

Matter of Glisenti v New York Kitchen & Bathroom Corp.

2007 NY Slip Op 32378(U)

July 24, 2007

Supreme Court, New York County

Docket Number: 0105845/2007

Judge: Eileen Bransten

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

PRESENT: BRANSTEN
Justice

PART 6

MICCOLO CARPAIN BRANSTEN
- v -

INDEX NO. 105845/07
MOTION DATE 5/8/07
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to 1 were read on this ^{petition} motion to/for examined books
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1, 2
Answering Affidavits — Exhibits _____ 3, 4
Replying Affidavits _____ Law

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B)

Dated: 7-24-07

Eileen Brand
J.S.C.

HON. EILEEN BRANSTEN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
In the Matter of
The Demand of
NICCOLO CARPANI GLISENTI,

Upon

Index No.105845/07
Motion Date: 5/8/07
Motion Seq. No: 01

NEW YORK KITCHEN & BATHROOM
CORPORATION

For an Examination pursuant to
N.Y. Lien Law Section 76

UNFILED JUDGMENT

his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

PRESENT: EILEEN BRANSTEN, J.

In this special proceeding, petitioner Niccolo Carpani-Glisenti ("Mr. Glisenti") seeks a Judgment pursuant to N.Y. Lien Law § 76(5) directing respondent New York Kitchen & Bathroom Corporation ("N.Y. Kitchen") to "make available for examination and copying its books and records with respect to a statutory trust under Article 3-A of the New York Lien Law, established by petitioner's deposit with respondent of \$225,298.98 under a home improvement contract." Order to Show Cause, at 1; *see also*, Affidavit in Support of Application for Examination of Books and Records Pursuant to N.Y. Lien Law Section 76 ("Glisenti Aff."), at ¶ 1. N.Y. Kitchen opposes the petition.

Background

On February 17, 2006, Mr. Glisenti (along with Nil Erbil) entered into a contract with N.Y. Kitchen "to undertake construction and renovations at the apartment" in which Mr. Glisenti resides. Glisenti Aff., at ¶ 2. The agreement, which specified that work would be

performed on areas including the first floor powder room, kitchen, closets, bedrooms and staircase, sets forth payment terms as follows: 30% of the \$214,850 contract price was due on February 17, 2006 and was designated as a “Deposit Upon Signing Contract,” 25% was due “Upon Completion of Design (prior to job opening and kitchen design excluded),” 25% “Upon Kitchen and Bathroom Demolition,” 10% “Upon Ordering and Confirmation of Cabinetry,” and 10% “Upon Completion of Renovation and Prior to Punchlist.” Glisenti Aff., Ex. A.

The parties’ contract provided that N.Y. Kitchen “is legally required to deposit all payments received prior to completion in accordance with subdivision 4 of section 71-a of the lien law. In lieu of such deposit, [it] may post a bond or contract of indemnity with the owner guaranteeing the return of proper applications of such payments to the purpose of the contract.” Glisenti Aff., Ex. A.

It was estimated that work would begin in mid April and end on August 30, 2006. *Id.*

Mr. Glisenti asserts that pursuant to the agreement he “deposited with [N.Y. Kitchen] a total of \$225,298.89 for the costs of the construction and renovation work on the apartment.” Glisenti Aff., at ¶ 3. The money was allegedly provided “before the work was done.” *Id.* Mr. Glisenti maintains that N.Y. Kitchen did not “perform its obligations” and that he therefore “terminated the Agreement and demanded a return of [his] funds and an

accounting” on November 17, 2006. *Id.*, at ¶¶ 4, 5. Despite repeated demands, N.Y. Kitchen refused to return any funds or to provide an accounting.

On March 19, 2007, Mr. Glisenti requested pursuant to Lien Law § 76 that N.Y. Kitchen allow his attorneys to examine the books and records “with respect to the monies [he] deposited * * * to be held in trust for that construction and renovation work.” Glisenti Aff., at ¶ 8. Ten days later, N.Y. Kitchen responded that Mr. Glisenti was not a “‘beneficiary’ under the trust fund law and does not have a trust fund claim.” Glisenti Aff., Ex. B.

As a result of N.Y. Kitchen’s refusal to permit an examination of its books and records related to the \$225,298.89, Mr. Glisenti commenced this special proceeding seeking a Judgment authorizing him to inspect books and records related to the \$225,298.98 that was paid.

N.Y. Kitchen opposes the petition, urging that Mr. Glisenti is not a “beneficiary” of a trust, and therefore, cannot invoke the provisions of the Lien Law authorizing an examination of books. Affirmation of C. Jaye Berger in Opposition (“Opp”), at ¶¶ 4, 6. N.Y. Kitchen further asserts that it was wrongfully terminated and that the “project was underway” (not that it was completed or substantially completed). *See*, Affidavit of Perry Hiiman in Opposition, at ¶ 3. It maintains that “a substantial amount of work had been done.” *Id.*, at ¶ 6.

Analysis

Beneficiaries of an Article 3-A Lien-Law trust are defined as those “having claims for payment of amounts for which the trustee is authorized to use trust assets.” Lien Law § 71(4). Lien Law § 71(2) provides that the “trust assets of which a contractor * * * is trustee shall be held and applied for the following expenditures arising out of * * * home improvement” and includes “payment to which the owner is entitled pursuant to the provisions of section seventy-one-a of this chapter [“Further trust of funds received or receivable by owner under executory contract for the sale and improvement of real property”].”

Lien Law § 71-a(4), in turn, mandates that under “a home improvement contract, payments received from an owner by a home improvement contractor prior to the substantial completion of work under the contract shall be deposited within five business days thereafter by the recipient in an escrow account * * *. * * * Such deposit or deposits shall remain the property of the owner until (i) the proper payment, transfer or application of such deposits by the contractor to the purposes of the home improvement contractor under the schedule of payments provided therein; or (ii) the default or breach of the owner excusing the recipient’s performance of the terms of the home improvement contract, but only to the extent of any reasonable liquidated damage amount as defined in section 2-718 of the uniform commercial code and set forth in the contract, and only after seven days prior

written notice to the owner; or (iii) substantial performance of the contract” (emphasis added).

Finally, Lien Law § 76 authorizes any trust beneficiary “holding a trust claim” to examine trust-related books or records.

Mr. Glisenti made payments to N.Y. Kitchen before substantial completion of work. In the absence of substantial performance of the contract--of which there is no allegation here (a “substantial amount of work” is not enough)--Mr. Glisenti remains the owner of the monies he paid. Those monies constitute Article 3-A trust funds and Mr. Glisenti is a beneficiary thereto. *See, People v. Lincoln*, 272 A.D.2d 945, 945 (4th Dept. 2000) (contractors who receive money in advance for home improvements hold them in trust for owners who advance them); *People v. Hollowell*, 168 A.D.2d 970, 971 (4th Dept. 1990) (Article 3-A trust assets include monies advanced by owner for purposes of home improvement); *cf., Peters v. Griffin*, 111 B.R. 42, 44 (W.D.N.Y. 1990) (provisions of Lien Law require deposit of owner’s funds into a “trust account”).

As such, pursuant to Lien Law § 76, Mr. Glisenti is entitled to examine books and records related to the funds that technically remain his property.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted and within 20 days New York Kitchen & Bathroom Corporation must make available for examination and copying its books and records with respect to the \$225,298.98 paid by Mr. Glisenti.

This constitutes the Decision, Order and Judgment of the Court.

Dated: New York, New York
July 24, 2007

ENTER:



Hon. Eileen Bransten

UNFILED JUDGMENT

his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B)