SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK J.S.C. PART 39

Index Number : 650721/2010
LOPEZ, PHILLIS
vs.
ZAMIR, GADI
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 4/5/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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PHILLIS LOPEZ, BOCHI & SONS CONSTRUCTION CORP. a/k/a BOCHY & SONS CONSTRUCTION CORP. and ALDEESA RENOVATIONS, INC. a/k/a ALDESSA RENOVATIONS, INC.,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 650721/10
Motion Seq. No. 001

WORLDWIDE MANAGEMENT GROUP, LLC., WORLDWIDE MAINTENANCE GROUP, LLC., GADI ZAMIR, SHACAF ZAMIR, TIBEIR MANAGEMENT GROUP, TIBEIR GSA & INVESTMENTS PROPERTIES, LLC., TIBEIR GSA & INVESTMENT TRUST, TIBEIR FIDUCIARY MANAGEMENT, 145 AUDUBON AVENUE, LLC., 40 SHERMAN AVENUE, LLC, 608-614 WEST 189TH STREET, LLC, COLUMN GUARANTEED, LLC., FANNIE MAE, SOVEREIGN BANK, 507 WEST 171TH STREET, LLC, 515-517 WEST 171ST STREET, LLC., 150 WEST 140TH STREET, LLC., COLUMN FINANCIAL, INC., WELLS FARGO BANK, N.A. as Trustee for the registered Holders of Credit Suisse First Boston Mortgage Securities Corp. Commercial Mortgage Pass-Through Certificates Series 2006-C5, 532-36 WEST 143RD STREET, LLC., NEW YORK COMMUNITY BANK, HARLEM PROPERTIES, LLC., 215-219 WEST 145TH STREET, LLC., 200-210 WEST 145TH STREET, LLC., WASHINGTON MUTUAL BANK, FANNIE MAE,

Defendants.

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BARBARA R. KAPNICK, J.:

This is an action to recover monies allegedly owed for materials furnished and work performed for certain painting, plastering, renovation and/or repair projects at various buildings in Manhattan, each of which are managed by Worldwide Management

Group, LLC and Worldwide Maintenance Group, LLC (the "Worldwide defendants").

Plaintiffs assert the following causes of action: foreclosure of mechanics liens (first cause of action);[1] breach of contract (second cause of action); fraud (third cause of action); duress and coercion (fourth cause of action); misrepresentation (fifth cause of action); unjust enrichment (sixth cause of action); conversion (seventh cause of action); breach of trust in violation of Article 3-A of the New York Lien Law (eighth cause of action); breach of fiduciary duty in violation of Article 3-A of the New York Lien Law (ninth cause of action); and rescission (tenth cause of action).

Plaintiff Phillis Lopez ("Lopez") is an officer of Bochi & Sons Construction Corp. a/k/a Bochy & Sons Construction Corp. ("Bochi") and Aldeesa Renovations, Inc. a/k/a Aldessa Renovations, Inc. ("Aldeesa") (collectively "plaintiffs").

The Complaint alleges that on or about January 20, 2008, October 20, 2009, and December 10, 2009, respectively, Bochi

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[1] There are no allegations in plaintiffs' first cause of action relevant to defendants Worldwide Management Group, LLC and Worldwide Maintenance Group, LLC, the only moving defendants herein.

entered into oral agreements with the Worldwide defendants, acting as managing agents for building owners, whereby Bochi was to furnish materials and provide work for painting, plastering, renovation and/or repair projects at various properties in and around Manhattan.

On December 22, 2009, and again on January 14, 2010, Lopez alleges that he went to the office of defendant Gadi Zamir ("Zamir"), owner and manager of the Worldwide defendants. On each occasion, Zamir and Lopez were allegedly in Zamir's office alone when Zamir presented a document for Lopez's signature. Plaintiffs allege that Lopez, while familiar with the spoken English language, is unable to read or write well in English. When presented with the document, Zamir "purported to translate" it to Lopez, allegedly telling him that it was a memorialization of their agreement and that Lopez's signature was required if he wanted to get paid for the work he had been doing, and was continuing to do, pursuant to the parties' oral agreement.

Contrary to Zamir's alleged representation, the documents Lopez signed on each of the above dates were Releases, releasing the Worldwide defendants from "all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies,

agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands" as to certain specified properties.

The Worldwide defendants now move pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) for an order dismissing plaintiffs' Complaint as against them.

The Worldwide defendants contend that Lopez's execution of the Releases, which were presented to him on standard "Blumberg" forms, acts as a complete bar to this action as against them. Neither the allegation that Zamir misrepresented the contents of the Releases to Lopez, nor that Zamir threatened to withhold payment if Lopez failed to execute the Releases, constitutes a valid defense to the Releases, according to the Worldwide defendants.

The Worldwide defendants also contend that plaintiffs have failed to state a cause of action pursuant to Article 3-A of the Lien Law, as the law creates no fiduciary duty between themselves and plaintiffs and, even assuming that there is a fiduciary duty, *arguendo*, plaintiffs cannot establish the breach of such a duty.

Plaintiffs contend, in opposition to the motion, that the Releases are invalid and unenforceable under New York law because

Lopez is unable to read English and the contents were misrepresented to him, an exception to the general rule of strict enforcement of Releases.

Further, plaintiffs dispute that the relationship between the parties can be characterized as "arms length" or that Lopez is a "sophisticated businessman" as characterized by the Worldwide defendants. While Lopez acknowledges in his own Affidavit that he is an officer of the two different construction and renovation companies, plaintiffs argue that he should be treated as a laborer since he is not an attorney or a sophisticated party.

Finally, plaintiffs contend that, pursuant to Article 3-A of the Lien Law, the Worldwide defendants had a fiduciary duty to plaintiffs because when the building owners transferred money to defendants' bank accounts for payment to plaintiffs, those funds were held in trust for plaintiffs. The assets entrusted to the Worldwide defendants, according to plaintiffs, were for the benefit of the laborers and workers who provided materials and performed work at the various premises.

It is well established law in New York that "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Global Minerals and Metals Corp. v Holme*,

35 AD3d 93, 98 (1st Dept 2006), see also *Hack v United Capital Corp.*, 247 AD2d 300, 301 (1st Dept 1998).

Plaintiffs do not dispute that Lopez executed the December 22, 2009 and January 14, 2010 Releases, or that the claims raised by the Complaint are the subject of the Releases.[2] Plaintiffs contend, rather, that Lopez was fraudulently induced into signing the Releases or that his signature was obtained through misrepresentation, coercion or duress, such that the Releases should be set aside and considered unenforceable.[3]

Plaintiffs cite to *Pimpinello v Swift & Co.*, 253 NY 159, 163 (1930) for the proposition that strict enforcement of a Release is excepted where "the signer is illiterate, or blind, or *ignorant of the alien language of the writing*, and the contents thereof are misread or misrepresented to him by the other party." (emphasis

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[2] While Lopez alleged in his Affidavit in Opposition to the motion that the Releases were falsely notarized, since he and Zamir were the only two individuals present when each of the Releases was signed, plaintiffs acknowledged during oral argument that they are not disputing that the signature on the Releases is that of Lopez. As the Worldwide defendants point out, Article 15 of the General Obligations Law, which governs enforceability of Releases, does not require that a Release be notarized in order to be enforceable.

[3] Plaintiffs' second cause of action (breach of contract), sixth cause of action (unjust enrichment), seventh cause of action (conversion) and tenth cause of action (rescission) are each barred by the Releases, unless there is a basis to set them aside.

added). According to plaintiffs, Lopez's lack of fluency or proficiency in the written English language, and Zamir's misrepresentations regarding the contents and consequences of the Releases, justify this Court setting the Releases aside.

