

NYC Fireplaces & Outdoor Kitchens v 392 Hands Cr. LLC
2024 NY Slip Op 35607(U)
June 6, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 630900/2023
Judge: James F. Quinn
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INDEX No. 630900/2023SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY**PRESENT:**Hon. JAMES F. QUINN
Acting Justice of the Supreme CourtMOT. DATE 03/15/2024
MOT. ADJ. DATE 06/04/2024
Mot. Seq. #001-MD-----X
NYC FIREPLACES & OUTDOOR KITCHENS,
LLC,

Plaintiff,

- against -

392 HANDS CREEK LLC and ARTISANAL
BUILDING AND DEVELOPMENT, LLC,Defendants.
-----X**DECISION AND ORDER**ALBERT MAIMONE & ASSOCIATES, P.C.
Attorneys for Plaintiff
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College Point, New York 11356ROSEN LAW LLC
Attorneys for Defendant 392 Hands Creek LLC
216 Lakeville Road
Great Neck, New York 11020

Upon the E-File document list numbered 7-9 and 11-16 read on application by the Defendant 392 Hands Creek LLC ("Hands Creek") for an order pursuant to CPLR §3211(a)(1) and (7) granting an application dismissing the complaint and pursuant to CPLR §6514(a), (b) and (c) for an order cancelling the Notice of Pendency and costs and expenses; it is hereby

ORDERED, that the motion by Defendant 392 Hands Creek LLC for an order pursuant to CPLR §3211(a)(1) and (7) dismissing Plaintiff's cause of action and pursuant to CPLR §6514(a), (b) and (c) cancelling the Notice of Pendency and costs and expenses is **denied**.

This is an action to foreclose a mechanic's lien and for unjust enrichment as against Hands Creek. Plaintiff NYC Fireplace & Outdoor Kitchens, LLC commenced this action on December 14, 2023 by the filing of a summons and complaint. Issue has not been joined as Defendant 392 Hands Creek LLC makes this pre-answer motion.

Defendant Hands Creek moves this Court to dismiss the complaint pursuant to CPLR §3211(a)(7) on the grounds that the complaint does not state a cause of action. Hands Creek submits an attorney affirmation and reply affirmation. Hands Creek seeks dismissal of the complaint based upon a failure of Plaintiff to plead they had a valid home improvement license from the Town of East Hampton which is required for a cause of action to foreclose on a mechanic's lien. Plaintiff submits an attorney affirmation

and affidavit of Salvatore Alesci, the managing member of the Plaintiff. Plaintiff in opposition argues that Plaintiff did not require a home improvement license as Plaintiff did not engage in home improvement. Plaintiff asks this Court to deny Defendants' application in its entirety.

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Matneja v Zito*, 163 AD3d 800, 801, 81 NYS3d 174 [2d Dept 2018]; *see also*, *Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test of the sufficiency of a pleading is "whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*Hampshire Prop. v BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, [1994]; *see also*, *JPMorgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting, *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action (*Kaplan v New York City Dept. Of Health and Mental Hygiene*, 142 AD3d 1050, 38 NYS3d 563 [2d Dept 2016]). However, "conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts" (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; *see also* *DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; *Greschler v Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]). "Whether the pleading will later survive a motion for summary judgment...is not relevant on a pre-discovery motion to dismiss" (*Lieberman v Green*, 139 AD3d 815, 32 NYS3d 239 [2d Dept 2016]). "In assessing a motion under CPLR §3211(a)(7)...a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Doe v Ascend Charter Schools*, 181 AD3d 648, 121 NYS3d 285 [2nd Dept 2020], quoting, *Leon v Martinez*, 84 NY2d 972, 614 NYS2d 972, 638 NE2d 511; *see*, *Rovello v Orfino Realty Co.*, 40 NY2d 633, 635-636, 389 NYS2d 314, 357 NE2d 970). Affidavits may preserve "inartfully pleaded, but potentially meritorious, claims" (*Rovello, supra*).

"A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action. 'Therefore, whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss' " (*Oluwo v Sutton*, 206 AD3d 750, 170 NYS3d 177 [2d Dept 2022]; quoting *Kaplan v. New York City Dept. of Health & Mental Hygiene*, 142 A.D.3d 1050, 1051, 38 N.Y.S.3d 563, quoting *Lieberman v. Green*, 139 A.D.3d 815, 816, 32 N.Y.S.3d 239; *see* *Twinkle Play Corp. v. Alimar Props., Ltd.*, 186 A.D.3d 1447, 1448, 128 N.Y.S.3d 848).

Plaintiff argues Hands Creek has been unjustly enriched by not having paid for the all outdoor kitchen equipment that it currently enjoys. The affidavit by Slavatore Alesci states that in or around December 2022 Defendant Artisanal Building and Development hired the Plaintiff to provide certain equipment and appliances which it supplied, assembled and positioned in the rear yard of Hands Creek but was not responsible for any plumbing or electrical and did not affix the appliances to the ground. Plaintiff argues this is not home improvement within the meaning of Town of East Hampton Code §156-3 and therefore a license is not required. Hands Creek argues in its reply papers that this argument proves that the Notice of Pendency and mechanic's lien should be cancelled because under New York Lien Law §3 a contractor may have a mechanic's lien only if the work resulted in a permanent improvement pursuant to New York Lien Law §2.

"Lien Law §3 states that "[a] contractor, subcontractor, laborer, materialman, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent... shall have a lien for the principal and interest, of the value, or the agreed price, of such labor ..." (emphasis added). As defined in Lien Law § 2(3), an "owner" may include "the owner in fee of real property" such as 392 Hands Creek (*Executive Const. Services, Inc. v MKXT LLC*, 2006 WL 8420773 [Sup Ct NY Cty 2006]).

"In *J. Fried Plumbing & Heating Corp. v. 245 Glenmore Ave. Corp.*, the Second Department found that it was error to grant a defendant's motion to dismiss the complaint in a mechanic's lien foreclosure action for failure to state a cause of action:

'It has been consistently held that objections to a notice of lien which do not involve matters appearing on the face of the lien, raise issues of fact for disposition upon trial rather than upon motion to vacate the lien.'" (*Matter of Miller*, 133 NYS2d 421, 422).

55 AD2d 945, 946, 391 NYS2d 142 [2d Dept 1977].

As to the cause of action for unjust enrichment, "[t]he theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement" (*Goldman v. Metropolitan Life Insurance Company*, 5 NY3d 561 [2002]). "It is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2002]). "To establish a claim for unjust enrichment under New York law, a plaintiff must demonstrate '(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution'" (internal quotation omitted) (*New York Grp. for Plastic Surgery LLP v. Anthem Blue Cross*, 20-CV-4234, 2022 WL 524106 [SDNY 2022]).

Here, it is undisputed that the contract was between Defendant Artisanal Building and Development and Plaintiff. While there is admittedly no contract between Plaintiff and Defendant 392 Hands Creek, a reading of the complaint in a light most favorable to the Plaintiff, the Court finds that the complaint states a cause of action.

Accordingly, the motion by Defendants is *denied*.

ORDERED, in accordance with CPLR §3211(f), Defendant 392 Hands Creek LLC is directed to file and serve a verified answer herein within 20 (twenty) days after service of notice of entry of this Decision and Order.

The foregoing constitutes the *Decision and Order* of this Court.

Dated: June 6, 2024
Riverhead, New York


HON. JAMES F. QUINN

____ FINAL DISPOSITION XX NON-FINAL DISPOSITION