

Henao v Vizcaya Constr., Corp.
2020 NY Slip Op 35346(U)
July 27, 2020
Supreme Court, Queens County
Docket Number: Index No. 702026/2019
Judge: Robert J. McDonald
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Opposition-Exhibits.....EF 93 - 109
 Vizcaya Construction Corp.'s Affirmation in
 Opposition-Exhibits.....EF 110 - 113
 Affirmations in Reply-Exhibits.....EF 114 - 117

This action stems from a construction project at plaintiffs' home located at 89-05 70th Road, Forest Hills, New York 11375.

Plaintiffs commenced this action on February 4, 2019 by filing a summons and complaint, asserting five causes of action, including breach of contract, breach of express and implied warranty, professional malpractice, negligence, and punitive damages. Defendant Jabar Construction Corp. joined issue by service of a verified answer on March 26, 2019. Defendant Jabar Construction Corp. now seeks to dismiss the action against it on the grounds that plaintiffs' own documentation reveals a contract with Jabar Construction Inc., which is different from Jabar Construction Corp., located at an address unknown to Jabar Construction Corp., containing a phone number unknown to Jabar Construction Corp., and signed by someone other than a principal of Jabar Construction Corp.

Defendant Jabar Construction Corp. waived any defense founded upon documentary evidence under CPLR 3211(a)(1) by failing to raise the defense prior to service of its responsive pleading or in the responsive pleading itself (see CPLR 3211[e]). Therefore, that branch of the motion pursuant to CPLR 3211(a)(1) is denied. The branch of the motion for summary judgment in favor of Jabar Construction Corp. will now be decided herein.

In support of the summary judgment motion, Jabar Construction Corp. submits an affidavit from Gowkarran Jabar, the President and sole shareholder of Jabar Construction Corp. Mr. Jabar affirms that Jabar Construction Corp. is in the business of general contracting. Its office is located and has always been located at 18-35 26th Road, Astoria, NY 11102. Its telephone number is 718-204-0371. Jabar Construction Corp. has no relationship whatsoever to Jabar Construction Inc. Mr. Jabar further affirms that he is completely unfamiliar with the address and telephone number listed in the contract that is the subject of this action. The contract appears to be signed by Mark Mohan on behalf of Jabar Construction Inc. Mr. Mohan has never been an employee of Jabar Construction Corp. At no time was Mr. Mohan authorized to enter into contracts or bind Jabar Construction Corp. in any manner. Neither Jabar Construction Corp. nor anyone on its behalf ever performed any construction at the subject premises.

A copy of the subject contract is also annexed to the motion papers.

Based on the evidence submitted, counsel for Jabar Construction Corp. contends that summary judgment is warranted as there is no basis for maintaining this action against Jabar Construction Corp.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

Here, based on Mr. Jabar's affidavit and the subject contract, Jabar Construction Corp. established its prima facie showing of entitlement to summary judgment by demonstrating that it is not the proper party defendant.

Defendants Francis Albert Construction and Vizcaya Construction, Corp. each oppose the motion on the grounds that, inter alia, the motion is premature and numerous questions of fact exist that preclude summary judgment.

Upon a review of the motion papers, oppositions, and replies thereto, this Court finds that the opposing parties failed to raise a triable issue of fact. The argument that Jabar Construction Corp. obtained a copy of the contract during discovery, and thus, a relationship between Jabar Construction Corp. and Jabar Construction Inc. must be found is merely speculative and insufficient to raise a triable question of fact. The opposing parties submit only affirmations from their attorneys which are insufficient to defeat a summary judgment motion (see Zuckerman, 49 NY2d at 563).

Additionally, the contention that this motion for summary judgment is premature is without merit. The non-moving parties failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, and for the above stated reasons, it is hereby

ORDERED, that defendant JABAR CONSTRUCTION CORP.'s motion for summary judgment is granted, the complaint and any and all cross-claims are dismissed as against defendant Jabar Construction Corp., and the Clerk of the Court shall enter judgment accordingly.

Dated: July 27, 2020
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

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COUNTY CLERK
QUEENS COUNTY