

**N.Y. Custom Interior Woodworking Corp. v 37-20
Prince Street, LLC**

2006 NY Slip Op 30061(U)

September 27, 2006

Supreme Court, Queens County

Docket Number: 0022247/2472

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----X
N.Y. CUSTOM INTERIOR WOODWORKING CORP.,

Plaintiff,

-against-

Index No.:22247/03

Motion Dated:
September 19, 2006

Cal. No.: 24

37-20 PRINCE STREET, LLC, FUSION ELECTRIC,
INC., AND GUS PAINTING COMPANY a/k/a GUS
PAINTING CORP. a/k/a GUS PAINTING &
CONTRACTING CORP a/k/a GS PAINTING CO.,

Defendants.

-----X

The following papers numbered 1 to 13 read on this motion by defendant 37-20 PRINCE STREET, LLC for summary judgment and dismissal of plaintiff's complaint.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits, Memo...1-5
Affirmation in Opposition, Exhibits, Memo.....6-9
Reply Affirmation, Exhibits, Memo.....10-13

Upon the foregoing papers, it is ordered that the motion is determined as follows:

The Court sua sponte vacates its previous order dated September 19, 2006, and issues the following decision.

Plaintiff commenced this action against defendant to enforce a mechanic's lien, unjust enrichment, quantum meruit and account stated. Plaintiff claims that it performed work on behalf of defendant landlord 37-20 Prince Street, LLC (hereinafter referred to as "Prince") and defendant's tenant Monahan Ford Corporation of Flushing (hereinafter referred to as "MFC") for which it has not been paid.

Defendant Prince moves for summary judgment and dismissal of plaintiff's claims, arguing that as a matter of law it is not liable for plaintiff's damages. Prince does not dispute that plaintiff had a written agreement with MFC to perform services for MFC in the premises owned by Prince. However, Prince asserts that plaintiff has only sued it because MFC, the real party in interest with plaintiff, has filed a bankruptcy petition which may prevent plaintiff from recovering damages. Prince argues that plaintiff's notice of mechanic's lien should be canceled because it was not properly served, plaintiff's services were not permanent improvements for which a mechanic's lien is permissible, and this court already denied plaintiff's motion to extend its notice of pendency. Prince argues that plaintiff's claim of unjust enrichment should be dismissed because Prince never expressly consented to plaintiff's services and there is no evidence that plaintiff's services were rendered in good faith and for a reasonable value. Plaintiff's claim of quantum meruit should be dismissed because its services were not performed at Prince's behest. Plaintiff's claim of account stated should be dismissed because there was no express agreement between plaintiff and Prince, no prior debtor-creditor relationship, and plaintiff never presented any invoices or statements of account to Prince. Plaintiff's contention that there was an oral agreement between Micaela Monaghan, as part owner of both landlord Prince and tenant MFC, and plaintiff to perform services is inaccurate and was not presented in plaintiff's Bill of Particulars. While Micaela Monaghan was part owner of both Prince and MFC, she was merely a common passive investor. As there was no principal-agent relationship between the parties, Micaela's status does not enhance the parties' relationship as merely landlord and tenant to establish a valid cause of action. Further, Eleftherios Lagos, plaintiff's president, testified at a deposition that plaintiff's customer was MFC, that he did not know Prince and had no written or oral agreement with Prince. As there is no evidence of a written agreement between plaintiff and Prince, no evidence that Prince assented to plaintiff's services or benefitted from them, summary judgment is warranted.

Defendant moves to strike plaintiff's notice of jury demand as plaintiff's claims are equitable in nature. Defendant also moves to amend its Answer to include the affirmative defenses of Statute of Frauds and the Dead Man's Statute. Prince argues that amendments are liberally granted and that plaintiff is not surprised by these defenses based upon Prince's Answer and discovery between the parties.

Plaintiff opposes defendant's motion, arguing that there are issues of fact in dispute. Specifically, there are issues whether Prince was unjustly enriched by plaintiff's interior renovations in Prince's premises. Further, there are issues of fact as to Micaela's confidential and possibly conflicting

relationship as part owner of the landlord and tenant corporations. Further, Micaela made oral promises to plaintiff to pay for its services and accepted plaintiff's invoices without objection. Accordingly to Christ Tsiropoulos and Elizabeth Lagos, Micaela also observed plaintiff's work and implicitly approved it. Therefore, there are issues of fact as to whether Prince was unjustly enriched in the amount of \$78,500.

Plaintiff contends that defendant's motion to amend should be denied, as it is improper to move to amend on the eve of trial. Further, the Dead Man's Statute is a rule of evidence and not an affirmative defense. Prince's failure to plead Statute of Frauds constitutes a waiver of that defense, which is also inapplicable to plaintiff's equitable claims.

Plaintiff contends that its jury demand was proper, as its Complaint includes both legal and equitable claims that are inextricably interwoven and should be tried together. Finally, defendant's motion to cancel the mechanic's lien is moot, based upon the court's decision dated June 20, 2006, which denied plaintiff's application to extend its notice of pendency.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986].) Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact. (See *Zuckerman v. City of New York*, 49 NY2d 557 [1980].) It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept. 1991].) However, the alleged factual issues must be genuine and not feigned. (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept. 1987].)

Defendant's motion to cancel the notice of mechanic's lien is granted without opposition, as the court denied the extension of the notice of pendency by court order dated June 20, 2006.

Defendant's motion for summary judgment is denied, as there are issues of fact with regard to plaintiff's claims. Defendant presented a prima facie entitlement to summary judgment, by demonstrating that there was no written or oral agreement between plaintiff and Prince nor did Prince assume an obligation to pay for plaintiff's services. (See *Amana Elevation Corp. v. Ydrohoos-Aquarius, Inc.*, 244 AD2d 371 [2nd Dept. 1997].)

However, plaintiff raised issues of fact in dispute as to whether Micaela made oral promises to pay plaintiff, either on behalf of Prince or MFC. (See e.g. *Panetta v. Kelly*, 17 AD3d 163

[1st Dept. 2005], *lv dismissed* 5 NY3d 783 [2005].) Specifically, her ownership of both landlord and tenant raises issues of conflict of interest and whether there was an implicit acceptance of plaintiff's services on behalf of the corporations that preclude summary judgment.

Defendant's motion to amend its Answer is denied. Defendant failed to demonstrate good cause for its failure to seek leave to amend prior to the eve of trial. (See *Slivinsky v. Bloomerside Co- Op., Inc.*, 202 AD2d 491 [2nd Dept. 1994].)

Defendant's motion to vacate plaintiff's notice of jury demand is granted, as under established principles, the joinder of claims for legal and equitable relief amounts to a waiver of the right to demand a jury trial. (See *Kaplan v. Long Island University*, 116 AD2d 508 [2nd Dept. 1996]; *Magill v. Dutchess Bank and Trust Co.*, 150 AD2d 531 [2nd Dept. 1989].)

Accordingly, defendant's motion is denied in all respects except its motion to strike plaintiff's jury demand is granted and the motion to vacate the notice of mechanic's lien is granted. The notice of mechanic's lien filed on March 3, 2003 for the property located at 37-20 Prince Street, under Block 4972 Lot 43, is hereby vacated.

Dated: September 27, 2006

Augustus C. Agate, J.S.C.