Van Gogh Painters LLC v Stettin
2019 NY Slip Op 34095(U)
May 29, 2019
Supreme Court, Queens County
Docket Number: 700765/2019
Judge: Cheree A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

VAN GOGH PAINTERS LLC,

Index No.: 700765/2019

Plaintiff,

-against-

Motion
Date: April 24, 2019

Motion Cal. No.: 46

GLEN STETTIN and SHARON STETTIN,

Motion Sequence No.: 1

Defendants.

The following e-file papers numbered 2-19 and 21 submitted and considered on this motion by defendants GLEN STETTIN and SHARON STETTIN, (collectively referred to as "Defendants") seeking an Order pursuant to CPLR 3211 (a)(5) dismissing the Complaint filed by plaintiff VAN GOGH PAINTERS LLC, (hereinafter referred to as "Plaintiff") or alternatively dismissing the Second, Third and Fourth Causes of Action pursuant to CPLR 3211 (a)(1) and for such other relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 2-14
Affirmation in Opposition-Affidavits-Exhibits.	EF 15-19
Reply Affirmation-Memorandum of Law.....	EF 21

This action arises out of a contract between the parties entered on January 4, 2017. Plaintiff was to plan, furnish and perform renovation work at Defendants' apartment. On August 16, 2017, Plaintiff alleges it sent the Defendants an invoice that covered outstanding amounts owed and subsequent change orders that were requested. Defendants allegedly responded on or about December 3, 2017 refusing to pay the invoice. On or about January 10, 2018, Plaintiff sent Defendants an updated invoice reflecting the approved change orders. Plaintiff alleges that it has not been paid in full pursuant to the contract. Defendants allege that the contract required work to commence on January 17, 2017 and be completed by May 17, 2017. That as of December 2017 the work was not completed and Plaintiff never completed the work but allegedly "walked off the job".

On February 21, 2018, the Plaintiff filed a Notice of Mechanic's Lien in New York County in the amount of $85,358 for labor and materials related to the work it allegedly completed at Defendants' apartment. Defendants made a demand for written and verified itemization of the labor and material furnished and served it upon the Plaintiff on March 3, 2018. On October 30, 2018 the Honorable Arlene P. Bluth ordered the Plaintiff to provide a spreadsheet reflecting how Plaintiff arrived at $83,358. A hearing was held on November 27, 2018 before Justice Bluth. Subsequently, on December 4, 2018 Justice Bluth rendered a decision and order vacating the aforementioned lien due to Plaintiff's failure to provide an itemized statement. According to Justice Bluth, Plaintiff only provided "itemization as to about $36,000" of the $83,358.

On January 14, 2019, Plaintiff instituted this action by filing a Summons and Complaint. Plaintiff's causes of action are as follows: breach of contract, quantum meruit, account stated and unjust enrichment. Defendants seek to dismiss Plaintiff's entire Complaint or in the alternative all but Plaintiff's claim for breach of contract.

CPLR 3211 (a)(5)

CPLR 3211 (a)(5) reads as follows:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> (5) the cause of action may not be maintained because of arbitration and award, **collateral estoppel**, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;

Defendants seek to dismiss the Complaint in its entirety pursuant to CPLR 3211 (a)(5). Defendants allege Plaintiff is either precluded from bringing its claim based on the doctrine of res judicata or collateral estoppel.

In *Kaminsky*, defendant executed a lease of a commercial space owned by plaintiff. (*M. Kaminsky & M. Friedbergger, doing Business as GEM Realty Corp., v. Cedric Wilson*, 150 A.D.3d 1094, 1095 [2nd Dept 2017]). Upon expiration of the lease the plaintiff commenced this action to evict defendant claiming defendant failed to pay rent for numerous years and was using the space as a residence. A jury trial resulted in an award of the premises to the plaintiff but no monetary damages. The defendant moved for stay of eviction and the plaintiff cross moved to recover unpaid rents. By Order, the Supreme Court denied defendant's motion and granted plaintiff's cross motion. On appeal, defendant contended that the Supreme Court erred in granting plaintiff's motion because the prior jury trial declined to award monetary damages therefore, defendant argued the subsequent cross motion was barred by res judicata and/or collateral estoppel. Res judicata is applicable where it is demonstrated that the issue before the court "was decided in a prior action and that the party against who preclusion is sought was afforded a full and fair opportunity to contest the issue." Collateral estoppel is applicable where it is demonstrated that a specific "issue was actually litigated,

squarely addressed, and specifically decided in a prior proceeding". (*Id*). The court held that neither res judicata nor collateral estoppel is applicable. The court reasoned that the defendant failed to demonstrate that plaintiff's cross motion is "identical to either an issue in a prior action between the parties or an issue before the court in this action." (*Id* at 1096).

Here, Defendants assert that Plaintiff had an opportunity in the prior proceeding to prove its claims. Defendants point to Justice Bluth's Order directing Plaintiff to provide documentation indicating how it arrived at the lien amount. Plaintiff's failure to comply resulted in the vacatur of the lien. Defendants allege that the issues that will be presented by Plaintiff in this matter, specifically "that there is a balance due and how much", is now before this Court. Thus, Defendants assert Plaintiff is precluded.

First Cause of Action

Plaintiff's first cause of action is for breach of contract. Within its Verified Complaint Plaintiff alleges that the parties entered into the aforementioned agreement. That pursuant to the agreement the agreed upon price that Defendants would pay to Plaintiff was $519,831. That as a result of change orders the agreed upon price was changed to $628,633. That Defendants have paid $528,347 to Plaintiff's but $100,286 remains due and owing. That Defendants breached the agreement by failing to remit the remaining balance.

Defendants have failed to demonstrate that the prior proceeding is "identical" to the issue of breach of contract that is before this Court. In the prior proceeding, Justice Bluth did not address the existence of a contract between the parties.

Second Cause of Action

Plaintiff's second cause of action is for quantum meruit.

To recover damages under quantum meruit the movant must demonstrate: 1. performance of services in good faith, 2. acceptance of the services by person to whom they were rendered, 3. expectation of compensation therefore, and 4. reasonable value of the services allegedly rendered. (*Crown Construction Builders and Project Managers Corp., v. Francisco Chavez. et al.*. 130 A.D.3d 969, 971 [2nd Dept 2015]). In *Crown.* plaintiff and defendant entered into a construction agreement. (*Id* at 970). In order to fund the project the defendant obtained a construction loan which was secured by a mortgage upon the property. Pursuant to the loan agreement the bank disbursed funds from the loan directly to plaintiff at different stages of the construction upon proof of completion, in the event that the defendant defaulted the bank would retain all undisbursed funds. The plaintiff defaulted and foreclosure proceedings were commenced, however, the construction project was not completed. In compliance with the loan agreement the bank retained the undisbursed funds and plaintiff commenced this action alleging breach of contract and quantum meruit. Plaintiff moved for summary judgment. (*Id*). The court granted summary judgment because plaintiff was unable to raise a triable issue of fact that would suggest the bank accepted services that plaintiff rendered. (*Id* at

971).

Here, Defendants fail to demonstrate that the prior proceeding is "identical" to the issue of quantum meruit before this Court. Justice Bluth in the prior proceeding made no ruling related to Plaintiff's performance of services for the Defendants or Defendants' acceptance of the same.

Third Cause of Action

Plaintiff's third cause of action is for account stated.

An account stated is an agreement between the parties with respect to the balance due, based on prior transactions between them. (*Erdman Anthony & Assoc., Inc. v. Robert T. Barkstrom and Richard P. La Croix, doing Bus. as Barkstrom & La Croix, Architects*, 298 A.D.2d 981 (4th Dept 2002). In *La Croix*, plaintiff and defendant entered an oral agreement where plaintiff would provide engineering services for defendant for a fee of five percent of the estimated construction and a flat fee of $12,000. Subsequently, plaintiff sent several invoices to defendants that computed fees on an hourly basis. Defendant's paid some of the invoices, but failed to pay all, and allegedly owed plaintiff $77,074.25. Plaintiff commenced this action claiming amongst other things account stated. The court found that account stated requires the existence of indebtedness between both parties or an express agreement to treat the statement as an account stated. It noted that account stated cannot be used to create liability where it otherwise does not exist. The court dismissed plaintiff's claim for account stated, agreeing with the lower court's decision that the defendants' oral objection to the purported account stated were sufficient to rebut an inference of an implied agreement to pay the stated amount. (*Id*).

Here, Defendants fail to demonstrate the prior proceeding is "identical" to the issue of account stated before this Court. Justice Bluth in the prior proceeding made no ruling related to "the existence of indebtedness between both parties". (*Id*). One could argue, Justice Bluth's decision to vacate the lien suggests that no indebtedness existed between the parties. However, such an argument would fail. The decision was based on Plaintiff's failure to provide an itemized statement illustrating how it arrived at the lien amount.

Fourth Cause of Action

Plaintiff's fourth cause of action is for unjust enrichment.

In *Manufacturers Hanover Trust Co. v. Chemical Bank*, plaintiff sought to recover the first of two redundant payments made through the defendants bank. (*Manufacturers Hanover Trust Co. v. Chemical Bank*, 160 A.D. 2d 113, 114 [1st Dept 1990]). The plaintiff claimed unjust enrichment, which is "[t]he principle that a party who pays money, under mistake of fact, to one who is not entitled to it should, in equity and good conscience, be permitted to recover it back is long standing and well recognized and applies even if the mistake is due to the negligence of the payor." (*Id* at 117). Unjust enrichment is an equitable principle where the law creates an obligation where no

agreement exists. According to the court, what is essential is to determine "whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered". (*Id*). The court granted defendants motion. (*Id*).

Here, Defendants fail to demonstrate the prior proceeding is "identical" to the issue of unjust enrichment. The prior proceeding did not address the transaction between the parties.

CPLR 3211 (a)(1)

Alternatively, Defendants request that this Court dismiss Plaintiff's second, third and fourth cause of action pursuant to CPLR 3211 (a)(1). In other words, the Defendants argue that quasi-contract should be dismissed where a valid and enforceable written contract governs.

