Brentwood Door Co., Inc. v Whelan
2015 NY Slip Op 31627(U)
July 24, 2015
Supreme Court, Suffolk County
Docket Number: 10-40333
Judge: Jr., Andrew G. Tarantino
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[* 1]

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SHORT FORM ORDER

INDEX No. 10-40333

ORIGINAL WHEN BLUE

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 10/14/14
ADJ. DATE 2/7/15
Mot. Seq. #004 - MotD

BRENTWOOD DOOR CO., INC., JMC STUDIO, and JACQUIE CAO,

Plaintiffs,

- against -

MARGARET WHELAN, WINDWARD BUILDERS, LLC, ADVANCED SOLAR POWER, INC., BAY BELL PLUMBING & HEATING, LAKESIDE CONCRETE CORP., COPPER CRAFTS, INC., LEO'S ELECTRIC CORP., JOSEPH CROTTY and JOHN DOE 1 through JOHN DOE 10,

Defendants.

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MARGARET WHELAN,

Third-Party Plaintiff,

- against -

JOSEPH LARSON and GUS MILLIARD,

Third-Party Defendants.

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Upon the following papers numbered 1 to 64 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-23; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 24-40; 41-45; Replying Affidavits and supporting papers 46-64; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

7/24

ORDERED that the motion by defendants Margaret Whelan and Joseph Crotty for an order pursuant to CPLR 3212, granting summary judgment dismissing all claims asserted against them by plaintiff Brentwood Door Co., Inc., by plaintiffs JMC Studio and Jacquie Cao, by defendant Windward Builders, LLC, and by defendant Bay Bell Plumbing & Heating, is granted to the extent of granting summary judgment dismissing the complaint of Brentwood Door Co., Inc. and the cross claims of Windward Builders, LLC and Bay Bell Plumbing & Heating against Margaret Whelan, and is otherwise denied.

In this consolidated action, the plaintiffs seek to recover damages for work, labor, and services allegedly performed in connection with the construction of a residence at 440 Further Lane, Amagansett, New York.

Based on the papers submitted in support of the pending motion, it appears that Margaret Whelan is the owner of the property, where she resides with Joseph Crotty; that the property is located in the Town of East Hampton; that JMC Studio and Jacquie Cao (collectively, "Cao") were retained by Whelan and Crotty as owner's representative, construction manager, and interior designer; that Windward Builders, LLC ("Windward") was the general contractor; and that the remaining parties were contractors, subcontractors, and materialmen that provided services and materials to Whelan and Crotty during the course of the project.

Among the claims asserted against Whelan and Crotty in this action are the following:

- Brentwood Door Co, Inc. ("Brentwood Door") claims that between January 25, 2010 and April 14, 2010, at the request of Windward and with the knowledge and consent of Whelan, it performed certain work, labor, and services at the property, including the installation of "carriage house" garage doors, having an agreed price and reasonable value of $7,050.00, no portion of which has been paid despite due demand. On June 28, 2010, within four months after providing the last item of work, Brentwood Door filed a notice of mechanic's lien in the amount of $7,050.00 against the property. Brentwood Door pleads a single cause of action against Whelan to enforce the mechanic's lien.

- Cao claims that between August 2008 and May 2010, at the specific request of Whelan and Crotty, she provided design and project management services in connection with the project, having an agreed price and reasonable value of $150,000.00, no portion of which has been paid despite due demand except for the sum of $19,000.00, leaving a balance due and owing of $131,000.00. In addition to the services provided, she incurred expenses in the performance of those services in the amount of $16,322.12, no portion of which has been paid. Cao pleads three causes of action against Whelan and Crotty, for breach of contract, unjust enrichment, and on an account stated.

- Windward claims that between April 2009 and May 2010, at the specific request of Whelan, it performed work, labor, and services and furnished materials in connection with the project, including a new main residence, pool house, pool, landscaping, driveway, and other

improvements, having an agreed price and reasonable value of $3,423,284.87, no portion of which has been paid despite due demand except for the sum of $2,681,200.00 remitted to Windward and the additional sum of $205,825.51 remitted directly to the subcontractors, leaving a balance due and owing of $536,259.36. Windward pleads three cross claims against Whelan, for breach of contract, unjust enrichment, and on an account stated.

- Bay Bell Plumbing & Heating ("Bay Bell") claims that between July 2009 and April 2010, at Windward's express request and with the knowledge, consent, and acquiescence of Whelan, it performed services and provided labor and materials to Windward, including the installation of a plumbing system at the property, having a reasonable value of $103,435.64, no portion of which has been paid despite due demand except for the sum of $79,400.00, leaving a balance due and owing of $24,035.64. On June 28, 2010, within four months after the final performance of the work, Bay Bell filed a notice of mechanic's lien in the amount of $24,035.64 against the property. Bay Bell pleads two cross claims against Whelan, for unjust enrichment and to enforce the mechanic's lien.

