

Evolution Constr. v Hewitt

2013 NY Slip Op 31014(U)

May 7, 2013

Supreme Court, Suffolk County

Docket Number: 4267/2011

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

EVOLUTION CONSTRUCTION AND
REMODELING CORP.,

Plaintiff,

-against-

JOHN P. HEWITT and JUSTINE HEWITT,
his wife, MELISSA GENSMAN MARTIN and
CHRISTOPHER GENSMAN, THE PEOPLE
OF THE STATE OF NEW YORK BY THE
ATTORNEY GENERAL OF STATE OF NEW
YORK, CITI MORTGAGE, INC., and JOHN
DOE and JANE DOE, said names being
fictitious the true names being unknown to the
Plaintiff, it being intended to designate
tenants and persons in possession of the
premises which are the subject of this action,

Defendants.

ORIG. RETURN DATE: APRIL 19, 2011
FINAL SUBMISSION DATE: JUNE 14, 2012
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: MAY 19, 2011
FINAL SUBMISSION DATE: JUNE 14, 2012
MTN. SEQ. #: 002
MOTION: MG

ORIG. RETURN DATE: MAY 19, 2011
FINAL SUBMISSION DATE: JUNE 14, 2012
MTN. SEQ. #: 003
CROSS-MOTION: XMD

ORIG. RETURN DATE: JANUARY 26, 2012
FINAL SUBMISSION DATE: JUNE 14, 2012
MTN. SEQ. #: 004
MOTION: MG

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COMPANY AND PDE TITLE SERVICES, LLC:

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Upon the following papers numbered 1 to 26 read on these motions FOR A TURNOVER ORDER, DISMISSAL, LEAVE TO SERVE A LATE ANSWER, AND OTHER RELIEF.
Order to Show Cause and supporting papers 1-3; Affirmation in Opposition 4; Reply Affirmation and supporting papers 5, 6; Notice of Motion to Dismiss and supporting papers 7-9; Memorandum of Law in Support 10; Affidavit in Opposition and supporting papers 11, 12; Reply Affirmation 13; Notice of Cross-motion and supporting papers 14-16; Memorandum of Law 17; Affirmation in Response to Cross-motion and supporting papers 18, 19; Reply Affirmation and supporting papers 20, 21; Order to Show Cause and supporting papers 22-24; Affirmation in Opposition and supporting papers 25, 26; it is,

ORDERED that this motion (seq. #001) by plaintiff, EVOLUTION CONSTRUCTION AND REMODELING CORP. ("plaintiff"), for an Order:

(1) directing PDE Title Services, LLC, of Melville, New York and Fidelity National Title Insurance Company of Riverhead and Westbury, New York to comply with the demand and claim of plaintiff, and to pay all funds due and owing to plaintiff, as Mechanic's Lienor, against a certain escrow fund held by the aforesaid title services and title insurance company, PDE Title Services, LLC, of Melville, New York and Fidelity National Title Insurance Company of Riverhead and Westbury, New York, as fiduciaries under the provisions of the Insurance Law of the State of New York; under the terms of said escrow agreement and subject to the statutory provisions of the Lien Law of the State of New York, *inter alia*, Lien Law § 76 *et seq.*, alleged upon information and belief to be in the sum of \$73,000.00, being approximately double the amount specified, of record, in plaintiff's Mechanic's Lien, is being held by said title companies;

(2) directing that PDE Title Services, LLC, of Melville, New York and Fidelity National Title Insurance Company of Riverhead and Westbury, New York account to plaintiff for said escrow funds held for the payment of plaintiff's Mechanic's Lien, aforesaid, and to tender to plaintiff a true copy of said escrow agreement, all of which said title insurance companies and agency have heretofore refused;

(3) directing that PDE Title Services, LLC, and Fidelity National Title Insurance Company be joined as defendants and necessary parties herein, pursuant to CPLR 1006, and that PDE Title Services, LLC, and Fidelity National Title Insurance Company be restrained and enjoined from paying over to any person or entity, excepting plaintiff, any sums in the aforesaid escrow account in

their possession and/or control on the date of these presents, without further Order of this Court;

(4) directing that plaintiff have judgment against PDE Title Services, LLC, and Fidelity National Title Insurance Company, for all sums due and owing plaintiff, by reason of the aforesaid Mechanic's Lien of plaintiff, and for the counsel fees and the costs and disbursements of this action incurred by plaintiff, and awarding to plaintiff, as against said title companies, the actual counsel fees, costs, disbursements incurred by plaintiff in connection with this motion, by reason of:

(a) the intentional and wilful refusal of PDE Title Services, LLC, and Fidelity National Title Insurance Company, to pay the claim of plaintiff, as against said escrow deposit, as to the amounts due and owing to plaintiff, by reason of plaintiff's Mechanic's Lien and claim, after due and express written Demand having been made by plaintiff upon them for same;

(b) PDE Title Services, LLC, and Fidelity National Title Insurance Company refusing to pay such Mechanic's Lien claim of plaintiff, as is required by the Insurance Law of the State of New York; as is further required under their fiduciary duty and duties as Escrowee, pursuant to the Insurance Law, to plaintiff and to the purchasers/current title holders, defendants JOHN P. HEWITT and JUSTINE HEWITT, with respect to said escrow fund held by said title companies; and

(c) PDE Title Services, LLC, and Fidelity National Title Insurance Company wilfully refusing to provide to plaintiff, and his attorney upon Demand duly made, a true copy of the Escrow Agreement, with which this motion is concerned as well as payment of all sums due under plaintiff's Mechanic's Lien, contrary to law and in violation of their fiduciary duties and duties as Escrowee, to plaintiff, all of which made this motion necessary, financial burden on plaintiff for which plaintiff should be recompensed by said title companies,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #002) by defendant MELISSA GENSMAN MARTIN ("defendant") for an Order, pursuant to CPLR 3015 (e) and 3211 (a) (7), dismissing the complaint of plaintiff, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #003) by non-parties Fidelity National Title Insurance Company and PDE Title Services, LLC for an Order directing PDE Title Services, LLC: (1) to bond the Mechanic's Lien that is the subject of this foreclosure action; (2) to deposit an escrow fund with the Court; or (3) for injunctive relief authorizing PDE Title Services, LLC to deposit an escrow fund with the Court or with the attorneys for the parties herein in escrow, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this motion (#004) by defendant for an Order, pursuant to CPLR 3012 (d), extending defendant's time to answer the Amended Verified Complaint, as well as compelling plaintiff's acceptance of her Verified Answer to the Amended Verified Complaint, is hereby **GRANTED** for the reasons set forth hereinafter.

On April 5, 2011, the Court (Spinner, J.) issued the following temporary restraining Order:

Pending the Hearing and determination on [plaintiff's] Order to Show Cause and Motion, LET PDE Title Services, LLC, and Fidelity National Title Insurance Company Inc. and their agents, servants and or employees be and they hereby are, RESTRAINED ENJOINED AND STAYED from paying over any sums in the aforesaid escrow account, presently in their possession or control, except to the Plaintiff herein, without and until further Order of this Court.

Plaintiff commenced this action on or about February 8, 2011, seeking to foreclose a Mechanic's Lien upon real property. In particular, plaintiff seeks to foreclose its Mechanic's Lien filed on or about March 25, 2010, in the

total amount of \$36,635.71, against the real property commonly known as 50 Bellwood Avenue a/k/a 50 Bellewood Avenue, South Setauket (Centereach), New York ("Premises"). Plaintiff alleges that defendant and defendant CHRISTOPHER GENSMAN were the former owners of the Premises, who contracted with plaintiff to perform certain renovations, improvements and repairs to the Premises. Plaintiff indicates that defendant CHRISTOPHER GENSMAN is the father of the grandson of Raphael DeMeglio, who is the president of plaintiff. The GENSMAN defendants conveyed title to the Premises to the HEWITT defendants on or about February 11, 2011, allegedly subject to plaintiff's lien. Upon the sale of the Premises, the GENSMAN defendants deposited the sum of \$73,271.42 in an escrow account with PDE Title Services, LLC, as title agent for Chicago Title Insurance Company, the entity that issued an owner's title insurance policy to the HEWITT defendants. Fidelity National Title Insurance Company was not a party to the subject escrow agreement. PDE Title Services, LLC informs the Court that it was in the process of bonding the Mechanic's Lien when it was served with plaintiff's instant application, and seeks to either finish that process or to deposit the escrow funds with the Court.

Plaintiff contends that the work was performed pursuant to an "oral family agreement," at an agreed-upon price of \$36,635.71. Plaintiff claims that it fulfilled all of its obligations under the family agreement from or about April 13, 2009 through on or about December 30, 2009, but that the GENSMAN defendants wholly failed to pay plaintiff therefor. As such, plaintiff filed a Mechanic's Lien for the purported full amount of the contract price.

The Court has received the applications described hereinabove. Initially, with respect to defendant's motion to extend her time to answer the Amended Complaint, as well as to compel plaintiff to accept her Verified Answer to the Amended Verified Complaint, CPLR 3012 (d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR 3012 [d]). Here, the Court finds that defendant has proffered a reasonable excuse for the minimal delay in service of her answer, to wit: the serious medical condition of her former attorney at the time which required hospitalization. CPLR 2005 provides in pertinent part that, "[u]pon an application satisfying the requirements of subdivision (d) of section 3012 . . . the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure."

Therefore, given the lack of willfulness on the part of defendant, and the strong public policy in favor of resolving cases on the merits, defendant's motion is **GRANTED** to the extent that her default in appearing herein is vacated (see *Giacopelli v Guiducci*, 36 AD3d 853 [2007]; *Giladi v City of New York*, 34 AD3d 733 [2006]; *Jolkovsky v Legeman*, 32 AD3d 418 [2006]; *Kaiser v Delaney*, 255 AD2d 362 [1998]; *I.J. Handa, P. C. v Imperato*, 159 AD2d 484 [1990]; see also *2M Realty Corp. v Boehm*, 13 AD3d 361 [2004]). Defendant's Verified Answer to the Amended Verified Complaint is deemed timely served upon plaintiff *nunc pro tunc*.

Next, regarding defendant's motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (see *Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]).

This Court is persuaded by defendant's argument that the matter must be dismissed as plaintiff does not possess a valid home improvement license from Suffolk County. Pursuant to Section 345-17 of the Laws of Suffolk County, it is unlawful for any person to engage in any business as a home improvement contractor without obtaining a license therefor. Here, defendant alleges that plaintiff does not possess a valid home improvement license, and plaintiff has not denied this allegation. Plaintiff has not alleged such a license in its complaint, in response to the instant motion to dismiss, or in its Amended Complaint. In addition, plaintiff failed to plead in the complaint or the Amended Complaint its license number or the governmental agency that issued its license, in violation of CPLR 3015 (e). Moreover, the failure of a contractor to enter into a signed written home improvement contract in conformity with General Business Law § 771 bars recovery based upon breach of contract, although the contractor may be able to recover under a theory of *quantum meruit* (see General Business Law § 771; *Frank v Feiss*, 266 AD2d 825 [1999]).

However, as it is undisputed that plaintiff was not licensed as a home improvement contractor in Suffolk County at the time the work was performed at the Premises, plaintiff cannot now recover any damages from the GENSMAN defendants, either under a breach of contract theory or in *quantum meruit* (see *B & F Bldg. Corp. v Liebig*, 76 NY2d 689 [1990]; *Richards Conditioning Corp. v Oleet*, 21 NY2d 895 [1968]; *Ben Krupinski Bldr. & Assoc., Inc. v Baum*, 36 AD3d 843 [2007]; *Callos, Inc. v Julianelli*, 300 AD2d 612 [2002], *lv denied* 100 NY2d

502 [2003]; *Durao Concrete, Inc. v Jonas*, 287 AD2d 481 [2001]; *Todisco v Econopouly*, 155 AD2d 441 [1989]; *CLE Assoc., Inc. v Greene*, 2006 NY Slip Op 52541[U] [Sup Ct, Kings County 2006]). Furthermore, plaintiff has failed to cite any authority for the proposition that an "oral family agreement" renders the licensing statutes inapplicable. Accordingly, even upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submission (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), the Court finds that plaintiff has failed to state a claim to foreclose a Mechanic's Lien.

Wherefore, this motion by defendant to dismiss the instant action is **GRANTED**, as plaintiff is unable to demonstrate that it possessed a valid home improvement license in Suffolk County during the subject time period. In view of the foregoing, these motions by plaintiff and non-parties Fidelity National Title Insurance Company and PDE Title Services, LLC are both **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: May 7, 2013



HON. JOSEPH FARNETI
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION