

SCP 4/17/18 @ 9:15 a.m.

To commence the 30 day statutory time period 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
AGRON OSMANI,

Plaintiff,

-against -

CELA BUILDERS, LLC,

Defendant.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 52616/16

Sequence No. 2

The following papers were considered in connection with this motion by plaintiff for an Order: (a) dismissing defendant's counterclaim in its entirety pursuant to CPLR Section 3212; and (b) granting plaintiff summary judgment on the breach of contract claim pursuant to CPLR 3212 and scheduling this matter for an inquest:

PAPERS	NYSCEF
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-N	55-73
MEMORANDUM OF LAW	72
AFFIRMATION IN OPPOSITION/AFFIDAVIT/EXHIBITS A-Q/MEMORANDUM OF LAW	76-95
REPLY AFFIRMATION	98-99

Plaintiff Agron Osmani ("Osmani") has asserted a single cause of action against Cela Builders, LLC ("Cela") for breach of an October 16, 2014 agreement (the "Agreement") based on Cela's purported failure to timely, competently and properly complete certain construction at and renovation of Osmani's home (the "Project") located at 1 Old House Lane, Chappaqua, New York. Cela has asserted counterclaims against Osmani for breach of contract and unjust enrichment. Osmani now seeks summary judgment, in his favor, on both his breach of contract claims and Cela's counterclaims.

DiscussionA. Applicable Law

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986))]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [Lacagnino v. Gonzalez, 306 A.D.2d 250 (2d Dept 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980)].

B. Osmani's Action for Breach of Contract

It is well-settled that to "recover damages for breach of contract, a plaintiff must demonstrate the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach." [Village of Kiryas Joel v. County of Orange, 144 A.D.3d 895, 896 (2d Dept 2016)].

Osmani alleges that Cela failed to perform its duties and obligations under the contract. Specifically, Osmani alleges that Cela performed sub-standard work that resulted in the existence of defective conditions which required remediation by subsequent contractors; and that Cela abandoned the Project well before its completion.

After a careful review of the record, the Court concludes that there are several disputed issues of material fact concerning the parties' performance, or lack thereof, of their respective obligations under the Project's contract. Among those issues are: (1) whether Osmani complied with his obligations under the payment schedule; (2) whether the parties modified the original payment schedule through their subsequent communications and conduct; (3) whether Cela adequately complied with the estimated time schedule set forth in the Agreement; (4) whether Cela competently and properly completed the Project and/or performed sub-standard work;

and (5) whether Cela abandoned the Project or whether Osmani terminated Cela.

As a result, Osmani's motion for summary judgment on the claims set forth in the Complaint must be denied.

C. Cela's Counterclaims

Osmani also argues that Cela's counterclaims, asserting breach of contract and unjust enrichment, must be dismissed. Specifically, Osmani argues that not only did Cela violate Article XVI of the Westchester County Administrative Code ("Code") but also his claims must be dismissed for failing to comply with CPLR 3015(e).¹

Westchester County Administrative Code § 863.313 provides that "[n]o person shall maintain, conduct ... operate or engage in a home improvement business within the County of Westchester. . . unless such person is licensed pursuant to this article." [Racwell Constr., LLC v. Manfredi, 61 A.D.3d 731, 732, (2d Dept 2009)]. "A contractor's failure to adhere to this requirement precludes the contractor from collecting fees from a consumer and enables a consumer to move for dismissal of an action commenced by the contractor against the consumer." [Id. at 732-733 (quotations and citations omitted)]. Where a home improvement contractor is not properly licensed in the municipality where the work is performed, the contractor cannot recover for the work performed either under the contract or on a quantum meruit basis [Hammerman v. Jamco Indus., 119 A.D.2d 544, 545 (2d Dept 1986)].

Licensing requirements such as those set forth in Westchester County Code Section 863.313 protect consumers against fraudulent practices and inferior work by home contractors. [See Todisco v. Econopouly, 155 A.D.2d 441 (2nd Dept. 1989)]. Addressing a Nassau County Administrative Code provision substantively similar to the Westchester Code provision at bar, the Second Department held in Todisco that "in order for a home improvement contractor to recover damages for breach of contract under a quantum meruit theory, he must possess (1) a valid license at the time of performance for

¹ To the extent that Osmani contends that Cela was not licensed at the time it filed its counterclaims, Osmani's argument is moot given Cela's commencement of an action against Osmani on December 7, 2017 asserting the causes of action set forth in Cela's counterclaims. Further, to the extent that Cela failed to include its licensing number and/or the name of the governmental agency that issued the license, it has remedied that defect by submitting a copy of the License in connection with its opposition to Osmani's motion. In any event, Osmani's reply papers do not respond to or further litigate these issues.

which he seeks compensation, and (2) a valid license at the time of pleading."

Osmani entered into a contract for the Project with Cela on October 16, 2014. Shortly after that, on or about October 28, 2014, Cela commenced work on the Project. Thereafter, on November 15, 2014, Cela's home improvement license expired. On or about December 2, 2014, Cela was notified, in writing, by the Licensing Division that its license had expired. In or about December 2014, Cela submitted an application to renew its license. On or about July 15, 2016, Cela's license was finally renewed.

The gravamen of Osmani's argument is that from on or about November 15, 2014 through on or about March 20, 2015 (the date that plaintiff formally terminated the contract for the Project in writing), Cela did not possess a valid Westchester County home improvement license. Based upon Cela's lapse in license, Osmani improperly concludes that he is entitled to summary judgment and that Cela is not entitled to litigate its claims for damages.

At the outset, summary judgment is not appropriate in the instant case because there are disputed issues of material fact as to the scope and the amount of work performed on the Project during that time period - from on or about October 28, 2014 through on or about November 15, 2014 - that Cela's home improvement license was, without question, in good standing.

Moreover, assuming arguendo that at some time during the pendency of the Project, Cela was not properly licensed - the Code makes clear that immediately ceasing home improvement activities on projects in progress is not a viable option for a licensee. Under Section 863.317 of the Code, even in the event of malfeasance by a licensee that results in the revocation or suspension of its license, "no revocation or suspension imposed . . . shall be construed to impair or preclude a licensee's obligation to complete home improvement contracts in existence on the date such revocation or suspension otherwise becomes effective." The clear intent of the Code is that once a properly licensed contractor begins a home improvement project that contractor is obligated to finish the contract no matter how the contractor comes to be without a proper license.

Finally, it is not proper to dismiss a licensee's claims for breach of contract and unjust enrichment in a situation like the instant case because "a refusal to recognize [a defendant's] claims on the subject home improvement contract [subject to Section 863.313 of the Code] . . . [may cause] a deprivation of [a defendant's] right to seek recovery [and] may unfairly result in

unjust enrichment to [the plaintiff]." [Kaspi v. Eddie's Home Remodeling Services, Inc., 12 Misc.3d 435, 436-37 (Sup. Ct. Westchester County 2006)].

As a result, Osmani's motion for summary judgment on Cela's counterclaims is denied.

Based upon the foregoing, it is hereby

ORDERED, that plaintiff's motion is denied in all respects; and, it is further

ORDERED, that the parties are directed to appear on Tuesday, April 17, 2018 at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York, prepared to conduct a settlement conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
March 21, 2018


HON. LEWIS J. FUBELL, J.S.C.

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