

<b>New York Interior Constr., Inc. v Heiber</b>
2022 NY Slip Op 30215(U)
January 12, 2022
Supreme Court, New York County
Docket Number: Index No. 652915/2021
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

NEW YORK INTERIOR CONSTRUCTION, INC.,

Plaintiff,

- v -

JENNIFER M. HEIBER,

Defendant.

-----X

INDEX NO. 652915/2021
MOTION DATE 09/15/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, and 8 were read on this motion to DISMISS LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that defendant's motion to dismiss the first cause of action for failure to state a claim pursuant to CPLR 3211(a)(7) is granted without opposition, based upon the following memorandum decision.

Background

In this action, plaintiff New York Interior Construction, Inc. ("plaintiff") alleges three causes of action: breach of contract (first cause of action); quantum meruit (second cause of action); and account stated. Defendant Jennifer M. Heiber ("defendant") now moves to dismiss the first cause of action for failure to state a claim.

Plaintiff alleges that, on August 30, 2019, defendant hired plaintiff to repair certain water damage to her apartment and conduct other cosmetic repairs (NYSCEF Doc. No. 1, ¶¶ 4-5). Plaintiff quoted to defendant a price of \$74,184.66 for the work, and defendant agreed (id., ¶¶ 6-8). Prior to beginning the work, defendant made two payments of \$30,000 in total, and received a credit of \$5,462.50 when certain items were removed from the scope of work (id., ¶¶ 9-11).

Plaintiff alleges that it completed all items of work and invoiced defendant for the balance of \$38,722.16 (*id.*, ¶¶ 12-13). To date, defendant has not paid the balance (*id.*, ¶¶ 14-16).

Plaintiff commenced this action by filing a summons and complaint on May 3, 2021 (NYSCEF Doc. No. 1). Defendant was served with process and filed the instant pre-answer motion to dismiss the first cause of action for breach of contract and did not move with regard to the second cause of action for quantum meruit or the third cause of action for an account stated. There is no opposition to the motion.

### **Standard of Review**

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

### **Discussion**

Defendant moves to dismiss the first cause of action for breach of contract. A cause of action for breach of contract requires allegations of “the existence of a contract, the plaintiff’s

performance thereunder, the defendant's breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Moreover, the General Business Law defines as a “Home Improvement” contract any contract for “the repairing, remodeling, altering, converting, or modernizing of, or adding to, residential property” (General Business Law § 770(3)). All home improvement contracts must be evidenced by a writing signed by all parties and containing certain statutorily required provisions (General Business Law § 771).

Here, plaintiff alleges that plaintiff quoted defendant a price for the requested scope of work home repairs and renovations, and that defendant agreed to that price (NYSCEF Doc. No. 1, ¶¶ 6-8). Plaintiff does not allege that the parties entered into a written contract based upon that quote, and no such contract is attached to the complaint. Without a signed writing, plaintiff cannot allege the existence of a contract for home repairs and renovations, and thus the breach of contract cause of action must be dismissed (*F & M Gen. Contr. v Oncel*, 132 AD3d 946, 948 [2d Dept 2015] [“the absence of an enforceable written agreement necessarily precludes recovery based on a breach of contract cause of action”]).

Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss the first cause of action for breach of contract is granted and the first cause of action is dismissed, and it is further

ORDERED that defendant is directed to serve an answer to the complaint within ten (10) days after filing of this order; and it is further

ORDERED that counsel shall appear for a preliminary conference on Microsoft Teams in Part 38 on February 9, 2022 at 10 a.m.

This constitutes the Decision and Order of the Court.

ENTER:

*Louis L. Nock*

1/12/2022

DATE

LOUIS NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE