SB Coughlin, Inc. v Cabrera
2014 NY Slip Op 30966(U)
April 14, 2014
Sup Ct, New York County
Docket Number: 603866/09
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

SB COUGHLIN, INC.,

Plaintiff/Counterclaim-Defendant,

- against-

IVONNE CABRERA and DANIEL ARTHURS,

Defendants/Counterclaim-Plaintiffs.

INDEX NO. 603866/09

MOTION SEQ. NO. 001

The following papers were read on this motion by defendants/Counterclaim-Plaintiffs for summary judgment pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

Before the Court is a motion by Defendants/counterclaim-plaintiffs Ivonne Cabrera (Cabrera) and Daniel Arthurs (Arthurs) (collectively, defendants), pursuant to CPLR 3212, for summary judgment dismissing the complaint against them, and for summary judgment on their first counterclaim for injunctive relief. Discovery in this matter is complete and the Note of Issue has been filed.

BACKGROUND

Plaintiff/counterclaim-defendant SB Coughlin, Inc. (Coughlin or plaintiff) commenced this action against defendants, in the nature of an account stated, seeking payment of certain invoices. Plaintiff is a closely held interior designing firm, of which Scot B. Coughlin is the sole owner, president and principal. Defendants, husband and wife, reside in the cooperative

building at 360 Riverside Drive, New York, New York.

In the fall of 2004, defendants hired plaintiff to advise them on decorating their residential apartment, 6A, in the building. In 2006, defendants purchased apartment 6B, the neighboring apartment in the building. The Complaint alleges that defendants retained plaintiff to advise on how best to combine the two apartments; to prepare all necessary drawings; to make all required filings with the Department of Buildings; and to oversee the construction involved in the combination and renovation of both apartments.

The submissions present a dispute between the parties as to the basic terms of their agreements. Plaintiff claims that in 2004, the parties verbally agreed to a two-tiered billing procedure for the work on apartment 6A. Plaintiff outlines the billing procedure as follows: (1) an hourly rate for meetings, consultation, design, specification of the work, coordination of the contractor, research and selection of materials, lighting, furnishings, and fabrics; and (2) a percentage for the coordination and purchasing of materials, lighting, furnishings, and fabrics. Plaintiff also claims that in 2006, before work was completed on apartment 6A, but after defendants decided to purchase 6B and combine the two apartments, the billing procedure became (1) a basic fee of 20% of the overall construction costs for design work, and (2) additional fees of (i) 25% of all purchasing costs and (ii) 15% of all administration or coordination expenses. Plaintiff further asserts that the agreement was subsequently modified to allow compensation for additional coordination services after defendants experienced difficulty making decisions and problems arose with the general contractor. In addition, plaintiff asserts that it agreed to pass on trade discounts.

However, defendants assert that they hired plaintiff as their architect to renovate apartment 6A and, thereafter, to combine apartments 6A and 6B. Defendants claim that the parties reached a straightforward, verbal agreement to compensate plaintiff for architectural services. Specifically, defendants assert that the parties agreed that plaintiff would receive 20%

of the total cost of combining the two apartments in exchange for the architectural services. Defendants also insist that plaintiff's principal held himself out as an architect, agreeing to provide architectural services, but that they later learned that he was not a licensed architect and, in fact, did not hold any licenses in this State. Plaintiff's principal denies presenting himself as an architect, stating, instead, that he planned to use a registered architect to do a final review of plans for the projects and make the necessary filings.

In any event, the parties also dispute the circumstances underlying the progression of the projects and the amount billed by plaintiff. Plaintiff began work on the project to combine the two apartments in June 2007. Plaintiff now claims, in essence, that it performed the work required under the parties' verbal agreement, and incurred substantial additional expenses for goods and services procured after the departure of the general contractor, but that defendants failed to pay several invoices. Plaintiff also asserts that disputes as to the invoices arose only after defendants made it clear that they were contemplating litigation. On the other hand, defendants assert that plaintiff unilaterally ceased work, before the projects were completed, but after receiving full payment under the terms of the parties' verbal agreement.

The submissions before the Court are clear that defendants paid two of the invoices submitted by plaintiff after commencing work on the projects. Specifically, in August 2007, defendants paid $38,000.00 on a July 2007 invoice in the amount of $38,500.00 (Perlman Affirm, exhibit 9). In addition, defendants paid $43,334.25 on an October 21, 2008 invoice after the parties negotiated a reduction from the original amount of $44,143.23 (*id.*, exhibit 10).

The submissions include additional invoices from plaintiff to defendants, which form the basis of this action. An invoice, also dated October 21, 2008, seeks payment of $7,790.12 for professional services/decoration (Perlman Affirm, exhibit 2A). In addition, in April 2009, plaintiff submitted an invoice for design work, in the amount of $83,176.38, but showing a credit of only $38,500, and seeking payment of $44,676.38. Also, an invoice, dated June 19, 2009, sought

payment of $78,547.29 for professional services/construction (Perlman Affirm, exhibit 2B).

On May 12, 2009, defendants sent plaintiff an email essentially questioning the accuracy of the invoices. Defendants also sent a letter, dated May 28, 2009, detailing their challenges to the amounts plaintiff claimed was still outstanding (Perlman Affirm, exhibit 11). The parties failed to reach an agreement as to the amount owed, if any, and this action ensued.

The Summons states that the nature of this action is payment of account stated. The Complaint alleges a claim for compensatory damages in the sum of $86,337.41; namely, $66,544.31 for design work professional services, $11,250.00 for additional services, $752.98 for reimbursable expenses, and $7,790.12 for decoration services.

On July 24, 2009, plaintiff filed notice of a mechanic's lien on apartments 6A and 6B, in the amount of $78,547.29, to secure payment of the invoices. On September 29, 2009, Justice Edmead granted defendants' motion, by order to show cause, to lower the amount of the mechanic's lien to $45,176.38 (*see* Order to Show Cause, Perlman Affirm, exhibit 16). Defendants deposited with the Court the amount of the mechanic's lien, plus interest, in the sum of $48,067.67.

Defendants interposed a verified answer, generally denying the allegations in the Complaint, asserting various affirmative defenses, and alleging counterclaims for injunctive relief discharging the mechanic's lien, breach of contract, and negligence.

Defendants now seek summary judgment dismissing the Complaint. Defendants also seek summary judgment on their counterclaim for injunctive relief discharging the mechanic's lien. Plaintiff is in opposition to defendants' motion.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian*

Management Corp. v Cristi Cleaning Service Corp., 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

Preliminarily, the Court rejects plaintiff's conclusory assertion that dismissal is warranted since defendants filed their summary judgment motion at the end of the statutory period as a stalling tactic. Turning to the merits, it is well established that "[a]n account stated is an account, balanced and rendered, with an assent to the balance either express or implied" (*Abbott, Duncan & Weiner v Ragusa*, 214 AD2d 412, 413 [1st Dept 1995], citing *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153 [1975]). It "is an agreement between parties to an account balance based upon prior transactions between them" (*Jim-Mar Corp. v Aquatic Constr.*, 195 AD2d 868, 869 [3d Dept 1993]). "[T]he very meaning of an account stated is that the parties have come together and agreed upon the balance of the indebtedness. . .so that an action to recover the balance as upon an implied promise of payment may thenceforth be maintained " (*Herrick, Feinstein LLP v Stamm*, 297 AD2d 477, 478 [1st Dept 2002]; *see James Talcott, Inc. v United States Tel. Co.*, 52 AD2d 197, 200 [1st Dept 1976]).). However, there can be no account stated if there is any dispute about the account (*see Abbott, Duncan & Weiner*, 214 AD2d at 413).

On review of the submissions, the Court concludes that defendants have demonstrated entitlement to summary judgment dismissing the claim for an account stated. The evidence submitted by defendants clearly shows a dispute between the parties as to the terms of their agreement and any outstanding balance so as to preclude the claim (*see id.*).

Defendants also seek summary judgment on their counterclaim to discharge the mechanic's lien, among other things, based on plaintiff's failure to perfect the lien. In order to prevent discharge of a lien on deposit, a lienor is required to take one of two courses of action within one year after the filing of the notice of lien. The lienor must either commence an action to foreclose the lien, or secure an order continuing the lien actions (*see* Lien Law §§ 17, 19, 20; *Frank Salz & Sons, Inc. v Lehr Constr. Corp.*, 124 Misc2d 790 [Sup Ct, NY County 1984];

Matter of Flintlock Realty & Const. Corp., 188 AD2d 532 [2d Dept 1992]).

Here, the submissions reveal that plaintiff filed the notice of lien on July 24, 2009. However, plaintiff failed to institute an action to foreclose the mechanic's lien within one year after filing it. Defendants' act of depositing money with the Court merely caused the lien on the apartments to be substituted for a lien on the money (*Frank Salz & Sons, Inc. v Lehr Constr. Corp.*, 124 Misc2d 790 [Sup Ct, NY County 1984], *supra*), and did not modify the requirement that plaintiff take one of the above courses of action to perfect the lien. Plaintiff's failure to comply with that requirement entitles defendants to summary judgment discharging the lien (*see M & A Constr. Corp. v McTague*, 21 AD3d 610, 611 [3d Dept 2005]). Further, where a license is required to perform certain work, an unlicensed person cannot assert or foreclose on a mechanic's lien for such work (*see Ben Krupinski Bldr. & Assoc., Inc. v Baum*, 36 AD3d 843 [2d Dept 2007]; New York City Administrative Code §§ 20-102[a-c], 20-104[a], 20-386[2, 4, 6], 20-387[a], 20-390[1]; *Mortise v 55 Liberty Owners Corp.*, 102 AD2d 719 [1st Dept 1984], *affd* 63 NY2d 743 [1984], citing *Richards Air Conditioning Corp. v Oleet*, 21 NY2d 895, 896-897 [1968] ["'Since the purpose of a regulatory scheme is to protect the public . . . safety. . . lack of . . .(a) license bars recovery on the agreement'"]).

CONCLUSION

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in its entirety and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the New York City Department of Finance, Treasury Division, Client Services, located at 1 Centre Street, Rm. 2200, New York, N.Y., is directed, upon receipt of a certified copy of this order, a Certificate of Deposit duly issued by the Department of Finance, and any other forms required by the Department, to turn over to defendants Ivonne Cabrera

and Daniel Arthurs the funds deposited with that Department by said defendants, totaling $48,067.67, as reflected in the Certificate, less the fee of the Department; and it is further,

ORDERED that this action shall continue on defendants' remaining counterclaims of breach of contract and negligence; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 4-14-14 **Enter:**

PAUL WOOTEN, J.S.C

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION
Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE