KIJ Contr., Inc. v Radeljic
2025 NY Slip Op 35348(U)
February 11, 2025
Supreme Court, Rockland County
Docket Number: Index No. 034817/2022
Judge: Keith J. Cornell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

KIJ CONTRACTING, INC., Plaintiff,	:	**DECISION AND ORDER**
-against-	:	Index # 034817/2022 (Mot. Seq. Nos. 2 & 3)
	:	AND
DONNA RADELJIC and ADOLF RADELJIC, Defendants.	:	Index # 034818/2022 (Mot. Seq. Nos. 2 & 3)

HON. KEITH J. CORNELL, A.J.S.C.

Before the Court are two motions for summary judgment by DONNA RADELJIC and ADOLF RADELJIC (Defendants) seeking dismissal the complaints of KIJ CONTRACTING, INC. (Plaintiff). The papers relating to Index No. 034817/2022 (e-filed documents 34-43, 46) and the papers relating to Index No. 0348181/2022 (e-filed documents 35-40, 44-47, 50) were considered. Also before the Court are Plaintiff's cross-motions for leave to amend the complaints.

Background and Procedural History

On or around January 11, 2021, the parties entered into a home improvement contract whereby Plaintiff agreed to furnish work, labor and services to renovate Defendants' basement (NYSCEF Index 034818/2022, Doc.#1, ¶6-7) (the "First Contract"). In exchange, Defendants agreed to pay Plaintiff $178,585.00. On or about April 3, 2021, Plaintiff and Defendants entered into second contract for Plaintiff to perform additional renovation work on the garage. (NYSCEF 034817/2022 Doc.#1, ¶7) (the "Second Contract"). Defendants agreed to pay the Plaintiff an additional $172,674.00 for this work.

Plaintiff alleges that the work was performed on the two contracts between January 11, 2021 and July 29, 2021. Plaintiff alleges that Defendants paid the sum of $106,365.00 on the First

Contract, leaving a balance due of $72,220.00. Plaintiff alleges that Defendants paid $114,874.00 on the Second Contract, leaving an outstanding balance of $57,800.00 for the second contract.

On November 16, 2021, with no additional payments made, Plaintiff filed two mechanic's liens on the Defendant's property: File No. 2021-0047975, in the amount of the $72,220.00 and File No. 2021-00047973, in the amount of $57,800.00.

On November 14, 2022, Plaintiff commenced two separate actions, each demanding the outstanding amount from one of the mechanic's liens, plus interest from July 19, 2021, and each seeking to foreclose on the relevant lien. Plaintiff then filed Amended Verified Complaints in each action on November 19, 2022, to add the verification signed by Karl Javenes, President of KIJ Contracting. In answering the complaints, Defendants admitted that there were two contracts, but denied that any balance is owed Plaintiff on either contract. Defendants also asserted counterclaims, *inter alia*, to recover damages for Plaintiff's allegedly defective work.

Defendants now move for summary judgment to dismiss both of Plaintiff's complaints and to vacate the mechanic's liens. Plaintiff opposes the motions for summary judgment and cross-moves to amend the complaints.

Arguments

Defendants argue that they are entitled to summary judgment on the two complaints. First, Defendants argue that the liens expired by operation of law pursuant to NY Lien Law §17 on November 16, 2022 because Plaintiff failed to file notices of pendency. Therefore, Defendants argue that they are entitled to dismissal of the foreclosure causes of action and to have the two mechanic's liens vacated. Second, Defendants argue that they are entitled to summary judgment dismissing the complaints because Plaintiff failed to plead with specificity that it is a licensed home improvement contractor in either complaint as required by CPLR § 3015(e).

Plaintiff argues that Defendants are not entitled to summary judgment dismissing the complaints because Plaintiff also alleged causes of action for recovery based on breach of contract and quantum meruit. Plaintiff cross-moves to amend the complaints to plead its valid licensing.

In reply and opposition to the cross-motion, Defendants again argue that dismissal of the complaints is warranted because of the failure of Plaintiff to file the notices of pendency. Defendants also argue that allowing Plaintiff to amend the complaints would cause undue prejudice.[1]

DISCUSSION

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient admissible evidence to eliminate any material issues of fact from the case. See Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). The movant bears the burden of proving entitlement to summary judgment, and the failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985). Once sufficient proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form that raises a triable issue of fact. See Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Mere conclusions or allegations unsupported by competent evidence are insufficient to raise a triable issue. See id. An attorney's affirmation, standing alone, is insufficient to raise a triable issue of fact in opposition to the motion. See Morales v. Amar, 145 A.D.3d 1000, 1002 (2d Dept. 2016).

[1] Per this Court's rules and 22 NYCRR §202.8-c, sur-replies are not permitted without express permission. Therefore, Plaintiff's Doc. 47 (Index No. 034817/2022) and Doc. 51 (Index No. 034817/2022) were not read or considered.

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. See Gitlin v. Chirkin, 98 A.D.3d 561 (2d Dept. 2012); Dowsey v. Megerlan, 121 A.D.2d 497 (2d Dept. 1986). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable," the motion must be denied. See Phillips v. Kantok & Co., 31 N.Y.2d 307 (1982).

"Pursuant to Lien Law § 17, a mechanic's lien expires one year after filing unless an extension is filed with the County Clerk, or an action is commenced to foreclose the lien within that time and a notice of pendency is filed in connection therewith." Aztec Window & Door Mfg., Inc. v. 71 Village Road, LLC, 60 A.D.3d 795, 796 (2d Dept 2009). "In the event neither of these conditions is accomplished within the statutory period, nor is a further extension of the lien obtained by order of the court, the lien automatically expires by operation of law, becoming a nullity and requiring its discharge." Id.

Plaintiff filed the two liens on November 16, 2021. It is undisputed that when Plaintiff filed the two complaints on November 14, 2022 to foreclose on the two mechanic's liens, Plaintiff failed to file the required notices of pendency. Accordingly, Plaintiff's mechanic's liens lapsed by operation of law on November 16, 2022, one year after they were filed. Lacking any valid liens, Plaintiff cannot maintain actions to foreclose on the liens. Thus, Defendants' motions for summary judgment dismissing the causes of action to foreclose the two liens is granted and the liens are vacated and cancelled.

However, even though the liens have expired, the Lien Law provides that the "failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against

such person." NY Lien Law §17; see also, Aluminum House Corp v Demetriou, 131 A.D.3d 986 (2d Dept 2015). The Lien Law further provides that if "the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action." NY Lien Law § 54. Therefore, the expiration of the liens, alone, is not sufficient to grant Defendants summary judgment on the complaints.

Defendants further move to dismiss the remaining causes of action on the ground that Plaintiff was not properly licensed by Rockland County to perform home improvement work. Pursuant to CPLR § 3015(e), a complaint that seeks to recover damages for breach of a home improvement contract or to recover under a quasi-contractual theory for home improvement services must allege compliance with the licensing requirement. A defendant may move to dismiss under CPLR § 3211(a)(7) if the complaint fails to plead licensing with particularity. See CPLR §3015(e); Cunningham v. Nolte, 188 A.D.3d 806, 807 (2d Dept. 2020) (reversing and dismissing plaintiff's claims when he failed to plead that he was licensed and he, in fact, was not licensed to perform home improvements).

Here, rather than moving to dismiss under CPLR § 3211(a)(7), Defendants' motions are for summary judgment. In opposition to the Defendants' motions, Plaintiff provided evidentiary proof that it was duly licensed in Rockland County as a general contractor at the time that the services were rendered to Defendants. Plaintiff's proffer is sufficient to establish a question of fact and defeat Defendants' motion.

Finally, to remedy its pleading omission, Plaintiff now seeks to amend the complaints to allege compliance with the licensing requirement under CPLR § 3015(e). CPLR § 3025(b) provides that a party may amend its pleading "at any time by leave of court" and that "[l]eave shall

be freely given upon such terms as may be just." Additionally, the case law makes clear that "[d]elay alone is not sufficient to deny a motion to amend unless accompanied by significant prejudice." Architectural Bldrs. v. Pollard, 267 A.D.2d 704, 705 (3d Dept 1999). When a home improvement contractor has established that it was in fact properly licensed to perform the services allegedly provided, amendment of the complaint is proper. See Vatco Contr., Ltd. v. Kirshenbaum, 73 A.D.3d 1163 (2d Dept. 2020) (affirming grant of *sua sponte* relief allowing plaintiff to amend complaint to comply with CPLR § 3015(e) pleading requirements).

Applying such principles here, the Court finds that the proposed amendments to the complaints clearly do not lack merit and Defendants will not suffer significant prejudice from allowing Plaintiff to plead with specificity as required by CPLR § 3015(e).

Therefore, for the reasons stated above, it is hereby

ORDERED that the branches of Defendants' motions for summary judgment to dismiss Plaintiff's causes of action to foreclose the mechanic's liens are **GRANTED** and it is further

ORDERED that the mechanic's liens filed under File No. 2021-0047975 and File No. 2021-00047973 are **VACATED** and the Rockland County Clerk's Office is directed to cancel same; and it is further

ORDERED that Defendants' motions for summary judgment are otherwise **DENIED**; and it is further

ORDERED that Plaintiff's motions to amend the complaints a second time are **GRANTED**; and it is further

ORDERED that Plaintiff shall electronically file the two Second Amended Complaints within twenty (20) days of the date of this order by NYSCEF, and such filing shall be deemed effective service upon Defendants; and it is further

ORDERED that Defendants shall have twenty (20) days from the date of the filing of the two Second Amended Complaints to file their amended verified answers; and it is further

ORDERED that the parties shall appear for a conference that will be noticed by a separate court communication.

Dated: New City, New York
February 11, 2025

ENTER:

Hon. Keith J. Cornell, A.J.S.C.

TO: All parties via NYSCEF