

**Proud Designs, Inc. v Whidden**

2010 NY Slip Op 31268(U)

May 10, 2010

Sup Ct, Nassau County

Docket Number: 9373/05

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

PROUD DESIGNS, INC. and GRETAR'S  
PLUMBING & HEATING, INC.,

TRIAL / IAS PART 29  
NASSAU COUNTY

Plaintiff,

Index No. 9373/05

- against -

Motion Sequence No. 002, 003

CHRISTOPHER WHIDDEN and KERI-ANN  
WHIDDEN,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1, 2</u>
Answering Affidavits .....	<u>3</u>
Replying Affidavits .....	<u>4</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendants move pursuant to CPLR 3212, 3025, 2304, and 3103 for summary judgment on liability and breach of contract, permitting the defendants to amend their answer, quashing subpoenas served by the plaintiffs, and for a protective order regarding discovery demands by the plaintiffs. The defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden states, in an October 22, 2009 affirmation, the underlying action involves a breach of contract regarding a residential home improvement contractor. The defense counsel for the defendants Christopher Whidden and Keri-Ann

Whidden points to the August 24, 2006 deposition testimony by Kenneth Coburg, the president of the plaintiff Proud Designs, Inc., and the October 21, 2009 affidavit by the defendant Christopher Whidden. The defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden notes the underlying action was stayed since March 2007, at plaintiffs' request during the pendency of a lengthy investigation by the Nassau County District Attorney's office regarding misappropriation of funds by Proud Designs, Inc. for the subject home improvement contract, and states the investigation ended according to plaintiff's counsel, so the stay should be lifted.

The defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden asserts Proud Designs, Inc., in detail, materially breached the agreement by misappropriating funds allocated for the subject residential home improvement project. The defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden avers the defendants are entitled to amend their answer to assert additional claims against Kenneth Kobarg, Marzia Kobarg, and James Vasallo, who are corporate officers of the plaintiff Proud Designs, Inc. The defendants seek personal liability against these corporate officers for the unauthorized transfers and abuse of escrow account money entrusted to the plaintiff Proud Designs, Inc., since they now formed a contracting company named Artisan. The defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden maintains the Court should quash the subpoenas served by the plaintiff regarding the defendants' personal banking accounts. The defense counsel for

the defendants Christopher Whidden and Keri-Ann Whidden remarks there is no dispute about the money deposited by the defendants into their account controlled by the plaintiff Proud Designs, Inc., and adds such personal banking records should only be received, if at all, for an *in camera* inspection to determine whether these records should be disclosed to the opposing side. The defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden states the Court should issue a protective order regarding discovery demands, and with respect to the plaintiff's supplemental request for the production of documents by the defense served by the plaintiff because such demands are irrelevant to this litigation. The defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden indicates the plaintiff's demand to photograph has no rational basis to the plaintiffs' claims.

The plaintiff Proud Designs, Inc. opposes this motion, and moves pursuant to CPLR 1003 and 3025 (a) to amend the caption by dropping Greter's Plumbing & Heating as a party pursuant to the Court's March 14, 2006 short form order, and grant leave to file an amended verified complaint which includes an amended damages calculation with compensatory damages, lost profit damages and punitive damages. The plaintiff's counsel states, in a January 8, 2010 affirmation, the procedural history of this case, adds the complaint must be amended to accurately reflect the contract between the parties, and to include additional damages, and points to the defendant Kenneth Kobarg's January 12, 2010 affidavit in support of this motion. The plaintiffs' counsel notes the change of

plaintiff's attorneys, and the baseless defense by the defendants. The plaintiff's counsel maintains the original complaint failed to request damages for lost profits and the margin on these matters, as well as punitive damages.

