

Habilis Design LLC v Hirtenstein

2010 NY Slip Op 31808(U)

July 1, 2010

Sup Ct, NY County

Docket Number: 113988/2009

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK

PART 2

Index Number : 113988/2009
HABILIS DESIGN LLC
vs.
HIRTENSTEIN, MICHAEL
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/14/10

L. York
LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X

HABILIS DESIGN LLC,

Index No.: 113988/2009

Plaintiff,

-against-

MICHAEL HIRTENSTEIN and INTERNATIONAL
FIDELITY INSURANCE COMPANY,

Defendants.

-----X

LOUIS B. YORK, J.S.C.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

In this action to recover the value of decorating and design work rendered to an apartment, defendant moves to dismiss plaintiff's amended complaint pursuant to CPLR 3015(e) and 3211(a)(1) and (a)(7). Defendant also seeks to discharge the bond he has filed in response to plaintiff's mechanic's lien. For the reasons stated below, the Court grants defendant's motion to dismiss with respect to plaintiff's first cause of action, and orders that defendant's bond be discharged. However, the Court denies the part of the motion that seeks to dismiss plaintiff's other causes of action.

BACKGROUND

The parties do not dispute the straightforward sequence of events leading up to the present action. Aaron Kirsten ("Kirsten") is the principal of plaintiff Habillis Design LLC ("Habillis"), an interior design and decorating firm organized according to the laws of New York and doing business in New York. In April 2009, defendant Michael Hirtenstein ("Hirtenstein") hired Habillis to provide "little homey touches" and to "help [him] decorate" an apartment at 25 Bond Street, Penthouse West, New York, New York ("the Apartment"). After exchanging a number of proposals via e-mail, Habillis and Hirtenstein recorded their official agreement in a standard form contract issued by the American Society of Interior Designers. In the contract, Habillis promised to provide standard interior design and decorating services, including the preparation of drawings, design concepts, layouts, schematic plans, and other interior decorative details. Furthermore, Habillis agreed to purchase decorating items on Hirtenstein's behalf and to act as Hirtenstein's agent and intermediary in dealing with vendors, fabricators, and manufacturers. The contract excused Habillis from having to supervise any contractors hired to work on the Apartment—instead, Habillis was only responsible for making "periodic visits" to the Apartment and for ensuring that work was proceeding "in general conformity" with the agreed upon design concepts. For its efforts, Habillis was to receive a \$25,000 Design Fee; in addition, Hirtenstein agreed both to pay Habillis a 10% fee on all items purchased and work performed and to cover the direct cost of merchandise, services, and any reimbursable expenses incurred by Habillis.

Work on the Apartment commenced shortly thereafter and concluded in mid-June 2009. On July 7, 2009, Habillis sent Hirtenstein an invoice for \$80,645.65, of which \$79,031.30 had not been paid. However, for reasons not apparent in the record, Hirtenstein refused to pay the invoice. As a result, on August 18, 2009, Habillis filed a Notice of Mechanic's Lien against the Apartment in the Office of the Clerk of New York County. Two months later, in October 2009, Habillis also filed a complaint against Hirtenstein, naming him and Shinbone Alley Associates LLC ("Shinbone"), the owner of the Apartment, as defendants.

In response, Hirtenstein entered into an agreement with International Fidelity Insurance Company ("Surety") to execute a bond ("the Bond") discharging the Mechanic's Lien. Subsequently, on December 14, 2009, Habilis filed an amended complaint removing Shinbone as a defendant and replacing it with Surety, the issuer of the Bond. However, Surety would not remain a defendant for long. In February 2010, counsel for Habilis signed a stipulation which discontinued the action as to Surety. Thus, the action now apparently proceeds against Hirtenstein as the sole defendant.

In his motion to dismiss the action, Hirtenstein claims that Habilis's decision to file the Mechanic's Lien amounts to an admission on its part that it performed "home improvement," a category of work which, by statute, requires the worker to possess a valid license; Habilis does not possess the requisite license, nor does it allege that it possesses the license. Furthermore, Hirtenstein argues that the doctrine of judicial estoppel prevents Habilis from assuming an inconsistent position by contending, contrary to its sworn statement in the Mechanic's Lien, that it performed mere decorating work. Habilis, on the other hand, claims that the Mechanic's Lien may have been filed in error, and does not oppose dismissal of its cause of action based on the Lien. However, Habilis asserts that the Lien should not prevent it from pursuing its contract and unjust enrichment claims. Moreover, Habilis argues that Hirtenstein was not a resident of 25 Bond Street at the time the work was rendered, thus exempting Habilis from the license requirement.

ANALYSIS

On a motion to dismiss pursuant to CPLR 3211, the pleading is afforded a liberal construction. *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 974 (1994). The Court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory. *Id.* at 87-88, 614 N.Y.S.2d at 974. To prevail under CPLR 3211(a)(1), the defendant has the burden of showing that the

relied-upon documentary evidence resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claim. *Fortis Financial Services LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 383, 737 N.Y.S.2d 40, 40-41 (1st Dep't 2002). Correspondingly, pursuant to CPLR 3211(a)(7), the Court assesses whether the plaintiff *has* a cause of action, not whether the plaintiff has stated one in his or her pleading. *Leon*, 84 N.Y.2d at 88, 614 N.Y.S.2d at 974.

Hirtenstein's first contention is that, when it filed the Mechanic's Lien, *Habilis* admitted that its services fell within the category of "home improvement," requiring *Habilis* to possess a valid home-improvement contractor's license ("HIC License"). Under CPLR 3015(e), when a plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the Department of Consumer Affairs of the City of New York, the complaint must allege that the plaintiff is duly licensed, or else the plaintiff risks dismissal under CPLR 3211. Indeed, "not being licensed to practice in a given field which requires licensure precludes recovery for the services performed, either pursuant to contract or in quantum meruit." *Gordon v. Adenbaum*, 171 A.D.2d 841, 842, 567 N.Y.S.2d 777, 777 (2d Dep't 1991) (citation and internal quotation marks omitted).

As Hirtenstein notes, the license requirement holds true in the context of "home improvement" contracts. New York City Administrative Code section 20-387(a) states that "[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesperson from an owner without a license therefor." The Administrative Code defines "home improvement" as follows:

"Home improvement" means the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place and shall include but not be limited to the construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures or upon land which is adjacent to a dwelling house.

§ 20-386(2). Thus, in a previous case, a plaintiff who performed repairs on defendants' townhouse, and who was described in the contract between the parties as a "contractor" for general construction, was prevented from pursuing an action for breach of contract because the plaintiff lacked a HIC license. *Lee v. Schweizer*, 300 A.D.2d 364, 365, 751 N.Y.S.2d 517, 518 (2d Dep't 2002). Similarly, a plaintiff who conceded that it was an unlicensed home-improvement contractor during performance of the defendants' construction project had its action for damages dismissed. *Vanguard Constr. & Dev. Co. v. Polsky*, 879 N.Y.S.2d 300, 302, 24 Misc. 3d 854, 855 (Sup. Ct., N.Y. County 2009). Hence, as Hirtenstein avers, if Habilis's services are successfully categorized as "home improvement," Habilis cannot recover on those services.

While CPLR 3015(e) and section 20-387(a) of the Administrative Code advance important policy objectives, not every person who performs "home improvement" is subject to a license requirement. Among other things, the Administrative Code specifies that the term "home improvement" does not cover "painting or decorating of a building, residence, home or apartment, when not incidental or related to home improvement work as herein defined." § 20-386(2)(iv). Indeed, Habilis argues in depth that the services mentioned in its standard form contract with Hirtenstein—including certain repair and treatment work—fall squarely within this exception to section 20-386(2). However, Hirtenstein points out that, for the purposes of the motion to dismiss, his argument relies not on the *nature* of Habilis's work but on its decision to file the Mechanic's Lien. In New York, mechanics' liens are reserved for those "who perform[] labor or furnish[] materials for the improvement of real property." N.Y. LIEN LAW § 3 (2010). Hence, Hirtenstein argues that by filing the Mechanic's Lien, and by swearing under oath that its professional services were used "In the improvement of . . . real property," Habilis is now judicially estopped from claiming its services were anything other than "home improvement."

“The doctrine of judicial estoppel or the doctrine of inconsistent positions precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.” *Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 176-77, 674 N.Y.S.2d 280, 286 (1st Dep’t 1998) (emphasis and internal quotation marks removed). The doctrine has an equitable dimension as well, precluding a party “from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding.” *Nestor v. Britt*, 270 A.D.2d 192, 193, 707 N.Y.S.2d 11, 12 (1st Dep’t 2000). Thus, in light of its equitable capacity, judicial estoppel may be applied in situations that do not involve a formal “judgment.” See, e.g., *Rogers v. Ciprian*, 26 A.D.3d 1, 5-6, 805 N.Y.S.2d 36, 39 (1st Dep’t 2005) (applying judicial estoppel to INS determination); *All Terrain Properties, Inc. v. Hoy*, 265 A.D.2d 87, 93, 705 N.Y.S.2d 350, 355 (1st Dep’t 2000) (applying judicial estoppel to bankruptcy court decree). However, while judicial estoppel is designed to prevent individual parties from playing “fast and loose” with the courts, *Rogers*, 26 A.D.3d at 6, 805 N.Y.S.2d at 39, the primary policies underlying the doctrine “are general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings.” *Kimco of New York, Inc. v. Devon*, 163 A.D.2d 573, 574, 558 N.Y.S.2d 630, 632 (2d Dep’t 1990). The doctrine is required in specific circumstances “lest a mockery be made of the search for truth.” *Karasik v. Bird*, 104 A.D.2d 758, 759, 480 N.Y.S.2d 491, 492-93 (1st Dep’t 1984).

Here, Hirtenstein argues that Habills’s Mechanic’s Lien—which compelled Hirtenstein to file his own Bond discharging the Lien—constitutes the kind of affirmative relief that triggers the application of judicial estoppel. However, Hirtenstein is mistaken for two reasons. First, a mechanic’s lien is, by definition, only a stepping stone toward the achievement of full relief. A mechanic’s lien is nothing more than “[a] legal right or interest that a creditor has in another’s property, lasting usually until a debt or duty that it secures is satisfied.” BLACK’S LAW DICTIONARY 712 (8th ed. 2004) (emphasis added).

While a mechanic's lien creates an interest in the realty, it is not an estate therein (see Jensen, *Mechanics' Liens* (4th ed.), § 36) and the title, use and possession, including the right to alienate, remains with the owner The owner's use and possession can in no way be materially affected without court approval. The realty cannot be applied to satisfy the lien until a judgment in an action to enforce it has been obtained. (Lien Law §§ 24, 41). Thus, the "Interest" acquired by a mechanic's lien is not such as requires court sanction prior to its filing.

Carl A. Morse, Inc. v. Rentar Indus. Dev. Corp., 379 N.Y.S.2d 994, 998, 85 Misc. 2d 304, 307 (Sup. Ct., Special Term, Queens County 1976), *aff'd*, 56 A.D.2d 30, 391 N.Y.S.2d 425 (2d Dep't 1977), *aff'd*, 43 N.Y.2d 952, 404 N.Y.S.2d 343 (1978).

Second, and perhaps even more germane to the circumstances at hand, the application of equitable judicial estoppel would be unduly harsh in light of Habilis's contention—undisputed by Hirtenstein—that it filed the Mechanic's Lien in error. See *United National Funding LLC v. Volkmann*, No. 602826/06, 2009 WL 4110772, at *8 (Sup. Ct., N.Y. County, Nov. 17, 2009). Dismissal is not warranted where, as here, "defendant[] [has] not shown that what occurred in the prior motion was not the product of mere confusion, or a misunderstanding of business entity law." *Id.* Habilis asserts in its memorandum of law that it is no longer pursuing the action to foreclose the Mechanic's Lien, and counsel for Habilis has signed a stipulation releasing the Bond-issuer Surety as a defendant. Also, significantly, Habilis expressly stated that it does not oppose dismissal of this cause of action. Thus, to adopt the purely formalistic stance that the Mechanic's Lien, even if erroneous, terminates the present action would be to commit "a classical exaltation of form over substance . . . hardly to be countenanced by equity." *American Broadcasting Companies, Inc. v. Wolf*, 52 N.Y.2d 394, 409, 438 N.Y.S.2d 482, 489 (1981).

Hirtenstein's final argument in favor of dismissal stems from the concept of judicial admission. A fact asserted in a complaint is a judicial admission of that fact. See *Aronitz v. PricewaterhouseCoopers*

LLP, 27 A.D.3d 393, 394, 812 N.Y.S.2d 504, 505 (1st Dep't 2006). As the first cause of action in Habilis's amended complaint is based on the Mechanic's Lien, Hirtenstein contends that Habilis's sworn statement in the Lien that its services "were used in the improvement of the real property hereinbefore described" must be deemed a binding judicial admission that the work Habilis performed required a HIC license. Further, Hirtenstein asserts that this binding judicial admissions necessarily dooms Habilis's four other causes of action, grounded in breach of contract, account stated, unjust enrichment and quantum meruit. However, once again, Hirtenstein's argument falls short for two reasons. First, as mentioned, Hirtenstein does not contest Habilis's claim that the Mechanic's Lien was filed in error, and Habilis itself has stated that it is no longer pursuing the action to foreclose the Bond. The Court therefore refuses to treat the Mechanic's Lien as the narrowly determinative factor in this action. Second, Hirtenstein is mistaken in asserting that the Mechanic's Lien precludes Habilis from advancing any additional causes of action in the amended complaint. It has long been the rule that "a plaintiff is entitled to advance inconsistent theories in alleging a right to recovery." *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 218, 473 N.Y.S.2d 148, 153 (1984) (citation omitted); see CPLR § 3014.

The Mechanic's Lien aside, Habilis offers in its memorandum of law a number of additional arguments that its work at 25 Bond Street did not constitute statutory "home improvement." The strongest of these arguments derives from *Frank v. Sobel*, 38 A.D.3d 229, 230, 831 N.Y.S.2d 151, 152 (1st Dep't 2007), which states that when a plaintiff merely supervises his or her designs for aesthetic purposes, and never performs or supervises any services that require the expertise of a licensed professional, "the fact that [the plaintiff] is not a licensed architect or home improvement contractor would not bar recovery of [his or her] fee." Thus, even if Habilis "engage[d] the services of a licensed professional to perform a portion of the services covered by the contract," that engagement would "not convert [the] contract into one for the performance of those services." *SKR Design Group, Inc. v. Yonehama, Inc.*, 230 A.D.2d 533, 537, 660 N.Y.S.2d 119, 122 (1st Dep't 1997). Certainly, the standard

form contract between Habllis and Hirtenstein required Habllis to make mere "periodic visits" to the Apartment and to macroscopically oversee the implementation of its design concepts, aligning Habllis with the rule in *Frank*. Whether Habllis actually complied with these contractual provisions, however, is a question more properly reserved for the trier of fact.

As the Court finds dismissal inappropriate based on the above, it need not reach Habllis's alternative argument that Hirtenstein was not an *actual* resident of the Apartment during the contractual period, which bars him from seeking the protections of CPLR 3015(e). However, the Court notes that this argument likely lacks merit, as licensing ordinances such as Admin. Code 20-387(a) should be reasonably interpreted to protect both those who reside and those who *intend to reside* in the premises where home improvement work is performed. *See Routier v. Waldeck*, 184 Misc. 2d 487, 490, 708 N.Y.S.2d 270, 273 (Dist. Ct., Nassau County 2000).

CONCLUSION

An examination of the record gives rise to an inference that Habllis's work at 25 Bond Street may well fall outside the scope of "home improvement." Habllis markets itself as an interior design firm, in the business of providing services of an aesthetic rather than of a structural or architectural nature. The standard form contract between Habllis and Hirtenstein was issued by the American Society of Interior Designers, and does not appear to contain any services that exceed the professional offerings of an interior designer. *See* 13 N.Y. JUR. 2d § 303. Furthermore, in several e-mails, Hirtenstein stated that he hired Habllis to "help [him] decorate" and to provide "little homey touches." As this is the basis for the current motion, and as Habllis does not oppose dismissal of its first cause of action, it is therefore

ORDERED that the motion to dismiss is granted with respect to plaintiff's first cause of action to foreclose the Bond, but denied with respect to plaintiff's four other causes of action; and it is further

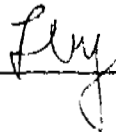
ORDERED that the October 9, 2009 "Discharge of Mechanic's Lien Bond" for \$86,935.00, Bond No. 0482211, filed on behalf of MICHAEL L. HIRTENSTEIN, in response to an August 18, 2009 "Notice of Mechanic's Lien" filed by HABILIS DESIGN LLC, is discharged; and it is further

ORDERED that defendant INTERNATIONAL FIDELITY INSURANCE COMPANY is directed, upon receipt of a certified copy of this order, to turn over to defendant MICHAEL L. HIRTENSTEIN, all funds in the October 9, 2009 "Discharge of Mechanic's Lien Bond" for \$86,935.00, Bond No. 0482211; and it is further

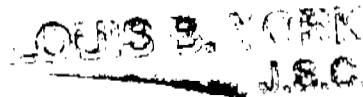
ADJUDGED that, upon such turnover of funds, defendant INTERNATIONAL FIDELITY INSURANCE COMPANY shall be discharged of all liability on the bond to the extent of payment made.

ENTER:

Dated: 7/1/10



LOUIS B. YORK, J.S.C.



UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).