

**Matter of Maidi Decorating & Remodeling Inc. v
Farley**

2011 NY Slip Op 30573(U)

February 28, 2011

Supreme Court, Nassau County

Docket Number: 20082/2010

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: I.A. PART 17

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In the Matter of the Application of

MAIDI DECORATING AND REMODELING INC.,

Petitioner,

DECISION AND ORDER

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No.: 20082/2010

- against -

Original Return Date: 11/19/10
Motion Seq. No. 001

MADALYN F. FARLEY, as Acting Commissioner
of the **NASSAU COUNTY OFFICE**
OF CONSUMER AFFAIRS,

Respondent.

-----X
P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 7 were submitted on this Order to Show Cause
on November 19, 2010:

Papers numbered:

Order to Show Cause, Petition, Affidavit, and Affirmation in Support:	1-4
Answer, Administrative Record and Affirmation in Opposition:	5-7
<u>Reply Affirmation</u>	<u>X</u>

The Petition pursuant to Article 78 of the C.P.L.R. for a judgment annulling the
determination of the Respondent **MADALYN F. FARLEY**, Acting Commissioner of the **NASSAU**
COUNTY OFFICE OF CONSUMER AFFAIRS (“**CONSUMER AFFAIRS**”) dated October 8, 2010

upholding five (5) violations¹ against the Petitioner MAIDI DECORATING AND REMODELING INC. (“MAIDI”) is determined as follows:

On or about June 24, 2010, DOMENICK PASCARELLA filed a Consumer Complaint Form with the NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS against the Petitioner MAIDI DECORATING AND REMODELING INC., a licensed home improvement contractor in the County of Nassau. Complainant PASCARELLA alleged that his residence located at 155 Lexington Street, Westbury, New York, was “... uninhabitable due to incomplete and faulty repairs[]” performed by the Petitioner. Following an investigation by CONSUMER AFFAIRS, a written Report dated July 8, 2010 was issued which revealed a number of deficiencies in the work performed by MAIDI. Petitioner MAIDI responded to the Investigator’s Report *via* a written communication from its attorneys dated July 9, 2010 whereby, *inter alia*, the jurisdiction of CONSUMER AFFAIRS was challenged on the grounds that the Complainant PASCARELLA was a “house-flipper” who did not reside at the subject real property. As a result of the CONSUMER AFFAIRS investigation, MAIDI was notified on July 19, 2010 that it was being charged with nine (9) violations of the Administrative Code of Nassau County regulating home improvement contractors, to wit:

No. 456 - In violation of Section 21-11.7(4)1C - absence of correct license number on contract.

No. 457 - In violation of Section 21-11.9(9) - failure to notify Consumer Affairs of a change to its telephone number.

No. 458 - In violation of Section 21-11.9(9) - failure to display correct telephone number on contract.

¹Such violations were later reduced to four (4) based upon a clerical ambiguity between the written determination of the Hearing Officer dated October 8, 2010 and the Violation Disposition dated August 26, 2010 and issued in connection with Violation Number 464 (*See* Exhibit “H” of Opposition).

No. 459 - In violation of Section 21-11.9(9) - failure to maintain workers' compensation for employees.

No. 460 - In violation of Section 21-11.9(14) - deviation from or disregarded plans or specifications without consent of owner.

No. 461 - In violation of Section 21-11.9(9) - performance of work outside of scope of license.

No. 462 - In violation of Local Rule 10 - failure to print legible name of a representative of the company below signature.

No. 463 - In violation of Section 21-11.9(13) - failure to provide three-day cancellation notice or cancellation form with contract.

No. 464 - In violation of Section 21-11.11 - failure to include completion date on contract.

In an attempt to establish that the Complainant PASCARELLA did not reside at the premises, MAIDI subpoenaed records from PASCARELLA, CONSUMER AFFAIRS, and the Third Precinct of the Nassau County Police Department. Neither PASCARELLA nor the Police Department complied with such demand.

A hearing was held on August 3, 2010, at which time counsel for MAIDI submitted a motion seeking dismissal of the proceeding based upon PASCARELLA'S failure to respond to discovery requests, and lack of jurisdiction based upon the contention that PASCARELLA was not a "consumer" entitled to protection by the NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS because he did not reside at the subject real property.

By written Decision dated August 27, 2010, Violations 458 and 461 were dismissed, with the decision regarding Violations 459 and 460 being reserved. Violations 456, 457, 462, 463 and 464 were upheld and MAIDI was fined \$200.00 per violation, for a total fine of \$1,000.00. MAIDI'S motion to dismiss on jurisdictional grounds was not addressed in such Decision.

By letter dated September 1, 2010, counsel for MAIDI challenged the August 27, 2010

Decision and sought reconsideration on several grounds. They once again challenged the jurisdiction of CONSUMER AFFAIRS based on PASCARELLA'S ownership interest as a purported "house flipper" as opposed to a consumer/resident, and noted that the motion to dismiss had not been addressed or decided.

Upon reconsideration and by written communication dated October 8, 2010, CONSUMER AFFAIRS dismissed violations 459 and 460 based upon "lack of evidence", while the findings regarding the remaining violations were sustained.² Further, CONSUMER AFFAIRS acknowledges an ambiguity in the October 8, 2010 Decision in that Violation 464 was upheld, while the corresponding Violation Disposition Notice indicates that such violation was dismissed. CONSUMER AFFAIRS conceded the error and therefore reduced the fine to \$800.00. The Hearing Officer further stated that the Commissioner had reviewed the motion and denied it.

In his Petition submitted in support hereof, MAIDI alleges that it is undisputed that PASCARELLA did not reside at the subject property and that, in fact, such property remained vacant at all pertinent times. MAIDI further alleges that he established that PASCARELLA lived at and paid the mortgage on an alternate residential location. MAIDI has not otherwise substantively challenged the determinations of CONSUMER AFFAIRS. The NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS maintains that MAIDI essentially waived the non-consumer defense, and is estopped from asserting same as it utilized a certain form of home improvement contract with PASCARELLA, thereby representing that it was licensed by the NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS and that PASCARELLA was a consumer.

²The Respondent claims that two (2) of the violations (to wit: 458 and 459) were based upon the failure of the Petitioner to "abide by a previous order of the Commission to remedy violations."

“The scope of judicial review of a determination of the [Office] of Consumer Affairs is limited and a court may not interfere unless the determination is arbitrary and capricious, affected by an error of law, or constitutes an abuse of discretion.” Aveonis Management, Inc. v. Kranker, 36 A.D.3d 903, 904 (2nd Dept. 2007), citing Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 230-231 (1974).

Pursuant to Section 21-10.0 of the Nassau County Administrative Code, the Commissioner of the NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS is empowered “to receive and investigate complaints and initiate his own investigation of frauds or unfair dealings against **consumers** (emphasis added). . . .” Furthermore, Local Law 6-1970 defines home improvement as:

“... repair, maintenance, replacement, remodeling, alteration, conversion, modernization, or addition to any land or building, or that portion thereof, which is used as a private residence or dwelling place for not more than three families (emphasis supplied) ... ”

It is recognized by both parties that the jurisdiction of the NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS is limited to consumer disputes. Since the inception of this matter, MAIDI has steadfastly maintained that PASCARELLA was not a “consumer” in this context as he did not reside at the property involved, thereby removing this dispute from within the limited jurisdiction of the Respondent. However, the record is devoid of any indication that the jurisdictional challenge was ever addressed or decided in the administrative process, notwithstanding the conclusory statement contained in the written communication of CONSUMER AFFAIRS dated October 8, 2010 that such motion had been “reviewed ... and ... denied”. Finally, the Court notes that the majority of the violations did not arise directly from the work performed at the subject premises, but rather from the form of contracts utilized by MAIDI and presented to the customer. Therefore, the jurisdictional issue survives.

Accordingly, after due deliberation, it is

ORDERED, that this matter is hereby remanded to the NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS for a formal determination of whether such entity has jurisdiction over the complaints against MAIDI DECORATING AND REMODELING INC. as filed by Complainant DOMENICK PASCARELLA; and it is further

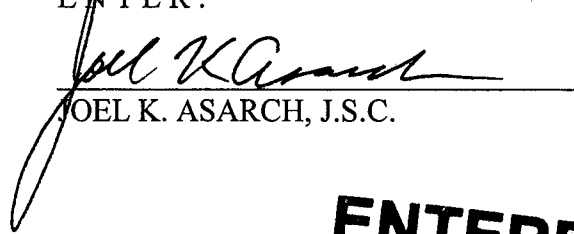
ORDERED, that the Petitioner shall submit to the Court a copy of the written determination of the NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS as to whether such entity has proper jurisdiction over this matter within TWENTY (20) DAYS of the issuance thereof; and it is further

ORDERED, that the enforcement of the fines and any penalties imposed upon MAIDI DECORATING AND REMODELING INC. as a result of Violations 456, 457, 462, and 463 as contained in Complaint number 2010001407, if not heretofore paid, are hereby stayed pending the further order of this Court following the determination of NASSAU COUNTY OFFICE OF CONSUMER AFFAIRS on remand.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 28, 2011

ENTER:


JOEL K. ASARCH, J.S.C.

Copies mailed to:
Jablonski & Jablonski, Esqs.
Attorneys for Petitioner

John Ciampoli, Esq.
Attorney for Respondent

ENTERED
MAR 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE