

Young Lumber v. Chris Dekker, et al.

C.A. No. 05L-02-014

September 7, 2005

ORDER

1. The defendant, Anthony D'Agostino ("D'Agostino"), has filed this motion requesting the Court dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6). The original Complaint and claim for a Mechanic's Lien was filed by William Young Co. ("Young Co.") on February 2, 2005 naming Chris Dekker d/b/a Dekker Construction ("Dekker") and Anthony D'Agostino, the homeowner, as defendants.

2. On September 12, 2004, D'Agostino and Dekker had contracted for the construction of an addition on D'Agostino's home. Young Co. provided lumber to Dekker to be used in the project. D'Agostino canceled the contract on January 21, 2004. Payments were made by D'Agostino to Dekker pursuant to a contract payment schedule. The amount of payments made is in dispute. The record contains copies of checks submitted by D'Agostino to Dekker totaling \$20,000. Another \$60,000 is alleged to have been paid to Dekker in cash. The record contains a certificate signed by Dekker and D'Agostino stating that Dekker had been paid in full for all "work, labor, materials and services to date" but there is no other evidence of the \$60,000 cash payments.

3. The underlying action was initiated by Young Co. after checks written by Dekker to pay Young Co. bounced due to insufficient funds. The plaintiff seeks to recover against Dekker for breach of contract and against Dekker and D'Agostino under the doctrines of *quantum meruit* and *quantum valebant*. He also demands a Mechanic's Lien against the structure and land owned by D'Agostino. Dekker filed a Chapter 13 bankruptcy on June 1, 2004.

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3. D'Agostino argues that the plaintiff's action against him is barred because he paid Dekker in good faith for work performed, citing *25 Del. C. § 2707* for support. He further argues that, as the homeowner, he is protected against claims of subcontractors when he has made payment to the general contractor citing *6 Del. C. § 3503*. Finally, he argues the plaintiff has not met the requirements of *25 Del. C. § 2717(b)* requiring the plaintiff to annex a bill of particulars to the Complaint.

4. The plaintiff responds that the motion is not properly before the Court because, pursuant to Superior Court Civil Rule 16.1, prior to assignment to arbitration or prior to the filing of the last responsive pleading, the Court shall only hear non-dispositive motions. He next argues that the motion should be stayed pending a determination on his Motion for Relief from the Automatic Stay in Bankruptcy Court. On the merits of the motion, counsel for the plaintiff argues that Dekker informed them the reason he did not pay the plaintiff was because he did not receive payment from D'Agostino. He contends that the motion should be denied to allow time for further discovery to test the veracity of this statement.

4. The Court finds that the Motion is properly before the Court and not precluded by Rule 16.1 as the case has not yet been assigned to an arbitrator. The motion is also not barred by the Automatic Stay in Bankruptcy Court. Considering the bankruptcy filing by Dekker, any actions relating to the suit against Dekker should be stayed. The instant action, however, concerns only Young Co. and D'Agostino and is appropriately before the Court. Finally, the failure to specifically comply with the bill of particulars requirement does not warrant a dismissal of the action.

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5. Turning to the merits of the motion, the motion has been filed with supporting affidavits and exhibits. As such, it will be treated as a motion for summary judgment.¹ Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.²

6. A majority of the contract payments made by the homeowner, D'Agostino, to the contractor, Dekker, were allegedly paid in cash. There is insufficient evidence in the record at this time to determine that these payments were indeed paid. Furthermore, Young Co. presents a genuine issue of material fact regarding the cash payments. Should it later be found that payment in full was not made to Dekker, D'Agostino would not have the protection of 25 *Del. C.* § 2707 or 6 *Del. C.* § 3503. Since I conclude that the motion should be denied on its merits, I do not address the procedural issue raised by the plaintiff.

7. The motion to dismiss D'Agostino as a party is ***denied***.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File

¹ *Venables v. Smith*, 2003 Del. Super. LEXIS 131.

² Superior Court Civil Rule 56(c).