

**Saratoga Assoc. Landscape Architects, Architects,
Engrs. & Planners, P.C. v Lauter Dev.
Group**

2009 NY Slip Op 32274(U)

October 6, 2009

Supreme Court, Albany County

Docket Number: 2322-09

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

SARATOGA ASSOCIATES LANDSCAPE
ARCHITECTS, ARCHITECTS, ENGINEERS
AND PLANNERS, P.C.,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 2322-09
RJI NO. 01-09-097106

THE LAUTER DEVELOPMENT GROUP,
SANFORD ZIMMERMAN and ABODE BLUE
CHIP, L.L.C.,

Defendants.

Supreme Court Albany County All Purpose Term, October 2, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Breakell Law Firm, PC
Paul Marthy, Esq.
Attorneys for Defendants Lauter Development Group and Sanford Zimmerman
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TERESI, J.:

By written Agreement, dated June 20, 2008, (hereinafter the "Agreement") Plaintiff

contracted with “The Lauter Development Group” (hereinafter “Lauter”) to provide architectural, and related, services for Lauter’s proposed development of a parcel of real property owned by Abode Blue Chip, LLC (hereinafter “Abode”). Sanford Zimmerman (hereinafter Zimmerman”), a member of “Lauter Development Group, LLC”, signed the Agreement on behalf of Lauter. It is uncontested, on this record, that Plaintiff performed its obligations under the Agreement but was not fully paid for its services.

Plaintiff commenced this action against Lauter and Zimmerman setting forth causes of action sounding in breach of contract, failure to pay for professional services performed, account stated and fraud. Lauter and Zimmerman answered, set forth specific denials, affirmative defenses and a counterclaim. Plaintiff’s complaint also sought to foreclose the mechanics’ lien it filed against Abode’s property. Abode answered and set forth a counterclaim, as is relevant to this motion, seeking damages pursuant to Lien Law §39-a. Discovery is ongoing.

Zimmerman now moves for summary judgment dismissing Plaintiff’s complaint against him individually. Plaintiff opposes the motion, moves to amend its complaint and moves for summary judgment dismissing Abode’s Lien Law §39-a counterclaim. Zimmerman, Lauter and Abode all oppose Plaintiff’s motion. Because Zimmerman failed to demonstrate his entitlement to judgment as a matter of law, his motion for summary judgment is denied. Plaintiff, however, demonstrated its entitlement to both summary judgment and to amend its complaint, in part.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). Moreover, all evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 AD3d 835 [3d Dept. 2005]).

“To succeed on a motion for summary judgment, the movant is required to establish its entitlement to judgment as a matter of law by demonstrating that there are no questions of fact, shifting the burden to the nonmovant to raise a question of fact requiring a trial.” (Lynch v. Liberty Mut. Fire Ins. Co., 58 AD3d 939, 940 [3d Dept. 2009]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). “[A]n affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden” (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384-85 [2005]). Rather, the motion must be supported by a “person having knowledge of the facts” or other “admissible proof”. (CPLR §3212(b) and Alvarez, supra). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]).

Zimmerman’ summary judgment motion claims that he is not personally liable under the Agreement because the Limited Liability Company Law shields him from liability. LLCL §609(a) provides that: “[n]either a member of a limited liability company, [nor] a manager... is liable for any debts, obligations or liabilities of the limited liability company... solely by reason of being such member, [or] manager...” In support of his motion, Zimmerman submits his own affidavit in which he denies entering into a contract with Plaintiff in his individual capacity, denies guaranteeing the Agreement and denies assuming the debt under the Agreement. He also supports his motion with a copy of the Agreement¹.

¹ A alleged “proposal” was improperly and without explanation attached to Zimmerman’s attorney’s affirmation and not adopted by Zimmerman. As such, it constitutes inadmissible hearsay and is not considered. Moreover, even if such proposal was considered, it fails to sufficiently support Zimmerman’s motion.

