

**Hardy Plumbing, Heating & Air Conditioning, Inc. v
Menu**

2008 NY Slip Op 33110(U)

October 21, 2008

Supreme Court, Suffolk County

Docket Number: 2004-26168

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 06-26-08
ADJ. DATE 09-04-08
Mot. Seq. # 016 MD

-----X
HARDY PLUMBING, HEATING & AIR :
CONDITIONING, INC., :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 SUSAN MENU, :
 :
 :
 Defendant :
-----X

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 :
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-----X
SUSAN MENU, :
 :
 Third-Party Plaintiff, :
 :
 - against - :
 :
 J. MICHAEL HAIGHT d/b/a WATERSEDGE :
DESIGN CONSTRUCTION MANAGEMENT, :
and J. MICHAEL HAIGHT, Individually, :
 :
 Third-Party Defendants :
-----X

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 31; Replying Affidavits and supporting papers 32 - 40; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant/third-party plaintiff's motion for summary judgment dismissing the counterclaim for breach of contract is denied.

In 2004, plaintiff Hardy Plumbing, Heating & Air Conditioning, Inc. commenced this action to recover the sum of \$4,703 allegedly due for work performed at a residence located in Amagansett, New York owned by defendant/third-party plaintiff Susan Menu (hereinafter Menu). Thereafter, Menu instituted a third-party action against third-party defendant J. Michael Haight (hereinafter Haight) for an accounting and for damages under the theories of contribution and indemnification. Menu alleges that in 2003 she and Haight entered into an oral agreement wherein Haight agreed to design and oversee the renovation of the Amagansett premises, as well as to assist in decorating and furnishing the residence, and Menu agreed to pay all costs incurred in the construction project and a construction management fee. The third-party answer interposed by Haight denied Menu's claims and interposed counterclaims for an accounting and for sanctions.

Subsequently, by so-ordered stipulation (Sutherland, Referee) dated July 28, 2007, Menu withdrew her third-party complaint with prejudice. The following month, Menu moved for summary judgment dismissing the third-party counterclaims, arguing that Haight was not entitled to the equitable remedy of an accounting, as his services as a construction manager and design consultant on the renovation project did not create a fiduciary relationship between the parties, and that there was no separate cause of action for sanctions. Haight opposed the summary judgment motion and cross-moved for an order granting leave to serve an amended third-party complaint containing the existing causes of action and new causes of action for breach of contract and abuse of process. Haight alleges that Menu breached their agreement by failing to pay him a fee equal to 26% of the cost of the furnishings, fixtures, hardware and decorations purchased on her behalf for the Amagansett residence. Oral argument on the motions for summary judgment and for leave to interpose the proposed counterclaim was held by this Court on October 18, 2007. By order dated October 23, 2007, this Court dismissed the counterclaims against Menu for an accounting and for sanctions, but granted Haight leave to serve an amended third-party answer with a counterclaim for breach of contract.

Menu now moves again for summary judgment in her favor, arguing for the first time that Haight is not entitled to recover a decorating fee under the parties' agreement, because he is not a licensed home improvement contractor. Haight opposes the motion, arguing, among other things, that Menu's motion violates the general proscription against successive summary judgment motions, and that he did not need a home improvement license to help Menu design and furnish her residence. The Court notes that it did not consider Haight's sur-reply or Menu's "Affirmation in Response to Third-Party Defendant's Sur-Reply" in the determination of this

motion (*see* CPLR 2214).

Haight's argument that the motion must be dismissed because Menu already has moved for summary judgment in her favor on the counterclaims is denied. It is well established that multiple summary judgment motions by the same party are disfavored absent a showing of newly discovered evidence or sufficient cause (*see Oppenheim v Village of Great Neck Plaza, Inc.*, 46 AD3d 527, 846 NYS2d 628 [2d Dept 2007]; *Lapadula v Sang Shing Kwok*, 304 AD2d 798, 757 NYS2d 869 [2d Dept 2003]; *Marine Midland Bank v Fisher*, 85 AD2d 905, 447 NYS2d 186 [4th Dept 1981]). Here, the counterclaim for breach of contract was interposed by Haight against Menu after she had moved for summary judgment dismissing the existing counterclaims against her and the Court granted leave to serve an amended third-party answer containing such a claim. Thus, contrary to the conclusory assertions by Haight's counsel, the instant motion does not represent an improper attempt by Menu to re-litigate the issue of whether she breached the parties' oral agreement by failing to pay a fee for decorating services (*cf. Staib v City of New York*, 289 AD2d 560, 735 NYS2d 799 [2d Dept 2001]).

