

**Outerbridge Plumbing Group, LLC v MJM Constr.
Serv., LLC**

2011 NY Slip Op 33811(U)

June 10, 2011

Sup Ct, Queens County

Docket Number: 2757/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

OUTERBRIDGE PLUMBING GROUP, LLC,

Plaintiff,

-against-

MJM CONSTRUCTION SERVICES, LLC,
et al.,

Defendants.

Index No. 2757/11

Motion
Date May 31, 2011

Motion
Cal. No. 14

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendants pursuant to CPLR 3211(a) dismissing the first and third causes of action in the Verified Complaint of plaintiff, Outerbridge Plumbing Group, LLC is hereby denied.

The underlying dispute arises out of work allegedly performed by plaintiff as subcontractor in connection with a series of construction projects at 413 West 150th Street, New York, New York, 117 and 121 Edgecombe Avenue, New York, New York, and 779 Melrose Avenue a/k/a 392 East 158th Street, Bronx, New York for which defendant MJM Construction Services, LLC ("MJM") was the general contractor. Plaintiff commenced this action with a first cause of action sounding in breach of contract against defendant MJM, alleging that MJM has breached its contract with the plaintiff, and that labor and services have been provided and materials have been furnished by the plaintiff to the defendant MJM and have not been paid for by the defendant MJM; a second cause of action for quantum meruit against defendant MJM; and a third cause of action against all defendants pursuant to Article 3A of the New York Lien Law for the enforcement of a trust fund. Defendants now move to dismiss the first cause of action in the Verified Complaint pursuant to CPLR 3211(a)(1) and CPLR

3211(a)(7) and the third cause of action pursuant to CPLR 3211(a)(5).

First Cause of Action

A. CPLR 3211(a)(1)

That branch of defendants' motion to dismiss plaintiff's first cause of action pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248).

"The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages" (*Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]).

To the extent this branch of the motion is based upon lack of any written contracts, this evidence is insufficient to dispose of the first cause of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman*, 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the lack of any written contracts is insufficient to dispose of the first cause of action, as plaintiff maintains breach of oral agreements. As such, this branch of the motion is denied.

B. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action in Verified Complaint against defendant MJM for failure to state a cause of action for breach of contract is decided as follows: "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 [1977]; *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). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). 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). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

Applying these principles in this case, the court decides that that branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the first cause of action is denied, as the Verified Complaint adequately states a cause of action for breach of contract via paragraphs 13-16 of the Verified Complaint.

Defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, *supra*; *Jacobs v. Macy's East Inc.*, *supra*).

Third Cause of Action

C. CPLR 3211(a)(5)

That branch of defendants' motion to dismiss plaintiff's third cause of action pursuant to CPLR 3211(a)(5) on the grounds that the plaintiff's third cause of action pursuant to Article 3A

of the New York Lien Law is barred by the Statute of Limitations is hereby denied.

Pursuant to 77(2) of New York's Lien Law, "[n]o such action [to enforce trust that arises under article 3-A of the Lien Law] shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later . . ." It is undisputed that the action was commenced on February 4, 2011. It is also undisputed that plaintiff completed its alleged work in April 2009. While plaintiff brought the action one year and nine months after it allegedly completed its last piece of work, as the date on which final payment on claimant's contract became due has not been established, this branch of the motion is denied.

Sanctions

That branch of defendants' motion for an order pursuant to 22 NYCRR 130-1.1 awarding defendants's counsel attorneys' fees due to the frivolous conduct of plaintiff's counsel is denied.

Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false". At this stage, the court finds that the defendants have not demonstrated that plaintiff's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. Nor have defendants established sufficient cause to warrant sanctions (see, *Schaeffer v. Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the plaintiff has not risen to the level of frivolous. Accordingly, this branch of the motion is denied.

This constitutes the decision and order of the Court.

Dated: June 10, 2011

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Howard G. Lane, J.S.C.