

Outerbridge Plumbing Group, LLC v MJM Constr. Serv., LLC
2012 NY Slip Op 33430(U)
November 27, 2012
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 October 16, 2012 Motion Cal. No. 14 Motion Sequence No. 2
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Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPLR 3212 dismissing as a matter of law, plaintiff's Verified Complaint in its entirety; or in the alternative, pursuant to Lien Law §§ 70, 77 dismissing plaintiff's third cause of action is hereby decided as follows:

This is an action in which plaintiff, Outerbridge Plumbing Group, LLC seeks to recover monies from the defendants for the failure to pay plaintiff for plumbing materials and services provided to the defendants on different construction projects for which plaintiff acted a subcontractor for the defendants. It is undisputed that plaintiff cannot establish the existence of any written contracts between the parties.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against

(*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Plaintiff's first cause of action is a breach of contract claim against defendant MJM Construction Services, LLC ("MJM"). Plaintiff's second cause of action is a *quantum meruit* claim against defendant MJM. Plaintiff's third cause of action is a claim pursuant to Article 3A of the New York Lien Law against all defendants.

The first cause of action is for breach of contract. "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]).

Pursuant to New York General Obligations Law § 5-701 an agreement is required to be in writing if, in relevant part: "[by] its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime" (*Pace v. Perk*, 81 AD2d 444 [2d Dept 1981]).

In support of this branch of the motion, defendants established that there are no triable issues of fact. Defendants submit, inter alia, an affidavit of defendant, Manuel J. Herrera, Jr., a member of defendant, MJM, who avers that: at no point did plaintiff have a written contract with defendant MJM to perform plumbing services; an affidavit of defendant Manny Kaneris, a

principal member of defendant MJM, who avers that: he has discovered no record of any written contract with plaintiff, at no point did plaintiff ever submit a request for payment to defendant MJM; and a copy of plaintiff's Response to Interrogatories, wherein plaintiff stated that any contract was oral and would have commenced in September 2008 and completed in late 2009 or early 2010.

In opposition, plaintiff raises a triable issue of fact. Plaintiff submits, inter alia, an affidavit of Salvatore Volpe, the principal of plaintiff, who avers that: "[w]hen work by the plaintiff commenced on September 1, 2008, it was represented to [him] by the Defendants and contemplated by the parties, that all of the work on all of the projects would be able to be completed within a one year period".

Accordingly, there are triable issues of fact on the first cause of action, including the length of time the project was supposed to last.

Regarding the cause of action for quantum meruit, defendants established that there are no triable issues of fact. In support of this branch of the motion, defendants submit, inter alia: an affidavit of defendant, Manuel A. Herrera, Jr., wherein he averred that: "at the time that Defendant MJM allegedly terminated plaintiff-April 0f 2009-Outerbridge had no outstanding accounts payable and/or receivable".

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff submits, an affidavit of Salvatore Volpe, a principal of plaintiff, wherein he avers that: there is a balance due of \$277,104.00 for the reasonable value of services provided to the defendant for different construction projects.

Accordingly, there are triable issues of fact regarding the quantum meruit cause of action, including whether there is any balance due for services rendered.

Regarding the third cause of action, defendants established a prima facie case that plaintiff's third cause of action to enforce a trust should be dismissed as a matter of law. Article 3-A of the New York Lien Law created "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."

Defendants established that this cause of action is procedurally defective. Plaintiff failed to commence the action

in a representative capacity. Section 77(1) of the New York Lien Law provides that "[a] trust arising under this article may be enforced by the holder of any trust claim . . . in a representative action brought for the benefit of all the beneficiaries of the trust" (see, *Atlas Building Systems, Inc. v. Rende, Jr.*, 236 AD2d 494 [2d Dept 1997]). Also, the record reflects that plaintiff commenced a single action to enforce four (4) potential trusts. Plaintiff should have commenced four (4) separate actions for each claim in which it alleges a trust has been established (*Hamburg Bros., Inc. v. Jachless*, 210 AD2d 985 [4th Dept 1994]).

Accordingly, plaintiff is granted leave to amend its complaint to state a separate cause of action for each action in which plaintiff contends that a trust fund has been established.

This constitutes the decision and order of the Court.

Dated: November 27, 2012

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Howard G. Lane, J.S.C.