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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 112040/2009
CHIN, WENDY
VS.
QUANTUM GENERAL CONTRACTING
SEQUENCE NUMBER : 006
AMEND SUPPLEMENT PLEADINGS

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

motion to/for _____
No(s). 1, 2
No(s). _____
No(s). 5, 6 / 3, 4

Upon the foregoing papers, it is ordered that this motion is cross-motion by plaintiff to amend summary judgment + cross motion for summary judgment are decided in accordance with the attached memorandum decision

FILED
JAN 13 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/9/2012

_____, J.S.C.
HON. DORIS LING-COHAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 36

WENDY CHIN,

Plaintiff,

-against-

QUANTUM GENERAL CONTRACTING, INC., and TREVOR McAREE,

Defendants,

INDEX NUMBER 112040/2009
Motion Sequence 006
DECISION & ORDER

DORIS LING-COHAN, J.:

Plaintiff Wendy Chin (Plaintiff) moves for leave to amend her complaint, pursuant to CPLR 3025, and for partial summary judgment on the amended complaint and dismissal of defendants' counterclaims, pursuant to CPLR 3212. Defendants Quantum General Contracting, Inc., (Quantum) and Trevor McAree (McAree) (together, Defendants) oppose and cross-move for dismissal of the complaint as against McAree.

Factual Background

Plaintiff owns real property at 107 Hamilton Place, New York, New York (the Property). In March 2008, she engaged defendants to perform work on the Property, which continued until October 2008. In her complaint, plaintiff claims that the Property was damaged by the negligent, careless and reckless manner in which the work was performed, the substandard materials used, and the inexperience or poor training of the workers employed. Ex. 2 attached to motion. The instant action commenced on or about August 24, 2009. Defendants' verified answer, dated January 27, 2010, asserts counter claims for breach of contract, account stated, "book account," quantum meruit, and unjust enrichment. Ex. 3 attached to motion.

Discussion

Plaintiff was deposed on succeeding days, May 4, 2011 (Chin I) and May 5, 2011 (Chin

II). Ex. 5 attached to motion. McAree testified on June 1, 2011 (McAree I) and June 6, 2011 (McAree II). Ex. 6 attached to motion. Plaintiff purchased the Property, a four-story townhouse, in September 2007. She hired an architect and a contractor, Michael Cupo, LLC, (Cupo) to renovate the premises, for both cosmetic improvements and to change the layout in places.

Before this work was completed, while Plaintiff was still living in a rental apartment, a fire occurred on the Property, on January 10, 2008. By then, plaintiff had paid Cupo about $140,000 of the $220,000 agreed-upon contract price. Her insurer paid her over $600,000 in damages and, subsequently, brought suit against Cupo and its painting contractor to recover. *Fireman's Fund Insurance Company v Painting Systems, Inc.*, New York County Supreme Court Index No. 100218/2011. Additionally, Cupo settled an action by Plaintiff for breach of contract by a confession of judgment in the amount of $31,000. *Rinehart v Michael Cupo, LLC*, New York County Civil Court Index No. 68082/2008. Cupo did no additional work for plaintiff after the fire.

CPLR 3025 (b) provides for the court to freely give leave to amend "upon such terms as may be just." *See Kocak v Egert*, 280 AD2d 335 (1st Dept 2001) ("Where, as here, the proposed amended pleading stated meritorious causes of action supported by affidavits and evidentiary showings, and there was no apparent prejudice to the opposing party, leave to amend is to be 'freely given'"); *Valdes v Marbrose Realty*, 289 AD2d 28, 29 (1st Dept 2001) ("Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment").

Plaintiff identified two unsigned written agreements between the parties, one for demolition following the fire, and the other for the restoration of the premises. Exs. C and D attached to Chin Transcripts. The demolition contract, dated January 24, 2008, had a price of

$47,080; the restoration contract, dated July 9, 2008, had a price of $306,445.81. Plaintiff agreed that the restoration contract, although unsigned, was "the final agreement" with Qauntum for the post-demolition work to be performed. Chin I, at 131. McAree acknowledged, as well, that this document was acted upon by Quantum, whether or not signed. McAree I, at 40. Defendants' counterclaims include a cause of action for breach of contract, so extending leave to Plaintiff to amend the complaint to include a cause of action for breach of contract is reasonable. There is no prejudice to defendants where they have already raised the issue. As such, plaintiff's motion for leave to amend the complaint is granted.

Plaintiff claims that McAree walked off the job, taking all of his equipment, on October 17, 2008. Another contractor, GGAPRO Construction (GGAPRO), succeeded Defendants, under a written contract executed on October 29, 2008. Ex. D attached to Chin Transcripts. GGAPRO's contract is dated October 13, 2008, earlier in the week when Defendants allegedly stopped working, but Plaintiff testified that she thought that this date was an error. Chin I, at 152. She said that GGAPRO had worked on the Property before the fire. *Id.* at 151. She claimed to have paid GGAPRO about $100,000, about half to correct Defendants' work, about $37,000 to complete work undone by Defendants, and about $13,000 for work outside the scope of Quantum's agreement. *Id.* at 153-155. Plaintiff eventually moved into the Property on February 2, 2009.

McAree testified that he was the president of Quantum, which ceased operation in 2009 after Plaintiff stopped paying him. McAree I, at 15-16. Quantum had no other employees, but hired subcontractors and day workers that McAree picked up at certain street locations. *Id.* at 20, 56. McAree stated that his contact with the Property originated with non-party Chris Rinehart.[1]

[1]Chris Rinehart has a variety of associations with Plaintiff. He was her business partner in 2006. Chin I, at 21. He joined her in looking for a residence before she purchased the Property. *Id.* at 25-26. She acknowledged that Rinehart referred to her as his wife on occasion.

"Wendy Chin, she only came into the picture after Chris Rinehart had represented himself as the owner of 107 Hamilton Place. All correspondence was done with Chris Rinehart." *Id.* at 33. McAree testified that he met Rinehart shortly after the Property was purchased, before Cupo began his renovations. *Id.* at 36-37. Rinehart showed him architectural drawings for "the Rinehart residence"; an example is attached as Exhibit A to the cross motion. Rinehart called him again after the fire, because Rinehart claimed to be dissatisfied with Cupo. *Id.* at 46-47. Rinehart gave him keys to the Property and "told me to start demolition." *Id.* at 48. He recalled probably starting demolition the next day, after receiving the keys from Rinehart, who told him, "[g]o for it and get moving." *Id.* at 52.

McAree did not meet Plaintiff until after the fire. *Id.* at 36. Rinehart "presented themselves as husband and wife." *Id.* at 38. He eventually saw the deed listing Plaintiff as the sole owner of the Property, and heard as much from his attorney and Cupo. *Id.* at 38-39. He recalled that a formal contract was drafted, with the document dated July 9, 2008 as an attachment, but either Plaintiff "refused to sign it or I never received a signed contract back." *Id.* at 41.

Id. at 114. While Cupo was working on the Property, Rinehart visited "there probably twice a week, a little bit more than me [Plaintiff]." *Id.* at 55-56. He resided with her at the time of the fire. *Id.* at 21-22, 84. He appeared at the scene of the fire before she did. *Id.* at 92. He is named as a plaintiff in the Civil Court action against Cupo, although Plaintiff said she asked her attorney to remove Rinehart's name. *Id.* at 68. He gets rent-free work space in the townhouse. *Id.* at 24. Rinehart found McAree through the Internet and gave him keys to the Property in order to estimate the demolition work. *Id.* at 113-114. The demolition contract is addressed to "Rinehart Residence" and "Chris Rinehart/Wendy Chin" is printed below its signature line. Plaintiff explained the use of Rinehart's name, "[b]ecause like everybody else, they assume it's his house. Even though I tell them it's not the case, they continue to use his name." *Id.* at 126. In fact, he made no financial contribution towards purchasing the Property, and it is titled only in Plaintiff's name. *Id.* at 32. She stated that Defendants proceeded with the demolition without authorization from her or Rinehart. *Id.* at 116-119. When confusion arose in her discussions with McAree about the construction work, "Chris started talking on my behalf." *Id.* at 171. He was in California from June to November 2008 (Chin II, at 121), but he seemed to have made frequent telephone calls to McAree while he was away (McAree I, at 79, 133-134).

The renovation project did not go smoothly, according to McAree; "we had [Rinehart] a drunken buffoon interfering, calling subcontractors, Wendy Chin calling subcontractors directly trying to circumvent me." *Id.* at 68. An architect, who had not been paid, "wouldn't release updated drawings, and he wouldn't update the schedule B so we could move forward with the plumbing inspections." *Id.* He claimed that he had not walked off the job, but that "Chris Rinehart changed the locks on the job and put us out of the job."[2] *Id.* at 71. At the time, an insurance company had appraised the job as 95% complete. *Id.* at 74. McAree estimated that "about 93, 95 percent of the job was completed" when he stopped working on it, although "22, 23 percent of the job" was unpaid. *Id.* at 110. The only tools left at the site when he was terminated were painting tools. *Id.* at 76. Plaintiff "had stopped talking to [McAree] at least five months prior to that. We had no communication with Wendy Chin. She refused to take . . . phone calls from me." *Id.* at 78. McAree testified that relations with Rinehart took a harsh turn "after [disputes about the work] intensified, he was going to call immigration, he was calling tax authorities. He was going to have people beat me up and everything." *Id.* at 133.

McAree stated that some choices or compromises made during the project were governed by Chin and Rinehart's finances, "at this point, they had no money. They couldn't afford to do anything. They couldn't afford to buy doors. Remember, they were starting a business in California that was draining their cash." McAree II, at 18-19.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ.*

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[2]McAree testified that Rinehart changed the locks on two earlier occasions, but soon gave him new keys. McAree II, at 39-40.

Med. Center, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Chin's depositions and McAree's depositions contain hundreds of pages of mutually contradictory answers about doors, floors, moldings, staircases, electrical outlets, plumbing, windows, steam pipes, the roof, lighting fixtures, gas lines, dry walls, a skylight, kitchen appliances, paint and cabinets, virtually every item involved in a residential building renovation project larger than a nail. The testimony of each is often couched in accusations about the veracity of the other, and, in the case of McAree, derisive comments about Rinehart's conduct as well. Under these circumstances, in the face of numerous questions of fact, no dispositive determination can be reached at this time.

McAree claims that he formed Quantum with his brother, a resident in Ireland. McAree I, at 14. He did not believe that he himself was a shareholder in Quantum, and didn't know if his brother held any shares. *Id.* at 14-15. McAree was also very vague as to insurance coverage for Quantum (McAree I, at 70-73), its accounting and bookkeeping system and records (McAree II, at 30-32). When asked if Quantum had an accountant, he replied, "I believe so . . . I think he was a guy in Ireland." McAree II, at 33. His answers about Quantum's status as a licensed contractor were also indefinite. His deposition testimony does, however, indicate a serious involvement in the project at issue and the activities of Quantum. In all, it is inappropriate to dismiss McAree as

an individual defendant, at this time, without a sound factual base to delineate his responsibility from Quantum's. On the within submissions, McAree failed to establish that there are no material facts in dispute and that he is entitled to judgment of dismissal as a matter of law. *See Winegrad v New York Univ. Med. Center*, 64 NY2d at 853.

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers as Exhibit 7 shall be deemed served upon service of this order with notice of entry thereof; and it is further

ORDERED that the defendants shall serve an answer to the amended complaint within 20 days of said service; and it is further

ORDERED that plaintiff's motion for partial summary judgment on the amended complaint and dismissal of defendants' counterclaims is denied; and it is further

ORDERED that defendants' cross motion for dismissal of the complaint as against McAree is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants with notice of entry.

DATED: **January 9, 2012**

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Chin v Quantum_gotthelf.wpd