

Isogon Interim, LLC v Crnkovic

2004 NY Slip Op 30348(U)

August 10, 2004

Supreme Court, New York County

Docket Number: 122109/03

Judge: Herman Cahn

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

PRESENT: MIRIAM CAHILL

PART 49

0122109/2003

ISOGON LLC.
vs
CRNKOVIC, CEDEMIR

INDEX NO. _____

MOTION DATE 5/17/04

SEQ 1

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

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

Dated: 8/10/04

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
ISOGON INTERIM, LLC,

Plaintiff,

-against-

Index No. 122109/03

CRNKOVIC, CEDEMIR,

Defendant.

-----X
CAHN, J.

Defendant, in this action to enforce a mechanic's lien, move to dismiss the complaint and discharge the lien on the grounds that plaintiff is not a proper party, and that the complaint fails to state a cause of action upon which relief may be granted.

CPLR 3211 (a) (1), (7).

The complaint alleges the following relevant facts:

On April 24, 2003, plaintiff Isogon L.L.C. (Isogon) contracted with defendant Cedemir Crnkovic and his wife, Valerie Rubsamen to repair and alter the premises owned by defendants, located at 327 Central Park West, Unit PH C&D, in Manhattan. Defendants promised to pay Isogon \$437,572.82 for the work.

Plaintiff performed the work, labor and services it contracted to perform, but defendants have refused to pay plaintiff the balance due of \$329,143.76, with interest from September 4, 2003.

Plaintiff filed a notice of lien against defendants' property on September 9, 2003,

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within four months after final performance of the work, and the final furnishing of the material. The notice of lien was docketed in the County Clerk's office, and a copy was served upon defendants by certified mail.

Plaintiff seeks to enforce the lien.

Defendants move to dismiss, claiming that they never signed a contract with an entity known as Isogon, L.L.C. Defendants claim that they signed a home improvement contract with "Isogon Interim L.L.C.," and that plaintiff has failed to allege that it is licensed by the City of New York as a home improvement contractor, citing New York City Administrative Code § 20-385 and § 20-387.

Plaintiff has cross-moved to amend the complaint to name "Isogon Interim L.L.C." as the plaintiff and to alleged that plaintiff is a licensed home improvement contractor, and to deny defendants' motion to dismiss.

Leave to amend pleadings is to be freely given, in the absence of prejudice or surprise, upon a showing that the proposed amendment has merit. *Centrifugal Assoc., Inc. v Highland Metal Indus., Inc.*, 193 AD2d 385 (1st Dept 1993); CPLR 3025 (b). Defendants have not offered any objection to the application to amend the complaint to reflect plaintiff's true name, "Isogon Interim L.L.C.," and that branch of plaintiff's application is granted.

With respect to the branch of the motion which seeks to amend the complaint to allege that plaintiff is a licensed home-improvement contractor, plaintiff claims that it

was licensed in Westchester County when it entered into the contract with defendants, that its principal was licensed in New York City at all relevant times, and that it acquired a New York City license after it was no longer at work on this contract. None of these circumstances satisfies the licensing requirements of the Administrative Code with respect to home improvement contractors. NYC Admin Code § 20-385, § 20-387. That branch of the motion seeking to amend to allege that plaintiff was a licensed home improvement contractor is, therefore, denied.

Plaintiff argues that the contract was not a “home improvement contract,” within the meaning of the Administrative Code, since defendants were listed at several addresses in the New York City phonebook. In its reply, plaintiff raises for the first time that defendants have admitted that they were not living at the premises during the period in question.

A copy of the parties’ contract, (Exhibit “A” to defendant Rubsamen’s affidavit), identifies the project as “Renovations to the Rubsamen-Crnkovic Residence 327 Central Park West, Penthouse C/D.” Plaintiff has failed to offer evidence to rebut the plain language of the parties’ contract. Defendants have offered reasonable explanations for their numerous telephone listings and their occupancy at a different residence during construction of the premises. In any event, merely having multiple telephone listings would not by itself determine that the premises in question is not a residence. Plaintiff has failed to come forward with evidence to rebut these explanations.

There is no merit to plaintiff's objection that the premises were not defendants' primary residence. The statute does not limit the home improvement contractor's licensing requirement to work performed on primary residences.

Ayres v Dunhill Interiors, Ltd. (138 AD2d 303 [1st Dept 1988]), cited by plaintiff, does not require a different result. In *Ayres*, the apartment owner had commenced suit to stay arbitration, and the trial court had granted the apartment owner's motion to dismiss the arbitration proceeding. On appeal, the First Department found that the motion court had accepted the apartment owner's contention that she was the tenant of the apartment without a sufficient evidentiary basis. The owner had stated that she had moved into temporary quarters during the period in question. However, the contractor submitted proof that the owner also owned three other apartments on that same block, that all contract negotiations had taken place at the quarters alleged to be "temporary," which in fact were fully-furnished, and that the telephone directory listed that "temporary" apartment as plaintiff's residence for the period in question.

The contractor here has failed to offer any evidence of the quality or substance offered in *Ayres*.

Accordingly it is


ORDERED that plaintiff's motion is granted to the limited extent that the caption is to be amended to change plaintiff's name to "Isogon Interim, I.L.C.," and is denied in all other respects; and it is further

ORDERED that defendants' cross motion to dismiss the complaint is granted and the complaint is dismissed, and plaintiff's two liens against the subject premises are ordered to be discharged; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

ENTER

Dated: August 10, 2004



J.S.C.

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