

Singh v R.S.N. Constr. Co., Inc.

2010 NY Slip Op 30088(U)

January 7, 2010

Supreme Court, Nassau County

Docket Number: 017710/06

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

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

Present:

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

-----x
GURNAM SINGH,

Plaintiff,

-against-

**R.S.N. CONSTRUCTION CO., INC. and
JASWANT SINGH,**

Defendant.

-----x

TRIAL PART: 45

INDEX NO.:017710/06

MOTION DATE:10-16-09

SUBMIT DATE:12-3-09

SEQ. NUMBER - 002

The following papers have been read on this motion:

- Notice of Motion, dated 9-23-09.....1**
- Exhibit Book.....2**
- Affirmation in Opposition, dated 11-11-09.....3**
- Exhibits in Opposition.....4**
- Reply Affirmation, dated 12-1-09.....5**

This motion by defendants R.S.N. Construction Co., Inc. ("R.S.N. Construction") and Jaswant Singh for an order pursuant to CPLR 3212 granting Jaswant Singh summary judgment dismissing the complaint against him personally and an order pursuant to CPLR 3212(e) granting R.S.N. Construction Co., Inc., summary judgment dismissing the claim pursuant to Nassau County Administrative Code is denied.

On November 30, 2005, the plaintiff and the defendant R.S.N. Construction entered into an agreement whereby R.S.N. Construction agreed to build the plaintiff "a new one family dwelling" at 62 Stirrup Lane in Roslyn Heights at an agreed upon base

price of \$835,000. On September 26, 2006, the plaintiff terminated the contract, at which time the plaintiff had advanced R.S.N. Construction \$605,000 of the agreed upon price. In this action, the plaintiff asserts a breach of contract claim against R.S.N. Construction in the sum of \$523,000. The plaintiff alleges that \$283,000 of the \$605,000 paid to the defendant R.S.N. Construction, was not applied to the materials and labor to construct his house. Based on that, he also seeks to recover of the individual defendant pursuant to his personal guaranty. Their contract provided:

Should the contractor [RSN] materially default in its performance under this contract, * Jaswant Singh personally guarantees the sums advanced by the Owner to the extent the sums advanced have not been applied to the materials and labor to construct the home.

* becomes insolvent or bankrupt or fails to complete work he has been compensated for based on schedule I.

R.S.N. Construction has counterclaimed for breach of contract as well as *quantum meruit*.

The defendants seek dismissal of the alleged claim pursuant to the Nassau County Administrative Code. Defendant Singh seeks dismissal of the claim seeking to enforce his personal guaranty. Whether or not either side breached the contract is not an issue on this motion.

"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).

"[A]verments merely stating conclusions, of fact or of law, are insufficient" to defeat summary judgment. *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 (1973); *see, Ehrlich v Americana Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 (1970); *see also, Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381 (2004).

Contrary to the defendants' representations, the plaintiff has not advanced a claim or a defense pursuant to Section 21-11.1 of the Nassau County Administrative Code predicated upon the lack of a contractor's license. In fact, under that Code, a license is not necessary to construct a new home. Nassau County Administrative Code § 21-11.1(3). The mere allegation of a lack of a license is not sufficiently scandalous or prejudicial so as to warrant striking it pursuant to CPLR 3024(b). Whether evidence of not having a contractor's license is relevant and admissible is deferred to the trial court.

In support of his motion, defendant Singh has submitted an affidavit in which he attests that "the monies paid by Gurnam Singh to R.S.N. Construction were all applied to the material and labor involved in constructing the new house at 62 Stirrup Lane." He has submitted checks representing payments allegedly made to subcontractors and suppliers on the project totaling \$394,461.81. He has also submitted receipts from Springstone Concrete in the amount of \$55,500, Herrera's Carpentry Corp. for \$15,000, and Blackman Plumbing Supply for \$5,754.63. In addition, he personally attests that R.S.N. Construction performed sanding and priming of the interior walls at a cost of \$6,500 and installed interior doors at a cost of \$3,500 and has additionally submitted invoices, along with credit card payments, from Accent-Supply and Pioneer Building Materials Corp. totaling \$14,345.89. In an effort to establish R.S.N. Construction's additional expenditures of funds on the plaintiff's house, defendant Singh attests that because the plaintiff paid it in cash, R.S.N. Construction paid Dellilo Construction \$65,000 in cash to perform framing and wrapping of the house with Tyvek or other protective wrap and window installation. He has submitted photographs to establish that that work was done. He also attests that he paid \$11,500.00 cash to John Flooring for hardwood floors; \$6,000.00 to Wagner Roofing for roof installation; \$23,000.00 to Belmont Construction for brickwork; \$8,000.00 to Tony Stairs for stair installation; \$10,000.00 to AA Drywall for sheetrock and compoundry; \$21,340.00 to AH Construction for excavation and backfilling; and, \$3,500.00 to Metro Vacuum for rough-in of vacuum system, for a total of \$83,340.00 in cash. Thus, he attests to having expended a total of \$643,403.33 on the

construction of the plaintiff's home, thereby exceeding the \$605,000 forwarded by the plaintiff and absolving him of liability pursuant to his personal guaranty.

The defendant Singh has not established his entitlement to summary judgment and his motion is denied. His bald allegations that R.S.N. Construction made significant substantial cash payments, standing alone, does not under the circumstances extant establish his defense as a matter of law. In fact, it does no more than create an issue of fact as to whether all of the funds the plaintiff advanced to R.S.N. Construction were expended on the plaintiff's house. A trial is necessary. *See, Botocska v Garanvolgyi*, 16 Misc3d 133(A) (Appellate Term 9th and 10th Judicial District 2007); *Botocska v Garanvolgyi*, 25 Misc3d 127(A) (Appellate Term 9th and 10th Judicial District 2009); *Jara v Strong Steel Door, Inc.*, 20 Misc3d 1135(A) (Supreme Court Kings County 2008). In any event, plaintiff, in opposition, has submitted competent evidence to raise an issue of fact as to whether the materials which defendant claims were purchased for the construction were actually incorporated into the work and if so, whether they failed to meet specifications and acceptable standards of workmanship. Included in the foregoing are issues raised as to whether plaintiff's job site was used as a staging area for materials to be directed elsewhere, the failure to submit evidence connecting materials to plaintiff's project, and copies of bills representing substantial expenditures made by plaintiff to cure or complete the work.

The Court has not considered the reports of plaintiff's expert engineer since they are not in affidavit form and are thus hearsay. *Raux v. City of Utica*, 59 AD3d 984 (4th Dept. 2009); *Stankowski v. Kim*, 286 AD2d 282 (1st Dept. 2001).

Based on the foregoing, the motion is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 7, 2010



HON. DANIEL PALMIERI
Acting Supreme Court Justice

**TO: David L. Smith, Esq.
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ENTERED
JAN 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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