

**Flanagan & Assoc. PLLC v Cisneros**

2014 NY Slip Op 30012(U)

January 6, 2014

Supreme Court, New York County

Docket Number: 650445/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Justice

Index Number : 650445/2013
FLANAGAN & ASSOCIATES, PLLC,
vs
CISNEROS, ISMAEL
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). 1,2

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). 3,4,5

Replying Affidavits \_\_\_\_\_ No(s). 6

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/6/2014

[Signature], J.S.C.
HON. EILEEN A. RAKOWER

- 1. CHECK ONE: ... CASE DISPOSED ... NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ... MOTION IS: ... GRANTED ... DENIED ... GRANTED IN PART ... OTHER
3. CHECK IF APPROPRIATE: ... SETTLE ORDER ... SUBMIT ORDER ... DO NOT POST ... FIDUCIARY APPOINTMENT ... REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
FLANAGAN & ASSOCIATES PLLC n/k/a  
LAW OFFICE OF RICHARD J. FLANAGAN PLLC,

Index No. 650445/2013

Plaintiff,

-against-

DECISION and ORDER

Mot. Seq. 1

ISMAEL CISNEROS, IZI PLUMBING & HEATING  
SERVICES LTC., et al.,

Defendants.

-----X

HON. EILEEN A. RAKOWER:

This is an action seeking payment on a promissory note and for attorneys' fees and disbursements from defendants Ismael Cisneros ("Cisneros") and Izi Plumbing & Heating Services, Ltd. ("Izi Plumbing") (collectively, "Defendants"). The first and third causes of actions of the Complaint are for account stated and quantum meruit and seek the sum of \$86,205.05 for legal services allegedly rendered by Plaintiff to Defendants, plus interest from September 30, 2010. The second cause of action is for breach of a Balloon Note and seeks the sum of \$75,000, plus interest from April 21, 2004.

Defendant Cisneros interposed an answer on March 18, 2013. The Answer raised, among others, the following affirmative defenses: (1) "payment in full for all services actually rendered," (2) that the Note was secured by certain Pennsylvania property owned by Defendant, that on or about July 2009, Defendant tendered the deed of said property to Plaintiff in full satisfaction of any debts accrued by Defendant as contemplated by the terms of the parties' agreement, and that such tender of payment was rejected by Plaintiff; (3) "Plaintiff has not performed work and services in the sums claimed herein. Said sum merely reflects the amount of the note executed by the parties and does not represent any agreed upon fees for services provided by Plaintiff"; (4) Plaintiff was retained by

Defendant for representation in one specific proceeding with regard to filings brought by the New York State Department of Labor and Plaintiff has been paid in full for said representation; and (5) Plaintiff failed to perform in connection with its representation of Defendant.

Plaintiff now moves for an Order for summary judgment, pursuant to CPLR §3212, as against Cisneros, and default judgment as against IZI Plumbing.

Plaintiff submits the affidavit of Richard J. Flanagan. Annexed to Flanagan's affidavit is a copy of the: Summons and Complaint, Cismero's Answer, Plaintiff's Request for Judicial Intervention, and undated Balloon Note executed by Cisneros, as Borrower, for payment of \$75,000 to Flanagan & Associates, LLC, on April 21, 2009, the maturity date of the Note. The Balloon Note appears to be secured by property identified as "Lot J442, A Pocono Country Place, Coolbaugh Twp., Tobyhanna, Pennsylvania 18466."

Flanagan avers that Cisneros is the principal of defendant Izi Plumbing and that the parties' relationship commenced over ten years ago when Flanagan met with Cisneros. Plaintiff was thereafter retained by Defendants to represent them in various legal matters, and that Defendants failed to make timely payment for services rendered by Flanagan. Flanagan avers that as a result, on April 21, 2004, the parties entered into a Balloon Note which had a five year term and became due on April 21, 2009 and which remains unpaid. The Balloon Note annexed to Flanagan's affidavit, however, refers to Cisneros as the borrower. It does not refer to Izi Plumbing.

Flanagan further avers that during the parties' relationship, Plaintiff sent Defendants itemized monthly invoices and that Defendants recognized the debt and acquiesced thereto by continuing to ask Plaintiff to perform additional services. Flanagan avers that Plaintiff completed its services for defendants on September 2010. No invoices are submitted.

Defendant Cisneros opposes and cross moves for leave to serve an Amended Answer to Plaintiff's Amended Complaint.<sup>1</sup> Defendant submits the attorney

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<sup>1</sup> Defendant Cisneros did not e-file his cross motion and opposition. A hard copy was filed and Plaintiff also provided the Court with another copy of Cisnero's papers.

affirmation of Lawrence Stern and the affidavit of Ismael Cisneros.

The proposed “Amended Complaint & Counterclaims” supplement Cisnero’s previous affirmative defenses and add additional ones, including that the Mortgage and Balloon Note is void or voidable on the basis that they were the product of fraud, duress, or overreaching. Nine affirmative defenses are alleged in the proposed Amended Complaint. The proposed Amended Complaint, however, does not contain any proposed Counterclaims.

In his affidavit, Cisneros alleges that “he did not acquiesce to payment of many of the invoices included in the motion” and that he “challenged the accuracy of the invoices in many telephone conversations with Richard Flanagan and his associate.”

CPLR §3025 provides,

(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of the court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleadings clearly showing the changes or additions to be made to the pleading.

Here, Defendant is entitled to amend its Answer. There is nothing in the record indicating that any prejudice will result from amendment nor is the proposed amendment plainly lacking in merit.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557[1980]). In addition, bald, conclusory allegations, even if

believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

“An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other . . . In this regard, receipt and retention of plaintiff's accounts, without objection within a reasonable time, and agreement to pay a portion of the indebtedness, [gives] rise to an actionable account stated, thereby entitling plaintiff to summary judgment in its favor.” (*Shea & Gould v. Burr*, 194 A.D. 2d 369,370[1st Dept. 1993]). “Oral objections to an account stated are sufficient to defeat a motion for summary judgment.” *Prudential Building Maintenance Corp. v. Burton Siedman Associates, et. al.*, 445 N.Y.S. 2d 758, 759 [1<sup>st</sup> Dept. 1982].

To prevail on a quantum meruit cause of action, a party must move “(1) performance of services in good faith, (2) acceptance of the services by the person for whom they were rendered, (3) an expectation of compensation, and (4) the reasonable value of the services provided.” *Precision Foundations v. Ives*, 4 A.D. 3d 589, 591 [3d Dept 2004].

Here, Plaintiff has failed to make a prima facie showing of entitlement to summary judgment on its first and third causes of action for account stated and unjust enrichment. Plaintiff has not provided copies of any of the invoices allegedly rendered to Cisneros (or Izi Plumbing) or any other statement that establishes the services allegedly rendered to Cisneros (or Izi Plumbing).

However, Plaintiff has made a prima facie showing of entitlement to summary judgment on its second cause of action based on the terms of the Balloon Note as against defendant Cisneros by providing a copy of the Note entered between the parties and proof of non-payment on the Note by Cisneros. In opposition, Cisneros fails to raise an issue of fact with respect to this claim.

As for default judgment against defendant Izi Plumbing, Plaintiff's application fails to submit proof of service of the Complaint on Izi Plumbing in accordance with the CPLR §3215 and there are further issues concerning the basis of Plaintiff's action as against Izi Plumbing as identified above.

Wherefore it is hereby

ORDERED that plaintiff's motion for summary judgment against defendant Ismael Cisneros is granted only as to plaintiff's second cause of action; and it is further

ORDERED that the Clerk is directed to enter judgment, on plaintiff's second cause of action, in favor of plaintiff and against defendant Ismael Cisneros, in the amount of \$75,000.00, with interest as prayed for allowable by law at the contractual rate of 6% per annum from the date of April 21, 2009 until the date of entry of this judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff's first and third causes of action against defendant Ismael Cisneros are severed and shall proceed; and it is further

ORDERED that plaintiff's motion for default judgment against defendant Izi Plumbing & Heating Services Ltd., is denied; and it is further

ORDERED that defendant Cismero's cross motion to amend the Answer is granted, and the Amended Answer in the proposed form annexed to the moving papers shall be deemed served on plaintiff upon service of a copy of this Order with a notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: JANUARY 6, 2014



EILEEN A. RAKOWER, J.S.C.