

**Nirac Realty, Inc. v A. Prokosch & Sons Sheet Metal, Inc.**

2010 NY Slip Op 30105(U)

January 15, 2010

Supreme Court, New York County

Docket Number: 602854/05

Judge: Louis B. York

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

**PRESENT: Hon. LOUIS B. YORK**

**PART 2**

**Justice**

-----X

**NIRAC REALTY, INC.,**

Plaintiff,

-against-

Index No. 602854/05

Motion Date \_\_\_\_\_

Motion Seq. No. 006

Motion Cal. No. \_\_\_\_\_

**A. PROKOSCH & SONS SHEET METAL, INC., SURE  
TEMP CORPORATION, SURE-TEMP HEATING &  
AIR CONDITIONING CORP., SURE-TEMP  
MECHANICAL CORP, SURE TEMP SERVICE CORP.,  
SURE TEMP AUTOMATIC SYSTEMS, INC., SURE  
TEMP SUPPLY CORP., RONALD SOFIA, Individually,  
DOUGLAS TOMPKINS, Individually, and BRUCE SIMPSON,  
Individually,**

Defendants.

-----X

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for Summary Jgmt.

**PAPERS**

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

**JAN 20 2010**

**NEW YORK  
COUNTY CLERK'S OFFICE**

This is an action for breach of contract, specific performance and fraudulent inducement to enter into the contract.

**Background**

Plaintiff moves for summary judgment on its breach of contract claim.

Prior to the motion, the Court awarded default judgments against all of the defendants except A. Prokosch & Sons Sheet Metal ("Prokosch"), Douglas Tompkins and Bruce

Simpson. The action has been discontinued against Douglas Tompkins. This motion, therefore, is addressed to Prokosch and Simpson.

### Motions

Defendant Bruce Simpson cross-moves to dismiss the causes of action for breach of contract and specific performance on the ground that he never entered into a contractual relation with plaintiff, and as to fraud, he claims the assertions of fraud are not sufficiently particularized to constitute an adequately pleaded cause of action and, in addition, he never negotiated any contract with plaintiff.

Defendants Prokosch and Tompkins move for an order extending discovery, which the Court summarily denies. This action has been active since early 2006. The disclosure deadline was January 4, 2008, and the Note of Issue was filed on January 14, 2009. Now that the time for disclosure has expired, as well as the Note of Issue having been filed nearly a year ago, and no motion to vacate it has been made, the Court will not extend disclosure. The Court notes that Prokosch also claims in the moving affidavit that additional grounds to dismiss are based on plaintiff's inability to prove damages, that damages and liability are too inter-related to justify bifurcating liability and damages, that expert testimony will be required, the cause of action for fraudulent inducement was not pled with particularity and the plaintiff's action for specific performance must be dismissed.

Plaintiff, Nirac Realty, hired non-party Sure Temp to design and install a geothermal heating system in connection with demolition of plaintiff's home and the construction of a new home.

None of the foregoing claims were set forth in Prokosch's Notice of Cross Motion, but they were responded to by plaintiff, and, therefore, the Court will entertain them. In defense to the contract claims, Prokosch responds that it did not have a contractual relationship with defendant and while it seeks to have the fraudulent inducement claim dismissed, its Notice of Cross Motion does not move for dismissal on this ground. Therefore, it has been improperly raised by affidavit. Movant has also raised the statute of frauds in the body of its complaint. However, it has waived this defense because it was not raised as an affirmative defense.

Prokosch also seeks to dismiss the specific performance claim, but once again, this claim was not set forth in plaintiff's Notice of Motion and, therefore, will not be considered.

### **Facts**

Defendant Sure Temp was to design and install the system and install instrumentation controlling the system. Sure Temp subcontracted the duct and sheet metal work to non-party CIT Mechanical, a company owned by former defendant Doug Tompkins. Sure Temp assigned defendant Bruce Simpson to the project. CIT apparently stopped functioning and Tompkins went to work for Prokosch. Thereafter, a dispute arose between Nirac and

Sure-Temp about payment and the quality of the work, and Sure Temp pulled Simpson from the work. This caused the work to stop.

This is where the parties' conclusions seem to differ. According to plaintiff, there was a meeting between Carin Trumble, a trustee of the trust that owned plaintiff, the owner of the property, her husband Ed Trundle, the G.C. in the person of George Boblen and Doug Tompkins and Bruce Simpson. According to the plaintiff's representatives, it was agreed that the contract with Sure Temp was cancelled and Tompkins and Simpson would take over the project. Simpson does not agree, and states that he has no recollection of being at such a meeting or agreeing to independently being retained for this assignment. He states that no one other than Sure Temp paid his salary while he was on the project. Tompkins states that the agreement was that he agreed to restart the work on behalf of Prokosch as a go-between between the plaintiff and Sure Temp.

Plaintiff points to an alleged contract via an e-mail dated January 31, 2005 sent to Doug Tompkins after the meeting, which it claims established a contract between it and Prokosch and Simpson because after that Simpson and Tompkins recommenced working on the project. The e-mail was very detailed (Ex. F of plaintiff's moving affidavit) as to the work to be done and the cost. Prokosch sent its own e-mail through Tompkins, a little earlier on the same day in which it set out its own work progress and payment schedule. Although neither side responded to the others work

and payment schedules, it is undisputed that as the work progressed, payments were made according to Prokosch's work and payments schedule.

Ultimately, Prokosch stopped working, alleging that plaintiff stopped paying. Plaintiff responds that it stopped paying because of the inferior quality of the work.

### **Decision**

This action is dismissed against Simpson. There is no evidence that Simpson received either the e-mail message sent by plaintiff or the fax sent to him by defendant Prokosch. All of the interaction was between plaintiff and Tompkins. There isn't even conclusive proof for plaintiff's allegation that Simpson participated in the talks bringing Simpson and Tompkins into returning to the project. No progress payments were sent to Simpson. There is no challenge to Simpson's statement that he was paid all along by Sure Temp and once Sure Temp stopped functioning he was without a job. That is what caused him to abandon the project. Consequently, there was no meeting of the minds on Simpson's part and hence no contract involving him that he could have breached.

Because of the uncertainty of whether the parties agreed that the e-mail or the fax was the controlling document, or whether the subsequent resumption of the work and the payments by plaintiff were sufficient acts to ratify the documents, the Court cannot determine whether there was a contract that could have been breached. But even if there was a contract, there is still a question of fact as to which of the litigants may have breached the contract.

The Court is unable to determine as a matter of law whether the work was so shoddy as to be a breach of contract or that defendant had substantially complied with the contract, entitling it to final payment, less, perhaps, a nominal deduction for any remaining items left to be completed. These are all issues that must be decided by the fact finder.

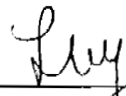
Accordingly, it is

**ORDERED** that this action is dismissed as against Bruce Simpson; and it is further

**ORDERED** that plaintiff Nirac Realty, Inc's. motion for summary judgment is denied.

Dated: 1/15/10

Enter:

  
\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
J.S.C.  
**FILED**  
JAN 20 2010  
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Check if appropriate:  DO NOT POST  REFERENCE