SHORT FORM ORDER

INDEX # 25149-07
RETURN DATE: **10-1-07 (001)**
2-27-08 (002)
MOT. SEQ. # **001 & 002**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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ALLAN REYES,

Plaintiff,

-against-

EDMUND TUNG LING LO a/k/a EDMUND LO, LARRY J. GUFFEY, as Trustee of 94 Narod Boulevard Trust, CATHY SILVERSTEIN and "John Doe" and "Jane Doe" Tenants or Persons in possession of 94 Narod Boulevard, Water Mill,

Defendants.
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CALENDAR DATE: April 23, 2008
MNEMONIC: MD; Mot. D.

PLTF'S/PET'S ATTORNEY:

Keegan & Keegan, Ross & Rosner
315 Westphalia Ave.
Mattituck, NY 11952

DEFT'S/RESP ATTORNEY:

Donald Eng, Esq.
Atty for Lo
217 Park Row,
New York, NY 10038

Upon the following papers numbered 1 to ____ read on this motion to dismiss and default judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-8; 15-22 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 9-11; 23-25 ; Replying Affidavits and supporting papers 12-14 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by defendant, Edmund Tung Ling Lo, to dismiss the complaint which seeks to foreclose on a mechanics lien pursuant to CPLR §3211 (a) (7) is hereby denied in its entirety and the plaintiff's cross-application by order to show cause to serve a supplemental summons and second amended complaint to assert a cause of action in trust against Edmund Lo (hereinafter Lo), (4th cause of action), is granted, and the summons and complaint is denied as against the title company, South Bay Abstract, Inc. (hereinafter South Bay) and Clarence Banks, Esq. (hereinafter Banks),(3rd cause of action). The request for an order of attachment is denied but the Court will grant injunctive relief allowing the funds to be released from the title company South Bay, and to be returned to Lo's counsel. Such funds, however, shall be held in escrow by Lo's counsel as security pending further order of this Court or the parties may stipulate to use the escrowed funds to bond the mechanic's lien. The third (3rd) cause of action as asserted against Banks and South Bay in the plaintiff's proposed amended complaint is denied and the plaintiff is directed to serve a new amended complaint absent the cause of action against Banks and South Bay, as set forth in this order, within twenty days of service of a copy of this order. Lo is thereafter given ten (10) days to file his answer to the amended complaint.

The plaintiff, an interior decorator from West Palm Beach, Florida, initially instituted this action seeking to foreclose on a mechanic's lien in the amount of $98,610.77 filed for labor and services described as "interior decoration" at premises owned by Lo located at 94 Narod Boulevard in Water Mill, Suffolk County on Long Island, New York. The plaintiff claims that he performed the work and was not paid and his attorney filed a mechanic's lien

against the premises on August 17, 2007. The plaintiff thereafter filed an amended complaint against the defendants asserting both a first cause of action on the mechanic's lien and a second cause of action sounding in contract. Subsequent thereto Lo conveyed the premises to Larry J. Guffey, as Trustee of 94 Narod Blvd Trust by deed, dated March 12, 2007, and recorded on March 23, 2007. During the closing Lo was required to place in escrow with South Bay an amount to satisfy the mechanic's lien filed against the property by the plaintiff and those funds are presently being held in escrow by Banks, the principal owner of South Bay and its counsel.

Lo now moves in a pre-answer motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 (a) (7) initially arguing that the plaintiff is an unlicensed home improvement contractor and therefore may not maintain such an action under the authority of ***Fisher Mechanical Corp. v. Gateway Demolition Corp. et al.***, 247 AD2d 579, 669 NYS2d 347 (2nd Dept. 1998). The plaintiff opposes such relief claiming that such licensing was not required by interior decorators, to which Lo responds that the plaintiff could not file a mechanic's lien under the New York State Lien Law §3 because he was not a contractor. The plaintiff then moved by order to show cause seeking to serve a second amended complaint (attached as Exhibit G) which states a cause of action not only to foreclose a mechanic's lien (1st cause of action) and for breach of contract (2nd cause of action), but also seeking a declaration of trust funds against both South Bay, the title company, and Lo (3rd and 4th causes of action) and to add Banks and South Bay as defendants. Lo opposes this requested relief.

For the following reasons, Lo's motion to dismiss the plaintiff's cause of action to foreclosure a mechanic's lien is denied. The plaintiff's complaint sets forth a cause of action under the New York State Lien Law (hereinafter Lien Law) and a cause of action in contract upon which relief can be granted pursuant to CPLR §3211 (7); however, the plaintiff's application to serve an amended second complaint and supplemental summons to assert causes of action as to an allegation of trust funds against either Banks or South Bay (3rd cause of action) is denied. The plaintiff's application to assert a 4th cause of action against the defendant Lo is granted. The request for an order of attachment is denied but the Court will grant injunctive relief allowing the funds to be released from the title company, South Bay and/or Banks, and to be returned to the defendant's counsel. However, such funds are to be held in escrow by the defendant Lo's counsel as security pending further order of this Court.

Upon a motion to dismiss a complaint for legal insufficiency, the test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action known to our law can be discerned from its averments. ***Frank v. DaimlerChrysler Corp.***, 292 AD2d 118, 741 NYS2d 9 (1st Dept. 2002); ***Gruen v. County of Suffolk***, 187 AD2d 560, 590 NYS2d 217 (2nd Dept. 1992); ***Moore v. Johnson***, 147 AD2d 621, 538 NYS2d 28 (2nd Dept. 1989); ***Conroy v. Cadillac Fairview Shopping Center Properties***, 143 AD2d 726, 533 NYS2d 446 (2nd Dept. 1988). Furthermore, the complaint should be liberally construed in plaintiff's favor and the facts alleged in the complaint should

be assumed to be true. ***P.T. Bank Central Asai v. ABN Amro Bank N.V.***, 301 AD2d 373, 754 NYS2d 245 (1st Dept. 2003); ***Palazzolo v. Herrick, Feinstein, LLP***, 298 AD2d 372, 751 NYS2d 401 (2nd Dept. 2002); ***Holly v. Pennysaver Corp.***, 98 AD2d 570, 471 NYS2d 611 (2nd Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. ***McGill v. Parker***, 179 AD2d 98, 582 NYS2d 91 (1st Dept. 1992); ***Marini v. D'Atolito***, 162 AD2d 391, 557 NYS2d 45 (1st Dept. 1990).

As noted by the Court in ***Pace v. Perk***, 81 AD2d 444, 440 NYS2d 710 (2nd Dept. 1981) with regard to a motion to dismiss pursuant to CPLR 3211

> " Upon such a motion to dismiss a complaint for legal insufficiency, the court must assume that the allegations are true (***Denihan Enterprises v. O'Dwyer***, 302 NY 451, 458, 99 NE2d 235), and must deem the complaint to allege whatever can be imputed from its statements by fair and reasonable intendment, however imperfectly, informally or illogically facts may be stated therein (***Condon v. Associated Hosp. Service of New York***, 287 NY 411, 40 NE2d 230). In making its analysis, the court is not bound by the constructions and theories of the parties (see, Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3211:24). The test of the sufficiency of a complaint is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action know to our law can be discerned from its averments (CPLR 3013; ***Foley v. D'Agostino***, 21 AD2d 60, 62-65, 248 NYS2d 121; ***Guggenheimer v. Ginzberg***, 43 NY2d 268, 274-275, 401 NYS2d 182, 372 NE2d 17). Where the motion to dismiss for failure to state a cause of action is made under CPLR 3211, the plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of his complaint (***Rovello v. Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314, 357 NE2d 970)."

The rules governing the Court's review of a motion to dismiss pursuant to CPLR 3211 (a)(7) are straight forward. The Court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 401 NYS2d 182 (1978); ***One Acre Inc. V. Town of Hempstead***, 215 AD2d 359, 626 NYS2d 226 (2nd Dept. 1995). Although, as the Court noted, the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if affidavits are submitted by the plaintiff, they "may be used freely to preserve inartfully pleaded, but potentially meritorious

claims" (***Rovello v. Orofino Realty Co.***, supra, 635, 389 NYS2d 314, 316).

With these general principles in mind, the Court, upon review of the plaintiff's complaint and the allegations contained therein, finds that the plaintiff's complaint presents sufficient allegations which fall within the provisions of the Lien Law and also breach of contract by Lo. While Lo suggests that the plaintiff's complaint may not fall within the Lien Law because the plaintiff is not a contractor and the work complained of involved interior decorating work, this argument is unavailing. Lien Law §23 specifically provides that:

> "This article is to be construed liberally to secure the beneficial interests and purposes thereof."

Because there are a paucity of cases concerning the lienability of labor and services of interior decoration, this case appears to be one of first impression. In this regard, ***Sica & Sons Inc. v. Ciccolo***, 39 Misc 2d 698, 241 NYS2d 923 (1963) is quite informative. In that case, the Court examined "the lienability of "labor and materials" associated with painting and decorating, interior and exterior, and for minor carpentry work with work done on a house, with the Court holding that:

> "painting and decorating are permanent improvements and fall within the benefits of the Mechanic's Lien Law. We deem the word 'permanent' in connection with painting and decorating to mean *becoming part of the realty*..."

New York Jurisprudence, 2d edition §28 states that, "The requirement for permanence seems to be satisfied if the work, labor, and materials are so incorporated in the structure as to become part of it. For example, painting and decorating and the making of such repairs as are ordinarily associated with painting and decorating constitute a permanent improvement under the Lien Law."

Again, the Court in ***New York Artcrafts, Inc. v, Marvin***, 29 Misc 2d 774, 215 NYS2d 788 (1961) dealing with a similar issue stated that:

> "The term improvement, when used in this chapter, includes *** any work done upon such property or materials furnished for its permanent improvement *** (Emphasis supplied.) The precise issue therefore presented is whether painting and decorating and the making of such repairs as are ordinarily associated with painting and decorating constitutes a 'permanent improvement' under the Lien Law of State of New York."

Thus, pursuant to the provision of the Lien Law §23 that it be construed liberally to secure the beneficial purposes for which it came into existence, i.e. the protection of

workmen that provide labor and services to improve an owner's home, the Court finds that the interior decoration of a home may constitute improvement and/or services that would be lienable under the Lien Law. A decorator providing services involving the fastening of drapes and curtains with matching furniture, upholstery, carpets and decorations to a room to express a view or desire of its owner/resident and to provide the theme of such room could be considered permanent to the house and to the realty. Moreover, if the purpose for the interior decoration ultimately improves the realty for resale, as occurred in this case, then the workman or decorator needs the added protection provided by the Lien Law and its tenet to be construed liberally to provide such protection.

The fact that such drapes, curtains and specially ordered furniture as well as wall coverings could be removed was addressed in ***Monroe Savings Bank v. First National Bank of Waterloo***, 50 AD2d 314, 377 NYS2d 827 (4th Dept. 1976) wherein the Court noted that household appliances such as ranges, dishwasher, air conditioners could be moveable and found,

> "Courts are required to give the mechanic's lien statute a liberal construction in order to effectuate the beneficial interests and purposes thereof (Lien Law §23). Despite the fact that the appliances could all be removed with little or no damage to the realty, the items were nevertheless intended to be permanent by the owner and, therefore, qualify as improvements within the meaning of Lien Law §2 (4) and thus are lienable." citing to ***Wahle-Phillips Co. v. Fitzgerald***, 225 NY137, 121 NE 763 (1919) which held electric lighting fixtures are lienable.

The plaintiff, in asserting his mechanic's lien, stated that the interior decoration of the Lo residence applied to furniture, upholstery, fabric and decorations. However, the plaintiff's complaint does not detail what items were provided nor how they were affixed on the walls or to the realty, including whether or not the interior decoration became part and parcel of the realty. The plaintiff, in his affidavit, lists his responsibilities which included space planning, selection of furniture, selection of fabrics, supervision of furniture restoration, curtain making and upholstery work.

As the Court in ***Scott v. Cooper***, 215 AD2d 368, 625 NYS2d 661 (2nd Dept. 1995) app. Dis. 86 NY2d 812, 632 NYS2d 497, aptly noted:

> " The criterion is whether the plaintiff has a cause of action and not whether he may ultimately be successful on the merits (see, ***Stukuls v. State of New York***, 42 NY2d 272, 275; ***Detmer v. Acampora***, 207 AD2d 475; ***Greenview Trading Co. V. Hershman & Leicher***, 108 AD2d 468, 470)."

Using that criterion and affording the complaint a liberal construction, accepting as true the allegations contained therein, giving plaintiff the benefit of every favorable inference and determining only whether the facts alleged fit within any cognizable legal theory, ***Guggenheimer v. Ginzburg***, supra, the Court finds the plaintiff's complaint sufficiently presents a cause of action and therefore denies the defendant Lo's motion to dismiss pursuant to CPLR §3211 (a) (7). This case may be ripe for disposition on a motion for summary judgment after the completion of discovery and a more detailed analysis and review of the work performed and whether it qualifies as improvements to realty. Lo is directed to file an answer to the proposed amended complaint to be served within ten (10) days of service of a copy of this Court's order on him.

Lo's other objection that the plaintiff fails to assert and/or possess a home improvement license and therefore may not maintain this lawsuit is without merit. The law is well settled that an unlicensed contractor may not recover and strict compliance with the statutory scheme and licensing requirements will be upheld. The Court in ***Ellis v. Gold***, 204 AD2d 261, 611 NYS2d 587 (2nd Dept. 1994) has succinctly stated that;

> "In ***Segrete v. Zimmerman***, 67 AD2d 999, 413 NYS2d 732, this court approved of an earlier decision of the Supreme Court **588(***Buffoleno v. Dening***, 82 Misc2d 472, 369 NYS2d 600) and held that a home improvement contractor who had not obtained the license required by virtue of a Nassau County ordinance had forfeited his right to recover damages either on a breach of contract theory or a quantum meruit theory."

The question of whether or not an interior decorator qualifies as a home improvement contractor required to be licensed is a question of fact based upon the work being done and whether the definition of a home improvement encompasses an interior decorator and the placement of furniture, wall covering and upholstery. The plaintiff claims the Town of Southampton, New York, does not require licensing of interior decorating and Lo points to nothing to dispute that proposition. The motion to dismiss based upon the claim of an unlicensed home improvement contractor is denied at this time.

The plaintiff also cross-moves not only to serve a supplemental summons and second amended complaint to add the title company, South Bay and its principal Banks as defendants but also for an order of attachment pursuant to CPLR Article 62 et seq., on the sum of money being held in escrow by South Bay to satisfy the mechanic's lien filed.

A party may amend his pleadings at any time by permission of the Court and leave is to be freely given. CPLR §3025 (b). While a Court has broad discretion in deciding

whether leave to amend should be granted, it is considered an improvident exercise of discretion to deny leave to amend in the absence of inordinate delay and a showing of prejudice to the opposing party. ***Cannon v. Milone***, 157 AD2d 695, 549 NYS2d 793 (2nd Dept. 1990); ***Williams v. Ludlow's Sand & Gravel Co. Inc.***, 122 AD2d 612, 504 NYS2d 901 (4th Dept. 1986); ***Pignataro v. Balsamo***, 108 AD2d 1086, 485 NYS2d 656 (3rd Dept. 1985). The merits of a proposed amendment will not be examined on the motion to amend unless insufficiency or lack of merit is clear and free from doubt. Only in those cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit should leave be denied. ***Degradi v. Coney Island Medical Group***, 172 AD2d 582, 568 NYS2d 412 (2nd Dept. 1991); ***Norman v. Ferrara***, 107 AD2d 739, 484 NYS2d 600 (2nd Dept. 1985).

In this case, the sought after amendment to add Banks and South Bay is unnecessary in light of the Court's order to turn over the escrowed funds to Lo's counsel to hold in escrow as security for the mechanic's lien or by stipulation of the parties to bond a release of the mechanic's lien. In ***Joyce v. McKenna***, 2 AD3d 592, 768 NYS2d 358 (2nd Dept. 2003), the Court found that "it is incumbent upon the movant to make 'some evidentiary showing that the claim can be supported'." and absent that such amendment should be denied on the mere request of a party without a proper basis. The plaintiff's motion to amend is granted as to the 1st, 2nd and 4th causes of action and denied as to the 3rd cause of action for the addition of Banks and South Bay as defendants.

Finally, the plaintiff seeks an attachment as to the monies being held in escrow by South Bay and its principal Banks which application is denied. Attachment is considered a harsh remedy and the statute (CPLR Article 62) is strictly construed in favor of those against whom it may be employed. Since the provisional remedy of attachment is statutory in origin and construed strictly against those who seek to invoke the remedy [***Penoyar v. Kelsey***, 150 NY 77 (1896)] the plaintiff, under the facts and circumstances of this action, can not prevail on his application to attach the asset since the question of success on the merits is yet to be established. Further, in light of the Court's ruling that the escrowed funds presently being held in trust by South Bay be turned over to Lo's counsel as security for the mechanic's lien or by stipulation of the parties to bond the mechanic's lien, an order of attachment is unnecessary at this time.

The foregoing constitutes the decision of the Court.

Dated: July 31, 2008

J.S.C.