Despite Zimmerman's denials, his moving papers fail to demonstrate his entitlement to judgment as a matter of law. Importantly, the Agreement submitted shows that it was entered into by "The Lauter Development Group", not the limited liability company Zimmerman is a member of, i.e. "Lauter Development Group, LLC". Nor did Zimmerman execute the Agreement as a member of the limited liability company; but rather, executed it without specifying his title. Viewing these unexplained discrepancies in the formation of the Agreement in a light most favorable to Plaintiff, on this record Zimmerman failed to demonstrate, as a matter of law, that the Agreement was entered into between Plaintiff and Lauter Development Group, LLC. Zimmerman's moving papers also failed to address Plaintiff's fraud cause of action, a claim which would not be shielded by the Limited Liability Company Law. (Rothstein v. Equity Ventures, LLC, 299 AD2d 472 [2d Dept. 2002]).

While Zimmerman's attorney's Reply claims that Plaintiff's fraud cause of action fails the specificity requirement of CPLR §3016[b], improperly attempts to introduce additional proof that the Agreement was entered by Lauter Development Group, LLC and presents an additional legal argument, it fails to properly support his motion for summary judgment. Zimmerman's Reply is "an improper vehicle for raising new arguments to the court" and he has failed to demonstrate his entitlement to summary judgment as a matter of law. (Albany County Dept. of Social Services v. Rossi, 62 AD3d 1049 [3d Dept. 2009]). Accordingly, Zimmerman's motion for summary judgment is denied.

Turning to Plaintiff's motion for summary judgment, Plaintiff demonstrated its entitlement to judgment as a matter of law dismissing Abode's Lien Law §39-a counterclaim. Lien Law §39-a states that: "Where in any action or proceeding to enforce a mechanic's lien upon

a private... improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor.” (emphasis added). It is well established that “Lien Law §39-a is penal in nature and therefore must be strictly construed in favor of the person upon whom the penalty is sought to be imposed.” (Pyramid Champlain Co. v. R.P. Brosseau & Co., 267 AD2d 539 [3d Dept. 1999]). “As a result, there can be no liability under this provision by implication of fact or law.” (Wellbilt Equipment Corp. v. Fireman, 275 AD2d 162 [1st Dept. 2000]). The case law establishes that “damages may not be awarded under [Lien Law] section 39-a unless the lien has been discharged for willful exaggeration.” (Pyramid Champlain Co., supra; Joe Smith, Inc. v. Otis-Charles Corp., 279 AD 1 [4th Dept. 1951]).

Here, Plaintiff established its entitlement to judgment as a matter of law dismissing Abode’s Lien Law §39-a counterclaim and no issue of fact was raised. In this Court’s prior Decision and Order, dated July 25, 2009, Plaintiff’s lien was discharged because Plaintiff failed “to obtain Abode’s ‘consent’ to its work.” This was a “non-consent [discharge] not a ‘wilful exaggeration’ discharge.” As such, Abode cannot establish that Plaintiff’s lien was discharged for “wilful exaggeration” because it has already been discharged due to “non-consent”. Accordingly, Plaintiff demonstrated its entitlement to judgment as a matter of law, Abode is precluded from recovering under Lien Law §39-a or raising an issue of fact and Plaintiff’s motion for summary judgment of this claim is granted.

Plaintiff failed, however, to demonstrate its entitlement to all of the amendments it seeks. It is well settled that “[p]rovided that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit, leave to amend pleadings under CPLR §3025(b)

should be freely granted.” (Smith v. Haggerty, 16 AD3d 967, 967-68 [3d Dept. 2005]; see also Ciarelli v. Lynch, 46 AD3d 1039, 1040 [3d Dept. 2007]; Adirondack Combustion Tech., Inc. v Unicontrol, Inc., 17 AD3d 825, 826 [3d Dept. 2005]). “In determining the merit of the proposed amendment, [the court] must accept as true the facts alleged and draw all reasonable inferences in favor of [the movant].” (Shelton v. New York State Liquor Authority, 61 AD3d 1145, 1149 [3d Dept. 2009]).

