

Eldan Constr. Corp. v Wei Wang

2008 NY Slip Op 30237(U)

January 16, 2008

Supreme Court, Nassau County

Docket Number: 7943-07/

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**ELDAN CONSTRUCTION CORP.,
Plaintiff,**

**Motion Sequence #1
Submitted November 2, 2007**

-against-

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**WEI WANG a/k/a ANGELA WANG, YU SHU ZHE,
and "JOHN DOE 1 THROUGH 3", the names of
the last 3 defendants being fictitious, intending
to designate tenants or persons in possession
or persons who may have an interest in the liened
premises, the true name of the last 3 defendants being
fictitious an unknown to plaintiff,
Defendants.**

The following papers were read on this motion:

- Notice of Motion/Order to Show Cause.....1**
- Affidavit in Opposition.....2**

Plaintiff, ELDAN CONSTRUCTION CORP. (hereinafter referred to as "ELDAN"), moves for an order granting plaintiff access to the premises located at 3 Fairview Lane, Glen Cove, New York, for the purpose of taking inventory of the tools and equipment allegedly belonging to plaintiff and for the purpose of retrieving same, and for an award of attorney's fees and costs on the application. An interim order, issued in the initiating order to show cause, dated October 9, 2007, enjoined the defendants, pending the hearing and

determination of the motion, from disposing of or allowing others to use the plaintiff's tools and equipment presently located at the subject property. Defendants, WEI WANG a/k/a ANGELA WANG and SHU ZHEN YU s/h/a YU SHU ZHE, oppose the motion, which is determined as follows:

In this action, ELDAN seeks, *inter alia*, to foreclose a mechanics lien on the subject property and to recover damages for defendants alleged breach of contract relating to the renovation of said property and for conversion based upon the alleged wrongful withholding of plaintiff's tools and equipment. By affidavit of Daniel Mendelsohn, the President of ELDAN, plaintiff relates that by letter, dated September 10, 2007 and allegedly received by plaintiff on September 17, 2007, the defendants wrongfully terminated a construction contract for improvements on the premises and instructed plaintiff to "cease and desist" contacting or visiting the owner of the premises and to not utilize the "private" roads abutting the property. Mendelsohn states that ELDAN has valuable tools and equipment located at the property which he requires to utilize in other locations and on other jobs and that defendants are wrongfully withholding same. He claims that the tools and equipment have an approximate value of \$7,000.00 to \$7,500.00 and that he requires access to the property to do an inspection and accounting of what items of his remain at the property. He states that he will suffer irreparable harm if the requested relief is not granted.

In opposition to the motion, defendant WANG acknowledges that she entered a contract with ELDAN for a substantial renovation of her home that is legally titled in the name of her mother, co-defendant YU, but asserts that she became dissatisfied with the quality of the work performed which caused her to terminate the contract in accordance with provisions therein. WANG relates that plaintiff caused a flood at her home resulting

in approximately \$60,000.00 in damages which were not covered under ELDAN's insurance policy because plaintiff had failed to pay the premium and the insurance had lapsed. Additionally, she states that ELDAN walked off the job site in anger, without taking his tools, because he claimed that WANG owed him a payment when, in actuality, ELDAN had not completed all the work required at that point under the contract and had failed to pay many sub-contractors working at the house. WANG states that two (2) of those sub-contractors have filed liens against her property and at least five (5) sub-contractors who completed work at her home were not paid despite her having paid \$181,000.00 as of the date ELDAN left the job site. WANG claims that, on September 10, 2007, her attorney forwarded a letter to ELDAN canceling the contract in accordance with §14.2.1 and §14.2.2, which provides, as follows:

- §14.2.1 The Owner may terminate the Contract if the Contractor
- .1 persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
 - .2 fails to make payment to Subcontractors for materials or labor in accordance with the respective agreements between the Contractor and Subcontractor;
 - .3 persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
 - .4 otherwise is guilty of substantial breach of a provision of the Contract Documents.

§14.2.2 When any of the above reasons exist, the Owner, upon certification by an Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

- .1 take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor;
- .2 accept assignment of subcontracts pursuant to Section 5.4; and

- .3 finish the Work by whatever reasonable method the Owner may deem expedient. Upon request of the Contractor, the Owner shall furnish to the Contractor a detailed accounting of the costs incurred by the Owner in finishing the Work.

Included in the mailing was a letter from DiGiovanni and Associates Architects, dated September 10, 2007, in which it is certified that there exists sufficient grounds and cause justifying the decision to terminate the contract in accordance with the Termination by Owner clause of the contract.

It is WANG's position that ELDAN forfeited the tools that he abandoned at her home seven (7) days following the mailing of the termination letter and has no further rights to the tools. Moreover, she claims that plaintiff utilized self-help to obtain his tools and that all the tools listed in the motion, except for a table saw and two (2) ladders, have been recovered by ELDAN. She states that Mr. Mendelsohn has been observed, by the workers presently at her home, removing tools and other items from the property and, notwithstanding the direction that he not appear at the property, he has come and removed the following items from her home that do not belong to him:

- two (2) step ladders;
- WANG's electric drill/screwdriver;
- the contents of two (2) tool boxes;
- a Sony computer;
- a digital camera;
- a jewelry box and its contents;
- two (2) ladders owned by the present contractor, Chapin's, Inc.

Indeed, WANG relates that, on October 9, 2007, Mr. Mendelsohn was at her home without permission and, as she was driving home, he saw her and deliberately drove his vehicle into her car. WANG claims that Mendelsohn was arrested for assault and claims to annex a copy of the police report regarding the incident, but no such report is provided.

WANG contends that plaintiff should immediately return the items taken from her home and, with respect to his table saw and ladders, WANG claims that they are now her property based upon the provisions of the contract.

In reply, counsel for plaintiff states that plaintiff vehemently denies any assaultive conduct directed toward WANG or that Mendelsohn took things from the residence. Counsel states that said accusations have no bearing to the application and claims that plaintiff seeks access to the residence to do an accounting of the tools located therein and to peaceably remove them. Moreover, counsel claims that the provisions in the contract relied upon by WANG are in a form contract not executed by the parties. No affidavit of Mr. Mendelsohn is annexed and the affirmation of counsel is not probative of the facts as it is not of his personal knowledge.

It is well settled that to be entitled to a preliminary injunction, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balancing of the equities in the movant's favor. *Nobu Next Door, LLC. v Five Arts House, Inc.*, 4 NY3d 839, 800 NYS2d 48, 833 NE2d 191 (C.A. 2005); *Ying Fung Moy v Hohi Omeki*, 10 AD3d 604, 781 NYS2d 684 (2nd Dept. 2004); *Singer v Riskin*, 304 AD2d 554, 755 NYS2d 902 (2nd Dept. 2003); *cf.*, *Pellicoro's Dance Sport International, Inc. v Levy*, 266 AD2d 305, 729 NYS2d 389 (1st Dept. 2001).

After a careful reading of the submissions herein, the Court is unconvinced of ELDAN's likelihood of success on the merits or that plaintiff will suffer irreparable injury absent the granting of the preliminary injunction. The Court finds that the contract executed by the parties makes reference to Article 14 of the General Conditions, which is

enumerated as part of the Contract Documents and initialed by the parties and, therefore, the provisions relied upon by defendants are applicable herein. Based on the record before the Court, it is the Court's judgment that ELDAN, by its principal Mr. Mendelsohn, should not be permitted to return to the subject residence and retrieve tools and materials he claims are ELDAN's property. However, an accounting of the items claimed by the parties is preliminary to any settlement or adjudication of the issues raised herein. Therefore, the Court directs that, within ten (10) days from the date of this order, counsel for the parties are directed to arrange for a viewing of the premises, with the sole purposed of identifying items claimed to belong to ELDAN. At said viewing, counsel for both parties shall accompany their client and, if they deem it necessary, the Police Department of said locality shall be notified and requested to attend. Absent the written agreement of the parties, no tools or materials whatsoever shall be removed from the property. Based on the foregoing, it is hereby

ORDERED, that ELDAN's motion for a preliminary injunction is denied except to the extent as directed above; and it is further

ORDERED, that the temporary restraining order directed in the initiating order to show cause, dated October 9, 2007, shall remain in effect until the further order of the Court and the defendants are enjoined from disposing of or allowing others to use the plaintiff's tools and equipment presently located at the subject property; and it is further

ORDERED, that the caption is corrected and shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ELDAN CONSTRUCTION CORP.,

Plaintiff,

-against-

WEI WANG a/k/a ANGELA WANG, SHU ZHEN YU,
and "JOHN DOE 1 THROUGH 3", the names of
the last 3 defendants being fictitious, intending
to designate tenants or persons in possession
or persons who may have an interest in the liened
premises, the true name of the last 3 defendants being
fictitious an unknown to plaintiff,

Defendants.

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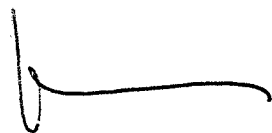
and it is further

ORDERED, that the parties shall appear for a Preliminary Conference February 20, 2008, at 9:30 A.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 16, 2008



WILLIAM R. LaMARCA, J.S.C.

ENTERED

JAN 23 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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