

Addis v Bloom Flowers, Inc.
2020 NY Slip Op 32471(U)
July 27, 2020
Supreme Court, New York County
Docket Number: 656297/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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SUSAN ADDIS, JOHN ADDIS

Plaintiffs,

- v -

BLOOM FLOWERS, INC., STEPHEN YARABEK,

Defendants.

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INDEX NO. 656297/2018
MOTION DATE 06/20/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to STRIKE CASE FROM CALENDAR.

Upon the foregoing documents, defendants' motion to strike the Note of Issue in this case is granted for the reasons stated hereinbelow.

The Players

Plaintiffs, Susan Addis and John Addis, were and are tenants of the premises located at 450 North End Avenue, Apartment 26C, New York, NY 10282 (the "Premises"). Defendant Stephen Yarabek ("Yarabek") is the owner of defendant Bloom Flowers, Inc. ("Bloom"), which, according to the instant petition, "performs home improvement contracts within the City of New York, without a license from the City of New York" (NYSCEF Doc. 1, at 2).

Background

The instant complaint claims that, prior to December 18, 2018, defendants represented to plaintiffs that they "performed landscape architecture design, installation, and plant and tree maintenance, on roofs and decks in the City of New York" (NYSCEF Doc. 1, at 2). During defendants' second visit to the Premises, they allegedly showed plaintiffs a prepared sketch of a landscape architecture design that they proposed to install for plaintiffs. Pursuant to an alleged agreement, plaintiffs and defendants apparently determined that all planters for the subject design would be of particular sizes and colors (NYSCEF Doc. 1, at 2). A different design, dated on or about August 12, 2017, outlined the plant type "that would be purchased or otherwise installed or moved on the designed grid" (NYSCEF Doc. 1, at 3).

Plaintiffs assert that, on or about August 12, 2017, they entered into a contract (the "Contract") with defendants, pursuant to which defendants would design and install a roof garden on plaintiffs' deck by early November 2017 for a total cost of \$27,000.00 (NYSCEF Doc. 1, at 3). Plaintiffs claim that defendants then charged \$10,000.00 to plaintiffs' credit card to purchase materials for the subject project (NYSCEF Doc. 1, at 3).

On or about the first week of December 2018, defendants allegedly appeared to deliver and install planters and plants and to reconfigure plaintiffs' deck to conform with the apparently agreed-upon design. However, plaintiffs "immediately" noticed that various materials (detailed in NYSCEF Doc. 1, at 3-4) that defendants brought did not comply with the alleged Contract. Plaintiffs claim that defendants refused to remove the materials that did not comply with the alleged Contract from the plaintiffs' deck. Additionally, plaintiffs assert that defendants failed to perform their duty pursuant to the alleged Contract to protect plaintiffs' plants, trees, shrubs and plants from dying prematurely, which, except for two (2) maple trees, apparently did occur. Thus, plaintiffs assert that "defendants delivered to the plaintiff [sic] nothing of value" (NYSCEF Doc. 1, at 4).

Plaintiffs allege that although defendants promised to remedy the issues with the materials that they delivered to plaintiffs' deck, they charged the remaining \$17,000.00 (of the \$27,000.00 total cost for the subject project) to plaintiffs' credit card, allegedly without plaintiffs' authorization (NYSCEF Doc. 1, at 4). Plaintiffs also assert that defendants have failed to complete the work pursuant to the alleged Contract, claiming that the deck "resembles a poorly kept storage facility of building material, dead plants, massively oversized planters, and bags of soil" (NYSCEF Doc. 1, at 4). Furthermore, plaintiffs claim that defendants removed various of plaintiffs' planters from the deck (NYSCEF Doc. 1).

According to plaintiffs, defendants provided new design plans at a proposed additional cost of \$6,477.57. Defendants apparently refused plaintiffs' requests that they (1) return plaintiffs' funds and/or (2) remove the materials and/or (3) properly plant and protect the plants (NYSCEF Doc. 1, at 5).

On December 18, 2018, plaintiff commenced the instant action, alleging causes of action for (1) breach of contract; (2) conversion; (3) private nuisance; and (4) "cover" (NYSCEF Doc. 1, at 5-6). Plaintiffs seek a judgment (1) on the first cause of action, against defendant Bloom Flowers, Inc., in an amount not less than \$27,000.00; (2) on the second cause of action, against both defendants, in an amount not less than \$1,000.00, plus punitive damages; (3) on the third cause of action, against both defendants, in an amount not less than \$500,000.00, plus punitive damages; and (4) on the fourth cause of action, against defendant Bloom Flowers, Inc., in an amount not less than \$35,000.00 (NYSCEF Doc. 1, at 8).

On February 23, 2019, defendants jointly answered the complaint with various admissions, denials, and thirteen Affirmative Defenses (NYSCEF Doc. 4). Defendants assert, inter alia, that (1) the doctrine of waiver bars plaintiffs' alleged claims, as plaintiffs and defendants resolved the instant dispute on or about January 2, 2018 "under the chargeback policy for American Express charge card in favor of defendants;" (2) defendants have a defense based upon the Statute of Limitations; (3) plaintiffs interfered with defendants' ability to perform; (4) plaintiffs failed to mitigate damages; and (4) defendants did not enter into the alleged Contract with plaintiff that the complaint cites (NYSCEF Doc. 4).

In a Compliance Conference Order, dated March 3, 2020, this Court ordered, "P shall respond to outstanding D+1 by March 31, 2020. P's EBT shall be conducted on May 12 and 13. D's EBT

shall take place on May 27 and May 28. NOI – 6/1/20 (90 days past NOI for dispositive motions)” (NYSCEF Doc. 15).

On June 1, 2020, plaintiffs e-filed a Note of Issue and Certificate of Readiness for Trial (the “NOI”) and served defendants with said NOI (NYSCEF Doc. 17, at 1).

Defendants now move, pursuant to 22 NYCRR § 202.21(e), to vacate the NOI and/or allow disclosure to continue and to extend the deadline to file dispositive motions to 120 days after discovery is completed (NYSCEF Doc. 18).

Discussion

As 22 NYCRR § 202.21(e) states, in pertinent part:

Within 20 days after service of a note of issue and certificate of readiness, any party to the action...may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect.

Pursuant to 22 NYCRR § 202.21(e), defendants had through June 21, 2020 to move to vacate the NOI that plaintiff served upon defendants on June 1, 2020. Thus, defendants’ notice of motion is timely, as it is dated June 20, 2020 (NYSCEF Doc. 18).

In her June 20, 2020 Affirmation, defendants’ attorney, Ana B. Alba, Esq. (“Alba”), asserts that discovery for the trial of the instant causes of action is not complete. Alba also claims that at the subject compliance conference, plaintiffs asserted that they still had to produce receipts from third-party vendors, which have not yet been produced and which, according to Alba, are necessary prior to taking depositions. Additionally, Alba asserts that discovery is nearing completion and that plaintiffs’ June 1, 2020 note of issue is premature. According to Alba, to proceed to trial without depositions would significantly prejudice defendants while depositions would not prejudice plaintiffs. (NYSCEF Doc. 19.)

Levy v Schaefer, 160 AD2d 1182, 1183 (1990), states that a note of issue should be vacated when it “incorrectly [gives] the impression that discovery [is] completed when it [is] not” (NYSCEF Doc. 19, at 3). Alba thus asserts that plaintiffs marked as “complete” items # 5 and 6 of the NOI, which read, respectively, “discovery proceedings [are] now known to be necessary completed” and “there are no outstanding requests for discovery” (NYSCEF Doc. 17). Pursuant to a June 8, 2020 letter that Alba sent to plaintiffs, the following discovery remains outstanding: (1) depositions of both plaintiffs; (2) depositions of both defendants; (3) plaintiffs’ answer and objections to defendants’ first request for production of documents; (4) copies of new receipts from any vendors; and (5) a copy of the deposition transcript for non-party Lifesource Irrigation, Inc. (NYSCEF Doc. 24). In that correspondence, Alba requested that plaintiffs withdraw their NOI by June 15, 2020, which they failed to do (NYSCEF Doc. 24). Additionally, Alba asserts that plaintiffs failed to comply with discovery under CPLR Article 31.

Plaintiffs also marked item #7 as “complete” on the NOI, which reads, “there has been reasonable opportunity to complete the foregoing proceedings” (NYSCEF Doc. 17). However,

this Court finds defendants’ arguments about the COVID-19 tolling order, dated on or about March 20, 2020, to be compelling (NYSCEF Doc. 22).

Alba claims that “a good faith effort has been made to resolve the issues raised in this motion,” as she sent correspondence to plaintiffs on June 8, 2020 (NYSCEF Doc. 24) and apparently called them on June 11, 2020 (NYSCEF Doc. 19, at 4).

Plaintiffs have failed to oppose or otherwise respond to defendants’ motion.

Conclusion

Thus, for the reasons stated herein, the motion of defendants, Bloom Flowers, Inc. and Stephen Yarabek, to strike the Note of Issue in this case is hereby granted, and, accordingly, the Clerk is hereby directed to strike the Note of Issue and strike this case from the trial calendar.

<u>7/27/2020</u>			<u>ARTHUR F. ENGORON, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE