

**Cypress Bldrs. Inc. v Abramsky**

2016 NY Slip Op 32560(U)

December 8, 2016

Supreme Court, Suffolk County

Docket Number: 14-5322

Judge: Joseph Farneti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**PUBLISH**

SHORT FORM ORDER

INDEX No. 14-5322  
CAL. No. 15-01937CO

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 37 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOSEPH FARNETI  
Acting Justice Supreme Court

MOTION DATE 3-17-16  
ADJ. DATE 5-26-16  
Mot. Seq. # 001 - MotD

-----X  
CYPRESS BUILDERS INC., and KEVIN  
MURRAY, As Executor of the Estate of ROSS  
REISNER,

Plaintiffs,

- against -

TERRI ABRAMSKY and DEBORAH  
PISCIOTTA,

Defendants.  
-----X

McGIFF HALVERSON, LLP  
Attorney for Plaintiffs  
96 South Ocean Avenue  
Patchogue, New York 11772

DAVID SHOTTEN, PC  
Attorney for Defendants  
5225 Nesconset Highway, Suite 29  
Port Jefferson Station, New York 11776

Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 20 - 34; Replying Affidavits and supporting papers 35 - 37; Other       ; it is,

**ORDERED** that the branch of the motion by defendants for summary judgment dismissing the complaint is granted; and it is further

**ORDERED** that the branch of the motion by defendants for summary judgment in their favor on the counterclaim is denied.

Plaintiffs Cypress Builders, Inc. and Kevin Murray, as executor of the estate of Ross Reisner, commenced this action on March 12, 2014, alleging breach of contract, unjust enrichment and quantum meruit. Plaintiffs allege that on September 14, 2007, Cypress Builders, Inc., which was owned and operated by Ross A. Reisner, entered into a construction contract with defendants Terri Abramsky and Deborah Pisciotta, owners of real residential property located at 27 11<sup>th</sup> Street in East Hampton, New

York. Defendants retained Historic Construction Management Corp., owned and operated by Anton G. Wetzel, as a construction manager to oversee the project. On November 15, 2007, the contract between the parties and its addendum was signed by Anton Wetzel, as agent for the defendant homeowners, and Ross Reisner, as president of Cypress Builders. In relevant part, the contract provided that time was of the essence, with work to begin on November 15, 2007, and be completed within 120 days. Plaintiffs allege that \$84,186.00 of the total \$162,430.00 contract price was not paid. Defendants counterclaim, alleging that renovations were not performed in a professional workmanlike manner, that plumbing work was not to code and not performed by a licensed plumber, that additional sums were demanded, and that the project was behind scheduled. Issue has been joined, discovery is complete and a note of issue has been filed.

Defendants now move to dismiss the complaint asserted against them and for summary judgment in their favor on the counterclaim. In support of the motion defendants submit, among other things, the pleadings; their own affidavits and the affidavit of Anton Wetzel; various checks; plaintiffs' construction proposal; the contract; the deposition transcript of Kevin Murray; correspondence dated March 8, 2007 (sic) transmitted by facsimile on March 8, 2008; and two lease agreements. In opposition, plaintiffs submit the pleadings; the deposition transcripts of Kevin Murray, Teri Abramsky, and Deborah Pisciotta; a home improvement contractor license; the construction proposal; the addendum; the contract; a lien dated March 27, 2008; and an unsigned letter.

Teri Abramsky avers that she and defendant Deborah Pisciotta are the owners of real property located at 27 11<sup>th</sup> Street in East Hampton. She avers that the property was purchased in 2004 as an investment and is rented for approximately \$40,000.00 per year. In March of 2007, an inside pipe broke and caused substantial damage to the property. Documentary evidence establishes that Travelers Insurance Company paid Advanced Restoration \$40,412.73 for the initial water damage and clean up. Thereafter, Travelers paid \$176,706.70 for repairs and renovations to the subject property. Abramsky avers that in September she hired Historic Construction Management Corp., owned and operated by Anton Wetzel, as construction manager to oversee the renovations. On November 15, 2007, Cypress Builders (hereinafter "Cypress") was hired for the construction project. The construction start date was November 15, 2007, and the work was to be completed by March 14, 2008. The agreement provided that time was of the essence so that the property could be rented for the Hampton's summer season. Abramsky avers that during the course of the contract that there were problems in the general construction of the renovations, that the plumbing was not properly installed, and that the project was behind schedule. Abramsky avers that Cypress was also demanding additional sums of money in violation of the terms of the construction agreement. She further avers that on February 20, 2008, "frustrated by the problems in the renovations," Wetzel communicated with Cypress about the construction problems, delays, failure to submit itemized invoices, and its demand for additional fees. According to Abramsky, on February 20, 2008, "a decision was made to terminate Cypress from the project."

Deborah Pisciotta avers that she owns the subject property with Abramsky and concurs with the statements made in Abramsky's affidavit. She adds that on March 10, 2008, the day after Wetzel dismissed Cypress from the project, she went to the subject property and was surprised to find Kevin Murray there. She avers, "I told him that he should not be at the property and that he had better call Wetzel if he needed further clarification of his dismissal from the project. Murray left the property."

Anton Wetzel avers that he is the president and sole shareholder of Historic Construction Management Corp. and was retained as the construction manager to oversee the project. On November 15, 2007, as agent for the homeowners, he signed the construction contract and its addendum. Wetzel avers that during the course of the renovation project, that he brought to the attention of Cypress workmanship, quality, and safety issues that were not to the building code, including electrical and plumbing work. He avers that because Cypress failed to submit itemized invoices for services pursuant to the contract, was demanding additional fees, and was considerably behind schedule, he lost faith in Cypress's ability as a general contractor. He avers he was authorized by Abramsky and Pisciotta to discuss the matter with Cypress and, if not satisfied, to terminate it from the project. On March 8, 2008, Wetzel requested a budget review from Cypress, as by that date Abramsky and Pisciotta had paid Cypress \$81,215.00. Wetzel avers that he met with Murray on Sunday, March 9, 2008, at a parking lot next to a Staples store to discuss the problems. Unsatisfied with Murray's responses, Wetzel avers that he terminated Cypress from the project on March 9, 2008. He also avers that later that same day he went to defendants' home in Glen Cove, New York and advised them he terminated Cypress.

Kevin Murray testified that he worked for Cypress, and was in charge of field operations and negotiations. Ross Reisner, owner of Cypress, was both his life partner and business partner. He testified that it "was possible" that he received a fax on March 8, 2008 from Wetzel and that "he cannot be sure" if he met Wetzel in a Staples parking lot to discuss the contract. He testified that he was locked out of the project on February 20, 2008. He testified, "Mr. Wetzel said that he would contact the ladies, if I'm not mistaken, and see if I could access the property, since I was intending to continue construction, and the ladies said at the time that I could go into the property for one reason or another, which I don't recall, but that I was not allowed to continue any construction at that time." He testified that no one specifically stated to him, "you're fired." [His] assumption by the locks being changed was that, in fact." He then retracted that assumption. At a meeting at Murray's home, Murray testified that "Wetzel suggested to [him] at that time that [he] was not going to be hurt, that [he] should simply walk away from this project and that the girls wanted [Wetzel] to remind [Murray] that they were both U.S. Marshals and could make [his] life hell." Murray testified that from March of 2008 until his death on September 24, 2013, Ross Reisner did not file a lawsuit against defendants.

It is well-settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of*

*Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

The statute of limitations applicable to a breach of contract action is six years from the date of the breach (CPLR 213 [2]). Here, defendants maintain the action accrued on March 9, 2008, when Wetzel fired Cypress in the parking lot of a Staples store. Under New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts and pled in the alternative, a six-year statute of limitations applies (see *Knobel v Shaw*, 90 AD3d 493, 495, 936 NYS2d 2 [1st Dept 2011]). Likewise, the statute of limitations on a claim for *quantum meruit* is six years (see CPLR 213 [2]). A plaintiff may not recover for work performed outside the six year statute of limitations (see *Moors v Hall*, 143 AD2d 336, 532 NYS2d 412 [2d Dept 1988]). Defendants have established their *prima facie* entitlement to summary judgment as the six year statute of limitations bars the claims, as this action was not commenced until March 12, 2014.

In opposition, plaintiff's reference to an unsigned letter dated March 18, 2008, referring to a meeting on March 17, 2008, unsupported by affidavit or deposition testimony, is without evidentiary value. Murray testified that he penned the letter, "after having been locked out of the property" as an "attempt at honoring a contract." There is no evidence that the letter was ever sent, and it is not signed by any party, including Murray. The mechanics' lien, also relied upon by plaintiff, indicates that the last work performed on the subject property was on March 12, 2008. The lien is signed by Mark Nash, as an agent of Cypress. Verified by Mark Nash, the mechanics' lien was notarized and filed with the Clerk of Suffolk County on March 27, 2008. CPLR 105 (u) states that a "'verified pleading' may be utilized as an affidavit whenever the latter is required." In *Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890, 965 NYS2d 775 (2013), the Court of Appeals ruled that this provision permitted a verified complaint and verified bill of particulars to be considered as affidavits in opposition to a motion for summary judgment. Accordingly, the mechanics' lien, while not a pleading, raises a triable issue of fact as to when work was last performed on the subject property. Therefore, the issue of whether plaintiffs' claims are barred by the statute of limitations cannot be decided by motion.

As to defendants' argument they are entitled to summary judgment in their favor on the complaint on the ground that, it is undisputed that the contract required, and plaintiff failed to supply, itemized invoices for services that Cypress performed from the start of the project. Defendants have established, based upon plaintiff's breach of the contract, their entitlement to summary judgment dismissing the complaint, as Cypress was paid in full for all work and materials prior to its breach of the

contract. In opposition, plaintiff has failed to raise a triable issue of fact regarding its substantial and material breach of the construction contract (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). Accordingly, plaintiff's complaint is dismissed.

With regard to defendants' counterclaim, defendants have failed to establish their entitlement to summary judgment. The allegation of rental loss for the 2009 summer rental season is speculative and is not supported by documentary evidence of a lease, other than leases for 2010, 2012, 2013 and 2014, or by expert testimony (*Solow v Liebman*, 262 AD2d 633, 692 NYS2d 693 [2d Dept 1999]). Defendants allegation of "out-of-pocket loss" is also speculative as defendants have failed to demonstrate and differentiate construction changes or amendments that were made during the course of the contract. Accordingly, defendants' application for judgment in their favor on the counterclaim is denied.

Dated: December 8, 2016

  
Hon. Joseph Farneti  
Acting Justice Supreme Court

FINAL DISPOSITION  NON-FINAL DISPOSITION