SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: I.A.S. PART 42

----------x

KSP CONSTRUCTION LLC

Plaintiff,

DECISION AND ORDER

- v -

Index No. 656646/19

LV PROPERTY TWO, LLC, LV PROPERTY THREE, LLC, RICHMOND HILL CREDT, LLC and BEN KRUPINSKI BUILDER LLC

MOT SEQ 001

Defendants.

----------x

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking, *inter alia*, to recover for breach of a home improvement contract, the defendants, LV Property Two, LLC, LV Property Three, LLC, and Richmond Hill Crest, LLC (collectively the movants), owners of the real property, move pre-answer pursuant to CPLR 3211(a)(1) to dismiss the complaint as against them. The plaintiff, KSP Construction LLC (KSP), opposes the motion, and cross-moves pursuant to CPLR 3025(b) for leave to file an amended complaint. The motion and cross-motion are granted to the extent discussed herein.

II. BACKGROUND

It is undisputed that the moving defendants, by their managing member, Richard Kellam, entered into an oral agreement

with KSP in the fall of 2018 to perform framing and carpentry work at the residential townhome located at 22 Charlton Street in Manhattan. The agreement was terminated by Kellam on June 16, 2019. According to KSP, of the $989,500.00 it invoiced from February through July of 2019, $521,819.78 remains unpaid. According to the movants, KSP performed only substandard work, inflated their invoices and are not entitled to recover any further sums. After KSP was terminated, it filed a mechanic's lien against the property but did not provide a detailed statement of its lien when demanded as per Lien Law §38. At the core of this case is the fact that, during the entire time that KSP performed under the contract its home improvement contractor's license, issued by the New York City Department of Consumer Affairs (DCA), was expired, having lapsed in February 2017. Although KSP claims to have made subsequent efforts to renew its license with the DCA, the application was never approved. The instant action ensued.

The complaint contains five causes of action - breach of contract, unjust enrichment, account stated, quantum meruit, and mechanic's lien foreclosure. It seeks $521,819.78 in damages for work or services allegedly performed but for which the defendants did not pay. As part of its claims for breach of contract and unjust enrichment, KSP adds the allegation that it was prevented from recovering tools that it left on the worksite

valued at $20,000. Although in its complaint, KSP names as defendants the movants herein, as well as Ben Krupinsky Builders LLC, another contractor, there are no allegations against Ben Krupinsky Builders,LLC. Ben Krupinski Builder LLC answered and asserted cross-claims against the moving defendants.

The movants now seek dismissal the complaint as against them pursuant to CPLR 3211(a)(1), a defense based upon documentary evidence. The gravamen of the motion is that KSP was not licensed at the time it performed its work as required by New York City Administrative Code § 20-387(a), thus precluding recovery. KSP opposes the motion and, without filing a Notice of Cross-Motion, cross-moves for leave to serve the amended complaint appended to its papers. The amended complaint (1) adds allegations, *inter alia*, regarding the lapse in its DCA license, and (2) asserts a separate sixth cause of action for conversion in regard tools it left at the job site and seeks $20,000.

III. DISCUSSION

A. KSP's Cross-Motion For Leave to Amend

The plaintiff's motion for leave to amend the complaint pursuant to CPLR 3025(b) is granted. Initially, the court finds that the absence of a Notice of Cross-Motion (CPLR 2214; 2215) is not fatal to the cross-motion. CPLR 2001 provides that "at any stage of the action ... the court may permit a mistake,

omission, defect or irregularity ... to be corrected, *upon such terms as may be just* or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded..(emphasis added)." No substantial right of the defendants is prejudiced by the procedural defect in the plaintiff's cross-motion. See Marx v Marx, 258 AD2d 366 (1st Dept. 1999); Plateis v Flax, 54 AD2d 813 (3rd Dept. 1976). Further, where, as here, a plaintiff seeks to amend the complaint in response to a motion to dismiss directed at the previous complaint, the court may consider the motion to dismiss as being directed at the proposed amended complaint. See Ferguson v Sherman Square Realty Corp., 30 AD3d 288 (1st Dept. 2006); Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35 (1st Dept. 1998).

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit. See CPLR 3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). Here, the plaintiff's proposed amendments are neither palpably insufficient nor patently devoid of merit. There is significant overlap between the initial complaint and the proposed amended complaint. The amended complaint merely provides additional allegations regarding the plaintiff's

licensing status with the DCA and adds a sixth cause of action for conversion, based in the same allegations contained in the first complaint concerning tools left at the job site and not returned. The proposed separate conversion cause of action is sufficient for pleading purposes in that it alleges that the plaintiff owns the tools and has the right to possession to the tools and that the tools are in the unauthorized possession of the defendants who have acted to exclude the rights of the plaintiff. See generally Markov v Spectrum Group Intern., Inc. 136 AD3d 413 (1st Dept. 2016); Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883 (1st Dept. 1982).

In opposition to KSP's cross-motion, the movants do not argue substantial prejudice or surprise. Rather, they again argue that dismissal of the entire complaint is warranted due to KSP's lack of a DCA license. That issue is addressed below.

B. The Defendants' Motion to Dismiss

The moving defendants seek to dismiss the complaint on the ground of CPLR 3211(a)(1), a defense grounded on documentary evidence. However, dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see Amsterdam

Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014). No such document is submitted. The movants rely primarily on the affirmation of their attorney, Matthew Worner and the affidavit of Richard Kellam. This is insufficient for dismissal under CPLR 3211(a)(1). It is well settled that factual affidavits do not constitute documentary evidence. See Bou v Llamoza, 173 AD3d 575 (1st Dept. 2019); Asmar v 20th and Seventh Assocs., LLC, 125 AD3d 563 (1st Dept. 2015).

Although the moving defendants premised their motion to dismiss on the ground of CPLR 3211(a)(1), the gravamen of the motion falls within the purview of CPLR 3211(a)(7) - that the complaint fails to state any cause of action since the plaintiff is barred from recover for failing to be properly licensed when the work was performed. "[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides" despite a movant's failure to formally and specifically request relief in their Notice of Motion provided that the proof offered supports the relief and there is no prejudice to any party. See Blauman-Spindler v Blauman, 68 AD3d 1105 (2nd Dept. 2009). That is the case here.

The moving defendants correctly argue that KSP is barred from recovery, under any of the theories asserted, for any work it performed while it was unlicensed.

The application for a license to perform home improvement work is made to the Commissioner of the DCA, who issues such licenses. See Administrative Code of City of N.Y. § 20-102[a], [b], [c]; 20-104[a]; 20-390[1]. Administrative Code of City of N.Y. § 20-386(2) defines home improvement as "the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place...." Section 20-386(6) defines a home improvement contract as "an agreement, whether oral or written, or contained in one or more documents, between a contractor and owner... for the performance of a home improvement and includes all labor, services and materials to be furnished and performed thereunder." Section 20-387(a) provides: "No person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor ... from an owner without a license therefor." An owner for this purpose includes any person who orders, contracts for or purchases the home improvement services of a contractor or the person entitled to the performance of the work of a contractor pursuant to a home improvement contract." (Administrative Code of City of N.Y. § 20-386[4]).

Section 20-387(a) provides that: "[n]o person shall solicit, canvass, sell, perform or obtain a home improvement

contract as a contractor or salesperson from an owner without a license therefor." A home improvement contractor who is unlicensed at the time work is performed is barred from recovering for the work based on theories of breach of contract, unjust enrichment, accounts stated, quantum meruit or foreclosing on a mechanic's lien because the contract is unenforceable. See Metrobuild Assocs., Inc. v Nahoum, 51 AD3d 555 (1st Dept. 2008); Blake Electric Contracting Co., Inc. v Paschall, 222 AD2d 264 (1st Dept. 1995); Papadopoulos v Santini, 159 AD2d 335 (1st Dept. 1990). Where a contractor is not licensed when the work was performed, it cannot recover even if it subsequently obtained renewal of its license. See Hanjo Contractors v Wick, 155 AD2d 304 (1st Dept. 1989). Section 20-387(a) is intended to protect consumers of home improvement services from defective work and fraud by contractors. See B & F Bldg. Corp. v Liebig, 76 NY2d 689 (1990). These licensing requirements for home improvement contractors is to be strictly construed. See Chosen Const. Corp. v Syz, 138 AD2d 284 (1st Dept. 1988).

Further, CPLR 3015(e) provides: "[w]here 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 … 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 ... The failure of the plaintiff to comply with this subdivision will permit [a] defendant to move for dismissal pursuant to [CPLR 3211(a)(7)]." (emphasis added).

KSP cannot plead that it was properly licensed at the time that it performed the work under the parties agreement. KSP's license expired in February 2017 and KSP concedes that it failed to properly renew its license or cure any defects in its application to renew its license prior to performing under the contract. Thus, KSP is barred from recovering for the work performed. See Metrobuild Assocs., Inc. v Nahoum, supra; Blake Electric Contracting Co., Inc. v Paschall, supra. KSP maintains that it should not be barred from recovery Administrative Code § 20-387(a) because its lack of a license was due to the DCA's failure to process its payment. In his affidavit, Kostyantyn Polyansky, a member of KSP, describes his attempts to renew KSP's license, claiming that he made payment for the license in 2016 but unbeknownst to him, the application was not processed such that the license lapsed on February 28, 2017, approximately a year and one-half before KSP began work on this project. Polyansky claims to have finally met with a "supervisor at DCA" in February 2020, six months after KSP was terminated, and that he was simply unaware of the need to follow-up anytime after

2016 to make sure the license was actually renewed by DCA.[1] Notably, among the movants' submissions is a 2014 notice from DC to KSP advising that it may not operate its business unless it "receive[s] an actual license from [DCA] or DCA has given written permission to operate your business while your application is pending." Again, KSP concedes that it was unlicensed when it performed the subject work.

While application of the statute may at times seem harsh, Administrative Code § 20-387(a) requires strict compliance and failure to comply bars recovery regardless of whether the failure to obtain a license was willful. See Chosen Const. Corp. v Syz, 138 AD2d 284 (1st Dept. 1988); Millington v Rapoport, 98 AD2d 765 (2nd Dept. 1983). Indeed, CPLR 3015[e] requires that any contractor seeking to recover for work performed must be able to allege in a complaint that it was duly licensed at the time the work was performed or the services rendered and that, if no such allegation can be made, the defendant is entitled to dismissal of the complaint pursuant to CPLR 3211(a)(7). Thus,

[1] KSP submitted additional DCA notices as exhibits to an improper sur-reply affirmation. The court does not consider sur-replies filed without leave of court. See CPLR 2214(b), (c); Garced v Clinton Arms Assocs., 58 AD3d 506 (1st Dept. 2009). In any event, these improper submissions do not support KSP's position. The submission consists of (1) two notices sent to KSP by the DCA stating that KSP failed to submit a roster of employees and that Polyansky failed to appear for required fingerprinting and (2) an affirmation of KSP's counsel alleging that the license lapsed due to the incomplete application and that he obtained the above documents through efforts he made in 2020.

KSP's first five causes of action for breach of contract, unjust enrichment, account stated, quantum meruit, and mechanic's lien foreclosure must be dismissed pursuant to CPLR 3211(a)(7).

KSP's sixth cause of action for conversion of tools left at the job site continues since that is independent of the causes of action seeking payment for construction work performed or other services rendered to the defendants. While KSP may not ultimately prevail on the claim, as discussed above, it is sufficient for pleading purposes. Further, the moving defendants do not establish entitlement to dismissal of the claim pursuant to CPLR 3211(a)(1) or (a)(7) by submitting a single photograph purportedly showing KSP's employees retrieving their tools or the affidavit of Kellam stating that KSP was provided an opportunity to retrieve the tools. Finally, the court notes that although the causes of action for breach of contract and unjust enrichment in the amended complaint also include an allegation regarding the tools, perhaps erroneously, and those causes of action are dismissed, the allegations regarding the tools, as alleged in the sixth cause of action nonetheless remain.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the cross-motion of the plaintiff, KSP Construction, LLC, pursuant to CPLR 3025(b) for leave to file an

amended complaint is granted, and the proposed amended complaint appended to the motion papers is deemed served and filed as of this date; and it is further,

ORDERED that the motion of the defendants LV Property Two, LLC, LV Property Three, LLC, and Richmond Hill Crest, LLC to dismiss the complaint is granted to the extent that the first through fifth causes of action of the amended complaint are dismissed as against those defendants pursuant to CPLR 3211(a)(7); and the motion is otherwise denied, and it is further,

ORDERED that all parties shall appear for a telephonic compliance conference on January 7, 2021, at 3:00 p.m., as previously scheduled.

This constitutes the Decision and Order of the court.

DATED: December 8, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON