J & D Devans Constr. Corp. v Iannucci
2015 NY Slip Op 30222(U)
February 9, 2015
Supreme Court, Suffolk County
Docket Number: 00-17507
Judge: James C. Hudson
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SHORT FORM ORDER

INDEX No. 09-17507
CAL No. 14-00068CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 9-17-14
ADJ. DATE 10-22-14
Mot. Seq. # 004 - MotD
005 - MD

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J & D EVANS CONSTRUCTION CORP.,

Plaintiff,

- against -

VINCENZO IANNUCCI and ANGELA IANNUCCI,

Defendants.

DINO EVANGELISTA and ANTHONY CUOCCO PLUMBING & HEATING, INC.,

Additional Defendants On Counterclaim.

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Upon the following papers numbered 1 to 90 read on these motions for summary judgment/amend pleadings ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18, 45 - 62 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 37, 65 - 66, 67 - 72 ; Replying Affidavits and supporting papers 40 - 42, 75 - 80 ; Other memoranda of law 19 - 20, 38 - 39, 43 - 44, 63 - 64, 73 - 74, 81 - 82; proposed orders 83 - 84, 85 - 86, 87 - 88, 89 - 90 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff and the additional defendant on the counterclaim Dino Evangelista for an order pursuant to CPLR 3212 granting summary judgment dismissing the defendants' third and fourth counterclaims, and for an order pursuant to CPLR 3025(a) and (b) permitting the plaintiff to amend its complaint, is granted to the extent of granting the plaintiff leave to serve an amended complaint in the proposed form annexed to the moving papers, and is otherwise denied; and it is further

ORDERED that the amended complaint shall be deemed served upon service of a copy of this order with notice of its entry on the defendants, and that the defendants shall serve an answer to the amended complaint within 30 days after the date of such service; and it is further

ORDERED that the motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This is an action to recover the amount of $134,442.17 allegedly due and owing to the plaintiff for home improvement work performed at the defendants' residence located at 4 Ferncliff Road, Huntington, New York (the premises). It is undisputed that the defendant Vincenzo Iannucci (Mr. Iannucci) entered into a written contract with the plaintiff on April 10, 2008 to perform said work on the single family dwelling that he owns with his wife, the defendant Angela Iannucci (Mrs. Iannucci) (collectively, the defendants). The plaintiff commenced work pursuant to the contract and, at the request of the defendants, undertook to complete additional work for which it billed the defendants. On or about January 21, 2009, the basement of the premises flooded when certain water pipes froze and burst. Thereafter, the defendants terminated the contract and the plaintiff filed a mechanic's liens against the premises.

It is also undisputed that the defendants' filed a property damage and personal property loss claim with their homeowners insurance company in which their insurer disclaimed on the basis, among other things, that they were not residing in the premises at the time of the loss. Thereafter, the plaintiff filed a claim with its insurance company which was denied on the basis, among other things, that the plaintiff had misrepresented the nature of its work as consisting solely of "carpentry, drywall and painting," and that it did not act as a general contractor or hire subcontractors in performing home improvement work.

The plaintiff commenced this action by the filing of a summons and complaint on May 4, 2009. In its complaint, the plaintiff asserts a cause of action against Mr. Iannucci for breach of contract, and a cause of action for unjust enrichment against both defendants. In their answer, the defendants assert counterclaims against the plaintiff and one of its co-owners, additional defendant on the counterclaim Dino Evangelista (Evangelista), as well as the plaintiff's plumbing subcontractor, additional defendant on the counterclaim Anthony Cuocco Plumbing and Heating, Inc.

The plaintiff and Mr. Evangelista now move, among other things, for summary judgment dismissing the defendants' third and fourth counterclaims sounding in intentional/negligent misrepresentation and injurious falsehood respectively. In their third counterclaim, the defendants allege that the plaintiff and Mr. Evangelista knew or should have known that their representations to the defendants that they were properly insured were false, and that said misrepresentations were made to induce them to enter into the aforesaid home improvement contract. In their fourth counterclaim, the defendants allege that, in filing the aforesaid mechanic's lien, the plaintiff and Mr. Evangelista falsely allege that they are owed money for the work performed, and that the plaintiff and Mr. Evangelista did so knowing that the defendants were in the process of refinancing the premises, resulting in their inability to get favorable financing.

In support of their motion, the plaintiff and Mr. Evangelista's submissions include the deposition transcripts of Mr. Evangelista and the defendants. At his deposition, Mr. Evangelista testified that he met with the defendants prior to the signing of the subject contract, that he did not recall if they asked him any questions regarding the plaintiff's insurance coverage, and that they first asked for a certificate of insurance for the plaintiff after the basement had flooded. Mr. Iannucci testified that, in multiple meetings with Mr. Evangelista prior to the signing of the contract, he and his wife asked if the plaintiff was properly insured, and that Mr. Evangelista directed them to check with the Suffolk County Department of Consumer Affairs (the DCA) for that information. He further testified that he and his wife requested the plaintiff's insurance policy after the flood, and that Mr. Evangelista never gave it to them. Mrs. Iannucci testified that, prior to the signing of the contract, she asked Mr. Evangelista about the plaintiff's business, including how many employees it had and its insurance coverage. She indicated that Mr. Evangelista said the plaintiff had 30 employees who were insured through the plaintiff, and that all its subcontractors were insured. She stated that, at those preliminary meetings, she asked Mr. Evangelista for the plaintiff's certificate of insurance, and that Mr. Evangelista said he did not have it but that the defendants should call the DCA. Mrs. Iannucci further testified that she called the DCA and was told that the plaintiff was insured, that she asked Mr. Evangelista for the plaintiff's insurance information after the basement flood, and that Mr. Evangelista did not give her a certificate of insurance until 10 to 14 days after the flood. She stated that, after the basement flood, she spoke with a representative from the plaintiff's insurance company who indicated that the plaintiff's claim was denied because it had lied on its insurance application.

In order to prevail on a claim of negligent misrepresentation, a party must establish that the other party had a duty to use reasonable care to impart correct information due to a special or privity-like relationship existing between them, that the information provided by the [other party] was incorrect or false, and that the claimant reasonably relied upon the information provided (***J.A.O. Acquisition Corp. v Stavitsky***, 8 NY3d 144, 831 NYS2d 364 [2007]; ***MatlinPatterson ATA Holdings LLC v Federal Express Corp.***, 87 AD3d 836, 929 NYS2d 571 [1st Dept 2011]). Generally, commercial parties dealing at arms length in negotiating a contract are not in a special relationship (***High Tides LLC v DeMichele***, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; ***U.S. Express Leasing, Inc. v Elite Tech. (NEW YORK), Inc.***, 87 AD3d 494, 928 NYS2d 696 [1st Dept 2011]). However, a special relationship may exist in a commercial context, where the speaker

should be "aware of the use to which the information would be put and supplied it for that purpose" (***Kimmell v Schaefer***, 89 NY2d 257, 652 NYS2d 715 [1996]). In addition, a deliberate misrepresentation is actionable where it is made for purpose of inducing another to enter into a contract and there is a reliance by the party to whom the misrepresentation was made (***Demov, Morris, Levin & Shein v Glantz***, 53 NY2d 553, 444 NYS2d 55 [1981]). Whether the nature of the relationship between parties is such that a person's reliance on a negligent misrepresentation is justified, generally raises an issue of fact (*see* ***Caprer v Nussbaum***, 36 AD3d 176, 825 NYS2d 55 [2d Dept 2006]; ***Salesian Socy. v Nutmeg Partners***, 271 AD2d 671, 706 NYS2d 459 [2d Dept 2000]).

Here, the plaintiff and Mr. Evangelista failed to establish their entitlement to summary judgment dismissing the third counterclaim as there is an issue of fact regarding the relationship between the parties. Nonetheless, the plaintiff and Mr. Evangelista contend that the defendants could have discovered whether they had the correct insurance coverage if the defendants had requested a copy of the relevant policy, and that the defendants' did not reasonably rely on any alleged representation that they were insured against the subject loss. Whether a party could justifiably rely on an alleged fraudulent or negligent misrepresentations is generally left for the trier of fact (***Gonzalez v 40 W. Burnside Ave. LLC***, 107 AD3d 542, 968 NYS2d 50 [1st Dept 2013]; ***Orlando v Kukielka***, 40 AD3d 829, 836 NYS2d 252 [2d Dept 2007]). The plaintiff and Mr. Evangelista have failed to establish as a mater of law that the defendants could not justifiably rely on their alleged representation. A party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, as such party must affirmatively demonstrate the merit of its claim or defense as a matter of law (***Velasquez v Gomez***, 44 Ad3d 649, 843 NYS2d 368 [2d Dept 2007]). Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Accordingly, that branch of the motion which seeks to dismiss the defendants' third counterclaim is denied.

The Court now turns to that branch of the motion which seeks to dismiss the defendants' fourth counterclaim which alleges that the filing of a "false" mechanic's lien amounted to an injurious falsehood which prevented them from re-financing the mortgage on the premises. The elements of a cause of action for injurious falsehood are that a party intentionally made false or reckless statements regarding the claimant, without regard to the consequences that will naturally flow therefrom, which result in damage to the claimant without a legal excuse or justification (***Penn-Ohio Steel Corp v Allis-Chamlers Mfg. Co.***, 7 AD2d 441, 184 NYS2d 58 [1st Dept 1959]; *see also* ***Gilliam v Richard M. Greenspan, P.C.***, 17 AD3d 634, 793 NYS2d 526 [2d Dept 2005]; ***L.W.C. Agency v St. Paul Fire and Marine***, 125 AD2d 371, 509 NYS2d 97 [2d Dept 1986]).

The adduced evidence reveals that the defendants submitted a "pre-application" for re-financing to Chase Bank (Chase) in 2009, that, on March 2, 2009, Chase mailed a "notice to home loan applicant" (the Notice) to the defendants, and that the Notice indicated, among other things, that Mr. Iannucci's credit scores reflected that his "ratio of balance to limit on bank revolving or other

bank revolving accounts" was too high, and that he had "too many consumer finance company accounts." The plaintiff and Mr. Evangelista contend that the defendants' failure to file a full application with Chase is fatal to the defendants' counterclaim, and that the Notice reveals that any application for refinancing the premises would have been denied due to bad credit, not the subject mechanic's lien.

The plaintiff and Mr. Evangelista have failed to establish their prima facie entitlement to summary judgment regarding the subject counterclaim. Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]).

Here, there are issues of fact requiring a trial including, but not limited to, whether the filing of said mechanic's lien was legally justified, whether the filing of a full application with Chase would have been necessary under the circumstances, and whether the filing of said mechanic's lien was a substantial factor in the alleged inability of the defendants to refinance the mortgage on the premises. Accordingly, that branch of the motion which seeks to dismiss the defendants' fourth counterclaim is denied.

The defendants now move for summary judgment dismissing the complaint against them on the grounds that the plaintiff is barred from recovering herein as it was not licensed to perform home improvement work as a general contractor, and that the contract between the parties fails to meet the requirements of General Business Law 771. It is undisputed that the plaintiff made application for a license to perform home improvement work with the DCA through John Evangelista, a co-owner with Dino Evangelista, and that Dino Evangelista did not have a license to act as a salesman for the plaintiff as required by the Suffolk County Code. It is also undisputed that the DCA issued a license to John Evangelista and the plaintiff on December 5, 2006 which included the designation "GENERAL CONTRACTOR" under the heading "License Category." In addition, the adduced evidence reveals that John Evangelista failed to disclose that Dino Evangelista was a co-owner of the plaintiff in the application to the DCA, and that the contract between the parties did not include several provisions required pursuant to General Business Law 771.

The defendants have failed to establish their prima facie entitlement to summary judgment on the ground that the plaintiff was unlicensed to perform the work herein. It is well settled that a home improvement contractor who is unlicensed at the time of performance of the work for which compensation is sought cannot recover damages based on either breach of contract or quantum meruit (***Graciano Corp. v Baronoff***, 106 AD3d 778, 964 NYS2d 602 [2d Dept 2013]; ***Quick Start Const. Corp. v Staiger***, 77 AD3d 900, 910 NYS2d 131 [2d Dept 2010]). Here, there are issues of

fact including, but not limited to, whether the license issued to the plaintiff entitled it to act as a general contractor herein.

In addition, the defendants have failed to establish their prima facie entitlement to summary judgment on the ground that the contract between the parties is unenforceable because it violates General Business Law 771. General Business Law 771, which specifically addresses home improvement contracts, requires that such contracts be set forth in a writing signed by all parties, and include information such as a description of the work to be performed and the approximate dates for commencement and completion of the project (*see* ***Precision Founds v Ives***, 4 AD3d 589, 772 NYS2d 116 [2004]; ***Frank v Feiss***, 266 AD2d 825, 698 NYS2d 363 [1999]). However, a failure to comply with all the provisions of GBL 771 will not render unenforceable a contract which otherwise reflects that the parties had a meeting of the minds (*see* ***Wowaka & Sons v Pardell***, 242 AD2d 1, 672 NYS2d 358 [1998]). Here, there are issues of fact regarding the effect of the alleged deficiencies in the subject contract and their impact, if any, on the contract negotiation process as well as the subsequent performance and termination thereof. Accordingly, the defendants' motion for summary judgment dismissing the complaint is denied.

The Court now turns to the third branch of the motion made by the plaintiff and Mr. Evangelista seeking leave to amend the complaint pursuant to CPLR 3025. Pursuant to said statute, leave to serve an amended pleading should be freely given upon such terms as are just. Leave to amend will generally be granted provided the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see* ***Kiaer v Gilligan***, 63 AD3d 1009, 883 NYS2d 224 [2d Dept 2009]; ***Kinzer v Bederman***, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]). Courts are unlikely to deny the request if the proposed amendments do not prejudice the opponent by changing the basic issues of the action, or, by adding significant factual allegations of which the party is unaware (***Symphonic Electronic Corp. v Audio Devices, Inc.***, 24 AD2d 746, 263 NYS2d 676 [1st Dept 1965]; ***Rogers v South Slope Holding Corp.***, 255 AD2d 898, 680 NYS2d 772 [4th Dept 1998]). It is also the established rule that the legal sufficiency or merits of a proposed amendment of a pleading will not be examined on the motion to amend unless the insufficiency or lack of merit is clear and free from doubt (***Vista Properties, LLC v Rockland Ear, Nose & Throat Assocs., P.C.***, 60 AD3d 846, 875 NYS2d 848 [2d Dept 2009]). Thus, the party opposing the motion to amend, must overcome a heavy presumption of validity in favor of the movant and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient (***Otis Elevator Co. v 1166 Ave. of the Americas Condominium***, 166 AD2d 307, 564 NYS2d 119 [1st Dept 1990]; ***Daniels v Empire-Orr, Inc.***, 151 AD2d 370, 542 NYS2d 614 [1st Dept 1989]).

A review of the proposed amended complaint reveals that the plaintiff seeks to make changes to the amount in controversy as well as the status of the corporation, and to add an allegation that it was "duly licensed as a general contractor" at the time that it performed the work under the subject contract. The plaintiff contends that its license was exchanged in the process of discovery, and that there can be no prejudice to the defendants in permitting it to amend the

complaint. In opposition, counsel for the defendants contends that the amendment should be denied as moot because the evidence establishes that the plaintiff was not properly licensed. Here, the defendants do not allege any prejudice should the motion be granted. In addition, although a note of issue has been filed, it cannot be said that this action is "on the eve of trial," and the Court can discern no reason to deny the application. Accordingly, that branch of the plaintiff's motion which seeks leave to amend the complaint in the form attached as an exhibit to the motion is granted.

DATED: FEBRUARY 9, 2015

HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**