

New Found., LLC v Ademi
2011 NY Slip Op 34262(U)
July 25, 2011
Supreme Court, Nassau County
Docket Number: 5911/10
Judge: Karen V. Murphy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

NEW FOUNDATION, LLC,

Plaintiff(s),

Index No. 5911/10

-against-

**Motion Submitted: 5/25/11
Motion Sequence: 002, 003**

VIKTOR ADEMI d/b/a YORK PLUMBING,

Defendant(s).

_____x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....X
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendant Viktor Ademi ("Ademi"), appearing pro se, moves this Court for an Order dismissing the complaint, and for an order imposing sanctions against plaintiff for failure to comply with discovery demands. The Court is not in possession of any papers filed by David Ademi. Plaintiff opposes the motion to dismiss, but has not submitted papers with respect to defendant Ademi's discovery motion.

This action arises from the alleged failure of the defendants to execute the plumbing services they were hired to perform in accordance with the New York City Building Code. Plaintiff corporation hired York Plumbing to install new plumbing, heating and sanitary systems in its building in Queens, New York. According to the verified complaint, defendants Viktor and David Ademi, d/b/a York Plumbing, retained defendant KCM

[* 2]

Plumbing and Heating Corp. to perform the work. Plaintiff is suing to recover damages for breach of contract when it was unable to obtain a certificate of occupancy, and had to replace the piping installed by defendants.

Defendant Ademi contends that this action should be dismissed because of certain findings made by the Civil Court of the City of New York (Kings County) in an action involving some of the same parties to this action. In his motion, Ademi purports to summarize the Civil Court's findings and decision as a basis for the instant dismissal motion.

An action was commenced in the Civil Court of the City of New York (Kings County), entitled Viktor Ademi d/b/a York Plumbing v. New Foundation, LLC (Index No. 36013-10/KI). Plaintiff previously sought consolidation of that case with this action, but that motion was denied by this Court in late 2010 on the ground that it had not been conclusively established that the Kings County action involved the same contract in dispute in this Nassau County action.

According to the submissions of both parties in connection with the instant motions, the Civil Court case was dismissed on the ground that plaintiff in that matter, Viktor Ademi d/b/a York Plumbing, is an unlicensed contractor. According to plaintiff New Foundation, the Civil Court action was dismissed on the second day of a bench trial in that matter. Neither party to this action has provided this Court with a transcript of the decision, or with a written decision by the Civil Court.

The New York State Unified Court System (e-Courts) indicates that decision was reserved in the Civil Court action, and that subsequent motions for a trial preference made by Ademi have been denied as late as July 7, 2011.

Inasmuch as this Court has not been provided with the Civil Court's decision in the Kings County matter, this Court cannot rely on the parties' representations as to that Court's decision in determining the instant motion.

Furthermore, in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the facts pleaded must be presumed to be true and accorded every favorable inference, and the sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 372 N.E.2d 17, 401 N.Y.S.2d 182 (1977); see *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994); *Sokol v. Leader*, 74 A.D.3d 1180, 1180-1181, 904 N.Y.S.2d 153 (2d Dept., 2010); *Gershon v. Goldberg*, 30 A.D.3d 372, 373, 817 N.Y.S.2d 322 [2d Dept., 2006]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBCI, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11,

19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]).

To state a cause of action sounding in breach of contract, a plaintiff must allege “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*JP Morgan Chase v. J.H. Electric of New York, Inc.*, 69 A.D.3d 802, 803, 893 N.Y.S.2d 237 (2d Dept., 2010); *Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 [2d Dept., 1986]).

In this case, plaintiff has provided a signed copy of contract stating that York Plumbing is responsible for, *inter alia*, installing “a new plumbing, heating and sanitary in and upon the premises . . . in accordance with the approved plans, New York City building code, and specifications and requests made by the Owner/General Contractor.” Defendant Ademi does not dispute the authenticity of the contract submitted by plaintiff in opposition to the instant motion to dismiss.

In addition, the verified complaint alleges that defendants did not perform the services for which they were hired in accordance with the New York City Building Code because they used PVC (polyvinylchloride) piping instead of cast iron piping in the subject premises, which is in violation of the Building Code. As a result of defendants’ breach of the contract, plaintiff alleges that it was unable to obtain a certificate of occupancy, and had to vitiate the lease with prospective tenants of the subject premises. In addition, plaintiff alleges that it was unable to collect rent, and had to hire a contractor to break through the walls and replace the improper piping.

Based on the foregoing, plaintiff has pleaded a cognizable cause of action for breach of contract.

Defendant’s motion to dismiss the complaint is denied.

The Court now turns to defendant’s motion for sanctions based on plaintiff’s failure to comply with discovery.

Defendant Ademi claims that plaintiff has failed to comply with this Court’s Preliminary Conference Stipulation and Order, this Court’s Final Compliance Conference Order, and defendant Ademi’s March 9, 2011 discovery demand requesting various documents.

Plaintiff is hereby directed to provide all outstanding discovery, including a complete response to, and/or production of the documents listed in the March 9, 2011 demand, within ten (10) days of service of a copy of this order upon plaintiff.

Upon proof of service of this Order upon plaintiff, together with proof of plaintiff's failure to comply with this directive, sanctions will issue upon further notice. Defendant Ademi's request for sanctions is denied at this time.

The foregoing constitutes the Order of this Court.

Dated: July 25, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
JUL 29 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE