

Fong Constr. Corp. v Gordon
2011 NY Slip Op 31316(U)
May 13, 2011
Supreme Court, New York County
Docket Number: 115444/09
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECENT.

PART 36

Index Number : 115444/2009

FONG CONSTRUCTION

vs

GORDON, ANTHONY

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to/for Summary Judgment/answer

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

5

34

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *v* cross-motion are

decided in accordance with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 18 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 5/13/11

[Signature]
JUDGE DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----x
FONG CONSTRUCTION CORPORATION,

Plaintiff,

-against-

ANTHONY GORDON,

Defendant.

-----x
DORIS LING-COHAN, J.:

Index No.: 115444/09
Motion Seq. No.: 003

DECISION

FILED

MAY 18 2011

BACKGROUND

Defendant Anthony Gordon (Gordon) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint, and also moves, pursuant to CPLR 6514 (a), to direct the Clerk of New York County to cancel the notice of pendency dated November 2, 2009, filed by plaintiff Fong Construction Corporation (Fong) with respect to the condominium unit 9/10C in the building known as 18 West 12th Street, New York, New York 10003. Gordon also seeks costs and expenses. Fong cross-moves, pursuant to CPLR 3015 (c) and 3025, for leave to serve and file an amended complaint.

On or about June 4, 2007, Gordon and Fong entered into a contract whereby Fong agreed to act as a home improvement contractor to renovate Gordon's apartment. Motion, Ex. D. Pursuant to the contract, work was to commence on or about June 6, 2007, and was to be completed within the following 26 weeks.

Between July 16, 2007 and November 26, 2008, Fong submitted 40 change orders to Gordon's architect, David Fratianne

(Fratianne), pursuant to the contract, totaling \$435,778.57. Motion, Ex. E; Fratianne Aff. On or about August 6, 2008, Fong submitted the second-to-last payment requisition to Fratianne, wherein Fong claimed that the work was substantially completed. Motion, Ex. F; Fratianne Aff. Shortly after receiving this payment request, Fratianne conducted an inspection of the premises, wherein Fratianne allegedly discovered numerous defects in the work and prepared a punch list of items to be repaired and/or corrected. Fratianne Aff.

Gordon alleges that, despite his dissatisfaction with the work, he made a partial payment to Fong of \$100,000.00. On or about November 26, 2007, Fong presented an application and certification for payment in the amount of \$295,746.42, as the final payment due for the work performed. Motion, Ex. G.

Gordon states that, pursuant to Articles 4, 5 and 15 of the contract, he withheld \$122,756.29 as "retainage," representing the final ten percent of the contract price. Gordon contends that final payment of the retainage was conditioned upon Fong's obligations, pursuant to Article 18 of the contract, regarding timely completion and remediation of all defects appearing in Fratianne's punch list.

Article 4 of the contract provides for progress payments throughout the period when work is being performed, and allows for retainage of 10% of the contract price. Article 5 states:

"FINAL PAYMENT

5.1 Final Payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the conditions of sections 15.4 of this

Agreement are satisfied or waived by the Owner. Owner shall withhold the amount of ten percent (10%) 'Retainage' of the total Contract Sum for a period of no longer than three (3) weeks after Substantial Completion. The Owner shall pay the Retainage to the Contractor when Final payment is due in accordance with the Section 15.4 of this Agreement."

Section 15.4 of the agreement states:

"Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees."

Article 18 of the contract states:

"18.1 The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of six months from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractors.

18.2 Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced nor to the time within which proceedings may be commenced to establish the Contractors [sic] liability with respect to the Contractors [sic] obligations other than specifically to correct the Work."

Gordon asserts that Fong failed to make the requisite

corrections and that he, Gordon, had to expend various sums to correct the work that Fong failed to correct, said amount negating the retainage. According to Gordon, Fong refused to accept the deductions to the final payment due. Gordon avers that, on December 15, 2008, Fong stopped all work, vacated the premises, and ceased supplying all materials for the project. Fratianne Aff.

For the following seven months, counsel for both sides allegedly attempted to reach a settlement regarding the punch list and final payment, but no agreement was reached.

Gordon alleges that, on or about April 21, 2009, he hired Fong for leak damage repair that resulted from a leak into Gordon's den on the ninth floor portion of his apartment. Gordon says that the leak was caused by flooding of a neighboring apartment terrace after a heavy rain storm. Gordon Aff. According to Gordon's sworn statement, he retained Fong to make the repairs because, at that time, the work and punch list negotiations appeared to be nearly finalized, and because Fong was already familiar with the premises. Fong submitted a bill to Gordon on April 22, 2009, in the amount of \$4,625.00, representing "Kitchen Garage Door-Repair Finishing; Labor for Leak Problem-04/21/09; and Job Condition/Overhead/Profit." Motion, Ex. H. Gordon contends that this bill has no relation to the home improvement contract.

On May 21, 2009, Fong prepared a Notice of Lien in the amount of \$312,144.84, which was filed with the County Clerk, New

York County, on July 16, 2009. Motion, Ex. J. Gordon says that the Notice of Lien was not served on him until August 7, 2009. *Id.* According to the Notice of Lien, Fong states that the last work performed pursuant to the contract was on April 21, 2009; Gordon contends that that work was unrelated to the contract, and that the last date on which Fong performed any work under the contract was December 15, 2008.

In support of his motion, Gordon posits the following arguments: (1) the Notice of Lien was untimely, not having been filed within the four-month statutory deadline; (2) Fong may not maintain this action because he failed to plead and prove that he is a licensed home improvement contractor; and (3) Fong failed to foreclose on the mechanic's lien in a timely fashion as mandated by section 59 of the Lien Law.

Gordon has attached to his motion an e-mail sent by Fong's former counsel to Fratianne and Gordon's counsel, in which Fong's attorney says, in the midst of negotiations regarding final payment:

"As requested attached is the change order quote for the garage door. In addition, Fong's invoice is attached for the time spent last Tuesday on the ceiling leak which turned out to be caused by Tony's neighbor upstairs and not as a result of Fong's work."

On November 16, 2009, Fong instituted the instant action and simultaneously filed a Notice of Pendency against the premises.

In opposition to Gordon's motion, and in support of its own cross motion, Fong has provided a copy of his home improvement licence (Cross Motion, Ex. A), which, he states, he did not think

was necessary to allege in the complaint because Fratianne already had a copy of his license. In this context, Fong seeks leave to amend the complaint to include a statement to the effect that he is so licensed and to include causes of action for breach of contract, quantum meruit, account stated, and a declaration that Fong has a valid lien on the premises. Fong has provided a copy of the proposed amended complaint. Cross Motion, Ex. B.

Fong also asserts that, during the time that he was working on the project, Gordon and Fratianne issued numerous punch lists (Cross Motion, Ex. C), and questions why Gordon failed to include the punch list in his motion that, allegedly, contains the items that Fong failed to correct. Additionally, Fong argues that the retainage, according to the contract price, should not be more than \$122,756.29 (10%), but that Gordon has withheld \$295,746.42. Moreover, Fong states that, although Gordon says that there are deductions from the retainage to which he is entitled, Gordon has failed to provide evidence of such amounts.

With respect to the work performed on April 21, 2009, Fong insists that he was called in by Gordon because Gordon initially maintained that the leak was caused by Fong's faulty work; however, Fong later discovered that the leak was caused by a neighboring apartment. Fong contends that, because the work he did on April 21, 2009, was initially performed pursuant to the contract, that is the date for which the statutory period for filing a Notice of Lien should start. Fong has also provided an e-mail from Fratianne to his, Fong's, former counsel, dated May

5, 2009, in which Fratianne states that he believes that

"its still an open question as to who is at fault. We contend that the neighbor's terrace is the source of the leak, but no definitive answer has been determined. We are actually preparing a request for Fong to provide a change order for the ceiling work required at the den. I would hope he would be interested in doing this work for a price while he's picking up the punch list."

Cross Motion, Ex. E.

Fong asserts that, since at the time that it was called in to repair the leak no one knew the cause of the leak, it was called to make the repair because Gordon believed that the cause of the leak was Fong's faulty work. Therefore, according to Fong, regardless of what may have been subsequently determined, on April 21, 2009, Fong was making repairs pursuant to the contract, not separate from the contract as Gordon asserts. Moreover, the invoice for the work performed on that day includes work on the kitchen garage door, which was part of the home improvement contract. The court notes that the kitchen garage door is mentioned on one of the punch lists sent to Fong by Fratianne on June 16, 2008 and June 28, 2008 (Cross Motion, Exs. C and D).

In reply, Gordon only argues against Fong being granted leave to amend the complaint. Gordon contends that Fong's cause of action for breach of contract is without merit, and that the cause of action for account stated must fail because Fong never presented him with an invoice that he did not challenge. In addition, Gordon merely reiterates his earlier arguments in support of his motion.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Lien Law § 10 (1) states:

"[W]here improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or within four months after the completion of the contract, or the final performance of the work, or the final furnishing of materials, dating from the last item of work performed or materials furnished."

Gordon asserts that Fong's Notice of Lien was untimely because, according to Gordon, the last work performed on the apartment was in November, 2008, and the Notice of Lien was not filed until July, 2009. Lien Law § 10.3 (b). However, both parties have provided an invoice from Fong for work performed in April, 2009, less than four months before the Notice of Lien was

filed. The crux of both sides' contentions concerns the interpretation of this April invoice and the subsequent e-mails regarding the April, 2009 repairs.

Gordon asserts that the invoice was for work unrelated to the contract. In support of this contention, Gordon points to an e-mail sent by Fong's former counsel in which the attorney indicates that the leak was caused by Gordon's neighbor, not Fong's work.

Conversely, Fong maintains that the invoice included work being performed pursuant to the contract, i.e., the kitchen/garage door, which does appear on Fratianne's punch list of items that Fong was to repair pursuant to the contract. Moreover, the fact that the source of the leak subsequently was determined to be caused by Gordon's neighbor does not conclusively establish that, at the time that the work was being performed, the parties did not believe that it was caused by Fong's work. In addition, Fratianne e-mailed Fong's former counsel in May, 2009, indicating that, at that time, it was uncertain as to who was at fault for causing the leak.

Based on the foregoing, the court cannot conclusively conclude that the work performed by Fong in April, 2009, was unrelated to his contract with Gordon. However, even if the Notice of Lien were determined to have been timely filed, the lien is hereby vacated due to Fong's failure to foreclose on the lien in a timely fashion.

Fong was served with a notice, pursuant to Lien Law § 59, to

commence an action to foreclose on the lien by October 21, 2009 Motion, Ex. L); however, Fong did not institute the present action until November, 2009, and has proffered no reason for its delay. A lien is properly vacated when a lienor fails "either to commence an action to foreclose the lien, or to demonstrate why the lien should not be vacated for his failure to commence an action to foreclose the lien within 30 days of receipt of the ... notice pursuant to Lien Law § 59." *Matter of Marple v Sorg*, 230 AD2d 858, 858 (2d Dept 1996); *Matter of Kushaqua Estates, Inc. v Bonded Concrete, Inc.*, 215 AD2d 993 (3d Dept 1995).

Based on the foregoing, the court vacates the lien.

That portion of Gordon's motion seeking to dismiss the complaint because Fong neglected to plead or prove that it is a licensed home improvement contractor is denied.

The evidence submitted conclusively proves that, at all times during the performance of the contract that is the subject of this litigation, Fong was a licensed home improvement contractor. CPLR 3015 (e) requires that, where a plaintiff's cause of action requires that he have a valid license, the complaint must allege the existence of such license. However, since CPLR 3015 (e) allows the complaint to be amended to include such allegation if the contractor acquires a license after the suit is initiated, it is reasonable to allow the complaint to be amended in circumstances in which the contractor always had the license but neglected to so state in the complaint.

In the instant matter, Gordon's architect was aware that

Fong had the appropriate license, and Fong has cross-moved to amend the complaint to allege the existence of such license. In the interests of justice, and because, under the circumstances, Gordon had actual or constructive knowledge of such license, the court denies this portion of Gordon's motion.

Lastly, the court grants that portion of Gordon's motion seeking to vacate the Notice of Pendency.

"CPLR 6501 provides, in pertinent part: 'A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property.' As the Court of Appeals has stated, 'The usual object of filing a notice of *lis pendens* is to protect some right, title or interest claimed by a plaintiff in the lands of a defendant which might be lost under the recording acts in event of a transfer of the subject property by the defendant to a purchaser for value and without notice of the claim' [internal citation omitted]."

Rose v Montt Assets, Inc., 250 AD2d 451, 451 (1st Dept 1998).

In the instant case, the lien against the property has been vacated and, as discussed below, Fong's amended complaint has only one cause of action for breach of contract, for which Fong seeks monetary damages.

"[W]here, as here, ... the judgment[] ... would [not] 'affect the title to, or the possession, use or enjoyment of, real property,' the extraordinary provisional remedy of a notice of pendency pursuant to CPLR 6501 is not available and consequently must be cancelled."

Downs v Yuen, 297 AD2d 251, 251 (1st Dept 2002); *Tiger Riverdale, Inc. v Tiger Dale, Inc.*, 47 AD3d 441 (1st Dept 2008); *Prezioso v Demchuk*, 127 AD2d 576 (2d Dept 1987). Therefore, the court cancels the Notice of Pendency filed against the subject premises.

Fong's cross motion for leave to amend the complaint is granted in part and denied in part.

CPLR 3025 (b) mandates that motions for leave to amend the pleadings shall be freely given, absent a showing of prejudice or surprise to the opposing party. However, with all such motions, the court must determine whether the proposed amendment is meritorious. See generally *Lucido v Mancuso*, 49 AD3d 220 (2d Dept 2008).

For the reasons stated above, that portion of Fong's cross motion seeking leave to amend the complaint to allege the existence of his home improvement license is granted.

That portion of Fong's cross motion seeking leave to amend the complaint to allege a cause of action for breach of contract is granted.

Gordon's opposition to this portion of the cross motion concerns his contention that he does not owe Fong any money and, therefore, a breach of contract action will not lie. However, Gordon is confusing proof of a breach, or non-breach, with a meritorious allegation of breach of contract. There is no question that a contract existed between Gordon and Fong, but it remains a question of fact as to what, if any, amounts are still owed under that agreement.

That portion of Fong's cross motion seeking leave to amend the complaint to allege a cause of action for quantum meruit is denied.

"[A] party may not recover in quantum meruit or unjust

enrichment where the parties have entered into a contract that governs the subject matter." *Cox v NAP Construction Company, Inc.*, 10 NY3d 592, 607 (2008).

That portion of Fong's cross motion seeking leave to amend the complaint to allege a cause of action for account stated is denied.

To allege a cause of action for account stated, there must be a showing that the defendant received an invoice which he accepted without objection. *Miller v Nadler*, 60 AD3d 499 (1st Dept 2009). In the case at bar, Gordon has done nothing but question the invoice, which would preclude Fong from alleging this cause of action.

Lastly, that portion of Fong's cross motion seeking leave to amend the complaint to assert a cause of action declaring that it has a valid lien is denied, since the lien has been vacated by this decision.

Since the action remains ongoing, the court declines to allocate costs and expenses at this time, as requested by Gordon in his motion.

CONCLUSION

Accordingly, it is

ORDERED that the portion of defendant's motion which seeks to vacate the mechanic's lien placed by plaintiff on the premises known as condominium unit 9/10C in the building known as 18 West 12th Street, New York, New York 10003, and to cancel the Notice of Pendency filed against said premises, is granted and said lien

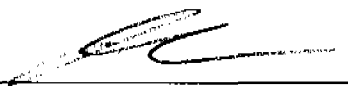
is vacated and the Notice of Pendency is canceled, and the remainder of defendant's motion is denied; and it is further

ORDERED that upon proof of service of a copy of this order with notice of entry upon plaintiff, the Clerk of New York County is directed to cancel the notice of pendency dated November 2, 2009 and the mechanic's lien dated May 21, 2009, filed with respect to the condominium unit 9/10C in the building known as 18 West 12th Street, New York, New York 10003; and it is further

ORDERED that the portion of plaintiff's cross motion which seeks leave to amend the complaint to allege its home improvement contractor's license and to add a cause of action for breach of contract is granted, and the remainder of plaintiff's cross motion is denied; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: 5/13/11


Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Fong Construction.helewitz.wpd

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MAY 18 2011
NEW YORK
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