

J.B. Custom Masonry & Concrete, Inc. v Sutera
2012 NY Slip Op 33692(U)
February 1, 2012
Sup Ct, Queens County
Docket Number: 19925/2011
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
 CIVIL TERM - IAS PART 34 - QUEENS COUNTY
 25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
 Justice

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J. B. CUSTOM MASONRY & CONCRETE, INC., Index No.: 19925/2011

Plaintiff, Motion Date: 12/1/11

- against - Motion No.: 22

KIM SUTERA, FONTANNE DOLLECK, AS Motion Seq.: 1
 TRUSTEE OF THE IVAN DOLLECK QUALIFIED
 PERSONAL TRUST, IVAN DOLLECK, and
 FONTANNE DOLLECK, FORMERLY KNOWN AS
 FONTANNE BANK,

Defendants.

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The following papers numbered 1 to 11 were read on this pre-answer order to show cause for an order pursuant to CPLR 3211(a)(1)(3)(7)(8) dismissing the complaint on the grounds that the plaintiffs are without legal capacity to sue; that the complaint fails to state a cause of action as there is a complete defense founded upon documentary evidence; on the ground that the court is without in personam jurisdiction; and for an order discharging and cancelling a mechanic's lien filed by the plaintiff:

Papers Numbered

Order to Show Cause-Affidavits-Exhibits.....1 - 6
 Affirmation in Opposition-Affidavits-Exhibits.....7 - 9
 Reply affirmation.....10 - 11

By supplemental summons and complaint filed on September 13, 2011, plaintiff J. B. CUSTOM MASONRY & CONCRETE, INC., a general contracting company, alleges that on January 11, 2010, it contracted with defendant Kim Sutera to provide labor and materials for remodeling and alterations on the plaintiff's home located at 133-01 Rockaway Beach Boulevard, Queens County, New

York. Ms. Sutera purchased the property as sole title owner from FONTANNE DOLLECK, AS TRUSTEE OF THE IVAN DOLLECK QUALIFIED PERSONAL RESIDENCE TRUST on November 24, 2008. The construction contract price was \$377,000 of which the defendant paid \$313,852.50, leaving a balance due of \$63,147.50. Plaintiff claims that he performed all agreed upon work and is entitled to payment of the agreed upon price. Plaintiff contends that Kim Sutera was personally served pursuant to CPLR 308(2) on October 18, 2011 by service on her brother at 451B 127th Street, Belle Harbor, New York. Plaintiff filed a notice of pendency on August 23, 2011 and notice of mechanic's lien in the amount of \$63,147.50 on May 19, 2011. The complaint asserts two causes of action, one for breach of contract and the second for foreclosure of a mechanic's lien.

Defendant Sutera claims that the plaintiff performed sub-standard work and as a result Ms. Sutera terminated plaintiff's services in February 2011 and hired a new general contractor to repair the prior work of the plaintiff. Defendants, prior to filing an answer, move to dismiss the complaint on the ground that neither the plaintiff nor its principal, Joe Battaglia, is licensed as a home improvement contractor. Defendant contends that the plaintiff is therefore without legal standing or capacity to sue pursuant to § 20-386 of the Administrative Code of the City of New York.

Secondly, the defendant contends that the complaint fails to state a cause of action pursuant to CPLR 3211(a)(7) in that the complaint does not allege that the plaintiff is duly licensed, does not contain the name and number of the license or the governmental agency which issued the license as required by CPLR 3015(e).

Thirdly, defendant Kim Sutera submits an affirmation stating that the address to which service was made pursuant to CPLR 308(2) is not her dwelling place or usual place of abode or actual place of business. She states that she does not reside at 451 Beach 127th Street Belle Harbor, New York nor has she ever resided in said premises. As a result the defendant asserts that the complaint must be dismissed for failure to obtain personal jurisdiction.

Fourth, the defendant contends that as the certified copy of the deed indicates that Ms. Sutera was the sole owner of the subject premises as of the date of the contract that there is no cause of action properly stated against the remaining defendants who were the previous title owners of the property.

In opposition, the plaintiff submits a copy of its Home Improvement Contractor's License issued by the City of New York Department of Consumer Affairs bearing license No. 1130103 issued on July 21, 2009 and expiring on June 30, 2011. Plaintiff concedes that he failed to include this information in the complaint but asserts that the affidavit reciting the license information be incorporated by reference so as to remedy the defect in the complaint. Counsel also contends Ms. Sutera was properly served and that the mere denial of service is insufficient to rebut the prima facie proof of service created by the process server's affidavit. Further, counsel asserts that although Ms. Sutera claimed she did not reside at the address where service was made that she failed to offer any proof of where she does in fact reside.

Plaintiff's counsel also claims that dismissal against the remaining defendants is premature as said defendants have not been served with a summons and complaint in this action and the time to serve said defendants has not yet expired. In addition, counsel claims that the additional defendants hold a possible fee interest in the lien premises as the result of no consideration conveyances to defendant Sutera.

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and the defendant's reply thereto this court finds that the defendant's motion for an order dismissing the complaint on the ground that the plaintiff is not a licensed home improvement contractor is denied. The defendant has submitted a copy of its home improvement license issued by the New York City Department of Consumer Affairs which was in effect at the time it entered into a contract with the defendant. Plaintiff's counsel has sworn that the license was provided to him by the plaintiff. This court finds that although the complaint does not contain the particulars of the license as required by CPLR 3015(e), the submission of the license and affidavit from counsel is sufficient to remedy the defect in the pleading. Therefore, plaintiff is granted leave to serve an amended complaint setting forth the required particulars. Said amended complaint shall be served within 20 days of service of a copy of this order with notice of entry thereof (see CPLR 3025(b); Vatco Contr., Ltd. v Kirschenbaum, 73 AD3d 1163 [2d Dept. 2010]).

That branch of the defendants' motion to dismiss the complaint against defendants, FONTANNE DOLLECK, AS TRUSTEE OF THE IVAN DOLLECK QUALIFIED PERSONAL TRUST, IVAN DOLLECK, and FONTANNE DOLLECK, FORMERLY KNOWN AS FONTANNE BANK, is granted. The court

file indicates that affidavits of service upon said defendants were filed with the court on October 14, 2011. In addition, the defendants were not signatories to the home improvement contract and, moreover, the certified copy of the current deed submitted by Ms. Sutera, indicates that she was the sole owner of the property in question on the date of the contract. Therefore, as the Dolleck defendants did not own the property at the time the work at issue was completed the complaint fails to state a cause of action against them.

Accordingly it is hereby

ORDERED, that the plaintiff's complaint is dismissed as against defendants FONTANNE DOLLECK, AS TRUSTEE OF THE IVAN DOLLECK QUALIFIED PERSONAL TRUST, IVAN DOLLECK, and FONTANNE DOLLECK, FORMERLY KNOWN AS FONTANNE BANK and the lis pendens and mechanics lien shall be discharged and cancelled as against defendants FONTANNE DOLLECK, AS TRUSTEE OF THE IVAN DOLLECK QUALIFIED PERSONAL TRUST, IVAN DOLLECK, and FONTANNE DOLLECK, FORMERLY KNOWN AS FONTANNE BANK.

That branch of the defendant's motion for an order dismissing the action for lack of personal jurisdiction with respect to Ms. Sutera is set down for a traverse hearing. The parties are directed to appear for the hearing to be held in Room 304 of the Queens County Supreme Court, located at 25-10 Court Square, Long Island City, New York 11101, at 10:00 a.m on March 2, 2012.

Dated: February 1, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.