

Knight Harte Constr., Inc. v Zurick

2016 NY Slip Op 31296(U)

July 11, 2016

Supreme Court, New York County

Docket Number: 650340/16

Judge: Manuel J. Mendez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

KNIGHT HARTE CONSTRUCTION, INC.,

Plaintiff,

-against-

JOHN ZURICK, ADRIENNE ZURICK, and
RLI INSURANCE COMPANY,

Defendants.

INDEX NO. 650340/16
MOTION DATE 05 -18-2016
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 17 were read on this motion to/for dismiss pursuant to CPLR §3211[a][7] and Cross-Motion pursuant to CPLR §3215 to amend the complaint :

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that defendant's motion pursuant to CPLR §3211[a][7] to dismiss the complaint, and for costs, sanctions and attorney fees, is granted as stated herein.

Plaintiff brought this action to recover fees totaling \$27,195.49, plus interest, costs, and attorney fees, for services rendered on the installation of kitchen fixtures and a renovation of flooring starting on May 23, 2014 through October 30, 2014, at 340 East 74th Street, New York, New York, Apartment PH-D (hereinafter referred to as "the apartment").

Defendants pursuant to CPLR § 3211[a][7], seek to dismiss the complaint for failure to state any causes of action. Defendants argue that plaintiff did not have a valid contractor's license at the time services were allegedly rendered as required pursuant to CPLR §3015[e] and that the underlying mechanics lien is defective on its face.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

§771. Defendants also seek to dismiss the account stated claims because there was allegedly no agreement on any of the amounts alleged.

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, 614 N.Y.S., 2d 972, 638 N.E. 2d 511 [1994]).

New York City Administrative Code §§20-386 [2] and 20-287[a] require that a home improvement contractor have a license, the failure of a home improvement contractor to have a license precludes the enforcement of a mechanic's lien, a home improvement contract, or recovery under the equitable principles of quantum meruit and account stated (Kamco Supply Corp. v. JMT Brothers Realty, LLC, 98 A.D. 3d 891, 950 N.Y.S. 2d 701 [1st Dept. 2012] and Joseph A. Tuana & Associates Inc. v. Burns, 125 A.D. 3d 561, 1 N.Y.S. 3d 819 [1st Dept., 2015]).

“CPLR §3015[e] states, “Where 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 department of consumer affairs of the City of New York...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.”

(McKinney’s Cons. Laws of N.Y. Annot., CPLR §3015[e], Eff. date: May 2, 2013).

Pursuant to CPLR §3015[e] the plaintiff is required to show that it had a valid license at the time the work was performed and at the time it commenced the action. The plaintiff’s failure to provide proof of license possession at the time work was performed is fatal to all claims (B & F Bldg. Corp. v. Liebig, 76 N.Y. 2d 689, 564 N.E. 2d 650, 563 N.Y.S. 2d 40 [1990]). The failure to have a valid license at the time of commencement of the action is not fatal to the plaintiff’s claims, if proof of a license acquired after commencement of the action is produced (B & F Bldg. Corp. v. Liebig, 76 N.Y. 2d 689, supra). Harmless and inadvertent error, as in a contractor using the wrong name on a contract, does not result in a finding of violation of the code’s license requirement provided the contractor was actually licensed at the time the work was performed (Marraccini v. Ryan, 17 N.Y. 3d 83, 950 N.E. 2d 135, 926 N.Y.S. 2d 399 [2011]).

Defendants rely on an April 22, 2014 Decision and Order issued by the New York City Department of Consumer Affairs, that revoked plaintiff’s license “effective immediately” (Harlan Aff. In Supp., Exh B), as proof that there was no home improvement license in effect as of the May 23, 2014 start date. In opposition to the motion plaintiff provides a copy of an “Order Vacating Decision and Order,” dated May 1, 2014 which vacates the April 22, 2014 Order (Cross-Mot. Exh. F). Plaintiff also provides proof in the form of a May 28, 2014, letter sent to building management that provides the contractor’s license number 1455748, and states it is active until February 28, 2015 (Cross-Mot. Exh. B).

Defendants have failed to prove that plaintiff was not a licensed contractor at the time it performed the work in the apartment (see CPLR §3015[e]). Defendants assertion

that plaintiff did not have a home improvement license at the time the action was commenced is unsupported by proof, and relies solely on the part of the April 22, 2014 Decision and Order that states in a footnote (# 1), the license was due to expire on February 28, 2015. Defendants have not stated a basis to dismiss plaintiff's case for lack of a license at the time the action was commenced, because the defect can be corrected.

Defendants also seek to dismiss the account stated claims because there was allegedly no agreement on any of the amounts alleged to have been billed by plaintiff. The Zuriks claim that the amounts billed through October 30, 2014 were paid in full, except for a bill in the amount of \$2,545.49 that was contested, but provide no proof that they made the payments. Plaintiff's claims of account stated are potentially meritorious and cannot be dismissed.

Defendants have stated a basis to dismiss plaintiff's "first count" of breach of contract. Plaintiff concedes that the parties did not have a written contract. The failure to enter into a signed and written home improvement contract that conforms with the requirements of General Business Law §771, bars recovery based upon breach of contract (*Frank v. Feiss*, 266 A.D. 2d 825, 698 N.Y.S. 2d 363 [2nd Dept., 1999] and *Power Cooling Inc. v. Churchill School and Center*, 17 A.D. 3d 148, 792 N.Y.S. 2d 452 [1st Dept., 2005]). Plaintiff can still seek to recover damages in quantum meruit for the reasonable value of labor and materials provided to the Zuriks, to the extent a separate claim is asserted for damages in quantum meruit (*Frank v. Feiss*, 266 A.D. 2d 825, supra).

Plaintiff cross-moves to amend the complaint to include the home improvement license number and to state that at the time services were rendered it had a valid home improvement license number.

CPLR §3015[e] permits amendment of the complaint pursuant to CPLR §3025, to provide the license number and name of the government agency that issued the license (*B & F Bldg. Corp. v. Liebig*, 76 N.Y. 2d 689, supra). Pursuant to CPLR §3025, leave to amend pleadings, "shall be freely granted upon such terms as may be just..." the decision to disallow the amendment is at the Court's discretion (*McCaskey, Davies & Associates, Inc. v. New York City*, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). Leave to amend should be granted as long as there is no surprise or prejudice to the opposing party. To establish prejudice there must be a showing of hindrance in preparation of the case or the prevention from taking measures in support of a party's position (*Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D. 3d 502, 925 N.Y.S. 2d 51 [1st Dept., 2011]).

Plaintiff has stated a basis to amend the complaint pursuant to CPLR §§3015[e] and 3025[b]. The proposed amended complaint annexed to the motion papers, corrects plaintiff's failure to provide the valid home improvement license number at the time the work was performed. Plaintiff will also need to provide in the amended complaint the valid home improvement license number in its possession at the time the action was commenced or one that was obtained after the action was commenced. The proposed amended complaint also includes a "count" for breach of contract, which should not be included in light of this decision.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. The imposition of sanctions requires a pattern of frivolous behavior (*Sarkar v. Pathak*, 67

A.D. 3d 606, 889 N.Y.S. 2d 184 [N.Y.A.D. 1st Dept. 2009]). Neither party has stated a basis to find frivolity or that they are entitled to the sanctions sought.

Accordingly, it is ORDERED that the defendants' pre-answer motion to dismiss pursuant to CPLR §3211[a][7], is granted as stated herein, and it is further,

ORDERED, that the first "count" asserted in the plaintiff's complaint for breach of contract, is severed and dismissed, and it is further,

ORDERED, that the remainder of the relief sought in defendants' motion is denied, and it is further,

ORDERED that plaintiff's cross-motion to amend the complaint, is granted, as stated herein, and it is further,


ORDERED, that plaintiff shall serve an Amended Summons and Complaint on the defendants by serving a copy of the Amended Complaint on counsel for the defendants together with a copy of this Order with Notice of Entry, within twenty (20) days from the date of entry of this Order, stating plaintiff's alleged valid home improvement license number at the time the work was performed, and the alleged valid home improvement license number at the time the action was commenced, and omitting the "count" for breach of contract, and it is further,

ORDERED, that the defendants, shall serve an Answer or otherwise respond to the Amended Summons and Complaint, within thirty (30) days from the date of service of the Amended Summons and Complaint, and it is further,

ORDERED, that the remainder of the relief sought in plaintiff's cross-motion is denied, and it is further,

ORDERED, that plaintiff shall serve a copy of this Order with Notice of Entry on the defendants and the general clerk's office (Room 119), pursuant to e-filing protocol, within twenty (20) days of entry of this Order.

ENTER:



MANUEL J. MENDEZ, J.S.C. MANUEL J. MENDEZ J.S.C.

Dated: July 11, 2016

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE