Lax v Design Quest N.Y., Ltd.
2012 NY Slip Op 33305(U)
January 19, 2012
Sup Ct, NY County
Docket Number: 105299/11
Judge: Manuel J. Mendez

[* 1]

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

SUSAN and STEVEN LAX,
Plaintiffs,
-against-
DESIGN QUEST N.Y., LTD., RICHARD RUBENS, and BARBARA RUBENS,
Defendants.

INDEX NO. 105299/11
MOTION DATE 11-23-2011
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for dismiss complaint

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 2
Answering Affidavits — Exhibits ____ cross motion ____	3
Replying Affidavits	4, 5

FILED

JAN 25 2012

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendants' motion pursuant to CPLR §3211[a][7] and CPLR §3016[b] to dismiss this action for failure to state a cause of action, is granted.

Defendants seek to dismiss the complaint pursuant to CPLR § 3211[a][7] for failure to properly state a cause of action and CPLR §3016[b], for failure to allege their claims of fraud. Plaintiffs asserted four causes of action in the complaint, for breach of an oral contract, fraud, fraudulent concealment and for punitive damages (Def. Supp. Aff. Exh. E).

Plaintiffs oppose the motion claiming that the parties entered into an oral agreement with the individual defendants subsequent to entering into a written agreement for interior design. Plaintiffs also claim that the defendants hired all the contractors, ordered materials, scheduled, supervised and managed the renovation work performed, not just the interior design work. Plaintiffs state that all the defendants were involved in the fraudulent misrepresentation, that they were experienced in renovation and construction, although they never obtained a home improvement license. They claim defendants fraudulently listed another entity, DL Restoration Company, as the general contractor on work permits when it never actually performed any work on the project. Plaintiffs seek punitive damages based on the reckless and dangerous plumbing work performed on the premises.

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim.(Leon v. Martinez, 84 N.Y. 2d 83, 614 N.Y.S., 2d 972, 638 N.E. 2d 511 [1994] and Guggenheimer v. Ginzberg, 43 N.Y. 2d 268, 401 N.Y.S. 2d 182, 372 N.E. 2d 17, [1977]). Documentary evidence that contradicts the allegations, or pleadings that consist of bare legal conclusions will not be presumed to be true and are a basis for dismissal (Morgenthow & Latham v. Bank of New York Company, Inc., 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1st Dept.,2003]).

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

To establish a breach of contract claim, a party must allege, "(1) the existence of an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages"(Oppman v. IRMC Holdings, Inc., 14 Misc. 3d 1219(A), 836 N.Y.S.2d 494 [N.Y. Sup. Ct., 2007] citing to Noise in the Attic Productions, Inc. v. London Records, 10 A.D. 3d 303, 782 N.Y.S. 2d 1 [N.Y.A.D. 1st Dept., 2004]). It is well settled that an action involving a contract requires definiteness as to the terms of the agreement and, "the intention of the parties to assume the obligations of the contract." A court that cannot determine what the actual agreement is or whether it has been breached is unable to formulate a remedy. If the terms of the contract are not definite then the court cannot impose obligations because the parties did not reach a binding agreement (Marlo v. McLaughlin, 288 A.D. 2d 97, 734 N.Y.S. 2d 4 [N.Y.A.D. 1st Dept. 2001]). A valid enforceable written contract governing a specific subject matter prevents recovery events arising out of the same subject matter. In the absence of an express agreement, the relief sought is in "quasi contract" which is not actually a contract but an obligation, "imposed to prevent a party's unjust enrichment." (Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y. 2d 382, 516 NE. 2d 190, 521 N.Y.S. 2d 653 [1987]).

The parties entered into a written contract on October 31, 2009, for interior design work to be performed at plaintiff's apartment, 240 Riverside Drive, Apartment 18A, New York, New York (Supp. Aff. Exh. A). The agreement provides that in exchange for design services, Design Quest NY, will charge a separate fee for fixtures and appliances and a design service fee of 35 percent. An exception was made for services concerning audio video equipment, special lighting systems, telephone and intercom systems which Design Quest NY charged at 15 percent. The agreement includes a separate billing provision for work performed by architects and/or designer and draftpersons utilized by Design Quest NY. Defendants claim that the agreement was extended to and included both apartments which were to be combined into one apartment. Defendants also claim they were not retained to perform general contractor work because DL Restoration Company was retained by the plaintiffs for that purpose. As proof that DL Restoration Company was retained as a general contractor on behalf of the plaintiff, the defendants provide a copy of the signed, sworn and certified Work Permit Application filed with the New York City Department of Buildings (Mot. Exh. C) and the actual Work Permit issued to DL Restoration Company (Mot. Exh. B). Defendants also provide a notarized letter dated April 8, 2011 sent to the New York City Department of Buildings seeking to replace their contractor DL Restoration Company with Homecrest Inc. (Mot. Exh. D). Defendants have established that there was not a separate oral contract and there is no basis for plaintiffs allegations that they were retained as general contractors instead of interior designers.

Plaintiffs are not able to state the date the oral contract was entered into, or provide the specific terms of the oral agreement other than the defendants were to perform services and/or supervise the work and be reimbursed for the actual cost of the work plus a markup of 35% of the actual construction costs. Defendants' written contract indicates they billed at 35% for design services which was separate from materials and the services of individuals that were not interior designers, for example architects. Plaintiffs have not provided sufficient proof that a second separate oral contract existed, they have not asserted any claims of oral modification of the written contract, or a cause of action asserting a quasi contract claim. The first cause of action for breach of contract is dismissed.

A cause of action asserting fraud requires, "a representation of a material existing fact, falsity, scienter, deception and injury" (Channel Master Corporation v. Aluminum Limited Sales, Inc., 4 N.Y. 2d 403, 176 N.Y.S. 2d 259 [1958]) and Lama Holding v. Smith Barney, Inc., 88 N.Y. 2d 413, 688 N.E.. 2d 1370, 646 N.Y.S. 2d 76 [1996]). A party asserting

fraud is required to meet the pleading requirements of CPLR §3016[b], requiring particularity and specificity in their claims. General and conclusory allegations of fraud will not sustain the cause of action (Abrahami v. UPC Const. Co. Inc., 176 A.D. 2d 180, 574 N.Y.S. 2d 52 [N.Y.A.D. 1st Dept. 1991] and Polonetsky v. Better Homes Depot, Inc., 97 N.Y. 2d 46, 760 N.E.. 2d 1254, 735 N.E. 2d 479 [2001]).

Plaintiffs allege in the complaint that the defendants fraudulently billed them for services that were not rendered, and misrepresented the identities of the entities that performed work at the premises. Plaintiffs also allege that the defendants committed fraud based on failure to disclose their lack of experience and unlicensed status as a general contractor (Supp. Aff. Exh. A).

In support of the fraudulent billing allegations, plaintiffs provide an unsworn letter, dated February 7, 2011 from DL Restoration and Builders, Corp., indicating they were not hired to do the work at Apartment #18C (Aff. in Opp., Exh. I). The complaint names other entities that were billed and "upon information and belief" never provided services, including NY Tile, Master Plumbing and Heating Inc., Fred Smith Plumbing, Response Electric and Shava Electrical. The plaintiffs do not provide invoices naming these entities or any other proof to support the allegations that they were billed by the defendants for services that were not provided from these entities. Plaintiffs also allege they were billed inappropriately fpr materials and services, corrective work, shipping costs and unsupervised work but provide no invoices or other proof to substantiate these claims. There are only two invoices annexed to the opposition papers, they refer to demolition and construction services. There is no indication on the invoices which entity provided the services (Aff. in Opp. Exhs. G & H) and they only name Design Quest NY.

Defendants provided as proof that DL Restoration Company was retained as a general contractor on behalf of the plaintiff, a copy of the signed, sworn and certified Work Permit Application filed with the New York City Department of Buildings (Mot. Exh. C) and a notarized letter dated April 8, 2011 sent to the New York City Department of Buildings seeking to replace their contractor DL Restoration Company with Homecrest Inc. (Mot. Exh. D). Plaintiffs do not substantiate their contentions that they changed the name of the general contractor after being threatened with legal action. A letter dated July 28, 2010, sent from Design Quest NY Ltd. to the Trump Corporation annexed to the opposition papers clearly states, "...DL Restoration will be the general contractor.."(Aff. in Opp. Exh. C). Plaintiffs have not provided sufficient proof that the defendants intentionally held themselves out as a general contractor or did anything other than refer or assist the various service providers related to interior design work. The second cause of action for fraud is dismissed.

A cause of action asserting fraudulent concealment requires the plaintiff establish that , "(1)defendant made a material false representation,(2) the defendant intended to defraud the plaintiffs thereby (3) the plaintiffs reasonably relied upon the representation and (4) the plaintiff suffered damages as a result of their reliance," additionally, "plaintiff must set forth that the defendant had a duty to disclose material information" (Swersky v. Dreyer & Traub, 219 A.D. 2d 321, 643 N.Y.S. 2d 33 [N.Y.A.D. 1st Dept., 1996]).

Plaintiffs allege in the complaint that there was fraudulent concealment of actual costs in the invoices (Supp. Aff. Exh. A). Plaintiffs do not provide copies of any invoices that establish intentional misrepresentation of the bills or any written correspondence requesting copies of the actual invoices addressed to the defendants. Plaintiffs have failed to provide more than bare allegations and conclusions for their claims of fraudulent concealment. The third cause of action for fraudulent concealment is dismissed.

A claim for punitive damages related to fraud requires gross, wanton or willful fraud or other morally culpable conduct sufficient to justify an award for damages (Borkowski v. Borkowski, 39 N.Y. 2d 982, 355 N.E. 2d 287, 387 N.Y.S. 2d 233 [1976]). Punitive damages cannot be asserted as a separate cause of action because it constitutes an element of the total claim for damages on underlying causes of action (APS Food Sys. v. Ward Foods, 70 A.D. 2d 483,421 N.Y.S. 2d 223 [N.Y.A.D. 1st Dept. 1970]).

Plaintiffs have asserted a cause of action for punitive damages. Defendants have established that the plaintiffs do not have a basis to maintain their claims of punitive damages based on their allegations of fraud. The fourth cause of action for punitive damages is dismissed.

A cause of action that states work was not performed in a skillful and professional manner or of negligent performance under the contract is, "merely a restatement of contractual obligation" and seeks to recover damages for breach of contract, not in negligence (Gordon v. Teramo, 308 A.D. 2d 432, 764 N.Y.S. 2d 144 [N.Y.A..D. 2nd Dept., 2003] citing to, Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y. 2d 382, 516 NE. 2d 190, 521 N.Y.S. 2d 653 [1987]).

The officers of a corporation may be held personally liable for torts committed on behalf of the corporation, but cannot be held personally liable on contracts that they did not bind themselves to individually (See, Newman v. Berkowitz, 50 A.D. 2d 479, 857 N.Y.S. 2d 75 [N.Y.A.D. 1st Dept., 2008] and Apollon Waterproofing & Restoration Corp., Inc. v. Bergassi, 241 A.D. 2d 347, 661 N.Y.S. 2d 997 [N.Y.A.D. 1st Dept. 1997]).

The individual defendants Richard Rubens and Barbara Rubens did not personally bind themselves to the written contract entered into on behalf of the corporation. Although a corporate officer may be liable for fraud committed on behalf of the corporation the plaintiffs have not provided a basis to maintain those causes of action against any of the defendants.

Upon review of all the papers submitted with this motion, this Court finds the plaintiffs have not sufficiently established a basis to maintain this action. The causes of action do not survive because potentially meritorious claims were not asserted.

Accordingly, it is ORDERED that the motion pursuant to CPLR §3211[a][7], and CPLR §3016[b] to dismiss this action for failure of plaintiffs to state a cause of action, is granted, the case is dismissed; and it is further

ORDERED, that the Clerk is directed upon service of a copy of this Order with Notice of Entry to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk.

This constitutes the decision and order of this court.

Dated: January 19, 2012

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE