

<b>Apostolatos v Kanelakis</b>
2016 NY Slip Op 30599(U)
April 12, 2016
Supreme Court, Queens County
Docket Number: 12056/15
Judge: Allan B. Weiss
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2  
Justice

JAMES APOSTOLATOS

Plaintiff,

-against-

STAMOS KANELAKIS, Individually,  
GATEWAY DEMOLITION CORPORATION and  
GEORGE J. RAZIS, ESQ. and  
RAZIS & ROSS, P.C.

Defendants.

Index  
Number: 12056/15

Motion  
Date: 2/4/15

Motion Seq. No.: 1

The following papers numbered 1 to 30 read on this motion by plaintiff for an order pursuant to CPLR 1006 directing the stakeholders to release all or part of disputed insurance proceedings of \$284,904.09 now held by stakeholder George J. Razis, Esq. and Razis & Ross, P.C. to the plaintiff; on the cross motion by defendants Stamo Kanelakis, individually and George J. Razis, Esq. and Razis & Ross, P.C. as defendant stakeholders, pursuant to CPLR 1006(f) discharging defendants George J. Razis, Esq. and Razis & Ross, P.C. as stakeholders in this action; pursuant to Lien Law § 38 directing lienor defendant Gateway Demolition Corporation (Gateway) to deliver to defendant Stamo Kanelakis an itemized statement and its failure to do so- a discharge of the notice under mechanic's lien filed by Gateway, pursuant to CPLR 1202 for the appointment of a guardian ad litem for plaintiff James Apostolatos, and awarding attorney fees in the sum of \$10,000 to be paid to Razis & Ross, P.C.; and on the cross motion by defendant Gateway to dismiss the plaintiff's third cause of action.

Papers  
Numbered

Order to Show Cause - Affidavits - Exhibits.....	1 - 11
Notice of Cross Motion - Affidavits - Exhibits...	12 - 18
Notice of Cross Motion - Affidavits - Exhibits...	19 - 22
Answering Affidavits - Exhibits.....	23 - 24
Answering Affidavits - Exhibits.....	25 - 26
Answering Affidavits - Exhibits.....	27 - 28
Reply Affidavits.....	29 - 30

Upon the foregoing papers it is ordered that this motion and these cross motions are determined as follows:

The plaintiff James Apostolatos and his sister, defendant Stamo Kanelakis inherited the premises known as 94-51 44<sup>th</sup> Avenue, Elmhurst, Queens County, New York (the subject premises). This deed was recorded on or about May 18, 2004. Since that time AND up to February 2015, the plaintiff lived in a basement apartment at THE subject premises. There is a dispute as to whether the plaintiff or defendant was collecting rent from tenants since that time. On or about February 25, 2015, there was an explosion at the subject premises rendering the premises uninhabitable. After the explosion, the Department of Buildings for the City of New York required the owner of the premises to hire a demolition company to demolish the entire structure immediately. Then either the insurance company or the defendant Kanelakis hired Gateway for demolition of the premises. The defendant Kanelakis signed a contract with Gateway, though she did not sign the contract herself until after the completion of the demolition work, for the sum of \$155,000. Gateway was paid a deposit of \$38,750 directly by the insurance company but has not been paid since. The insurance company also issued two further checks totaling \$284,904.09 in the name of the plaintiff and defendant Kanelakis. The defendant Kanelakis did not want to endorse these checks and instead gave the checks to her attorney the defendant George J, Razis, Esq.

The plaintiff then commenced this action concerning the subject property. The plaintiff's first cause of action is for partition of the subject premises against the defendant Stamo Kanelakis. The second cause of action is for an accounting of all rents allegedly collected by the defendant Kanelakis. The third cause of action is pursuant to CPLR 1006 to distribute insurance funds allegedly held by defendant stakeholder George J. Razis, Esq. and Razis & Ross, P.C. as stakeholder and also names Gateway as a competing claimant defendant.

The defendant Kanelakis has brought counterclaims against the plaintiff. The first counterclaim is for partition of the subject premises. The second counterclaim is for an accounting of all rents allegedly collected by the plaintiff. The third counterclaim is for unjust enrichment for the plaintiff collection of rents and profits from the subject premises. The defendant Kanelakis has also brought a cross claim against the defendant Gateway for a demand for itemized statement.

Gateway filed a notice of mechanic's lien on October 7, 2015 against the subject premises. Gateway then commenced an action by way of a motion for summary judgment in lieu of complaint against

Kanelakis to collect the balance due under the demolition contract. That action is pending in Queens County Supreme Court under Index No. 712716/2015.

The plaintiff has moved by order to show cause for an order granting a preliminary injunction under his third cause of action pursuant to CPLR 1006 directing the stakeholders to release all or part of disputed insurance proceedings of \$284,904.09 allegedly held by stakeholders George J. Razis, Esq. and/or Razis & Ross, P.C. to plaintiff. The plaintiff's motion must be denied. The plaintiff seeks relief under CPLR 1006. Under CPLR 1006 "A stakeholder may commence an action of interpleader against two or more claimants." The plaintiff, however, did not have standing to bring an interpleader action under CPLR 1006 as the plaintiff does not allege that he is a stakeholder but rather he alleges he is a claimant. CPLR 1006 does not give a claimant a right to proceed against a stakeholder, rather an interpleader action under CPLR 1006 is used in cases where a stakeholder can bring claimants into to resolve disputes to their claims. Thus, it was not proper for the plaintiff to bring a cause of action under CPLR 1006 and therefore relief under this section is not warranted, though, the plaintiff is not barred from seeking the funds at dispute by way of another claim.

The branch of the cross motion by the defendant Gateway to dismiss the plaintiff's third cause of action pursuant to CPLR 1006 against Gateway is granted. As discussed above, the cause of action brought pursuant to CPLR 1006 is improper and therefore, it must be dismissed.

The branch of the cross motion by George J. Razis, Esq. and Razis & Ross, P.C. to be discharged is denied. George J. Razis, Esq. and Razis & Ross, P.C. cannot be discharged under CPLR 1006 as this was not a proper interpleader action brought by these parties. An discharging order under CPLR 1006(f) would give George J. Razis, Esq. and Razis & Ross, P.C. a discharge from any liability, and they are not entitled to such relief. Only after initiating an interpleader action under CPLR 1006 would a stakeholder then be entitled to an order discharging them. Furthermore, the defendants George J. Razis, Esq. and Razis & Ross, P.C. argue that they are not stakeholders. Therefore these defendants are not entitled to an order discharging them. The relief that these defendants are actually seeking is to dismiss the cause of action. A court is empowered to search the record and award summary judgment to a nonmoving party (*Lennard v Khan*, 69 AD3d 812 [2010]). In light of the finding that the plaintiff is not entitled to relief under CPLR 1006, which in effect was a motion for summary judgment on that cause of action, the defendants are entitled to summary judgment

dismissing the purported CPLR 1006 cause of action. The defendants are not entitled to an award of attorneys' fees.

The branch of the motion by the defendant Kanelakis for an itemized statement pursuant to Lien Law § 38 is denied. Inasmuch as Gateway is not a proper party to this action and further, the proper procedure under the Lien Law for an aggrieved party for the failure of a contractor to respond to a demand for an itemized statement or if the response is inadequate, is to petition the Court by way of a special proceeding, this Court will not issue an order with regards to the lien of a party that is not properly in this action. Furthermore, where the claim is based upon an express contract for a specified sum, it is not necessary to provide an itemization where the contract provides details of the labor performed (see *Associated Bldg. Servs., Inc. v Pentecostal Faith Church*, 112 AD3d 1130 [3d Dept 2013]; *F.J.C. Cavo Constr. v Robinson*, 81 AD2d 1005 [4<sup>th</sup> Dept 1981]). Additionally, while defendant Kanelakis is correct that Gateway will bear the burden of establishing its entitlement to payment, this issue and the defendant Kanelakis' contention that the amount of the lien is exaggerated may be explored through the discovery process in the other action.

Finally, the Court turns to the motion to appoint a guardian ad litem. CPLR 1201 provides for the appointment of a guardian ad litem for "an adult incapable of adequately prosecuting or defending his rights." While the movant put forth some evidence of the mental well-being of the plaintiff and the inability of the plaintiff to handle his own personal and financial affairs, the record before the court does not contain evidence sufficient to raise an issue of fact as to whether the plaintiff, who is represented by counsel, is capable of prosecuting this action (cf. *Resmae Mtge. Corp. v Jenkins*, 115 AD3d 926 [2d Dept 2014]). This denial is without prejudice to renewal upon a proper showing. The court further notes in passing, that even if a guardian ad litem is appointed, the guardian ad litem would not have any authority to receive or distribute the proceeds of any recovery in this matter, which would require the appointment of a personal representative of the property management pursuant to Article 81 of the Mental Hygiene Law.

Accordingly, the plaintiff's motion for an order pursuant to CPLR 1006 is denied.

The branch of the cross motion by defendants Stamo Kanelakis, George J. Razis, Esq. and Razis & Ross, P.C. pursuant to CPLR 1006(f) discharging George J. Razis, Esq. and Razis & Ross, P.C. as

stakeholders in this action is denied. The plaintiff's third cause of action, however is dismissed.

The branch of the cross motion by defendant Stamo Kanelakis, for an itemized statement pursuant to Lien Law § 38 is denied.

The branch of the cross motion by defendants Stamo Kanelakis, George J. Razis, Esq. and Razis & Ross, P.C. pursuant to CPLR 1202 for the appointment of a guardian ad litem for plaintiff is denied.

The branch of the cross motion by defendants Stamo Kanelakis, George J. Razis, Esq. and Razis & Ross, P.C. awarding attorney fees in the amount of \$10,000 to be paid to Razis & Ross, P.C. is denied.

The defendant Gateway's cross motion to dismiss the third cause of action is granted.

The dismissal of the plaintiff's third cause of action under CPLR 1006 is without prejudice to him bringing another claim for the funds that are in dispute.

Dated: April 12, 2016

---

J.S.C.