SHORT FORM ORDER

INDEX No. 08-19920

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8/5/11 (#003)
MOTION DATE 1/26/12 (#004)
ADJ. DATE 8/9/12
Mot. Seq. #003 - MD
Mot. Seq. #004 - XMotD

NICHOLAS PETSCHEK,

Plaintiff,

- against -

PAUL KAMPA and LAURA KAMPA,

Defendants.

DAVIS & FERBER, LLP
Attorney for Plaintiff
1345 Motor Parkway
Islandia, New York 11749

VERNON & GINSBURG, LLP
Attorney for Defendants
261 Madison Avenue, 26th Floor
New York, New York 10016

Upon the following papers numbered 1 to 43 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-38; Answering Affidavits and supporting papers 39-40; Replying Affidavits and supporting papers 41-43; Other defendants' memorandum of law; defendants' reply memorandum of law; it is,

ORDERED that this motion by the defendants for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the second, third, fifth, sixth, seventh, eighth, and ninth causes of action in the complaint, is denied; and it is further

ORDERED that this cross-motion by the plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment in his favor on the third, fifth, sixth, and seventh causes of action in the complaint and dismissing the defendants' affirmative defenses and counterclaims, is granted to the extent of granting summary judgment dismissing the defendants' first and third affirmative defenses and each of the defendants' three counterclaims, and is otherwise denied.

This is an action to recover moneys allegedly due and owing for architectural services rendered by the plaintiff in connection with the design of a new house on the defendants' property known as 305 Neptune Walk, Saltaire, Fire Island, New York.

KAK

On January 15, 2007, the parties entered into a written contract outlining the architectural services to be provided by the plaintiff, including (in order of contemplated performance) the schematic design phase, the design development phase, the construction documents phase, the filing and bidding phase, and site inspections. The contract recited that compensation for such services was to be based on 12% of the overall scope of the work, to be determined in agreement following the schematic design phase. The contract further provided that the plaintiff would bill the defendants for the work performed "[a]t the completion of each phase."

According to the plaintiff, the estimated construction cost of the project was in excess of $600,000. Despite the language of the contract, the parties orally agreed that he would charge the defendants only for the time involved in the project, should it total less than the contractual fee, because the defendants had requested that he design the same home as he had designed for a previous client. Through October 2007, the plaintiff performed substantial work on the first three phases of the project, all with the defendants' knowledge and approval. During that period, the defendants twice requested substantial design revisions when the plaintiff's construction drawings were nearly completed, necessitating that the plaintiff expend significant amounts of additional time on the project. In September 2007, the defendants filed with the Suffolk County Health Department a septic tank application that the plaintiff had previously prepared; in October 2007, the defendants submitted certain of the plaintiff's designs for approval by the Village of Saltaire Architectural Review Committee. Nevertheless, after the plaintiff completed the third set of revised construction drawings in October 2007 and forwarded an invoice reflecting the hours involved in the project, the defendants disputed the fee and directed the plaintiff to cease work. Subsequent negotiations regarding the fee were unsuccessful, and this action followed.

The defendants' version of events is substantially different. The defendants claim never to have entered into any agreement with the plaintiff apart from the written contract, and that the plaintiff never provided extra work or materials beyond that outlined in the contract. While they acknowledge collaborating with the plaintiff on design drafts for the house between January and September 2007–Paul Kampa having experience in matters of design and construction–they never accepted or used any of the plaintiff's work and never approved any designs provided by the plaintiff, as the plaintiff failed to provide any schematic design that complied with their project goals. Nor did the plaintiff ever advise that any of the revisions or other work he was providing was beyond the schematic design phase of the project. Since the project never proceeded beyond that phase, the defendants immediately objected to the plaintiff's attempts to bill them as if they had agreed to a design plan or an overall budget for the project. On September 27, 2007, the defendants advised the plaintiff that no further work on the project was needed without resolution of the fee dispute. However, the plaintiff continued to send invoices reflecting charges for unapproved services and to reject the defendants' efforts to resolve the fee dispute amicably. After the plaintiff commenced this action, the defendants hired an architect to renovate the existing house at a fraction of the plaintiff's estimated cost.

The plaintiff alleges nine causes of action in his complaint. The first is for breach of contract and seeks a balance due under the contract in the amount of $71,178.72. The second alleges that the sum of $30,092.50 is due and owing to the plaintiff for extra work and materials furnished simultaneously with

the work performed under the contract. The third alleges that the sum of $1,600.00 is due and owing to the plaintiff for septic engineering work and drawings performed simultaneously with the work performed under the contract. The fourth is for breach of contract and seeks a balance due under the contract in the amount of $102,871.22 (the sum of the amounts sought in the first, second, and third causes of action). The fifth seeks recovery in the amount of $102,871.22 as the fair and reasonable value of the work, labor, services, and materials provided. The sixth is for an account stated in the amount of $42,817.50 based on an invoice dated September 12, 2007. The seventh is for an account stated in the amount of $53,067.50 based on an invoice dated October 12, 2007. The eighth is for an account stated in the amount of $86,255.00 based on an invoice dated November 14, 2007. The ninth is for an account stated in the amount of $102,871.22 based on an invoice dated June 11, 2008.

The defendants, by their answer, assert five affirmative defenses and three counterclaims. As their affirmative defenses, the defendants allege first, that the plaintiff failed to state a cause of action "in that the complaint is prolix, unintelligible and redundant," second, that the plaintiff failed to allege an enforceable agreement, third, that there can be no account stated because the defendants objected to every bill that they received, fourth, that the plaintiff's failure to abide by the terms of the written agreement renders it unenforceable, and fifth, that the plaintiff's wrongful and unilateral calculations of the scope and budget of the project constitutes a material breach of the parties' agreement. The defendants' first counterclaim is to recover damages for breach of contract. The second is for fraud in the inducement of the contract. The third is to recover damages on the theory that the plaintiff's failure to act in a professional, ethical or competent manner constitutes professional malpractice.

By Order dated September 13, 2010, this Court, *inter alia*, granted the defendants' prior motion for summary judgment to the extent of dismissing the plaintiff's first and fourth causes of action, alleging breach of contract.

The defendants now move for summary judgment dismissing the plaintiff's remaining (second, third, fifth, sixth, seventh, eighth, and ninth) causes of action. The plaintiff cross-moves for summary judgment in his favor on his third, fifth, sixth, and seventh causes of action and dismissing the defendants' affirmative defenses and counterclaims.

It is well-settled that multiple summary judgment motions by the same party are disfavored in the absence of newly discovered evidence or sufficient cause (***National Enters. Corp. v Dechert Price & Rhoads***, 246 AD2d 481, 667 NYS2d 745 [1998]; ***La Freniere v Capital Dist. Transp. Auth.***, 105 AD2d 517, 481 NYS2d 467 [1984]; ***Marine Midland Bank v Fisher***, 85 AD2d 905, 447 NYS2d 186 [1981]). "Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment" (***Levitz v Robbins Music Corp.***, 17 AD2d 801, 232 NYS2d 769, 770-771 [1962]).

Here, as the defendants have failed to identify any new evidence or sufficient cause to justify the making of their motion, the Court finds no reason to deviate from the general rule proscribing successive motions for summary judgment. Although intervening discovery has taken place, their motion is not

based on evidence obtained through such discovery but rather on documents and information which were previously available. Furthermore, while a court may entertain a subsequent summary judgment motion if "it is substantively valid and the granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (***Detko v McDonald's Rests. of N.Y.***, 198 AD2d 208, 209, 603 NYS2d 2d 496, 497 [1993], *lv denied* 83 NY2d 752, 611 NYS2d 134 [1994]; *accord* ***Rose v Horton Med. Ctr.***, 29 AD3d 977, 816 NYS2d 174 [2006]; *see also* ***Freeze Right Refrig. & A.C. Servs. v City of New York***, 101 AD2d 175, 475 NYS2d 383 [1984]), the defendants' showing is not dispositive of the plaintiff's claims. In particular, and without addressing the merit of the defendants' assertions relative to any other cause of action, the Court finds the defendants' showing insufficient to warrant summary judgment dismissing the plaintiff's fifth cause of action to recover in quantum meruit. Whether, as the defendants contend, they did not accept the plaintiff's services is, on the basis of the conflicting affidavits presented, an issue of fact; whether they obtained any benefit or value from those services is immaterial (*see* ***Farash v Sykes Datatronics***, 59 NY2d 500, 465 NYS2d 917 [1983]; ***Pulver Roofing Co. v SBLM Architects***, 65 AD3d 826, 884 NYS2d 802 [2009]). Since it does not appear that the matter can be disposed of without proceeding to trial, no departure from the rule is warranted (*cf.* ***Varsity Tr. v Board of Educ. of City of N.Y.***, 300 AD2d 38, 752 NYS2d 603 [2002]; ***Freeze Right Refrig. & A.C. Servs. v City of New York***, *supra*).

As to the cross-motion, the Court will address the subject causes of action, affirmative defenses, and counterclaims seriatim.

The plaintiff's third cause of action appears to be pleaded on a theory of implied contract. An implied contract "does not differ from an express agreement except in the manner by which its existence is established," *i.e.*, by the conduct of the parties rather than by their words (***Matter of Boice***, 226 AD2d 908, 910, 640 NYS2d 681, 682 [1996]; ***Watts v Columbia Artists Mgt.***, 188 AD2d 799, 591 NYS2d 234 [1992]; *see also* ***Maas v Cornell Univ.***, 94 NY2d 87, 699 NYS2d 716 [1999]). Here, notwithstanding the parties' apparent performance and acceptance of services relative to the septic tank drawings, there remain questions of fact as to the terms of the alleged contract, including the basis for fixing compensation (*see* ***Rocky Point Props. v Sear-Brown Group***, 295 AD2d 911, 744 NYS2d 269 [2002]).

Nor is the plaintiff entitled to summary judgment on his fifth cause of action. "To make out a claim in quantum meruit, a [plaintiff] must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they were rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" (***Miranco Contr. v Perel***, 57 AD3d 956, 957, 871 NYS2d 310, 313 [2008]). On the record provided, the Court finds questions of fact, sufficient to defeat summary judgment, as to the extent to which the plaintiff's services were accepted by the defendants and the reasonable value of those services.

Summary judgment is likewise denied with respect to the plaintiff's sixth and seventh causes of action. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. The agreement may be express or, as here, implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances" (***Jim-Mar Corp. v Aquatic Constr.***,

195 AD2d 868, 869, 600 NYS2d 790, 791 [citations omitted], *lv denied* 82 NY2d 660, 605 NYS2d 6 [1993]). "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (***Legum v Ruthen***, 211 AD2d 701, 703, 621 NYS2d 649, 651 [1995]). "There can be no account stated . . . where any dispute about the account is shown to have existed" (***Abbott, Duncan & Wiener v Ragusa***, 214 AD2d 412, 413, 625 NYS2d 178 [1995]). Based on the sharply conflicting evidence presented, the Court is unable to determine as a matter of law that the defendants acquiesced to the correctness of the invoices (*see* ***Landa v Blocker***, 87 AD3d 719, 928 NYS2d 779 [2011]).

The defendants' first affirmative defense is dismissed. Whether, as the defendants allege, a complaint is loosely drawn, verbose or poorly organized is a matter distinct from whether it states a cause of action. If a complaint is inartfully drafted, a defendant may move for a more definite statement under CPLR 3024 (a). But such a complaint may still state a cause of action, and if it does, it will not be dismissed for insufficiency (***Foley v D'Agostino***, 21 AD2d 60, 248 NYS2d 121 [1964]). That a complaint is allegedly "prolix, unintelligible and redundant," therefore, does not qualify as a defense.

As to the defendants' second, fourth, and fifth affirmative defenses, which relate to the causes of action for breach of contract previously dismissed, the cross-motion is denied as moot.

The defendants' third affirmative defense, in which they allege that there can be no account stated because they objected to every bill received, is clearly covered by the denials in their answer. As such, it need not be pleaded as a defense, and since the defense is superfluous, it is dismissed (*cf.* ***Union Circulation Co. v Hardel Publs. Serv.***, 6 Misc 2d 340, 164 NYS2d 435 [1957]; *see generally* CPLR 3018).

In their first counterclaim, the defendants allege that by reason of the plaintiff's failure to do "what he said he was going to do," they incurred additional expenses, including upkeep, maintenance, and repair of the property, which they would not otherwise have incurred. The Court construes the quoted phrase to refer either to the parties' written contract, which the Court previously determined to be unenforceable, or to a separate agreement, as to which allegations of its essential terms, including those specific provisions upon which liability is predicated, are lacking (*see e.g.* ***Caniglia v Chicago Tribune-N.Y. News Syndicate***, 204 AD2d 233, 612 NYS2d 146 [1994]; ***Chrysler Capital Corp. v Hilltop Egg Farms***, 129 AD2d 927, 514 NYS2d 1002 [1987]). Accordingly, the Court finds that the defendants have failed to state a cause of action for breach of contract.

The defendants' second counterclaim is deficient as well, as there can be no viable claim for fraudulent inducement to enter an unenforceable contract (***Clifford R. Gray, Inc. v LeChase Constr. Servs.***, 31 AD3d 983, 819 NYS2d 182 [2006]).

Finally, the plaintiff is entitled to summary judgment dismissing the defendants' third counterclaim, which sounds in professional malpractice. Through the affidavit of his expert–a licensed architect who attests to have overseen the successful completion of over thirty projects on Fire Island,

including a number within the Village of Saltaire–the plaintiff established *prima facie* that he performed in accordance with accepted standards of practice for architects and the building industry on Fire Island (*cf.* ***Mary Imogene Bassett Hosp. v Cannon Design***, 84 AD3d 1524, 923 NYS2d 751 [2011]). The defendant, in opposition, did not address the opinions of the plaintiff's expert and, hence, failed to raise a triable issue of fact.

Dated: December 11, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**