Lee v Ciaramella
2010 NY Slip Op 33975(U)
February 1, 2010
Supreme Court, Bronx County
Docket Number: 381107/2007
Judge: Lucindo Suarez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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THOMAS LEE,

Plaintiff,

- against -

ANTHONY CIARAMELLA, YOLANDA SELVAGGI and "JOHN DOE #1" through and including "JOHN DOE #10," said names being fictitious, the persons or parties, corporations or entities, if any, having or claiming an interest in or lien upon, or occupying, the premises described in the complaint,

Defendants.

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DECISION AND ORDER

Index No. 381107/2007

PRESENT: Hon. Lucindo Suarez

Upon plaintiff's notice of motion dated September 21, 2009 and the affirmation, affidavits (2) and exhibits submitted in support thereof; defendant's notice of cross-motion dated October 23, 2009 and the affidavits (5), exhibits and memorandum of law submitted in support thereof; plaintiff's affidavits (2) in opposition and reply dated November 10, 2009 and November 12, 2009; defendant's undated reply affidavit and the memorandum of law submitted therewith; and due deliberation; the court finds:

Plaintiff moves for summary judgment in this action, which stems from a purported real estate agreement between plaintiff and defendant Anthony Ciaramella ("Ciaramella"). The complaint alleges that after Ciaramella bought a parcel of land containing one existing residential structure, plaintiff and Ciaramella agreed that Ciaramella would contribute the land and plaintiff would rezone and subdivide the lot into three plots and would advance all monies to construct two new residential structures and to rehabilitate the existing structure. In return, Ciaramella was

to deed to plaintiff one of the new plots and structures.

Plaintiff alleges that while he has performed his obligations under the agreement, Ciaramella has failed to convey one of the subdivided properties to plaintiff despite due demand. Instead, Ciaramella has conveyed one property to codefendant and Ciaramella's mother, Yolanda Selvaggi ("Selvaggi")[1], has conveyed the second property to a non-party and has leased the third property to a non-party. The complaint alleges causes of action for specific performance, unjust enrichment, equitable lien, constructive trust, foreclosure on mechanics liens, fraud and an accounting.

The standard for granting summary judgment is succinctly stated:

> "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. On a summary judgement motion, the moving party must set forth evidence that there is no factual issue and that it is entitled to summary judgment. If the moving party establishes a basis for a grant of summary judgment, the opposing party must present evidence that there is a triable issue.
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> "It is not the court's function on a motion for summary judgment to assess credibility." "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions; not those of a judge, whether he [or she] is ruling on a motion for summary judgment, or for a directed verdict."
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> Moreover, the facts must be viewed in the light most favorable to the nonmoving party.

Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 314-15, 819 N.E.2d 998, 1013-14, 786 N.Y.S.2d 382, 397-98 (2004) (Smith, J., concurring) (internal citations omitted). Where issues

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[1]Although papers have been submitted on the motion on behalf of both Ciaramella and Selvaggi, the court will refer to a single "defendant" because plaintiff's complaint contains no allegations against Selvaggi.

of fact essentially reduce to questions of credibility, they cannot be resolved on a motion for summary judgment and the motion must be denied. *See Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 836 N.Y.S.2d 86 (1st Dep't 2007).

A. Specific Performance

A cause of action for specific performance must demonstrate plaintiff's substantial performance of its contractual obligations; its readiness, willingness and ability to perform its remaining obligations; defendant's ability to perform its contractual obligations and the unavailability of any adequate remedy at law. *See EMF Gen. Contr. Corp. v. Bisbee*, 6 A.D.3d 45, 51, 774 N.Y.S.2d 39, 44 (1st Dep't 2004), *appeal dismissed*, 3 N.Y.3d 656, 816 N.E.2d 568, 782 N.Y.S.2d 695 (2004); *Marlanx Corp. v. Lage*, 307 A.D.2d 824, 764 N.Y.S.2d 6 (1st Dep't 2003), *appeal denied*, 1 N.Y.3d 502, 807 N.E.2d 290, 775 N.Y.S.2d 240 (2003). Specific performance is granted in the discretion of the court and will not be awarded where money damages would suffice to make the plaintiff whole. Equity will not intervene to aid a party who himself has defaulted in performance. *See Hadcock Motors, Inc. v. Metzger*, 92 A.D.2d 1, 459 N.Y.S.2d 634 (4th Dep't 1983). The plaintiff seeking specific performance must also show "that the contract is within the power of the defendant to perform ... and that the defendant is a party to the contract." *75 Christopher St. Corp. v. Furman*, 138 A.D.2d 323, 323-24, 526 N.Y.S.2d 111, 112 (1st Dep't 1988) (internal citations omitted). Conclusory allegations regarding an agreement are insufficient. *See Lamanna v. Wing Yuen Realty, Inc.*, 283 A.D.2d 165, 724 N.Y.S.2d 54 (1st Dep't 2001), *appeal denied*, 96 N.Y.2d 719, 759 N.E.2d 370, 733 N.Y.S.2d 371 (2001).

Inherent in a discussion of specific performance of a contract is the finding of the

formation of a contract to which to be bound. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. That meeting of the minds must include agreement on all essential terms . . . the consideration for a bilateral contract such as this one, in which promises are exchanged, consists of the acts mutually promised." *Kowalchuk v. Stroup*, 61 A.D.3d 118, 121, 873 N.Y.S.2d 43, 46 (1st Dep't 2009). "[T]here must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Gulf Ins. Co. v Transatlantic Reins. Co.*, 2009 NY Slip Op 6788 at *18, 2009 N.Y. App. Div. LEXIS 6643 at *46 (1st Dep't Oct. 1, 2009).

Definiteness is required both in the terms of the agreement and in the intention to be bound; if a court cannot tell what the parties agreed to, it cannot accurately determine whether there has been a breach or how fashion an appropriate remedy. The court could otherwise impose terms and conditions never agreed to by the parties. *See Marlio v. McLaughlin*, 288 A.D.2d 97, 734 N.Y.S.2d 4 (1st Dep't 2001), *rearg denied*, 2002 N.Y. App. Div. LEXIS 914 (1st Dep't Jan. 24, 2002), *appeal denied*, 98 N.Y.2d 607, 774 N.E.2d 756, 746 N.Y.S.2d 691 (2002); *see also Richbell Info. Servs. v. Jupiter Partners, L.P.*, 309 A.D.2d 288, 765 N.Y.S.2d 575 (1st Dep't 2003), *appeal denied*, 2004 N.Y. App. Div. LEXIS 1272 (1st Dep't Feb. 5, 2004); *Jamaica Pub. Serv. Co. v. Compagnie Transcontinentale De Reassurance*, 282 A.D.2d 227, 723 N.Y.S.2d 168 (1st Dep't 2001).

A dispute as to material terms need not inevitably lead to the conclusion that a contract was not created; however, a manifestation of the intent to be bound to an agreement must be shown and may imply the existence of an agreement. *See Kleinschmidt Div. of SCM Corp. v.*

Futuronics Corp., 41 N.Y.2d 972, 363 N.E.2d 701, 395 N.Y.S.2d 151 (1977). In this regard, "'the parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties' . . . 'the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence . . . [parties' actions] under [an agreement] is often the strongest evidence of their meaning.'" *Gulf Ins. Co.*, 2009 NY Slip Op 6788 at *11, 2009 N.Y. App. Div. LEXIS 6643 at *26-*27, *citing Federal Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 691 N.Y.S.2d 508 (1st Dep't 1999).

Accordingly, in the absence of a writing incorporating all the material terms of a contract, it is possible to establish the existence of a contract with substantial evidence of a course of dealing between the parties claimed to be bound. *See e.g. Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 361 N.E.2d 999, 393 N.Y.S.2d 350 (1977). Coupled with substantial evidence of a course of dealing, an oral agreement may also support a cause of action for breach of contract. *See Generale Bank v. Bell Security, Inc.*, 293 A.D.2d 273, 741 N.Y.S.2d 198 (1st Dep't 2002); *ISS Intern. Service System, Inc. v. Pastreich Realty Organization, Inc.*, 194 A.D.2d 378, 598 N.Y.S.2d 499 (1st Dep't 1993).

The terms of this alleged agreement, however, are impermissibly vague and inchoate for purposes of supporting a motion for summary judgment. The manner in which the contract was created could not have been established without resort to very detailed affidavits, and even with the multiple affidavits of both parties, there is still an insufficient basis to find a valid and binding agreement. The general subject of the actual agreement and the ultimate end intent can be discerned; however, it is unclear whether the agreement was to actually deliver items

promised or to accomplish some other end. It is unclear what the parties' respective obligations actually were, and what was necessary to accomplish the obligations. It is also unclear as to what type of new structures plaintiff was to finance.

Despite the apparent actions of both parties in furtherance of conditions precedent to the ultimate end of the transaction, which in any event have not been established, and particularly where there is vehement disagreement as to the very issue of the parties' obligations and performance of conditions precedent to consummating the transaction, the parties' understanding can best be described as "a promise to negotiate at a future time," which is not an enforceable contract. *See Royce Haulage Corp. v. Bronx Terminal Garage, Inc.*, 185 Misc. 892, 57 N.Y.S.2d 760 (App. Term 1st Dep't 1945). "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable . . . The rule applies all the more, and not the less, when, as here, the extraordinary remedy of specific performance is sought." *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109-110, 417 N.E.2d 541, 543-44, 436 N.Y.S.2d 247, 249 (1981); *Prospect Plaza Tenant Ass'n v. N.Y. City Hous. Auth.*, 11 A.D.3d 400, 783 N.Y.S.2d 563 (1st Dep't 2004); *cf. TAJ Int'l Corp. v. Edward G. Bashian & Sons, Inc.*, 251 A.D.2d 98, 674 N.Y.S.2d 307 (1st Dep't 1998).

The parties' conduct in attempting to reach an ultimate end does not indicate the formation of an agreement intended to be equally binding upon them. It is clear that the parties did not agree on material terms of the contract, such as time of completion, upon which defendant bases material reformations of the agreement. The email correspondence has accordingly demonstrated no meeting of the minds with respect to either party's obligations or actions required under a binding agreement. Having failed to establish a valid agreement, there

can therefore be no valid cause of action for specific performance. Plaintiff has furthermore made clear that monetary damages would suffice to satisfy his claims.

B. Unjust Enrichment

"A cause of action for unjust enrichment is stated where 'plaintiffs have properly asserted that a benefit was bestowed . . . by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor' . . . Where defendants have reaped such benefit, equity and good conscience require that they make restitution." *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 119, 672 N.Y.S.2d 8, 12 (1st Dep't 1998), *citing Tarrytown House Condominiums, Inc. v. Hainje*, 161 A.D.2d 310, 555 N.Y.S.2d 83 (1st Dep't 1990). Accordingly, as the court will not rewrite parties' agreements, the existence of a valid contract precludes recovery in *quasi* contract. *See EBC I, Inc., supra*; *Goldstein v. CIBC World Mkts. Corp.*, 6 A.D.3d 295, 776 N.Y.S.2d 12 (1st Dep't 2004).

Here it is undisputed that plaintiff expended sums to complete two new homes, while there is a dispute as to the source of the funds expended to rehabilitate the existing home. It is also undisputed that defendant has failed to convey one of the new homes to plaintiff. Defendant, however, has alleged numerous material reformations of the parties' alleged agreement, each one increasing the monetary obligation of plaintiff in favor of defendant as a condition precedent to defendant's conveyance of property to plaintiff. Plaintiff denies these revisions to the agreement. It is unclear from the parties' respective courses of conduct which version of the agreement, if any, each was acting upon. It is accordingly unclear whether in fact defendant has been unjustly enriched by plaintiff's contributions, if time was of the essence in the original agreement, a fact which is also in dispute. *See e.g. J. Manes Co. v. Greenwood Mills,*

Inc., 53 N.Y.2d 759, 421 N.E.2d 840, 439 N.Y.S.2d 348 (1981).

C. Equitable Lien

An equitable lien may be imposed where there is an express or implied agreement evincing "a sufficiently clear intent that the property 'is to be held, given or transferred as security for the obligation.'" *M & B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 12 N.Y.3d 798, 800, 907 N.E.2d 690, 692, 879 N.Y.S.2d 812 (2009). Such agreement, however, "must deal with some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation." *Teichman v. Community Hosp.*, 87 N.Y.2d 514, 520, 663 N.E.2d 628, 631, 640 N.Y.S.2d 472, 475 (1996). Here it is unclear which of the three properties was to be deeded to plaintiff in exchange for his monetary outlays. Any such agreement, therefore, does not sufficiently identify the particular property upon which an equitable lien, if warranted, should properly be imposed. *See id.* Accordingly, plaintiff cannot be granted summary judgment on this claim for relief.