However, plaintiffs only selectively quote the *Pimpinello* decision; when read fully, the decision does not compel the conclusion urged by plaintiffs.

> If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case, the writing binds him....
>
> If the signer is illiterate, or blind, or ignorant of the alien language of the writing, and the contents thereof are misread or misrepresented to him by the other party, or even by a stranger, *unless the signer be negligent*, the writing is void.

(*Pimpinello v Swift & Co.*, supra at 162-163).

While plaintiffs argue that Lopez's limited familiarity with the written English language should not be considered negligent and should, in fact, be a factor weighing in his favor in support of his allegations of fraud and duress, numerous cases, including *Pimpinello*, have found to the contrary. "[E]xecution of an agreement of this type under such circumstances constitutes gross negligence, since he failed to seek proper assistance in understanding it before signing, and it would be binding against him." *Chemical Bank v Geronimo Auto Parts Corp.*, 225 AD2d 461, 462

(1st Dept 1996); see also *Suk v Lee*, 2009 NY Slip Op 31368U (Sup Ct, Nassau Co, June 12, 2009) (lack of familiarity with English found not a valid excuse for failing to take prudent steps to understand the document, even where it is alleged that the terms were misrepresented).

It is not alleged that there was an emergency or other condition that prevented Lopez from seeking outside advice or counsel about the contents of the two Releases. Further, as the Worldwide defendants emphasize, the two Releases were signed several weeks apart. Lopez does not allege that he asked for a copy of the first Release or sought out anyone's assistance to help explain or translate the first Release even after it was signed, and before the second Release was signed.

Where an individual is not fluent in the language of a legally binding document and no emergency prevents access to a competent translator, the failure of that individual to seek an independent translation is negligent, even if the other contracting party or its representative provides an inaccurate oral translation. *Gaskin v Stumm Handel GmbH*, 390 FSupp 361, 365-67 (SDNY 1975), citing *Pimpinello*, supra.

Nor can plaintiffs succeed in setting aside the Releases on the ground of fraud. In order to set aside a Release on the ground that it was fraudulently induced, plaintiffs have the burden of establishing "the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury." *Global Minerals and Metals Corp. v Holme*, supra at 98; see also *Pope v Saget*, 29 AD3d 437, 441 (1st Dept 2006).

The case law is clear that "failure to take any prudent step to understand" the Releases defeats any claim by Lopez that he justifiably relied on the alleged misrepresentations of Zamir. *Suk v Lee*, supra at *15; *Chemical Bank v Geronimo Auto Parts Corp.*, supra.

Lopez also alleges that he was compelled to sign the Releases under duress, by virtue of Zamir's threat that if Lopez failed to sign the Releases he would not be paid for the materials and services already rendered.

An otherwise valid contract "is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the

forced to agree to it by means of a wrongful threat precluding the exercise of his free will." *Austin Instrument v Loral Corp.*, 29 NY2d 124, 130 (1971). "The existence of economic duress is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand." *805 Third Ave. Co. v M.W. Realty Associates*, 58 NY2d 447, 451 (1983), citing *Austin Instrument v Loral Corp.*, supra).

However, a mere threat by one party to breach the contract by not performing does not in itself constitute economic duress; it must also be shown that the ordinary remedy for breach of contract would not be adequate. *Austin Instrument v Loral Corp.*, supra at 130-131.

Here, plaintiffs have failed to allege that the Releases were signed under duress caused by anything more than Zamir's threat not to perform under the parties' existing agreement, and there is no allegation or evidence that the usual remedies available in instances of a breach of contract would not have been adequate to address plaintiffs' damages in that instance.

Further, the Worldwide defendants argue that by accepting the benefits of the Releases, i.e., defendants' payment of substantial sums, and not timely objecting to them, plaintiffs ratified the Releases. By depositing the checks issued in exchange for the Releases, which was done shortly after they were issued in January, and not bringing this action until June 24, 2010, plaintiffs have voluntarily ratified and waived their right to object. *Leader v Dinkler Management Corp.*, 26 AD2d 683 (2d Dept 1966); *VKK Corp v National Football League*, 244 F3d 114, 122-123 (2d Cir 2001).

As there is no basis for setting aside the December 22, 2009 and January 14, 2010 Releases, plaintiffs' second, third, fourth, fifth, sixth, seventh and tenth causes of action must be dismissed pursuant to CPLR 3211(a)(5) and (a)(7).

Finally, plaintiffs allege that the Worldwide defendants owed them a fiduciary duty to protect the assets entrusted to them for the benefit of the laborers and material men who provided materials and performed work at the Premises. When the building owners transferred money to the Worldwide defendants' bank account(s) for payment to be made to plaintiffs, they argue, those funds were to be held in trust pursuant to Article 3-A of the Lien Law. By failing to disclose all material facts bearing on the Releases,

plaintiffs allege that the Worldwide defendants breached this fiduciary duty.

Article 3-A of the Lien Law creates "trust funds out of certain construction payments or funds to assure payment of subcontractors, suppliers, architects, engineers, laborers, as well as specified taxes and expenses of construction." *Caristo Construction Corp. v Diners Financial Corp.*, 21 NY2d 507, 512 (1968); see Lien Law 70, 71.

The primary purpose of Article 3-A is "'to ensure that "those who have directly expended labor and materials to improve real property . . . at the direction of the owner or a general contractor" receive payment for the work actually performed.'" *RLI Insurance Co. v New York State Dept of Labor*, 97 NY2d 256, 264 (2002), quoting *Canron Corp. v City of New York*, 89 NY2d 147, 155 (1996). To this end, the Lien Law establishes that designated funds received by owners, contractors and subcontractors for improvements of real property are trust assets, and the trust is created when any asset thereof comes into existence. *City of New York v Cross Bay Contracting Corp.*, 93 NY2d 14, 19 (1999); Lien Law 70.

In this case, the Court need not determine whether the Worldwide defendants had or breached a fiduciary duty to plaintiffs because, pursuant to the statute, no Article 3-A trust was created. Section 70(5) of the Lien Law lists the funds received, or assets, which trigger creation of a trust for which the owner is a trustee:[4]

> (a) a building loan contract;
> (b) a building loan mortgage or a home improvement loan;
> (c) a mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after completion of the improvement;
> (d) consideration for a conveyance recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion thereof;
> (e) consideration for, or advances secured by, an assignment of rents due or to become due under an existing or future lease or tenancy of the premises, under certain conditions;
> (f) the proceeds of any insurance payable because of the destruction of the improvement or its removal by fire or other casualty; and
> (g) an executory contract for the sale of real property and the improvement thereof by the construction of a building thereon.

Other than the conclusory statement that a trust existed, the Complaint makes no allegation regarding how the trust was

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[4] Plaintiffs allege in the Complaint that the Worldwide defendants and Zamir acted as an agent and/or employee of the owner(s). Because the Court finds that no trust was established pursuant to Article 3-A of the Lien Law, it makes no determination with regard to whether an owner's management company can be considered a trustee in place of a building owner under theories of agency.

created, and the facts presented in the pleadings and the papers submitted on this motion do not support an inference that one of the above conditions provided for in section 70(5), above, exists so as to create a trust.

As such, plaintiffs' eighth and ninth causes of action against the Worldwide defendants are dismissed pursuant to CPLR 3211(a)(7).

Accordingly, the motion by defendants Worldwide Management Group, LLC and Worldwide Maintenance Group, LLC, is granted and the Complaint, as against them, is dismissed in its entirety with prejudice and without costs or disbursements. The Clerk is directed to enter judgment accordingly. The remaining claims are hereby severed and continued.

Dated: 4/5, 2011

Hon. Barbara R. Kapnick, J.S.C.

BARBARA R. KAPNICK
J.S.C.