

J.V.C. Elec. Co., Inc. v Airmont Woods LLC
2017 NY Slip Op 32831(U)
December 4, 2017
Supreme Court, Rockland County
Docket Number: 031983/2015
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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J.V.C. ELECTRICAL CO., INC. a/k/a
J.V.C. ELECTRICAL COMPANY, INC.
CARMELO SCAFFIDI & SONS BLACKTOPPING,
INC. d/b/a SCAFFIDI'S PAYING & DRAINAGE , and
LJC TRUCKING INC.,

Plaintiffs,

-against-

DECISION AND ORDER

Index#031983/2015

Motion # 7 - MD
DC - N
Adj: 12/6/17

AIRMONT WOODS LLC, ABEKEN APARTMENTS LP,
ABEKEN APARTMENTS II, LLC, ABEKEN LLC,
ABEKEN MANAGEMENT LLC, CARDINAL DEVELOPMENT,
LLC, CONGERS APARTMENT RENTALS, LLC, DENTON
ACRES LLC, GLW DEVELOPERS LLC, K.D.J. REALTY, INC,
KENABE, LLC, TUTHILL PARC, LCC, VIOLA PARK REALTY,
LLC, WARWICK COMMONS LLC, KENNETH J. BERGSTOL,
SUSAN BERGSTOL, JON BERGSTOL, JOHN DOE NO. "3"
Through JOHN DOE NO. "5", JANE DOE NO."1"
Through JOHN DOE NO. "5",

Defendant(s)

-----X
Thomas E. Walsh II, J.

The following papers numbered 1- 3 read on this motion by Defendant Susan Bergstol, Jon Bergstol, Denton Acres LLC and KDJ realty Inc.'s for an order pursuant to Civil Practice Law and Rules § 3211, Civil Practice Law and Rules § 3016(b) and Civil Practice Law and Rules § 3214 (1) dismissing Counts 11 and 12 for the Plaintiff's Second Amended Complaint as to Defendant Susan Bergstol, (2) staying any disclosure sought by plaintiffs from her pending determination of the instant motion and (3) for such other and further relief as this Court deems just and proper under the circumstances:

PAPERS

NUMBER

NOTICE OF MOTION/AFFIRMATION OF ANTHONY X. ARTURI, ESQ./
EXHIBITS (A-D)

1

AFFIRMATION OF PATRICIA E. HABAS, ESQ. IN OPPOSITION/AFFIDAVIT OF
JOSEPH V. CACIOPPO, JR/AFFIDAVIT OF WILLIAM SCAFFIDI/AFFIDAVIT OF

JOSEPH JOHN BERTOLINO/EXHIBITS (1-18)/MEMORANDUM OF LAW IN OPPOSITION TO AIRMONT DEFENDANTS' MOTION TO DISMISS	2
REPLY AFFIRMATION OF ANTHONY X. ARTURI, JR., ESQ./EXHIBITS (A-C)	3
REPLY BRIEF OF SUSAN BERGSTOL ON MOTION DISMISS PLAINTIFF'S COMPLAINT	4

Upon careful consideration of the foregoing, the Court now rules as follows:

Briefly, this action arises from non-payment for services provided by Plaintiffs to Defendants as part of the building of various homes in a subdivision in Airmont, New York between 2009 and 2012. Originally Plaintiff JVC ELECTRICAL commenced this action on May 5, 2015 against Defendants AIRMONT WOODS and BERGSTOL. The Complaint contains contract causes of action, causes of action pursuant to Article 3-A of the Lien Law ("Trust Fund Claims").

On June 1, 2015 Plaintiff's counsel served Sterling National Bank with a litigation hold letter. Defendant's prior counsel contacted Plaintiff's counsel on June 2015 requesting an extension to answer or appear, which resulted in protracted settlement discussions. The settlement discussions ended unsuccessfully in 2016 and Plaintiffs filed a Subpoena Duces Tecum on February 9, 2016 on Sterling National Bank on notice to Defendants. Prior to the bank's compliance with the subpoena, the issue was joined when Defendants AIRMONT WOODS and BERGSTOL filed a joint Verified Answer to the original Complaint. Subsequently, Defendants filed a motion seeking summary judgment dismissing the fourth and fifth causes of action and to quash the subpoena served on Sterling Bank which was denied by the undersigned from the bench. On March 1, 2016, Plaintiff served a Supplemental Summons and Amended Complaint pursuant to Civil Practice Law and Rules § 3025(a) joining Plaintiffs LJC TRUCKING and SCAFFIDI PAVING. On that date Plaintiffs LJC TRUCKING and SCAFFIDI PAVING also served on Defendant a Trustee Demand. Defendants filed a Verified Answer to the Amended Complaint on March 30, 2016.

In November 2016 the undersigned issued a Decision and Order addressing Defendant

Airmont Woods, LLC and Kenneth Bergstol's Motion for partial Summary Judgment dismissing the tenth (Trust Fund), Eleventh (Fraudulent Conveyance) and Twelfth (Fraudulent Conveyance) causes of action and for a protective order and an order quashing the non-party subpoena filed on Sterling National bank and other related relief. That same Order also considered the Plaintiff's Motion for Summary Judgment on the various causes of action. Within the November 2016 Decision and Order the Court denied Defendant's aforementioned motion for partial summary judgment, a protective order and the motion to quash the Sterling National Bank subpoena and denied Plaintiff's motion for summary judgment. The Court granted Plaintiff's motion to compel and the Defendant's were directed to furnish Plaintiffs with a verified statement and provide access to books and records which constituted the lien law trust for the construction project Biret Drive Subdivision Project in Airmont, New York. Additionally, the Court directed the parties to appear for a framed-issue hearing as to the tenth, eleventh and twelfth cause of action in the Complaint two weeks after the Decision and Order. The framed-issue hearing has not occurred and has been adjourned numerous times over the past year.

Pursuant to the above November 2016 Decision and Order, the Defendants forwarded copies of Defendants Airmont Woods, LLC and Kenneth Bergstol's banking records from Sterling Bank. Plaintiff's filed a motion for leave to amend the Complaint in December 2016. The Court issued a Decision and Order on February 14, 2017 granting plaintiff's motion to amend the Complaint. Plaintiff e-filed and served the Second Amended Complaint on February 21, 2017, which added the additional defendants and causes of action. The Second Amended Complaint alleged that the newly added defendants were recipients of fraudulent conveyances from Defendant Airmont. Defendants Airmont Woods and Kenneth Bergstol filed a Verified Answer to the Second Amended Complaint on March 13, 2017. Defendants Denton Acres, LLC, KDJ realty Inc., Jon Bergstol and Susan Bergstol filed Verified Answers to the Second Amended Complaint on March 13, 2017.

Defendants Susan Bergstol has filed the instant motion seeking to dismiss Counts 11 and 12 of the Plaintiff's Second Amended Complaint based upon the Plaintiff's failure to set forth with particularity which if any fraudulent conveyances "any Defendant named therein" is alleged to have received from Defendant Airmont Woods, LLC. In addition, Defendant Susan Bergstol is seeking a stay of any further discovery in the interest of justice pursuant to Civil Practice Law and Rules § 3214(b).

Pursuant to Civil Practice Law and Rules § 3211(e) there are certain grounds for dismissal of an action that are waived if not asserted in the responsive pleading or in a motion to dismiss brought prior to the time service of the responsive pleading is required. Motions for dismissal based on a lack of subject matter jurisdiction, failure to state a cause of action or the absence of a person who should be a party may be brought at any time even if that objection is not raised in the party's answer. [Civil Practice Law and Rules § 3211(e)].

In the instant action Defendant Susan Bergstol filed an Answer to the Second Amended Complaint on March 13, 2017 and raised seven (7) affirmative defenses within that Answer. Prior to filing the aforementioned Answer on March 13, 2017, Defendant Susan Bergstol did not file a pre-answer Motion to Dismiss on any grounds delineated within Civil Practice Law and Rules § 3211(a). Further, a review of Defendant Susan Bergstol's Answer reveals that she failed to raise the affirmative defense that the fraudulent conveyance causes of action (eleven and twelve within the Second Amended Complaint) were not plead with the particularity required for a fraud cause of action. Defendant Susan Bergstol's instant motion to dismiss is made pursuant to Civil Practice Law and Rules § 3211, but fails to delineate which subsection within the statute the Defendant is seeking a dismissal. The Defendant Susan Bergstol has included documentary evidence in the form of bank statements which she alleges demonstrate that the eleventh and twelfth causes of action are not plead with particularity, it is the Court's assessment that the Defendant's motion to dismiss could be pursuant to Civil Practice Law and Rules § 3211(a)(1). However, the Court need not guess which subsection Defendant Susan

Bergstol is seeking to dismiss the Plaintiff's Complaint, as the only subsections that would not be waived in this instance would be those that address lack of subject matter jurisdiction, failure to state a cause of action or the absence of a person who should be a party and none of those pertain to Defendant Susan Bergstol's instant argument. Therefore, the Court has determined that Defendant Susan Bergstol's instant Motion to Dismiss pursuant to Civil Practice Law and Rules § 3211 is untimely and improper.

Pursuant to Civil Practice Law and Rules § 3211(c) the Court can convert Defendant's motion to dismiss to one for summary judgment, but "adequate notice" must be provided to the parties. [*Mihlovan v. Grozavu*, 72 NY2d 506, 508 (1988)]. The Court declines to convert the instant motion to one for summary judgment, as there remains outstanding discovery, which has been addressed in a prior Decision and Order dated December 1, 2017 (granting and denying Defendant Airmont Woods, LLC and Defendant Kenneth Bergstol's Motion to Quash and for a Protective Order). As such, this Court would be premature in converting the instant motion to one for summary judgment.

The Court would be remiss in not addressing Defendant Susan Bergstol's argument that the Court expressly permitted the Defendant to file the instant motion to dismiss. The Court concedes that it engaged in discussions in the hopes of moving the parties toward resolution of their discovery issues. However, the Court's permission to file a motion does not and should not indicate to the moving party that the Court in any way has formed an opinion regarding the validity of the movant's motion in terms of timeliness and whether it is proper pursuant to the Civil Practice Law and Rules. The Court will not prevent any party from seeking redress through motion practice, but the permission to file a motion does not imply the Court's support or belief that the moving party's application is with merit and should be granted.

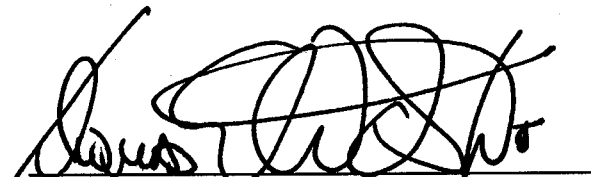
Accordingly, it is hereby

ORDERED that Defendant Susan Bergstol's Motion to Dismiss and for a Stay of

further disclosure (Motion #7) is denied in its entirety.

The foregoing constitutes the Decision and Order of this Court on Motion #7.

Dated: New City, New York
December 4, 2017



HON. THOMAS E. WALSH II
Justice of the Supreme Court

TO:

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REALTY INC.
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