

**A.T.S. Mech. Contrs., Inc. v Metrobuild
Assoc., Inc.**

2007 NY Slip Op 30265(U)

March 13, 2007

Supreme Court, New York County

Docket Number: 0112733

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. Richard F. Braun
Index Number : 112733/2004

PART 23

A.T.S. MECHANICAL CONTRACTORS

vs

METROBUILD ASSOCIATES et al.

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/7/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion ~~to~~ for Summary Judgment;
(Cross motion for summary judgment)

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...
Notice of cross motion

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

MAR 22 2007

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this ~~motion~~ *is denied*, and the cross motion is granted to the extent of awarding plaintiff summary judgment dismissing the fifth affirmative defense of defendant Barry upon and it is further

ORDERED that the Clerk shall enter judgment accordingly, and it is further

ORDERED that plaintiff is awarded \$100 motion costs against defendant Barry upon, to abide the event, and \$100 motion costs against him on the cross motions.

This constitutes the decision and order of the Court. See separate Opinion.

ENTER

Dated: New York, New York, March 13, 2007 *Mc*

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

-----X

A.T.S. MECHANICAL CONTRACTORS, INC.

Index No. 112733/2004

Plaintiff,

OPINION

against-

METROBUILD ASSOCIATES, INC.
and LARRY MUFSON

Defendants.

FILED

-----X
RICHARD F. BRAUN, J.:

MAY 11 2007
CLERK OF THE COURT

This is an action for damages for breach of contract and quantum meruit. Defendant Larry Mufson (Mufson) moves for summary judgment against plaintiff and to dismiss plaintiff's third cause of action against him. Plaintiff cross-moved for summary judgment dismissing "the Fifth Cause of Action in defendant Mufson's amended answer." By stipulation, the notice of motion was deemed amended to substitute therefor "the Fifth Affirmative Defense in Def. Mufson's Amended Answer."

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). Once done, to defeat summary judgment the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 968 [1985]).

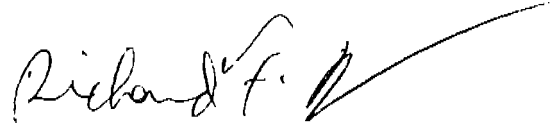
Defendant Mufson has shown prima facie that he is entitled to summary judgment (see Eastern States Elec. Contrs. v. Crow Construction Co. 153 AD2d 522, 523 [1st Dept 1989]).

However, plaintiff has demonstrated that there are questions of fact that preclude an award of summary judgment to defendant Mufson. The issues are whether defendant Mufson agreed to have plaintiff continue its work after he terminated his relationship with defendant Metrobuild Associates, Inc.; whether defendant Mufson agreed to pay plaintiff directly; whether he asked plaintiff not to file a mechanic's lien; whether plaintiff did plumbing repairs for defendant Mufson which were not part of the renovation project; and whether work plaintiff did was defective.

Plaintiff has shown that it should be awarded summary judgment dismissing defendant Mufson's fifth affirmative defense. Plaintiff demonstrated that it was not performing work for which a home improvement contractor's license was required, pursuant to Administrative Code of City of NY § 20-387(a), because plaintiff was a licensed plumber acting exclusively as such (Administrative Code of City of NY § 20-397[2]). Defendant Mufson has not shown that there is any question of fact pertaining to that defense. Thus, plaintiff may maintain its third cause of action (cf. Blake Elec. Constr. Co. v Paschall, 222 AD2d 264, 266 [1st Dept 1995] ["An unlicensed contractor can neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit" (citations omitted)]; Youngs L&M Constr., Inc. v Kelley, 13 Misc 3d 307, 310-311 [Sup Ct, NY County 2006] [due to the plaintiffs' failure to have such a license and plead in the complaint compliance with CPLR 3015(e), the complaint was dismissed]).

Therefore, the motion has been denied, by this court's separate March 13, 2007 decision and order. The cross motion was granted to the extent of awarding plaintiff summary judgment dismissing defendant Mufson's fifth affirmative defense. Pursuant to CPLR 8106 and 8202, plaintiff has been awarded \$100 motion costs against defendant Mufson, to abide the event, and \$100 motion costs on the cross motion.

Dated: New York, New York
March 13, 2007



RICHARD F. BRAUN, J.S.C.

FILED

MAR 21 2007

CLERK OF COURT
CLERK'S OFFICE