

KSP Constr., LLC v LV Prop. Two, LLC
2022 NY Slip Op 31787(U)
June 2, 2022
Supreme Court, New York County
Docket Number: Index No. 656646/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 42

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KSP CONSTRUCTION, LLC,	INDEX NO.	<u>656646/2019</u>
Plaintiff,		
- v -	MOTION DATE	<u>11/16/2021,</u> <u>11/16/2021</u>
LV PROPERTY TWO, LLC, LV PROPERTY THREE, LLC, RICHMOND HILL CREST, LLC, and BEN KRUPINSKI BUILDER LLC,	MOTION SEQ. NO.	<u>002 002</u>
Defendants.	DECISION + ORDER ON MOTION	

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92
 were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92
 were read on this motion to/for MISCELLANEOUS.

I. INTRODUCTION

In this action seeking, *inter alia*, to recover for breach of a home improvement contract, the plaintiff, KSP Construction, LLC (KSP), moves pursuant to CPLR 3212 for summary judgment against the defendants LV Property Two, LLC, LV Property Three, LLC, and Richmond Hill Crest, LLC, (collectively, the LVRH defendants) on the first through fifth causes of action of the second amended complaint. In the alternative, KSP moves to strike the LVRH defendants' answer pursuant to CPLR 3126 or to compel the LVRH defendants to produce responses to KSP's discovery demands pursuant to CPLR 3124. The LVRH defendants oppose the motion and cross-move pursuant to CPLR 3212 for summary judgment dismissing the first

through fifth causes of action of the second amended complaint, or, in the alternative, to strike the second amended complaint pursuant to CPLR 3126. KSP opposes the cross-motion.

For the following reasons, KSP's motion is denied and the LVRH defendants' cross-motion is granted in part.

II. BACKGROUND

KSP commenced this action by filing of the summons and complaint on November 8, 2019. In the complaint, KSP alleged that the LVRH defendants, as owners of a residential town home located at 22 Charlton Street in Manhattan (the premises), had orally engaged KSP as replacement contractor for the completion of certain renovation work at the premises. KSP stated that it had performed the work and submitted invoices to the LVRH defendants totaling \$989,500.00. The LVRH defendants ultimately terminated the oral agreement, leaving \$521,819.78 outstanding on the invoices and refusing to return KSP's tools, valuing approximately \$20,000.00. Based on the foregoing, KSP stated five claims against the LVRH defendants sounding in breach of contract, unjust enrichment, account stated, *quantum meruit*, and foreclosure on its mechanic's lien.

The LVRH defendants moved, pre-answer, to dismiss the complaint on the ground that all of KSP's performance under the subject construction contract was done while KSP's home improvement contractor's license, issued by the New York City Department of Consumer Affairs (DCA) pursuant to New York City Administrative Code § 20-387(a), was expired, thus precluding recovery. KSP cross-moved to file an amended complaint adding (1) allegations that it attempted to renew its home improvement contractor's license over a year prior to commencing work at the premises but failed to do so only because DCA did not process its payment

and (2) an additional claim sounding in conversion. By decision and order dated December 8, 2020, the court granted KSP's cross-motion to amend and granted the LVRH defendants' motion to dismiss to the extent that KSP's first five claims in the amended complaint, sounding in breach of contract, unjust enrichment, account stated, *quantum meruit*, and foreclosure on its mechanic's lien, were dismissed. Only the conversion claim survived.

The LVRH defendants filed an answer to the amended complaint on January 11, 2021. The following day, KSP filed a second amended complaint reinserting each of the five causes of action the court dismissed. The only substantive change KSP made in the second amended complaint was the addition of legal arguments to the effect that it "was not required to be licensed by the New York City Department of Consumer affairs under NYC Administrative Code § 20-387 in connection with the work performed under the [subject contract] because the Project was a commercial project, not used as a residence and the [LVRH defendants] [are] not...consumer[s] as defined by the statute." On February 22, 2021, the LVRH defendants filed an answer to the second amended complaint. In response to the first five restated causes of action in the second amended complaint, the LVRH defendants stated that "no answer or other response is required" since the causes of action were dismissed by the court's December 8, 2020, order and, according to the LVRH defendants, barred by the law of the case. On February 24, 2021, KSP filed a notice of rejection of the LVRH defendants' answer for failure to admit or deny each allegation in the second amended complaint in compliance with CPLR 3018. The instant motions ensued.

