

Matter of Lane v Vilshteyn

2008 NY Slip Op 31737(U)

June 16, 2008

Supreme Court, Nassau County

Docket Number: 8153-06/

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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In the Matter of the mechanic's lien of
DUANE EDWARD LANE, Subcontractor,
Plaintiff-Lienor

Plaintiff,

-against-

ESFIR VILSHTEYN, owner, DON THACKURDEEN,
contractor, ALEX BUZIASHVILI, and LILLY
BUZIASHVILI,

Defendants,

ALEX BUZIASHVILI and LILY BUZIASHVILI

Third Part Plaintiffs,

- against-

REGAL TITLE AGENCY

Third Party Defendant.

TRIAL PART: 21

NASSAU COUNTY

INDEX NO: 008153/06

MOTION SEQ. NO: 3,4,5

SUBMIT DATE:5/19/08

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The following papers having been read on this motion:

- Notice of Motions1,2,3**
- Opposition 4**
- Reply..... 5,6**

There are three motions before the Court. The first (Sequence 3) is by the Defendant Thackurdeen for dismissal of the Complaint under Civil Practice Law and Rules § 3015(e) and Nassau County Administrative Code § 21-11.1 on the grounds that the Plaintiff was not a licensed contractor at the time of the performance of the work for which payment is claimed. The second (Sequence 4) is on behalf of Defendant Vilshteyn and Third-Party Defendant Regal Title Agency, for summary judgment dismissing the complaint pursuant to Civil Practice Law and Rules § 3212.

The basis for the motion, as with the first, is that the Plaintiff was not licensed when he performed the work for which he seeks payment. The third motion (Sequence 5) is on behalf of the Defendants Alex and Lily Buziashvili. They request summary judgment dismissing the complaint pursuant to Civil Practice Law and Rules § 3212, also claiming that the Plaintiff is not entitled to recover fees for work performed because he was not licensed as required by Civil Practice Law and Rules § 3015(e) and the Nassau County Administrative Code.

This dispute involves labor charges and expenditures of the Plaintiff for brickwork performed at 233 Sands Lane, Hewlett Bay Park, New York. Thackburdeen was the general contractor, or as he is identified in the Reply Affirmation on his behalf, the “Project Manager” at the site. Lane was to install 45,000 bricks for the sum of \$60,000. At some point, when the Buziashvilis, the owners of the property, sought to have some additional decorative touches added to the brickwork, Lane quoted a labor cost of \$15,000, but acceded to do the work for \$8,000 when Thackburdeen advised him that the owners would not agree to the larger sum.

The work was ultimately completed, but Thackburdeen did not pay the final balance of \$23,120, or reimburse Lane for the \$590.51 which he expended for supplies. The oral agreement was that the bricks, mortar, workers’ compensation and licenses would be the responsibility of Thackburdeen. The Plaintiff acknowledges that he did not have a home improvement license issued by Nassau County at the time the work was performed. As it turns out, neither did Thackburdeen.

As reflected in the public records of the Nassau County Department of Assessment, the Buziashvilis sold the dwelling to Defendant Vilshteyn on September 30, 2005, allegedly for \$1,325,000. The records further reflect the acquisition of the property on November 30, 2000, and that the construction was new as of 2004.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” *Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450, (1st Dept. 1992); See also, *S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 343 (1974).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 (1957). It is a drastic

remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *Moskowitz v. Garlock*, 23 A.D.2d 943 (3d Dept. 1965); *Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 (3d Dept. 1965).

The evidence will be considered in a light most favorable to the opposing party. *Weill v. Garfield*, 21 A.D.2d 156 (3d Dept. 1964). The proof submitted in opposition will be accepted as true, and all reasonable inferences drawn in favor of the opposing party. *Tortorello v. Carlin*, 260 A.D.2d 201, 206 (1st Dept. 2003). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which there is appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, (1980).

Licensing Requirements for Home Improvement Contractors

Civil Practice Law and Rules § 3015(e) provides as follows:

Rule 3015. Particularity as to specific matters

(e) License to do business. Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the department of consumer affairs of the city of New York, the Suffolk county department of consumer affairs, the Westchester county department of consumer affairs/weight-measures, the county of Rockland, the county of Putnam or the Nassau county department of consumer affairs, the complaint shall allege, as part of the cause of action, that plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license; provided, however, that where the plaintiff does not have a license at the commencement of the action the plaintiff may, subject to the provisions of rule thirty hundred twenty-five of this article, amend the complaint with the name and number of an after-acquired license and the name of the governmental agency which issued such license or move for leave to amend the complaint in accordance with such provisions. The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter.

Nassau County Administrative Code (the Code)§ 21-1.1 provides, in pertinent part, as

follows:

* * *

3. "Home Improvement" means repair, maintenance, replacement, remodeling, alteration, conversion, modernization, or addition to any land or building, or that portion thereof, which is

used as a private residence or dwelling place for not more than three families, and other improvements to structures or upon land which is adjacent to a dwelling, and shall include, but

not be limited to, the installation, construction, replacement or improvement of driveways, swimming pools, porches, garages, sheds, central heating or air conditioning systems, vacuum

cleaning systems, windows and awnings, sandblasting, power washing, waterproofing, floor refinishing, chimney cleaning, interior and/or exterior painting, carpet installation, and

gardening/landscaping, when the gardener/landscaper uses his/her own equipment in the conduct of his/her business and uses his/her vehicle to transport such equipment. "Home

Improvement" shall not include (a) the construction of a new home building or work done by a contractor in compliance with a guarantee of completion of a new building project, or (b) the sale

of goods or materials by a seller who neither arranges, to perform nor persons directly or indirectly any work or labor in connection with the installation of goods or materials, or (c) decorating when not incidental or related to home improvement work as herein defined, or (d) residences owned by, the state or any municipal subdivision thereof, or (e) automatic fire alarm systems, or (f) burglar alarm systems.

