

<b>Carducci v Bensimon</b>
2011 NY Slip Op 34077(U)
August 3, 2011
Sup Ct, Westchester County
Docket Number: 16079/10
Judge: Richard B. Liebowitz
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
ANTONIO CARDUCCI,

Plaintiff,

-against-

**FILED**

AUG - 8 2011

TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

**FILED  
AND  
ENTERED**  
ON Aug 8 2011  
**WESTCHESTER  
COUNTY CLERK**

DECISION AND ORDER  
Sequence No. 3 and No. 4

Index No. 16079/10

ABBE SOHNE BENSIMON and MICHAEL A.  
PICCIRILLO,

Defendants.

-----X  
LIEBOWITZ, J.

The following documents numbered 1 to 13 were read in connection the motion of defendant Abbe Sohne Bensimon ("Bensimon") for an Order pursuant to CPLR §3211 (a)(5) and (a)(8) dismissing the complaint against her, and plaintiff's cross-motion for an Order dismissing Bensimon's third affirmative defense.

Notice of Motion, Affidavits and Supporting Papers	1-10
Notice of Cross Motion, Affidavits and Supporting Papers	11-12
Reply Affidavits and Supporting Papers	13

Plaintiff, Antonio Carducci, brought the instant action seeking to recover damages in the amount of \$127,220.80 from defendant from Bensimon, and \$119, 070.80 from defendant Michael A. Piccirillo ("Piccirillo"). Plaintiff alleges that Bensimon owes him \$127,220.80 for

“extra work” performed at her home pursuant to a home improvement contract between Bensimon and T & M Carducci Construction (“T & M”). Plaintiff further alleges that Piccirillo guaranteed payment for the “extra work.”

On April 17, 2007, T & M Construction (“T & M”) and Bensimon executed a home improvement contract to renovate Bensimon’s house which is located at 70 East Ridge Road in Stamford, Connecticut. The contract was executed in Harrison, New York. Plaintiff signed the contract on behalf of T & M. Plaintiff began work on Bensimon’s house on September 4, 2007. It is unclear as to the exact date plaintiff last worked.

On November 10, 2008, plaintiff filed a Claim of Lien in Connecticut in the amount of \$127,220.80 against the property (the “mechanic’s lien”), which property is owned by Bensimon. Thereafter, Bensimon brought an application in the Connecticut Superior Court for an Order discharging the mechanic’s lien on the grounds that the home improvement contract did not comply with the Connecticut Home Improvement Act. The matter was heard by the Connecticut Court on March 9, 2009.

In opposition to the motion to discharge the mechanic’s lien, plaintiff argued that Bensimon acted as a general contractor, and thus, the Connecticut Home Improvement Act did not apply. He further argued that Bensimon did not act in good faith by stopping payment on a check and hiring her own subcontractors. Additionally, plaintiff argued that Bensimon’s course of conduct effectively carved out an exception to the Act’s requirement that the entire agreement be in writing.

After an evidentiary hearing, the Connecticut Court found that there was no probable cause for a mechanic’s lien because the “contract doesn’t even come close to meeting the Home Improvement Act.” The Court further stated that “this law is over 20 years old now

and there's just no excuse for this contract". As such, the Connecticut Court granted Bensimon's application to discharge the mechanic's lien.

It is well settled in New York that a "judgment in one action is conclusive in a later one...when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interest established in the first." Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 306-307 (1929). *Res Judicata* prevents parties from re-litigating claims and/or issues arising out of the same transaction or series of transactions, that have already been litigated to conclusion. McNally Intl. Corp. v. New York Infirmary Beekman Downtown Hospital, 145 A.D.2d 417 (2<sup>nd</sup> Dept.,1988). "When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping' [citation omitted], the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions". McNally, id. citing O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357-358 (1981).

Plaintiff contends that the proceeding held before the Connecticut Court was solely to determine the existence of probable cause to file a mechanic's lien against Bensimon's property. In the instant case, plaintiff is seeking to recover damages based on breach of contract, account stated and unjust enrichment. Plaintiff maintains that the hearing on the mechanic's lien did not afford him the opportunity to fully argue the merits of his case. Although the mechanic's lien and resulting hearing to discharge said lien in the Connecticut Court arose from the contract between Carducci and Bensimon, the discharge of the mechanic's lien does not bar plaintiff's claims in the instant action based upon work he allegedly performed for which he allegedly has not received just compensation. Therefore, Bensimon's motion to dismiss this action based on

the grounds of *res judicata* is denied.

A defendant may move to dismiss an action based on the grounds that the Court does not have personal jurisdiction over him. CPLR §3211(a)(8). CPLR §3211(e), in pertinent part, states that “[at] any time before the service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted” [emphasis supplied]. In the instant case, Bensimon filed two (2) motions to dismiss on the grounds of *res judicata*, one of which was subsequently withdrawn by her. However, neither motion raised the issue of lack of personal jurisdiction. As such, Bensimon has subjected herself to the jurisdiction of the Court and her application to dismiss the action on the grounds of lack of personal jurisdiction is denied. Given this result, plaintiff’s cross motion to dismiss Bensimon’s third affirmative defense asserting lack of personal jurisdiction is granted.

As defendant is properly before this Court, all parties except Bensimon reside in this state and the contract was executed here, New York is a proper forum for this matter. Therefore, Bensimon’s application to dismiss the instant action on the grounds of *forum non conveniens* is also denied.

On the basis of the foregoing, it is hereby

ORDERED that the motion of defendant Abbe Sohne Bensimon for an Order pursuant to CPLR §3211 (a)(5) and (a)(8) dismissing the complaint is denied; and it is further

ORDERED that plaintiff’s cross motion for an Order dismissing Bensimon’s third affirmative defense is granted; and it is further

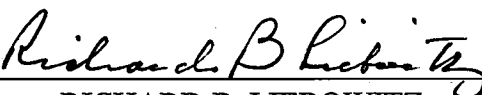
ORDERED that the third affirmative defense is dismissed; and it is further

ORDERED that the parties shall appear for a preliminary conference in this

matter in the Preliminary Conference Part, Room 808, on September 14, 2011 at 9:30 a.m.

This constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
August 3, 2011

  
RICHARD B. LIEBOWITZ  
SUPREME COURT JUSTICE

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Preliminary Conference Part