

**R & M Alterations, Inc. v Erker**

2009 NY Slip Op 30894(U)

April 16, 2009

Supreme Court, Nassau County

Docket Number: 18409/07

Judge: Daniel R. Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----X  
**R & M ALTERATIONS, INC.,**

**TRIAL TERM PART: 47**

**Plaintiff,**

**-against-**

**INDEX NO.:18409/07**

**MOTION DATE:2-23-09  
SUBMIT DATE:3-23-09  
SEQ. NUMBER - 001**

**FRANK ERKER, BETH ERKER, A/K/A FRANCIS  
ERKER, A/K/A ELIZABETH ERKER,**

**MOTION DATE: 3-4-09  
SUBMIT DATE: 3-23-09  
SEQ. NUMBER - 002**

**Defendants.**

-----X  
**FRANK ERKER and BETH ERKER,**

**Third-Party Plaintiffs**

**-against-**

**TOBY CAPUTI,**

**Third-Party Defendant.**

-----X

**The following papers have been read on this motion:**

- Notice of Motion, dated 2-2-09.....1**
- Notice of Cross Motion, dated 2-20-09.....2**
- Reply Affirmation in support of Motion and in  
Opposition to Cross Motion, dated 3-9-09.....3**

This motion by defendants Frank Erker, Beth Erker, a/k/a Francis Erker, a/k/a Elizabeth Erker for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is denied.

This cross-motion by plaintiff R & M Alterations, Inc., for an order pursuant to CPLR 3025(b) granting it permission to amend its complaint in the form annexed to the cross motion is granted, and is deemed served as of the date of this order.

This is an action to recover damages for breach of a home improvement contract. The plaintiff has also advanced claims for unjust enrichment and account stated. The defendant homeowners have counterclaimed for, *inter alia*, breach of contract.

The defendants presently seek dismissal of the complaint pursuant to CPLR 3212 on several grounds: They allege: (1) that they did not enter into a home improvement agreement with the plaintiff "R & M Alterations, Inc.," but rather, with "R. M. Alterations, Inc.;" (2) that R. M. Alterations is not licensed in Nassau County as is required by Section 21-11.2 of the Nassau County Administrative Code and therefore may not enforce its contract; (3) that the plaintiff failed to comply with CPLR 3015(e) which requires that businesses which are required to be licensed by the Nassau County Department of Consumer Affairs allege in their complaint that they are duly licensed and to set forth the name and number of their license, as well as the name of the issuing governmental agency; and, (4) that their home improvement agreement violated Section 21-11.9.13 of the Nassau County Administrative Code which requires that it contain a notice of the buyers' right to cancel.

The plaintiffs seek leave to amend their complaint to comply with CPLR 3015(e).

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact."

*Sheppard-Mobley v King*, 10 AD3d 70, 74 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627

(2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King*, *supra*, at p. 74; *Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp.*, *supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 (2d Dept. 2006), citing *Secof v Greens Condominium*, 158 AD2d 591 (2d Dept. 1990).

In their Answer, the defendants "admitt[ed] that Plaintiff and Defendants entered into agreements with respect to the construction of improvements at [their] house located at 44 Robin Road in Westbury, New York;" "[t]hat on or after November 20, 2006 the plaintiff did provide work, labor, and materials at the subject premises for [their] benefit;" and, "[t]hat at [their] specific insistence and request . . . the plaintiff provided work, labor and materials to the subject premises." In addition, in support of their First Affirmative Defense alleging breach of contract, the defendants allege, *inter alia*, that "[o]n or about November 2006, [they] engaged Plaintiff to provide labor and materials to construct two bedrooms on the second floor of the Premises and to perform certain other services in connection with the construction of improvements to the Premises." In support of their Second Affirmative Defense alleging that the plaintiff performed work which they did not authorize, the defendants allege, *inter alia*, that the "[p]laintiff performed additional work

