

**Hakimi v Cantwell Landscaping & Design, Inc.**

2007 NY Slip Op 32483(U)

July 11, 2007

Supreme Court, Suffolk County

Docket Number: 0026438/2005

Judge: Thomas F. Whelan

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publication.



**ORDERED** that the joined actions shall bear the caption of the two actions; and it is further

**ORDERED** that all matters of trial practice are reserved to the Justice presiding at the Trial of these consolidated actions; and it is further

**ORDERED** that all parties shall serve upon any party so demanding copies of all disclosure documents heretofore obtained in the other action(s); and it is further

**ORDERED** that the pleadings in each of the actions consolidated herein for trial shall stand as the pleadings in the consolidated actions and each action shall keep its separate identity; and it is further

**ORDERED** that upon completion of discovery, the parties shall serve and file separate Notes of Issue and Certificates of Readiness as to each action and each party shall be entitled to enter separate Judgments and Bills of Costs and Disbursements in each action respectively, if costs are allowed; and it is further

**ORDERED** that movant shall serve a copy of this Order with Notice of Entry upon counsel for defendant in Action No. 1 within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit of service with the Clerk of the Court; and it is further

**ORDERED** that a Compliance Conference in the consolidated actions is scheduled for **September 26, 2007**, at 9:30 a.m. in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York, 11901; and it is further

**ORDERED** that movant is directed to serve a copy of this Order upon the Calendar Clerk of this IAS Part 33 within ten (10) days of the date hereof.

Plaintiff, Farhad Hakami (hereinafter "Hakami"), moves to consolidate for trial the above action with an action entitled **Cantwell Landscaping & Design, Inc. and L. Lincoln Cantwell v Farhad Hakimi** bearing Suffolk County Index No. 23304/06. These two actions arise out of the same breach of contract action brought by Hakami against Cantwell Landscaping & Design, Inc. and L. Lincoln Cantwell (hereinafter "Cantwell"). Hakimi also seeks affirmative relief pursuant to CPLR 3211(a)(7) and/or CPLR 3212 dismissing the counterclaims filed in the action under Suffolk County Index No. 26438/05, granting summary judgment to defendant in the action under Suffolk County Index No. 23304/06 and dismissing the action in its entirety pursuant to CPLR 3212 and/or CPLR 3211(a)(7), and vacating, discharging and cancelling the mechanic's lien and Notice of Pendency filed by Cantwell.

Cantwell opposes that branch of Hakami's motion seeking summary judgment under CPLR 3211(a)(7) and CPLR 3212. Hakimi is compliance with the pleading requirements of CPLR 3212(b) in submitting a partial transcript of Cantwell's examination before trial in addition to affirmations (*see Osowicki v Cohen*, 140 AD2d 898, 528 NYS2d 716 [3d Dept1988]).

Generally, a joint trial is favored where the actions share common questions of fact and law (*see* CPLR 602[a]; *McDutchess Bldrs., Inc. v Dutchess Knolls, Inc.* 244 AD2d 534, 665 NYS2d 579 [2d Dept 1997]). Upon motion, the power to order a joint trial rests in the sound discretion of the court where common questions of law or fact exist, absent prejudice to a substantial right of the opposing party (*see D'Abreau v American Bankers Inc. Co. of Florida*, 261 AD2d 501, 690 NYS2d 655 [2d Dept 1999]). This motion was served on May 20, 2007. That portion of the motion to consolidate is unopposed and consented to (*see Hermitage Ins. Co. v Trance Nite Club, Inc.*, \_\_\_ AD3d \_\_\_, \_\_\_ NYS2d \_\_\_ [2d Dept 2007]; *Tortorello v Larry M. Carlin*, 260 AD2d 201, 688 NYS2d 641 [1<sup>st</sup> Dept 1999]). Thus, the application to consolidate for trial, is granted.

The Appellate Division, Second Department has restated the rules governing a motion to dismiss in *State of New York v Grecco*, 21 AD3d 470, 800 NYS2d 214 [2d Dept 2005]). The Court's inquiry is limited to determining whether, taking the allegations of the complaint as true and affording plaintiff the benefit of every reasonable inference, plaintiff has stated a cause of action against one or more defendants (*see Parsippany Constr. Co. Inc. v Clark Patterson Assoc., P.C.*, \_\_\_ AD3d \_\_\_, \_\_\_ NYS2d \_\_\_ [2d Dept 2007]; *Sirlin v Town of New Castle*, 35 AD3d 713, 826 NYS2d 676 [2d Dept 2006]; *Dunleavy v Hilton Hall Apts. Co., LLC*, 14 AD3d 479, 789 NYS2d 164 [2d Dept 2005]). In applying the standard, the Court expresses no opinion as to the truth or falsity of the allegations of the complaint or, consequently, as to the conclusions plaintiff argues should be drawn therefrom. On the procedural posture of the action, these issues are not properly before the Court. On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (*see Fast Track Funding Corp. v Perrone*, 19 AD3d 362, 796 NYS2d 164 [2d Dept 2005]; *Paterno v CYC, LLC*, 8 AD3d 544, 778 NYS2d 700 [2d Dept 2004]; *McGee v City of Rensselaer*, 174 Misc2d 491, 663 NYS2d 949 [Sup Ct, Rensselaer County 1997]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Morone v Morone*, 50 NY2d 481, 429 NYS2d 592 [1980]; *see also 511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 746 NYS2d 131 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 729 NYS2d 425 [2000]).

Thus, a motion to dismiss for failure to state a claim may be granted only if it appears certain that under no possible circumstances would the plaintiff be entitled to relief (*see Lipsky v Commonwealth United Corp.*, 551 F.2d 887 [2d Cir 1976]). Even if it appears on the face of the pleadings that recovery is very remote, the petition will withstand the motion to dismiss as long the petitioner retains a possibility of success (*see Scheuer v Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed 90 [1974]).

CPLR 3212(b) sets forth the summary judgment standard. Summary judgment will be granted if, upon on all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of a summary judgment motion must make a primary facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of a fact from the case

(see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]) or an issue of fact is even arguable since it deprives a party of his day in court (see *Henderson v City of New York*, 178 AD2d 129, 576 NYS2d 562 [1<sup>st</sup> Dept 1991]; *Andre v Pomeroy*, 35 NY2d 361, *supra*).

Issue finding rather than issue determination is the key to the procedure (see *Weiner v Ga-Ro Die Cutting, Inc.*, 104 AD2d 331, 479 NYS2d [2d Dept 1984]; *affd* 65 NY2d 732, 492 NYS2d 29 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, *supra*). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even arguable, summary judgment must be denied (see CPLR 3212[b]; *American Home Assurance Co. v Amerford Intl. Corp.*, 200 AD2d 472, 606 NYS2d 229 [1<sup>st</sup> Dept 1994]; *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 562 NYS2d 89 [1<sup>st</sup> Dept 1990]; *lv den* 77 NY2d 939, 569 NYS2d 612 [1991]; *Freeman v Easy Glider Roller Rink, Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]; *Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Stone v Goodman*, 8 NY2d 8, 200 NYS2d 627 [1960]; *rearg den* 8 NY2d 934, 204 NYS2d 1025 [1960]).

CPLR 3212(b) requires that in order for a court to grant summary judgment, the court must determine if the movant's papers justify, as a matter of law, that his cause of action or defense has merit. The evidence submitted in support of the motion must be viewed in the light most favorable to the non-movant (see *Akseizer v Kramer*, 265 AD2d 356, 969 NYS2d 849 [2d Dept 1999]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In that portion of Hakimi's application to dismiss Cantwell's counterclaims in the action bearing Index No. 26438-05 and to cancel the mechanic's lien and the Notice of Pendency, Hakimi bases his contention on the fact that Cantwell was an unlicensed contractor at the time he was working on the subject property located at 234 Wickapogue Road, Southampton, New York and that both the Southampton Town Code § 143-1(a) and the Suffolk County Administrative Code § 345-17 required him to be a licensed Home Improvement Contractor. In support of his position, Hakimi cites well settled law that in the State of New York, an unlicensed home improvement contractor cannot sue either for breach of contract or in quantum meruit and forfeits his or her right to file a mechanic's lien (see CPLR 3015[e]; *Al-Sullami v Broskie*, 40 AD3d 1021, 834 NYS2d 873 [2d Dept 2007]; *Flax v Hommel*, 40 AD3d 809, 835 NYS2d 735 [2d Dept 2007]; *Ben Krupinski Bldr. and Assocs. Inc. v Baum*, 36 AD3d 843, 828 NYS2d 583 [2d Dept 2007]; *Callos, Inc. v Julianelli*, 300 AD2d 612, 752 NYS2d 398 [2d Dept 2002], *lv app den* 100 NY2d 502, 761 NYS2d 595 [2003]).

However, both the Southampton Town Code (hereinafter "Town") and the Suffolk County Administrative Code (hereinafter "County") provide an exception to the licensure requirement when the house is new construction.

The Southampton Town Code § 143-1B states as follows:

B. "Home Improvement" shall not include

The construction of a new home.

The Suffolk County Administrative Code in § 345-16 defines a Home Improvement Contractor as one who engages in "home improvement contracting" and thence defines what is home improvement contracting is. The statute in relevant part defines the term as being:

any repair, remodeling, alteration, conversion, modernization, improvement or addition to residential property, and includes but is not limited to . . . ,as well as other improvements to structures or upon land which is part of residential property, including landscaping and arboriculture, which is used herein shall mean tree sprayers, tree pruners, stump removers and all other tree services but shall not include the construction of a new home.

Hakimi disingenuously dehors the record wherein he attempts in counsel's reply affirmation to characterize the building of the house as not new construction but rather, a custom built construction. The semantics which counsel engages in cannot change nor refute the sworn testimony of Hakimi where he states on October 3, 2006 that the house constructed on property located at 234 Wickapogue Road, Southampton, New York was new construction. Thus, under the licensure exceptions of both the Town and County Codes, Cantwell was not required to be licensed while he was performing landscaping service to Hakimi (*see Innovative Audio Video v Friedman*, 7 Misc3d 383, 789 NYS2d 417 [Sup Ct New York County 2005]; *cf. Matter of Charles P. Scaturro v M.C.S Landscape, Inc.*, 212 AD2d 798, 622 NYS2d 975 [2d Dept 1995]).

The Court concludes that Hakimi's CPLR 3211(a)(7) motion to dismiss Cantwell's causes of action must be denied under the liberal approach regarding a motion to dismiss as his counterclaims set forth a cognizable legal theory for breach of contract in the first action (*see Atkinson v Mobil Oil Corp.*, 205 AD2d 719, 614 NYS2d 36 [2d Dept 1994]; *Shields v School of Law of Hofstra Univ.*, 77 AD2d 867, 431 NYS2d 60 [2d Dept 1980]) and a cognizable legal theory to foreclose on the mechanic's lien in the second action.

Summary judgment shall be granted only when there are no issues of material fact and here Hakimi fails to demonstrate a prima facie case of entitlement to judgment pursuant to CPLR 3212 as a matter of law in either Action number 1 or Action Number 2 of the consolidated actions by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Thus, Hakimi's motion for summary judgment pursuant to CPLR 3211(a)(7) and CPLR 3212 in the consolidated actions is denied.

Accordingly, the motion is decided as herein indicated. This constitutes the Order and decision of the Court.

DATED: 7/11/07

  
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THOMAS F. WHELAN, J.S.C.