Troy Calabria v International Fidelity Ins. Co.
2013 NY Slip Op 31862(U)
August 12, 2013
Sup Ct, Suffolk County
Docket Number: 15574/2011
Judge: Andrew G. Tarantino
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At **PART 17** of the County Court of the County of Suffolk, at 235 Griffing Avenue, Riverhead, NY, on August 12, 2013.

PRESENT

Hon. Andrew G. Tarantino, Jr.,
Judge.

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Index No: **15574/2011**

TROY CALABRIA, D/B/A
TOTAL LANDSCAPING CARE

Plaintiff(s)

-against-

INTERNATIONAL FIDELITY INSURANCE COMPANY, MICHAEL J. O'BRIEN AND WANDA O'BRIEN

Defendant(s)

---:

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

Motion Seq # 004 Mot Dec

Appearances:

Mikel Hoffman, PC
Attorney for Defendants O'Brien
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Babylon NY 11702
(631)661-2121

Troy Calabria
Plaintiff, Pro se
11 Jareds Path
Brookhaven NY 11719

NATURE OF THE INSTANT PROCEEDING

This motion, pursuant to NY Civ. Pract. Laws & Rules (CPLR) §3212 was brought by Plaintiff seeking:

- Summary Judgment against Defendants for breach of contract, unjust enrichment and quantum meruit; and
- Summary Judgment against Defendants dismissing the counterclaim, brought pursuant to Lien Law §39, which alleged that Plaintiff wilfully exaggerated the amount of a Mechanic's Lien.

Defendants O'Brien opposed the motion. Both parties submitted affidavits by someone having personal knowledge of the facts and circumstance in this matter, and each submitted supporting documents. Defendant International Fidelity Insurance Company (IFIC) did not appear on the motion. The Court is aware that although named as a party, IFIC merely issued the bond which permitted discharge of the Mechanic's Lien, but was not a part of the controversy set forth herein. Hereinafter, Defendant(s) refer to Michael J. O'Brien and Wanda O'Brien.

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THE MOTION

In May 2010, Plaintiff presented an initial proposal to Defendants as follows:

Seed and Restore pathway	$ 245
Fill	$1,260
Grading and prep work	$ 495
Waste removal old pool	$ 790

(1) Fill by hand 70 yards @43 per yard $3,010? [sic]

Plaintiff completed the project at Defendant's residence on May 25, 2010. Of the above items, Plaintiff completed the "fill by hand" and the "grading and prep work." Therefore, as stated by Plaintiff, Defendants agreed to pay $3,807.31 for Plaintiff's services (such amount including sales tax). As its final bill, Plaintiff used the initial proposal, crossed out the items which it did not do on the project, and forwarded it to Defendants. Plaintiff's bill was for "fill by hand" of the pool for $3,010.00, and the related "grading and prep work" for $495.00, plus $302.31 tax. Defendants had made a down payment of $1,500.00 on May 23, 2010, therefore, Defendants owed a balance of $2,307.31. As contained in one of Defendants' emails, Plaintiff explained that the Defendants initially refused to pay the sales tax until advised by their accountant in Pennsylvania that the tax was required in New York State. Plaintiff stated that Defendants also initially tried to avoid paying the balance by claiming that the Plaintiff damaged the driveway. To demonstrate that Defendants' claim was untrue, Plaintiff submitted a copy of the Defendants' HUD-1 closing statement, dated June 23, 2010 when they sold their house, showing that there was no adjustment to the Defendants' selling price for a damaged driveway. On May 28, 2010, Defendants tendered payment of $1,510.00 which the Plaintiff rejected. Instead, Plaintiff filed a Mechanic's Lien which set forth the value of services as $3,807.31, and an unpaid amount of $4,117,31. Plaintiff explained that it set forth the full contract price because the Defendants' $1,500.00 down payment check had not yet cleared the bank when the lien was filed. Plaintiff also added costs of the lien which raised its total to $4,117.31. In order to clear title for the Defendants' sale of the house, Defendants obtained a bond on June 11, 2010, to discharge the Mechanic's Lien. This action was commenced May 12, 2011.

Defendants claimed that the original estimate upon which they agreed was only for $3,010.00. As proof, Defendants submitted a copy of the initial proposal which set forth the following:

Seed and Restore pathway	$ 245
Fill	$1,260
Grading and prep work	$ 495
Waste removal old pool	$ 790

(1) Fill by hand 70 yards @43 per yard $3,010? [sic]

On May 23, 2010, Defendant made a down payment in the amount of $1,500.00. Defendants acknowledged that they received a final invoice for $3,807.31 ("fill by hand" for $3,010.00, plus "grading and prep-work" for $495.00, plus $302.31 tax). However, they claimed that the Plaintiff "unilaterally changed" the agreement. On May 28, 2010, Defendants tried to pay Plaintiff $1,510.00, which the Plaintiff refused and, instead, filed a Mechanic's Lien. Defendants claimed that they are entitled to damages for an exaggerated lien, and that they have incurred the costs of the annual premium for the bond.

PRIOR PLEADINGS

Plaintiff filed a verified complaint on May 12, 2011. Plaintiff alleged breach of contract, *quantum meruit*, unjust enrichment, and foreclosure of the Mechanic's Lien.

Defendants' July 6, 2011, amended verified answer included a counterclaim that the Plaintiff wilfully exaggerated the amount of the Mechanic's Lien and was, thereby, void. Defendants did not counter-claim for any property damage.

ANALYSIS AND DECISION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue. *Rossal-Daub v Walter*, 58 A.D.3d 992, 871 N.Y.S.2d 751 (3d Dep't 2009). The Court must view the evidence in the light most favorable to the non-movant and if there are issues of fact summary judgment should be denied. *Rossal-Daub v Walter, id.* The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion. *CPLR §3212(c)*.

BREACH OF CONTRACT:

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties: (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. *Palmetto Partners LLP v AJW Qualified Partners, LLC*, 83 A.D.3d 804, 921 N.Y.S.2d 260 (2d Dep't 2011); *See also, Furia v. Furia*, 116 A.D.2d 694, 498 N.Y.S.2d 12 (2d Dep't 1986). A Plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound in order to establish an enforceable agreement. *Kowalchuk v Stroup*, 61 A.D.3d 118, 873 N.Y.S.2d 43 (1st Dep't 2009). The central issues regarding whether the parties had entered into a binding contract are: (1) meeting of the minds (mutual assent to the terms of the agreement by the parties); (2) definiteness (does the agreement establish the intention of the parties with sufficient certainty as to be enforceable by a court); and (3) consideration (was there a bargained for exchange of something of value between the parties). 28 New York Practice Series, Contract Law § 2:1. *See also, T.H. Cheshire & Sons, Inc. v. Berry*, 37 Misc.3d 1220(A), Slip Copy, 2012 WL 5512544 (Table), (N.Y.Co.Ct.,2012). Under [our] system of adversary litigation, the task of furnishing evidence rests solely upon the parties, neither the judge nor the jury having any obligation or duty in this regard. As a general rule, the party who has the burden of pleading a fact also has the burden of producing evidence and of persuading the trier of fact. [...] *Fisch on New York Evidence*, Second Edition, §1087, Lond Publications 1977/2008.

Plaintiff seeks payment of $2,307.31. Defendants acknowledged receiving the initial itemized proposal. Defendants also acknowledged receiving Plaintiff's final accounting whereon "seed and restore," "fill," "waste removal" and "demolition" were crossed out. Plaintiff set forth in his affidavit that it deleted from the initial proposal those items which he did not complete, thus leaving $3,010.00 for "fill by hand" and $495.00 for the "grading and prep work." It is that bill which Defendants claimed the Plaintiff "unilaterally changed." Defendants did not dispute that Plaintiff completed that work. Instead, Defendants contended that the item on the initial proposal for $3,010.00 included all supplies and labor, and that they should not have been billed for the "grading and prep work." Based upon the above, it is apparent that there was no "meeting of the minds." The Court cannot grant summary judgement on Plaintiff's claim for breach of contract.

QUANTUM MERUIT:

In order to make out a claim in quantum meruit, a claimant must establish (1) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services. *Candreva v. Ultra Kote Applied Technology, Ltd.*, 44 A.D.3d 601, 844 N.Y.S.2d 48 (2nd Dept. 2007). *See also, Pulver Roofing Co., Inc. v. SBLM Architects, P.C.*, 65 A.D.3d 826, 884 N.Y.S.2d 802 (4th Dept. 2009); *Thomas J. Hayes & Associates, LLC v. Brodsky*, 101 A.D.3d 1560, 957 N.Y.S.2d 473 (3d Dept. 2012).

Plaintiff clearly satisfied the first three elements of a cause of action for quantum meruit. However, its claim is fatally defective because Plaintiff failed to provide the Court with proof of the reasonable value of its services. Merely submitting a bill for completed work does not satisfy this element. The Court denies the Plaintiff summary judgment on this cause of action.

EXAGGERATION OF MECHANIC'S LIEN:

NY Lien Law, §3, states, in pertinent part:

> A [...] landscape gardener [...] who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner [...] shall have a lien for the principal *and interest*, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. *[emphasis added]*

NY Lien Law §39 states:

> In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice

The Lien Law is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same. *See, NY Lien Law §23.* The Lien Law provision with regard to excessive lien claims is intended to punish willful exaggeration, rather than honest differences, and to protect an owner or contractor against fictitious, groundless and fraudulent liens. *E-J Elec.*

Installation Co. v. Miller & Raved, Inc., 51 A.D.2d 264, 380 N.Y.S.2d 702 (1st Dep't 1976). A claim under mechanics' lien statute is subject to summary disposition where evidence concerning whether or not lienor wilfully exaggerated lien is conclusive; such burden necessarily involves proof as to credibility of lienor, and accordingly issue of wilful or fraudulent exaggeration is one that is ordinarily determined at trial of foreclosure action, and not on summary disposition. *On the Level Enterprises, Inc. v. 49 East Houston LLC*, 104 A.D.3d 500, 964 N.Y.S.2d 85 (1st Dep't 2013) [that Court noted that the lienor's motion was devoid of affidavits absent which the court could not summarily conclude they bore no ill will when they calculated the lien and that any errors were the result of ignorance or honest mistake.] The burden is upon Defendant to show that the amounts set forth were "intentionally and deliberately exaggerated." *Sheng Sheng Const. Inc v Har's Const. Inc.*, 39 Misc.3d 1238(A), Slip Copy, 2013 WL 2495071 (Table) (N.Y.Sup.,2013), citing, *Park Place Carpentry & Builders, Inc. v. DiVito*, 74 AD3d 928, 901 N.Y.S.2d 866 (2nd Dep't 2010); *Garrison v. All Phase Structure Corp.*, 33 AD3d 661, 821 N.Y.S.2d 898 (2nd Dep't 2006). Once a mechanic's lien is satisfied, a willful exaggeration claim will necessarily fall as unsupported by a lien foreclosure action. *5 Brothers, Inc. v. D.C.M. of New York, LLC*, 39 Misc.3d 711, 960 N.Y.S.2d 876 (N.Y.Sup.2013)

It is Defendants' burden to prove that Plaintiff "intentionally and deliberately exaggerated" the amount of the Mechanic's Lien. For the purposes of this determination, and accepting, *arguendo*, the Defendants' position that there was no "meeting of the minds," the Court must accept the Plaintiff's belief that the total cost for materials, labor and tax was $3,807.31. Unlike the lienor in *On the Level Enterprises, Inc. v. 49 East Houston LLC, supra.*, 964 N.Y.S.2d 85, Plaintiff in this case submitted its explanation. It explained that it knew the Defendants were selling their house, the sale it believed was imminent, and the $1,500.00 down payment had not yet cleared the bank. It is, therefore, reasonable that the Plaintiff filed the Mechanic's Lien for the full balance of agreement. The additional $310.00 was for costs of the Mechanic's Lien, and other expenses and disbursements accruing to Plaintiff. Although the Defendants claimed that Plaintiff was limited to filing a lien for "only labor provided and material furnished and the values thereof," Lien Law §3 clearly sets forth that the lienor is entitled to interest on the principal due. The Court notes that based alone upon the $1,500.00 admittedly still owing from Defendant, interest has been accruing at $11.25 per month, which currently totals $427.50. Based upon Plaintiff's explanation, this Court does not find that the Plaintiff "intentionally and deliberately exaggerated" the amount of the Mechanic's Lien. Notwithstanding the analysis of whether the Mechanic's Lien was exaggerated, the lien was discharged before the commencement of this action and, with it, the Defendants' claim for exaggeration of the Mechanic's Lien. Accordingly, the Court grants Plaintiff summary judgment and dismisses the Defendants' counterclaim.

As for a final disposition of this controversy, we begin with identical initial proposals submitted by each party. Because the Defendants tendered their May 28, 2010, payment of $1,510.00, they have admitted owing as much. It appears, then, that this controversy continues to exist over a $797.31 disagreement, of which $302.31 represents NY State tax. Accordingly, a hearing is scheduled for **SEPTEMBER 5, 2013, 9:30 AM,** before this Court, at 1 Court Street, Riverhead NY. (*CPLR 3212(c)*)

Accordingly, it is hereby

ORDERED that the Plaintiff's motion for summary judgment on its claim for breach of contract is granted to the extent that a hearing shall be conducted for the reasons set forth above; and it is further

ORDERED that the Plaintiff's motion for summary judgment on its claim for quantum meruit is denied; and it is further

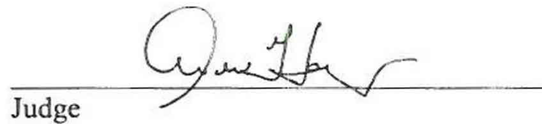
ORDERED that the Plaintiff's motion for summary judgment dismissing the counterclaim alleging intentional and deliberate exaggeration of the Mechanic's Lien is granted; and it is further

ORDERED that all parties are directed to personally appear, together with counsel, for a conference and hearing before this Court, on **SEPTEMBER 5, 2013**, 9:30AM, at 1 Court Street, Riverhead, NY 11901, and the Court may enter judgment in favor of one party if the other party fails to appear; and it is further

ORDERED that because INTERNATIONAL FIDELITY INSURANCE COMPANY has no personal involvement regarding the facts and circumstances herein, except as to act as the surety of the bond which discharged the lien, its appearance is waived on September 5, 2013.

This constitutes the decision and order of the Court.

ENTER



Judge