that [they] were unaware of and which was not authorized by [them] in advance and the amount sought by Plaintiff included that unauthorized additional work." In support of their Third Affirmative Defense alleging that the plaintiff failed to comply with CPLR 3015(e), the defendants allege, *inter alia*, that the "[p]laintiff performed services as a home improvement contractor." In response to the plaintiff's account stated claim, in support of their Fourth Affirmative Defense, the defendants allege that "[they] have disputed Plaintiff's entitlement to the additional sums sought in the Complaint." In support of their Fifth Affirmative Defense, the defendants allege that "[p]laintiff failed to perform the Work with the due care required and directly or through its employees or subcontractors was negligent in the performance of the Work." And, in support of their Sixth Affirmative Defense, the defendants allege that "[a]ny damages claimed by Plaintiff were caused in whole or in part by [its] own acts of commission or omission." And, the defendants filed a complaint against the plaintiff with the Nassau County Department of Consumer Affairs.

The defendants are bound by their admissions as well as the allegations in their Answer. "Facts admitted by a party's pleadings constitute judicial admissions." *Falkowski v 81 and 3 of Watertown, Inc.*, 288 AD2d 890, 891 (4<sup>th</sup> Dept. 2001), citing Prince, Richardson on Evidence § 8-215 at 523-524 (Farrell 11<sup>th</sup> ed). A fact affirmatively pleaded by plaintiff in his complaint and admitted by defendants in their answer is not in controversy. *Urraro v Green*, 106 AD2d 567 (2<sup>nd</sup> Dept. 1984); *see also, Evans v Ithaca Urban Renewal Agency*, 205 AD2d 844 (3<sup>rd</sup> Dept. 1994); *Friedman v Blaunder*, 219 App.Div. 326 (1<sup>st</sup> Dept. 1927). As the Court of Appeals long ago stated, "the allegations

of the complaint, admitted by the answer must be taken as true (citations omitted)."

*Thompson v Postal Life Ins. Co.*, 226 NY 363, 368 (1919). Accordingly, the submission of the pleadings undermines any *prima facie* showing with regard to the absence of a contract between the parties, irrespective of the the strength of the opposing papers.

*Sheppard-Mobley v King, supra.*

In any event, "[I]t has long been held that 'a corporation may be known by several names in the transaction of its business, and it may enforce and be bound by contracts entered into in an adopted name other than the regular name under which it was incorporated.' " *Harmon v Ivy Walk, Inc.*, 48 AD3d 344 (1<sup>st</sup> Dept. 2008), *lv den.*, 11 NY3d 702, *citing Mail & Express Co., Inc. v Parker Axles, Inc.*, 204 AppDiv 327, 329 [1923]. "This is particularly true where there is no confusion as to the parties involved in the contract." *Harmon v Ivy Walk, Inc., supra, citing R.P.I. Servs., Inc. v Eisenberg*, 29 AD3d 459 (2006). That is the case here, as "R & M Alterations" and "R.M. Alterations" had the same principals, offices and contact information, factors noted as important by the *Harmon* court.

Further, in view of the foregoing the Court cannot hold, as a matter of law, that the defendants were dealing with an unlicensed contractor because there is no dispute that plaintiff R&M Alterations, Inc. was in fact licensed as required by the Nassau County Administrative Code. This also means that an amendment to the complaint to allege the license should be granted. Where a plaintiff had the required license when the work was performed, as well as when the suit was brought but failed to plead those facts, an

amendment is permitted. *See*, Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C:3015:6, p. 55; *B & F Bldg. v Liebig*, 76 NY2d 689 (1990). The plaintiff's application to amend its complaint to comply with the requirements of CPLR 3015(e) therefore is granted. *Pepe v Tannenbaum*, 262 AD2d 381, 382 (2<sup>nd</sup> Dept. 1999).


Finally, the plaintiffs' failure to include the defendants' cancellation rights in the parties' contract as is required by Nassau County Administrative Code § 21-11.9.13 does not result in its forfeiture of its right to enforce its contract. It simply extends the defendants' cancellation rights. *See, Rossi v 21<sup>st</sup> Century Concepts, Inc.*, 162 Misc2d 932 (N.Y. City Ct. 1994).

All parties are reminded of the previously scheduled certification conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on June 2, 2009, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

E N T E R

DATED: April 16, 2009

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Edward R. Young & Associates  
Attorneys for Plaintiff  
112 Route 109  
West Babylon, NY 11704**

**ENTERED**  
APR 20 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE