

**Arthur Lange, Inc. v Slagle**

2018 NY Slip Op 33720(U)

March 29, 2018

Supreme Court, Westchester County

Docket Number: Index No. 52125/2017

Judge: Terry Jane Ruderman

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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

-----X  
ARTHUR LANGE, INC.,

Plaintiff,

-against-

DECISION AND ORDER  
Sequence Nos. 1 and 2  
Index No. 52125/2017

ROBERT D. SLAGLE and ROBERT J. STICCA,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with the defendants' motion to dismiss the complaint and plaintiff's cross-motion to amend the complaint:

| <u>Papers</u>  | <u>Numbered</u> |
|--|-----------------|
| Notice of Motion, Affirmation and Exhibits A – E                     | 1               |
| Memorandum of Law in Support   | 2               |
| Affirmation in Opposition and Exhibits A – C                         | 3               |
| Notice of Cross-Motion, Affirmation in Support and Exhibits A – B    | 4               |
| Reply in Further Support of Motion and in Opposition to Cross-Motion | 5               |
| Memorandum of Law in Opposition to Cross-Motion                      | 6               |
| Reply Affirmation in Further Support of Cross-Motion                 | 7               |

Plaintiff Arthur Lange, Inc. commenced this action against defendants Robert D. Slagle and Robert J. Sticca by filing a summons and complaint on February 16, 2017. The complaint asserts five causes of action for fraud, misrepresentation, breach of contract, breach of the duty of good faith and fair dealing, and unjust enrichment. According to the complaint, defendants retained plaintiff on December 24, 2015 to renovate defendants' home at 230 Pennsylvania Avenue, Yonkers, New York. Pursuant to the parties' agreement, the plaintiff sent the defendants monthly itemized invoices for time spent and materials purchased. Between January 2016 and July 5, 2016, defendants paid plaintiff a total of \$314,000 in four installments of \$91,774, \$62,226.41, \$20,000 and \$140,000. Thereafter, defendants allegedly embarked on a scheme to defraud plaintiff of the final payment amount of \$155,750 by challenging the basis and method of plaintiff's billing for

work previously performed, questioning the integrity of plaintiff's workers and claiming, for the first time, that they were dissatisfied with the renovations.

The defendants now move for an order, pursuant to CPLR 3211(a)(1), (5) and (7), and CPLR 3015(e), for an order, dismissing the complaint. The plaintiff opposes the motion and cross-moves for an order granting leave to amend the complaint pursuant to CPLR 3025(b).

In support of its motion to dismiss, defendants initially argue that the complaint should be dismissed because plaintiff failed to plead that it was a licensed home improvement contractor and provide its contractor's license, as required by CPLR 3015(e). Next, defendants contend that the complaint fails to state a cause of action for breach of contract because the parties' agreement was not evidenced by a signed writing and is therefore unenforceable as a home improvement contract under General Business Law § 771. Defendants also assert that the complaint fails to plead the essential elements of fraud and misrepresentation, and, in any event, those claims must be dismissed as duplicative of the breach of contract cause of action. Lastly, defendants argue that the documentary evidence, in the form of the mechanic's lien and defendants' cleared checks, demonstrate the defense of payment and warrant dismissal of the unjust enrichment claim. The mechanic's lien states that the total agreed upon value of the renovation work was \$295,750; however, the cleared checks show that defendants paid plaintiff a total of \$314,000.

In opposition, plaintiff argues that there is a valid contract between the parties, as evidenced by a December 29, 2015 email from defendants to plaintiff containing a document signed by defendants stating that they contracted with Arthur Lange, Inc. to renovate and restore the house at 230 Pennsylvania Avenue. Plaintiff also submits, as proof of a binding contract, an email it sent to defendants dated January 21, 2016 with a detailed breakdown estimating the cost of the labor and materials necessary to perform the renovations.

With respect to the cross-motion, plaintiff argues that the amended complaint, if permitted to be filed by the Court, would render defendants' motion to dismiss moot. The proposed amendments include a pleading of plaintiff's contractor's license, additional facts to support the fraud and misrepresentation claims, and the addition of a sixth cause of action for quantum meruit.

#### Analysis

##### I. *Motion to Dismiss Pursuant to CPLR 3211(a)(7)*

In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under CPLR 3211 (a)(7), the court's role is to determine whether, accepting

as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated (*Campaign for Fiscal Equity v State of New York*, 86 NY2d 307, 318 [1995]). On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), “the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Vertical Progression, Inc. v Canyon-Johnson Urban Funds*, 126 AD3d 784, 786 [2d Dept 2015] [citing *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010] [internal quotation marks omitted]).

A. *Breach of Contract and Breach of Good Faith and Fair Dealing Claims*

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, performance pursuant to the contract, a breach of the contract, and damages resulting from the breach (*Meyer v N. Shore-Long Is. Jewish Health Sys., Inc.*, 137 AD3d 878, 879 [2d Dept 2016]). In addition, General Business Law § 771 requires all home improvement contracts, such as the one at issue here, to be in a writing signed by both parties and to include certain additional information as detailed in the statute. A contractor cannot enforce a contract that fails to comply with General Business Law § 771 (*see Home Const. Corp. v Beaury*, 149 AD3d 699, 701–02 [2d Dept 2017] [generally, a contractor may not recover for breach of a home improvement contract in the absence of a signed, written agreement that largely complies with General Business Law § 771]; *see also F & M Gen. Contr. v Oncel*, 132 AD3d 946 [2d Dept 2015]).

Although plaintiff submits, in opposition, defendants’ December 29, 2015 authorization and the January 21, 2016 home renovation estimate, neither document is signed by both parties, and both documents omit even the most basic terms required by General Business Law § 771. As such, plaintiff cannot recover on its breach of contract claim.

The absence of a contract between the parties also warrants dismissal of plaintiff’s claim for breach of the implied covenant of good faith and fair dealing (*see Meyer*, 137 AD3d at 879–80). Accordingly, that branch of defendants’ motion seeking to dismiss plaintiff’s third and fourth causes of action for breach of contract and breach of the duty of good faith and fair dealing is granted.

B. *Fraud and Misrepresentation Claims*

“The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” (*Introna v Huntington Learning Ctrs., Inc.*, 78

AD3d 896, 898 [2d Dept 2010]). To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). In addition, where a cause of action is based upon fraud and misrepresentation, “the circumstances constituting the wrong must be stated in detail” (*see* CPLR 3016[b]).

A cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of a contract (*see Gorman v Fowkes*, 97 AD3d 726, 727 [2d Dept 2012]). Nor will a mere misrepresentation of an intent to perform under a contract sustain a cause of action to recover damages for fraud (*see Selinger Enters., Inc. v Cassuto*, 50 AD3d 766 768 [2d Dept 2008]). Where “a claim to recover damages for fraud is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties’ agreement, a cause of action sounding in fraud does not lie” (*Genovese v State Farm Mut. Auto. Ins. Co.*, 106 AD3d 866, 867 [2d Dept 2013]).

Here, plaintiff alleges that the defendants knowingly deceived plaintiff into believing it would be paid for its work by continually praising the progress and quality of the renovation work and promising that they would pay for the costs of plaintiff’s labor, material and service. These allegations amount to an alleged misrepresentation of defendants’ intent to perform under the parties’ agreement. Accordingly, plaintiff’s first and second causes of action for fraud and misrepresentation must be dismissed.

C. *License to do Business Pursuant to CPLR 3015(e)*

CPLR 3015(e) requires the plaintiff in an action against a consumer arising from the plaintiff’s conduct of a business that is required to be licensed by the city or county, to allege, in the complaint, that plaintiff was duly licensed at the time services were rendered along with the name and number of the license and the agency that issued the license. Plaintiff’s failure to comply with this provision permits a defendant to move for dismissal of the complaint pursuant to CPLR 3015(e).

Section 863.313 of the Westchester County Consumer Protection Code provides that “[n]o person shall maintain, conduct, advertise, operate, or engage in the home improvement business

within the County of Westchester, or hold himself or herself out as being able to do so, unless such person is licensed pursuant to this Article.”

A review of the complaint shows that plaintiff failed to allege that it was duly licensed at the time it rendered services to the defendants, and failed to include the name and number of his license and the agency that issued it. However, this is a technical deficiency that can be cured by an amended pleading, particularly where, as here, plaintiff was indeed licensed at the time it was retained to perform the renovation work (*see* CPLR 3025 [leave to amend a pleading shall be freely given upon such terms as may be just]; *see also* CPLR 3026 [permitting defects in pleadings to be ignored if a substantial right of a party is not prejudiced]).

## II. *Motion to Dismiss Pursuant to CPLR 3211(a)(1) and (5)*

A motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence “utterly refutes” the plaintiff’s factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Rodeo Family Enters., LLC v Matte*, 99 AD3d 781, 782 [2d Dept 2012]). “A motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on the ground of payment may be granted where the documentary evidence establishes the defense of payment as a matter of law” (*Parkoff v Stavsky*, 109 AD3d 646, 647 [2d Dept 2013]).

The defendants’ documentary evidence consisting of the lien, and images of the cleared checks, do not conclusively establish a defense to plaintiff’s claim of unjust enrichment. A plaintiff asserting a cause of action for unjust enrichment must demonstrate that: (1) the defendant was enriched, (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mandarin Trading Ltd. V Wildenstein*, 16 NY3d 173, 182 [2011]).

As an initial matter, plaintiff contends that the agreed value of the work as stated in the lien is a scrivener’s error and that the correct value for the work performed is \$469,750. The defendants do not dispute that plaintiff submitted an invoice to them in the amount of \$155,750 and that the defendants did not pay that invoice. Thus, the defendants’ documentary evidence cannot conclusively establish the defense of payment as a matter of law. Nor does the documentary evidence utterly refute plaintiff’s claim of unjust enrichment. The complaint adequately asserts a claim for unjust enrichment by alleging that plaintiff performed renovation work at the defendants’ premises and that defendants have not paid the final invoice which represents the amount plaintiff

expended on labor and materials. Accordingly, that branch of defendants' motion seeking to dismiss plaintiff's fifth cause of action for unjust enrichment is denied.

III. *Leave to Amend the Complaint*

Turning to plaintiff's cross-motion, "[l]eave to amend a pleading should be freely given (*see* CPLR 3025[b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit." (*Reyes v Brinks Glob. Services USA, Inc.*, 112 AD3d 805, 806 [2d Dept 2013], quoting *Ortega v Bisogno & Meyerson*, 2 AD3d 607, 609 [2d Dept 2003]; *see Douglas Elliman, LLC v Bergere*, 98 AD3d 642, 643 [2d Dept 2012]). "[P]rejudice requires that the defendant has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position" (*Bd. of Managers of Century Condominium v Bd. of Assessors*, 96 AD3d 739, 741 [2d Dept 2012] [internal quotation marks and citations omitted]).

Here, the proposed amendments to the complaint would not prejudice or surprise defendant because it merely seeks to plead: (1) the required information regarding plaintiff's home improvement license, as required by CPLR 3015(e), (2) additional facts to support the fraud and misrepresentation claims, and (3) a cause of action for quantum meruit. There can be no claim that defendants would be prejudiced or surprised by the amendments or hindered in the preparation of their case by the proposed amendments, since the theory of the case remains the same. However, despite plaintiff's inclusion of additional facts with respect to its claims for fraud and misrepresentation, those causes of action remain insufficient as a matter of law for the reasons already discussed.

Accordingly, plaintiff's cross-motion to amend the complaint is granted to the extent of permitting plaintiff to allege that it was duly licensed at the time services were rendered and to assert an additional cause of action for quantum meruit, and is otherwise denied (*see Hill v 2016 Realty Assoc.*, 42 AD3d 432, 433 [2d Dept 2007] [Supreme Court properly denied plaintiff's motion for leave to amend the complaint where plaintiff's proposed amendment was palpably insufficient as a matter of law to show the conduct alleged]).

Based upon the foregoing, it is hereby,

ORDERED that the branches of defendant's motion to dismiss the first, second, third and fourth causes of action are granted; and it is further



ORDERED that plaintiff's motion to amend the complaint is granted only to the extent of asserting an additional cause of action for quantum meruit; and it is further

ORDERED that plaintiff shall serve and file an amended complaint within 30 days of this Decision and Order, which amended complaint shall not include those causes of action that have been dismissed from the action; and it is further

ORDERED that the parties appear on Friday, April 27, 2018 at 9:30 a.m. in the Compliance Conference Part of the Westchester County Supreme Court, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601, as previously directed.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

March 29, 2018



HON. TERRY JANE RUDERMAN, J.S.C.