

**Mikhailov v Abrams**

2012 NY Slip Op 31206(U)

April 30, 2012

Sup Ct, New York County

Docket Number: 105100/2011

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Justice

Index Number : 105100/2011  
MIKHAILOV, ALEXANDER  
vs.  
ABRAMS, STEVEN  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2  
3  
4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

MAY 08 2012

Dated: 4/30/12

NEW YORK  
COUNTY CLERK'S OFFICE

**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER /JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
ALEXANDER MIKHAILOV A/K/A  
ALEX MIKHAILOV,

Plaintiff,

Index No.  
105100/2011

- against -

**DECISION  
and ORDER**

STEVEN ABRAMS,  
c/o Magnolia Bakery  
401 Bleecker Street  
New York, New York 10014,

-----Mot. Seq.: 001

**FILED**

Defendant.

MAY 08 2012

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Alex Mikhailov ("Plaintiff") brings this action for alleged fraud based on breach of contract arising out of a written contract entered into between Plaintiff and Fountainhead Construction LLC ("Fountainhead"), a limited liability company of which Steven Abrams ("Defendant") is a member. Plaintiff and Fountainhead entered into a standard AIA construction contract dated November 9, 2007, whereby Fountainhead agreed to provide services for the project, plaintiff's residence, located at 15 Central Park West, Apt 34C, in the County and State of New York. Plaintiff alleges in his complaint that Abrams fraudulently induced him to contract with Fountainhead, and that he made misrepresentations regarding Fountainhead. Defendant now moves for summary judgment pursuant to CPLR 3212 dismissing the complaint. Plaintiff opposes Defendant's motion.

Pursuant to the terms of the contract, Plaintiff made an initial payment in the amount of \$134,317.75. Work commenced at the project location in June 2008; however, Fountainhead abandoned the project in July 2008.

Alan Bloom was an officer of Fountainhead who signed as the representative of Fountainhead on the signature page of the November 9, 2007 contract. Joseph DiPalermo worked on the project for Fountainhead, and is noted on the mechanics liens filed against plaintiff's property. Defendant states that in January 2008, not long after the contract was executed, he suffered illness for 12-16 months and his partners Joseph DiPalermo and Alan Bloom took over control of the operations of Fountainhead. He alleges that through a combination of mismanagement and the bad economy of 2008, Fountainhead's business failed. Defendant claims that in July 2008, Fountainhead went out of business with a number of projects unfinished, including the Mikhailov Project.

Plaintiff alleges two causes of action: the first cause of action for fraud states that defendant misrepresented to plaintiff that (1) Fountainhead fully intended to perform [the Mikhailov Project] for which it was hired, and (2) that the down payment would be used strictly for the [Mikhailov Project] and would not be used for any other purpose. The second cause of action is that defendant misrepresented that "Fountainhead was licensed to conduct the work outlined in the agreement and... qualified to complete the work and furnish the materials outlined therein."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Defendant, in support of its motion, provides the sworn affidavit of Steven Abrams, the Summons and Complaint, the Answer, the Contract agreement dated November 9, 2007, copies of invoices and other documents purchased by Fountainhead in connection with this project, and Fountainhead's license issued by the Department of Consumer Affairs of the City of New York on June 28, 2007,

which expired on June 30, 2009. Defendant submits that it has made a prima facie showing of entitlement to summary judgment.

Plaintiff, in opposition to defendant's motion, provides the sworn affidavit of Alexander Mikhailov, its down payment check of \$134,317.75 dated December 7, 2007, issued to Fountainhead and deposited into Fountainhead's account, the Contract agreement dated November 9, 2007, the subcontractor's demand for payment from plaintiff dated August 1, 2008 and December 4, 2008, other complaints filed against Steven Abrams, defendant's discovery responses dated September 12, 2011, and a notice from Defendants regarding their motion for summary judgment. Fountainhead is allegedly out of business, but no proof of the corporate status is provided.

Fraud in the inducement must be shown by the party asserting the fraud by clear and convincing evidence. The party asserting the fraud must show that the signer knew the terms of the contract, assented to the terms of the contract, and intended to execute the contract, but the assent itself was induced by a fraudulent representation. It requires a knowing misrepresentation of material fact, intent to deceive another party and to induce that party to act on it, causing injury. Plaintiff alleges that defendant, the only person with whom he dealt regarding the transaction, represented to plaintiff that Fountainhead fully intended to perform the contract.

The contract was signed in November 2007. Plaintiff attempts to show defendant could not have expected Fountainhead to perform by pointing to other lawsuits, and allegations of failing to pay subcontractors which originated in September 2008. Further, while plaintiff notes Fountainhead was out of business, there is no showing of when the corporation became unable to perform. Notably, defendant shows a license for Fountainhead issued by the Department of Consumer Affairs June 28, 2007 and good for two years from issuance. Therefore, there is no evidence provided to demonstrate that defendant knew Fountainhead was not licenced to perform its obligations under the contract at the time the contract was executed in November 2007.

Plaintiff also asserts there were representations about how the down payment would be applied, but such representations are alleged to have been made after the execution of the contract. "Following receipt of the sum \$134,317.75, defendant represented to plaintiff that the monies would be used strictly for the contracting services . . ." The contract, which already stated the terms of how the funds would

be applied, was signed in November 2007, and the down payment was tendered in December, 2007. Thus, these representations could not have induced the signing of the contract.

Plaintiff further alleges that “defendant, at the time the aforesaid agreement was consummated, represented to plaintiff that Fountainhead was licensed to conduct the work outlined in the agreement and that Fountainhead would be qualified to complete the work and furnish the materials outlined therein.”

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” (*See, Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 [2009]).

Initially, defendant provides Fountainhead’s license issued by the City of New York Department of Consumer Affairs, indicating: license type: Home Improvement Contractor/Funded A. Plaintiff, in opposition does not dispute the authenticity of the license, but urges that the defendant knew Fountainhead was not “qualified to complete the work for which defendant was engaged and to deliver the materials for which defendant has been paid.”

The law is well settled that “[a] cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract.” (*See, Krantz v. Chateau Stores of Canada, Ltd.* 256 AD2d 186, 683 NYS2d 24 [1<sup>st</sup> Dept 1998]). To survive a motion for summary judgment, a plaintiff asserting a fraud claim in the context of a contractual relationship must establish that the alleged false representation of facts was “collateral and extraneous to the contract.” *Id.*

Article 1 of the contract states, “the contractor shall fully execute the Work described in the Contract Documents..” Thus, the allegation that defendant misrepresented that Fountainhead fully intended to perform the project for which it was hired, is nothing more than a representation that Fountainhead would perform its obligations under the contract. Moreover, Article 4 of the contract provides that the down payment would be “applied against the first progress payment(s) due to the Contractor.” Plaintiff’s cause of action alleging that defendant represented that “[the down payment] would be used strictly for contracting services at plaintiff’s residence and would not be used for any other purpose” is unsupported since Article 4 of the contract set forth how the down payment would be used, and there was no written

modification of that provision as would be required under the contract. Plaintiff's affidavit as well as other documentary evidence provided, fail to address how the allegations of fraud are collateral to the contract, and as such, Plaintiff has not met his burden of showing that a material issue of fact exists for this first cause of action.

With regard to the second cause of action, that defendant fraudulently represented that it was "licensed" and "qualified" to complete the work, defendant, through the provision of the Department of Consumer Affairs license, demonstrates that it was in fact licensed to perform the work at the time the contract was entered into. In opposition, the affidavit of Alexander Mikhailov provides that defendant insisted on committing his company to the renovations and accepted the substantial down payment, "without a hint of the problems that were to follow, all of which he was most certainly aware." However, plaintiff provides no proof in admissible form to demonstrate that in September 2007, when the contract was signed, that Fountainhead was not duly licensed and qualified.

Plaintiff argues that discovery remains outstanding. However, plaintiff cannot rely on CPLR 3212(f) to explain his failure to submit competent evidence. Indeed, although CPLR 3212(f) provides grounds for denial of a summary judgment motion where "facts essential to justify opposition may exist but cannot then be stated, it is well settled that the mere hope that a party may be able to uncover some evidence during the discovery process is insufficient to deny summary judgment" pursuant to CPLR 3212(f). (*See, Pow v. Black*, 182 AD2d 484 [1<sup>st</sup> Dept 1992]) (internal quotes and citations omitted.).

Wherefore, it is hereby,

ORDERED that Defendant STEVEN ABRAM'S motion for summary judgment is granted.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April ~~26~~<sup>30</sup>, 2012

  
EILEEN A. RAKOWER, J.S.C.

**FILED**

MAY 08 2012