Consumer Protection Restoration LLC v Hickory House Tenants Corp.
2020 NY Slip Op 35808(U)
July 28, 2020
Supreme Court, Rockland County
Docket Number: Index No. 031285/2018
Judge: Paul I. Marx

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

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CONSUMER PROTECTION RESTORATION LLC and PRESTIGE REALTY GROUP INC.,

Plaintiff,

Index No. 031285/2018

-against-

DECISION AND ORDER

HICKORY HOUSE TENANTS CORP. and NATIONAL BILLING AND FUNDING LLC,

Motion Date: July 8, 2020
Motion Sequence ## 9 & 10

Defendants.

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The following papers were read on: (1) Defendant Hickory House Tenants Corp.'s ("Hickory House") motion for summary judgment against Plaintiffs Consumer Protection Restoration LLC and Prestige Realty Group Inc. pursuant to CPLR §3212, or in the alternative, to dismiss pursuant to CPLR §3211, or for clarification of the Court's March 25, 2020 Decision and Order (Motion # 9); and (2) Plaintiffs' motion for sanctions against Hickory House and/or its counsel (Motion # 10):

Hickory House's Motion for Summary Judgment ....NYSCEF Doc. 403-410
Plaintiffs' Cross Motion for Sanctions...Doc. 414-426
Hickory House's Reply ....Doc. 429-432

BACKGROUND

By Decision and Order dated March 25, 2020, the Court granted Hickory House's prior motion for partial summary judgment dismissing Plaintiffs' cause of action for breach of contract and their mechanics' liens.[1] The Court determined that Hickory House could recover damages and reasonable attorney's fees for securing the discharge of the liens in an amount to be determined at trial. The Court ordered the County Clerk to expunge the mechanics' liens filed by Plaintiffs against Hickory House.

1 The joint motion of Plaintiffs and Defendant National Billing and Funding LLC ("NBF") for partial summary judgment was denied.

Thereafter, Hickory House made an application in the related interpleader action pending in the Nassau County Supreme Court to obtain the balance of fire insurance proceeds being held by that court. Plaintiffs asserted that the funds should not be released to Hickory House because Plaintiffs' unjust enrichment cause of action was still pending in this Court.

Returning to this Court, Hickory House then filed the instant motion "for an order to dismiss the cause of action for unjust enrichment pursuant to CPLR §3212, as to all Plaintiffs as there are no issues of fact, and/or CPLR §3211 based upon res judicata, legal fees, costs and disbursements, and for such other and further relief as this Court deems just and proper." Notice of Motion, NYSCEF Doc. # 403.

Plaintiffs responded with their cross-motion for sanctions.

DISCUSSION

Hickory House's Motion

Hickory House moves for summary judgment dismissing Plaintiffs' cause of action for unjust enrichment pursuant to CPLR §3212. Hickory House also moves to dismiss the cause of action pursuant to CPLR §3211 based upon res judicata. Alternatively, Hickory House casts its motion as an application to the Court to clarify that the unjust enrichment cause of action was dismissed when the Court ruled on Hickory House's prior motion for partial summary judgment. Hickory House asserts res judicata and/or collateral estoppel as the basis for its motion. Hickory House argues that Plaintiffs cannot simultaneously allege a cause of action for breach of contract and one for unjust enrichment. Hickory House contends that "[t]he unjust enrichment claim is an equitable cause of action provided for when there is NO assertion of a contract." Affirmation of Wayne A. Gavioli at ¶ 14. Hickory House also moves for counsel fees.

Plaintiffs oppose Hickory House's motion and cross move for sanctions against Hickory House and/or its counsel. Plaintiff contends that Hickory House's motion is untimely and neither CPLR §3212 or §3211 provide the proper vehicle for the relief sought in the motion. Plaintiff asserts that the proper vehicle for seeking clarification was pursuant to CPLR §2221. Memorandum of Law in Opposition at p 12 ("Pursuant to CPLR §2221, when a Court's decision is ambiguous and/or possibly subject to misinterpretation on a given issue, a party may file a motion for clarification or modification directly with the Judge who signed the order." *Erickson v*

Cross Ready Mix, Inc., 2009 NY Slip Op 30930[U] [Sup Ct, Nassau County 2009]; *Fowler v Parks*, 675 NYS2d 278 [1st Dept 1998] (motion for clarification granted and the Court issued its clarification); *In re Realty Rashida J.*, 615 NYS2d 7, 10 [1st Dept 1994] (motion for clarification granted and the Court recalled its prior decision and order and issued a new decision); *Rachels v Lugo*, 612 NYS2d 846 [1st Dept 1994] (motion for clarification granted)).

Plaintiffs approach the procedural conundrum presented by Hickory House's untidy and careless presentation by asserting in the first instance that the instant motion was untimely as a motion for summary judgment. Plaintiffs cite to CPLR §3212's requirement that a motion for summary judgment must be brought within a certain time period after issue is joined in an action. Pursuant to CPLR §3212(a):

> Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

This Court's Part Rules designate that any such motion "must be made within sixty (60) days of the filing of the Note of Issue." Part Rule IV.E. In this case, the Note of Issue was filed on August 30, 2019. Hickory House sought and obtained a thirty (30) day extension of time to file a motion for summary judgment. Therefore, the deadline to file motions for summary judgment expired on November 30, 2019. On November 26, 2019, Plaintiffs and NBF moved for partial summary judgment. On November 29, 2019, Hickory House moved for partial summary judgment. Both parties' motions for partial summary judgment were timely.

This is now Hickory House's second motion for summary judgment. As such, it falls within a different proscriptive rule which generally prohibits successive motions for summary judgment unless there is "newly discovered evidence or other sufficient cause". *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810, 811 [2nd Dept 2016]; *Vinar v Litman*, 110 AD3d 867, 868–69 [2nd Dept 2013] ("Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause"); *Coccia v Liotti*, 101 AD3d 664, 666 [2nd Dept 2012]; *Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845 [2nd Dept 2010]; *Powell v Trans–Auto Sys.*, 32 AD2d 650 [2nd Dept 1969]. Such motions "should not be made based upon facts or *arguments* which could have been submitted on the original motion for summary judgment." *Vinar, supra* at 706 (citing *Capuano v Platzner Intl. Group*, 5 AD3d 620, 621 [2nd Dept 2004]; *Harding v Buchele*, 59 AD2d 754, 755 [2nd Dept 1977]). "A court may, however, properly entertain such a motion 'when it is substantively valid and the granting of the motion will further the ends of justice and eliminate an unnecessary burden on the resources of the courts'." *Kolel Damsek Eliezer, supra* at 811 (citing *Graham v City of New York*, 136 AD3d 747, 748 [2nd Dept 2016]; *Landmark Capital Invs., Inc. v Li-Shan Wang*, 94 AD3d 418, 419 [1st Dept 2012]; *Town of Angelica v Smith*, 89 AD3d 1547, 1549 [4th Dept 2011]).

Plaintiffs further contend that even if Hickory House's motion seeking clarification was brought pursuant to CPLR §2221, it was untimely filed on May 14, 2020, which was more than 30 days after the notice of entry of the Court's March 25, 2020 Decision and Order[2] disposing of the parties' competing motions for partial summary judgment.

Hickory House's motion for clarification was timely made on May 14, 2020, because the COVID-19 temporary prohibition on filing of non-emergency applications that was in effect until May 4, 2020, tolled all filing deadlines. Hickory House may proceed with its motion.

The Court issues the following clarification of its March 25, 2020 Decision and Order.

Hickory House's prior motion, which sought only partial summary judgment, did not address Plaintiffs' cause of action for unjust enrichment. Hickory House opted to bring a motion for partial summary judgment which failed to address all of Plaintiffs' causes of action. To say that Hickory House's papers lacked clarity is a charitable interpretation, to say the least. The Court construed the motion papers as seeking partial summary judgment against Plaintiffs on their breach of contract cause of action, on the ground that a valid contract was not formed, and dismissal of the mechanics' liens. What was clear from the papers was that the motion did not address the cause of action for unjust enrichment. Consequently, the Court did not address that cause of action in the Decision and Order.[3]

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2 It is not entirely clear when notice of entry was filed. NYSCEF Docs. ## 282 and 283 are designated Notice of Entry with Proof of Service but they are simply copies of the Court's Decision and Order.

3 Therefore, the Court need not address Hickory House's claims that the unjust enrichment cause of action is barred by res judicata or collateral estoppel, which have no applicability here. The legal

The unjust enrichment cause of action is the only remaining cause of action Plaintiffs have against Hickory House. Hickory House's successive motion for summary seeking to dismiss that cause of action is substantively valid and it would further the ends of justice and eliminate an unnecessary burden on the resources of the Court it if was granted. Therefore, the Court will consider the motion.

The law regarding alternative pleading of causes of action for breach of contract and quantum meruit or unjust enrichment is that "the existence of a valid contract governing the subject matter of a dispute generally precludes recovery in quasi contract for events arising out of the same subject matter." *Jaybar Realty Corp. v Armato*, 175 AD3d 1391, 1393 [2nd Dept 2019] (citing *CSI Group, LLP v Harper*, 153 AD3d 1314, 1317; *Saunders Ventures, Inc. v Catcove Group, Inc.*, 151 AD3d 991, 995); *Ashwood Capital, Inc. v OTG Mgmt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012] ("Only where the contract does not cover the dispute in issue may a plaintiff proceed upon a quasi-contract theory of unjust enrichment."; *Whitman Realty Grp., Inc. v Galano*, 41 AD3d 590, 593 [2nd Dept 2007] ("Because a valid and enforceable contract existed which governed the relationship between the parties … the Supreme Court also properly determined that the plaintiff failed to raise a triable issue of fact as to the quantum meruit claim).

The precise principle of law which governs here, as aptly and succinctly stated in *Goldman v Simon Pro. Group, Inc.*, 58 AD3d 208 [2nd Dept 2008], is that "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies." 58 AD3d at 220 (citing *Hochman v LaRea*, 14 AD3d 653, 654-655 [2005]; *Zuccarini v Ziff-Davis Media*, 306 AD2d 404, 405 [2003]; *Old Salem Dev. Group v Town of Fishkill*, 301 AD2d 639 [2003]; *Parkash v Utilisave Corp.*, 295 AD2d 330 [2002]).

In this case, Hickory House contested the validity of the contracts and prevailed, resulting in the dismissal of the breach of contract cause of action. Consequently, Plaintiffs could proceed on their alternative claim for unjust enrichment. Plaintiffs are now entitled to present their theory of quantum meruit to a jury, *Thompson v Horowitz,* 141 AD3d 642, 646 [2nd Dept 2016], unless Hickory House can establish that it is entitled to summary judgment on that claim.

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principle, if applicable, would be law of the case, which holds that once an issue is decided in a case it becomes the final determination on that issue for the remainder of the case.

Plaintiffs may recover under unjust enrichment if they can show: "(1) the performance of services in good faith, (2) the acceptance of services by the person or persons to whom they are rendered, (3) the expectation of compensation therefor, and (4) the reasonable value of the services rendered." *Thompson v Horowitz, supra* at 644 (citing *F & M General Contr. v Oncel*, 132 AD3d 946, 948; *Crown Constr. Bldrs. & Project Mgrs. Corp. v Chavez*, 130 AD3d 969, 971; *Zere Real Estate Servs., Inc. v Parr Gen. Contr. Co., Inc.*, 102 AD3d 770, 772; *Tesser v Allboro Equip. Co.*, 73 AD3d 1023, 1026).

In seeking summary judgment, Hickory House asserts res judicata and/or collateral estoppel based on its contention that the Court disposed of the unjust enrichment cause of action when it decided Hickory House's prior motion for partial summary judgment. The Court has already clarified that it did not dispose of the cause of action. Hickory House asserts that there are no issues of fact regarding Plaintiffs' unjust enrichment claim, but it fails to demonstrate that Plaintiffs did not provide any services and are not entitled to recover the value of any work they may have performed. Hickory House's conclusory statements, which were made by counsel and without any evidentiary support, are insufficient to establish a prima facie case of entitlement to summary judgment. Accordingly, Hickory House's motion for summary judgment is denied.

Hickory House's other requests for relief are denied. Hickory House is not entitled to counsel fees. Hickory House cannot add new theories in its reply papers or request new forms of relief, such as striking the Notice of Pendency, which were not requested in its initial moving papers.

Plaintiffs' Cross-Motion for Sanctions

Plaintiffs cross move for "an Order pursuant to Section 130-1.1 of the Uniform Rules of the New York State Trial Courts, issuing sanctions [against Hickory House] and/or [its] counsel and scheduling a hearing date to determine the amount of sanctions ...". Notice of Cross-Motion. Plaintiffs seek sanctions against Hickory House and/or its counsel for frivolous conduct in bringing the instant motion.

Plaintiffs have not shown that Hickory House's motion is frivolous. Plaintiffs acknowledged that CPLR 2221 provides a proper avenue for the relief Hickory House seeks. The Court has determined that Hickory House could proceed with a successive motion for summary judgment. Notwithstanding the poor quality of Hickory House's papers and counsel's inability to present the issues and articulate his arguments with any real degree of clarity, the motion is not frivolous and does not provide a basis for an award of sanctions. Accordingly, Plaintiffs' motion for sanctions is denied.

SUMMARY

It is ORDERED, that Hickory House's motion for clarification is granted; and it is further

ORDERED that Hickory House's motion for summary judgment is denied; and it is further

ORDERED, that Plaintiffs' motion for sanctions is denied; and it is further

ORDERED, that the parties shall appear for a pre-trial conference on September 11, 2020 at 9:15 a.m.

The foregoing constitutes the Decision and Order of the court.

Dated: July 28, 2020
New City, New York

ENTER

HON. PAUL I. MARX, J.S.C.