

Conception to Completion v Ebstein

2014 NY Slip Op 31524(U)

May 27, 2014

Sup Ct, Suffolk County

Docket Number: 13-14698

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-4-13
ADJ. DATE 2-4-14
Mot. Seq. # 002 - MG
003 - MotD

-----X
CONCEPTION TO COMPLETION,

Plaintiff,

- against -

JERRY and MARILYN EBSTEIN,

Defendants.
-----X

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SELVAGGIO, LLC
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated October 15, 2013, and supporting papers 1-7; (2) Affirmation in Opposition by the defendants, dated November 1, 2013, and supporting papers 8-9; (3) Notice of Motion/Order to Show Cause by the defendants, dated October 8, 2013, and supporting papers 10-28 (including Memorandum of Law dated _____); (4) Affirmation in Opposition by the plaintiff, dated October 25, 2013, and supporting papers 29-34; (5) Reply Affirmation by the defendants, dated November 1, 2013, and supporting papers 35-36; (6) Other ~~___ (and after hearing counsels' oral arguments in support of and opposed to the motion)~~; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by plaintiff for leave to amend and this motion by defendants to dismiss are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by plaintiff for an order granting it leave to amend the complaint is granted; and it is further

ORDERED that this motion by defendants for an order pursuant to CPLR 3211 (a)(7) dismissing the first, second and third causes of action against them, and for an order pursuant to CPLR 3212 granting summary judgment dismissing the first and second causes of action is determined herein; and it is further

ORDERED that plaintiff is directed to serve a copy of this order upon defendants by certified mail, return receipt requested.

This is an action to recover payment for home improvement construction services plaintiff, through its president Gerard R. Beal, provided defendants at their home located at 137 Driscoll Avenue, Rockville Centre, New York between October 2011 and September 2012. Plaintiff commenced this action on May 4, 2013. By its complaint, it alleges a first cause of action for account stated in the sum of \$45,511.25, a second cause of action to recover on a contract for work, labor and services, and a third cause of action to recover based on quantum meruit. Defendants served an amended answer and asserted six affirmative defenses. Their affirmative defenses include a first affirmative defense of failure to state a cause of action and a third affirmative defense that plaintiff has overstated the amount due and has improperly imposed charges for services that were not performed by plaintiff or were performed without authorization or approval. The Court's computerized records indicate that no note of issue has been filed in this action.

Plaintiff now requests leave to amend the complaint to comply with CPLR 3015 (e) to allege that it possessed a home improvement license from Nassau County, as required by Title D-1 Section 21-211 of the Nassau County Administrative Code, at the time that the services were rendered and to add the name and number of the license as well as the governmental agency that issued the license. Plaintiff asserts that defendants have been fully aware that it was licensed by Nassau County and that this correction of a technical defect will not result in undue prejudice to defendants. In support of the motion, plaintiff submits the proposed amended complaint with an attached statement of alteration services, the affidavit in support of plaintiff's president, Gerard R. Beal, stating that at all times relevant to this action plaintiff was duly licensed by the Nassau County Department of Consumer Affairs, and a copy of the subject license.

Defendants acknowledge that plaintiff was licensed at the time that the services were provided but oppose the requested amendment arguing that it is moot based on their requests for dismissal and summary judgment.

Where a home improvement contractor is not properly licensed in the municipality where the work is performed at the time the work is performed, the contractor forfeits the right to recover for the work performed both under the contract and on a quantum meruit basis (*see Graciano Corp. v Baronoff*, 106 AD3d 778, 779, 964 NYS2d 602 [2d Dept 2013]; *Velardo v Tomescu*, 91 AD3d 859, 860, 936 NYS2d 695 [2d Dept 2012]).

CPLR 3015 (e) entitled "License to do business" provides that "[w]here the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by... the Nassau county department of consumer affairs, the complaint shall allege, as part of the cause of action, that plaintiff was duly licensed at the time of services rendered and shall contain the name and number, if any, of such license and the governmental agency which issued such license. The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter."

Generally, leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted absent prejudice or surprise and a court should not examine the merits or legal sufficiency of the proposed

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amendment unless it is palpably insufficient or patently devoid of merit on its face (*see Rosicki, Rosicki & Assocs., P.C. v Cochems*, 59 AD3d 512, 514, 873 NYS2d 184 [2d Dept 2009]; *see also* CPLR 3025 [b]).

Here, the proposed amendment cannot be characterized as palpably insufficient or patently devoid of merit on its face (*see Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 642, 914 NYS2d 641 [2d Dept 2011]; *Pat Pellegrini Flooring Corp. v Serota*, 20 Misc 3d 138(A), 867 NYS2d 376 [App Term, 2d Dept, 9th & 10th Jud Dists 2008]). Defendants concede that plaintiff has proof demonstrating that it was properly licensed to do business during the relevant time period. In addition, defendants have not alleged that the clarification that plaintiff was licensed to do business would cause them prejudice or surprise (*see Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 80 AD3d 558, 642, 914 NYS2d 641; *see also Post v County of Suffolk*, 80 AD3d 682, 915 NYS2d 124 [2d Dept 2011]). Therefore, plaintiff's request to amend its complaint is granted. The proposed amended complaint is deemed served upon the defendants in this action on the date that this order is served upon them as specified above.

Defendants seek an order pursuant to CPLR 3211 (a)(7) dismissing the first, second and third causes of action against them, and for an order pursuant to CPLR 3212 granting summary judgment dismissing the first and second causes of action. Defendants' request for dismissal of the first, second and third causes of action against them based on plaintiff's failure to comply with CPLR 3015 (e) is denied as moot based on the foregoing.

Defendants argue that they are entitled to summary judgment dismissing the second cause of action to recover on a contract for work, labor and services inasmuch as plaintiff cannot recover for breach of contract because plaintiff violated General Business Law §§ 771 and 771-a as well as Nassau County Administrative Code Chapter 21, Title D-1, Section 2 requiring written home improvement contracts.

In his affidavit in support, defendant Jerry Ebstein avers that he and his wife, defendant Marilyn Ebstein, own the subject property and hired plaintiff to perform work at the premises. He asserts that their agreement with plaintiff was an oral agreement and that plaintiff never presented them with a written contract. In his affidavit in opposition, plaintiff's president, Gerard R. Beal, acknowledges that there was no formal written contract.

General Business Law § 771 requires that all home improvement contracts be in writing and signed by all parties to the contract (*see* General Business Law § 771[1]). Here, the parties concede that there was no written contract signed by all the parties herein. Therefore, General Business Law § 771 bars plaintiff's recovery under the second cause of action based upon breach of contract (*see Precision Foundations v Ives*, 4 AD3d 589, 591, 772 NYS2d 116 [3d Dept 2004]; *Frank v Feiss*, 266 AD2d 825, 826, 698 NYS2d 363 [4th Dept 1999]; *Mindich Devs. v Milstein*, 227 AD2d 536, 536-537, 642 NYS2d 704 [2d Dept 1996]). Thus, the second cause of action is dismissed.

Defendants also argue that they are entitled to summary judgment dismissing the first cause of action to recover on an account stated inasmuch as an account never existed, there was no written contract, they never agreed to the charges or method of calculation, and defendants immediately objected to the amount billed. Their submissions in support of the motion include the pleadings and the affidavit of defendant Jerry Ebstein.

In opposition, plaintiff contends that defendants admit that they hired plaintiff and asked plaintiff to provide work, labor and materials, and that between October 2011 and September 2012 defendants were pleased with the substantial amount of work that Beal completed and repeatedly asked him to do more work. Plaintiff emphasizes that whether or not the terms of the work, price or payment were reduced to writing, defendants did contract for the services plaintiff provided. Plaintiff's submissions include Beal's affidavit, weekly time sheets, invoices, and the statement of account.

A licensed home improvement contractor may recover on an account stated and on a quantum meruit basis despite the absence of a written agreement in compliance with General Business Law § 771 (see *Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 932 NYS2d 100 [2d Dept 2011]; *Orchid Constr. Corp. v Gonzalez*, 89 AD3d 705, 932 NYS2d 125 [2d Dept 2011]; *Pepe v Tannenbaum*, 279 AD2d 620, 719 NYS2d 886 [2d Dept 2001]). An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them (see *Citibank (South Dakota) N.A. v Cutler*, 112 AD3d 573, 976 NYS2d 196, 197 [2d Dept 2013]; *White Plains Cleaning Servs., Inc. v 901 Props., LLC*, 94 AD3d 1108, 1109, 942 NYS2d 636 [2d Dept 2012]; *Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 223, 927 NYS2d 349 [2d Dept 2011]; *American Express Centurion Bank v Cutler*, 81 AD3d 761, 762, 916 NYS2d 622 [2d Dept 2011]). An account stated is independent of the original obligation (see *Citibank (South Dakota) N.A. v Cutler*, 112 AD3d 573, 976 NYS2d 196, 197). "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*American Express Centurion Bank v Cutler*, 81 AD3d 761, 762, 916 NYS2d 622; see *Citibank (South Dakota) N.A. v Cutler*, 112 AD3d 573, 976 NYS2d 196, 197). "Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible" (*Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579, 580, 749 NYS2d 270 [2d Dept 2002][internal quotation marks omitted]; see *Landau v Weissman*, 78 AD3d 661, 662, 913 NYS2d 107 [2d Dept 2010]).

Defendant Jerry Ebstein attests in his affidavit that defendants merely agreed with plaintiff to a flat, fixed fee of \$10,200.00 for work plaintiff's principal, Gerard Beal (Beal), performed in the kitchen. He states that defendants never agreed to a time and material basis, that they were never provided with the opportunity to pay plaintiff by progress payment method, and that Beal required that they pay in cash. According to defendant Ebstein, Beal performed some additional work outside of the kitchen, which Beal characterized as "simple straightforward work," and even though said work requires correction, defendants nevertheless offered to pay Beal approximately \$5,000.00 for said additional work. Defendant Ebstein maintains that he and his wife were shocked by Beal's request for payment over \$10,200.00, that although they were displeased with his work, they paid him \$7,000.00, that they immediately objected to plaintiff's request for further payment, and that never agreed to pay an amount close to that alleged in the complaint, \$45,511.25. He avers that the "statement" attached to plaintiff's complaint contains entries for dates that Beal never appeared or performed work at their premises and more than \$17,000.00 in double billing. Defendant Ebstein adds that defendants were never informed that plaintiff would be charging material plus cost and would render a final bill for "material plus cost plus 40 percent markup if paid in cash and 40 percent plus 25 percent if paid by check." He further states that Beal's work was defective and deficient, listing as examples that the kitchen floor was incorrectly laid and has begun to separate, that numerous holes

were left, that areas that were to be painted were left unpainted, that an air conditioning vent was improperly attached and fell off, that various moldings were incorrectly installed and are pulling off the walls, and that wallpaper is peeling. Defendants submit photos purportedly depicting said deficiencies.

In contrast, Beal avers in his affidavit submitted in opposition to defendants' motion that he incorporated his business in 1987, that he was recommended to defendants by a longstanding customer, that he explained to defendant Ebstein prior to commencing the job in defendants' 62-year-old, two-story center hall colonial in Rockville Centre how he would charge for the job, specifically, that he would charge on a time and material basis with a labor rate of \$43 per hour and a material markup of 40 percent if paid in cash and that defendant Ebstein agreed to his terms. Beal provides a detailed recitation of the work that he allegedly performed, some of which he was requested by defendants to redo or change due to personal preference or complications, including installing kitchen cabinets; removing wallpaper in the kitchen and foyer, along the stairs, in the upstairs hall and dining room and painting said walls; refinishing the bannister; replacing the toilet and sink and installing new porcelain tile over the tile floor in the hall bath; repairs in the master bath to floor tiles and a custom-built recessed medicine cabinet with mirrored doors; staining the living and dining room floors; installing crown and rope molding above the kitchen cabinets; constructing a hidden jewelry drawer in a kitchen cabinet; and replacing the kitchen window. He also addresses defendants' claims of defective and deficient work.

Beal explains in his affidavit his method of billing calculation and provides copies of weekly time sheets for the work at defendant's home, copies of receipts for all the materials he purchased for the job, and the statement of account indicating the weekday, date, location in the house, description of the work, the vendor, hours worked, and the total amount. He attests that defendants never asked about the cost, or for a formal estimate, regarding the additional work besides that of the kitchen; that defendants never offered Beal \$5,000.00 for the additional work, which he would have explained could not be done at said price; that defendant Ebstein authorized him to "[s]pread the cost over all the other work you're doing. Just don't tell my wife" with respect to restaining the floors; that during the project defendant Ebstein praised his work and said "[i]t doesn't matter how much it costs. When you're finished, just tell me how much and I'll pay you. You don't even have to write a bill;" and that he prepared a bill for the defendants near the end of the job. Beal states that when he provided the bill to defendants, they said that they were shocked by the bill's amount but that they would pay it even though it would take time, to which Beal agreed and continued to work. Beal further states that a few weeks later defendants began to question certain charges and shortly thereafter, defendant Ebstein said that he would not pay the full amount and his wife said that she wanted to negotiate despite the fact that more than 99 percent of the work was completed. Beal avers that he made multiple attempts to send a detailed bill to defendants by regular and certified mail and to contact defendants by phone and eventually received a voicemail from defendant Ebstein to the effect that "you left my house in a complete mess," "you've already been paid" and "don't bother to call me ever again." According to Beal, the "flat fixed fee" referred to by defendant Ebstein was from an estimate based on preliminary discussions that occurred many months prior to the start of the work and all the subsequent changes and was outdated by the time the work began. In addition, he asserts that he could not provide defendants with a formal contract because he was never given specifics until defendants were ready to begin the additional work.

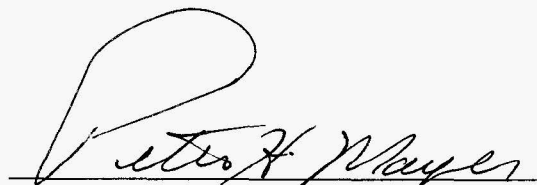
Notably, defendants only submit the reply affirmation of their attorney.

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It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence 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, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). “Once this showing has been made, however, 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” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

Here, the conflicting affidavits raise issues of fact including, whether prior to the commencement of the project there was an express agreement between the parties to an account stated and whether the \$7,000.00 payment defendants made to plaintiff constitutes partial payment on the account despite defendants’ subsequent objections (*see Branch Services, Inc. v Cooper*, 102 AD3d 645, 961 NYS2d 170 [2d Dept 2013]; *Accent Collections, Inc. v Cappelli Enterprises, Inc.*, 94 AD3d 1026, 943 NYS2d 189 [2d Dept 2012]). Therefore, defendants’ request for summary judgment dismissing the first cause of action is denied.

Dated: 5-28-14


PETER H. MAYER, J.S.C.