Now, Whelan and Crotty move for summary judgment, in part, on the ground that neither Brentwood Door, Cao, nor Windward possessed a home improvement contractor's license from the Town of East Hampton. Whelan and Crotty also contend that cross claims by Windward's subcontractors, Brentwood Door and Bay Bell, to enforce the mechanic's liens cannot survive dismissal of Windward's own claims and, further, that Bay Bell's cross claim for unjust enrichment is deficient for failure to plead that Whelan "expressly consented" to pay Bay Bell directly for its work.

A home improvement contractor who does not possess a required license to perform home improvement work in the municipality where the work is performed cannot recover for the work performed either under the contract or on theories of unjust enrichment (***Vatco Contr. v Kirschenbaum***, 73 AD3d 1163, 902 NYS2d 589 [2010]; ***Price v Close***, 302 AD2d 374, 754 NYS2d 660 [2003]) and account stated (***J.M. Bldrs. & Assoc. v Lindner***, 67 AD3d 738, 889 NYS2d 60 [2009]; ***Racwell Constr. v Manfredi***, 61 AD3d 731, 878 NYS2d 369 [2009]), and also forfeits the right to foreclose on a mechanic's lien (***Ben Krupinski Bldr. & Assoc. v Baum***, 36 AD3d 843, 828 NYS2d 583 [2007]; ***Matter of Ashmawy v L.I. Dock & Bulkhead Corp.***, 251 AD2d 500, 674 NYS2d 711 [1998]).

Section 156-10 of the Code of the Town of East Hampton, as effective at the time the events that are the subject of this action are alleged to have taken place,[1] makes it unlawful for a person to "conduct, undertake or engage in any home improvement, as the same is defined herein, without first obtaining and thereafter maintaining in effect at all times an East Hampton Town home improvement contractor's license from the Building Inspector." Section 156-5 defines "home improvement" as follows:

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[1] Whelan and Crotty have annexed to their moving papers a copy of what they describe as chapter 156 (entitled "Home Improvement Contractors") of the Code of the Town of East Hampton "in the form effective between December 15, 2005 and March 1, 2012." No objection has been raised by any party as to its authenticity or applicability. Accordingly, all references in this order to sections of chapter 156 shall be to that version of the chapter.

> New home construction, and/or any repair, remodeling, alteration, conversion, modernization, improvement or addition to existing residential premises and/or improvements, regardless of the zoning district in which such property may be situated, and shall include but not be limited to any such activity with regard to additions, alarm systems, awnings, basements, bathrooms, bulkheads, cabinets, carpentry, central air conditioners or vacuum cleaners, cesspools, decks, docks, dormers, driveways, electrical systems, extensions, extermination, fencing, flagpoles, flooring, fumigation, garages, heating, jetties, kitchens, landscape contracting, masonry, interior or exterior painting, railings, renovations or remodeling, roofing, septic tanks, siding, sprinklers, storm windows and screens, swimming pools, tennis courts, termite control, tile, waterproofing, weatherproofing and ventilation, but shall not include:
>
> A. The sale of goods by a seller who neither arranges to perform nor performs, directly or indirectly, any work or labor in connection with the installation or application of the goods sold.
>
> B. New construction or home improvement work undertaken directly by the owner of real property.
>
> C. Grounds maintenance/gardening.
>
> D. Home maintenance, as defined herein.

Here, Whelan and Crotty made a prima facie showing of entitlement to summary judgment by demonstrating that neither Brentwood Door, Cao nor Windward was duly licensed as a home improvement contractor in the Town of East Hampton at the time the work was performed (***LGP Founds. v Bantry***, 60 AD3d 739, 874 NYS2d 584 [2009]; ***Ben Krupinski Bldr. & Assoc. v Baum***, *supra*).

As Brentwood Door does not oppose the motion, summary judgment is granted dismissing its claims against Whelan and Crotty.

Cao, however, raises an issue of fact whether she was retained to perform and performed only interior design services and, hence, whether she was engaged in "home improvement" within the meaning of section 156-5 (which does not list such services among the activities within its scope). The court recognizes in this regard a plethora of conflicting statements in the record–many in the parties' pleadings and affidavits–concerning the nature of the services performed by Cao; viewed cumulatively, it cannot be gainsaid that they create a genuine issue of material fact. To the extent Cao admits to have been hired to provide design and project management services, such as decorating and purchasing furnishings, it is noted that such services likewise are not defined as "home improvement" work under section 156-5. While section 156-5 defines "home improvement contractor" to include "any person providing management or construction administration services to an owner for one or more home improvement," it does not include those services among the activities listed in the definition of "home improvement" for which a license is required under section 156-10. Even if Cao is a "home improvement contractor,"

then, it remains to be shown that the services performed constitute "home improvement" work for which a license was required. As to the alternative argument raised by Whelan and Crotty–that even a claim seeking damages only for interior design services requires the claimant to be licensed under section 156-10–the court finds it unpersuasive. In support of that argument, Whelan and Crotty cite ***Hardy Plumbing, Heating & A.C. v Menu*** (65 AD3d 609, 884 NYS2d 464 [2009]). In ***Hardy***, the Appellate Division reversed an order of this court (Pines, J.) and granted the homeowner's motion for summary judgment dismissing the contractors' breach of contract counterclaim based on the contractors' failure to obtain a home improvement contractor's license from the Town of East Hampton. In so doing, however, the Appellate Division did not identify the home improvements on which it found the counterclaim was based, except to refer to them as "certain home improvements." Absent further elucidation, this court will not presume to guess what services provided by the contractors in ***Hardy*** the Appellate Division deemed sufficient to bring them within the scope of section 156-10.

As to Windward, the court finds that it failed to raise a triable of fact sufficient to defeat summary judgment. Even assuming, as Windward claims, that it was hired by Whelan as part of a partnership or joint venture with Gus Milliard (a duly licensed home improvement contractor) to serve as general contractor for the project, and that Windward's role was to serve merely as business manager and to provide administrative support while Milliard was solely in charge of construction and was responsible for the day-to-day management of the project, this does not suffice to exempt Windward from the licensing requirement. Section 156-11 sets forth the exceptions to the licensing requirement, subdivision (B) of which, relied on by Windward, provides that no home improvement contractor's license shall be required for "[a] member or partner of a firm, partnership or other entity which is a licensed home improvement contractor who performs labor or services for such licensee." Here, it is evident that Milliard applied for and obtained the license as an individual, not as a partnership; how Windward could validly claim to be a "member or partner" of an individual escapes the court. Consequently, section 156-11 (B) does not avail Windward (*see* ***Flax v Hommel***, 40 AD3d 809, 835 NYS2d 735 [2007]). A review of sections 156-22 (C), providing that "[n]o license issued under this chapter shall be transferred or assigned to any person other than the licensee to whom it was issued," and 156-40 (F), prohibiting the conduct of a home improvement contracting business "in any name other than the one for which a license has been obtained," likewise supports the conclusion that Windward failed to satisfy the licensing requirement (*see* ***AEC Bldg. Assoc. v Crystal***, 246 AD2d 496, 667 NYS2d 399 [1998]). Summary judgment is granted, therefore, dismissing Windward's cross claims against Whelan.

Summary judgment is also granted with respect to Bay Bell's cross claims. As to an owner with whom it is not in privity, a subcontractor may recover on a theory of unjust enrichment only if the owner expressly consented to, or otherwise assumed, an obligation to pay the subcontractor (***Sears Ready Mix v Lighthouse Mar.***, 127 AD3d 845, 6 NYS3d 602 [2015]; ***M. Paladino, Inc. v Lucchese & Son Contr. Corp.***, 247 AD2d 515, 669 NYS2d 318 [1998]). Here, Bay Bell failed to allege in its pleading or to demonstrate by submitting evidentiary proof in opposition to the motion that Whelan expressly agreed to pay Bay Bell for the services it performed or the labor and materials it provided. The mere fact that an owner may have consented to improvements provided by a subcontractor and accepted their benefits, as alleged here, does not render the owner liable to the subcontractor in either contract or quasi-contract (***Sears Ready Mix v Lighthouse Mar.***, *supra*; ***Sybelle Carpet & Linoleum of Southampton v East End***

(***Sears Ready Mix v Lighthouse Mar.***, *supra*; ***Sybelle Carpet & Linoleum of Southampton v East End Collaborative***, 167 AD2d 535, 562 NYS2d 205 [1990]; ***Perma Pave Contr. Corp. v Paerdegat Boat & Racquet Club***, 156 AD2d 550, 549 NYS2d 57 [1989]). As for the cross claim to enforce the mechanic's lien, Whelan demonstrated her prima facie entitlement to summary judgment by establishing that Windward was unlicensed and, therefore, that there were no funds due and owing from Whelan to Windward so as to support such a claim (*see* ***Kamco Supply Corp. v JMT Bros. Realty***, 98 AD3d 891, 950 NYS2d 701 [2012]). Notably, as Bay Bell did not plead a direct contractual relationship between itself and Whelan as might otherwise support the mechanic's lien claim, Whelan did not have the burden on this motion of disproving the existence of such a relationship (*see* ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2010]; *cf.* ***Kamco Supply Corp. v JMT Bros. Realty***, *supra*). Since Bay Bell, in opposition, failed to raise a triable issue of fact, Whelan is entitled to judgment as a matter of law dismissing Bay Bell's cross claims against her.

The court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

It is further

ORDERED that all self represented litigants and attorneys of record are directed to appear for a Compliance Conference on **AUGUST 25, 2015** at 9:30AM.

Dated: JUL 24 2015

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**