4. "Home improvement contract" means an agreement between a contractor and an owner for the performance of a home improvement, and includes all labor, services and materials to be furnished and performed thereunder.

* * *

7. "Owner" means any homeowner, tenant, or any other person who orders, contracts for, or purchases the home improvement services of a contractor, or the person entitled to the performance of the work of a contractor pursuant to a home improvement contract.

* * *

The Code specifically excludes new construction. That the Department of Assessment treats the subject as new construction may be relevant. There has been no showing as to what, if anything, preceded the approximately 7,100 square foot residence upon which Lane performed brickwork. If the dwelling was new construction, the Code does not impose a licensing requirement upon

contractors. This is an issue of fact which must be determined before the application of the Code can be considered.

Thackburdeen's first argument in support of his motion is that there was no contract between him and the Plaintiff. The Plaintiff's position is to the contrary, in that he dealt directly with Thackburdeen as the general contractor, and that the only reason for the absence of a written contract was Thackburdeen's refusal to sign one. Thackburdeen's status when the agreement was made is relevant on the issue as to whether or not he is an "owner" within the language of the Code. Where an agent enters into a contract on behalf of a principal, he is personally liable on the agreement unless he made it clear that he was acting on behalf of a fully-disclosed principal. *Kaplon-Belo Associates, Inc. v. Farrelly*, 21 A.D.2d 321, 322 (2d Dept. 1995).

The Plaintiff cannot be expected to divine the relationship between Thackburdeen and the Buziashvilis. Thackburdeen may well have been a general contractor who received a gross amount, and was negotiating with Lane as a sub-contractor on his own behalf. If such was the reasonable assumption of Lane, Thackburdeen may not have been acting as an "owner" within the definition of the Code.

Thackburdeen's affidavit of November 3, 2005, contained in Exh. "H" to the Affidavit of Lane in Opposition to the Motions, is directly contrary to his claim of being a overseer, paid on a weekly basis. He therein states that he was the general contractor and entered into an oral contract with Lane to install bricks at the subject premises.

In *Ayres v. Dunhill Interiors*, 138 A.D.2d 303 (1st Dept. 1988) the Court was dealing with an appeal of a determination by the trial court that the work contracted for constituted home improvements, and that the failure of the contractor to hold a license from the City of New York

barred recovery of moneys withheld by the owner of the cooperative apartment. The Court remanded the matter for a determination as to whether the owner actually resided in the apartment, or one of the three other units she owned in the same building. In this case, the Buziashvilis have each stated their residence as 740 Kearny Drive, Woodmere, New York in Verified Petitions challenging the Notice of Lien. Parts of Exh. "F" to Affidavit of Lane in Opposition to Motions.

Citing *Ayres*, the Court in *Morrison v. Tooma*, 800 N.Y.S.2d 350, 2005 WL 502828

(Dist Ct., Nassau Co, Fairgrieve, J.) stated that "(i)t is clear from the definitional language employed that the person seeking to invoke the license requirements of the ordinance must actually reside in the dwelling unit in which the work is to be performed." The Court also noted decisions which hold "... that consumer protection laws don't apply when the contract involves two contractors, even though the subject is a residential home" (citing *Jack A. Corcoran Marble Co. v. Clark Const. Corp.*, 155 Misc.2d 49, App. Term, New York, 1st Dept. 1993).

But see *Fisher Mechanical Corp. v. Gateway Demolition Corp.*, 247 A.D.2d 579 (2d Dept. 1998), and cases cited therein, where the Court, noting the impact on the public health and safety of plumbing, refused to permit recovery by an unlicensed plumber working for a general contractor on a New York City Transit Authority contract.

Lane's affidavit states that the dwelling was completely vacant, unfinished, and uninhabitable during the course of his work. Affirmations by counsel that it was the Buziashvilis intention to move into the premises are not relevant, since they are not based upon factual knowledge of the affirmants. In fact, title was conveyed by the Buziashvilis within four months of the completion of Lane's work, and one would have to assume that the contract of sale was executed well in advance of that date.

According to the public records of the Department of Assessment, they acquired title to the

premises on November 20, 2000. There is ample basis to suspect that they never were, and never intended to be, homeowners who are the intended beneficiaries of the consumer protections included in the Code.

The motions by the Defendants and Third-party Defendant are all premised on attorney's affirmations, none of which is upon the personal knowledge of the affirrant. There remain open questions of fact as to whether the premises constituted new construction, exempted from the Code; whether the Defendant Thackburdeen is personally responsible on the contract, or whether he fully disclosed that he was acting solely as a representative of a fully-disclosed principal; and whether the Defendants Buziashvili were actually residents of the dwelling upon which work was performed by Lane, or whether they actually resided elsewhere. The motions by each of the movants are therefore denied.

With respect to the issue of transferring the escrow deposit of \$35,000 currently held by Regal Title Agency requested by Lane, the Court is without jurisdiction to make such direction. If the Third-party Defendant wishes to be discharged from further liability in this matter, they are free to make a deposit of the sum held by them into the Court pursuant to Civil Practice Law and Rules § 2601.

This constitutes the decision and order of this Court.

ENTER

DATED: June 16, 2008

ENTERED 

HON. ARTHUR M. DIAMOND

JUN 19 2008

J. S.C.

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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