

11 E. 69th St. Redevelopment v SMI Constr. Mgt., Inc.

2007 NY Slip Op 34615(U)

April 16, 2007

Supreme Court, New York County

Docket Number: Index No. 602117/06

Judge: Marilyn G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

11 EAST 69TH STREET REDEVELOPMENT
REDEVELOPMENT ASSOCIATES LLC,

Plaintiff,

- v -

SMI CONSTRUCTION MANAGEMENT, INC.,

Defendant.

INDEX NO. 602117/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION C.A.L. NO.

FILED
APR 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: This action involves a dispute between the owner of a six-story building located on East 69th Street in Manhattan (plaintiff 11 East 69th Street Redevelopment Associates LLC) and the company which it hired, pursuant to a written agreement, as a home improvement contractor, to convert the building from commercial use to a two-unit residential condominium (defendant SMI Construction Management, Inc.). The complaint alleges that the defendant breached the agreement by overcharging and providing services which were defective, unworkmanlike and incomplete. In its answer, the defendant asserted a counterclaim for breach of contract, alleging that plaintiff improperly terminated its services and failed to pay the amount due under the agreement.

The plaintiff has now moved to dismiss the defendant's counterclaim, pursuant to CPLR 3211(a)(7) and 3015(e), on the ground that the defendant is a home improvement contractor within the meaning of section 20-386 of the Administrative Code of the City of New York but was not licensed, as section 20-387 of the Code requires, when the agreement was signed or when the work was performed and that, as such, the agreement is unenforceable under existing case law. *See B & F Building Corp. v. Liebig*, 76 NY2d 689, 691 (1990); *Blake Electric Contracting Co., Inc. v. Paschall*, 222 AD2d 264 (2nd Dept 1995); *Mortise v. 55 Liberty Owners Corp.*, 102 AD2d 719, 720 (1st Dept), *aff'd*, 63 NY2d 743 (1984). In opposing the motion, the defendant does not deny that it did not have a home improvement contractor's license when the agreement was signed or when the work was performed. Nevertheless, it argues that the plaintiff may not avail itself of the protections afforded under section 20-387 because the plaintiff is a limited liability company which is not and cannot be a homeowner or a tenant using the premises as a residence. The court agrees.

It is well settled that section 20-387 is only intended to apply to home improvement agreements between a contractor and a homeowner or tenant who uses the premises as his or her residence. *See Routier v. Waldeck*, 184 Misc2d 487, 490 (Dist Ct Nassau Co 2000). *See also Matter of Kuchar v. Baker*, 261 AD2d 402, 403 (2nd Dept 1999); *Ayres v. Dunhill Interiors*, 138 AD2d 303, 305 (1st Dept 1988); *Corcoran Marble Co. v. Clark Constr. Corp.*, 155 Misc2d 49, 51 (App T 1st Dept 1993). In this respect, the plaintiff is neither a homeowner nor a residential tenant but, rather, a limited liability company created to convert the building in question from commercial use to a two-unit residential condominium. The plaintiff, however, argues that, in fact, the building will be used exclusively as the residence of David W. Levinson, a member of another limited liability company, L&L East 69th Street Redevelopment Associates LLC, which, in turn, is plaintiff's sole member. Thus, plaintiff essentially argues that Mr. Levinson is the real owner who is merely using a limited liability company to purchase and convert the premises for use as his residence. Although plaintiff thus suggests that Mr. Levinson is


the real party in interest, it is the LLC which owns title to the property, which entered into the home improvement contract with defendant and which brought this action. The plaintiff has not cited any cases, and the court has found none, where section 20-387 was applied to protect a company which owns the property being improved. Since the plaintiff is not an individual and cannot therefore use the premises as a residential home, section 20-387 is inapplicable to the transaction which is the subject of this action. The plaintiff's motion to dismiss the defendant's counterclaim must therefore be denied.

Accordingly, the plaintiff's motion to dismiss the defendant's counterclaim is hereby denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on May 8, 2007 at 10:00 a.m. for a preliminary conference.

ENTER ORDER

Dated: 4-16-07



MARYLIN G. DIAMOND, J.S.C.
[X] NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

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