

Intercoastal Specialty Contr. Corp. v Gateway Pools, Inc.
2008 NY Slip Op 33382(U)
December 8, 2008
Supreme Court, Suffolk County
Docket Number: 20211/07
Judge: Denise F. Molia
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SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

INTERCOASTAL SPECIALTY CONTRACTING,
CORP.,

Plaintiff,

- against -

GATEWAY POOLS, INC., and JAME BAYARD,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 11/19/08
SUBMISSION DATE: 10/10/08
MOTION SEQUENCE No.: 001 MD
002 MD

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated October 9, 2007; Affirmation dated October 9, 2007; Exhibits A through D annexed thereto; Affirmation in Opposition dated November 19, 2007; Exhibit A annexed thereto; Reply Affirmation dated December 7, 2007; Notice of Motion dated March 4, 2008; Affirmation dated March 5, 2008; Exhibits A through D annexed thereto; Affirmation in Opposition dated March 19, 2008; and upon due deliberation; it is

ORDERED, that the motion by defendant Gateway Pools, Inc., pursuant to CPLR 3211(a)(1) and (7), for an Order dismissing the Complaint as to said moving defendant, on the ground that the Complaint fails to state a cause of action and upon the ground that the defendant has a defense founded upon documentary evidence, to wit: the Code of the Town of East

Hampton, and plaintiff's lack of a home improvement contractor's license in the Town of East Hampton; is denied; and it is further

ORDERED, that the motion by defendant Jane Bayard (002), pursuant to CPLR 3211(a)(1) and (7), for an Order dismissing the Complaint as against said moving defendant on the grounds that the Complaint fails to state a cause of action, and upon the grounds that the defendant has a defense founded upon documentary evidence, to wit: the Code of the Town of East Hampton and plaintiff's lack of a home improvement contractor's license in the Town of East Hampton, is denied.

The Complaint alleges that the plaintiff, at the request of the defendant Gateway Pools, Inc., performed renovation work to the gunite pool located at the residence of the defendant Jane Bayard, which is located at 31 Dune Lane in the Village and Town of East Hampton. The Complaint alleges one cause of action against the defendant Gateway, alleging said defendant's failure to pay plaintiff the sum of \$8,900.00 for home improvement work completed at the Bayard residence. The Complaint also alleges two causes of action against Bayard; one for labor and materials and knowledge of the work to be performed, and a second for unjust enrichment.

Section 107-2 of the Code of the Village of East Hampton provides in pertinent part that:

“no person shall conduct or engage in any home improvement business without first obtaining and maintaining in effect at all times a license therefor from the Building Inspector, as hereinafter provided.

Under §107-1 of the Code of the Village of East Hampton, the term “home improvement”, in pertinent part, is defined as:

“Any repair, remodeling, alteration, conversion, modernization, improvement or addition to residual property, including but not limited to . . . swimming pools . . .”

Under the same section of the Village Code, a home improvement contract is defined as:

“An oral or written agreement between a home improvement contractor and an owner for the performance of a home improvement, and includes all labor, services and materials to be furnished and performed thereunder.”

A “home improvement contractor” is defined as:

“A person who conducts or engages in a home improvement business

and who performs or undertakes or agrees to perform or undertake a home improvement.”

Finally, the aforementioned Code of the Village of East Hampton, under §107-1 defines an “owner” as:

“Any owner of residential property, tenant or any other person who orders, contracts for or purchases the services of a home improvement contractor, or the person entitled to performance of the work of a home improvement contractor pursuant to a home improvement contract.”

The allegations of the Complaint identify the plaintiff as a home improvement contractor who contracted with the defendant, Jane Bayard, to perform “renovation work and marble dusting to the in-ground swimming pool and spa” located at the subject location, owned by said defendant. The plaintiff also alleges that defendant Gateway Pools, Inc., engaged the plaintiff to perform such work at the “behest of Defendant Jane Bayard.” After plaintiff billed the defendants for services performed and materials furnished, the defendants declined to pay the plaintiff, alleging that they were not required to do so inasmuch as the plaintiff did not possess a Home Improvement License within the Village of East Hampton. The plaintiff has admitted that he is not in possession of a license issued by the Village. However, he has alleged and demonstrated that he is a licensed home improvement contractor in Suffolk County under license number 21,185 HI.

The defendants have moved for dismissal of the Complaint, maintaining that the failure of the plaintiff to plead its possession of a Village of East Hampton home improvement license requires dismissal of the instant action pursuant to CPLR 3015(e) and 3211(a)(7). CPLR 3015(e) provides in pertinent part:

“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/weights-measures, the county of Rockland, the County of Putnam or the Nassau county department of consumer affairs, the complaint shall allege. . . .”

Gateway has alleged that the Complaint does not contend that Gateway was a sub-contractor, and that even if plaintiff were a sub-contractor, recovery would still be prohibited under the statutes and case law. However, §3015(e) is not applicable to Gateway, since Gateway is a commercial entity and not a “consumer” under said statute. In considering the circumstances presented, a plain reading of the statute signifies that only those municipalities specifically set

forth in the statute are covered by said statute. If the Legislature intended that an exhaustive list of municipal entities would be covered by the statute, such list or language which would have clearly included such municipalities could have been used. In the absence of such list, the specific City or County agencies shall be deemed the only ones referred to for the protection afforded. Therefore, since neither the Village of East Hampton is specifically designated under CPLR 3015(e) as a municipality or agency covered by such section, there is no requirement that a home improvement contractor plead the existence of a Village of East Hampton home improvement license, which the plaintiff does not possess.

The plaintiff does however, possess a home improvement contractor's license issued by the County of Suffolk, one of the entities denoted in CPLR 3015(e). The statute is silent with regard to the statewide necessity for the licensing of a home improvement contractor with every local municipality within which he or she does business, or that such contractor shall be subjected to a complete forfeiture of all of its contractual and equitable grounds for relief against a general contractor or homeowner. This Court does not assign such meaning to the language of the statute. Assuming arguendo that CPLR 3015(e) could be read to include the Village of East Hampton as a "person" entitled to have a licensed contractor perform sub-contract work, it is noted that the Code of the Village of East Hampton already provides a penalty for the failure to have obtained a Village license, in the way of a monetary fine.

The defendant, Jane Bayard, is clearly a "consumer" as contemplated by the statute, and might be entitled to raise the statutory defense that a contractor must allege in the Complaint that it is in possession of a Village of East Hampton home improvement license if required by CPLR 3015(e). The fact remains that the statute does not require same, if the plaintiff has demonstrated that he possesses a home improvement license contract from the County of Suffolk, which he does, and which fact is undisputed in this matter. Accordingly, the individual defendant is not entitled to a dismissal of the instant Complaint under CPLR 3015, and may pursue the remedies available to her under the Village Code or elsewhere.

ORDERED, that the parties are directed to appear for a Preliminary Conference to be held at the Courthouse, One Court Street, Room A201, Riverhead, New York at 9:30 a.m. on January 8, 2009.

The foregoing constitutes the Order of this Court.

Dated: December 8, 2008

DENISE F. MOLIA

HON. DENISE F. MOLIA J.S.C.