SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

KING CONSTRUCTION & DESIGN INC.

INDEX NO. 151448/16

MOT. DATE

- v -

MOT. SEQ. NO. 003

MICHAEL CERUSSI a/k/a MICHAEL A. CERUSSI et al.

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).____

Replying Affidavits NYSCEF DOC No(s).____

This is a breach of contract action. Plaintiff seeks to recover for work and labor performed at the individual defendant Michael Cerussi's request pursuant to a written contract. Plaintiff now moves for: [1] summary judgment against Cerussi, pursuant to CPLR 3212, directing that the subject apartment be sold and, out of the proceeds of the sale, plaintiff be paid the amount of the underlying mechanic's lien together with the expenses of the sale and the costs and disbursements of this action; [2] pursuant to CPLR 3211(b) and/or CPLR 321 I(a)(1) and/or (7), dismissing the individual defendant's fifth affirmative defense/first counterclaim; or, in the event summary judgment is not granted, [3] for leave to amend the complaint. Defendant opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. The court's decision follows.

The court will first consider whether plaintiff is entitled to summary judgment. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The undisputed facts are as follows. Following Cerussi's purchase of cooperative unit located at 77 Warren Street, 2nd Floor, New York, New York, he entered into an agreement signed on February 11,

Dated: 12/18/19

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

2015, whereby plaintiff was supposed to perform various services including protection, demolition, painting, glass installation, electrical work and millwork. The contract price was for $66,810 but it did not specify a completion date. Cerussi paid King $30,000 up front and King began its work.

In connection with the project, Cerussi testified at his deposition that he hired his cousin, Charlie Ferrer, to serve as an interior decorator. Cerussi claimed that both he and Ferrer communicated with plaintiff vis-à-vis Collin Curry and Michael Barbarich in person and via telephone and email during the course of plaintiff's work.

There is no dispute that during the course of the project, the scope of the work changed. Cerussi no longer required plaintiff to install a bar, which was itemized in the contract at $9,600. Cerussi admitted at his deposition that he requested add-ons such as hardware for barn doors. Plaintiff has provided a copy of an invoice for such special order hardware, totaling $1,410.50.

A document entitled "77 Warren / King Construction / Project Punch List / Revised Completion Plan" has been provided to the court. This document, although not signed by any party, appears to be dated July 23, 2015[1] and sets forth what work has been completed and has not yet been completed and sets forth timelines for completion. It states in relevant part:

> It was agreed this morning between KING and FERRER that following satisfactory and timely completion of the open items below, KING will close out their contract with the client and submit a final invoice to the client reconciling costs in excess of the deposit paid to them by the client. King will make best efforts to affect completion within two weeks of today, if not sooner.

On July 23, 2015, Ferrer sent an email to plaintiff which states:

> Mike, Collin:
>
> Find attached, the Punch List for this job annotated to reflect our understanding of work completed, work deleted and work that remains incomplete. Our mutual objective was to clear the punch list no later than 7/22. A number of items still require your attention and I have not received an update on delivery of the outstanding millwork items as you promised. The client remains frustrated with the lack of progress and the inability to drive the items to successful completion.
>
> Please let us know where you are with the millwork and by when you plan to remedy the items highlighted in red on the attached document.

On July 24, 2015, Cerussi sent an email to plaintiff which reads as follows:

> Collin and Mike, your unresponsiveness to calls and emails over the course of these past months has been frustrating to say the very least. Charlie gave you the opportunity to close out this project (against my order to terminate our relationship) after several missed target dates and in partial form compared to the scope we originally and continually discussed. He gave you two additional weeks. The drop dead date for completion of these items has come and gone, and now it seems we can't even get either of you to answer/return a call or reply to an email.
>
> Since at this point there is no reason to expect that any deadlines set forth will be met or that any of the items on this list will be completed anytime soon, I think it

[1] The date appears on the left side of the footer on each page of the four page document.

> is best to part company. Charlie, please arrange retrieval of my keys and fob from King today.
>
> Mike/Collin, please send an invoice for any balance you believe is due for us to review. Thank you.

Plaintiff sent a final invoice to Cerussi dated August 21, 2015 seeking an additional $45,985 which reflects the work it allegedly performed less Cerussi's initial payment of $30,000. The final invoice details a number of items less items removed from the scope of the work including the bar. Cerussi never remitted any payment. In his affidavit in opposition to the motion, he claims that plaintiff performed its work in a "negligent, careless, incomplete and unskilled manner and caused damage to the property." Cerussi claims that he spent $41,763.16 to have the work plaintiff was supposed to perform completed in a "workmanlike manner" and repair unspecified damage.

Plaintiff filed a mechanic's lien for the monies due under the contract and commenced this action. In its complaint, it asserts one cause of action to foreclose on the mechanic's lien. Cerussi's answer asserts several affirmative defenses and counterclaims. In an order dated March 13, 2017, the Honorable Joan Kenney dismissed Cerussi's 1st-4th affirmative defenses and "6th and 2nd counterclaims" but noted that Cerussi's 5th affirmative defense and 1st counterclaim "shall remain… as there is a factual dispute respecting a breach, if any, of the terms of the parties' contract." Cerussi's remaining defense/counterclaim asserts that plaintiff's work was performed "in a negligent, careless, incomplete and unskilled manner" and seeks a judgment against plaintiff for $41,763.16.

Plaintiff moves for summary judgment on its cause of action for a mechanic's lien, relying largely upon the affidavit of its principal, Michael Barbarich as well as Cerussi's deposition transcript. Neither demonstrates *prima facie* entitlement to judgment as a matter of law. Barbarich's affidavit is self-serving, vague, conclusory and otherwise unsubstantiated. He does not go into any detail about the work that was performed, focusing rather on the Punch List and additional work Cerussi requested that plaintiff perform. Absent proof of the work plaintiff performed, plaintiff has not met its burden on this motion.

Meanwhile, Cerussi admits that certain work was completed, argues that some was not and maintains that much of the work was not properly completed. On this record, even if plaintiff had met its *prima facie* burden, there is a dispute as to what work plaintiff performed and the reasonable value of those services. Accordingly, the motion for summary judgment on plaintiff's sole cause of action against Cerussi is denied.

Similarly, the motion to dismiss the fifth affirmative defense and first counterclaim must also be denied. On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88). Here, plaintiff has failed to demonstrate that Cerussi has failed to state a cause of action and the documentary evidence does not conclusively resolve Cerussi's claims in plaintiff's favor.

Finally, there is no opposition to the motion to amend. Leave to amend a pleading should be freely granted absent surprise or prejudice. Since there is no opposition to this request, and the second amended complaint merely seeks to assert alternative theories of recovery, that portion of the motion is granted.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that the Second Amended Complaint is deemed served and filed; and it is further

ORDERED that the motion is otherwise denied; and it is further

ORDERED that the parties are directed to appear for a status conference on January 28, 2020 at 9:30am in Part 8, 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 12/19/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.