

<b>Rapid Dry Inc. v Zwick</b>
2015 NY Slip Op 30475(U)
March 25, 2015
Sup Ct, Queens County
Docket Number: 706499/2014
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

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RAPID DRY INC. d/b/a RAPID DRY  
SERVICES,

Plaintiff,

- against -

MURIEL ZWICK,

Defendant.

Index No.: 706499/2014

Motion Date: 02/02/15

Motion No.: 85

Motion Seq.: 1

- - - - - x

The following papers numbered 1 to 14 were read on this pre-answer motion for an order pursuant to CPLR 3211(a) (7) dismissing the complaint on the grounds that the complaint fails to state a cause of action because the plaintiff is without legal capacity to sue:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 6  
Affirmation in Opposition-Affidavits-Exhibits.....7 - 9  
Reply affirmation.....10 - 14

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The plaintiff Rapid Dry, Inc. d/b/a Rapid Dry Services commenced the instant action by filing a summons and complaint on September 11, 2014, alleging that in November 2012 plaintiff provided work, labor and services in the agreed upon amount of \$25,405.04. The complaint alleges that no part of said sum has been paid and that there is still due and owing the sum of \$25,405.04. Plaintiff seeks a money judgment for the amount due based upon breach of contract and account stated.

Prior to filing an answer the defendant moves to dismiss the complaint pursuant to CPLR 3211(a) (7) on the ground that the complaint fails to state a cause of action because the plaintiff performed home improvement work for the defendant and has failed

to include a statement in its complaint that it is licensed by the New York City Department of Consumer Affairs and failed to provide its license number as required by CPLR 3015(e). In addition, plaintiff moves to dismiss the first cause of action for breach of contract on the ground that there was no written home improvement contract provided by the plaintiff. Defendant moves to dismiss the second cause of action for account stated on the ground that the defendant has timely and consistently objected to plaintiff's account statements.

In support of the motion, defendant, Muriel Zwick, submits an affidavit dated October 29, 2014, stating that she owns and resides in property located at 220-06 Breezy Point Boulevard Breezy Point, New York. She states that on October 29, 2012, Superstorm Sandy severely damaged her home. Due to the storm twelve feet of flood water filled her basement and rose about a foot into the first floor of her house. She states that she had flood insurance through Hartford Fire Insurance Company as well as excess flood insurance through Lexington Insurance.

A few days after the storm, Troy Hess, the CEO of Rapid Dry, Inc. ("Rapid Dry") came to her door unsolicited and told her that he was sent by her insurance company to provide clean up and restoration services. When she asked how much it would cost, he told her that he would bill the insurance company directly. She was not given an estimate of how much the work would cost nor was she ever provided with a contract. The work commenced on November 22, 2012 and was completed on December 2, 2012. She states that on January 17, 2013 she was surprised to receive a letter and an invoice in the amount of \$29,947.30 billing her for work she believed was to be paid by the insurance company. The letter itemized the work claimed to have been performed and included mold remediation, drying the basement and first floor with drying machines, tearing out drywall, baseboards, insulation and removing interior doors, floor tiles and fixtures in the kitchen and bathroom. She subsequently received additional invoices, one for \$30,873.41 and the other for \$29,492.53.

Ms. Zwick states that on January 21, 2013 she wrote to the plaintiff to dispute the bill. She also stated that she told plaintiff she was owed \$2,131,95 for the items the contractors wrongfully removed from her home. On February 5, 2013, Ms. Zwick found out that a mechanics lien in the amount of \$29,947.30 was placed on her house by the plaintiff. In addition, she states that she received an estimate from SIMSOL, an adjuster assigned by the National Flood Insurance Program, estimating the cost of the work at \$10,524,52. Based upon that estimate she offered to settle the account for \$15,000. When the plaintiff declined that offer she sent plaintiff a check in the amount of \$10,524.52 on

July 10, 2013 which was the amount the insurance company estimated the value of the work to be. Plaintiff cashed the check. The defendant asserts that she paid that amount as the full value of the work and not as payment on account toward the bill rendered by the plaintiff.

Defendant's counsel, Sirrah Harris, Esq., contends that the particular work performed by the plaintiff at the defendant's home including tearing out drywall, tearing out baseboards tearing out insulation, and removing floors, baseboards and doors constitutes home improvement services for which, pursuant to New York City Administrative Code § 20-387(a) a contractor is required to possess a home improvement contractor's license from the NYC Department of Consumer Affairs. Counsel submits a letter from Jordan P. Cohen Assistant Director of the Legal Division of the Department of Consumer Affairs dated August 25, 2014 as tearing out drywall, tearing out insulation, tearing out baseboards, and removing doors, is considered alteration work and therefore requires a DCA Home Improvement Contractors license.

Defendant also asserts that pursuant to CPLR 3015(e) the plaintiff, who is required to be licensed as a home improvement contractor, is required to plead that his company is licensed by the NYC Department of Consumer Affairs and must provide the license number in the complaint. Counsel states that she contacted the Department of Consumer Affairs and learned that there is no record of Rapid Dry, Inc. possessing a license. Because the complaint herein fails to provide a license number and a statement that the plaintiff possesses a valid home improvement contractor's license, the defendant moves to dismiss the complaint for failure to state a cause of action (citing Vatco Contr., Ltd. v Kirschenbaum, 73 AD3d 1163 [2d Dept. 2010][a contractor who is unlicensed in the municipality where the work is performed is barred from recovery in contract or under the theories of recovery of quantum meruit and unjust enrichment]; Epic Pool Corp. v Fontecchio, 67 AD3d 858 [2d Dept. 2009][in order for a home improvement contractor to recover damages for breach of contract it must possess (1) a valid license at the time of performance for which he seeks compensation, and (2) a valid license at the time of pleading]).

Defendant also claims that the first cause of action for breach of contract must be dismissed notwithstanding the license issue because the parties never entered into a contract for services to be provided to the defendant by the plaintiff. Counsel asserts that there can be no breach of contract without a contract. Further, as the defendant objected to plaintiff's statement of account it is claimed that there can be no cause of

action for an account stated on which the plaintiff can recover (citing Michael H. Spector, AIA, P.C. v Billy Smith's Sport Ctr., Inc., 95 AD3d 967 [2d Dept. 2012]; Cameron Eng'g & Assoc., LLP v JMS Architect & Planner, P.C., 75 AD3d 488 [2d Dept. 2010][an essential element of an account stated is an agreement with respect to the amount of the balance due]).

In opposition, Timothy Wan, Esq. Counsel for Rapid Dry, contends that the complaint sufficiently pleads a cause of action for breach of contract. The plaintiff submits a "payment authorization form" dated November 8, 2012 and a description of services rendered dated December 28, 2012 as well as a "certificate of satisfaction" signed by the defendant on December 12, 2012. Counsel claims that the defendant was paid by the insurance company and failed to remit payment to the plaintiff. Counsel also submits that whether the services rendered by the plaintiff constitute home improvements under the definition of the New York City Department of Consumer Affairs is an issue of fact because there was no installation or repair services performed. The plaintiff has not produced a home improvement contractor license.

In reply the defendant contends that the work performed by the plaintiff constitutes home improvements pursuant to the NYC Administrative Code § 20-386(2) which defines home improvements as "construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to a residential building, not just repair or installation as the plaintiff contends. Defendant contends that the plaintiff's itemized list of work performed contains a list of work most of which includes alterations to the home. Counsel claims that even if some of the work performed by the plaintiff did not require a home improvement contractor's license, plaintiff should still be barred from recovery because the work it performed was done under a nonseverable agreement that as a whole required a home improvement license (citing Ozouly v. American Contr. Solutions, LLC, 2009 N.Y. Misc. LEXIS 5862 [Sup Ct. Kings Co. 2009][where a contract is for both residential and commercial work, the contract is non-severable and the failure to obtain a home improvement license bars an unlicensed contractor from recovery]).

Lastly, the defendant asserts that she received a check from her insurance company for the remedial work performed by the plaintiff and remitted to the plaintiff the exact amount she received from the insurance company.

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds that the defendant's motion for an order dismissing the complaint on the ground that the plaintiff is not a licensed home improvement contractor is granted

"Administrative Code of the City of New York § 20-387 (a) states: "No person shall solicit, canvas, sell, perform or obtain a home improvement contract as a contractor or salesperson from an owner without a license therefor." Such provisions have been held to bar any recovery for either breach of contract or quantum meruit on the part of the unlicensed home improvement contractor and further preclude an unlicensed contractor from foreclosing a mechanic's lien" (Ozouly v American Contr. Solutions, LLC, supra; also see Callos, Inc. v Julianelli, 300 AD2d 612 [2d Dept. 2002][it is well settled that licensing statutes are to be strictly construed, and that an unlicensed contractor forfeits the right to recover damages based either on breach of contract or on quantum meruit as well as the right to foreclose on a mechanic's lien]).

The defendant established, prima facie, that the plaintiff seeks to recover damages for home improvement services which required it to obtain a home improvement contractor license and the plaintiff did not comply with that licensing requirement. Here, the defendant established her prima facie entitlement to an order dismissing the complaint insofar as asserted against her by establishing that the plaintiff performed home improvements as defined under the NYC Administrative Code and failed to produce or plead that it is duly licensed by the NYC Department of Consumer Affairs to perform home improvements in the City of New York (see Graciano Corp. v Baronoff, 106 AD3d 778 [2d Dept. 2013]; CMC Quality Concrete III, LLC v Indriolo, 95 AD3d 924 [2d Dept. 2012]).

In opposition the plaintiff failed to raise a material issue of fact.

Therefore, pursuant to CPLR 3015(e) as the plaintiff failed to plead that he possessed a home improvement contractor's license at the time the action was commenced or at the time the alterations were made to the plaintiff's house and for all of the aforesaid reasons, it is hereby,

ORDERED, that the plaintiff's complaint is dismissed for failure to state a cause of action (see Hardy Plumbing, Heating & A.C. v. Menu, 65 AD3d 609 [2d Dept. 2009]; Nicotra v Manger, 64

AD3d 547, [2d Dept. 2009]), and it is further,

ORDERED, that the mechanic's lien dated January 31, 2013 and filed in the Queens County Clerk's office on February 5, 2013 under ML 68/13 filed by the plaintiff in this matter shall be vacated.

Dated: March 25, 2015  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**