

Avery v WJM Dev. Corp.
2016 NY Slip Op 33145(U)
June 23, 2016
Supreme Court, Westchester County
Docket Number: Index No. 61219/2015
Judge: William J. Giacomo
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

-----X
LINDA AVERY and KYLE AVERY,
Plaintiff,

Index No. 61219/2015
Decision & Order

-against-

WJM DEVELOPMENT CORP, LUCIEN MARTIN,
INDIVIDUALLY, STACY MARTIN, INDIVIDUALLY, TOM F.
ABILLAMA, R.A., GEORGE GALGANO, ESQ.,
MCPHILLIPS MECHANICAL, INC. D/B/A B&C PLUMBING,
INC., TRAVELERS INSURANCE CO., CHASE
MANHATTAN MORTGAGE COMPANY, JP MORGAN
CHASE BANK, N.A., AS SUCCESSOR IN INTEREST TO
WAMU, AND INFINITY CONSTRUCTION COMPANY,
INC.,

Defendant.
-----X

The following papers numbered 1 to 8 were read on plaintiff's motion to allow her to enter her home, defendant Tom F. Abillama, R.A.'s motion to dismiss the complaint, defendant Charter Oak Insurance Company's, sued here as Travelers Insurance Co., motion to dismiss the complaint, plaintiff's petition for an order pursuant to Lien Law § 76, and WJM Development Corp., Lucien Martin, Stacy Martin, George Galgano, Esq., McPhillips Mechanical, Inc.'s ("WJM Defendants") motion to dismiss plaintiff's demand pursuant to Lien Law § 76.

PAPERS NUMBERED

Order to Show Cause/Affidavits/Exhibits _____	1-3
WJM Defendant's Affirmation in Opposition/Exhibits _____	4-5
Abillama's Notice of Motion/Affirmation/Exhibits _____	6-8
Plaintiff's Affidavit in Opposition _____	9
Reply Affirmation _____	10

Charter Oak's Notice of Motion/Affirmation//Exhibits _____	11-13
Plaintiff's Affidavit in Opposition _____	14
Reply Affidavit _____	15
Notice of Petition/Petition _____	16-17
Notice of Cross Motion/Affidavits/Exhibits _____	18-19

Factual and Procedural Background

On February 21, 2009, there was a fire at a home owned by plaintiff Linda Avery. Plaintiff Kyle Avery is Linda's adult son who also resides at the premises, 8 California Road, Mount Vernon, New York. On February 23, 2009, Avery (Linda Avery) reported the fire damage to Charter Oak. In 2012, Charter Oak agreed to pay about \$300,000 for the losses due to the fire damage.

In 2011, Avery suffered water damage to her home from a burst pipe. She contacted Charter Oak about that loss but on November 8, 2011, Avery withdrew her claim.

On December 18, 2014, Avery contacted Charter Oak again about the 2009 loss. According to Charter Oak, Avery hired a contractor who, according to Avery, was not properly licensed or insured and did not perform its work properly.

On June 30, 2015, plaintiffs commenced this action against defendants. In her complaint plaintiff Avery alleges that on July 28, 2009, she hired defendant Abillama as her architect for the restoration of her home from the fire damage. During this time she was represented by attorney Bruce Mogavero, who was subsequently disbarred. According to plaintiff, Mogavero obtained two checks totally \$100,613.97 and deposited them in his own account. Ultimately, plaintiff received \$61,500 from Mogavero after he was convicted of embezzlement.

Plaintiff alleges that after the fire damage Mogavero arranged for defendant Infinity Construction Company to start the renovation work on her home. In September 2009, Infinity Construction Company abandoned the project. Plaintiff states that in March 2011 Abillama recommenced Lucien Martin and his company WJM Development Corp. Plaintiff claims that through Martin she was introduced to Stephan Kroell of Energy Electric and Christopher McPhillips of B&C Plumbing, Inc. Avery claims that she agreed to pay WJM \$106,750 for the restoration work. Between January 24 and March 8, 2012, plaintiff paid a total of \$65,716 to Lucien Martin. On April 10, 2012, Traveler (Charter Oaks) issued a hold back funds check for \$13,023.19 which was to be paid to WJM.

Avery states that at a April 12, 2012 meeting with Martin, she raised concern that WJM had not done much work since March 7th and she was concerned that access to the second floor of the residence and the bedroom and bathroom areas was going to be delayed.

Avery states that the work performed by WJM and Martin was defective since they closed up the entire first floor walls without first having the proper inspections and permits issued. Avery also states that new windows she paid Martin for were never delivered.

Avery states that after she filed a consumer complaint against Martin, she was contacted by George Galgano, a friend of Martin's, seeking to work out the issues between her and Martin. However, they were not able to resolve the issues. After the Department of Consumer Protection (DCP) investigated her complaint, Avery was informed that the DCP was unable to resolve her complaint through mediation.

Avery claims that Martin and WJM did not have the proper insurance to perform work on her home.

On April 17, 2012, Charter Oak informed Avery that it was not renewing her homeowners insurance citing excessive claims. Further, Avery claims that it also refused to pay for the water damage she sustained in 2011.

Avery claims that she was not able to obtain replacement homeowners insurance because the necessary repairs were not made to her home. She states that thereafter Chase Mortgage assigned a force-placed insurance policy on her home which premiums are three times more than her previous policy.

In her complaint, Avery, appearing *pro se*, alleges that (1) Chase was grossly negligent for transmitting checks to Mogavero; (2) that Chase breached its mortgage contract by requiring her to have force-placed insurance which is excessively expensive; (3) Infinity Construction Corp converted funds owed to her; (4) Infinity Construction Corp was unjustly enriched; (5) Infinity Construction Corp breached its construction contract; (6) Infinity Construction Corp committed fraud; (7) WJM and Lucien Martin lacked the proper insurance and was ineligible for work permits and lacked the legal capacity to contract with her so their construction contract should be rescinded; (8) WJM, Lucien Martin, Stacey Martin, and B&C Plumbing, Inc. received funds to work on her home but converted those funds instead; (9) WJM, Lucien Martin, Stacey Martin, and B&C Plumbing Inc. were unjustly enriched; (10) WJM and Lucien Martin breached their construction contract with her; (11) WJM and Lucien Martin committed fraud; (12) Lucien Martin trespassed on her property after she revoked her permission allowing him access to the premises; (13) Abillama breached his fiduciary duty to Avery by recommending she use WJM and Lucien Martin; (14) Trespass against Chase Mortgage for changing the locks on her home; (15) Charter Oak breached its insurance contract with her when it negligently approved hold back funds based on work not performed by WJM. Plaintiff Kyle Avery asserts a claim for negligent infliction of emotional distress against all defendants due to their failure to repair his home.

Issue was joined by the WJM defendants on October 16, 2015.

Avery now moves for an order directing that she be permitted back into her home due to the lock change and that the WJM defendants disgorge monies provided to them in trust by Linda Avery, together with interest from the date of diversion. The WJM defendants oppose Avery's OSC to the extent it seeks to direct the WJM defendants to "disgorge monies provided to them in trust by Linda Avery, together with interest from the date of diversion." The WJM defendants argue that this is the ultimate relief sought in the complaint.

Defendant Abillama moves to dismiss the claims against him on the ground that there is no allegation that he did anything wrong other than recommend WJM and Lucien Martin for the project. Abillama argues that there is no allegation that the architectural services provided were defective. Abillama argues that he does not know what happened on the project after he submitted his plans to the Mount Vernon building department. Further, he owes no fiduciary duty to Avery. Finally, since the services provided ended in 2011, the applicable statute of limitations has expired.

Avery opposes the motion arguing that Abillama knew WJM and Lucien Martin did not have the proper insurance when he recommended them to her. Therefore, according to Avery Abillama owed her a fiduciary duty to disclose this information. Avery also argues that the action is not time barred since she did not learn until 2012 that WJM and Martin did not have the proper insurance.

Charter Oak moves to dismiss the complaint on the ground that it paid out on Avery's 2009 claim and the case was closed. Charter Oak argues that it has no further duty to Avery. Moreover, the two-year statute of limitations for suing Charter Oak as provided in the insurance policy issued to Avery has expired.

In opposition to Charter Oak's motion Avery argues that the statute of limitations has not expired since there is still additional work that needs to be performed on her home.

Avery then brought a notice of petition and petition demanding that the WJM defendants deliver verified statements to her pursuant to Lien Law § 75 & 76 setting forth the entries in their books and records maintained for the "Lien Law Trust." Avery argues that the WJM defendants obtained funds to repair her home but did not properly repair her home.

The WJM defendants cross move to vacate Avery's demand pursuant to Lien Law § 75 & 76 arguing that the notice of petition is defective since it is not supported by a petition. Further, Avery did not file a request for a verified statement in the manner required by statute. The WJM defendants argue that they were served by priority mail and not personally or by registered or certified mail as required by statute. The WJM Defendants also argue that Avery makes no enforcement of a lien trust claim in her complaint, therefore, is not entitled to a statement regarding any trust.

Discussion

Plaintiff's Order to Show Cause

To the extent Avery seeks to be permitted back into her home, that application has not been opposed and, therefore, is GRANTED.

Avery's application seeking to have the WJM defendants return money to her is in essence a motion for summary judgment on her complaint. However, Avery moved for summary judgment prior to issue being joined. She sought this relief in July 2015 before WJM answered. Accordingly, that relief is DENIED as premature.

Abillama's Motion to Dismiss

On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. (See *Sabadie v. Burke*, 47 A.D.3d 913 [2nd Dept 2008]; *Matter of Schwartz*, 44 A.D.3d 779 [2nd Dept 2007]). In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. (See *Sabadie v. Burke*, 47 A.D.3d 913 [2nd Dept 2008]; *Matter of Schwartz*, 44 A.D.3d at 779).

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v Belkin BV*, 109 AD3d 520 [2nd Dept 2013]; see *Leon v Martinez*, 84 NY2d 83, 87–88; *Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788, 791 [2nd Dept 2013]). In assessing a motion under CPLR 3211(a)(7) a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635) and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275; *Rovello v. Orofino Realty Co.*, *supra*, 40 N.Y.2d at 636).

In support of his pre-answer motion to dismiss, Abillama notes that the claims against him sound in negligence, breach of fiduciary duty, and fraud. Abillama argues that he prepared the plans for plaintiff's home which were submitted to the Mount Vernon Building Department and after some modification they were approved in April 2012. He had no further involvement with the project thereafter. Abillama acknowledges that he recommended WJM and Martin to plaintiff, but claims that she was free to hire any contractor of her choosing to perform the construction work. Thus, there is no fiduciary relationship between him and Avery. Finally, Abillama claims that he made no fraudulent misrepresentations to Avery nor does she expressly state any alleged fraudulent statements.

Abillama also argues that the statute of limitations for fraud is one year and any statements he allegedly made occurred in 2012 and this action was commenced in 2015 after the expiration of the statute of limitations. Further, the statute of limitations for a claim for property damages due to negligence is three years and any alleged negligence occurred in April 2012 and this action was commenced in June 2015 after the three years expired.

To the extent plaintiff is asserting any claims sounding in fraud, those claims must be dismissed as time barred. Likewise, plaintiff's negligence claims are must be dismissed as time barred.

With respect to plaintiff's claim for breach of fiduciary duty, the elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*see Rut v. Young Adult Inst., Inc.*, 74 A.D.3d 776, 901 N.Y.S.2d 715 [2nd Dept 2010]). A fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other (*see Roni LLC v. Arfa*, 18 N.Y.3d 846 [2011]).

Here, that claim must also be dismissed because no fiduciary duty existed between plaintiff and Abillama. While Abillama may have recommended WJM and Martin to plaintiff, she was free to vet and use any contractor of her choosing. Further, whether WJM or Martin had the proper insurance or pulled the proper permits for the project is information that was available to Avery.

Based on the foregoing, Abillama's motion to dismiss the complaint against him is GRANTED.

Charter Oak's Motion to Dismiss

In their pre-answer motion to dismiss Charter Oaks argues that pursuant to the terms of the insurance policy issued to plaintiff, there is a 2-year limitations period, from the date of the loss, to bring suit against Charter Oaks and that period expired. Charter Oaks argues that the loss sustained by fire occurred in 2009 and the loss due to water damage in 2011. However, this action was commenced in 2015 well after the two year limitations period expired. Charter Oaks also argues that plaintiff's claim for breach of implied covenant of good faith and fair dealing and negligent infliction of emotional distress must be dismissed because there is no evidence to support those claims.

In this case, the policy at issue contained a provision that any legal action for coverage under it must be brought within two years of the date the direct physical loss or damage occurred. Under New York law, the loss date is the date of "the occurrence of the casualty or event insured against" (*see Morgan Guar. Trust Co. of N.Y. v Aetna Cas. & Sur. Co.*, 199 AD2d 72, 73 [1993], *quoting Margulies v Quaker City Fire & Mar. Ins. Co.*, 276 App Div 695, 700 [1950]; *Califano v Citizens Ins. Co. of N.J.*, 163 Misc 542 [Sup Ct

1937], affd 252 App Div 731 [1937]). The losses experienced by plaintiff occurred in 2009 and 2011, yet plaintiff commenced this action in 2015 well after the expiration of the policy's two year limitations period. Accordingly, all claims against Charter Oak are time barred.

Based on the foregoing, Charter Oaks' motion to dismiss the complaint against it is GRANTED.

Plaintiff's Petition and the WJM's cross motion to Vacate Plaintiff's Demand

In her petition, Avery seeks verified statements pursuant to Lien Law §§ 75 and 76 pursuant to a demand she served on the WJM defendants on October 16, 2015. The WJM Defendants cross move to vacate the demand on the ground that it is improper.

Contrary to Avery's argument, she is not entitled to verified statements pursuant to the Lien Law § 76. The purpose of this article permitting subcontractor to require an accounting from general contractor was to make more certain that laborers and materialmen on an improvement would be paid from project funds. (See *Frontier Excavating, Inc. v. Sovereign Const. Co.* 30 A.D.2d 487 [4th Dept 1968] motion denied 24 N.Y.2d 991 [1969]; see generally *P.M. Excavating, Inc. v. Matthews Indus. Piping Co., Inc.*, 115 A.D.2d 464 [2nd Dept 1985]). Since plaintiff is not a contractor, subcontractor, or laborer, there are no trust funds being held for her benefit. Accordingly, she is not entitled to verified statements pursuant to the Lien Law.

Based on the foregoing, plaintiff's petition is DENIED and the WJM Defendant's motion to vacate the demand is GRANTED.

Summary

Plaintiffs' order to show cause is GRANTED only to the extent of permitting access to their home, Abillama's motion to dismiss the complaint is GRANTED, Charter Oak's motion to dismiss is GRANTED, plaintiffs' petition seeking verified statements pursuant to the Lien Law is DENIED, and the WJM Defendant's motion to vacate plaintiff's demand pursuant to the Lien Law is GRANTED.

The parties are to appear in the Preliminary Conference Part on July 12, 2016 at 9:30 a.m. Room 800 for further proceedings.

Dated: White Plains, New York
June 23, 2016



HON. WILLIAM J. GIACOMO, J.S.C.

H:\ALPHABETICAL MASTER LIST-WESTCHESTER\Avery v. WJM Development (5 motions).wpd