

**Joseph A. Tuana & Assoc., Inc. v Burns**

2014 NY Slip Op 31470(U)

May 30, 2014

Supreme Court, New York County

Docket Number: 652438/2013

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39**

-----X  
JOSEPH A. TUANA & ASSOCIATES, INC.,

Plaintiff,

- against -

ROBERT BURNS,

Defendant.

-----X  
SALIANN SCARPULLA, J.:

**DECISION and ORDER**  
Index No. 652438/2013  
Motion Seq. No. 001

Plaintiff Joseph A. Tuana & Associates, Inc. (“Tuana”) provides “owner representative” services to clients whose properties are planning for or undergoing construction. Tuana and defendant Robert Burns (“Burns”), who maintains a residence at 888 Fifth Avenue, New York, New York (the “Apartment”), entered into an Owner’s Representative Agreement (the “Agreement”) dated September 15, 2010, which provides that, with respect to construction at the Apartment, Tuana “will act as your consultant to provide input, advice, and information and to oversee and coordinate the efforts of the project team, including the Construction Manager/Contractor, Architect/Interior Designer and any additional subcontractors or vendors required.” The Agreement further delineates the scope of Tuana’s work as follows:

**I - Pre-Construction**

1. Affirm all-in Control Budget and Owner’s Progress Schedule.
2. Develop a financial reporting format satisfactory to you and update it monthly.

3. Assist your attorney and oversee contract negotiations with Architect/Interior Designer.
4. Meet with Architect/Interior Designer to review preliminary plans and oversee application for all permits including New York City Landmarks Preservation Commission permit.
5. Confirm that Architect/Interior Designer has completed sufficient specifications and plans necessary to engage Construction Manager.
6. Review design progress to insure compliance with stated objectives, including timely completion of Design Documents.
7. Assist Architect/Interior Designer with scheduling workflow to meet Owner's Progress Schedule.
8. Interview Construction Manager candidates and negotiate an agreement with your selected candidate.
9. With Construction Manager, develop a Construction Budget/Bid.
10. Update Owner's Progress Schedule based upon Construction Manager's schedule.
11. Interview Construction Manager's proposed subcontractors for appropriateness.
12. With your attorney, oversee contract negotiations with Construction Manager, subcontractors, consultants and vendors.

## **II - Construction**

1. Monitor Architect, Construction Manager, prime contractors, subcontractors, engineers, consultants and vendors; and evaluate performance and cost.
2. Review with you, Construction Manager and Architect all estimates and budgets for work; revise estimates in light of later revisions to drawings and specifications.
3. Review and identify ongoing Value Engineering opportunities to reduce unnecessary cost and assist you with remaining design and construction decisions. Evaluate trade-offs imposed by the schedule and budget.
4. Work with Construction Manager, Architect and Mechanical Engineer to optimize the functionality, aesthetics and cost-effectiveness of the mechanical systems.
5. Recommend and, with your approval, retain special consultants or inspectors as needed to guarantee compliance with your objectives.
6. Review procedures for the receipt, processing, approval and return of shop drawings, catalogues and samples.
7. Review Architect's meeting minutes for thoroughness and accuracy;

- make revisions as necessary.
8. Monitor the adequacy of site personnel and equipment and the availability of necessary material and supplies.
  9. Review the monthly Payment Applications and invoices from Construction Manager, Architect/Interior Designer, prime contractors and consultants.
  10. Analyze and negotiate claims, extras and Change Orders; submit for your approval.
  11. Notify you of work that is believed not to be in compliance with plans and other Contract Documents.

### **III - Move-in and Punchlist**

1. Make determination on Substantial and Final Completion.
2. Prepare and monitor completion of the punchlist of outstanding and deficient items.
3. Coordinate with the Construction Manager and Architect on inspections, issuance of Certificate of Occupancy, equipment warranties and release of lien waivers.
4. Provide advice on start-up, management and related matters.
5. Direct Architect in the production of as-built documentation, if required.

Finally, the Agreement provides that Tuana's fee is "capped at \$210,000...and is based on 14...months of service payable at \$15,000...per month starting September 1, 2010. If service is required beyond October 31, 2011, we will continue at the same rate." A handwritten revision initialed by the parties indicates their agreement that the "[m]onthly fee of \$15,000 includes all out-pocket [sic] expenses incurred in carrying out the service."

Plaintiff asserts two causes of action for breach of contract and account stated based on defendant's alleged failure to pay him the full amount due under the parties' Agreement. Defendant now moves pursuant to CPLR 3211(a)(1) and (a)(7) and 3015(e) to dismiss the complaint, arguing as a threshold matter that plaintiff's claims are barred because plaintiff is not licensed to provide home improvement services.

New York City Administrative Code (“NY Admin. Code”) § 20-387(a) provides that “[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor or salesperson from an owner without a license therefor.” Plaintiff argues that as an “owner’s representative,” it falls outside this licensing obligation because the services it provided to defendant are of a very different character than those provided by a “home improvement contractor.” For instance, plaintiff emphasizes that the services here involved financials and budgeting, architect and engineer selection, approval of architect drawings and meeting minutes, as well as assisting defendant’s attorney in negotiating contracts with the parties performing the actual construction work. Plaintiff further argues that the cases construing NY Admin. Code § 20-387 have found the statute to apply only to direct construction project management, supervision and oversight, and not the type of consultation services it performed here.

The same arguments have already been considered and rejected by the Appellate Division. In *O’Mara Org. v. Plehn*, 179 A.D.2d 548, 548 (1st Dep’t 1992), the Appellate Division affirmed dismissal of the action due to plaintiff’s lack of a license to undertake home improvements. The Appellate Division held that “the performance of services as a general contractor or *project manager* does not exempt persons engaged in the home improvement business from the licensing requirement [under NY Admin. Code § 20-387(a)].” *Id.* (emphasis added). The Appellate Division further stated that “[p]laintiff’s argument that the statute does not apply since it acted only as defendant’s agent in coordinating and monitoring the renovations is without merit.” *Id.* Similarly, the defendant

in *JMT Bros. Realty, LLC v. First Realty Bldrs., Inc.*, 51 A.D.3d 453, 454 (1st Dep't 2008), argued that it was not required to be licensed under NY Admin. Code § 20-387(a) because “its role on the project was solely to coordinate, monitor and supervise the renovation project.” Citing the *O'Mara* case, the Appellate Division concluded that the defendant “nevertheless was required to obtain a license when providing services in connection with a home improvement project.” *Id.*

While plaintiff refers to itself as an “owner’s representative” rather than as a “project manager” or “contractor,” this Court sees no distinction between the services this plaintiff provided in coordinating, monitoring and supervising the construction at the Apartment, and the services provided in the *O'Mara* and *JMT Bros. Realty* cases. As such, the licensing requirement under NY Admin. Code § 20-387(a) applies to plaintiff. Because plaintiff concedes that it did not maintain such a license during the relevant period, it is precluded as a matter of law from enforcing the parties’ Agreement. See *JMT Bros. Realty, LLC v. First Realty Bldrs., Inc.* at 454 (“an unlicensed contractor is precluded, as a matter of public policy, from either enforcing a home improvement contract or seeking recovery in *quantum meruit*”). Moreover, while the *JMT Bros. Realty* case did not involve a cause of action for account stated, as asserted herein, by logical extension of that holding, Tuana’s cause of action for account stated is also barred.

For all of the foregoing reasons, it is

ORDERED that defendant’s motion to dismiss is granted and this action is dismissed in its entirety, and the Clerk is directed to enter judgment in favor of defendant dismissing

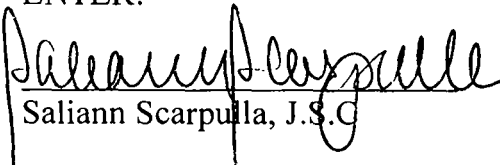
this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the decision and order of this Court

Date: New York, New York

May 30, 2014

ENTER:

  
Saliann Scarpulla, J.S.C.