

Azarias v Nelson

2025 NY Slip Op 32424(U)

July 1, 2025

Supreme Court, New York County

Docket Number: Index No. 650475/2024

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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GEORGE AZARIAS,

Plaintiff,

- v -

ORPHEOUS NELSON, ORPHEOUS ELECTRICAL, INC.,

Defendants.

-----X

INDEX NO. 650475/2024

MOTION DATE 06/20/2025

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

were read on this motion to/for JUDGMENT - SUMMARY.

Defendants' motion for summary judgment is granted in part and denied in part.

Background

Plaintiff owns an apartment in Manhattan and hired defendants to install and upgrade his electrical systems, including a sound system and his Internet connection. He claims that after contacting defendants, they sent over a proposal via email but that no one ever signed this agreement. Plaintiff alleges that the proposal omitted many key components, such as a description of the work to be done and the total amount due.

He adds that he was not informed that defendants were being financed by another entity. Plaintiff insists that defendants failed to complete the work by the agreed upon move in date in April 2023 and so all parties agreed to delay the move-in to May 2023. Plaintiff contends that defendants failed to respond in a timely manner or complete their tasks and so he fired them on

June 6, 2024. He claims that he hired new contractors to correct the damage, fix the improper work and finish the job. Plaintiff says he paid defendant about \$20,000.

Plaintiff brings causes of action under General Business Law § 772, General Business Law § 773, unjust enrichment and breach of contract.

Defendants move for summary judgment. They claim that there is no private right of action under General Business Law § 773 and that there is no basis for a General Business Law § 772 claim, as that prescribes damages for fraud. Defendants insist that there was no fraudulent inducement here and that plaintiff's claims concerning fraud are without merit. With respect to unjust enrichment, defendants contend that there was a valid contract between the parties. They insist that they submitted a proposal and that plaintiff agreed, and eventually paid defendants based on that proposal.

Defendants also seek dismissal of the breach of contract claim. They insist that plaintiff failed to identify the provisions of the contract that defendants breached. Defendants point out that plaintiff failed to perform his obligations under the contract by not paying what was owed (defendants contend their estimates totaled about \$41,000 and plaintiff only paid about \$27,000).

In opposition, plaintiff observes that defendants styled their motion, at least in part, as a motion to dismiss and so the argument about General Business Law § 773 was waived as defendants did not raise it in a pre-answer motion to dismiss or in their answer. Plaintiff emphasizes that he sustained damages as result of the allegedly defective work performed by defendants. Plaintiff stresses that he paid one contractor over \$10,000 to complete defendants' scope of work.

He observes that the General Business Law requires home improvement contracts to be in writing signed by all parties and that defendants failed to obtain such a contract prior to commencing work.

In reply, defendants question how plaintiff can pursue both an unjust enrichment claim and a breach of contract cause of action.

Discussion

As a preliminary matter, the Court must assess what type of motion defendants filed. The notice of motion cites CPLR 3211(a)(1), CPLR 3211(a)(7) and CPLR 3212(b). However, defendants' moving papers only include the summary judgment standard (NYSCEF Doc. No. 53, ¶¶ 15-16) and so the Court will evaluate this record on that standard.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]).

General Business Law §§ 772 and 773

General Business Law § 772 (1), titled “Penalty for fraud”, provides that “Any owner who is induced to contract for a home improvement, in reliance on false or fraudulent written representations or false written statements, may sue and recover from such contractor a penalty of five hundred dollars plus reasonable attorney's fees, in addition to any damages sustained by

the owner by reason of such statements or representations. In addition, if the court finds that the suit by the owner was without arguable legal merit, it may award reasonable attorney's fees to the contractor.”

The Court grants the branch of defendants’ motion that seeks summary judgment on this cause of action as plaintiff failed to raise a material issue of fact concerning the purported fraud. The fraud, as described in the complaint, seems to amount to, at most, a failure to do the contracting work. Plaintiff insists he had to hire a new contractor to fix and complete the work defendants were allegedly hired to perform. For instance, plaintiff specifically alleges that defendants failed to complete a certain line item (NYSCEF Doc. No. 54, ¶ 51). That does not constitute a fraudulent effort to induce plaintiff into agreeing to hire defendants.

