

In House Constr. Servs., Inc. v Kaufman Org.

2006 NY Slip Op 30772(U)

June 7, 2006

Supreme Court, New York County

Docket Number: 107520/05

Judge: Sherry Klein Heitler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

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IN HOUSE CONSTRUCTION SERVICES, INC.,
and ADAM KUSHNER,

Index No. 107520/05

Plaintiffs

DECISION & ORDER

-against-

KAUFMAN ORGANIZATION, STEVE KAUFMAN,
KAUFMAN 8TH AVENUE ASSOCIATES L.P.,
MACRAE-GIBSON ARCHITECTS P.C., and
GAVIN MACRAE-GIBSON,

Defendants.

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SHERRY KLEIN HEITLER, J.:

Plaintiff Adam Kushner is an owner of plaintiff In House Constructions Services, Inc. ("In House"), the contractor on a construction project for defendant Kaufman Organization ("Kaufman") on property owned by Kaufman. Kaufman separately contracted with Macrae-Gibson, inc. ("Macrae-Gibson") to perform architectural services on the project. Gavin Macrae-Gibson is the principal of Macrae-Gibson. The contract between Kaufman and Macrae-Gibson required Macrae-Gibson to report to Kaufman on the quality of the work done by In House.

Kaufman alleges that In House's work was unworkmanlike and was untimely. It therefore terminated the contract on December 2, 2004. Kaufman than reinstated the contract with an added penalty provision, requiring In House to pay \$10,000 for every week that the work was not completed beyond February 1, 2005. Kaufman alleges that In House's work continued to be of an unprofessional quality and was untimely and thus, Kaufman again terminated the contract on April 21, 2005.

On May 24, 2005, In House filed a complaint alleging that defendants were in breach of contract due to their failure to pay \$87,000 for construction work plaintiffs had already

completed. In House further alleged that defendants were unjustly enriched by the value of the work, and defendants should be equitably estopped from refusing to pay for In House's work because of their failure to timely object to the quality of In House's work. Additionally, In House alleged that Macrae-Gibson had maliciously written a letter to Kaufman which falsely stated that plaintiffs' construction work was defective. In House claims that this alleged libelous act damaged In House's, and Kushner's, reputation as architects.

Macrae-Gibson brought this motion for summary judgment, arguing that there was no privity of contract between In House and Macrae-Gibson and, therefore, Macrae-Gibson is not liable to In House for its alleged outstanding bill under either a contract or *quantum meruit* theory. Furthermore, Macrae-Gibson contends that it did not libel plaintiffs – and *could not* – because it was under a duty, as per the contract with Kaufman, to provide Kaufman with its opinion of the quality of plaintiffs' work.

Thereafter, In House filed a cross-motion for leave to amend its complaint to allege an additional claim of tortious interference. In House requests that the court grant leave to amend its answer and refrain from deciding the summary judgment motion until the plaintiffs have served an amended complaint on the defendants.

A movant for summary judgment must establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor. C.P.L.R. § 3212(b). Accordingly, the movant must tender evidentiary proof in admissible form. Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980). On the other hand, to defeat a motion for summary judgment, the opposing party must "show facts sufficient to require a trial of any issue of fact". C.P.L.R. § 3212 (b). Furthermore, where a party lacks evidence to counter a summary judgment motion, that party must provide a "demonstrable" excuse for the lack of such evidence.

Alvord v. Swift & Muller Constr. Co., 46 N.Y.2d 276, 281-282 (1978). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions” are insufficient to overcome a motion for summary judgment. Zuckerman, supra, 49 N.Y.2d at 562.

In House’s contract was with Kaufman, not with Macrae-Gibson. As such, it is Kaufman – and *not* Macrae-Gibson – which was responsible for paying In House for its work. Additionally, the contract between Macrae-Gibson and Kaufman states that the architect shall not be held liable for the result of any of its “interpretations or decisions” regarding the quality of the contractor’s work. This provision further clarifies that the ultimate responsibility for decisions regarding payment, and for actual payment of the contractor, lay with Kaufman, and not with Macrae-Gibson. Therefore Macrae-Gibson cannot be held liable for any outstanding debt owed to Kaufman, and the first and third causes of action in plaintiffs’ complaint must be dismissed.

Furthermore, since Macrae-Gibson was not benefitted by services performed by In House for Kaufman, plaintiffs have not pleaded a sufficient *quantum meruit* cause of action against Macrae-Gibson, and the second cause of action must be dismissed as well.

Plaintiffs’ fourth cause of action,¹ for libel, must also be dismissed. The Court of Appeals has cited three factors that should be considered in distinguishing between protected “expressions of opinion and actionable assertions of fact”:

(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to “signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact.”

¹ The fourth cause of action is mislabeled as the third cause of action in the complaint.

Guerrero v. Carva, 10 A.D.3d 105, 112 (1st Dept. 2004) (quoting Brian v Richardson, 87 N.Y.2d 46, 51 (1995)). Furthermore, in a cause of action for libel and slander, “the particular words complained of shall be set forth in the complaint.” C.P.L.R. § 3016(a); see also Kelly v. CBS, Inc., 59 A.D.2d 686, 687 (1st Dept. 1977) (internal citation omitted).

Here, however, plaintiffs have neither provided the allegedly libelous letter they contend Macrae-Gibson sent to Kaufman, nor have they recounted in the complaint, the exact language they contend was libelous. Consequently, it is impossible to tell from the complaint (or additional papers) whether the allegedly libelous statement plaintiffs attribute to Macrae-Gibson was that In House designed the lamps at issue, or whether they designed those lamps *defectively*. If the latter, such a statement would represent the opinion of Macrae-Gibson and would, therefore be protected speech. See Guerrero, supra, 10 A.D.3d at 112. Therefore, plaintiffs’

pleading as to libel is insufficient in that it lacks particularity. See Kelly, supra, 59 A.D.2d at 687. Therefore, the court will dismiss the fourth cause of action as well.

Additionally, the court must deny plaintiffs’ cross-motion to amend their complaint. Although generally, leave to amend a complaint is freely given, see C.P.L.R § 3025, a motion for leave to amend a complaint should be accompanied by a copy of the proposed amended complaint, so that the court can review its sufficiency. See Goldner Trucking Corp. v. Stoll Packing Corp., 12 A.D.2d 639, 640 (2d Dept. 1960); c.f., Leohner v. Simons, 224 A.D.2d 591, 591 (2d Dept. 1996). Plaintiffs herein have provided no such proposed amended complaint. Therefore, plaintiffs’ motion for leave to amend the complaint is denied, without prejudice to renew within fifteen days of the date of this decision and order.

Accordingly, it is hereby

ORDERED that the motion for summary judgment pursuant to C.P.L.R. § 3212, brought by defendant Macrae-Gibson Architects P.C. and Gavin Macrae-Gibson, is granted and the complaint is dismissed as against those defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

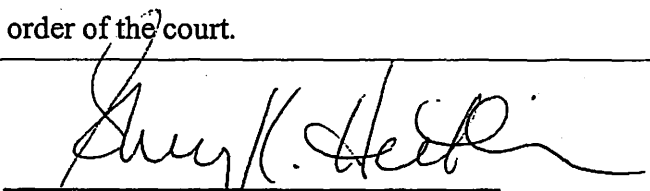
ORDERED that the case be severed, and as so severed, shall proceed to trial; and it is further

ORDERED that plaintiffs' motion for leave to amend the complaint is denied without prejudice to renew within fifteen (15) days of the date of this decision and order; and it is further

ORDERED that counsel for the remaining parties shall appear for a conference at 9:30 a.m. on July 10, 2006, at Room 438, 60 Centre Street, New York, New York 10007.

This shall constitute the decision and order of the court.

DATED: June 7, 2006



SHERRY KLEIN HEITLER
J.S.C.