| **Cha v Columbia E. Constr. Corp.** |
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| 2019 NY Slip Op 31829(U) |
| June 18, 2019 |
| Supreme Court, Kings County |
| Docket Number: 525240/18 |
| Judge: Karen B. Rothenberg |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
THERESA CHA,

Plaintiff, Index No: 525240/18

-against-

DECISION AND ORDER

COLUMBIA EAST CONSTRUCTION CORP. and
MINSOO HYUN,

Defendants,
x

Recitation as required by CPLR 2219(a), of the papers considered in this motion pursuant to CPLR 3211(a)(7).

| Papers | Numbered |
|---|---|
| Order to Show Cause/Motion and Affidavits Annexed. | 1 |
| Cross-motion and affidavits annexed..... | |
| Answering Affidavits..... | 3 |
| Reply Papers..... | 4 |
| Memoranda of law..... | 2 |



Upon the foregoing cited papers, the Decision/Order on this motion:

In this action to recover damages arising out of a home improvement contract, defendants Columbia East Construction Corp., [Columbia East] and Minsoon Hyun [Hyun] move for an order pursuant to CPLR 3211(a)(5), (a)(7) and CPLR 3016 dismissing the plaintiff's first, second, third, and fifth causes of action as against Columbia East and dismissing all causes of action against Hyun.

It is alleged in the complaint that plaintiff, the owner of a two-unit residential apartment building located at 122 Wycoff Avenue, Brooklyn, contracted with defendant Columbia East to perform certain work, improvements and construction at the property for the sum of $152,500, of which, to date, $132,500 has been paid. It is further alleged that defendants failed to complete the renovation and construction of the building and abandoned the project. In the complaint plaintiff asserts the following five causes of action against defendants: (1) violation of the New York home improvement business

law, (2) fraudulent inducement, (3) violation of the New York Lien Law and the New York Home Improvement Business Law, (4) breach of contract, and (5) unjust enrichment.

In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]).

With regard to the first cause of action, the plaintiff sufficiently pleaded a claim under the New York Home Improvement Business Law, N.Y. Gen. Bus. Law [GBL] Art. 36-A, §770 et. seq. Defendants argument that plaintiff is not a protected individual because the "home" is an investment property and not her residence is without merit. GBL§ 771(1) provides that "[e]very home improvement contract subject to the provisions of ... article [36–a], and all amendments thereto, shall be evidenced by a writing and shall be signed by all the parties to the contract." GBL §770 defines an "Owner" as *any* "homeowner" and defines a "home improvement contract" as "an agreement for the performance of home improvement, between a home improvement contractor and an owner, and where the aggregate contract price specified...exceeds five hundred dollars." Defendant fails to cite any language in the text of the GBL or case law interpreting the provisions of the GBL as restricting its protections to only certain types of homeowners. Further, as this action is not based on an alleged violation of the Home Improvement Business provisions of the Administrative Code of the City of New York, §20-386 et. seq, defendants' citation to cases holding that such provisions are only applicable to individuals residing in the subject premises is of no import. Thus, the protections afforded under GBL §770, et. seq. applies to the home improvement contract at issue.

Moreover, plaintiff, as an owner, sufficiently pleaded her third cause of action against defendants for diversion of trust funds in violation of Art. 3A of the Lien Law (*see Ippolito v TJC Dev., LLC* [83 AD3d 57 [2d Dept 2011]). Under the Lien Law, the funds paid to defendants under the home improvement contract qualify as trust funds, requiring defendants to hold the funds in an escrow account, where they would remain the property of the plaintiff until substantial completion of the contract (GBL §771[1][e]; N.Y. Lien Law §71-a[4][a][d]). The use of trust funds for any purpose "other than the expenditures authorized in Lien Law §71 before all trust claims have been paid or discharged constitutes an improper diversion of trust assets, regardless of the propriety of the trustee's intentions" and enables an owner to commence an action pursuant to Art. 3A of the Lien

Law (*RLI Ins. Co. v New York State Dept. of Labor*, 97 NY2d 256 [2002]). Further, an officer or agent of the defendant corporation, may be held personally liable for his/her acts which constitute an improper diversion of trust funds (*see Ippolito* at 71). The complaint alleges that the defendants, in violation of the Lien Law, wrongfully co-mingled funds and used or applied a portion of the paid funds for purposes unrelated to the construction and renovation work contemplated by the contract. It is also alleged that the defendants failed to maintain the required records concerning the trust. Thus, the plaintiff has a viable cause of action against both defendants pursuant to Art. 3A of the Lien Law (*see Gorman v Fowkes*, 97 AD3d 726 [2d Dept 2012]). Lastly, as it is alleged that the project was abandoned by the defendants, the one-year limitations period of §77(2) of Art. 3A of the Lien Law is not applicable (*see Putnins Contracting Corp. v Winston Woods at Dix Hills, Inc.*, 36 NY2d 679 [1975]).

However, the plaintiff's second cause of action alleging fraudulent inducement fails to state a viable claim. 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]). A cause of action premised upon fraud will not lie where the fraud claim relates to an alleged breach of contract (*see Mendelovitz v Cohen*, 37 AD3d 670 [2d Dept 2007]). Moreover, "mere conclusory language, without specific and detailed allegations establishing material misrepresentations of fact, is insufficient to state a cause of action to recover damages for fraud" (*Heffez v L & G General Const., Inc.*, 56 AD3d 526, 527 [2d Dept 2008]). Further, "[g]eneral allegations that defendant[s] entered into a contract while lacking the intent to perform it are insufficient to support [a] claim" of fraudulent inducement (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). Here, the complaint alleges that "[t]o obtain [p]laintiff's agreement to sign the contract [defendants], promised and agreed to complete the agreed upon construction project" and that at the time the promise was made "[defendants] had no present intention of completing the agreed upon construction project." Thus, the alleged misrepresentations amount only to a misrepresentation of the intent to perform under the contract and are wholly duplicative of the fourth cause of action for breach of contract (*see Gorman, supra*). As plaintiff fails to allege any misrepresentation that was collateral or extraneous to the alleged contract between the parties, the complaint fails to state a cause of action for fraudulent inducement (*see Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC*, 107 AD3d 788 [2d Dept 2013]).

Plaintiff also fails to state a viable claim for consequential damages (i.e. lost rental income) as part of her fourth cause of action (*see Janusonis v Carauskas*, 137 AD3d 1218 [2d Dept 2016]). In actions to recover damages for breach of contract, "the nonbreaching party may recover general damages which are the natural and probable consequence of the

breach" (*Kenford Co. v. County of Erie*, 73 NY2d 312, 319 [1989]). In order to recover consequential damages that do not flow directly from the breach, a plaintiff is required to plead that the damages were foreseeable and within "the contemplation of the parties at the time the contract was made" (*American List Corp. v. U.S. News & World Report*, 75 NY2d 38, 43 [1989]). Here, plaintiff claims that after her newly-hired contractor completed the work that defendants' failed to perform she rented the two apartments at her premises for $4,850.00 per month; income she alleges was lost during the period of time that defendants delayed and ultimately abandoned the project. However, as the complaint fails to plead that these damages were within the contemplation of the parties at the time the contract was made, that portion of plaintiff's fourth cause of action insofar as it seeks to recover consequential damages cannot stand (*see Yenrab, supra*).

Likewise, plaintiff's fifth cause of action fails to state a viable claim for unjust enrichment. "As a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recover in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter" (*Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 695 [2d Dept 2009]). Here, as plaintiff alleges the existence of a written contract for home improvement between the parties, plaintiff claim alleging unjust enrichment is precluded (*see Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755 [2d Dept 2009]).

In addition, plaintiff's complaint fails to state a viable claim for counsel fees. Generally, counsel fees, which are merely an incident of litigation, are not recoverable absent a specific contractual provision or statutory authority (*see Levine v Infidelity, Inc.*, 2 AD3d 691 [2d Dept]. Here, the complaint does not allege that the home improvement contract contemplated an award of counsel fees in an action between the parties. Further, as the plaintiff's fraudulent inducement claim fails, she cannot recover statutory counsel fees pursuant to GBL §772, which only permits the recovery of counsel fees from a contractor found to have committed fraud. Accordingly, plaintiff has no claim against defendants for an award of counsel fees in this matter.

Lastly, except as to the cause of action under Art. 3A of the Lien Law, defendants have demonstrated that the complaint should be dismissed insofar as asserted against the individual defendant Hyun. It is alleged in the complaint that plaintiff "agreed to and signed a written contract with Columbia East under which Columbia East agreed to perform certain work, improvements, and construction at the [p]roperty." It is further alleged that Hyun "interacted and dealt [with] the [p]laintiff on behalf of Columbia East." As the complaint alleges that Hyun acted on behalf of a disclosed principal, without alleging that he intended to be personally bound by the agreement, the complaint fails to state a cause of action against Hyun for breach of contract under agency law principles

(*see Environmental Appraisers & Builders, LLC v Imhof*, 143 AD3d 756 [2d Dept 2016]). Likewise, the complaint fails to plead any of the elements necessary to pierce the veil of the corporation to hold Hyun personally liable for the actions taken on behalf of the corporation (*see Allstate ATM Corp. v E.S.A. Holding Corp.*, 98 AD3d 541 [2d Dept 2012]).

Accordingly, it is hereby

**Ordered**, that the defendants' motion for dismissal of the complaint as against Hyun is granted as to the **first**, **second**, **fourth** and **fifth** causes of action and denied as to the **third** cause of action, and it is further

**Ordered**, that defendants' motion for dismissal of the complaint as against Columbia East is granted as to the **second** and **fifth** causes of action, and so much of the **fourth** cause of action as seeks to recover consequential damages, and is denied as to the **first** and **third** causes of action.

This constitutes the decision/order of the court.

Dated: June 18, 2019

Enter,

Karen B. Rothenberg
J.S.C.

Karen B. Rothenberg
Justice, Supreme Court

2019 JUN 25 AM 9:14
KINGS COUNTY CLERK
FILED