

Sheperd & Sheperd, Inc. v Keith
2024 NY Slip Op 35233(U)
June 25, 2024
Supreme Court, Westchester County
Docket Number: Index No. 55934/2024
Judge: Alexandra D. Murphy
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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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

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SHEPERD & SHEPERD, INC. d/b/a SERVPRO OF
SCARSDALE/MOUNT VERNON,

Plaintiff,

Index No. 55934/2024

– against –

Motion Seq. 1

RICHARD KEITH and 114 W 131st ST., LLC,
Defendants.

DECISION & ORDER

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Akiva Shapiro Law, PLLC, Old Bethpage, New York (Akiva Shapiro of counsel),
for plaintiff.

Welby, Brady & Greenblatt, LLP, White Plains, New York (Andreas M. Koudellou
of counsel), for defendants.

In an action to recover damages for breach of contract, unjust enrichment, and quantum meruit, the defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) and 3015(e):

Papers Considered

NYSCEF Doc. No. 7-18; 21-23

1. Notice of Motion/Affidavit of Richard Keith/Exhibits A-I;
2. Affirmation of Akiva Shapiro, Esq. in Opposition/Exhibit 1;
3. Reply Memorandum of Law.

Factual and Procedural Background

The defendant 114 W 131st St., LLC (LLC) is the owner of a building located at 114 W 131st Street, New York, New York, 10027. The defendant Richard Keith and his wife, the non-party Teresa Keith, are the sole members of the LLC. The building is a class C-3 property pursuant to the New York City Department of Buildings classification system. A class C-3 property is a residential "walk-up" apartment building consisting of no more than four residential units.

On March 17, 2023, a fire originated in unit two of the building causing damage to units one and two. On March 18, 2023, the LLC entered into a contract with the plaintiff to perform cleaning and restoration services to the damaged units. The contract

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authorized the LLC's insurance carrier, the non-party AMTRUST North America (AMTRUST), to pay the plaintiff directly for the work covered by its insurance policy. The plaintiff issued invoices to the LLC totaling \$189,912.80 for services rendered in connection with the contract. AMTRUST issued payment to the plaintiff for \$112,222.77. The defendants failed to pay the remaining statement balance of \$77,690.03.

The plaintiff commenced this action against the defendants for breach of contract, unjust enrichment, and quantum meruit. The plaintiff seeks the unpaid statement balance of \$77,690.03 plus interest and attorneys' fees in the amount of \$25,896.68.

The defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) and 3015(e). The defendants argue that the complaint fails to state a cause of action for breach of contract, unjust enrichment, or quantum meruit. They further argue that the allegations in the complaint are utterly refuted by the documentary evidence. Specifically, the defendants argue that the plaintiff is precluded from recovering damages because it did not have a home improvement contract license as required by the New York City Administrative Code (NYC Administrative Code).

In opposition, the plaintiff argues that the work performed pursuant to the contract was clean-up work and not renovation work and therefore, a home improvement contract license was not required. The plaintiff further argues that because Keith is not a resident of the premises, the defendants are not afforded the protection of the NYC Administrative Code. Notably, the plaintiff's opposition does not assert that the plaintiff has a valid home improvement contract license.

Discussion

A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the complaint's factual allegations, conclusively establishing a defense as a matter of law (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017] citing *Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2d Dept 2013]; see *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2d Dept 2013]).

The defendants argue that the plaintiff did not have a home improvement contract license and therefore, the complaint must be dismissed. In opposition, the plaintiff argues that the work performed pursuant to the contract was "clean-up" work and not renovation work within the meaning of the NYC Administrative Code.

New York City Administrative Code 20-387(a) provides that "[n]o person shall solicit, canvass, sell, perform or obtain a home improvement contract as a contractor from

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an owner without a license therefor." "A home improvement contractor who is unlicensed at the time of the performance of the work for which he or she seeks compensation forfeits the right to recover damages based on either breach of contract or quantum meruit" (*CMC Quality Concrete III, LLC v Indriolo*, 95 AD3d 924, 925 [2d Dept 2012] quoting *Flax v Hommel*, 40 AD3d 809, 810 [2d Dept 2007]). Moreover, pursuant to CPLR 3015(e), "a complaint that seeks to recover damages for breach of a home improvement contract or to recover in quantum meruit for home improvement services is subject to dismissal . . . if it does not allege compliance with the licensing requirement" (95 AD3d at 926 quoting *ENKO Constr. Corp. v Aronshtein*, 89 AD3d 676, 677 [2d Dept 2011]).

Here, the defendants established that the plaintiff performed home improvement work at the premises, the plaintiff did not have a home improvement contract license as required by the NYC Administrative Code, and that the complaint fails to plead that the plaintiff complied with the licensing requirement of NYC Administrative Code 20-387 (see *Epic Pool Corp. v Fontecchio*, 67 AD3d 858 [2d Dept 2009]).

The NYC Administrative code 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 ... (NYC Administrative Code 20-386).

Here, the work performed by the plaintiff at the defendants' premises included tearing out wet plaster, tearing out non-salvageable tile floor, tearing out wood flooring, detaching and resetting shower doors and faucets, detaching and resetting sinks, vanities, mirrors, and light fixtures, HEPA vacuuming, and sealing studded walls (see NYSCEF Doc. 5, 22). The Court finds that the work performed by the plaintiff is considered alteration or rehabilitation work, and therefore, required a home improvement contract license (see *Rapid Dry Inc. v Zwick*, 2015 NY Misc. LEXIS 1033 [Queens County, Supreme Court 2015]).

The plaintiff further argues that because Keith does not live at the subject premises, the defendants are not entitled to the protection of the NYC Administrative Code. The Court finds this argument to be without merit.

In *KSP Constr., LLC v LV Prop. Two, LLC* (224 AD3d 58 [1st Dept 2024]), the First Department held that a business-entity owner of residential property can avail itself of the protections of NYC Administrative Code 20-387. In *KSP*, the Court determined that the defendant owners, which were LLCs, were "persons" for the purpose of applying the licensing requirement and "owners" under the NYC Administrative Code (see *KSP Constr., LLC v LV Prop. Two, LLC*, 224 AD3d 58 [determining that "[a]lthough it is tempting to assume that an 'owner' must be an individual, the City Council expressly defined the term 'persons' as it is used in the Home Improvement Business subchapter to mean 'an individual, firm, company, partnership, or corporation, trade group or

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association”]; see NYC Administrative Code 20-386). Indeed, the Court in *KSP* further determined that there is no provision of the licensing law that specifically imposes a requirement that the title owner of a residential structure who enters into a home improvement contract with a contractor for the performance of home improvement reside at the property (*KSP Constr., LLC v LV Prop. Two, LLC*, 224 AD3d at 65).

Thus, the defendants established that the complaint seeks to recover for home improvement services performed by the plaintiff which required the plaintiff to obtain a home improvement contractor license. The plaintiff did not have a home improvement license and therefore cannot recover against the defendants. Moreover, the complaint failed to plead that the plaintiff obtained a valid home improvement license. Therefore, the complaint must be dismissed.

Accordingly, it is

ORDERED that the defendants’ motion to dismiss the complaint pursuant to CPLR 3211(a)(1) & (7) and 3015(e) is **GRANTED** and the complaint is **DISMISSED** in entirety; and it is further

ORDERED that the defendants shall serve a copy of this order with notice of entry upon the plaintiff within 20 days of the date herein.

Dated: White Plains, New York
June 25, 2024


HON. ALEXANDRA D. MURPHY, J.S.C.