First Choice Plumbing Corp. v Miller Law Offs., PLLC
2016 NY Slip Op 32940(U)
February 2, 2016
Supreme Court, Nassau County
Docket Number: 602921-15
Judge: Timothy S. Driscoll

ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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FIRST CHOICE PLUMBING CORP. and MALACY PLUMBING SUPPLY, INC.,

Plaintiffs,

-against-

MILLER LAW OFFICES, PLLC,

Defendant.

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TRIAL/IAS PART: 12

Index No: 602921-15
Motion Seq. No. 2
Submission Date: 12/10/15

The following papers have been read on this motion:

Notice of Motion, Affidavit in Support, Affirmation in Support and Exhibits....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x

This matter is before the court on the motion filed by Plaintiffs First Choice Plumbing Corp. ("First Choice") and Malacy Plumbing Supply, Inc. ("Malacy") ("Plaintiffs") on November 17, 2015 and submitted on December 10, 2015. For the reasons set forth below, the Court denies the motion.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR § 2221, granting their Motion for Leave to Reargue and Renew the Court's prior decision ("Prior Decision") dated October 15, 2015 (Ex. A to Vila Aff. in Opp.) in which the Court granted the prior motion to dismiss ("Prior Motion") by Defendant Miller Law Offices, PLLC ("Miller" or "Defendant").

Defendant opposes the motion.

B. The Parties' Background

The parties' background is set forth in detail in the Prior Decision and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, the Complaint alleges as follows:

This case arises out of Miller's alleged negligent failure to prosecute two (2) mechanics' liens ("Liens"), in breach of its duty, as attorneys, to Plaintiffs, resulting in the extinguishment of the Liens and the preclusion of Plaintiff's legal right to pursue and collect the sums owed and secured by the Liens. First Choice is a New York corporation that performs plumbing services in and around New York City. Malacy is a New York corporation that supplies plumbing equipment, fittings and furnishings in and around New York City.

Plaintiffs allege that Morris Heights Health Center, Inc. ("Morris"), a health services provider with medical centers in and around New York City, owns real property ("Property") located at 57 West Burnside Avenue, Bronx, New York, Block 3206, Lots 1001-1003. In or about 2009, Morris hired Glenman Industrial & Commercial Contractor Corp. ("Glenman"), as general contractor, to develop a health and medical center for the elderly on the Property, the Harrison Circle Project (the "Project"). Glenman, in turn, hired First Choice as subcontractor to provide plumbing services for the Project. Plaintiff provides a copy of the April 10, 2008 Glenman-First Choice Subcontract (Ex. 1 to Comp.). First Choice completed the plumbing services for the Project in or about 2010. First Choice hired Malacy as subcontractor to provide plumbing supplies for the Project. Malacy completed its subcontractor work for the Project in or about 2010. The Project was completed in or about 2010.

Glenman owed First Choice $471,000.00 for the plumbing services that First Choice performed on the Project. First Choice demanded payment but Glenman did not pay First Choice. On or about May 24, 2010, pursuant to New York Lien Law ("Lien Law") Article 2, Section 3, First Choice filed a mechanic's lien on the Project Property with the County Clerk of Bronx County in the amount of $471,000.00 ("First Choice Lien") (Ex. 4 to Comp.). Plaintiffs allege that, in or about 2011, First Choice hired Miller to pursue collection of the $471,000 and provided Miller with the relevant documentation regarding the Project and First Choice Lien.

On or about May 9, 2011, pursuant to the Lien Law, First Choice filed a one (1) year extension of its Lien. Plaintiffs allege that Miller knew, or should have known that, pursuant to Lien Law Article 2, Section 17, the First Choice Lien would be extinguished by operation of law unless First Choice foreclosed its Lien or obtained an additional court-ordered extension. Plaintiffs allege that Miller did not foreclose on the First Choice Lien within the prescribed time period and did not pursue a court-ordered extension of the First Choice Lien within the prescribed time period. Plaintiffs allege that Miller, instead, negligently permitted the First

Choice Lien to lapse and be extinguished within the one (1) year extension period provided by Lien Law Article 2, Section 17. In or about May 2012, the First Choice Lien was extinguished by operation of law, leaving First Choice unable to foreclose on its Lien to collect the $471,000.00 owed to it by Glenman.

Plaintiffs also allege that Glenman owed Malacy $152,847.00 for the plumbing supplies that Malacy provided to the Project. Malacy demanded payment but Glenman did not pay Malacy. On or about June 8, 2010, Malacy filed a mechanic's lien on the Project Property with the County Clerk of Bronx County in the amount of $152,847.00 ("Malacy Lien"). In or about 2011, Malacy hired Miller to pursue collection of the $152,847.00 and provided Miller with the relevant documentation regarding the Project and Malacy Lien.

On or about June 8, 2011, pursuant to the Lien Law, Malacy filed a one (1) year extension of its Lien. Plaintiffs allege that Miller knew, or should have known that the Malacy Lien would be extinguished by operation of law unless Malacy foreclosed its Lien or obtained an additional court-ordered extension. Plaintiff alleges that Miller did not foreclose on the Malacy Lien with the prescribed time period and did not pursue a court-ordered extension of the Malacy Lien within the prescribed time period. Plaintiff alleges that Miller, instead, negligently permitted the Malacy Lien to lapse and be extinguished within the one (1) year extension period provided by Lien Law Article 2, Section 17. In or about June 2012, the Malacy Lien was extinguished by operation of law, leaving Malacy unable to foreclose on its Lien to collect the $152,847.00 owed to it by Glenman.

On or about January 11, 2011, Glenman filed a Voluntary Petition in the United States Bankruptcy Court, Southern District of New York pursuant to Chapter 11 of the Bankruptcy Code (Ex. 5 to Comp.) ("Glenman Bankruptcy Action"). In or about January 2011, Plaintiffs were notified of the Glenman Bankruptcy Action. Plaintiffs allege that the Glenman Bankruptcy Action names First Choice and Malacy as "Disputed," "Contingent," and "Unliquidated" Creditors, reflecting that Glenman disputes the amounts owed to Plaintiffs. Plaintiffs allege that when a creditor is disputed, contingent or unliquidated, it must file a "Proof of Claim" (Comp. at ¶ 44) in the bankruptcy proceeding within the time prescribed by the Bankruptcy Court in order to substantiate the creditor's claim against the Debtor, citing U.S.C.S. § 1111(a) and Rule 3003(c)(2) of the Federal Rules of Bankruptcy. A disputed, contingent or unliquidated creditor that fails to file a Proof of Claim within the time allotted will not be treated as a creditor in the

bankruptcy proceeding and will be foreclosed from collecting from the bankruptcy distribution of assets.

Plaintiffs allege that on November 18, 2011, the Bankruptcy Court ordered that all Proofs of Claim in the Glenman Bankruptcy Action be filed by January 13, 2012. In or about January 2011, First Choice notified Miller, its attorney, of the filing of the Glenman Bankruptcy Petition. Plaintiffs allege that Miller knew, or should have known, that First Choice must file a Proof of Claim by January 13, 2012 to collect against the Glenman Estate. Plaintiffs allege that Miller failed to appear on behalf of First Choice in the Glenman Bankruptcy Action, and failed to file a Proof of Claim on behalf of First Choice. As a result, pursuant to 11 U.S.C.S. § 502(b)(9), First Choice is barred from collecting the $471,000.00 against the Glenman estate. And, because Miller failed to file a timely Proof of Claim, First Choice's claim against Glenman is also discharged by operation of law, pursuant to 11 U.S.C.S. § 1328(a).

Similarly, in or about January 2011, Malacy notified Miller, its attorney, of the filing of the Glenman Bankruptcy Petition. Plaintiffs allege that Miller knew, or should have known, that Malacy must file a Proof of Claim by January 13, 2012 to collect against the Glenman Estate. Miller also failed to appear on behalf of Malacy in the Glenman Bankruptcy Action, and failed to file a Proof of Claim on behalf of Malacy. As a result, pursuant to 11 U.S.C.S. § 502(b)(9), Malacy is barred from collecting the $152,847.00 against the Glenman estate. And, because Miller failed to file a timely Proof of Claim, Malacy's claimagainst Glenman is also discharged by operation of law, pursuant to 11 U.S.C.S. § 1328(a). The Complaint contains four (4) causes of action against Miller alleging attorney malpractice in connection with 1) its failure to extend or foreclose on the First Choice and Malacy Liens, and 2) its failure to file a Proof of Claim on behalf of First Choice and Malacy.

In the Prior Decision, the Court granted the Prior Motion and dismissed the Complaint based on the Court's conclusion that the documentary evidence refuted Plaintiffs' allegation that there was an attorney-client relationship between Plaintiffs and Miller with respect to the Liens and their Extensions. That documentary evidence included 1) the email from Stephanie L. Soondar, Esq. at Construction Lien Consultants, LLC ("CLC") to First Choice which mentions the "bar date" for the Glenman Bankruptcy and advises First Choice of its need to "immediately file a proof of claim," 2) the email from Miller to Yosi Azulay ("Yosi"), an owner of First Choice, and others reminding them that Plaintiffs had advised Miller that they were hiring someone other than Miller to prepare a proof of claim, 3) the email from Miller to Yosi which

makes reference to the fact that Plaintiffs, without discussing the matter with Miller, hired a company to help them collect monies owed, 4) the email from Yosi to Miller in which Yosi concedes that he did not handle the matter properly and asks Miller to "take over this case," which clearly implies that Miller was not previously responsible for the Liens and Extensions, 5) the email from Miller reminding Plaintiffs that he did not file the lien and could not extend the Lien and suggesting that Plaintiffs use "whatever company you used to prepare/file the lien" which is again consistent with the conclusion that Plaintiffs retained someone other than Miller to pursue their rights under the Liens and Extensions, 6) the letter dated July 22, 2010 from Bruce R. Snyder, the Chief Executive Officer of CLC to Steven Diaz of First Choice regarding the Lien which included a signed Contract for Services dated November 8, 2010 between CLC and First Choice signed by Yosi Azulay, President of First Choice and Dario S. Diaz, Vice President of First Choice, 7) the language in the CLC Contract which a) authorized CLC to "proceed with the investigation, recovery and/or settlement of debts owed to [First Choice] reflected in Mechanic's Liens, Construction Claims and other overdue receivables (hereinafter "claims") as described in the Contract;" and b) provided that CLC "agrees to put forth its best efforts to recover debt(s) owed to Client by engaging in" actions including "[s]ubmitting "Proof of Claim" forms for payment and performance bonds," and 8) the Lien Extensions which reflect that they were filed by and through Speedy Lien. The Court held that Azulay's conclusory assertion that Plaintiffs retained Miller as "general counsel" for Plaintiffs and to "supervise" the Liens and Extension, which was inconsistent with the documentary evidence before the Court, was insufficient to support the existence of an attorney-client relationship between Plaintiffs and Defendant with respect to Plaintiffs' enforcement of their rights under the Liens and Extensions.

In support of the motion now before the Court, Azulay, who provided an affidavit in opposition to the Prior Motion, affirms that he is the manager and co-owner of First Choice and his son-in-law Benjimin Twizer is the owner of Malacy. Azulay affirms that from 2008 to 2014, Miller was general counsel for Plaintiffs and, during that time, Azulay paid Miller between $1,200 and $1,500 monthly to represent Plaintiffs on all legal issues related to the Plaintiff companies. Azulay affirms that his daughter Ashley Twizer, his son Yosi and Azulay were the points of contact between Miller and the Plaintiff companies. Azulay affirms that, during this time period, Miller visited Azulay's offices approximately once per week to advise Plaintiffs on all legal issues related to the companies.

Azulay affirms that in or about 2010, he consulted Miller, in his alleged role as general counsel to Plaintiffs, regarding outstanding receivables for services and plumbing materials provided to Glenman on the Project. Azulay affirms that Miller "agreed to protect First Choice and Malacy's legal rights to recover the outstanding receivables" (Azulay Aff. in Supp. at ¶ 10). Azulay avers that Miller advised Azulay that Plaintiffs must file mechanic's liens on the Project and advised him of the steps involved in that process. Pursuant to that advice, Plaintiffs filed the mechanic's liens on the Project in amounts to cover the outstanding receivables. Azulay affirms that it was "understood, at all times" (Azulay Aff. in Supp. at ¶ 14) that Miller would supervise the filing and handling of the Liens, and avers that Plaintiffs sent to Miller all documentation related to the collection of the outstanding receivables, including documents relating to the liens. On May 27, 2010, First Choice faxed a letter to Miller (Ex. 1 to Azulay Aff. in Supp.) which stated: "Please find attached a copy of the lien First Choice put on Glennman. I understand they are also preparing one for Malacy which I do not have paperwork on yet. When I get it I will forward to you [sic]."

Azulay affirms that First Choice hired CLC, a professional collection company, to collect amounts owed for plumbing services on the Project. He affirms that, although First Choice hired CLC, an outside vendor, Miller agreed to continue to supervise recovery efforts and "to protect Plaintiffs' legal rights" (Azulay Aff. in Supp. at ¶ 18). First Choice sent an October 27, 2010 fax to Miller (Ex. 2 to Azulay Aff. in Supp.) with the subject line "Lien Against Glenman Const." which read: "Attn: Jeff. Please look over the attached paperwork for the lien against Glenman Construction and let me know if this is good. Thank you. Ziv." As part of that correspondence, First Choice included a draft of the CLC-First Choice Contract (Ex. 3 to Azulay Aff. in Supp.). Azulay quotes some of the language contained in paragraph 11 of the CLC-First Choice Contract which includes "Client understands that CLC is not a law firm...CLC shall not be held responsible for the waiver of any of client's rights due to client's failure to retain legal counsel." Azulay affirms that First Choice faxed to Miller relevant documentation regarding CLC's recovery efforts because Miller agreed to represent Plaintiffs on the Project receivables and protect their legal interests regarding those receivables. Azulay affirms, further, that pursuant to Miller's opinion and advice, Plaintiffs used Speedy Lien to extend the liens and that it was "understood, at all times" (Azulay Aff. in Supp. at ¶ 23) that Miller would supervise the handling of the liens and protect Plaintiffs' rights to collect money secured by the liens.

Azulay provides documentation in support of Plaintiffs' motion to renew/reargue that Plaintiffs did not submit in opposition to the Prior Motion ("New Submissions"). Azulay affirms that "[d]ue to the length of time this matter has progressed, I have not been able to locate all of the documents and files" reflecting Miller's representation of Plaintiffs regarding the Liens (Azulay Aff. in Supp. at ¶ 25). He affirms, further, "I was able to retrieve the following relevant documentation from my archives that demonstrates Attorney Miller's representation of First Choice" (*id.* at ¶ 26). The documentation provided includes invoices, checks and check receipts (Exs. 4-17 to Azulay Aff. in Supp.). Azulay submits that this documentation demonstrates that Miller represented him and his companies throughout the pendency of the liens.

C. The Parties' Positions

Plaintiffs submit that reargument is appropriate because the Court misapprehended or overlooked the following: 1) correspondence between Miller and Plaintiffs suggesting that there was no attorney-client relationship with respect to the Glenman Bankruptcy Action is not relevant to the separate issue of whether there was an attorney-client relationship between Miller and Plaintiffs with respect to the Liens; 2) Miller's statement, in correspondence sent after the Liens had expired, that he was unable to extend the Liens a) was false because there was no reason that Miller could not have extended them if they had not expired; and b) was self-serving, and an effort to shift blame away from Miller, and is not instructive on the issue of whether there was an attorney-client relationship between Miller and Plaintiffs with respect to the liens; 3) the fact that Plaintiffs retained non-attorney consultants to assist in their collection efforts does not mean that there was no attorney-client relationship between Plaintiffs and Miller with respect to the liens; 4) correspondence between Miller and Plaintiffs demonstrates that such an attorney-client relationship existed; and 5) the Court should consider Defendants' failure to submit an affirmation of Miller in support of the Prior Motion. Plaintiffs contend that, upon reargument, the Court should deny the Prior Motion and permit this matter to proceed to discovery and trial.

Plaintiffs submit, further, that renewal is appropriate. Plaintiffs contend that they did not offer the New Submissions in opposition to the Prior Motion because that documentation "was not previously available due to the length of time that had passed since the filing and lapse of the Liens and the date of this lawsuit" and Azulay "was only recently able to retrieve[] these documents from Plaintiffs' archives (Lillis Aff. in Supp. at ¶ 40). Plaintiffs contend that the New Submissions support the conclusion that Miller acted as general counsel for Plaintiffs

throughout the pendency of the Liens and their expiration, and warrant a modification of the Prior Decision.

Defendants oppose the motion submitting that 1) renewal is not warranted in light of Plaintiffs' failure to offer any justification for their failure to include the New Submissions in opposition to the Prior Motion, particularly because Plaintiffs initiated this action and would logically be expected to obtain all relevant documentation and files prior to commencing this action; 2) even if the Court were to consider the New Submissions, that evidence should not change the Prior Decision because the New Submissions do not mention liens, extensions, Glenman, or bankruptcy and therefore "do not even hint at the existence of an attorney-client relationship with respect to the liens and their extensions" (Ds' Memo. of Law in Opp. at p. 9); and 3) reargument is not warranted because Plaintiffs have not established that the Court overlooked or misapprehended matters of fact or law in determining the Prior Motion, and Defendants are incorrect in asserting that the Court failed to consider the November 13th email from Miller to First Choice (*see* Lillis Aff. in Supp. at ¶ 27) as the Prior Decision reflects the Court's consideration of the email exchange of which that email was a part (*see* Prior Decision at pp. 5, 12-13).

RULING OF THE COURT

A. Leave to Renew

A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. *Schenectady Steel Co., Inc. v. Meyer Contracting Corp.*, 73 A.D.3d 1013, 1015 (2d Dept. 2010), quoting CPLR §§ 2221(e)(2) and (3) and citing, *inter alia*, *Barnett v. Smith*, 64 A.D.3d 669 (2d Dept. 2009) and *Chernysheva v. Pinchuk*, 57 A.D.3d 936 (2d Dept. 2008).

B. Leave to Reargue

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion. *Matter of American Alternative Insurance Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), *lv. app. den.*, 18 N.Y.3d 803 (2012), quoting CPLR § 2221(d)(2). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to

present arguments different from those originally presented. *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010), quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999).

C. Application of these Principles to the Instant Action

The Court denies Plaintiffs' motion to renew. Plaintiffs have failed to provide a reasonable justification for their failure to offer the New Submissions in opposition to the Prior Motion; Azulay's conclusory assertions regarding his inability to locate this documentation in the past are insufficient. Moreover, even assuming *arguendo* that Plaintiffs had provided a reasonable justification for that failure and the Court were to consider the New Submissions, the Court denies the motion to renew because the New Submissions would not change the Prior Decision because they do not mention the Liens or Extensions and, therefore, do not provide evidence of an attorney-client relationship between Plaintiffs and Defendant with specific reference to the Liens or Extensions.

The Court denies Plaintiffs' motion to reargue based on the Court's conclusion that Plaintiffs have not demonstrated that the Court overlooked or misapprehended any matter of fact or law in issuing the Prior Decision granting the Prior Motion.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
February 2, 2016

HON. TIMOTHY S. DRISCOLL

J.S.C.