

385 Sunrise Corp. v Pecora

2019 NY Slip Op 33286(U)

September 16, 2019

Supreme Court, Queens County

Docket Number: 710427/2019

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

385 SUNRISE CORP. D/B/A VANITY FAIR
BATHS,

Plaintiff,

- against -

LISA A. PECORA, FRANK V. PECORA, VILLA
DI MALBA LLC, AND TEAMS MANAGEMENT
LLC,

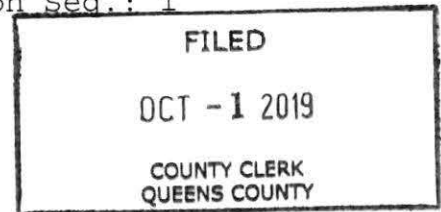
Defendants.

Index No.: 710427/2019

Motion Date: 9/12/19

Motion No.: 40

Motion Seq.: 1



The following electronically filed documents read on this motion by defendants for an Order dismissing the complaint pursuant to CPLR 3211(a)(1) and (a)(7) on the grounds that the underlying agreement was not evidenced by a writing signed by all parties as required by NY General Business Law 771, and dismissing the complaint against the individual defendants, Lisa A. Pecora and Frank V. Pecora, and corporate defendant Villa Di Malba LLC pursuant to CPLR 3211(a)(1), (7), and (8) on the grounds that the individual defendants cannot be held liable as named defendants under NY Limited Liability Company Law 60:

Table with 2 columns: Document Name, Page Range. Includes: Notice of Motion-Affidavits-Memo. of Law-Exhibits (EF 36 - 42), Affirmation in Opposition-Exhibits (EF 43 - 54), Reply Affirmation-Exhibits (EF 55 - 60).

This breach of contract action seeks damages for unpaid services in the amount of \$46,750 plus attorney's fees in the amount of \$15,000.

Plaintiff commenced this action by filing a summons and complaint on June 12, 2018 in the Supreme Court of the State of New York, County of Nassau. Defendants then moved to transfer this action from Nassau County to Queens County and dismiss the

complaint pursuant to CPLR 3211(a)(1), (7), and/or (8). By decision and Order dated May 21, 2019, this action was transferred to Queens County. The motion to dismiss will be determined herein.

The complaint alleges that on or about February 5, 2018, plaintiff and defendants entered into an agreement whereby plaintiff agreed to manufacture various specialized goods and provide services on defendants' behalf. Plaintiff performed all of its obligations. Defendants breached the agreement by failing and refusing to pay the balance due in connection with the manufacturing of various specialized goods provided by plaintiff. The complaint further alleges that defendants refused delivery and/or canceled the written contract with plaintiff after plaintiff caused the manufacturing of various specialized goods and provided services on defendants' behalf. The specially manufactured goods are of no use to plaintiff as they were manufactured for defendants at their specific insistence and request. Plaintiff has been damaged in the sum of \$46,750. Regarding attorney's fees, the complaint alleges that the agreement provides that the customer shall be responsible for reasonable attorney's fees.

In support of the motion to dismiss, defendant Frank V. Pecora submits an affidavit dated August 1, 2018. He is the managing member of Teams Management LLC (Teams LLC) and Villa Di Malba LLC (Malba LLC). Plaintiff was hired to perform home improvement services at his and Mrs. Pecora's residence located at 117 Malba Drive, Whitestone, New York 11357. Shortly after plaintiff and Teams LLC entered into negotiations, on or about February 5, 2018, plaintiff began to perform home improvement services on the subject premises. Teams LLC specifically asked plaintiff to enter into a formal written contract several times. A proposed contract was sent to plaintiff, but plaintiff failed and refused to sign the contract. Despite the fact that no formal contract was ever executed, plaintiff continued to perform services on the subject premises. The work was grossly negligent, unworkmanlike, and ultimately resulted in Teams LLC having to pay alternative vendors to repair and/or redo nearly all of the work that plaintiff did. In his capacity as a managing member of Teams LLC, he had discussions with plaintiff. He was the only individual to speak to plaintiff. The other defendants have no connection to the alleged agreement. Mr. Pecora further affirms that in communicating with Teams LLC, plaintiff made reference to the potential timeline of performance of the services as "phases", spread out over the course of phase 1, phase 2, and phase 3. Finishing certain phases would take approximately 120 days or more.

Defendant Lisa A. Pecora also submits an affidavit dated August 1, 2018, affirming, inter alia, she is not a party to any contract with plaintiff.

Based on the affidavits, counsel for defendants contends that plaintiff's breach of contract claims are barred because the underlying agreement is not a signed writing. Additionally, counsel contends that the individual defendants and Malba LLC are improperly named in this action as they have no involvement with or connection to any of the allegations.

In opposition, Bill Carney, the President of plaintiff, submits an affidavit dated February 7, 2019. Mr. Carney affirms that in or about January 2018, the individual defendants came into plaintiff's showroom on Voice Road in Nassau County. They decided that plaintiff would be retained to design custom cabinets. Frank Pecora signed plaintiff's Design Retainer, which is addressed to the individual defendants. Frank Pecora also remitted a deposit toward the cost of the vanities in the sum of \$3,500. The deposit was paid for with a credit card in the name of Frank Pecora. The contract for the manufacturing of various cabinetry was invoiced by plaintiff to defendants and executed by defendant Lisa Pecora on January 19, 2018. Mr. Carney states that he prepared designs for the railings. Defendants approved the designs and purchased the railings on February 5, 2018. A deposit check in the sum of \$85,000 was remitted by defendants to plaintiff. On February 25, 2018, plaintiff prepared a contract for a total design fee of \$275,000 against which defendants paid \$100,000 on March 10, 2018. Certificates of Insurance were supplied with the individual defendants named as the certificate holders. A formal contract was prepared, but defendants did not sign the contract. In April 2018, defendants paid \$41,034 representing the balance due for the cost of the vanities. In or around May 2018, the individual defendants placed the entire project on hold.

Copies of the design retainer, credit card receipts, invoices, checks, and Certificates of Insurance are annexed to the opposition papers. Based on Mr. Carney's affidavit and the submitted documents, plaintiff's counsel contends that issues of fact preclude dismissal.

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Teitler v Pollack & Sons, 288 AD2d 302 [2d Dept. 2001]). "A motion to dismiss a complaint based on documentary evidence

"may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" Stein v Garfield Regency Condominium, 65 AD3d 1126 [2009], quoting Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002].

It is undisputed that NY General Business Law 771(1) requires all home improvement contracts to be evidenced by a writing, signed by all parties. However, the documentary evidence submitted by defendants does not conclusively establish that the underlying agreement was a home improvement contract as defined by General Business Law 770(3). The invoices submitted in opposition to the motion indicate that plaintiff does not perform installation work. As such, an issue of fact remains as to whether the underlying agreement is a home improvement contract.

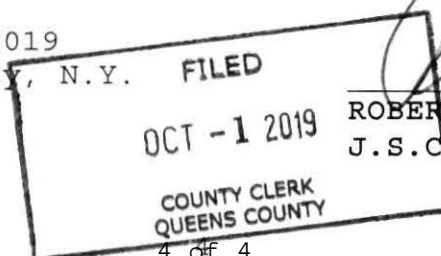
Defendants also contend that plaintiff's claims are barred by the statute of frauds as the underlying agreement was not to be performed within one year. However, defendants have failed to remit documentary evidence that conclusively establishes the performance of the contract was not to be completed within one year. Defendants' contentions are merely speculative at this point and insufficient to warrant dismissal of the complaint.

Similarly, although defendants contend that the individual defendants and Malba LLC are improperly named in this action, the documentary evidence does not conclusively establish that the only entity involved with or connected to any of the allegations raised in the complaint is Teams LLC. Contrary to defendants' contentions, the design retainer and the receipt of sale for the deposit in the amount of \$3,500 are signed by Frank Pecora, three Invoices each dated January 19, 2018 and a check in the names of Lisa Pecora and Frank Pecora indicating a payment to plaintiff in the amount of \$25,000 are signed by Lisa Pecora, a check in the name of Frank Pecora dated March 10, 2018 indicates a payment to plaintiff in the amount of \$100,000, and the certificates of liability insurance list Frank and Lisa Pecora as the certificate holders. Regarding Malba LLC, counsel for defendants contends that the only relation Malba LLC has with the instant action is that it is the holding company that maintains the status of corporate owner of the subject premises. However, no documentary evidence has been submitted to support this contention.

Accordingly, and based on the above reasons, it is hereby

ORDERED, that the motion to dismiss by defendants is denied in its entirety.

Dated: September 16, 2019
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.