# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. MARY V. ROSADO** **PART** **33**

*Justice*

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GOOD-WILL MECHANICAL CORP.,

Plaintiff,

- v -

RICHARD KELLAM, ARCAP, LC, LV PROPERTY TWO, LLC,LV PROPERTY THREE, LLC,JOHN DOES NO. 1 - 10

Defendant.

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**INDEX NO.** 157456/2021

**MOTION DATE** 12/15/2021

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISS.

Upon the foregoing documents, and oral argument which took place on July 28, 2022 where Eric P. Schutzer, Esq. appeared on behalf of Good-Will Mechanical Corp. ("Plaintiff") and Sloan Zakheim, Esq. appeared on behalf of Defendants Richard Kellam ("Kellam"), ARCAP, LC ("ARCAP"), LV Property Two, LLC, and LV Property Three, LLC (collectively "Defendants"), Defendants motion to dismiss is granted.

## I. Factual and Procedural Background

This action arises out of construction work done by Plaintiff on property owned by Defendants located at 22 Charlton Street, New York, New York (the "Property") (NYSCEF Doc. 1). Plaintiff is seeking to foreclose on a mechanic's lien in the amount of $39,150.00, or in the alternative recoup that amount via other causes of action including breach of contract, account stated, unjust enrichment, and violations of the General Business Law (*id.*). Defendants have filed this pre-answer motion to dismiss pursuant to CPLR 3211(a)(7) (NYSCEF Doc. 4). Defendants move to dismiss on the basis that Plaintiff did not have a valid home improvement ("HI") license

while it performed work on the property and therefore is precluded from seeking recovery against Defendants under any legal theory.

Plaintiff alleges that on January 2, 2018 it entered into a written contract with Kellam and ARCAP whereby Plaintiff agreed to install HVAC in the building for $118,500.00 (NYSCEF Doc. 1 at ¶ 10). Plaintiff alleges it completed this work between January 2, 2018 and March 27, 2020 (*id.* at ¶ 11). However, according to Plaintiff, Defendants failed to pay Plaintiff in full (*id.* at ¶ 14). Therefore, Plaintiff filed a mechanics lien on October 15, 2020 (*id.* at ¶ 15). Plaintiff did not have a home improvement license while it worked on the Property (NYSCEF Doc. 11).

## II. Discussion

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Defendants assert numerous grounds to dismiss Plaintiff's Complaint. First, Defendant claims that since Plaintiff installed HVAC in violation of NYC Admin Code § 20-387(a), Plaintiff is barred from recovering under any legal theory (*Blake Elec. Contr. Co. v Paschall*, 222 AD2d 264, 266 [1st Dept 1995]). Second, Defendants argue that Plaintiff has not pled its licensing

requirements in conformance with CPLR § 3015(e). Finally, Defendants claim that Plaintiff's lien is fatally defective per Lien Law §§ 9-10.

Plaintiff opposes the motion to dismiss by arguing that NYC Admin. Code § 20-387(a) applies only to home improvement contractors and does not apply to work performed for real estate developers or general contractors, and since Defendants were acting as real estate developers/general contractors, § 20-387(a) does not apply. In essence, Plaintiffs argue that because Kellam does not occupy the building, and the building is owned by two LLCS set up by Kellam, he cannot be considered the type of individual who § 20-387(a) was meant to protect.

In reply, Defendants argue that Plaintiff cites no binding and persuasive case law supporting its interpretation of the proper application of § 20-387(a), and that in any event, Kellam has clearly stated that he intends to reside in the Building after the renovations of the premises are complete (NYSCEF Doc. 19). Kellam also asserts that he is the 100& owner of ARCAP, LV Property Two, LLC, and LV Property Three, LLC and that these LLCs were set up simply to renovate and to purchase the home (*id.*).

NYC Admin Code § 20-387(a) defines "home improvement" as "the construction, repair, replacement, remodeling, alteration, conversion rehabilitation, renovation, modernization, improvement, or addition to any and or building, or that portion thereof which is used or designed to be used as a residence of dwelling place...."

NYC Admin Code § 20-386(4) defines an owner as "any other person who orders, contracts for or purchases the home improvement services of a contractor or the person entitled to the performance of the work of a contractor."

An unlicensed contractor may neither enforce a home improvement contract against nor seek quantum meruit, and a contractor is barred from enforcing a contract if its license is not issued

until after the work is completed (*Metrobuild Asssociates, Inc. v* Nahoum, 51 AD3d 555, 556 [1st Dept 2008]; *Blake Elec. Contracting Co., Inc. v Paschall*, 222 AD2d 264, 266 [1st Dept 1995]).

Based on the pleadings, Plaintiff alleges it entered into a contract with Kellam (*id.* at ¶ 10). Plaintiff admits in its pleadings that Kellam owns and controls Defendants LVP2 and LVP3 who own the property (*id.* at ¶ 3). Kellam has substantiated this via affidavit in support of Defendants motion to dismiss by testifying that he is the 100% owner of LVP2 and LVP3 and they were set up solely to purchase the property and hold title on his behalf (NYSCEF Doc. 19). Kellam also testified in support of his motion to dismiss that he intends to reside in the Property (NYSCEF Doc. 6). The certificate of occupancy clearly shows the building is residential and as such the construction done by Good Will qualifies as "home improvement" (NYSCEF Doc. 9). Therefore, since Kellam owns the property, intends to reside in the property, and contracted with Plaintiff for home improvement services while Plaintiff was an unlicensed home improvement contractor, Plaintiff cannot enforce its contract against Defendants. Although Plaintiff asserts that Kellam cannot be protected by NYC Admin. Code § 20-387(a) because he was not residing in the Property, the Court disagrees, as this exception create a gaping hole in a law designed to protect consumers simply by virtue of a consumer's home being uninhabitable due to ongoing construction. In any event, Plaintiff's argument is also flatly contradicted by binding precedent (*Mortise v 55 Liberty Owners Corp.*, 102 AD2d 719 [1st Dept 1984] ["contracts to convert office building for use as cooperative apartments involved "home improvement" within meaning of city administrative code, and thus, construction company's failure to obtain license from city to engage in business of home improvement rendered contract unenforceable".

Moreover, Plaintiff has not complied with the pleading requirements of CPLR 3015(e) which places the burden of pleading a required license on the contractor plaintiff (*B&F Bldg. Corp.*

*v Liebig*, 76 NY2d 689, 693 [1990]). Further, Plaintiff has not pled in its Complaint that the construction was for a commercial purpose to ostensibly take its action outside the scope of NYC Admin. Code § 20-387(a). As such, the pleadings do not allow for an enforceable right of recovery, and therefore the Complaint should be dismissed (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Accordingly, it is hereby

ORDERED that Plaintiff's Complaint against Defendants is dismissed in its entirety.

This constitutes the decision and order of the Court.

10/3/2022
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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| CHECK ONE: | x | CASE DISPOSED | | NON-FINAL DISPOSITION | | | |
| | x | GRANTED | ☐ DENIED | ☐ GRANTED IN PART | | ☐ OTHER | |
| APPLICATION: | ☐ | SETTLE ORDER | | ☐ SUBMIT ORDER | | | |
| CHECK IF APPROPRIATE: | ☐ | INCLUDES TRANSFER/REASSIGN | | ☐ FIDUCIARY APPOINTMENT | | ☐ REFERENCE | |