Turning to the merits of Menu's motion, a home improvement contractor who does not possess a license as required by the relevant local law forfeits his right to recover under breach of contract or in quantum meruit (*see Flax v Hommel*, 40 AD3d 809, 935 NYS2d 735 [2d Dept 2007]; *Ben Krupinski Bldr. & Assoc., Inc. v Baum*, 36 AD3d 843, 828 NYS2d 523 [2d Dept 2007]; *Callos, Inc. v Julianelli*, 300 AD2d 612, 752 NYS2d 398 [2d Dept 2002]). A person engaged in the home improvement business is not excused from the licensing requirement simply because he or she performs services only as a general contractor or a project manager (*see O'Mara Org. v Plehn*, 179 AD2d 548, 579 NYS2d 48 [1st Dept 1992]). Further, the allegation that the homeowner knew of the lack of a license and planned to take advantage of its absence is insufficient to avoid dismissal of an action by an unlicensed home improvement contractor for money due under a contract or for work performed (*see Ermont Assocs. v Battenfeld*, 210 AD2d 293, 620 NYS2d 7 [2d Dept 1994]; *Chosen Constr. Corp. v Syz*, 138 AD2d 284, 525 NYS2d 848 [1st Dept 1988]).

Pursuant to section 156-10 of the Code of the Town of East Hampton, "[n]o person shall conduct, undertake or engage in any home improvement, as the same is defined herein, without first obtaining and thereafter maintaining in effect at all times an East Hampton Town improvement contractor's license for the Building Inspector." The term "home improvement" is defined by the section 156-5 of the Code as "[n]ew home construction, and/or any repair,

remodeling, alteration, conversion, modernization, improvement or addition to existing residential premises and/or improvements . . . and shall include but not be limited to any such activity with regard to additions, alarm systems, awnings, basements, bathrooms, bulkheads, cabinets, carpentry . . . docks, dormers, driveways . . . flooring . . . kitchens, landscape contracting . . . tile, waterproofing, weatherproofing and ventilation.” Excluded from the definition of home improvement are activities such as “the sale of goods by a seller who neither arranges to perform nor performs, directly or indirectly, any work or labor in connection with the installation or application of the goods sold,” grounds maintenance, and home maintenance (Code of the Town of East Hampton § 156-5). Further, a home improvement contractor is defined any person who “carries out, engages in, undertakes or holds himself out to others as performing or available to perform one or more home improvements, or any person providing management or construction administration services to an owner for one or more home improvements” (Code of the Town of East Hampton § 156-5).

Summary judgment dismissing the counterclaim for breach of contract based on Haight’s failure to be licensed as a home improvement contractor in the Town of East Hampton is denied. Menu’s submissions in support of the motion include an affirmation by her counsel; copies of the amended third-party answer and the reply; copies of a check allegedly issued by Menu to Haight in May 2004 and billing statements allegedly issued by Haight in connection with the project; and a copy of an affidavit of Haight, sworn to on November 29, 2006, submitted in connection with a cross motion to strike Menu’s counterclaims. However, absent from the moving papers is proof in admissible form as to the terms of the agreement between Menu and Haight and the work actually performed by Haight at the premises. The conclusory allegations by Menu’s counsel regarding the parties’ respective obligations under the alleged agreement and Haight’s alleged unlicensed performance of home improvement work, therefore, are insufficient to establish Menu’s entitlement to judgment in her favor as a matter of law on the breach of contract claim (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Dweck v Friedlander Group, Inc.*, 43 AD3d 854, 841 NYS2d 682 [2d Dept 2007]; *see also Frank v Sobel*, 38 AD3d 229, 831 NYS2d 151 [1st Dept 2007]). Issues of fact about the nature of the parties’ agreement, their obligations thereunder, and whether Haight is barred from recovering a fee for alleged design services must be resolved at trial (*see LoGerfo v Trustees of Columbia Univ. in City of N.Y.*, 35 AD3d 395, 827 NYS2d 166 [2d Dept 2006]; *SageGroupAssoc., Inc. v Dominion Textile (USA)*, 244 AD2d 281, 665 NYS2d 407 [1st Dept 1997]; *L.N.L. Constr. v M.T.F. Indus.*, 190 AD2d 714, 593 NYS2d 536 [2d Dept 1993]; *Brook Shopping Ctrs. v Allied Stores Gen. Real Estate Co.*, 165 AD2d 854, 560 NYS2d 317 [2d Dept 1990]).

Finally, Haight's argument that Menu should be estopped from arguing Haight needed a license to provide interior design services at the Amagansett residence is rejected. Under the doctrine of judicial estoppel, where a party assumes a certain position in a prior legal proceeding, and succeeds in securing a judgment in his or her favor on such issue, he or she may not thereafter, simply because his or her interests have changed, assume a contrary position in another action (*see Festinger v Edrich*, 32 AD3d 412, 820 NYS2d 302 [2d Dept 2006]; *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 626 NYS2d 527 [2d Dept 1995]; *Environmental Concern v Larchwood Constr. Corp.*, 101 AD2d 591, 476 NYS2d 175 [2d Dept 1984]). Here, there has been no prior legal proceeding involving Menu and the issue of whether Haight performed home improvement work at her Amagansett residence (*cf. Prudential Home Mtge. Co. v Neildan Constr. Corp.*, 209 AD2d 394, 618 NYS2d 108 [2d Dept 1994]).

Accordingly, Menu's motion for summary judgment dismissing the counterclaim for breach of contract is denied.

Dated: October 21, 2008



EMILY PINES
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION