

Mickey's Place on 43rd St., LTD. v Eye Design Interiors, LLC

2011 NY Slip Op 31067(U)

March 15, 2011

Supreme Court, Queens County

Docket Number: 11010/09

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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MICKEY’S PLACE ON 43RD St., LTD.,
Plaintiff,

Action No. 1
Index No.: 11010/09
Motion Date: 3/9/11
Motion Cal. No.: 32

-against-

EYE DESIGN INTERIORS, LLC and JONNIE
SULTAN a.k.a. JONNIE JETT SULTAN,
Defendants.

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EYE DESIGN INTERIORS, LLC
Plaintiff,

-against-

DEMETRIOU PROPERTY LLC, MICHAEL
DEMETRIOU, MICHAEL MCCREESH, and
MICKEY’S PLACE ON 43RD St., LTD.,
Defendants.

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The following papers numbered 1 to 18 read on this motion by defendants **EYE DESIGN INTERIORS, LLC** (“Interiors”) and **JONNIE SULTAN a.k.a. JONNIE JETT SULTAN** (“Sultan”) for an order pursuant to CPLR 3211(a)(7) dismissing the second, third, and fourth causes of action of **MICKEY’S PLACE ON 43RD St., LTD.’s** (“Mickey’s”) complaint, and dismissing Mickey’s entire complaint as against Sultan; and cross-motion by **DEMETRIOU PROPERTY LLC, MICHAEL DEMETRIOU, MICHAEL MCCREESH, and Mickey’s** for an order pursuant to CPLR 3212 dismissing Interiors’ complaint in its entirety. These two actions were consolidated for all purposes in a So-Ordered stipulation, dated September 4, 2009 (signed by Justice Siegal.) The consolidated action was to proceed under Index Number 11010/09 and the claims in action number two were to be deemed counterclaims in the consolidated action.

PAPERS
NUMBERED

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Upon the foregoing papers it is ordered that defendants Interiors and Sultan’s motion for an order pursuant to CPLR 3211(a)(7) dismissing the second, third, and fourth causes of

action of **MICKEY'S PLACE ON 43RD St., LTD's** ("Mickey's") complaint, and dismissing Mickey's entire complaint as against Sultan, and the cross-motion by **DEMETRIOU PROPERTY LLC, MICHAEL DEMETRIOU, MICHAEL MCCREESH, and Mickey's** for an order pursuant to CPLR 3212 dismissing Interior's complaint in its entirety, are decided as follows:

The underlying action stems from work Eye Design was to perform for Mickey's Place, the lessee of the property known as 43-06 43rd Street, Sunnyside, New York, 11104. Defendants Demetriou claim to be the owners of the construction project at this property and the property. On or about April 28, 2009, Mickey's Place on 43rd St., LTD. commenced an action against Eye Design and Jonnie Sultan to recover losses suffered as a result of their breach of contract, willful exaggeration of lien, unjust enrichment and fraud with regard to the project at the subject premises. On March 16, 2009, Eye Design filed a Notice of Mechanic's Lien against the subject property in the amount of \$201,714.00 in Queens County. Thereafter, Eye Design commenced an action against the Demetriou defendants and others for claiming breach of contract, unjust enrichment and quantum meruit, and a third cause of action to foreclose the Mechanics Lien. These two actions were consolidated for all purposes

Regarding Interiors and Sultan's motion for an order pursuant to CPLR 3211(a)(7), allegations in Mickey's complaint, which must be accepted as true for the purpose of this CPLR 3211(a)(7) motion (see, 1455 Washington Ave. Assocs. v Rose & Kiernan, 260 AD2d 770), are as follows:

Under the first cause of action, breach of contract, it is alleged that in or about October 2007, Mickey's entered into an agreement with defendant Interiors by which Interiors was to perform general construction and renovation work at the bar/restaurant, owned by Mickey's, located at 43-06 43rd Street, Sunnyside, New York. Pursuant to this agreement, Interiors was to initially receive the sum of \$210,000.00, but this amount was increased to \$255,000.00 based upon additional work requested by Mickey's. Interiors failed or refused to perform its work on the project or performed it poorly and failed to remedy such when requested. As a result, Mickey's hired other contractors to complete Interiors' work and paid them \$687,128 to do so. As a result of Interior's breach of contract, Mickey's expended \$432,128 more than it had agreed to with Interiors and Mickey's has been damaged in that amount.

Under the second cause of action, unjust enrichment, Mickey's claims Sultan demanded that payments be made directly to him in cash and/or by check as an individual instead of to Interiors. Defendants intermingled funds and were paid a total of \$250,500 (including cash and checks paid directly to Sultan), yet they failed to complete the work. As a result, defendants were overpaid and have been unjustly enriched in the amount of \$250,500. Under the third cause of action (willful exaggeration of lien), Mickey's claims that on March 13, 2009, Interiors filed a Notice of Lien in the amount of \$201,714 with the Queens County Clerk against the Project. Based on the payments made to Interiors by Mickey's and the other expenditures, this amount is void and cannot be recovered. Under the fourth cause of action, Mickey's claims that defendants representation that they could complete the work

agreed upon for the agreed upon amount was false and or misleading since they had no intention of completing the work, and merely sought to deceive Mickey's into making payments to them. Mickey's seeks an amount not less than \$932,128 for this fraud based on additional expenditures to complete the project and damages from delays, loss of reputation and other costs.

Defendants Interiors and Sultan now move to dismiss the unjust enrichment and fraud causes of action based upon these claims being based upon the same allegations that give rise to the breach of contract. They move to dismiss all causes of action against Sultan since the contract was between Mickey's Place and Interiors and there are no allegations that would impose individual liability on Sultan. Finally, they move to dismiss the wilful exaggeration of lien cause of action since the underlying lien has been discharged, pursuant to an Order of this Court, dated, June 8, 2010, which also dismissed the cause of action to foreclose the mechanic's lien. Mickey's opposes this motion.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy's East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy's East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.) Contrary to Mickey's assertion, on this motion, there is no requirement that the moving party submit an affidavit of a person with personal knowledge. CPLR 3211.

The second cause of action, sounds in unjust enrichment. A cause of action pursuant to a quasi contract theory only applies in the absence of an express agreement and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment. See, Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 (1987.) When, as here, there is no dispute as to the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract. See, Alamo Contract Builders v CTF Hotel Co., 242 AD2d 643 (2d Dept 1997.) The logic behind this is that the contract itself and its

alleged breach provide the basis for full recovery and the other quasi contract claims are unnecessary and duplicative. Accordingly, the branch of this motion to dismiss the second cause of action for unjust enrichment is granted.

The fourth cause of action sounds in fraud. A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained when the plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. McKernin v. Fanny Farmer Candy Shops, 176 A.D.2d 233 (2d Dept 1991) *See also*, Heffez v L&G General Construction, Inc., 56 AD2d 526 (2d Dept 2008.) Here, Mickey's alleges that the fraud stemmed from Interiors and Sultan's having misrepresented an intention to pay Mickey's the amounts due and owing under the parties' agreement. These allegations have failed to state a claim for fraud since the same circumstances also give rise to Mickey's breach of contract claim, and merely set forth a misrepresentation of future intent to perform under the contract. This is not sufficient to set forth a cause of action for fraud. *Id.* Accordingly, the branch of this motion to dismiss the third cause of action for fraud is granted.

The third cause of action is for wilful exaggeration of a lien. Pursuant to Lien Law § 39, the court may declare a lien void and deny recovery if the lienor has willfully exaggerated the amount claimed. Lien Law § 39-a provides that where the court has declared a lien void "on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor". Lien Law § 39-a is penal in nature, and therefore it must be strictly construed in favor of the person upon whom the penalty is sought to be imposed. Guzman v. Estate of Fluker, 226 A.D.2d 676 (2d Dep't 1996). Lien Law §§ 39 and 39-a must be read in tandem, and damages may not be awarded under section 39-a unless the lien has been discharged for willful exaggeration. *Id.* Here, the lien was discharged in this Court's June 8, 2010 Order based upon it having expired as a matter of law. As such, there was no finding that the lien was wilfully exaggerated and Mickey's cannot seek damages based on wilful exaggeration. Moreover, as discussed in this Court's June 8 Order, defendants Demetriou are the owners of the property, not Mickey's, and furthermore, Mickey's is not a contractor. As such, this serves as another bar to Mickey's bringing a cause of action for wilful exaggeration. Consequently, the third cause of action is dismissed.

The branch of the motion seeking to dismiss the entire complaint as against defendant Sultan is granted. The complaint is bereft of allegations that would impose any personal liability upon Sultan. The only allegation regarding Sultan involves him involving the defendants intermingling funds that were paid by Mickey's for the work performed by Interiors. There are no allegations that Sultan used these funds. Moreover, there is no claim seeking to pierce the corporate veil due to Sultan's actions in relation to Interiors. The Court notes that Mickey's has not offered any opposition to this branch of the motion to dismiss.

Based on the above, the motion by Interiors and Sultan to dismiss the second, third, and fourth causes of action of Mickey's complaint, and dismissing Mickey's entire complaint

as against Sultan is granted.

The motion for summary judgment by **DEMETRIOU PROPERTY LLC, MICHAEL DEMETRIOU, MICHAEL MCCREESH, and Mickey's** for an order pursuant to CPLR 3212 dismissing Interior's complaint in its entirety is denied in its entirety. First, these parties have failed to adhere to several of this Court's Orders for discovery. This has led to Interiors and Sultan not receiving necessary material to oppose this motion. Accordingly, the motion is denied as premature, pursuant to CPLR 3212 (f) and may be renewed upon the completion of discovery. The Court notes that defendants Demetriou have previously made a summary judgment motion and if they choose to renew the instant motion, they must set forth a reasonable excuse for failing to raise the grounds now asserted in their first summary judgment motion. The Court also notes that since the parties agreed to deem the causes of action in Action 2 as counterclaims in Action 1, even if Interiors is a foreign LLC, it is not prohibited from asserting counterclaims in an action it did not initiate. CPLR 3019. Finally there are issues of fact regarding the manner in which the plumbing work was authorized and paid for that preclude the granting of this motion.

Dated: March 15, 2011

ORIN R. KITZES, J.S.C.