

Zaromatidis v Last Detail Bldg., Inc.
2011 NY Slip Op 32592(U)
September 28, 2011
Supreme Court, Nassau County
Docket Number: 18667-07
Judge: Timothy S. Driscoll
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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
NICK ZAROMATIDIS and
CARMEN ZAROMATIDIS,

Plaintiffs,

-against-

LAST DETAIL BUILDING, INC.,

Defendant.
 -----X

TRIAL/IAS PART: 20

NASSAU COUNTY

Index No: 18667-07

Motion Seq. No: 3

Submission Date: 9/7/11

Papers Read on this Motion:

Notice of Motion, Affirmation in Support and Exhibits.....X
Part 2 of Plaintiffs' Exhibits.....X
Affidavit in Opposition and Exhibits.....X
Affirmation in Reply.....X

This matter is before the court on the motion by Plaintiffs Nick Zaromatidis ("Nick") and Carmen Zaromatidis ("Carmen") (collectively "Plaintiffs"), filed April 1, 2011 and submitted on September 7, 2011. For the reasons set forth below, the Court grants Plaintiffs' motion to the extent that the Court directs Defendant to remit the sum of \$28,000 to Plaintiffs on or before November 4, 2011 and further directs that, if Defendant fails to remit that sum to Plaintiffs on or before November 4, 2011, the Court will direct a judgment in favor of Plaintiffs and against Defendant in the sum of \$28,000, plus statutory interest since October 1, 2005.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 3212, granting judgment to the Plaintiffs against the Defendant Last Detail Building, Inc. ("Last Detail") on the First Cause of Action for breach of contract and on the Second Cause of Action for breach of implied contract,

and scheduling this matter for a hearing on damages.¹

Defendant opposes Plaintiffs' motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Fusco Aff. in Supp.) also names Steve Kontarines ("Kontarines") as a defendant, and makes allegations about him. Pursuant to a stipulation dated October 17, 2008 (*id.* at Ex. C), that was so-ordered by the Court (Austin, J.), counsel for the parties agreed, *inter alia*, that the claim against Kontarines personally would be withdrawn and the caption would be amended to remove Kontarines as a defendant. Last Detail and Kontarines are referred to as the "Defendants" in the Complaint.

The Complaint alleges as follows:

At all relevant times, Defendants were in the general contracting business doing business within the State of New York. On or about June 2005, Plaintiffs contracted with Defendants for work to be performed at Plaintiffs' residence ("Residence") located in Franklin Square, New York. Pursuant to that contractual relationship ("Contract"), Plaintiffs deposited with Defendants the sum of \$29,000.00.² The work contracted for ("Project") was to be completed on or before September 1, 2005.

Defendants failed to complete the Project as agreed. Plaintiffs also allege that the work performed by Defendants was "inadequate, shoddy, unsightly and below acceptable standards" (Compl. at ¶ 11). Plaintiffs allege further that the work performed by Defendants caused flooding at the Residence. Plaintiffs demanded a refund of "monies due for the work that was not completed and not completed to acceptable standards" (*id.* at ¶ 13), which Defendants have refused to issue to Plaintiffs.

In the first cause of action, Plaintiffs allege that Defendants' conduct constituted a breach of the parties' Contract, for which Plaintiffs seek incidental and consequential damages. In the second cause of action, Plaintiffs allege that Defendants' conduct constituted a breach of an

¹ In her Affirmation in Support, Plaintiffs' counsel affirms that Plaintiffs are seeking summary judgment as well as an Order declaring that Defendant is obligated to provide Plaintiffs with a reimbursement of funds they paid to Defendant in consideration of home improvement work they contracted with Defendant to perform on their residence.

² As discussed *infra*, Plaintiffs testified that they provided Defendants with \$28,000.

implied contract between the parties, for which Plaintiffs seek damages including loss of profit, incidental and consequential damages.

In her Affirmation in Support, Plaintiffs' counsel outlines the procedural history of this matter, and provides copies of the pleadings. She also provides transcripts of 1) the Plaintiffs' deposition testimony (Exs. J and K to Fusco Aff. in Supp.) in which they testified that they made cash payments to Last Detail totaling \$28,000, 2) Kontarines' deposition testimony in March of 2011 (*id.* at Ex. L) in which he admitted that he owned a majority interest in Last Detail, and was not licensed to do home improvement work in Nassau County in 2005, and 3) deposition testimony of Emmanuel Papazoglou ("Papazoglou") in March of 2011 (*id.* at Ex. M) in which he admitted that he owned a minority interest in Last Detail, and was not licensed to do home improvements in Nassau County in 2005. Plaintiffs' counsel also notes that, although Defendant testified that there was a written contract, they have not produced that writing. She cites deposition testimony of Kontarines and Papazoglou in which they "improbably" (Fusco Aff. in Supp. at ¶ 25) testified that the relevant documents were in a work van that was repossessed.

In his Affidavit in Opposition, Kontarines submits that Plaintiffs have failed to establish the elements constituting a cause of action for breach of contract. Specifically, Plaintiffs have failed to demonstrate that Last Detail failed to perform pursuant to the Contract, and Kontarines argues that Plaintiffs do now know what Last Detail failed to do. Kontarines refers to the Plaintiffs' depositions and submits that their testimony reflects that the Plaintiffs do not agree on the facts, and demonstrates the existence of triable issues necessitating a trial. Kontarines also contends that Plaintiffs have failed to demonstrate that they performed pursuant to the terms of the Contract, noting that their deposition testimony varies regarding the amounts of money that were tendered, and to whom that money was given.

Kontarines also argues that Plaintiffs have failed to provide documentation in support of their assertion that Defendants were unlicensed, and Plaintiffs lack personal knowledge regarding Defendants' licensing status. Thus, Plaintiffs' allegations regarding Defendants' alleged failure to obtain a home improvement license are merely "bald conclusory statements" (Kontarines Aff. in Opp. at ¶ 22). Kontarines also affirms the truth of his deposition testimony that there was a written contract, as well as a check issued by Plaintiffs. That documentation, he claims, was in a

van that was towed and never reclaimed.

In reply, Plaintiffs' counsel affirms that Kontarines was asked at his deposition whether Last Detail was licensed to perform home improvement during the time of the Project and "he answered in the negative." Plaintiffs' counsel refers to the following testimony of Kontarines in support:

Q: Did Last Detail ever have a license to perform home improvement contracting work in Nassau County, do you know?

A: No, I don't know.

Q: Who, other than you, would be responsible for obtaining such a license?

A: Manny. Which there might be a license in Suffolk, I don't know. Maybe he did it, maybe he didn't. I don't know if he got Suffolk.

Q: Are you, personally, licensed to do home improvement work in Nassau County?

A: I used to be.

Q: When was that?

A: Years ago.

Q: More than six years ago?

A: Four or five.

Q: Do you have any records anywhere that would indicate when you had a license to do home improvement work in Nassau County?

A: Oh, Nassau County? Not Nassau County, no.

Q: So you've never been licensed to do home improvement work in Nassau County?

A: No.

Kontarines Depo. at pp. 47-48

C. The Parties' Positions

Plaintiffs submit that, in light of the fact that Kontarines was not licensed to perform home improvement work, Defendants may not enforce the Contract against the Plaintiffs, or seek the reasonable value of the services rendered. Moreover, pursuant to the General Business Law, every contract for home improvement involving an aggregate price of \$500 or more must be in writing, and the contract must require certain payments pursuant to the Lien Law. As the Contract was oral, Plaintiffs are entitled to a full return of the monies they paid to Last Detail.

Last Detail opposes Plaintiffs' motion, submitting, *inter alia*, that 1) Plaintiffs have not established their performance under the Contract, or Last Detail's failure to perform under the Contract; 2) Plaintiffs have failed to provide documentation in support of their allegation that Defendants were unlicensed; and 3) there existed a written contract between the parties.

RULING OF THE COURT

A. Summary Judgment Standards

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Breach of Contract

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). *See also JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia*, *supra*.

C. Home Improvement Without a License

Section 21-11.2 of the Nassau County Administrative Code bars home improvement contractors from operating without a license. Public policy considerations forbid enforcement of a contract in violation of the code, or even the granting of *quantum meruit* relief. *Matter of Schwartz*, 74 A.D.2d 638, 638-639 (2d Dept. 1980). As strict compliance with the licensing statute is required, recovery is barred regardless of whether the work was performed satisfactorily or whether the failure to obtain a license was willful. *Millington v. Rapoport*, 98 A.D.2d 765, 766 (2d Dept. 1983). Estoppel may not be relied upon to reward a practice which violates public policy as prescribed by the Administrative Code. *Id.*

D. Application of these Principles to the Instant Action

Plaintiffs have established a breach of contract by Defendant by demonstrating that 1) Plaintiffs entered into an agreement with Defendant to perform home improvement on their Residence for financial compensation; 2) Plaintiffs paid monies to Defendant pursuant to the parties' agreement; and 3) Defendant breached the parties' agreement by failing to complete the home improvement work pursuant to that agreement.

In light of Kontarines' concession that Last Detail engaged in home improvement without a license, however, Last Detail is not entitled to compensation for work performed in connection with the Project. Thus, the Court views the parties' agreement as void. Plaintiffs are, therefore, entitled to the return of the \$28,000 they paid in connection with the unenforceable agreement. With respect to Plaintiffs' request for compensatory damages attributable to the flooding alleged in the Complaint, however, there is an insufficient record in both the pleadings and the proof to support an award of those damages. Accordingly, the Court grants Plaintiffs' motion to the extent that the Court directs Defendant to remit the sum of \$28,000 to Plaintiffs on or before November 4, 2011 and further directs that, if Defendant fails to remit that sum to Plaintiffs on or before November 4, 2011, the Court will direct a judgment in favor of Plaintiffs and against Defendant in the sum of \$28,000, plus statutory interest since October 1, 2005 in light of Nick's testimony that he made his last payment to Defendants in September of 2005 (Nick Depo. at p. 40). *See* CPLR § 5001. If Defendant does not make the payments to Plaintiffs as directed, Plaintiffs shall submit judgment on ten (10) days notice.

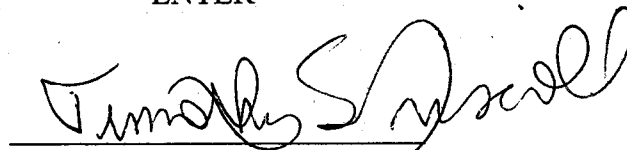
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Counsel shall not be required to appear on September 30, 2011 as previously directed.

ENTER

DATED: Mineola, NY
September 28, 2011

A handwritten signature in black ink, appearing to read "Timothy S. Driscoll", is written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
OCT 03 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE