

Charles Pavarini III Design Assoc., Inc. v Caplan

2012 NY Slip Op 30380(U)

February 15, 2012

Supreme Court, New York County

Docket Number: 102604/11

Judge: Emily Jane Goodman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

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

PRESENT: Hon. EMILY JANE GOODMAN, Justice

PART 17

CHARLES PAVARINI III ASSOCIATES

INDEX NO. 10264/11

MOTION DATE 10/27/11

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

v.

Caplan, David

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

Papers Numbered

Notice of Motion/Order to Show Cause — Affidavits— Exhibits 1-5

Answering Affidavits — Exhibits 6-7

Replying Affidavits 8-9

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided*
by the annexed memorandum Decision and Order.

FILED

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/15/12
New York, New York


EMILY JANE GOODMAN J.S.C.

- 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 17

-----X
CHARLES PAVARINI III DESIGN
ASSOCIATES, INC.,

Plaintiff,

Index No.: 102604/2011

-against-

DECISION & ORDER

DAVID CAPLAN and MARIA CAPLAN,

Defendants.

FILED

FEB 21 2012

-----X

Emily Jane Goodman, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff sues defendants for breach of an oral contract and for quantum meruit. Defendants move to dismiss, pursuant to CPLR 3211(a)(7), on the ground that they were not parties to the contract; and in the alternative, they move to change venue to Dutchess County, New York, pursuant to CPLR 503, on the grounds of improper venue and witness inconvenience. The motion is decided as follows.

Defendants David and Maria Caplan (the Caplans) are the principals of AristaData, Inc. (AristaData), a company, which owns property in Dutchess County known as 42 Altamont Road, Millbrook, New York (the Property). Plaintiff Charles Pavarini III Design Associates, Inc. (Pavarini) alleges that in March 2009, it entered into an oral agreement with the Caplans to provide interior design services and home furnishing to the Property. It claims that it did the work, but the Caplans have not paid the balance of \$116,503.15 that is due and owing. It brought this action in March 2011.

* 3]

Separately, in December 2009, AristaData initiated an action in Dutchess County against Pavarini and Charles Pavarini III, individually (*AristaData v. Charles Pavarini III Design Associates, Inc.*, Index No. 10118/2009 [Sup Ct, Dutchess Co. 2009] [hereinafter the AristaData Action]), based on the identical facts alleged herein; except that in the AristaData Action, it alleges that it, not the Caplans, entered into the agreement with Pavarini, and that Pavarini was negligent in the performance of its work and AristaData was financially harmed as a result of that negligence (*AristaData Complaint, Caplan Aff., Ex. A*). Pavarini answered in that action, but did not interpose counterclaims or implead the Caplans. Discovery has commenced there.

1. Dismissal

Defendants motion to dismiss, despite describing a failure to state a cause of action, is actually one based on documentary evidence (CPLR 3211[a][1]). The Caplans supply evidence showing that the property that Pavarini contracted to work on was owned by AristaData and that the work was paid for by checks drawn from AristaData's accounts (*Caplan Aff., Ex. E & F*). The Caplans also supply an unsigned written contract, admittedly drafted subsequent to the commencement of work, that names AristaData and Pavarini as the parties (*id., Ex. G*). They argue that this evidence establishes that they are improper parties to

4]

this action, as they were not direct parties to the contract.

Plaintiff opposes the motion by supplying two prior drafts of the unsigned written contract that named the defendants as parties to the contract, several emails written directly by defendants in their individual capacities that discuss the work being done (Epstein Aff., Ex. B), and invoices directed to the Caplans individually (*id.*, Ex. C). Finally, Mr. Pavarini avers that the Caplans used the Property as their personal home.

A motion to dismiss based on documentary evidence may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). The evidence supplied is inconclusive, and does not establish, as a matter of law, that the Caplans, individually, did not enter into the oral contract. Accordingly, it cannot be said that the complaint does not state a cause of action against them.

Next, the Caplans argue that the quantum meruit claim should be dismissed because the parties do not dispute that a contract exists. This argument is unpersuasive at this point because it cannot be said that there was, in fact, a contract between the parties.

Accordingly, the branch of the defendants' motion seeking to dismiss the complaint is denied.

2. Venue

The Caplans seeks to transfer venue to Dutchess county on the grounds of improper venue (CPLR 510[1]), and for the convenience of witnesses and the ends of justice (CPLR 510[3]).

Pavarini correctly argues that venue was prima facie valid under CPLR 503 because it has an office at 243 West 98TH Street, in Manhattan (Complaint, ¶ 1). Next, the Caplans' arguments regarding the convenience of material witnesses is supported only by a bare conclusory statement, and is unpersuasive (see e.g. *O'Brien v Vassar Brothers Hospital*, 207 AD2d 169 [2nd Dept 1995]).

Finally, in reply, the Caplans argue that the ends of justice would not be met because it is a waste of judicial resources for the parties to litigate two separate matters involving the exact same set of facts. While this may be correct, it is not a ground for a change of venue under CPLR 510, and, notably, the Caplans do not seek to consolidate or transfer the action under CPLR 602, where such an argument might be persuasive.

In light of the foregoing, it is hereby

ORDERED that the motion is denied; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for the parties appear for a preliminary conference on May 7, 2012, at 10:00, ^{PART 17} ~~in Room 122, 60~~ Centre Street, New York, NY 10007. 4

Dated: February 15, 2012

ENTER:

FILED

FEB 21 2012

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.
EMILY JANE GOODMAN