

Nifco v D.C.B.E, Inc.
2005 NY Slip Op 30620(U)
March 24, 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,

-against-

INDEX NO.: 113 ~~075~~/2004

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

Defendants.

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FRIED, J.:

Plaintiff moves to dismiss the counterclaims brought by defendants D.C.B.E, Inc., (DCBE), John Connelly and Thomas Morris. (CPLR § 3211[a][7] and § 3015[e]).

This action arises out of a contract between plaintiff and defendant DCBE, which required DCBE to perform “certain renovations and improvements” at 250 Mercer Street, New York, New York, the plaintiff’s residence. Plaintiff alleges that defendants breached this contract by their non-compliance with a “time of the essence” period (first cause of action), and by their subpar performance and use of inferior materials (second cause of action). In addition, plaintiff alleges that the individual defendants fraudulently represented that DCBE possessed a home improvement license issued by the New York City Department of Affairs (third cause of action). Finally, plaintiff alleges that the corporate veil should be pierced, and the individual defendants be held individually liable (fourth cause of action).

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 250 Mercer Street. (Plaintiff’s complaint ¶ 11; defendant’s answer ¶ 11). The renovations and improvements were to be performed in accordance with various construction documents, the terms of which were incorporated by reference into the July 8 contract. (*Id.*, at ¶ 12). It is further admitted that defendants did not possess a home improvement license issued by the New York City Department of Consumer 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.

Plaintiff moves to dismiss the counterclaims because that defendants violated NYC Administrative Code § 20-387, by 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 defendant’s failure to plead that it is duly licensed (which they in fact affirmatively admit they did not possess), is grounds for dismissal, citing to 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 completed work is classified as “home improvement” then dismissal is warranted since the counterclaims would fall within the statute. However, defendants contend that a license was not required since the work at

issue was not home improvement. First, defendant argues 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 defendant argues that “[f]or example, [defendants] transformed a storage site into two bedrooms and reconstructed the walls to support the new configuration of rooms.” Thus, the argument runs, 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 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 argument 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. Seibe 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, according to the defendants, since “[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 [this does not] not trigger the licensing requirement.”

At issue is whether the work involved in this case falls within the statute. Since this is more properly a factual issue, I am giving notice to the parties that this motion for dismissal is being converted to one for summary judgment. (3211[c]). Therefore, the parties are directed to submit supplemental papers to Part 60, within 30 days on Notice of Entry of this order.

Accordingly it is,

ORDERED that this motion to dismiss is converted into a motion for summary judgment pursuant to CPLR 3211(c); and it is further

ORDERED that the parties are directed to submit supplemental papers to Part 60, within 30 days on Notice of Entry of this order.

Dated: March 24, 2005

FILED

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NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

BERNARD J. FRIED

J.S.C.