D. Constructive Trust

A constructive trust requires a "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment." *Bankers Sec. Life Ins. Soc'y v. Shakerdge*, 49 N.Y.2d 939, 940, 406 N.E.2d 440, 440, 428 N.Y.S.2d 623, 624 (1980). It is more likely than not that a fiduciary relationship was formed between the parties, inasmuch as plaintiff's course of conduct could be objectively viewed as reliant upon defendant's trust and confidence, and vice versa. *See Braddock v. Braddock*, 60

A.D.3d 84, 871 N.Y.S.2d 68 (1st Dep't 2009). Furthermore, although the parties' explanations of their past relationship which led to their alleged joint undertaking differ significantly, the relationship itself could form the basis of a fiduciary relationship. *See Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 529 N.Y.S.2d 279 (1st Dep't 1988). Given the discussion above regarding unjust enrichment, however, plaintiff has not established entitlement to the establishment of a constructive trust.

E. Foreclosure of Mechanics Liens

There is no evidence that plaintiff himself performed any work upon the property. Plaintiff did not contract with defendant to improve the property. If any valid agreement is to be found, it was an agreement by plaintiff to procure and contract with other entities to provide the improvements. "[T]he term ["contractor"] for purposes of the Lien Law must be restricted to 'one who would be so characterized in the common speech of man' . . . procurement of bids and negotiation of contracts for the services of subcontractors . . . cannot provide the basis of a lien separate from the work of a 'contractor' or architect." *Carl A. Morse, Inc. v. Rentar Industrial Development Corp.*, 85 Misc.2d 304, 308-9, 379 N.Y.S.2d 994, 999 (Sp. Term Queens County 1976), *affirmed*, 56 A.D.2d 30, 391 N.Y.S.2d 425 (2d Dep't 1977), *affirmed*, 43 N.Y.2d 952, 375 N.E.2d 409, 404 N.Y.S.2d 343 (1978); *see also Potamkin Dev. Co. II LLC v. Greyhawk N. Am. LLC*, 2006 N.Y. Misc. LEXIS 4010 (Sup. Ct. N.Y. County Mar. 9, 2006). Therefore, as plaintiff is not a contractor within the meaning of Lien Law § 2(9), and does not fall into any of the other categories enumerated in Lien Law § 3, plaintiff is not a proper lienor. The mechanics liens filed by plaintiff must be discharged and the seventh and eighth causes of action dismissed. *See Popular Contr., Inc. v. Khokar*, 303 A.D.2d 590, 756 N.Y.S.2d 482 (2d Dep't 2003).

F. Fraud

"To establish its common law cause of action for fraud, the plaintiff had to demonstrate that the defendants knowingly uttered a falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged. The essential elements are the representation of a material existing fact, falsity, scienter, deception and injury." *Browning Ave. Realty Corp. v. Rubin*, 207 A.D.2d 263, 615 N.Y.S.2d 360 (1st Dep't 1994) (internal citations omitted), *appeal denied*, 85 N.Y.2d 804, 650 N.E.2d 415, 626 N.Y.S.2d 756 (1995). "While an inference that the promisor never intended to fulfill his promise should not be based solely upon the assertion that the promise was not, in fact, fulfilled, we must recognize that a present intention not to fulfill a promise is generally inferred from surrounding circumstances, since people do not ordinarily acknowledge that they are lying." *Braddock*, 60 A.D.3d at 89, 871 N.Y.S.2d at 73. Here, plaintiff claims that the failure to convey one of the newly created properties constitutes fraud. Viewing the facts in the light most favorable to defendant, however, the failure to convey could be the result of defendant's belief, whether rational or not, that plaintiff had not fulfilled the conditions precedent to such transfer, rather than an attempt to deceive. Insofar as plaintiff's claim for fraud is premised upon defendant's disposition of the properties, plaintiff's assistance in the disposition of at least one of the properties casts some doubt on whether defendant's actions were intended to deceive plaintiff.

