

Reyes v Tung Ling Lo
2013 NY Slip Op 30528(U)
March 13, 2013
Supreme Court, Suffolk County
Docket Number: 07-25149
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 9-18-12
ADJ. DATE 11-27-12
Mot. Seq. # 004 - MG

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ALLAN REYES,	:	KEEGAN & KEEGAN, ROSS & ROSNER, L.L.P.
	:	Attorneys for Plaintiff
Plaintiff,	:	315 Westphalia Avenue, P.O. Box 146
	:	Mattituck, New York 11952-0146
- against -	:	
	:	
EDMUND TUNG LING LO a/k/a EDMUND LO,	:	LELAND L. GREENE, ESQ.
LARRY J. GUFFEY, as Trustee of 94 Narod	:	Attorney for Defendant Lo
Boulevard Trust, CATHY SILVERSTEIN and	:	1565 Franklin Avenue, Second Floor
"JOHN DOE" and "JANE DOE" Tenants or	:	Mineola, New York 11501
Persons in possession of 94 Narod Boulevard,	:	
Water Mill, New York,	:	
Defendants.	:	
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Upon the following papers numbered 1 to 30 read on this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 27; Replying Affidavits and supporting papers 28 - 30; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Edmund Tung Ling Lo for an order granting summary judgment in his favor on the first and third causes of action is granted; and it is

ORDERED that, upon service by defendant Edmund Tung Ling Lo of a copy of this order with notice of its entry on the Clerk of Suffolk County, together with proof of service of a copy of this order on plaintiff, the Clerk shall release to defendant Edmund Tung Ling Lo the funds he deposited in connection with this action, as well as any interest earned on such funds.

Plaintiff Allan Reyes, an interior decorator and part owner of Decorations of Palm Beach, a decorating store in West Palm Beach, Florida, allegedly was hired by defendant Edmund Tung Ling Lo in 2004 to assist in decorating Lo's residence in Water Mill, New York. Lo, who also is an interior decorator

(PR)

and formerly owned a decorating store in Palm Beach, allegedly was preparing the Water Mill residence, known as 94 Narod Boulevard, for resale by re-upholstering or restoring furniture that he already owned and by adding new furniture, curtains, fixtures and decorative accessories. Prior to the job in Water Mill, plaintiff allegedly performed decorating work for Lo at his apartments in New York City and Palm Beach, as well as at his residence in Bridgehampton. In August 2006, after Lo allegedly failed to pay a balance of \$98,610 owed for the decorating services that were provided, plaintiff filed a mechanic's lien against the Water Mill property. In March 2007, title to the Water Mill property was transferred from Lo to defendant Larry Guffey by bargain and sale deed with covenants against grantor's acts.

Subsequently, in August 2007, plaintiff commenced this action against Lo, Guffey and defendant Catherine Silverstein, who previously had filed a mechanic's lien against the Water Mill property. By order dated July 31, 2008, this Court (Cohalan, J.) denied a motion by Lo pursuant to CPLR 3211 for an order dismissing the complaint against him and granted, in part, a cross motion by plaintiff for leave to serve an amended complaint. The Court also directed that approximately \$107,000 of the proceeds from the sale of the Water Mill property be held in the escrow account of Lo's attorney.

Thereafter, plaintiff served a second amended complaint containing three causes of action. The first cause of action seeks to foreclose the mechanic's lien plaintiff filed in 2006, and the second cause of action seeks damages from Lo for breach of contract. The third cause of action seeks a declaration that funds obtained by Lo from the sale of the Water Mill property constitute trust assets held for the benefit of plaintiff "and all other persons, if any there be, who are mechanics or material men who have furnished labor or materials in connection with the work of the improvement of said single family residence at the premises," and that Lo is the trustee of such funds. In 2009, the parties entered into an agreement that the money held in escrow be deposited with the Suffolk County Clerk and that the action be discontinued against all defendants except Lo. On July 15, 2009, Justice Cohalan issued an order discontinuing the case against all defendants except Lo, and providing that the \$107,000 in sale proceeds held in escrow be deposited with the County Treasurer and released "only pursuant to a subsequent court order."

Lo now moves for an order granting summary judgment in his favor on the first and third causes of action, arguing, in part, that plaintiff did not furnish labor or materials "for the improvement of real property" entitling him under Lien Law § 3 to a mechanic's lien against the Water Mill property, and that the issue of trust assets became moot when proceeds from the sale were deposited with the Clerk of the Court. Lo further asserts the money deposited with the Clerk of the Court should be released on the ground that plaintiff was not entitled to a mechanic's lien. Lo's submissions in support of the motion include copies of the pleadings, the notice of mechanic's lien filed by plaintiff, and excerpts of plaintiff's deposition testimony. Lo also submits an affidavit of plaintiff submitted to the Court in 2007 in opposition to Lo's prior motion for dismissal of the complaint.

Plaintiff opposes the motion, asserting that he properly filed the mechanic's lien against the Water Mill property after Lo failed to pay the balance he owed for furniture, furnishings, fixtures and interior decorating services. Plaintiff also contends that as Lo did not appeal the July 2008 order issued by Justice Cohalan, which states that "the interior decoration of a home may constitute improvement and/or services that would be lienable under the Lien Law," he is precluded from arguing plaintiff was not entitled to a mechanic's lien. In opposition to the motion, plaintiff submits, among other things, a copy of a computer

print-out listing purchases allegedly made and payments allegedly received in connection with Lo's Water Mill property, a copy of the 2007 deed transferring title to the subject property from Lo to Guffey, an affidavit of Lo submitted in support of his motion seeking dismissal of the complaint, and a transcript of Lo's deposition testimony.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

Lien Law § 3 provides, in relevant part, that a "contractor . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof" is entitled to a mechanic's lien for the value or agreed price of the unpaid materials. Pursuant to Lien Law § 2 (8), the term "improvement of real property" means "any improvement of real property not belonging to the state or a public corporation." Lien Law § 2 (9) defines the term "contractor" as a person "who enters into a contract with the owner of real property for the improvement thereof," and Lien Law § 2 (4) defines the term "improvement" as including the demolition, erection, alteration or repair of any structure upon . . . any real property and any work done on such property or materials furnished for its permanent improvement." Further, Article 3-A of the Lien Law provides that a statutory trust is created for funds received by owners, contractors, or subcontractors "in connection with an improvement of real property in this state" (Lien Law § 70 [1]; *Negvesky v United Interior Resources, Inc.*, 32 AD3d 530, 821 NYS2d 107 [2d Dept 2006]). The purpose of such trust is to ensure that "certain parties involved in [such] improvement . . . will be properly compensated for their services" (*Sabol & Rice v Poughkeepsie Galleria Co.*, 175 AD2d 555, 556, 572 NYS2d 811 [3rd Dept 1991]; *see Matter of Bette & Cring, LLC v Brandle Meadows, LLC*, 81 AD3d 1152, 917 NYS2d 717 [3d Dept 2011]; *Negvesky v United Interior Resources, Inc.*, 32 AD3d 530, 821 NYS2d 107).

When questioned at his deposition about the work performed at the Water Mill residence, plaintiff testified that he drew floor plans for Lo showing how the rooms should be arranged and advised him on treatments to use for the walls and floors. He testified that he "specified all the plumbing fixtures . . . specified granite tops, cabinets, flooring in the kitchen . . . specified window styles . . . specified the design of the fireplace . . . [and] specified all hardware for all doors . . . and the color of the paint of the [exterior] of the house." He testified that he "specified" the purchase of such items as furniture, rugs, lighting fixtures and accent pillows, "specified" the materials, design, construction and installation of curtains, and "specified" the placement of furniture and artwork in the rooms. Plaintiff also explained that his job involved both purchasing items for the house, which he would do either with or without Lo, as well as telling Lo what items should be purchased. Further, in an affidavit submitted in opposition to Lo's dismissal motion, plaintiff averred that his job as a decorator for the Water Mill property "included space planning, selection of furniture, selection of fabrics, supervision of furniture restoration, curtain making and upholstery

work.” He stated he made several trips from Florida to New York “to insure that the furniture was properly placed,” but “never performed work on the premises.” In addition, plaintiff stated in the affidavit that he “did not swing a hammer or take a saw to the structure,” but “provided merchandise and worked on that merchandise before it was delivered.”

Although Lien Law § 3 “should be liberally construed to secure the purposes for which it was intended, namely the protection of that class of people who perform services or supply the material for the improvement of realty” (*Matter of Claudio Perfetto, Inc. v Waste Mgt. of N.Y.*, 274 AD2d 389, 390, 710 NYS2d 120 [2000]; see Lien Law § 23), the evidence submitted in support of the motion establishes prima facie that the decorating services, furniture and furnishings provided by plaintiff for the Water Mill residence do not constitute the “permanent improvement” of property (see *Negvesky v United Interior Resources, Inc.*, 32 AD3d 530, 821 NYS2d 107; *Dura-Built Corp. v Polimeni*, 87 AD2d 661, 448 NYS2d 842 [2d Dept 1982]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

Plaintiff’s submissions in opposition are insufficient to defeat Lo’s motion for partial summary judgment. Significantly, plaintiff’s affidavit states only that he “supervised the purchase of furniture, furnishings and fixtures and the interior decoration” of the Water Mill property, and that his job included “space planning, selection of furniture, selection of fabrics, supervision of furniture restoration, curtain making and upholstery work.” It also states that much of the furniture and fixtures used in the Water Mill house came from plaintiff’s West Palm Beach store. No showing has been made, however, that the furniture or furnishing actually supplied by plaintiff were incorporated or installed in the residence so as to constitute a permanent improvement to the property (see Lien Law § 2 [4]; cf. *Wahle-Phillips Co. v Fitzgerald*, 225 NY 137, 121 NE 763 [1919]; *Monroe Sav. Bank v First Natl. Bank of Waterloo*, 50 AD2d 314, 377 NYS2d 827 [4th Dept], *appeal denied* 39 NY2d 708, 385 NYS2d 1027 [1976]). The Court notes the fundamental rule of statutory construction that a statute must be construed as a whole, and all parts of an act must be read and considered together to determine the legislative intent (see *Sanders v Winship*, 57 NY2d 391, 396, 456 NYS2d 720 [1982]; *People v Mobil Oil Corp.*, 48 NY2d 192, 422 NYS2d 33 [1979]; McKinney’s Consol. Laws of N.Y., Book 1, Statutes, § 98). “Every part of a statute must be given meaning and effect” (*Heard v Cuomo*, 80 NY2d 684, 689, 594 NYS2d 675 [1993]). Even assuming, for purposes of the instant motion, that Lo failed to pay plaintiff for furniture, furnishings, fabric and curtains that were used to re-decorate the Water Mill residence, and that Lo was contractually obligated to pay plaintiff for his consulting services and supervision of the decorating project, the Court finds a determination that supplying such easily and customarily moved items, or providing such decorating services, constitutes “work done . . . or materials furnished” within the scope of Lien Law § 3 would ignore the statutory requirement that the labor or materials supplied by the lienor were for the “permanent improvement” of the real property.

Finally, as to plaintiff’s contention that this Court already determined he was entitled to a mechanic’s lien, the law of the case doctrine provides that once an issue is judicially determined, it is not to be reconsidered by judges or courts of co-ordinate jurisdiction in the course of the same litigation (*Halloway v Cha Cha Laundry*, 97 AD2d 385, 386, 467 NYS2d 834 [1st Dept 1983]; see *People v Evans*, 94 NY2d 499, 706 NYS2d 678 [2000]; *Martin v City of Cohoes*, 37 NY2d 162, 371 NYS2d 687 [1975]). The doctrine “‘applies only to legal determinations that were necessarily resolved on the merits in the prior decision’” (*Gilligan v Reers*, 255 AD2d 486, 487, 680 NYS2d 621 [2d Dept 1998], quoting *Baldasano v*

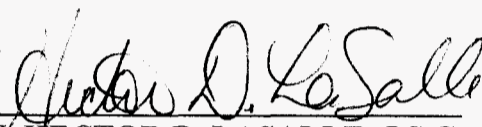
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Bank of N.Y., 199 AD2d 184, 185, 605 NYS2d 293 [1st Dept 1993]; see *RPG Consulting, Inc. v Zormati*, 82 AD3d 739, 917 NYS2d 897 [2d Dept 2011]). Here, the July 2008 order denying Lo's motion under CPLR 3211 addressed the sufficiency of the allegations in the complaint, and does not bar a finding on a subsequent summary judgment motion that the mechanic's lien filed by plaintiff against the Water Mill property was invalid (see *Teller v Bill Hayes, Ltd.*, 213 AD2d 141, 630 NYS2d 769 [2d Dept 1995]; *Mindel v Village of Thomaston*, 150 AD2d 653, 541 NYS2d 526 [2d Dept 1989]; *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 513 NYS2d 157 [1st Dept 1987]). Thus, the statement in the July 2008 order that "the interior decoration of a home may constitute improvement and/or services that would be lienable under the Lien Law" was not a determination on the issue of whether plaintiff furnished labor or materials "for the improvement of real property" (see *Thompson v Lamprecht Transp.*, 39 AD3d 846, 834 NYS2d 312 [2d Dept 2007]; *Kidd v Delta Funding*, 299 AD2d 457, 751 NYS2d 267 [2d Dept 2002]).

Accordingly, the motion for summary judgment dismissing the first and third causes of action is granted, and it is declared that the money obtained by Lo from the sale of the Water Mill property does not constitute trust assets within the scope of Lien Law § 70.

The foregoing constitutes the Order of this Court.

Dated: March 13, 2013
 Riverhead, NY


 HON. HECTOR D. LASALLE, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION