

**Silverlining Interiors, Inc. v 30 Grove St., LLC**

2018 NY Slip Op 33354(U)

December 14, 2018

Supreme Court, New York County

Docket Number: 657210/2017

Judge: Gerald Lebovits

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

----- X  
SILVERLINING INTERIORS, INC.,

Plaintiff,  
-against-

Index No. 657210/2017  
Motion sequence 01

**DECISION AND ORDER**

30 GROVE STREET, LLC,  
Defendant.

----- X  
30 GROVE STREET, LLC,

Plaintiff,  
- against-

Index No. 650944/2018  
Motion sequence 01

SILVERLINING INTERIORS, INC., JOSHUA  
WIENER AND DARYL ANGELL,

Defendants.

----- X

The following e-filed documents, listed by NYSCEF document number (Motion 001 on Index No. 657210/2017) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001 on Index No. 650944/2018) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 were read on this motion to/for DISMISSAL

*Schwartz Sladkus Reich Greenberg Atlas LLP*, New York, Rachael G. Ratner of counsel) for 30 Grove Street, LLC.

*Duane Morris, LLP*, New York (Frederick Cohen & John S. Wojak, Jr., of counsel), for Silverlining Interiors, Inc., Joshua Wiener, and Daryl Angell.

Gerald Lebovits, J.S.C.:

The above-listed motions are consolidated for disposition.

These motions to dismiss, for partial summary judgment, and to strike allegedly irrelevant and inflammatory allegations, arise in two related actions involving disputes between

30 Grove Street, LLC (the Owner) and the construction manager, Silverlining Interiors, Inc. (Silverlining), under an October 23, 2013 contract (the Contract) for the renovation of a brownstone at 30 Grove Street in Greenwich Village (the Premises), for use as the residence of nonparty Michael Barnes, the principal of the Owner, and his family. Individual defendants in the Owner's action, Joshua Wiener and Daryl Angell, are the president and CFO, respectively, of Silverlining.

The Contract is a modified standard form AIA A134-209. Sections 1 through 12 of the body of the Contract are submitted as exhibit A to the Silverlining complaint. The general conditions to the Contract, sections 1 through 15 are submitted as exhibit A-1.

Nonparty Brian E. Boyle (the Architect), prepared the plans for the renovation, including a rooftop greenhouse that allegedly has defects and code compliance issues that will require its demolition and replacement. The Architect acts as the "initial decision maker" pursuant to section 9.3 of the Contract for any disputes between the parties. The Architect is also responsible for certifying, among other things, all payment applications from Silverlining under the Contract; the degree of completion of the work; and that grounds exist for termination of the Contract under Article 14.

These actions arise from a disputed payment application that, allegedly fraudulently, certifies that subcontractors, that were contractually required to be paid from the proceeds of prior payment applications, have been paid. In October 2017, Silverlining submitted payment application 19r4 (the Payment Application, Barnes aff, exhibit 7) in the net amount of \$244,068. Angell certified the Payment Application on October 4, 2017, and the Architect also certified it on November 1, 2017. By notice dated November 2, 2017, the Owner terminated the Contract (Arencibia aff, exhibit D). The Payment Application remains unpaid.

In certifying payment applications, the Architect is authorized by section 7.19 of the Contract to rely upon the information furnished by Silverlining, and is not required to examine how Silverlining has used amounts paid pursuant to prior payment applications.

Silverlining had previously submitted a series of such applications, which were all certified by both the Architect and, except for two applications, also by Angell, and duly paid by the Owner (Barnes aff, exhibits 5-7). All of the payment applications list amounts charged by subcontractors, and contain the following certification (the CFO's Certification):

*"to the best of [Silverlining's] knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, [and] that all monies have been paid by [Silverlining] for Work for which previous Certificates for Payment were issued ..."*

(Arencibia aff, exhibit C [emphasis supplied]).

Section 9.6.2 of the Contract provides for payments by the Owner upon certification of applications for payment by the Architect, within seven days of receipt of payment from the Owner. The Owner has paid all prior applications for payment, each of which certified that the subcontractors listed in the prior applications had been paid. Section 9.6.2 requires Silverlining to pay subcontractors within seven days of receipt of payments from the Owner. Thus, for the certification to be accurate, Silverlining would have had to have paid all the subcontractors listed

on each payment application, within seven days of receipt of the funds from the Owner, in accordance with the Contract documents.

On December 5, 2017, the day after the notice of termination, Silverlining commenced an action (the Silverlining Action), against the Owner. The verified complaint contains a single cause of action for unpaid amounts claimed under the Contract. The verified complaint also alleges that the notice of termination was invalid under the contract, but it does not seek declaratory relief.

On February 28, 2018, the Owner commenced an action against Silverlining (the Owner's Action), and the individual defendants. The verified complaint contains 10 causes of action, including causes of action for various alleged breaches of the Contract pertaining to alleged defects in workmanship or items on a punch list; a cause of action for willful exaggeration of a mechanics' lien; and a cause of action for fraud, alleging that Silverlining fraudulently certified that all subcontractors had been paid, and a cause of action for fraud based on Angell's certification of the Payment Application.

In motion sequence no. 001, in the Silverlining Action, Silverlining moves for partial summary judgment, seeking payment in the amount of \$244,068, which is net of amounts determined by the Architect for uncompleted work, as set forth on a punch list.

In motion sequence no. 001 in the Owner's Action, Silverlining moves for an order, pursuant to 3211 (a) (1) and (a) (7), dismissing the Owner's third and fourth causes of action; and, pursuant to CPLR 3024, striking certain allegedly inflammatory and irrelevant allegations. The Owner cross-moves, pursuant to CPLR 602 (a) to consolidate the two actions. The cross-motion is granted without opposition only to the extent that the two actions are joined for disclosure and trial.

In support of its motion in the Silverlining Action, Silverlining argues that it is entitled to payment because it substantially completed the work required under the Contract, as certified by the Architect, and as demonstrated by the fact that the Barnes family moved into the Premises in July 2017. Section 9.8 of the Contract states that substantial completion is the stage at which "the Work is sufficiently complete in accordance with the Contract Documents that the Owner can occupy" the Premises (Arencibia aff, exhibit A [emphasis supplied]).

The verified Complaint in the Owner's Action alleges that, pursuant to a series of 19 payment applications, 14 of which were certified by Angell, the Owner made payments to Silverlining that included amounts that were required by the Contract to be paid to subcontractors by Silverlining. The complaint alleges that, as of May 30, 2017, 12 subcontractors remained unpaid in the total amount of \$210,000 (Complaint, ¶¶ 40 - 42). Silverlining allegedly diverted those funds to its own use on other projects, resulting in mechanics' liens being filed against the Premises. It alleges further that the roofing subcontractor, Fort Cica, was not paid, resulting in the revocation of the roof warranty, and the filing of a mechanics' lien (id., ¶ 43). Silverlining has not submitted any evidence refuting these allegations.

The Owner also alleges that Silverlining violated section 6.11 of the Contract, captioned "accounting records," which requires Silverlining to keep "full and detailed records and accounts related to the cost of the Work" and to provide the Owner access to these records and the right to make copies (Contract, section 6.11).

To the extent that Silverlining has made a prima facie showing of entitlement to judgment as a matter of law, on the ground of substantial completion of the work, the Owner, by submitting the Payment Application and the Contract, and uncontroverted evidence of at least one mechanic's lien, as well as numerous unpaid subcontractors, has demonstrated the existence of questions of fact, including, whether Silverlining materially breached the Contract by failing to pay subcontractors, and by denying the Owner access to its records in accordance with the terms of the Contract (*see Zuckerman v City of New York*, 49 N.Y.2d 557, 562, 427 [1980]).

The general rule is that “[w]hen one party commits a material breach of a contract, the other party to the contract is relieved, or excused, from further performance under the contract” (*Markham Gardens L.P. v 511 9th LLC*, 38 Misc3d 325, 331 [Sup Ct, Nassau County 2012] [citations omitted]). But if the party in default has substantially performed, the other party's performance is not excused (*see Hadden v Consol. Edison Co. of New York*, 34 NY2d 88, 96 [1974]).

The Court of Appeals in *Hadden* stated:

“[t]here is no simple test for determining whether substantial performance has been rendered and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance”

(*Hadden*, 34 NY2d at 96 [citations omitted]).

Silverlining has not established as a matter of law that it substantially performed the Contract. Silverlining's motion for partial summary judgment is denied, with leave to renew upon a showing or stipulation that all subcontractors have been paid and no mechanics' liens are outstanding against the Premises. Assuming the truth of the Owner's uncontroverted allegations of unpaid subcontractors and mechanic's liens, it would be inappropriate for the court to order partial summary judgment at this early stage, considering the possibility that the Owner could then be subject to claims and liens which it had already paid Silverlining to satisfy. Silverlining has made a prima facie showing that the Certification is based on a misrepresentation involving Silverlining's fulfillment of its contractual obligation to pay subcontractors. It is immaterial to the motion for partial summary judgment whether that misrepresentation was fraudulent, negligent, or merely inadvertent. As a matter of discretion, the court may withhold

“partial summary judgment when there is a counterclaim to be resolved and when there is a reason, apparent from the record, for concluding that if the partial summary judgment were to be entered, it might result in some prejudice, financial or otherwise, to the party against whom the partial summary judgment is granted if the party subsequently prevails on its unsettled claims”

(*Trans World Maintenance. Servs., Inc. v Luna Park Hous. Corp.*, 157 AD2d 586, 587 [1st Dept 1990]). The Owner's Action is the functional equivalent of a counterclaim in this context.

It is also immaterial to these motions whether the Owner was entitled to terminate the Contract. The Owner has sufficiently alleged that Silverlining's breaches occurred prior to the termination notice, and Silverlining has not established as a matter of law that it substantially completed the work prior to the alleged breaches.

In the Owner's Action, Silverlining's motion, pursuant to CPLR 3024 (b), to strike allegedly irrelevant and inflammatory matter is granted. Silverlining lists 12 instances in the Owner's complaint that it seeks to strike as irrelevant and unnecessarily inflammatory (Cohen aff. ¶ 26 [i-xii]), including such emphatic characterizations as "amateurish," "underhanded tactics," "downright dishonest," and characterizations of the emotional effects on the Owner's family. These characterizations, that have no probative value to weigh against their inflammatory potential, even if they were ultimately to be admitted at trial, are neither precluded from admission at trial by having been stricken, nor necessary at the pleading stage to establish the sufficiency of the Owner's cause of action (*see Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]).

The items listed in the Cohen affidavit are stricken from the complaint, and the Owner is directed to serve and file a complying revised complaint.

Silverlining's motion to dismiss the third and fourth causes of action, pursuant to CPLR 3211 (a) (1) and (a) (7), is granted.

The third cause of action, alleging willful exaggeration of a mechanic's lien is dismissed for failure to state a cause of action against Silverlining. This is a statutory cause of action, pursuant to Lien Law 39-a, which "by its terms, only permits a willful exaggeration claim to be asserted in an action to enforce a mechanics' lien, namely, a foreclosure action [internal quotation marks omitted]" (*Wellbilt Equip. Corp. v Fireman*, 719 NYS2d 213, 216 (1st Dept 2000)).

The fourth cause of action alleges that Angell fraudulently certified the Payment Application. Under New York law, the elements of a fraud cause of action are:

"a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury"

(*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016] [internal quotation marks and citation omitted]).

Silverlining argues that the alleged fraud is not based on any duty outside of the Contract. "It is well settled that a cause of action to recover damages for fraud may not be maintained when the only fraud charged relates to a breach of contract [citations omitted]" (*Alamo Contract Builders, Inc. v CTF Hotel Co.*, 242 AD2d 643, 644 [2d Dept 1997]).

The fourth cause of action is dismissed because the alleged fraud was not collateral or extraneous to the contract, did not allege any damages, including those for foregone opportunities that would not be recoverable under a contract measure of damages, and failed to plead a breach of duty separate from a breach of the contract (*Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept 2001] [internal citations omitted]).

Accordingly, it is

ORDERED that Silverlining's motion in the Silverlining Action (657210/2017), for partial summary judgment, is denied; and it is further

ORDERED that Silverlining's motion, in the Owner's action (650944/2018), to strike certain allegedly inflammatory and irrelevant allegations is granted, in its entirety, as set forth above; and it is further

ORDERED that Silverlining's motion, in the Owner's Action (650944/2018), to dismiss the third and fourth causes of action, pursuant to CPLR 3211 (a) (1) and (a) (7), is granted; and it is further

ORDERED that the cross-motion of 30 Grove Street LLC to consolidate the two actions is granted only to the extent that the two actions are joined for disclosure and trial, and the motion is otherwise denied; and it is further

ORDERED that the third and fourth causes of action in the Owner's Action (650944/2018) are dismissed; and it is further

ORDERED that Silverlinings Interiors, Inc. must serve a copy of this decision and order on the County Clerk's office and the General Clerk's office, which are directed to amend their records accordingly.



12/14/2018

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE