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.HORT FORM ORDER

COPY

INDEX # 15005-10
RETURN DATE: **4-15-11**
MOT. SEQ. # **003 & 004**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

----------x
EAST END CEMENT AND STONE, INC.,

Plaintiff,

-against-

RALPH DESTINO,

Defendant.

----------x

CALENDAR DATE: August 31, 2011
MNEMONIC: MG ;XMD

PLTF'S/PET'S ATTORNEY:
Stim & Warmuth, PC
2 Eighth Street
Farmingville, New York 11738

DEFT'S/RESP ATTORNEY:
Lewis Johs Avallone Aviles, LLP
425 Broad Hollow Road, Suite 400
Melville, New York 11747-4712

Upon the following papers numbered 1 to 31 read on this motion to dismiss and cross motion for default ; Notice of Motion/Order to Show Cause and supporting papers 1-11 ; Notice of Cross-Motion and supporting papers 12-20 ; Answering Affidavits and supporting papers 21-28 ; 29-31 ; Replying Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the defendant, Ralph Destino, seeking to dismiss the plaintiff's first cause of action sounding in oral contract and partially as to the third cause of action sounding in quantum meriut pursuant to CPLR §3211 (a)(1) and (a)(7) because the plaintiff, East End Cement and Stone, Inc., is an unlicensed home improvement contractor is granted in its entirety and the plaintiff's first and third (in part) causes of action for monies allegedly owed pursuant to an alleged home improvement agreement are dismissed.

The plaintiff instituted this action seeking to recover monies allegedly owed for materials, labor and supplies associated with the renovation of the defendant's residence located at 972 Noyac Road in Watermill, Suffolk County on Long Island, New York. The plaintiff alleges that it provided concrete, labor and supplies in improving the defendant's home by installing a patio, vault roof with decking and poured concrete as well as putting in footings to support stone ledges, steps and a wall for a full basement. The contract price for the work was $54,340.00 of which $19,870.00 was paid leaving a balance owed of $34,470.00. The plaintiff also alleges that the defendant ordered $12,500.00 worth of trees for his property using the plaintiff's account with Bissett Nurseries. When the defendant failed to pay the amounts owed, the plaintiff instituted this lawsuit with the service of a summons and complaint alleging three causes of action. The first cause of action sounds in an oral contract for the monies left owing, the second cause of action seeks $12,500.00 for the improper charges to the plaintiff's account for trees ordered by the defendant and the third cause of action alleges a quantum meriut claim for the amounts owed under an account stated for the amounts owed in the first cause of action seeking $34,470.00 plus the $12,500.00 alleged in the second cause of action for the trees amounting to a total claim for $46,970.00.

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When the defendant defaulted in answering the complaint, the plaintiff obtained a Clerk's judgment in the amount of $57,138.12 on July 13, 2010 which was entered on July 27, 2010 in the Office of the Suffolk County Clerk (New York) based upon monies allegedly due and owing for goods and services received from the plaintiff. The defendant thereafter moved to vacate his default and in an order, dated December 30, 2010, this Court vacated the defendant's default and reinstituted the action.

The defendant now moves for dismissal of the first cause of action and so much of the third cause of action which seeks $34,470.00 of the monies owed for the renovation work pursuant to CPLR §3211 (a)(1) and §3211 (a)(7) for failure to comply with the pleading requirements of CPLR §3015(e) and the licensing requirements for the work performed. The plaintiff opposes the requested relief arguing it is only a subcontractor and therefore is not required to be licensed as the pool contractor was licensed. The defendant argues in reply that the plaintiff is not licensed, was not a subcontractor but did the work and billed the defendant directly, and has failed to even establish that the pool contractor was licensed. The defendant argues, in any event, that CPLR §3015(e) requires the plaintiff to plead the licensing requirements to perform the work.

The plaintiff also cross-moves for a default judgment or requests the reinstatement of its prior default judgment pursuant to CPLR §3215 because the defendant failed to provide his answer to the complaint within the time constraints imposed by this Court's order of December 30, 2010 requiring the filing of an answer within twenty days of service of the order. The defendant opposes that requested relief arguing that a pre-answer motion seeking dismissal under CPLR §3211 relieved him of his obligation to file the appropriate answer pending receipt of the Court's decision on his motion to dismiss.

For the following reasons, the defendant's motion to dismiss the plaintiff's complaint as to the first cause of action and so much of the third cause of action seeking the amounts owed under the first cause of action in quantum meruit pursuant to CPLR §3211 on the grounds of documentary evidence and failure to state a cause of action for failure to provide a "***valid***" home improvement license is granted in its entirety and the plaintiff's action is dismissed as to the first cause of action and part of the third cause of action as plaintiff is barred from recovery on those causes of action as an unlicensed home improvement contractor. In light of the Court's decision, the plaintiff's cross-motion for a default judgment pursuant to CPLR §3215 is denied; however, the defendant shall file his answer to the remaining causes of actions in the complaint within ten days of receipt of a copy of this order.

CPLR §3015(e) requires that an action commenced against a consumer by the plaintiff in the conduct of a business which is required by state **or local law** to be licensed provides in pertinent part:

> "The complaint shall allege, as part of the cause of action, that the plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license."

Here, in the case at bar, the plaintiff's complaint does not indicate that it is licensed. However the plaintiff claims to have been working under the pool contractor (Pools by Paul Guillo Inc., License # 000070-0) who was licensed as a subcontractor. The defendant disputes this, asserting that the plaintiff contracted to do patio, deck and awning work, not pool work, as evidenced by the invoices submitted and that the billing invoices were not sent through the pool contractor but were directly sent to the defendant homeowner.

The Town of Southampton, New York (hereinafter Town) Code §143-1 and §143-2 requires a home improvement contractor to be licensed by the Town Licensing Review Board to perform such home improvement work. The Town Code §143-1 defines home improvement work as

> "The repairing, remodeling, altering, converting or modernizing of, or adding to, residential property and shall include... awnings... decks... renovations... water weatherproofing... terraces, patios, landscaping, fences, porches..."

and Town Code §143-1b exempts from the provisions of Town Code §143-1 the

> "sale of goods to a home improvement contractor by a supplier who neither arranges to perform nor performs, directly or indirectly, any work or labor in connection with the installation... ."

Thus the Town Code identifies material men who provide only supplies but no labor as exempt from any licensing requirement under Town Code §143-2 which requires a license for all persons engaged in the home improvement business. The plaintiff cannot support an argument that it was only a material provider since it not only provided the supplies, but also provided and performed the labor and billed for the work it performed directly to the defendant homeowner. A simple review of the invoices billed by the plaintiff to the defendant demonstrates that on April 9, 2008 under Invoice # 5596 billings for "labor to layout and form, pour all footings, walls, stone ledges, steps and etc."; "labor for machine to tamp and backfill patio area & step for concrete." Under Invoice #5584 revised, dated April 7, 2008, the plainitff billed the defendant for "bags of peat moss" and "unloading and stacking trees" as well as yards of top soil involving landscaping of the defendant's property. The plaintiff by David Schiavoni, in his affidavit in opposition to the defendant's motion, claims that he was a material man only and that "I only provided concrete, steel, landscaping items such as trees, peat moss and topsoil. All of the labor was done by others." The invoices belie that statement as the plaintiff's charges reflect that labor was billed by the plaintiff to the defendant.

The law is well settled that an unlicensed contractor may not recover and strict compliance with the statutory scheme and licensing requirements will be upheld. The Court in ***Ellis v. Gold***, 204 AD2d 261, 611 NYS2d 587 (2nd Dept. 1994) succinctly stated that;

> "In ***Segrete v. Zimmerman***, 67 AD2d 999, 413 NYS2d 732, this court approved of an earlier decision of the Supreme Court **588(***Buffoleno v. Dening***, 82 Misc2d 472, 369 NYS2d 600) and held that a home improvement contractor who had not

> obtained the license required by virtue of a Nassau County ordinance had forfeited his right to recover damages either on a breach of contract theory or a quantum meruit theory."

and the Court went on to discuss the history and case applications of this rule of law and also reflected that the Court of Appeals had several opportunities to "reconsider or limit the scope" of the harsh application of the law and then further stated, *supra*, at 265;

> "From the foregoing, it is apparent that New York has taken a strict approach on this area of the law and that our 'courts have been adamant in their refusal to permit recovery under a contract * * * where the contractor is not licensed' " (citations omitted).

There is nothing to distinguish or limit the strict holding of the rule that an unlicensed contractor or subcontractor is barred from recovery under either contract or quantum meruit. ***Fisher Mechanical Corp. v. Gateway Demolition Corp. et al.***, 247 AD2d 579, 669 NYS2d 347 (2nd Dept. 1998). The plaintiff's attempt to claim it was a subcontractor of a licensed contractor, the pool company, is not only belied by the work performed and billed but is unavailing to an unlicensed subcontractor. ***JME Enterprises v. Kostynick Plumbing & Heating***, 273 AD2d 201, 708 NYS2d 696 (2nd Dept. 2000); ***Zimmett v. Professional Acoustics, LTD***, 103 Misc2d 971, 431 NYS2d 243 (1980). While denying unlicensed home improvement contractors the ability to receive payment for work completed is severe, the protection of the consumer is of paramount interest.

As the Court in ***Hakimi v. Cantwell Landscaping and Design, Inc.***, 50 AD3d 848, 855 NYS2d 273 (2nd Dept. 2008) noted, a home improvement contractor who is unlicensed at the time of performance of the work (in that case it was landscaping work) for which he seeks compensation forfeits the right to recover damages based on either breach of contract or quantum meruit, as well as the right to foreclose on a mechanic's lien. See also, ***Flax v. Hommel***, 40 AD3d 809, 835 NYS2d 735 (2nd Dept. 2007); ***Ben Krupinski Builder and Associates, Inc. v. Baum***, 36 AD3d 843, 828 NYS2d 583 (2nd Dept. 2007).

The Court is left with little discretion notwithstanding the unfairness that seems to result here. The plaintiff's failure to plead or prove it was licensed to perform the work at the defendant's home is fatal to its claims under the oral agreement and/or quantum meriut [See, ***Racwell Contr., LLC v Manfredi***, 61 AD3d 731, 878 NYS2d 369 (2nd Dept. 2009).]. Equally unavailing is any argument as to a lack of wilfulness which is not a defense to the failure to be licensed. See, ***Bujas v. Katz***, 133 AD2d 730, 520 NYS2d 18 (2nd dept. 1987), app. dis. 70 NY2d 1001, 526 NYS2d 437; ***Robert M. Padden Construction, Inc. v. Reitkopf***, 146 Misc 2nd 272, 274, 550 NYS2d 523 (1989).

Accordingly, the defendant's motion to dismiss the plaintiff's complaint as to the first cause of action sounding in contract and so much of the third cause of action seeking the amounts owed under the first cause of action in quantum meruit pursuant to CPLR §3211 on the grounds of documentary evidence and failure to state a cause of action for failure to provide a "***valid***" home improvement license is granted in its entirety and the plaintiff's action

is dismissed as to the first cause of action and part of the third cause of action as plaintiff is barred from recovery on those causes of action as an unlicensed home improvement contractor.

The plaintiff's cross-motion to reinstate the default judgment against the defendant pursuant to CPLR §3215 as to the remaining causes of action because the defendant failed to file his answer within the twenty days required in this Court's order vacating the default judgment entered by the Suffolk County Clerk, dated December 30, 2010, is denied.

CPLR §3211(f) states that:

> "Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order."

In ***United Equity Services, Inc. v. 1st American Title Ins. Co of NY***, 75 Misc2d 254, 347 NYS2d 377 (1973), the Court stated in addressing this very issue:

> "The question before this court is, 'Does Section 3211 (f) operate to extend a defendant's time to answer all causes of action in a complaint where the defendant has addressed a motion under CPLR §3211(a) to only one of the causes of the action?' In the Practice Commentary (McKinney's Cons. Laws of N. Y., Book 7B, CPLR §3211, C3211:72, p. 78) Professor Siegel sets forth 'the better construction would be that a CPLR 3211 motion made against any part of a pleading extends the time to serve a responsive pleading to all of it ... Thus, where defendant moves to dismiss cause of action #1, he should be able to rely on subdivision (f) and its extension of time to serve his answer to the other causes of action.' "

Therefore, the service of a pre-answer motion to dismiss the first cause of action and part of the third cause of action in the complaint pursuant to CPLR §3211 (a) extended the defendant's time to answer the complaint and the defendant is not in default in answering the complaint. See, ***De Falco v. JRS Confectionary***, 118 AD2d 752 , 500 NYS2d 143 (2nd Dept. 1986). The fact that the Court's order vacating the defendant's default contained a directive or executory language to file an answer within twenty days of the service of the order with notice of entry thereon did not abrogate the provisions of the CPLR generally or CPLR §3211(f) in particular. In any event, this Court's ability and power to extend time generally under the authority of CPLR §2004 makes the cross-motion legally unavailing.

Accordingly, the plaintiff's cross-motion for a default judgment pursuant to CPLR §3215 is denied in its entirety.

The foregoing constitutes the decision of the Court.

Dated: December 2, 2011

J.S.C.