry in the living room.

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Plaintiff also submits a "Preconstruction Detailed Budget Estimate", which he received "at or shortly prior to the time the contract was executed" and which computes the cost of the renovations.

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In opposition, defendants' attorney submits an affidavit that essentially reiterates the two arguments made in connection with the motion to dismiss. First, that the defendants' work was not merely home improvement, rather, it was the complete construction of a new home. Alternatively, defendants contend that substantial portions of the work performed are not specifically listed in the statute, and that some are excluded from the statute since they are decorative in nature.

Under CPLR 3211(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case. (e.g. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; See also, Bush v St. Clare's Hospital, 82 NY2d 738, 739 [1993). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. (Indig v Finkelstein, 23 NY2d 728, 729 [1968]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose. (Zuckerman v City of New York, 49 NY2d 557 [1980]). The key to summary judgment is issue-finding, rather than

issue-determination, and the motion is scrutinized in the light most favorable to the opposing party.

Inasmuch as the only opposing affirmation is made by the attorney for the defendants, who does not state that he was a party to contract, and who is not presumed to have knowledge of facts, defendants have failed to controvert the proof submitted by plaintiffs, which includes documentary evidence, since an affidavit by an attorney having no knowledge of the facts has no probative value. (GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc. 66 N.Y.2d 965, 968 [1985]; South Bay Center, Inc. v. Butler, Herrick & Marshall 43 Misc.2d 269 [Nassau Cty, 1964]).

In any event, the work defendants contracted to perform clearly falls within the statute requiring a license. NYC Administrative Code § 20-387(a) provides that:

> No person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesperson from an owner without a license therefor.

The term "Home improvement" is defined in NYC Code § 20-386(2) to mean:

> the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used

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as a residence or dwelling place and shall include but not be limited to the construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures or upon land which is adjacent to a dwelling house. "Home improvement" shall not include (i) the construction of a new home or building or work done by a contractor in compliance with a guarantee of completion of a new building project, (ii) the sale of goods or materials by a seller who neither arranges to perform nor performs directly or indirectly any work or labor in connection with the installation of or application of the goods or materials, (iii) residences owned by or controlled by the state or any municipal subdivision thereof, or (iv) painting or decorating of a building, residence, home or apartment, when not incidental or related to home improvement work as herein defined. Without regard to the extent of affixation, "home improvement" shall also include the installation of central heating or air conditioning systems, central vacuum cleaning systems, storm windows, awnings or communication systems.

The term "Home improvement contract" is defined in NYC Code § 20-386 to mean:

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 and includes all labor, services and materials to be furnished and performed thereunder.

The unopposed evidence submitted by plaintiff establishes that defendants work falls within the purview of the statute requiring a license. Moreover, defendants' contentions that it does not, are without merit. The contract between the parties identifies the work to be done as "renovations" and "improvements" and the items delineated in the construction documents and in plaintiff's affidavit buttress this conclusion. The work did not consist of "construction of a new home or building," as urged by defendants, since even extensive apartment renovations, such as joining two residential units to form on larger unit, had been found not to fall under the "new home" exception. (Blake Elec. Contracting Co., Inc. v. Paschall 222 A.D.2d 264, 266 [1st Dept., 1995]).

Similarly, defendants contention that "work performed by [defendants] such as masonry, plumbing and electric panels ... fall outside the litany of items included in the City Code ... [since] the City intended to exclude anything not provided for," citing Power Cooling, Inc. v. Wassong, 5 Misc.3d 22 (N.Y. Sup. App. Term, 2004), is meritless. In Power Cooling the court found that:

Although the City Council specifically included the installation of

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'central heating or air conditioning systems' in the list of items qualifying as a home improvement, it conspicuously omitted any mention of individual air-conditioners from that list (see Administrative Code § 20-386 [2]). Thus, applying the interpretive canon of expressio unius est exclusio alterius, an 'irrefutable inference' must be drawn that the City Council intended to exclude the installation of room air-conditioners as a home improvement.

The court did not conclude, as defendants submit, that "the City intended to exclude anything not provided for", rather the ruling was limited to "individual air-conditioners" since "the City Council specifically included the installation of 'central heating or air conditioning systems.'" indeed the statute specifically provides that "Home improvement" to means "the construction, repair, replacement, . . . **<u>and shall include but not be limited to</u>** the construction, erection, replacement, or improvement of ...." Thus, while some of the items may not be specifically itemized in the statute, they are all within the definition of "Home Improvement". (Emphasis provided)

Finally, defendants' contention that portions of the work performed are excluded from the statute since they are decorative in nature, is also unpersuasive. The statute provides that "home improvement" shall not include "painting or decorating of a building, residence, home or apartment, **<u>when not incidental or related to</u>** home improvement work as herein defined." Here, any "decorative" work was "incidental" and "related" to the "home

improvement work."

Accordingly, it is

ORDERED that defendants' counterclaims are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 9/30/05

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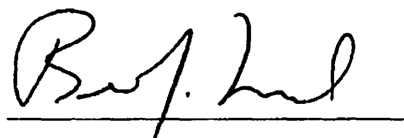

J.S.C.

BERNARD J. FRIED
J.S.C.

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