

Fairpoint Cos. LLC v Vella

2015 NY Slip Op 32057(U)

March 17, 2015

Supreme Court, New York County

Docket Number: 102016/2012

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EA
3/19/15
E

PRESENT: DEBRA A. JAMES
Justice

PART 59

Index Number : 102016/2012
FAIRPOINT COMPANIES, LLC.
vs
VELLA, NANCY MCCORMICK
Sequence Number : 005
AMEND

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

denied for the reasons stated in
the attached Memorandum Decision and Order.

FILED
MAR 20 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
MAR 19 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: MAR 17 2015

Debra A. James, J.S.C.
DEBRA A. JAMES

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS FULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

-----X
FAIRPOINT COMPANIES LLC,

Plaintiff,

-against-

Index No. 102016/2012

NANCY MCCORMICK VELLA, ZACH VELLA,
VANQUISH CONTRACTING CORP., TITAN
P & H LLC, MID-ATLANTIC
WATERPROOFING OF NEW YORK, INC.,
GOTHAM DRYWALL INC., COOLING GUARD
MECHANICAL CORP. and NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD OF
NEW YORK, INC.,

Defendants.

-----X
NANCY MCCORMICK VELLA,

Plaintiff,

FILED

Index No. 150611/2012

-against-

MAR 20 2015

FAIRPOINT COMPANIES LLC,

Defendant.

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
DEBRA A. JAMES, J.:

Motion sequence numbers 004 and 005 are consolidated for
disposition.

Defendant Zach Vella (Vella) moves, pursuant to CPLR 3212,
for an order granting summary judgment against plaintiff
Fairpoint Companies LLC (Fairpoint) in Fairpoint Companies LLC v
Nancy McCormick Vella, Index No. 102016/2012 (Fairpoint action),
dismissing all of Fairpoint's claims against Vella (motion

sequence number 004).

Plaintiff Nancy McCormick Vella (McCormick) moves, pursuant to CPLR 3025 (b), for an order granting leave to amend her complaint in Nancy McCormick Vella v Fairpoint Companies, LLC, Index No. 102016/2012 (McCormick action), adding Marlboro Group International, LLC (Marlboro) as a defendant (motion sequence number 005).

The Fairpoint action complaint alleges that the real property known as 58 East 66th Street, New York, New York is "a five story, landmarked (sic) building that contained at least five residential dwelling units and a doctor's office" (the premises). The complaint asserts that the premises, in which neither Vella nor McCormick reside, were purchased by McCormick in 2008. Fairpoint, as general contractor, commenced the Fairpoint action seeking payment for its services and to foreclose on a mechanic's lien for renovation work it performed on the premises, which work commenced in or about May 2009. The complaint asserts that McCormick abruptly terminated Fairpoint's work in 2011. By Order dated January 9, 2013, the court (Schlesinger, J.), finding that Fairpoint's Home Improvement License lapsed on June 30, 2011, dismissed any of Fairpoint's claims post such date.

McCormick commenced her action claiming breach of contract with respect to the renovation work by Fairpoint, shortly after

Fairpoint commenced its action. By Order dated January 15, 2013, this court consolidated the Fairpoint and McCormick actions for joint discovery and trial.

Vella and McCormick, defendants in the Fairpoint action, are now divorced. During the course of the renovation project, they were married. Defendant Vella interacted and communicated with Fairpoint during such renovation.

In support of his motion to dismiss, Vella alleges that at all times relevant to this action, the sole title to the real property was and remains with McCormick. Vella argues that he was merely an agent of the known principal, his now former wife McCormick. In opposition, Fairpoint alleges that its work was directed or controlled by and benefitted Vella and that Vella is therefore jointly liable for the value of the work.

In support of her motion to amend, McCormick alleges that Fairpoint was not an operational company, and that Marlboro ran the project using Fairpoint's name. In opposition, Fairpoint argues that Fairpoint was formed for the legitimate purpose of performing non-union work.

Turning first to Vella's motion for summary judgment:
"[T]he 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 eliminate any material issue of fact from the case (Smalls v AJI Indus., Inc., 10 NY3d 733, 735

[2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). 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. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (Vega v Restani Constr. Corp., 18 NY3d 499, 505 [2012]).

General Business Law § 771 provides in pertinent part:

1. Every home improvement contract subject to the provisions of this article, and all amendments thereto, shall be evidenced by a writing and shall be signed by all the parties to the contract.

General Business Law § 770 defines "home improvement" to include an alteration to any "residential property". Here, with respect to a residential property, there is no written home improvement contract signed by Vella, but only a proposal signed by the principal of non-party Marlboro Group International LLC,

alone. Nor do the AIA Application and Certificate for Payment forms, issued by Fairpoint to McCormick, none of which are signed by an owner, meet the requirements of the General Business Law. Since plaintiff did not enter into a signed written home improvement contract in conformity with General Business Law § 771, recovery against Vella, based upon breach of contract, is barred (Precision Founds. v Ives, 4 AD3d 589 [3d Dept 2004]; Frank v Feiss, 266 AD2d 825 (4th Dept 1999)).

A licensed home improvement contractor may recover on a quasi contract basis, despite the absence of a written agreement in compliance with General Business Law § 771 (Orchid Constr. Corp. v Gottbetter, 89 AD3d 708 [2d Dept 2011]; Frank v Feiss, 266 AD2d 825 [4th Dept 1999]), especially where, as here, an owner denies the very existence of a contract.

Plaintiff argues that Vella has been unjustly enriched by the work that it performed on the premises. On the other hand, Vella argues that since he did not own the property, and the work did not benefit him, Fairpoint's claim for such recovery against him must be dismissed.

The elements of an unjust enrichment claim are "(1) defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit defendant to retain what is sought to be recovered" (Farina v Bastianich, 116 AD3d 546 [1st Dept 2014] internal quotation marks and citations

omitted).

In this case, Vella has established prima facie that he was neither enriched by nor retained what is sought to be recovered, but rather, his former wife, Nancy Vella, as the title owner of the premises, solely requested and retained the benefits of Fairpoint's work. His evidence is comprised of the Fairpoint's Application and Certificate for Payment forms and the project architect's invoices that are addressed solely to McCormick, and the project architect contract, which though listing Vella and McCormick as the Owner, is signed by McCormick only.

However, there are appended to Vella's supporting papers, Fairpoint invoices listing "Job-Site address; McCormick-Vella Residence, 58 East 66th Street" addressed solely to Vella, as well as e-mail messages dated February 3, 2011, February 10, 2010, June 15, 2010 and October 15, 2010 from Vella approving certain Fairpoint invoices. Coupled with the Marlboro Group International Group LLC Proposal dated February 26, 2009, which is addressed solely to Zach Vella, "Re: McCormick-Vella Residence" and additional Fairpoint invoices addressed solely to "Mr. Zach Vella-Vella Group, LLC", attached to Fairpoint's opposition papers, Fairpoint raises an issue of fact with respect to Fairpoint's claim of unjust enrichment. Such documents "indicate a relationship between the parties that could have caused reliance or inducement'" (Georgia Malone & Co., Inc. v

Rieder, 86 AD3d 406, 408 [1st Dept 2011]).

With respect to quantum meruit, plaintiff must establish the elements of the claim, which are "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." (Moors v Hall, 143 AD2d 336, 338 [2d Dept 1988]).

Vella is correct when he argues that "[a]n agent who acts on behalf of a disclosed principal will generally not be liable for a breach of contract" (Savoy Record Co. v Cardinal Export Corp., 15 NY2d 1, 4 [1964]). "A principal is considered to be 'disclosed' if, at the time of a transaction conducted by an agent, the other party to the contract had notice that the agent was acting for the principal and of the principal's identity" (Matter of Anderson v PODS, Inc., 70 AD3d 820, 821 [2d Dept 2010]).

As evidence that he was the agent of a disclosed principal, Vella comes forward with evidence in the form of (1) the deed dated August 13, 2008 conveying the premises solely to McCormick, (2) the prenuptial agreement dated April 1, 2005, between he and McCormick, his wife-to-be, that stated that any and all property owned or "hereafter" purchased by a spouse would remain the separate property of that spouse and (3) the settlement agreement dated October 2012 that resolved all financial claims in

connection with the dissolution of their marriage, by ratifying the prenuptial agreement provisions in connection with the separate property. However, as Fairpoint points out, at the time of the renovation project, Fairpoint would have no knowledge of either the prenuptial agreement or the marriage dissolution settlement agreement, the latter of which did not exist at that time. Therefore, there are issues of fact with regard to whether McCormick was Vella's disclosed principal. (Rich v Benjamin, 107 AD3d 1551 [4th Dept 2013]). Likewise through the various invoices addressed to Vella and Vella's e-mails approving payment of invoices, Fairpoint raises issues with respect to whether Vella accepted performance of the services on his own behalf and whether Fairpoint had a reasonable expectation of payment from Vella for the work Fairpoint performed on the premises.

Therefore, Vella's motion for summary judgment with respect to Fairpoint's breach of contract claim must be granted, but with respect to the balance of the complaint must otherwise be denied.

Turning to the motion to amend the complaint, "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (McCaskey, Davies & Assoc. v New York City Health & Hosp. Corp., 59 NY2d 755, 757 [1983]; CPLR 3025 [b]). On such a motion, the court considers "the sufficiency of the merits of the proposed amendment" (Heller v Louis Provenzano, Inc., 303 AD2d 20, 25 [1st Dept 2003]), and,

"if the proposed amendments are totally devoid of merit and legally insufficient, leave to amend should be denied." (Mosaic Caribe, Ltd. v AllSettled Group, Inc., 117 AD3d 421, 422 [1st Dept 2014]).

Both sides agrees that Marlboro had collective bargaining agreements with various construction unions, and that it created Fairpoint, at least in part, for the purpose of being able to bid McCormick's project based on the use of non-union labor. Nor is it disputed that Marlboro and Fairpoint share the same address and ownership. McCormick seeks to impose liability on Marlboro on a theory of alter ego liability, alleging that Marlboro created Fairpoint for Marlboro's benefit alone, and that Fairpoint is undercapitalized, dominated by Marlboro, and intermingled its assets with those of Marlboro. Her proposed pleading alleges that through Marlboro, Fairpoint "falsely represented the true and actual amount of work completed on the Project in the respective applications for payment".

"The elements of a fraud cause of action require a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009]). McCormick's amended pleading, which relies on allegations that Fairpoint overbilled for labor and materials, does not amount to a fraud cause of action, but relates to a

claim of breach of contract. (Delta Dallas Omega Corp. v Wair Assoc., 180 AD2d 701, 702 [1st Dept 1993]). Such conclusory allegations regarding piercing the corporation veil that fail to state that the corporate form was used to commit a fraud against her are insufficient for pleading purposes. (Albstein v Elany Contr. Corp., 30 AD3d 210 [1st Dept 2006], lv denied 7 NY3d 712 [2006]; 20 Pine St. Homeowners Assn. v 20 Pine St. LLC, 109 AD3d 733, 735 [1st Dept 2013]). [1998]). Therefore, the motion to amend must be denied.

Accordingly, it is

ORDERED that the motion for summary judgment (motion seq. no. 004) of defendant Zach Vella is granted only to the extent that the cause of action for breach of contract against such defendant is dismissed, but the motion is otherwise denied; and it is further

ORDERED the motion to amend the complaint (motion seq. no. 005) of plaintiff Nancy McCormick Vella is denied.

Dated: March 17, 2015

ENTER:

FILED
MAR 20 2015
NEW YORK
COUNTY CLERK'S OFFICE

[Signature]
DEBRA A. JAMES

J.S.C.