To the extent that plaintiff contends that defendants failed to disclose that their work was being financed, that does not save this cause of action. Plaintiff did not adequately explain how the financing issue is causally related to his purported damages. Instead, the alleged damages seem to have arisen from defendants’ inaction and allegedly shoddy work.

The Court also observes that cases involving this statute concern instances where a contractor’s affirmative misrepresentations led to damages (*see Crippen v Adamao*, 165 AD3d 1227, 87 NYS3d 608 [2d Dept 2018] [fining defendants (contractors) where they falsely claimed that they were licensed to perform home improvement work when, in fact, their license was suspended]). The factual scenario in *Crippen* clearly falls under the auspices of General Business Law § 772—a contractor induced an owner to hire the contractor based on the fact that he had a license when, in fact, he did not. Plaintiff did not point to any misrepresentations here that he relied upon before agreeing to hire defendants.

The Court also dismisses plaintiff's cause of action premised upon General Business Law § 773. This provision, titled "Violations," contains penalties for violations. Defendants seek dismissal of this claim on the ground that there is no private right of action and that only the attorney general can bring such a case. Plaintiff did not address this point in reply and so the Court dismisses the claim. In any event, it is not clear how plaintiff has viable, stand-alone claim under this section, which provides remedies as opposed to detailing prohibited conduct.

Unjust Enrichment/Breach of Contract

"As we have stated on several occasions, the theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516, 950 NYS2d 333 [2012] [internal quotations and citations omitted]).

Clearly, there is an issue of fact with respect to plaintiff's unjust enrichment claim. Plaintiff contends that defendants did a lousy job, failed to meet deadlines and forced him to expend additional money to complete the job (and to fix defendants' work). Contrary to defendants' argument, that plaintiff paid defendants for some of the work is not a basis to dismiss this cause of action. A fact finder will have to assess how much, if any, plaintiff is entitled to recover. Defendants' argument that they "completed a significant amount of work on this project, and that defendant[s] bore significant expense in ordering materials necessary for

this project” (NYSCEF Doc. No. 53, ¶ 76) may be a persuasive argument for trial but it does not justify granting them summary judgment.

The Court observes that plaintiff pled his breach of contract claim in the alternative. He insists that he never signed a contract with defendants and defendants do not contend that the parties ever signed an agreement, although they insist there was a valid contract. The only documents included in this record were an estimate and an invoice provided by defendants to plaintiff (NYSCEF Doc. No. 18). These documents contain no indication that both parties signed the agreement. “General Business Law § 771 provides that all home improvement contracts must be in writing and signed by the parties thereto” (*F & M Gen. Contr. v Oncel*, 132 AD3d 946, 948, 18 NYS3d 678 [2d Dept 2015] [dismissing a contractor’s claim for breach of contract for failure to obtain a home improvement contract signed by all parties]).

Of course, this statute typically arises in situations like the one in *Oncel, supra*, where a contractor is suing the homeowner for failure to pay. But the Court sees no reason to depart from this caselaw and find that there is no valid breach of contract claim as there was no contract signed by the parties as required under the General Business Law. Plaintiff can pursue his claim under a quasi-contract claim (*c.f. Frank v Feiss*, 266 AD2d 825, 698 NYS2d 363 [4th Dept 1999] [barring a contractor from recovering under a breach of contract theory for failure to obtain a signed written agreement but permitting the contractor to pursue a quantum meruit claim]).

Summary

On this record, there is a live dispute about the extent to which defendants’ allegedly unsatisfactory work for plaintiff’s home renovation project caused plaintiff damages. As there is no basis to pursue a breach of contract claim, the Court finds that plaintiff can seek damages under an unjust enrichment claim.

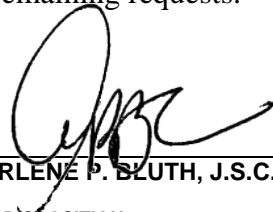
The Court also denies defendants' request that this case be transferred to Civil Court as plaintiff's complaint seeks only \$30,000 in damages. At this late stage of the case, there is no reason to delay this case indefinitely by transferring it. Defendants had ample opportunity to seek such a move prior to the commencement of any discovery.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted only to the extent that plaintiff's causes of action based upon General Business Law §§ 772-773 and breach of contract are severed and dismissed, and denied with respect to the remaining requests.

7/1/2025

DATE



ARLENE P. BLUTH, 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