

<b>Maximar Constr., Inc. v Mehta</b>
2015 NY Slip Op 30944(U)
June 3, 2015
Supreme Court, New York County
Docket Number: 162816/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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MAXIMAR CONSTRUCTION, INC.,

Plaintiff,

Index No. 162816/14

-against-

**DECISION/ORDER**

AMIT MEHTA, RUCHI MEHTA, 910 PARK AVENUE,  
INC., KENSET CORP., HIGHLINE DESIGN  
CORPORATION, ERIC COHLER DESIGN  
INCORPORATED and WESTCHESTER FIRE  
INSURANCE COMPANY,

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

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Plaintiff Maximar Construction, Inc. commenced the instant action to recover damages arising out of work it performed to renovate an apartment in Manhattan. Defendants Amit Mehta (“Amit”), Ruchi Mehta (“Ruchi”) (hereinafter collectively referred to as the “Mehtas”), Westchester Fire Insurance Company (“Westchester”) and 910 Park Avenue, Inc. (“910 Park”) (hereinafter collectively referred to as the “moving defendants”) now move for an Order (1) pursuant to CPLR § 3211(a)(7) dismissing the complaint; (2) directing the County Clerk to vacate the Mechanic’s Lien (the “Lien”) filed by the plaintiff; and (3) discharging the bond filed by the Mehtas. For the reasons set forth below, the moving defendants’ motion is granted.

The relevant facts are as follows. In or around August 2013, the Mehtas purchased Apartment 7B in the cooperative building located at 910 Park Avenue, New York, New York (the “subject premises”). Thereafter, the Mehtas entered into a written agreement with defendant Eric Cohler Design Incorporated (“Cohler”) pursuant to which Cohler was to perform certain construction and improvements to the subject premises prior to the Mehtas moving in in or around March 2014. On or about November 27, 2013, Cohler entered into a written agreement with plaintiff pursuant to which plaintiff was to perform labor and furnish materials for the renovation of the subject premises for the agreed-upon price of \$340,129.62. However, plaintiff alleges that it fully performed pursuant to the Contract but that it has only been paid \$221,250.00 leaving a balance of \$118,879.62.

On or about June 17, 2014, plaintiff filed the Lien against the subject premises based on its claim that it had not been paid for the work it performed. On or about August 19, 2014, the Mehtas filed a bond in the County Clerk’s Office of the County of New York, discharging the Lien filed by plaintiff. Thereafter, plaintiff commenced the instant action seeking to recover for the work it performed on the subject premises. The moving defendants then filed the instant pre-answer motion to dismiss the complaint.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some

recognizable form any cause of action known to our law.”” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

The moving defendants’ motion to dismiss the complaint on the ground that it fails to comply with the requirement set forth in CPLR § 3015(e) is granted. Pursuant to CPLR § 3015(e), if a plaintiff contractor is required to be licensed by the New York City Department of Consumer Affairs (“DCA”), its complaint shall allege that it is licensed as such. Indeed, plaintiff’s failure to comply with the requirement that it allege it is a licensed contractor in its complaint allows the defendant owner to move to dismiss the complaint pursuant to CPLR § 3211(a)(7). See CPLR § 3015(e).

In the instant action, this court finds that the complaint must be dismissed as the moving defendants have established that the complaint fails to allege that plaintiff was a licensed home improvement contractor and that plaintiff was required to be licensed as a home improvement contractor by the DCA pursuant to New York City Administrative Code (“Admin. Code”) § 20-387(a). Pursuant to that statute, “[n]o person shall...perform or obtain a home improvement contract as a contractor...from an owner without a license therefor.” Admin. Code § 20-387(a). “Home improvement” is defined as

the construction, repair, replacement, remodeling, alteration,

conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place and shall include but not be limited to the construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures or upon land which is adjacent to a dwelling house. "Home improvement" shall not include (i) the construction of a new home or building or work done by a contractor in compliance with a guarantee of completion of a new building project, (ii) the sale of goods or materials by a seller who neither arranges to perform nor performs directly or indirectly any work or labor in connection with the installation of or application of the goods or materials, (iii) residences owned by or controlled by the state or any municipal subdivision thereof, or (iv) painting or decorating of a building, residence, home or apartment, when not incidental or related to home improvement work as herein defined. Without regard to the extent of affixation, "home improvement" shall also include the installation of central heating or air conditioning systems, central vacuum cleaning systems, storm windows, awnings or communication systems.

Admin. Code § 20-386(2). Indeed, it is well-settled that "[n]o license is required for merely decorative additions such as painting, installation of appliances, and the arrangement of furniture and decorative objects." *Raywood Assoc. v. Seibel*, 172 A.D.2d 154 (1<sup>st</sup> Dept 1991).

Here, this court finds that plaintiff was required to allege that it is a licensed home improvement contractor on the ground that the work performed by plaintiff was "home improvement" as contemplated by the Admin. Code. It is undisputed that the renovation work performed by plaintiff included, *inter alia*, installation of plumbing, including new toilets, sinks, showers and bathtubs; removal and installation of tile flooring and countertops; installation of radiant flooring; construction and installation of bookcases with lights; installation of crown molding; construction of closets and built-ins; installation of wall sconces; installation of a built-in to house a Murphy bed; and painting and plastering (the "Project"). Indeed, the Contract, drafted and signed by plaintiff, contains three separate pages of items of work plaintiff was

required to perform at the subject premises, including, *inter alia*, replacing floors, countertops and walls with new stone tiles; replacing plumbing appliances such as toilets, showers, tubs, sinks; installing radiant flooring; and installing new crown molding and electrical outlets. Such work is clearly “construction,...alteration,...renovation, modernization, improvement” as contemplated by Admin. Code § 20-386(2). The First Department has found that what distinguishes a home improvement project from decorative and cosmetic work is whether the work was a “permanent improvement to the physical plant” or whether the work involved something akin to the installation of a kitchen appliance, which it found was merely decorative. *Raywood Assoc.*, 172 A.D.2d 154. As the extensive work performed by plaintiff involved many permanent improvements to the physical apartment and not just mere decorative and cosmetic changes, plaintiff was required to be licensed prior to performing the work on the Project and thus, was required to allege that it was licensed in its complaint pursuant to CPLR § 3015(e).

In response, plaintiff has failed to establish that it was not required to allege in its complaint that it was a licensed home improvement contractor. Plaintiff’s reliance on certain cases for the proposition that it did not need to allege it was licensed because the work it performed on the Project was not “home improvement” work as defined in the Admin. Code but rather merely decorative and cosmetic and thus, it did not need a license in the first place, is misplaced as those cases are distinguishable. Indeed, the cases relied upon by plaintiff all involve a single isolated task performed by a contractor, such as, *inter alia*, the installation of motorized window shades and the fabrication and installation of custom glass shower doors over an existing bathtub. However, in this case, the work plaintiff performed on the Project was much more extensive than just the performance of a single task as it is undisputed that plaintiff

undertook a renovation of the Mehtas' entire apartment.

Further, plaintiff's assertion that the work it performed on the Project was not "home improvement" work as defined in the Admin. Code based on the fact that the application submitted by the Mehtas to 910 Park for approval and consent for the Project was titled "Minor Alterations/Apartment Decorations" is without merit as the nature of the work that was actually performed by plaintiff was not merely decorative but rather a "home improvement" as defined in the statute.

Finally, plaintiff's assertion that the moving defendants' motion to dismiss should be denied because discovery has not been conducted is without merit. Plaintiff does not deny performing any of the alleged work at the subject premises but only asserts that said work is purely decorative in nature. However, as this court found that the work performed is not decorative in nature, plaintiff has failed to point to what evidence would be obtained during discovery that would result in a different finding.

Accordingly, it is hereby

ORDERED that the moving defendants' motion to dismiss the complaint as against them is granted; and it is further

ORDERED that the County Clerk is directed to vacate and cancel the Lien filed by the plaintiff on June 17, 2014 against the subject premises; and it is further

ORDERED that the County Clerk is directed to discharge the bond filed by the Mehtas. This constitutes the decision and order of the court.

Dated: 6/3/15

Enter: \_\_\_\_\_

*CK*  
J.S.C.  
CYNTHIA S. KERN  
J.S.C.