

Hardy Plumbing, Heating & A.C., Inc. v Menu

2007 NY Slip Op 33533(U)

October 23, 2007

Supreme Court, Suffolk County

Docket Number: 0026168/2004

Judge: Emily Pines

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Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:

Hon. Emily Pines

Justice Supreme Court

Motion Date: 08-27-2007
Submit Date: 10-18-2007
Motion No.: 013 MOTD

Motion Date: 08-27-2007
Submit Date: 10-18-2007
Motion No.: 014 MOTD

HARDY PLUMBING, HEATING & AIR
CONDITIONING, INC., X

Plaintiffs,

James Spiess, Esq.
McNulty-Spiess, P.C.
214 Roanoke Avenue
PO Box 757
Riverhead, New York 11901

-against-

SUSAN MENU,

Defendants. X

Steven L. Levitt, & Associates, P.C.
Two Hillside Avenue
Building F
Williston Park, New York 11596

SUSAN MENU,

Third Party Plaintiff,

-against-

J. MICHAEL HAIGHT dba WATERSEEDGE
DESIGN, and J. MICHAEL HAIGHT,
Individually,

Third Party Defendants. X

In this lawsuit arising out of the construction of a residence, Third Party Plaintiff, Susan Menu ("Menu") moves, by Notice of Motion (motion sequence number 013) for Summary Judgment, dismissing the Third Party counterclaims of J. Michael Haight, based on grounds set forth in CPLR §§ 3211 (a) (1) and (a) (7). The existing counterclaims seek an accounting and sanctions based on the provisions of 22 NYCRR 130-1.1.

Third Party Defendant, counter claimant, J. Michael Haight ("Haight") opposes the motion claiming that questions of fact exist and also cross moves (motion sequence number 014) for an Order granting leave to serve Amended counterclaims, which both reiterate the existing counterclaims and add two new counterclaims, for

Breach of Contract and for Abuse of Process. In her reply, Menu opposes the cross motion.

Counsel for Haight sought oral argument on the motion and cross motion, and such was held before the Court on Thursday, October 18, 2007. Following oral argument, based on the grounds set forth in Menu's papers, the Court granted Menu Summary Judgment, dismissing the two existing counterclaims. As Menu's construction manager and design consultant, Haight does not stand in the position of one in a fiduciary relationship entitled to seek the equitable remedy of an accounting. Nor, indeed, is such alleged as required in order to pursue the remedy. ***see, Palazzo v Palazzo, 121AD 2d 2619 (2d Dep't 1986)***. In addition, while his counsel is free to seek sanctions under **22 NYCRR § 130-1.1** for frivolous conduct as set forth in the regulation, no separate cause of action for such exists under the law.

Following oral argument, the Court granted Haight the portion of his cross motion which sought to add a counterclaim for breach of the parties' contract, since his papers raised a question of fact concerning whether the parties had agreed to pay Haight a certain percentage of "furnishings" for the residence in question as well as whether such amounts were in fact paid. While the Court agrees that "accord and satisfaction" is a defense to such cause of action, Haight's proposed pleading raises an issue of fact concerning whether payment for certain items, from which he may have been entitled to his percentage fee, may have been concealed from him.

At the request of counsel for Third Party Defendant, the Court referred the remaining open discovery requests for rulings to the Court appointed Referee, with a direction that Menu was to provide requested credit card authorizations and that Third Party Defendant was to obtain any outstanding rulings forthwith. The Court further warned both counsel that any further delays in the disclosure process would likely result in sanctions against the attorney concerned. It is the Court's hope and expectation that this will not be necessary.

With regard to the additional proposed counterclaim for "abuse of process", the parties cited two Court of Appeals cases with somewhat divergent holdings, and, therefore, the Court reserved decision and such is the subject of this determination.

In Haight's papers in support of his proposed counterclaim for abuse of process, his counsel relates that the underlying basis for the third party counter claim arises from a series of statements made by Menu to Haight and his companion prior to the litigation to

the effect that she intended to make Haight's life miserable from that time forward. During oral argument, Haight's counsel reiterated these statements claiming that Menu admitted them during her deposition in this action and withdrew her lawsuit for an accounting against Haight as soon as she received documents ordered by this Court during discovery, since the entire Third Party claim had been a sham.

The tort of abuse of process is generally considered a misuse of regularly issued legal process, whether civil or criminal, for a purpose not justified by the nature of the process, and it requires proof that the Defendant seeks to obtain a collateral advantage over the Plaintiff which is outside of the legitimate end of process. **see, I.G. Second Generation Partners L.P. vs. Duane Reade**, 17 AD 3d 206, 793 N.S. 2d 379 (1st Dep't 2005); **Perez vs. Mount Sinai Medical Center**, 297 Ad 2d 615, 747 N.S. 2d 479 (1st Dep't 2002); **W.I.L.D. W.A.T.E.R.S. Ltd. vs. Martinez**, 152 Ad 2d 799, 543 N.S. 2d 579 (3d Dep't 1989).

In **Curiano vs. Suozzi**, 63 NY 2d 113, 469 NE 2d 1324, 480 N.S. 2d 466 (1984), the Court of Appeals, upholding a dismissal of an abuse of process claim, held that a malicious motive, without more, in commencing an action, did not give rise to a cause of action for abuse of process. The same Court may have moved away from that principle, as a matter of law to be applied in all cases, in **Parkin vs. Cornell University**, 78 NY 2d 523, 583 NE 2d 939, 577 N.S. 2d 227 (1991). In **Parkin, supra**, the Court leaves open, but does not decide, whether a claim for abuse of process requires some allegation of improper use of process after the mere commencement of an action, in order to state a claim for abuse of process. The plaintiffs in **Parkin** were charged with petit larceny and, in one instance, possession of stolen property, all motivated by a labor dispute. They failed to raise the issue, either before the trial Court or in post Trial motions, concerning whether the Court should have instructed the jury on this point and therefore, the issue was not before the Appellate Court.


While the Court agrees with counsel for Third Party Defendant that the Court of Appeals in **Parkin** left the issue of the timing of the acts that give rise to an abuse of process claim open, neither that case nor any of the others cited by Haight support such a claim on this case. Whatever Menu may have stated to Haight and/or his companion, the facts and the timing of the facts render any such claim totally devoid of merit. Haight acted as construction manager and design consultant for the construction of Menu's home; Haight sent Menu a letter in May 2004, setting forth what he termed a final bill for the work. Menu was subsequently sued by one of the subcontractors on the job for nonpayment. It was not until she was

sued that Menu brought her third party complaint against Haight and that action was for indemnification and for an accounting. Once Menu received document discovery from Haight, she discontinued her action against him with prejudice. Whether her motive was for good or for evil, the facts simply do not state a cause of action for abuse of process, especially so many years after the original counterclaim was brought. **see, CPLR §3025.** Accordingly that portion of Third Party Defendant's motion which seeks to amend his Third party counterclaim to add a cause of action for abuse of process is denied.

The matter is transferred to this Court's Commercial Part 46 and counsel are directed to appear for a continued deposition on November 26, 2007 at 9:30 a.m. to be held at 400 Carleton Avenue, Central Islip, New York, before Janet Sutherland, Court Attorney Referee. The deposition will be completed on that date. Counsel are directed to appear in this Part for a Certification conference on Wednesday, December 19, 2007 at 2:30 p.m.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: October 23, 2007
Riverhead, New York



EMILY PINES
J. S. C.