

**Gabriella Enters., Inc. v Incorporated Vil. of
Manorhaven**

2011 NY Slip Op 31162(U)

April 20, 2011

Supreme Court, Nassau County

Docket Number: 21089/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X **PART 8**

GABRIELLA ENTERPRISES, INC. and ANTHONY SALDANO,

Plaintiff(s),

INDEX NO. 21089/10

MOTION DATE: 03/14/11

SEQUENCE NO: 02

-against-

INCORPORATED VILLAGE OF MANORHAVEN,

Defendant(s).

-----X

Notice of Motion, Affs, & Exs.....	<u>1</u>
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Upon the foregoing papers, it is ordered that the plaintiff's motion for summary judgment in lieu of complaint is denied. It is ordered that, pursuant to CPLR §3213, the motion and opposition papers shall be deemed the complaint and answer, respectively. It is further ordered that plaintiff is granted leave to file a late Notice of Claim regarding the within breach of contract claim within sixty (60) days of this order.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

In the instant action, plaintiffs allege that the defendant failed to issue payment, in the amount of \$27,000, in accordance with the terms of a written, executed settlement agreement.

Plaintiff Gabriella Enterprises, Inc. is the owner of property located at 35 Manorhaven Boulevard, in Port Washington, New York. Plaintiff Anthony Saldano is the president of Gabriella Enterprises, Inc. (hereinafter "Gabriella"). Pursuant to a lease agreement, plaintiff

rented the said property to the defendant, Incorporated Village of Manorhaven (hereinafter "Village") for the term of March 1, 2008 to July 31, 2008. The lease was thereafter extended on a month to month basis through November 2009. Plaintiff took possession of the property on or about November 2, 2009 and alleges that the defendant damaged the property, in violation of the lease, necessitating repairs. Plaintiff alleges that the property damage sustained totaled \$30,088.82. On January 21, 2010, plaintiffs served a Notice of Claim upon the defendant regarding the property damage and the failure of the Village to maintain the premises in "good repair and condition" in accordance with the lease terms. Before the filing of the within motion for summary judgment in lieu of complaint, the parties reached a settlement of \$27,000.00.

After a settlement was reached, a general release, executed on behalf of the corporate plaintiff Gabriella, was sent to the Village on March 10, 2010. After receipt of same, defendant sent correspondence stating that the Village Attorney, Gerard Terry, requested that a general release be executed by Anthony Soldano in his personal capacity and also requested that plaintiff execute a settlement agreement drafted by the defendant. Anthony Soldano executed the settlement agreement in his personal capacity and as president of Gabriella, and also executed a general release in his personal capacity. The settlement agreement was also executed by Village Clerk-Treasurer, Jonathan P. Fielding. Plaintiff alleges that same were received by defendant on April 21, 2010, as evidenced by the defendant's date stamp on the settlement agreement. The settlement agreement specifically states that "the Village has engaged in a substantial review of the elements described in the Notice of Claim, including the solicitation of estimates from reputable contractors with respect to the cost of repairs" and that the parties agree that the "Village shall pay the sum of Twenty-seven dollars and no cents (\$27,000.00)...in settlement of this claim."

Plaintiff Anthony Soldano submits an affidavit attesting, *inter alia*, that there has been no payment of the agreed upon settlement amount to date. Accordingly, plaintiff alleges that defendant is in violation of the agreement and that they are entitled to summary judgment. Plaintiff further alleges that pursuant to CPLR 5003-a(b), defendant was required to pay all sums due to the settling plaintiff within ninety (90) days of tender of the settlement documents and general releases. As over ninety (90) days have passed, plaintiff argues that it is entitled to payment of the agreed upon sum of \$27,000, plus statutory interest of nine percent (9%) per

annum.

Contrary to plaintiff's contentions, however, remedy pursuant to CPLR §5003-a is only available where a settlement is reached during a pending judicial action. CPLR §5003-a, requiring prompt payment following settlement, does not authorize judicial enforcement of agreements made prior to commencement of action. (*State Farm Mut. Auto. Ins. Co. v. Mamadou*, 17 Misc.3d 600, 844 N.Y.S.2d 680 (Sup. Ct. Kings Cty. 2007); *Bishop v. Icon Engineering, P.C.*, 24 Misc.3d 1237(A), 901 N.Y.S.2d 897 (Sup. Ct. Kings Cty. 2009)). As the within settlement agreement was entered prior to the commencement of an action, remedy pursuant to CPLR §5003-a is inapplicable to the instant action.

In opposition to plaintiff's motion for summary judgment, defendant argues that because the settlement agreement required releases, this is not an action based upon a judgment for the payment of money only, and as such, a motion in lieu of complaint, pursuant to CPLR §3213, is procedurally improper. Contrary to defendant's contentions, however, the settlement agreement in question states a sum certain and can form the basis of a motion for summary judgment in lieu of a complaint, since it is considered an instrument for the payment of money only. (*J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434, 723 N.Y.S.2d 205 (2d Dept. 2001); *Krape v. PDK Labs, Inc.*, 34 A.D.3d 751, 826 N.Y.S.2d 340 (2d Dept. 2006); *Tongkook America, Inc. v. Bates*, 295 A.D.2d 202, 743 N.Y.S.2d 709 (1st Dept. 2002)). Furthermore, the Court notes that the prerequisites to defendant's obligations to pay were met, as a release executed on behalf of the corporate plaintiff was received by the defendant prior to the execution of the settlement agreement, and a release executed by the individual plaintiff, Anthony Soldano, was received by the defendant simultaneously with the executed settlement agreement. As such, plaintiffs may establish a prima facie case by proof of the instrument and defendant's failure to make payments required pursuant thereto. (*See, Tongkook America, Inc. v. Bates*, 295 A.D.2d 202, 743 N.Y.S.2d 709 (1st Dept. 2002)).

Defendant further argues that the settlement agreement was not ratified by the Village Board of Trustees, and as such, is unenforceable. Defendant claims that at a meeting on August 26, 2010, the Board of Trustees adopted a resolution that the settlement agreement between plaintiff and the Village, dated April 21, 2010 and never ratified, was repudiated. Where the legislature provides that valid contracts may only be made by specified officers or boards and in a

specific manner, a contract that fails to comply with this statutory restriction cannot create an obligation or liability of the municipality. (*Kelly v. Cohoes Housing Authority*, 27 A.D.2d 463 (3d Dept. 1967); *New York Tel. Co. v. North Hempstead*, 41 N.Y.2d 691 (1977)). Neither party has demonstrated what statutory authority and/or procedure the Village had to follow to enter into the subject settlement agreement. A party contracting with a municipality is chargeable with knowledge of the statutes that regulate its contracting powers and is bound by them. (*Parsa v. State*, 64 N.Y.2d 143, 474 N.E.2d 235 (1984); *Hartford Ins. Group v. Town of North Hempstead*, 118 A.D.2d 542, 499 N.Y.S.2d 161 (2d Dept. 1986)). Accordingly, there are questions of fact which preclude the granting of summary judgment to plaintiff. (*See, Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

Lastly, while the plaintiffs timely served a Notice of Claim regarding their property damage claim, the defendant argues that the plaintiff failed to serve a timely Notice of Claim relating to the within breach of contract action pursuant to CPLR §9802. As the defendant had actual, specific knowledge of the facts regarding this claim from its outset, and had actual knowledge of both the terms of the settlement agreement and of its own failure to issue payment, no substantial prejudice will result from permitting plaintiff leave to serve a late notice of claim regarding the alleged breach of the settlement agreement. (*See generally, Sica v. Board of Educ. of City of New York*, 226 A.D.2d 542, 640 N.Y.S.2d 610 (2d Dept. 1996)). Accordingly, this Court grants plaintiff leave to file a late Notice of Claim upon the Village within sixty (60) days of this order.

Accordingly, plaintiff's motion for summary judgment in lieu of complaint is denied, and, pursuant to CPLR §3213, the motion and opposition papers shall be deemed the complaint and answer, respectively.

Movant is directed to serve a copy of this order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court within twenty (20) days of the date of this Order. The parties shall appear for a Preliminary Conference on **June 22, 2011, at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

Dated: April 20, 2011

ENTERED
 APR 25 2011
 Anthony L. Patga, J.S.C.
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

Cc: Kronrad & David
Jessica Kronrad, Esq.
1565 5th Industrial Court
Bay Shore, NY 11706

Leventhal & Sliney, LLP
15 Remsen Avenue
Roslyn, NY 11576