G. Accounting

The remedy of an accounting, a method of calculating damages, *see Coane v. American Distilling Co.*, 298 N.Y. 197, 81 N.E.2d 87 (1948), is restitutionary in nature, *see Ederer v. Gursky*, 9 N.Y.3d 514, 881 N.E.2d 204, 851 N.Y.S.2d 108 (2007). It may be based upon the

violation of a fiduciary duty or upon wrongdoing. Where it is sought on the basis of wrongdoing, the wrongdoing must obviously first be established by the proponent. *See Owen v. Blumenthal*, 280 N.Y. 96, 19 N.E.2d 977 (1939). However, "[a]n allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief." *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 242, 656 N.Y.S.2d 753, 759 (1st Dep't 1997). There, "[t]he right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Palazzo v. Palazzo*, 121 A.D.2d 261, 265, 503 N.Y.S.2d 381, 384 (1st Dep't 1986). In the absence of such a relationship, it is error to direct an accounting. *See Charles Hyman, Inc. v. Olsen Indus.*, 227 A.D.2d 270, 642 N.Y.S.2d 306 (1st Dep't 1996); *Satra Corp. v. Pullman, Inc.*, 102 A.D.2d 731, 476 N.Y.S.2d 483 (1st Dep't 1984).

However, even where such a relationship exists, "the doctrine of unclean hands applies to bar any right plaintiff might otherwise have had to an accounting." *Cohen v. Katz*, 242 A.D.2d 448, 662 N.Y.S.2d 40 (1st Dep't 1997). Here, the fact that plaintiff continued work on the homes after the parties' purported discussions and renegotiations, ostensibly in reliance upon a continuing agreement, creates a question of fact as to whether plaintiff had also agreed to additional monetary performance as a condition, and therefore whether the failure to pay such monies to defendant constitutes unclean hands. *See Ross v. Moyer*, 286 A.D.2d 610, 730 N.Y.S.2d 318, 1st Dep't 2001). This is particularly so in light of the lack of a specific and detailed denial by plaintiff of the existence of subsequent escalating agreements between the parties, and the timing of defendant's lease of one of the properties and conveyance of one of the

properties immediately before commencement of this action simultaneously with the final breakdown in communications between the parties, suggesting retaliation.

Defendants cross-move for summary judgment dismissing the causes of action of plaintiff's complaint, and for summary judgment on their counterclaims for breach of contract and willful exaggeration of mechanics lien. Given the discussion above, the cross-motion is granted to the extent of dismissing plaintiff's causes of action under the mechanics liens. It is apparent that numerous questions of fact remain regarding the formation, continuation and scope of the obligations of both plaintiff and defendant and whether their subsequent actions constitute breaches of the purported agreements. Furthermore, while the court is not to decide issues of credibility on a motion for summary judgment, serious credibility questions which go to the foundation of the parties' arguments will prevent the granting of summary judgment. *See Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 687 N.E.2d 1308, 665 N.Y.S.2d 25 (1997). Not only have plaintiff and defendant both raised each other's criminal histories, but one of the witnesses submitting affidavits on the motion has averred to having been threatened by a representative of plaintiff, an allegation which has not been refuted. In addition to other factors, the vastly differing factual histories given by the parties create issues more appropriate for consideration by a jury.

Accordingly, it is

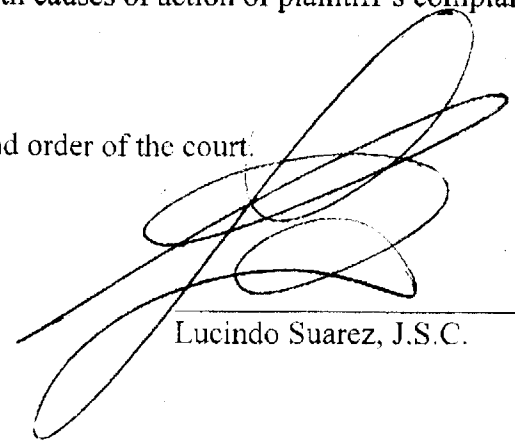
ORDERED, that plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that defendants' cross-motion for summary judgment is granted solely to the extent of dismissing the seventh and eighth causes of action of plaintiff's complaint seeking relief on mechanics liens; and it is further

ORDERED, that the clerk of the court shall enter judgment in favor of the defendants dismissing plaintiff's seventh and eighth causes of action of plaintiff's complaint seeking relief on mechanics liens.

This constitutes the decision and order of the court.

Dated: February 1, 2010



Lucindo Suarez, J.S.C.