III. DISCUSSION

A. Summary Judgment

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) *quoting* Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In support of its motion, KSP submits, *inter alia*, an attorney’s affirmation and the verified second amended complaint, which was executed in Connecticut but lacks a certificate of conformity as required by CPLR 2309(c). In support of their cross-motion, the LVRH defendants submit, *inter alia*, the pleadings, including the attorney-verified answer to the second amended complaint, the affidavit of Richard Kellam, the LVRH defendants’ manager, the certificate of occupancy and deed to the subject premises, and the court’s December 8, 2020, decision and order. To the extent that the original affidavit of Richard Kellam submitted by the LVRH defendants on the instant motions was unsigned and unnotarized, such defect is deemed

cured, *nunc pro tunc*, by the LVRH defendants' corrected submission at Docket No. 94.

However, the affidavit was notarized in Virginia and, as such, must be accompanied by a certificate of conformity. CPLR 2309(c). The absence of certificates of conformity in both the second amended complaint and the affidavit of Richard Kellam do not require the denial of the parties' motions and may be cured by the submission of the proper certificates *nunc pro tunc*.

See Wager Estate of Cordaro v Rao, 178 AD3d 434, 435–36 (1st Dept. 2019); Bank of New York v Singh, 139 AD3d 486, 487 (1st Dept. 2016).

The court notes that KSP's submissions do not include any affidavit of facts in support its motion, as required pursuant to CPLR 3212(b). See Sam v Town of Rotterdam, 248 AD2d 850, 851 (3rd Dept. 1998) (“[T]he inescapable fact is that CPLR 3212(b) very specifically requires a summary judgment motion to ‘be supported by an affidavit.’”). The affirmation of KSP's counsel is not a substitute for this requirement. Since counsel claims no personal knowledge of the facts, his affirmation is without probative value or evidentiary significance on KSP's motion. See Zuckerman v City of New York, 49 NY2d 557 (1980); Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010); Miller v City of New York, 277 AD2d 363 (2nd Dept. 2000). Assuming a certificate of conformity is properly submitted, however, the verified second amended complaint suffices as the equivalent of a responsive affidavit for purposes of a motion for summary judgment. Travis v Allstate Ins. Co., 280 AD2d 394, 394-95 (1st Dept. 2001).

Nonetheless, even considering the allegations in the second amended complaint as admissible statements of fact, KSP does not demonstrate entitlement to judgment as a matter of law on the first five causes of action because it has not established compliance with New York City licensing requirements for home improvement contractors. As explained in the court's

December 8, 2020, decision and order, the Administrative Code of the City of New York § 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.” The alleged agreement between the parties was for home improvement services to be provided by KSP, a home improvement contractor, to the LVRH defendants, the owners of the subject residential premises. KSP has admitted that it did not have an active home improvement contractor’s license at the time it performed pursuant to the agreement. Thus, the court held, KSP “is barred from recovery, under any of the theories asserted, for any work it performed while it was unlicensed.” See, e.g., Metrobuild Assocs., Inc. v Nahoum, 51 AD3d 555 (1st Dept. 2008); Hanjo Contractors v Wick, 155 AD2d 304 (1st Dept. 1989); Chosen Const. Corp. v Syz, 138 AD2d 284 (1st Dept. 1988).

KSP has not appealed the court’s determination, nor has it timely sought leave to reargue or renew its opposition to the LVRH defendants’ motion to dismiss. Instead, KSP has challenged the court’s determination by filing a second amended pleading wherein it avers, for the first time, that the law applied by the court is inapplicable because, “upon information and belief,” the subject renovation project was not residential but “commercial.” The only support KSP offers for its novel assertion is its observation that the LVRH defendants who own the premises are “corporate entities,” a fact that has been readily apparent to all involved in this action since its inception. Because the LVRH defendants are corporate entities, KSP avers that they “cannot reside” at the premises and that KSP is thus exempt from licensing requirements with respect to its work at the premises. However, KSP does not dispute that the premises is a residential townhouse and that the LVRH defendants’ manager, Richard Kellam, engaged KSP to perform a gut renovation to such townhouse in order to use it as his personal residence.

KSP offers no explanation as to why it failed to make the foregoing legal argument in opposition to the LVRH defendants' motion to dismiss. But even assuming that KSP's method of challenging the court's prior determination is procedurally proper, its argument is unavailing. The New York City Council has declared that the legislative purpose of requiring licenses for home improvement contractors is "to safeguard and protect the homeowner against abuses and fraudulent practices." A homeowner for this purpose broadly 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). Nothing in the Administrative Code or its declared legislative purpose distinguishes between an individual or a corporate homeowner. To be sure, the Appellate Division, First Department, has recognized that a contractor providing services in connection with a home improvement project in New York City is required to obtain a license without regard to the homeowner's corporate status. See Kamco Supply Corp. v JMT Bros. Realty, LLC, 98 AD3d 891, 891 (1st Dept. 2012) (defendant corporate homeowner properly established that home improvement contract was unenforceable by virtue of general contractor's unlicensed status); JMT Bros. Realty, LLC v First Realty Builders, Inc., 51 AD3d 453, 454 (1st Dept. 2008) (defendant construction company was required to obtain license in connection with home improvement contract with plaintiff corporate homeowner). The trial court decisions to the contrary cited by KSP are not binding on this court and predate the First Department decisions cited above. Thus, the court concludes that the licensing requirements generally applicable to home improvement contractors were applicable to KSP at the time it performed under the home renovation contract it had with the LVRH defendants and that KSP failed to establish its compliance with such requirements.

In light of the foregoing, KSP's motion for summary judgment on the first five causes of action of the second amended complaint must be denied. Insofar as the LVRH defendants establish, and KSP admits, that KSP was unlicensed at the time of its performance, the LVRH defendants' cross-motion for summary judgment dismissing the first five causes of action is granted.

The court notes that neither KSP nor the LVRH defendants have submitted a statement of material facts as required on motions for summary judgment by Section 202.8-g of the Uniform Rules for the Supreme Court. The court disregards this defect for purposes of the instant motion. However, in light of this and the numerous other procedural defects identified herein, the parties are cautioned that further failure to comply with the Uniform Rules, Individual Part Rules, or applicable provisions of the CPLR will not be excused.

B. Discovery

As to the discovery issues raised by the parties, neither KSP nor the LVRH defendants properly include in their submissions an affirmation of counsel attesting to having conducted an in-person or telephonic conference regarding their disputes, setting forth the date and time of such conference, persons participating, and the length of time of the conference, as required by Section 202.20-f of the Uniform Rules for the Supreme Court. Additionally, the parties did not request a conference with the court prior to filing their motions, as required pursuant to this Part's Individual Rules.

Further, the LVRH defendants do not identify any specific deficiencies in KSP's production. On its part, KSP acknowledges in its reply papers that the LVRH defendants have now produced a multitude of documents responsive to its demands. KSP nonetheless asserts that the LVRH defendants have not satisfied their discovery obligations but fails to identify specific

deficiencies, other than to vaguely assert in its memorandum of law that the LVRH defendants did not turn over any emails or text messages “concerning the Project.” Additionally, the parties have engaged in three status conferences before the court since the submission of their motions and have exchanged further discovery that may have rendered their controversies moot, at least in part.

In light of the foregoing, the branches of the parties’ motions seeking to compel discovery from one another and for sanctions pursuant to CPLR 3126 are denied. The parties may raise any remaining discovery issues at the final status conference scheduled for July 14, 2022.

IV. CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion of the plaintiff, KSP Construction, LLC, pursuant to CPLR 3212 for summary judgment against the defendants LV Property Two, LLC, LV Property Three, LLC, and Richmond Hill Crest, LLC, on the first through fifth causes of action of the second amended complaint, or, in the alternative, to strike such defendants’ answer pursuant to CPLR 3126 or to compel such defendants to produce discovery pursuant to CPLR 3124 is denied in its entirety; and it is further

ORDERED that the branch of the cross-motion of the defendants LV Property Two, LLC, LV Property Three, LLC, and Richmond Hill Crest, LLC, which is pursuant to CPLR 3212 for summary judgment dismissing the first through fifth causes of action of the second amended complaint is granted, and the first through fifth causes of action of the second amended complaint are dismissed; and it is further

ORDERED that the remainder of the cross-motion of the defendants LV Property Two, LLC, LV Property Three, LLC, and Richmond Hill Crest, LLC, seeking to strike the second amended complaint pursuant to CPLR 3126 and related relief, is denied.

This constitutes the Decision and Order of the court.

DATED: June 2, 2022



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