"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]; *see also Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity' " (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,' qualify as documentary evidence in proper cases..." (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]).

Defendants point to *Clark-Fitzpatrick Inc. v. Long Island Railroad Company.* where the plaintiff was hired by the defendant to complete construction on a second railroad track between Amott and Huntington. (*Clark-Fitzpatrick Inc. v. Long Island Railroad Company.* 70 N.Y.2d 382, 385 [1987]). Plaintiff alleged that the engineering design was flawed, thus requiring substantial design changes throughout construction, that defendant failed to acquire necessary properties that bordered the construction site, and defendant failed to locate and move various utility lines all of which, interfered with the construction. (*Id*). Plaintiff claimed as a result of the aforementioned, construction was completed one year behind schedule. (*Id).* Plaintiff asserted causes of action for breach of contact, quasi contact, fraud, gross negligence and negligence. (*Id* at 386). The Court of Appeals stated "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter". (*Id* at 388). Furthermore, the court states it is impermissible to seek damages on the basis of quasi contract where "the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties". (*Id* at 389). The court found that the parties relationship was defined by a written contract, the terms of which specifically "provided for project design changes with adjustments in compensation contemplated in light of those changes". (*Id*). Plaintiff's choice to not rescind the agreement and instead complete the contract and sue for damages foreclosed plaintiff from seeking recovery under a quasi contract claim. (*Id*).

One could argue, the Court of Appeals is completely foreclosing the right of a litigant to even

assert a claim for quasi contract where it also asserts a claim for breach of contract. However, since the holding in *Clark-Fitzpatirck*, the courts have expanded on the subject. *Joseph Sternberg, Inc. v. Walber 36th Associates*, involved a real estate brokerage agreement. (*Joseph Sternberg, Inc. v. Walber 36th Street Associates et al.*, 187 A.D.2d 225, 226 [2nd Dept, 1993]). Plaintiff alleged that he and the defendant entered into a brokerage agreement, that he succeeded in negotiating an agreement where defendant would purchase a premises for $11.5 million with $450,000 to be paid to plaintiff as commission. In reality, defendant closed at a reduced purchase price of $10.6 million dollars and paid plaintiff no commission. (*Id* at 227). Defendant asserted the agreement only contemplated a $450,000 commission upon purchase of the property at $11.5 million. The trial court found that the agreement was unambiguous and dismissed plaintiff's claim of breach of contract. The trial court also dismissed plaintiff's claim of quantum meruit on the basis that "plaintiff had made an election of remedies and could not proceed on both theories" in doing so, the court cited to *Clark-Fitzpatrick*. (*Id*).

The Second Department reversed the trial courts holding on plaintiff's quantum meruit claim. The Second Department held the facts in *Clark-Fitzpatrick* were different. According to the Second Department, in *Clark-Fitzpatrick* the plaintiffs cause of action for quantum meruit was dismissed because the contract terms addressed those very claims. "[T]he contract at issue here is silent as to plaintiff's entitlement to a commission in the event a sale of the building occurred for a lesser price". (*Id*). Therefore, the Second Department held "[W]here a litigant fails to establish the right to recover upon an express contract he may, in the same action, recover in quantum meruit". (*Id* at 228). In other words, where there is a bona fide dispute as to the existence of a contract or where the terms of the contract are silent as to what is disputed the plaintiff "may proceed upon a theory of quantum meruit and will not be required to elect his or her remedies". (*Id*).

Plaintiff argues the damages do not only pertain to the original contract but also the change orders that were demanded outside the original written contract.

Thus, the threshold question here is whether the contract contemplates the change orders that form the basis of a portion of the damages claimed in this action, if not Defendants' motion pursuant to CPLR 3211 (a)(1) must fail as it relates to Plaintiff's second, third, and fourth causes of action.

Paragraphs 7-8 of Plaintiff's Verified Complaint mentions in addition to the agreed price "certain change orders were agreed to" by the parties. To the extent, that these change orders fall outside the scope of the original contract Plaintiff is not foreclosed from asserting claims for quasi contract.

In Reply, Defendants reiterate that Plaintiff has not disputed the existence of a contract but fail to address Plaintiff's assertion that a portion of the damages were accrued based on agreements outside of the written contract. This Court has not been provided with enough information to determine whether the documentary evidence that forms the basis of the defense is 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]; *see also Held v Kaufman*, 91 NY2d 425 [1998]; *Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]). Therefore, it is

ORDERED, that the branch of Defendants' motion seeking to dismiss Plaintiff's Complaint pursuant to CPLR 3211 (a)(5) is denied; and it is further

ORDERED, that the branch of Defendants' motion seeking to dismiss Plaintiff's second, third, and fourth causes of action pursuant to CPLR 3211 (a)(1) is denied; and it is further

ORDERED, that Defendants' shall file an answer within 30 days of the filing of this Order.

The foregoing constitutes the decision and order of this Court.

Dated: May 29, 2019

Hon. Chereé A. Buggs, JSC

FILED
JUN 14 2019
COUNTY CLERK
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