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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 40719-08

PRESENT:
HON. DANIEL MARTIN

Motion Date: 12/7/10,12/13/10
Submitted: 12/14/10
Motion Sequence No.: 03 - **MD**
04 - **MG**

FRANK RAGONESE AND HELEN RAGONESE,

Plaintiff,

-against-

PATRICK FILIPPI, JOSEPH FILIPPI and P. FILIPPI CONTRACTING,

Defendant.

PLAINTIFF'S ATTY:
Zisholtz & Zisholtz, LLP.
170 Old Country Road, Ste. 300
Mineola, N Y 11501

DEFENDANTS' ATTY:
Jonathan Tatun, Esq.
167 Russell Road
Oakdale, NY11769

The following named papers have been read on this motion:	
Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

Plaintiffs, Frank Ragonese and Helen Ragonese move, pursuant to CPLR 3212, for summary judgment dismissing the defendants' counterclaim related to the work and services performed by defendants, breach of contract, and quantum meruit, and for dismissal of the defendants' counterclaims premised upon defamation and unjust enrichment.

Defendants, Patrick Filippi, Joseph Filippi and P. Filippi Contracting cross-move for an order directing the plaintiffs to provide separate and properly sworn answers to defendants' separately served First Set of Interrogatories as previously directed by the court; for leave to serve defendants' Second Set of Interrogatories; and for sanctions, costs, and attorney fees.

It is claimed that on or about September 1, 2006, Frank Ragonese and Helen Ragonese hired the defendants, Patrick Filippi, Joseph Filippi, and P. Filippi Contracting, to perform work, labor and services, and to furnish materials, in connection with the renovation and improvement of the

plaintiff's residence located at 8 Wyandanch Avenue, Smithtown, New York, for the sum of $35,000.00. The plaintiffs claim that they made payment to the defendants on a weekly basis, totaling $48,999. However, the defendants allegedly abandoned the contract with the plaintiffs on or about December 16, 2006 prior to the defendants' completion of the improvements and/or performance in a workmanlike manner, necessitating that the plaintiffs engage the services of another contractor to complete the renovations. The plaintiffs claim to have sustained damages in the sum of $75,000.00.

In their "Proposed Verified Answer with Defenses and Counterclaims," the defendants have set forth poorly framed and inartfully pleaded counterclaims which are not labeled as counterclaims and are interspersed with the affirmative defenses. Although the pleading has been denominated by the defendants as a "Proposed Verified Answer," this court deems it to be the Verified Answer with Defenses and Counterclaims. It appears that the counterclaims are as follows: breach of agreement by the plaintiffs on the basis that the plaintiffs failed to pay $50,000 for previous work performed by the defendants and unjust enrichment of the plaintiffs. The defendants seek money damages on the basis of quantum meruit and defamation premised upon the plaintiffs' claims being false and unconscionable. Neither the plaintiffs nor the defendants dispute that these are the counterclaims and relief sought pursuant to those counterclaims.

In motion (003) the plaintiffs seek summary judgment dismissing the defendants' counterclaims related to work and services, asserting that the defendants are not entitled to damages under breach of contract or quantum meruit theories as the defendants were unlicensed home improvement contractors at the time work and services were provided; that the complaint filed by the plaintiffs with the County Consumer Affairs Office sets forth statements of fact and does not constitute a defamatory communication; and that the defendants' application for sanctions is without merit as the plaintiffs' claims have been made in good faith.

It is noted in the transcript of the hearing held on June 2, 2009 (Costello, J.) that the Court denied motion (001) for dismissal and any other prayer for relief to dismiss until discovery is complete. It appears that all other discovery is not complete as the defendants are seeking further disclosure and interrogatories and that there are still many factual issues outstanding which preclude summary judgment in this matter.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue

of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion, the plaintiffs have submitted an attorney's affirmation; the affidavit of Helen Ragonese; copies of the summons and verified complaint and defendants' answer; an uncertified copy of the Suffolk County Department of Consumer Affairs Home Improvement Contractor License No. 20,416-HI issued January 1, 1992 and expiring January 1, 1994; uncertified copy of the Suffolk Country Executive's Office of Consumer Affairs Home Improvement License No. 36948-H dated March 30, 2005; a copy of a document labeled "Remodeling Proposal dated June 25, 2004;" photocopies of checks and bank statements; a copy of the complaint filed with Suffolk County Executive's Office of Consumer Affairs dated August 14, 2008; a copy of a letter dated August 20, 2008 from the County of Suffolk to Patrick H. Filippi with his response attached thereto, signed by Patrick Filippi as President; and a copy of a letter dated September 12, 2008 from the County of Suffolk to Frank and Helen Ragonese. It is noted that the uncertified copies of the Suffolk County Department of Consumer Affairs Home Improvement Contractor License No. 20,416-HI and the uncertified copy of the Suffolk Country Executive's Office of Consumer Affairs Home Improvement License No. 36948-H are not in admissible form pursuant to CPLR 3212 and such documents have not been certified or authenticated.

COUNTERCLAIM FOR DEFAMATION

Turning to the counterclaim which asserts that the plaintiff's claims are false and unconscionable, such claim is interpreted to be a cause of action for defamation. The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se (***Denaro v Rosalia***, 18 Misc3d 1111A, 856 NYS2d 497 [Sup. Ct. of New York, Queens County 2007]).

In the instant action, the defendants have failed to plead a cause of action on the counterclaim for defamation. Specifically, the counterclaim fails to allege the particular words complained of and the time, place, and manner of the purported defamatory statement. There is no allegation that the content of the communication, if privileged, was the product of actual malice (*see*, ***Grynberg v Alexander's Inc.***, 133 AD2d 667, 519 NYS2d 838 [2nd Dept 1987]). Also, the defendant has not claimed damages relative to any alleged false statement. However, the plaintiffs are not seeking dismissal of the cause of action for defamation based upon pleading requirements and have served an answer in response thereto. Instead, the plaintiffs seek summary judgment on the merits dismissing the counterclaim.

Helen Ragonese filed a claim for assistance with the Suffolk County Executive's Office of Consumer Affairs dated August 14, 2008 wherein she claimed that Pat Filippi never provided her

with a contract although requested, that he failed to complete the job as agreed, and that work performed by him had to be corrected at a cost of $32,852.00. However, the counterclaim does not set forth the statements claimed to be false and unconscionable, that there was actual malice, or the damages claimed. This court cannot speculate as to what statements the defendants are basing their counterclaim on, thus precluding summary judgment.

Accordingly, that part of the application to dismiss the counterclaim sounding in defamation in which the defendants assert that the plaintiff made false and unconscionable statements is denied.

COUNTERCLAIMS FOR BREACH OF CONTRACT AND UNJUST ENRICHMENT

The defendants have asserted a counterclaim premised upon the alleged breach of contract between the parties on the basis that the plaintiff failed to pay the defendant $50,000. The defendants seek monetary damages on the basis of breach of contract and/or in quantum meruit and claim the plaintiff has been unjustly enriched.

Suffolk County Code, Chapter 345 Article II, Home Improvement Contracts, provides in relevant part as follows: "License required. A. It is unlawful for any person to engage in any business as a home improvement contractor without obtaining a license therefor from the Office (Department of Consumer Affairs) in accordance with and subject to the provisions of this Article and Article I" (***C.F.C. Commercial Flooring Contractors, Inc. v Sachs,*** 13 Misc3d 143A, 831 NYS2d 358 [2nd Dept 2006]). "Suffolk County Local Law No. 21-1974, §2-207(2) provides: No license or identification card shall be required of an architect, professional engineer, or any other person who is required by state or local law to attain standards of competency or experience as a prerequisite to engaging in such profession, and who is acting exclusively within the scope of the profession for which he is currently licensed pursuant to such other law" (***The People of the State of New York v Kom***, 108 Misc2d 678, 438 NYS2d 694 [Dist. Ct. of New York, First Dist., Suffolk County 1981]). Home improvement contracting is broadly defined in this local law to include any repair, remodeling, alteration, conversion modernization, improvement or addition to residential property. To insure some minimal level of competence and character the legislature requires licensing of persons involved in performing home improvement contracting work. The statute does not exclude persons who perform as home improvement contractors (*see, generally*, ***The People of the State of New York v Kom***, supra).

Pleading requirements

CPLR 3015(e) requires that "[w]here a plaintiff's cause of action against a consumer arises from a plaintiff's conduct of a business required to be licensed by the department of consumer affairs of the city of New York, the Suffolk County Department of Consumer Affairs, ... the complaint shall allege, as part of the cause of action, that the plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license...." (***Nemard Construction Corp. v Deafeamkpor***, 21 Misc3d 320, 863 NYS2d 546 [Sup. Ct. of New York, Bronx County 2008]). A home improvement contractor must comply with two separate tests to advance a claim. He must have a valid license at the time of pleading, and he must have a valid license at the time of the contract and work. If the contractor cannot meet both tests its claim must be dismissed. While CPLR 1312 deals only with the capacity to sue on a valid contract, CPLR 3015(e) involves a pleading requirement in connection with a contract which may have been invalid when executed. Indeed, the effect of CPLR 3015(e) is actually similar to that of Real Prop. Law §442(d)

which requires a real estate broker to be licensed at the time the contract is entered into, not at the time of the action (*see*, ***Zandell v Zerbe***, 139 Misc2d 737, 528 NYS2d 779 [Civ. Ct. of the City of New York, New York County 1988]).

The New York courts have permitted recovery by an unlicensed contractor in limited situations where: the licensing statute is clearly designed only to raise revenue; the acts are malum prohibitum; there is not clear legislative intent to invalidate the contract; or there is no danger to health or morals. But, when the licensing scheme is designed to protect the public against fraud, a contract by an unlicensed person is unenforceable. An unlicensed person is barred from recovery under the contract or in quantum meruit on the theory that the consideration for the contract is contrary to public policy. The result is the same regardless of the contractor's partial compliance, good faith or lack of actual fraud in performance, or whether the homeowner knowingly takes advantage of the contractor's failure to be licensed *(see*, ***Zandell v Zerbe***, *supra*). As set forth in ***Al-Sullami v Broskie***, 40 AD3d 1021, 834 NYS2d 873 [2nd Dept 2007], "[a] home improvement contractor who fails to possess and plead a valid license as required by relevant local laws may neither sue to recover damages for breach of a construction contract by a consumer, nor recover in quantum meruit." It is well settled that a contractor who was unlicensed in the municipality where the work was performed was barred from recovery in contract or under the theories of recovery of quantum meruit and unjust enrichment (***Flax v Hommel,*** 40 AD3d 809, 835 NYS2d 735 [2nd Dept 2007]; ***Price v Close***, 302 AD2d 374, 754 NYS2d 660 [2nd Dept 2003]). As set forth in ***Bujas v Katz***, 133 AD2d 730, 520 NYS2d 18 [2nd Dept 1987], "an unlicensed home improvement contractor cannot recover for services rendered either on the contract or in quantum meruit. In addition, New York courts bar recovery regardless of whether the work is performed satisfactorily or whether the failure to obtain a license is willful."

In reviewing the evidentiary submissions, it is determined that the defendants have not pleaded their counterclaim in accordance with CPLR 3015(e) in that they do not state that they were duly licensed at the time the contract was entered into and when the work was performed. The plaintiffs claim the defendants were unlicensed at the time the work was being performed. However, the complaint sets forth that on or about September 1, 2006, Frank Ragonese and Helen Ragonese hired the defendants in connection with the renovation and improvement of the plaintiff's residence located at 8 Wyandanch Avenue, Smithtown, New York. The copy of the "Remodeling Proposal" is dated June 25, 2004. The plaintiffs have submitted a copy of the Home Improvement Contractor License, No. 36948-H which is not in admissible form but which was issued March 30, 2005. There is no expiration date on the license, and, therefore, the term of the license is not known. In light of the foregoing, this court cannot determine if the defendants were possessed of a valid license at the time the construction was performed as required by Suffolk County Code, Chapter 345, Article II, or when they asserted their counterclaim (*see*, CPLR 3015(e)).

In view thereof, there are factual issues concerning whether the defendants were licensed at the time they performed work at the plaintiff's residence at 8 Wyandanch Avenue, Smithtown or at 44 Village Hill Drive, Dix Hills, or for any period in which they claim the plaintiffs did not pay for the work and services provided.

Unjust enrichment

The defendants claim in paragraph 11 of their answer that the plaintiffs have been unjustly

enriched. The doctrine of unjust enrichment is used as a device for the prevention of unjust enrichment of one party at the expense of another in the absence of a valid contract (*see, **Blue Wolf Group, LLP v Gaiam, Inc.***, 16 Misc3d 1113A, 847 NYS2d 895 [Civ. Ct. of the City of New York, New York County 2007]). "The term unjust enrichment does not signify a single well-defined cause of action. It is a general principle, underlying the various legal doctrines and remedies. The phrase unjust enrichment is used in law to characterize the result or effect of a failure to make restitution, or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefore. An action to recover on a theory of unjust enrichment is based on the equitable principle that a person not be allowed to enrich himself unjustly at the expense of another. It does not require a wrongful act by the one enriched and only requires that equity and good conscience demand that the one enriched not retain the property held. In order then for the defendants to recover, the plaintiffs must in fact be enriched. However, where a valid and enforceable contract exists governing a particular subject matter, it precludes recovery in quasi-contract for events arising out of the same subject matter. Where there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue, a party may proceed on a quasi-contract. To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered (*see, **Blue Wolf Group, LLP v Gaiam, Inc.***, supra).

Breach of Contract

At paragraph 5 of their answer, the defendants assert that there was a contract that was fully executed by the defendants and breached by the plaintiffs by lack of payment. Patrick Filippi's sworn response to the demand for a first set of written interrogatories provides that in or about June 2004 to December 2004, Filippi Contracting contracted with the plaintiffs to provide construction services at 44 Village Hill Drive, Dix Hills, for fire restoration work for $50,000, brick work for $30,000, second floor addition for $55,000, roof and siding for $15,0000, inter alia. The plaintiff has submitted a copy of a remodeling proposal dated June 25, 2004 in the amount $165,000 for work to be done at the plaintiffs' premises, but submits no contract. In the claim form submitted to Suffolk County Executive's Office of Consumer Affairs dated August 14, 2008, Helen Ragonese states that she asked for a contract and never received one from Pat Filippi. In her supporting affidavit, Helen Ragonese states that between 2004 and 2005, the defendants were hired and engaged to perform certain work, labor and services in connection with her prior residence located at 44 Village Hill Drive, Dix Hills, New York. The defendants have pleaded a cause of action for breach of contract and seek to recover for damages, if so entitled. The defendants do not plead that there was no contract or that services were provided without a contract, and they do not plead that there is a dispute as to the existence of a contract; however, they have submitted no contract. The defendants set forth at paragraph 8 of their answer that the plaintiffs still owe $50,000.00 for previous work performed by the defendants.

Here, no party has produced a valid contract and there are factual issues concerning whether or not the parties entered into a contract for work performed by the defendants on either residence. Although the plaintiff has submitted a proposed work order, it is not known to this court if the proposed work order was to be used as the contract. The plaintiffs claim that they never received a contract although one was requested. The defendants merely assert that the parties entered into an agreement or contract. Therefore, there are factual issues with regard to whether or not a written

contract existed, when the contract was to be performed, which project it was for, whether the parties entered into an oral agreement, and the alleged terms agreed to by the parties.

Because it cannot be determined from the admissible evidence submitted whether or not there was a valid contract or contracts, and because it can not be determined whether or not the defendant possessed a valid home improvement contractor's license at the time the various home improvement work was performed, it cannot be determined whether or not the plaintiffs are entitled to dismissal of the counterclaims premised upon breach of contract, quantum meruit or unjust enrichment counterclaims.

Accordingly, plaintiffs' motion for dismissal of the defendants' counterclaims for damages, for breach of agreement, for quantum meruit, and for unjust enrichment are denied.

Defendants' cross-motion seeks separate, properly sworn Answers to defendants' First Set of Interrogatories and set forth the bases for such application. The defendants further seek permission to serve defendants' Second Set of Interrogatories by virtue of the plaintiffs' anticipated responses to the First Set of Interrogatories, as set forth.

Based upon a review of the submissions, it is determined that the defendants have demonstrated a basis to support the need for individual responses from the plaintiffs to defendants First Set of Interrogatories and have demonstrated the basis to permit service of a Second Set of Interrogatories with separate responses by each plaintiff.

So Ordered.

Dated: March 22, 2011
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.