

O'Neill & Son, Inc. v Serrone

2009 NY Slip Op 32742(U)

November 5, 2009

Supreme Court, Suffolk County

Docket Number: 21476/2007

Judge: Emily Pines

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

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 06-30-2009

Motion Submit Date: 09-09-2009

Motion Sequence No.: 003 MD

_____ X
O'NEILL & SON, INC.,

Plaintiff,

-against-

JANICE SERRONE,

Defendant.

_____ X

Attorney for Plaintiff

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One Old Country Road, Suite 276
Carle Place, New York 11514-1845

Attorney for Defendant

Zisholtz & Zisholtz, LLP
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ORDERED, that the motion (motion sequence number 003) by defendant for summary judgment or partial summary judgment is denied; and it is further

ORDERED, that this matter is scheduled for jury selection on January 7, 2010 and the trial shall begin on January 11, 2010.

Plaintiff commenced this action seeking foreclosure of a mechanic's lien by the filing of a Summons and Verified Complaint on or about June 19, 2007 and issue was joined by defendant's service of a Verified Answer dated October 2, 2007. The action arises out of the relationship between the parties wherein plaintiff performed certain construction work for the defendant on the property located at 5 Canal Way, Southampton, New York (the "subject premises"). The Complaint alleges that the parties entered into an agreement wherein plaintiff was to furnish labor and material to defendant to construct a one-family dwelling on the subject premises. Complaint at ¶4. Plaintiff states in the Complaint that it performed labor and services for defendant in the sum of \$333,291.35, that the sum of \$121,075.94 remains due and owing and that it filed a lien on the subject premises. Complaint at ¶'s 7, 11. See also, Notice of Mechanic's Lien, dated March 9, 2007, annexed as Exhibit "L" to the moving papers. Plaintiff also asserts that the amount of \$23,400.00 is due and owing as a result of defendant's failure to allow

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plaintiff to complete the work on the subject premises. Complaint at ¶18.

Defendant now moves for summary judgment or partial summary judgment dismissing the complaint, discharging the mechanic's lien and canceling the Notice of Pendency on the grounds that plaintiff failed to satisfy its obligations under CPLR §3015(e), General Business Law §771 and Lien Law §§10 and 38. Specifically, defendant states that (1) plaintiff performed certain construction services at the subject premises; (2) that she paid plaintiff the total sum of \$274,676.90; and (3) the parties never had a written agreement. Defendant states that plaintiff delayed construction, demanded additional funds and ceased performance on the job when she refused to tender additional funds. Defendant states that she has counterclaimed in the sum of approximately \$163,000.00 on the grounds that the renovations were not completed and/or were done in a negligent manner requiring her to retain other contractors to finish the work.

Defendant first claims that plaintiff is barred from recovery pursuant to CPLR §3015(e) because it failed to allege in the Complaint that it is a licensed home improvement contractor in Suffolk County. Defendant claims that she has requested a copy of plaintiff's license in two discovery demands but that plaintiff has failed to produce any license. Therefore, defendant asserts that plaintiff is an unlicensed contractor and as such, is barred from recovery for either breach of contract or under theories of quantum meruit and unjust enrichment.

Next, defendant claims that plaintiff cannot recover in this case because the parties never executed a home improvement contract as required by General Business Law §771 and Southampton Town Code §143. Here, defendant asserts that the parties never entered into a written agreement and there was no meeting of the minds as to the terms of any agreement. Defendant also claims there were numerous deficiencies in plaintiff's performance, including inadequate and incomplete renovations.

Defendant also claims that pursuant to Lien Law §38, she served plaintiff with a Demand for Itemized Statement but that plaintiff has failed to comply in that the Itemized Statement provided is not verified and does not contain the terms of the contract. Additionally, defendant states that plaintiff has refused to provide an adequate accounting and thus has failed to support its claims as set forth in the mechanic's lien. Defendant also states that pursuant to Lien Law §8 she served a Demand for Terms of Contract but that plaintiff never responded. Defendant further asserts that the Notice of Mechanic's Lien was not timely filed pursuant to Lien Law §10 in that it was filed more than four months from the last day of work, labor or services provided.

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Based on the foregoing, defendant seeks dismissal of the Complaint, discharge of the mechanic's lien and cancellation of the Notice of Pendency.

Plaintiff opposes the motion by affidavit of Charles Timothy O'Neill ("O'Neill"), president of the plaintiff corporation. Although O'Neill admits that the parties never entered into a written contract, he states that the reason for this was that defendant continuously changed her mind as to what she wanted, defendant was using the services of an architect and abruptly changed the locks on the subject premises in November of 2006 so defendant could not complete the work. O'Neill states that plaintiff is a licensed home improvement contractor in the Town of Southampton and attaches copies of its licenses which he claims had previously been provided in response to defendant's discovery demands. O'Neill also states that plaintiff is licensed by the Suffolk County Office of Consumer Affairs as a home improvement contractor and attaches copies of the license and the renewal thereof. To the extent plaintiff was required to plead that it was licensed, it seeks leave to amend its Complaint for that purpose.

With regard to the failure to have entered into a written contract, O'Neill asserts that he provided defendant with regular invoices and proposals (actually annexed to defendant's motion papers) which demonstrate defendant was aware of the work that was being performed and she intended to enter into a contract with plaintiff. He further notes that there are notices of cancellation on the proposal which advise defendant of her right to cancel the work. O'Neill also states that due to a familial relationship between the parties, he attempted to keep defendant's costs down and was accommodating when defendant changed her mind about the work she wanted performed. In sum, plaintiff argues that there was clearly a meeting of the minds despite the existence of a formal, signed contract as evidenced by the checks defendant delivered to plaintiff and her acceptance of the work performed. Additionally, plaintiff argues that GBL §771 does not bar recovery in quantum meruit or unjust enrichment for labor and materials on a home improvement project despite the lack of a written agreement.

Turning to the timeliness of the filing of the Notice of Mechanic's Lien, plaintiff states that it was filed within the requisite four month time period as work was still being performed at the end of November, 2006. O'Neill further explains that with regard to the Itemized Statement, plaintiff provided same in April of 2008 and thus not objected to, but he does acknowledge that it was inadvertently not verified. Likewise, plaintiff argues that the Notice of Mechanic's Lien is not defective and moreover, defendant did not challenge it until more than two years from its filing. Based on all of the foregoing,

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plaintiff argues that there are questions of fact as to whether it properly performed the work and whether there was an agreement between the parties, thus precluding summary judgment.

Defendant submits a reply affirmation by her counsel who reiterates the claim that plaintiff failed to comply with GBL §771 and Lien Law §§10 and 38. Additionally, plaintiff claims that plaintiff has failed to raise a triable issue of fact that it did not timely file the Notice of Mechanic's Lien nor provide defendant with a sufficient accounting. Defendant argues that there are no issues of fact and summary judgment should be granted dismissing the action.

Plaintiff has filed a supplemental affidavit in opposition to the motion wherein it attaches a detailed statement of expenses and payments and reflecting a balance due of \$181,748.69.

The law is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. *Goldberger v. Brick & Ballerstein, Inc.*, 217 AD2d 682, 629 NYS2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. *Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713, 641 NYS2d 701 (2d Dept. 1996). Bald conclusory assertions are insufficient to defeat a motion for summary judgment. *Orange County-Poughkeepsie Ltd Partnership v. Bonte*, 37 AD3d 684, 830 NYS2d 571 (2d Dep't 2007). "It is not up to the court to determine issues of credibility or the probability of success on the merits, but rather to determine whether there exists a genuine issue of fact." *Triangle Fire Protection Corp. v. Manufacturer's Hanover Trust Co.*, 172 AD2d 658, 570 NYS2d 960 (2d Dept. 1991). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Scott v. Long Island Power Auth.*, 294 AD2d 348, 741 NYS2d 708 (2d Dept. 2002).

General Business Law §771 provides in relevant part that:

- (1) Every home improvement contract subject to the provisions of this article, and all amendments thereto, shall be evidenced by a writing and shall be signed by all the parties to the contract.

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That provision further provides the items to be contained within the writing, including the approximate dates of when the project will begin and be substantially completed, a description of the work and materials to be provided and the agreed upon consideration.

Notwithstanding this provision, Courts have held that the failure to comply with this requirement does not operate as a complete bar to recovery by the contractor where the contract has been substantially performed and there was a meeting of the minds. *See, e.g., Island Wide Heating & Air Conditioning v. Sachs*, 189 Misc.2d 355, 732 NYS2d 824 (App. Term 2d Dept. 2001).

Lien Law §10(1) requires that a Notice of Mechanic's Lien can be filed at any time during the progress of the work or within four (4) months after completion of the contract or the final performance of work. Lien Law §38 requires in part that:

A lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms fo the contract under which such items were furnished. The statement shall be verified by the lienor or his agent in the form required for the verification of notices in section nine of this chapter. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court of this state ...for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section.

In the case at bar, defendant has not met her initial burden of demonstrating the absence of a material fact warranting dismissal. While plaintiff concedes that there was no written contract between the parties as required by GBL §771, there is a question of fact as to whether the parties agreed as to the construction work to be performed by plaintiff on the subject premises. The proposals by plaintiff and checks tendered by defendant reflect that the parties agreed to some work to be performed, however, the scope of that work and the quality of work performed, are questions of fact precluding summary judgment. Thus, notwithstanding the absence of a written agreement, plaintiff may still be able to recover under theories of quantum meruit or unjust enrichment. Additionally, contrary to defendant's allegations, the submissions reflect that plaintiff was licensed as a home improvement contractor by both the Town of Southampton and Suffolk County Office of Consumer Affairs.

With regard to the timeliness of the filing of the Notice of Mechanic's Lien, questions of fact exist as to when plaintiff last performed work on the project, triggering the four month time period. Finally, plaintiff has submitted an Itemized Statement, although challenged by defendant as to its


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content. The question of the amounts due, if any, is also for the trier of fact.

Based on the foregoing, defendant's motion for summary judgment is denied and this matter is scheduled for trial on January 7, 2010.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: November 5, 2009
Riverhead, New York



EMILY PINES
J. S. C.