O'Malley v Campione
2008 NY Slip Op 33743(U)
October 8, 2008
Supreme Court, New York County
Docket Number: 115283/05
Judge: Sheila Abdus-Salaam

[* 1]

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

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Peter O'Malley, Index No. 115283/05

Plaintiff,

-against-

Phil Campione,

Defendant.

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SHEILA ABDUS-SALAAM, J.:

A bench trial of this breach of contract and negligence action involving improvements to plaintiff's cooperative apartment was held on July 2, 2008. Plaintiff's wife, Celeste, testified that defendant had been paid $52, 900 for the work performed from June 2004 to the end of August 2004 under a contract consisting primarily of an e-mail dated June 7, 2004, from defendant to plaintiff listing nine items of work to be done at a "cash cost" of $55,000.[1] Although defendant admitted that he was paid in cash, he testified that he did not recall how much he had been paid or whether plaintiff still owed him any money. Defendant also testified that he never gave plaintiff an invoice showing what work was actually performed or how much he was paid. Defendant further conceded that neither he individually nor his company, TAC Contracting, Inc., (whose sole shareholder is defendant) is or was at the time the work was done on the O'Malley's

[1]This June 7, 2004 e-mail modified an "estimate" dated May 25, 2004, itemizing the work to be done within "6 week (sic)" at a cost of between $68,396 and $91,051. Defendant testified that he started the work based upon this May 25th estimate.

apartment licensed to perform home improvements in New York County.

The testimony of Mrs. O'Malley and defendant together with photographs of the apartment established that several items of the work were not done or were defective. For example, the tile floors in the children's bathroom and the master bathroom were improperly laid, the toilet in the children's bathroom had to be reinstalled because its installation by defendant caused leaks which corroded the floor, the light fixture in the children's bathroom was improperly installed leaving a hole in the ceiling, the defective installation of the shower bar in the master bathroom cracked the tile on the wall and the improperly installed faucet came off the master bathroom vanity whose door and drawers have gaps from improper installation, and the improper installation of the washer/dryer combination in the linen closet makes it impossible to close the dryer door and left pipes exposed. Celeste O'Malley testified that she was forced to hire a different contractor to fix the toilet in the children's bathroom and the problems caused by the improper installation of the washer/dryer in the linen closet. She also hired a painter to paint parts of the apartment that were supposed to be done by defendant. But no paid invoices for this work or proof of how much it would cost to repair defendant's other defective work was provided. Rather, at the close of the trial, plaintiff asked that defendant be made to return the $52,900 paid to him because defendant is an unlicensed contractor, whose negligent work breached the contract with plaintiff.

I reserved decision on plaintiff's request and directed the parties to submit post-trial memos on whether plaintiff could recover as damages the amount paid to defendant as an unlicensed contractor. I now conclude that under the circumstances presented in this case, he can.

Contractors who perform home improvements in New York City must be licensed (Administrative Code of the City of New York §20-387). The case law is clear that a home improvement contractor who is unlicensed at the time the work is performed is barred from recovering for the work based on breach of contract or quantum meruit, or foreclosing on a mechanic's lien because the contract is unenforceable (see B & F Building Corp. v. Liebig, 76 NY2d 689 [1990]; Ben Krupinski Builder and Assocs., Inc. v. Baum, 36 AD3d 843 [2007]; Brite-N-Up, Inc. v. Reno, 7AD3d 656 [2004]; Mortise v. 55 Liberty Owners Corp., 102 AD2d 719 [1984], affirmed 63 NY2d 743 [1984]). Strict compliance with the licensing statute bars recovery even where the work is done satisfactorily or the failure to obtain a license is not willful (see Millington v. Rapoport, 98 AD2d 765 [1983]). The question here is whether a homeowner who has paid an unlicensed contractor for work that is defective can recover the money paid.

Under one line of cases, when the contract is "rescinded" by the contractor's lack of a license, "[t]he parties ... should be left as they are" (Brite-N-Up, Inc. v. Reno, 7 AD3d 656, quoting Segrete v. Zimmerman, 67 AD2d 999 [1979]); see Goldstein v. Gerbano, 158 AD2d 671 [1990]; Allen v. Miller, 1 Misc. 2d 102 [1955]). This is the position taken by the Court of Appeals in Johnston v. Dahlgren, (166 NY 354 [1901]), where the Court concluded that a voluntary payment made to an unlicensed plumber by a homeowner who had had the benefit of the plumber's work should not be returned even though the plumber could not recover the amount left unpaid. Based on then Associate Judge Cardozo's observation in Schank v. Schuchman (212 NY 352, 359 [1914]), that "[t]he law may at times refuse to aid a wrongdoer in getting that which good conscience permits him to receive; it will not for that reason aid another

in taking away from him that which good conscience entitles him to retain", the First Department has held that a homeowner "plaintiff may not use the statute as a sword to recoup monies already paid in exchange for ... unlicensed services" (Sutton v. Ohrbach, 198 AD2d 144 [1993], citing, inter alia, Charlebois v. Weller Assocs., 72 NY2d 587, 595 [1988]; Voo Doo Contracting Corp. v. L & J Plumbing & Heating Co., Inc., 264 AD2d 361 [1999]). But in Sutton, id. and Voo Doo, id., there is no indication that the work performed was defective. The logical conclusion then is that the plaintiffs in those cases enjoyed the benefit of the contractor's work and were not entitled to a return of the payments they made. Because the O'Malleys have shown that they have received essentially no benefit from defendant's shoddy work, this is not a situation, such as the one referred to by Judge Cardozo in Schank, id., where a judgment in favor of plaintiff would take away from defendant what which good conscience entitles him to retain.

Accordingly, I find that plaintiff is entitled to recover the money he has paid to defendant. This conclusion is consistent with another line of cases that allow a homeowner to seek restitution for payments actually made for work that was not performed or was defective (see Brite-N-Up, Inc. v. Reno, 7 AD3d 656; Goldstein v. Gerbano, 158 AD2d 671). It is also consistent with the policy behind the Administrative Code's licensing requirement articulated by the Court of Appeals in B & F Building Corp. (76 NY2d 689, 692): "The Home Improvement Business provisions of the Administrative Code of the City of New York were enacted to safeguard and protect consumers against fraudulent practices and inferior work by home improvement contractors (*see, Mortise v 55 Liberty Owners Corp., 102 AD2d 719, affd 63 NY2d 743, supra; Administrative Code § 20-385*)."

The Clerk is directed to enter judgment in favor of plaintiff Peter O'Malley and against defendant Phil Campione in the amount of $52, 900 together with interest from August 31, 2004 (the approximate date of the last payment).

Dated: October 8, 2008

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J. S. C.