The plaintiff's counsel reiterates, more detail, in a January 12, 2010 affirmation, the circumstances of the April 6, 2004 written contract among the parties, and its aftermath, and the procedural history of the litigation. The plaintiff's counsel points out neither defendant had been deposed as of January 12, 2010, and there was other related criminal litigation. The plaintiff's counsel states the defense motion for summary judgment is premature, and violates the stay of the Court. The plaintiff's counsel contends the defendants are not entitled to summary judgment because they breached the April 6, 2004 written contract. The plaintiff's counsel states the defense request to amend the answer is procedurally deficient, and may be rendered moot by the plaintiff's motion to amend the complaint. The plaintiff's counsel indicates the defense will have to serve a third party summons or an amended third party summons, and implead the corporate officers except James Vasallo, who was never an officer nor a shareholder of Proud Designs, Inc., as shown in Vasallo's January 12, 2010 affidavit. The plaintiff's counsel argues a project fund bank account is not necessarily an escrow account, and if it is such the money is in escrow for the subcontractors. The plaintiff's counsel asserts the defendants have no standing to allege misconduct regarding other project fund bank accounts. The plaintiff's counsel avers the subpoenas should not be quashed, and no

protective order should issue. The plaintiff's counsel claims the plaintiff's discovery demands are relevant to the potential damages, and necessary to show payments by the defendants to the subcontractors, and the wrongful termination to save margin costs. The plaintiff's counsel claims photographs of the premises will demonstrate if additional work outside of the April 6, 2004 written contract was done, and if so whether the subcontractors procured by the defendants were used for this additional work because the plaintiff may be entitled to its 28% construction management margin on this well, as well.

The defendants oppose the plaintiff's motion seeking to amend the complaint by a February 25, 2010 affirmation from the defense counsel for the defendants Christopher Whidden and Keri-Ann Whidden. The defense counsel states the plaintiff's motion is a transparent defense tactic to avoid summary judgment for the defendants. The defense counsel argues the plaintiff's motion is untimely; the reason for it is legally insufficient; and an amendment of the complaint would be prejudicial to the defense. The defense counsel notes New York State does not allow punitive damages in a breach of contract claim. The defense counsel asserts quantum meruit lacks legal merit, and should not be permitted.

The defense counsel states, in a March 1, 2010 reply affirmation, the defendants are entitled to summary judgment based upon the circumstances, and the lack of any showing to the contrary by the plaintiffs. The defense counsel points to new records, the plaintiff's admission to improper removal of funds in Kobarg's January 12, 2010 affidavit

[\* 6]

in support of the instant defense motion, and states the project fund bank account was an escrow account. The defense counsel insists the defendants provided no further funds only after the plaintiff Proud Designs, Inc. failed to provide escrow records, and the defendants had serious financial issues before the project. The defense counsel maintains summary judgment is not premature based upon the circumstances. The defense counsel asserts Vasallo was identified by Kobarg as a potential participant with respect to the on-line escrow account, and adds defense counsel should not represent Vasallo and either or both Kobargs because of a conflict. The defense counsel reiterates a protective order should be granted, and with respect to the plaintiff's supplemental request for the production of documents by the defense, too.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to these two motions. Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial

(*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (see, *Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (see, e.g., *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; see, *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (see, *Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). That branch of the defense motion seeking summary judgment must be denied because there is a material issue of fact which must be decided by the trier of fact.

The Court determines the defendants have met their burden under CPLR 3025 permitting the defendants to amend their answer. The Court determines the defendants have not met their burden under CPLR 2304, and 3103 to quash the subpoenas served by the plaintiffs, and for a protective order regarding discovery demands by the plaintiffs.

The Court determines the plaintiff Proud Designs, Inc. met its burden under CPLR 1003 and 3025 (a) to amend the caption by dropping Greter's Plumbing & Heating as a

party pursuant to the Court's March 14, 2006 short form order, and grant leave to file an amended verified complaint which includes an amended damages calculation with compensatory damages and lost profit damages only, but not for punitive damages.

Accordingly, the defense motion is denied for in all respect except permitting the defendants to amend their answer, and the plaintiff's motion is granted only to the extent permit amending the caption by dropping Gretar's Plumbing & Heating as a party, and leave to file an amended verified complaint which includes an amended damages calculation with compensatory damages and lost profit damages only.

So ordered.

Dated: **May 10, 2010**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

**ENTERED**  
MAY 14 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE