Platt v Seafarer Group, Ltd
2019 NY Slip Op 33044(U)
October 11, 2019
Supreme Court, Suffolk County
Docket Number: 01934/2015
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Brian Platt,

Plaintiff,

-against-

The Seafarer Group, Ltd and James Garcia,

Defendants.

Motion Sequence No.: 001; MOTD
Motion Date: 3/13/19
Submitted: 4/10/19

Index No.: 01934/2015

Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendants dated January 29, 2019; Answering Affidavits and supporting papers by plaintiff dated March 27, 2019; Replying Affidavits and supporting papers dated April 4, 2019; it is

ORDERED that the motion by the defendants seeking an order striking the plaintiffs' complaint on the ground of spoliation of evidence, and seeking summary judgment dismissing the complaint against defendant James Garcia and precluding the testimony of one of plaintiff's witnesses, is granted only to the extent that James Garcia is dismissed from the action, and is otherwise denied.

Plaintiff commenced this action to recover damages for breach of contract concerning the repair and installation of siding performed at his residence by defendant Seafarer Group, Ltd ("Seafarer"), which was owned by defendant James Garcia. Plaintiff claims, among other things, that he entered into an agreement with the defendants to remove old siding on his property and to install new siding on the exterior walls. Plaintiff paid the defendants $47,068.49 for the completed work; however, because of the defendants' poor workmanship, water permeated into the plaintiff's home through the siding, causing damage to his property. Plaintiff asserts that because of the damage he was required to hire a new contractor to re-install new siding. Plaintiff further claims that the defendants were unjustly enriched, and that he is also entitled to recover under a quantum meruit cause of action.

Defendants now move to strike the complaint pursuant to CPLR 3126, arguing that plaintiff committed spoliation of evidence when he replaced the siding that the defendants installed and failed to preserve the same. Alternatively, defendants seek summary judgment dismissing the claims against defendant James Garcia, and preluding the testimony of one of the plaintiff's witnesses, Edward Seltenreich.

Plaintiff testified that he hired Seafarer to complete installation of the siding on his property based upon the recommendation of a friend. He received a written proposal from Garcia outlining the projected costs for the project, and he accepted the proposal. The plaintiff paid the required deposit of $15,000 in July 2014, before Seafarer started working, and he paid $53,913 in total for the job. At some point during the installation, the plaintiff observed that the siding did not "line up" and was "wavy," and that the cement board was pulling away from the house because it was not properly fastened. Plaintiff testified that he observed that Seafarer workers used nails that were shorter than those recommended by the manufacturer, and they did not install a new "vapor barrier" between the structure and the siding. He spoke to Garcia about his concerns and Garcia responded that it was the house that was the issue, not his workmanship. Thereafter, plaintiff terminated Seafarer's services and issued a final check for the work that was completed. According to the plaintiff, he hired more than one inspector to inspect the work done by Seafarer, and each informed him that the siding was not installed according to manufacturer specifications. Additionally, the manufacturer informed him that the siding would not be covered under its warranty because it was not properly installed. After he terminated Seafarer, plaintiff hired a new company to install siding of a different material and color. Plaintiff testified that any material or nails used when Seafarer installed the siding were discarded, and that the portion of siding that was not completed by Seafarer remained unfinished until the new company started its installation.

James Garcia testified that he owned Seafarer, which was an established roofing and siding company. Prior to starting the installation on plaintiff's home, Garcia read the installation manual specific to the type of siding that plaintiff requested, and he installed the siding as specified. There were certain local codes and customs that Garcia took into consideration during the installation. Plaintiff tendered an initial deposit check in Garcia's name, and subsequent checks in Seafarer's name. He testified that he employed three workmen for the project, and that they installed the siding over a new vapor barrier and nailed it to studs in the structure of the house using 1 ½-inch roofing

nails. Garcia was on the job site every morning; however, he often left the site to conduct other business. Garcia testified that the plaintiff asked him to stop working before the job was completed, and that he was not given a reason for his termination. He recalled that he had completed 85 percent of the work and that there were "open areas" left incomplete and exposed to weather elements.

In an affidavit, Garcia stated that during the relevant period, he acted solely on behalf of Seafarer as an officer of the company. Seafarer employees installed the siding in accordance with manufacturer specifications, subject to site conditions. Where manufacturer guidelines could not be met, Seafarer followed accepted industry custom and practice. Because Seafarer was not given the opportunity to complete the installation, portions of the property remained without siding exposing the structure to water for a period of time.

Edward Seltenreich testified that he was the proprietor of East End Inspection Agency, and that he inspected plaintiff's home after Seafarer installed the siding. At the time of his inspection, the siding was incomplete, and he used a moisture meter and a thermal imaging camera to measure moisture inside of the home. According to Seltenreich, "many areas around the windows developed a substantial amount of moisture due to leaks from siding." Seltenreich measured moisture inside of certain areas of the home at "17." He testified that there was no specific standard for moisture, but a measurement between 8 to 12 was generally acceptable. Seltenreich did not open any walls; thus, he did not observe whether there was insulation in the home or whether there was mold in the walls. He also testified that he reviewed the manufacturer guidelines for installation, and he observed that certain guidelines were not followed. He recalled that joint flashing was missing in the areas where the siding was not completed, and the areas around the dryer vent and other plumbing apertures were not properly sealed. He further testified that although he did not record any moisture around the "hose bib" or the dryer vent that protruded from the house, there were openings in those areas and water could enter the residence through those openings.

In an affidavit, Michael Tracey, the defendants' expert engineer, averred that he reviewed testimony transcripts, discovery responses, reports, photographs and other documents to conclude that the installation completed by Seafarer did not cause the damage alleged by the plaintiff. He further opined that the siding was properly installed and was not wavy or misaligned, that the proper nailing method was used to fasten the siding to the frame, that a new vapor barrier was installed in the sections that Seafarer completed, and that approximately three months passed before the portion of the house without the protection of siding was addressed allowing moisture to enter the home. According to Tracey, Seltenreich failed to state how he came to the conclusion that the moisture was related to Seafarer's work, and could not identify any support for his findings. He stated that although some areas of the siding installation varied from the manufacturer specification, those variations were due to site conditions beyond Seafarer's control, and that Seafarer followed local custom and practice in those instances.

It is well established that Supreme Court has broad discretion in determining the appropriate sanction for spoliation of evidence (*see* ***Pegasus Aviation I, Inc. v Varig Logistica S.A.***, 26 NY3d 543, 551, 2015 NY Slip Op 09187 [2015]; ***Samaroo v Bogopa Serv. Corp.***, 106 AD3d 713, 714, 964

NYS2d 255 [2d Dept 2013]; ***De Los Santos v Polanco***, 21 AD3d 397, 397, 799 NYS2d 776 [2d Dept 2005]). "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (***SM v Plainedge Union Free School Dist.***, 162 AD3d 814, 75 NYS 3d 215[2d Dept 2018]; *see* ***Neve v City of New York***, 117 AD3d 1006, 1008, 986 NYS2d 606 [2d Dept 2014]; ***Mendez v La Guacatala, Inc.***, 95 AD3d 1084, 944 NYS2d 313 [2d Dept 2012]; ***Utica Mut. Ins. Co. v Berkoski Oil Co.***, 58 AD3d 717,718, 872 NYS2d 166 [2d Dept 2009]). This sanction has been applied even if the destruction occurred through negligence rather than wilfulness (*see* ***DiDomenico v C & S Aeromatik Supplies, Inc.***, 252 AD2d 41, 53, 682 NYS2d 452 [2d Dept 1998]) and "where evidence was negligently destroyed, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense" (***SM v Plainedge Union Free School Dist.***, *supra*).

The defendants have failed to meet their burden to warrant a sanction for spoliation; thus, the branch of the motion seeking dismissal of the complaint on the ground of spoliation is denied. "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to' prove its claim or defense" (***Neve v City of New York***, 117 AD3d 1006, 1008 [2d Dept 2014] [citation omitted]). There is no indication in the record that plaintiff had an obligation to preserve the siding at the time of re-installation, and defendants failed to show that the disposal of the siding compromised their ability to defend against plaintiff's claims. Defendants' expert concluded that the photographs of the siding installed by Seafarer did not reveal any of the defects plaintiff alleged. He further opined that there was no waviness or misalignment, and the nails used to attach the siding to the framing of the house exceeded manufacturer requirements. According to defendants' expert, the cause of any moisture in plaintiff's residence was due to the unfinished portion of siding that remained when Seafarer was terminated.

Notwithstanding the above finding, the branch of the motion seeking summary judgment dismissing Garcia as a defendant is granted. A complaint "must allege, inter alia, the material elements of each cause of action asserted" (***East Hampton Union Free School Dist. v Sandpebble Builders, Inc.***, 66 AD3d 122, 127, 884 NS2d 94 [2d Dept 2009]). Here, the plaintiff failed to assert any claim that Garcia abused the privilege of doing business in the corporate form to warrant imposing liability against him in his personal capacity. Additionally, "[a] plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff" (***Id.*** at 126). Even assuming that such allegation was made, the defendants have established that Garcia acted in his capacity as an officer of Seafarer when he made the agreement to perform the services that the plaintiff requested, and that Garcia was acting on behalf of Seafarer during the installation of the siding (***Sharon v 398 Bond St., LLC***, 169 AD3d

1079, 1081, 95 NYS3d 234 [2d Dept 2019]). Plaintiff has failed to raise an issue of fact in opposition.

Lastly, the branch of the motion seeking to preclude the testimony of Seltenreich is denied. Contrary to defendants' contention, Seltenreich testified as to which methods he used to form his opinion that the siding was not properly installed. He testified that he reviewed the manufacturer's guidelines and inspected the installation based upon those guidelines, and measured the moisture inside the home. The weight accorded to his opinion must be determined by a jury (*see* ***Coates v Peterson & Sons, Inc.***, 48 AD2d 890, 890, 369 NYS2d 503 [2d Dept 1975]).

Dated: 10/11/2019

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**