SHORT FORM ORDER

INDEX No. 05-137
CAL. No. 06-03000-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1/19/07
ADJ. DATE
Mot. Seq. #001 - MG; CASEDISP

NEW TECH MECHANICAL SYSTEMS, INC., Plaintiff, - against - ALEC DIACOU, Defendant.	BARRY V. PITTMAN, ESQ. Attorney for Plaintiff 26 Saxon Avenue, P.O. Box 5647 Bay Shore, New York 11706-0455
	HOWARD E. GREENBERG, ESQ., P.C. Attorney for Defendant 180 East Main Street, Suite 308 Smithtown, New York 11787

Upon the following papers numbered 1 to 10 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 5-7; Replying Affidavits and supporting papers 8-10; Other defendant's memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This is an action to recover damages for breach of contract and on accounts stated, based on the defendant's failure to pay for work performed and materials supplied by the plaintiff with respect to the renovation of the defendant's residence in Bronx County

On or about July 31, 2004, the parties entered into a written contract pursuant to which the plaintiff was to install a ductless split heat pump system at the defendant's residence for a price of $33,500.00. More specifically, the plaintiff agreed to

> Furnish the needed labor and material to install nine (9) Mitsubishi heat pump ductless split evaporators with four (4) condensing units to service the entire home excluding the basement Supply and install nine (9) wireless remote digital thermostats. Installation is

> to include all the necessary equipment, piping, condenser pads and refrigerant for a complete system.

Based on the description of the work set forth in the contract and on the deposition testimony of Jared Hager, the plaintiff's vice president of sales and project manager of the job, it is apparent that the essence of the work performed under the contract was the installation of a central air conditioning system.

According to the plaintiff, a few weeks into the job, the defendant approached the plaintiff and explained that his plumber was behind schedule and required assistance. The parties subsequently entered into an oral agreement that the plaintiff would perform certain plumbing services in addition to the air conditioning work, and that the defendant would pay the plaintiff for such services on a "time and material" basis. The plaintiff claims that the parties discussed the fact that the plaintiff did not have a license to perform plumbing work in the Bronx and that, as a result, it was agreed that the plaintiff would work "under" the plumber's license. According to the defendant, however, the plaintiff assured him that it was fully licensed to provide the requested plumbing services.

It appears that there arose a subsequent dispute between the parties as to the quality of the plaintiff's work, and the defendant refused to make certain payments allegedly due. This action followed.

The defendant now moves for summary judgment on the ground that the plaintiff did not possess a valid contractor's or plumbing license and is, therefore, barred from recovery. The plaintiff, though conceding that it did not possess any such licenses, contends that the licensing requirement was not applicable because the installation of the ductless split heat pump system did not constitute a "home improvement" as defined under section 20-386 (2) of the New York City Administrative Code, because the defendant knew that the plaintiff was not licensed, and because the defendant acted as his own contractor and hired the plaintiff merely as a subcontractor.

Section 20-387 (a) of the New York City Administrative Code provides that "[n]o person shall * * * perform or obtain a home improvement contract as a contractor * * * from an owner without a license therefor." Thus, "[a]n unlicensed contractor may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit" (***Blake Elec. Contr. Co. v Paschall***, 222 AD2d 264, 266, 635 NYS2d 205, 207 [1995]). Section 20-386 (6) defines "home improvement contract," in part, as "an agreement, whether oral or written, between a contractor and an owner * * * for the performance of a home improvement." Section 20-386 (2) defines "home improvement" as

> 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 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 * * *. 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 [emphasis added].

Pursuant to section 20-386 (4), the term "owner" includes "any homeowner" who "contracts for * * * the home improvement services of a contractor."

Here, the Court finds as a matter of law that the air conditioning work performed by the plaintiff was a "home improvement" within the specific intendment of section 20-386 (2), and that the plaintiff performed such work without obtaining the necessary license. However the plaintiff might choose to characterize the work, it is evident from Hager's deposition testimony that it involved, at a minimum, the running of refrigerant piping and plastic drain tubing inside the walls and, therefore, cannot properly be analogized to the mere "hooking up" of a room air conditioner or similar appliance (*cf.*, ***Power Cooling v Wassong***, 5 Misc 3d 22, 783 NYS2d 741 [2004]). Nor is it relevant that the defendant may have known that the plaintiff was not licensed, since the failure to comply with a licensing requirement bars recovery even if "the homeowner knew of the lack of a license and planned to take advantage of its absence" (***Chosen Constr. Corp. v Syz***, 138 AD2d 284, 286, 525 NYS2d 848, 850 [1988]; *accord*, ***Millington v Rapoport***, 98 AD2d 765, 469 NYS2d 787 [1983]). Further, while the license requirement is designed to protect consumers (*see*, New York City Administrative Code § 20-385; ***B & F Bldg. Corp. v Liebig***, 76 NY2d 689, 563 NYS2d 40 [1990]) and the defendant concededly was a real estate investor in the business of renovating houses and did act as his own general contractor with respect to the renovation, he is nevertheless entitled, as an owner, to the protection of the license requirement as it appears from his deposition testimony that he intended to and ultimately did reside at the premises (*see*, ***Ayres v Dunhill Interiors***, 138 AD2d 303, 526 NYS2d 440 [1988]; ***Corcoran Marble Co. v Clark Constr. Corp.***, 155 Misc 2d 49, 597 NYS2d 259 [1993]; *cf.*, ***Routier v Waldeck***, 184 Misc 2d 487, 708 NYS2d 270 [2000]). Accordingly, the plaintiff is not entitled to recover for the air conditioning work under the contract or otherwise.

The Court likewise finds that the plaintiff is not entitled to recover for any plumbing services performed. Although the regulatory scheme for plumbers under the New York City Administrative Code (§ 26-141 *et seq.*) does not expressly require a license as a condition precedent for recovery under a contract for plumbing work performed in the City of New York (***Matter of Migdal Plumbing & Heating Corp. [Dakar Devs.]***, 232 AD2d 62, 662 NYS2d 106 [1997], *lv denied* 91 NY2d 808, 669 NYS2d 261 [1998]), there is ample judicial authority establishing that the failure to hold a plumber's license precludes recovery for such work (*see*, ***Fisher Mech. Corp. v Gateway Demolition Corp.***, 247 AD2d 579, 669 NYS2d 347, *lv dismissed* 92 NY2d 946, 681 NYS2d 476 [1998]; ***Vitanza v City of New York***, 48 AD2d 41, 367 NYS2d 820 [1975], *affd* 40 NY2d 872, 388 NYS2d 273 [1976]; ***Nu-Brass Plumbing & Heating v Wiener***, 29 AD2d 172, 286 NYS2d 922, *lv denied* 22 NY2d 641, 292 NYS2d

1025 [1968]); consistent with the analysis in the preceding paragraph, the Court rejects the plaintiff's attempt to limit or preclude the application of this rule.

Consequently, as the plaintiff did not possess either of the necessary licenses, the Court is constrained to grant summary judgment dismissing the complaint.

Dated: APR 10 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**