On this record, no prejudice has been demonstrated and a portion of Plaintiff’s amended complaint is not “plainly lacking in merit”. Plaintiff’s amended complaint seeks to add additional allegations to its previously set forth fraud cause of action (its fifth cause of action). The merit of the additional fraud allegations are not challenged. Instead, such amendment is objected to on the ground that the “new facts” discovered after commencement of this action are not specified. Such objection is irrelevant and fails to demonstrate a ground for denial of Plaintiff’s proposed amendment. Accordingly, Plaintiff’s motion to amend its fifth cause of action is granted.

Defendants have, however, demonstrated that Plaintiff’s new sixth cause of action, which alleges an oral promise to pay another’s debt, and its first cause of action, lack merit. Lauter and Zimmerman correctly claim that GOL §5-701(a)(2) prohibits the enforcement of Zimmerman’s alleged oral promise to pay the debt of Lauter. An exception to GOL §5-701(a)(2)’s writing requirement can be established, however, “where [the promise] is supported by new and beneficial consideration to the promisor, and where the parties intend that the promisor is to become primarily liable on the debt.” (Pyramid Champlain Co., supra at 543; Martin Roofing, Inc. v. Goldstein, 60 NY2d 262 [1983]). Accepting as true the facts alleged in Plaintiff’s

amended complaint and drawing all reasonable inferences in favor of Plaintiff, the amended complaint fails to allege “new and beneficial consideration” to Zimmerman. The amended complaint only alleges Plaintiff’s continued performance under the prior contract between Plaintiff and Lauter, and new “consideration may not rest upon plaintiff’s return to work.” (Martin Roofing, Inc., supra at 266). Nor does the amended complaint allege that the “parties intend[ed] that [Zimmerman was] to become primarily liable on the debt.” (Pyramid Champlain Co., supra). Without such allegations the amended complaint fails to properly set forth a cause of action alleging an oral agreement to pay the debt of another, and that portion of the amended complaint is “plainly lacking in merit”. Nor is the doctrine of part performance available to excuse the lack of a writing deemed unenforceable under GOL §5-701. (Valentino v. Davis, 270 AD2d 635 [3d Dept. 2000]). Moreover, because Plaintiff’s amended complaint’s first cause of action was previously dismissed by this Court’s Decision and Order, dated July 25, 2009, it is also “plainly lacking in merit.” Accordingly, Plaintiff’s motion to amend its sixth and first causes of action is denied.

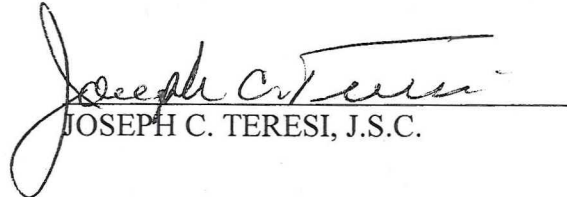
Plaintiff shall serve its amended complaint, within twenty days of the date of this Decision and Order, with its first and sixth causes of action stricken therefrom.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 6, 2009
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 11, 2009; Affidavit of Sanford Zimmerman, dated August 10, 2009 with attached Exhibits "A" - "C"; Affidavit of Paul Marthy, dated August 10, 2009, with attached Exhibits "A" - "G";
2. Notice of Motion, dated September 9, 2009, Affidavit of Robert Bristol, dated September 9, 2009, Affidavit of Gregg Ursprung, dated September 9, 2009, Affidavit of Donald Minnery, dated September 9, 2009 with attached Exhibits "A" - "K".
3. Affidavit of Neil Levine, undated.
4. Affidavit of Sean Wettig, dated September 25, 2009 with attached Exhibit "1".
5. Affirmation of Donna Wardlaw, dated October 1, 2009, Affidavit of Robert Bristol, dated October 1, 2009, Affidavit of Donald Minnery, dated October 1, 2009, with attached Exhibit "A".