

SHORT FORM ORDER

Scan

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

----- TRIAL/IAS, PART 8
NASSAU COUNTY

NEW YORK FIRE DETECTION, INC.,

Plaintiff,

MOTION DATE:

August 29, 2003

INDEX No. 4639/03

-against-

Action No. 1

SEQUENCE No. 1, 2, 3

F.J.F. ELECTRIC, INC. and FRANK FORONJY,

Defendants.

F.J.F. ELECTRIC CO., INC.,

Plaintiff,

INDEX No.

-against-

Action No. 2

CAPTREE ELECTRIC SUPPLY AND NEW YORK
FIRE DETECTION, INC.,

Defendants.

CAPTREE ELECTRICAL SUPPLY, Individually
and as Representative of other Similarly Situated
under New York Lien, Section 77,

Plaintiff,

INDEX No. 3991/03

-against-

Action No. 3

FRANK FORONJY and FJF ELECTRIC CO.,

Defendant.

The following papers read on this motion:

Notice of Motion and Supporting Papers
Notice of Motion and Supporting Papers
Notice of Motion and Supporting Papers
Affidavit in Opposition
Affidavit of Ronald Savastano in Further Support
Reply Affidavit
Affirmation in Reply to FJF Opposition

This motion by plaintiff New York Fire Detection, Inc., for an order pursuant to CPLR 3213 granting it summary judgment in the amount of \$21,000, plus interest, is granted. Settle judgment on notice.

This motion by defendants F.J.F. Electric, Inc. and Frank Foronjy for an order pursuant to CPLR 602(a) directing that New York Fire Detection, Inc. v F.J.F. Electric, Inc. and Frank Fornjy (Index No. 03-004639), be tried jointly with F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc. (Index No. 03-010033) and Captree Electrical Supply, Individually and as Representative of other Similarly Situated under New York Lien Law Section 77 v Frank Foronjy and FJF Electric Co. (Index No. 003991-03), is denied.

This motion by defendant Captree Electrical Supply for an order pursuant to CPLR 3211(a)(4) dismissing the complaint against it in F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc., (Index No. 03-010033)

or dismissing defendants Foronjy and FJF Electric's counter-claims in Captree Electrical Supply, Individually and as Representative of other Similarly Situated under Lien Law §77 v Foronjy and FJF Electrical Co. (Index No.003991/03) as duplicative of those advanced by plaintiff F.J.F. Electric in F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc. (Index No. 03-010033) and for an order pursuant to CPLR 603 severing the claims made by plaintiff F.J.F. Electric Co., Inc., in F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc., (Index No. 03-010033) against it and New York Fire Detection, Inc., from each other, is granted to the extent that the complaint against Captree Electric Supply in F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc., (Index No. 03-010033) is dismissed.

The plaintiff in New York Fire Detection, Inc. v F.J.F. Electric, Inc. and Foronjy (Index No. 003-004639) seeks to recover on an unconditional promissory note with a balance owing of \$21,000. It is not disputed that the borrowers, defendants F.J.F. Electric, Inc., and Frank Foronjy executed a note/guarantee obligating themselves jointly and severally on an outstanding debt of \$30,489.56 and that there is a balance owing of \$21,000. In the note/guaranty, the defendants agreed to pay the cost of collection, including attorney's fees. They also specifically waived any defenses of any kind (other than payment) which they then had or thereafter acquired. Plaintiff New York

Fire Detection accordingly seeks summary judgment pursuant to CPLR 3213.

The plaintiff New York Fire Detection, Inc., has presented a prima facie case, i.e., that the note/guarantee, by its terms, is for the payment of money only and that there has been a failure to make payment according to its terms. (Staten Island Sav. Bank v Bayview Associates, 251 AD2d 320; Interman Indus. v Products, Ltd. v R.S.M. Electron Power, Inc., 37 NY2d 151). In opposition, defendants F.J.F. Electric and Foronjy allege that they were fraudently overbilled by New York Fire Detection for the equipment which the promissory notes were executed to pay for. Essentially, they allege that unbeknownst to them, their former Operations Manager Michael O'Neill had them pay excessive amounts for goods procured from New York Fire Detection and Captree Electrical Supply and diverted merchandise and/or kickbacks to O'Neill or his company, Unlimited Power Corp. Defendants F.J.F. Electric and Foronjy allege counterclaims in their attempt to defeat summary judgment pursuant to CPLR 3213.

The defendants' unconditional guarantees of the promissory note preclude them from relying on the counterclaims advanced here. While defendant's assertions may serve as the basis of a claim, the waivers contained in the promissory note preclude the assertion of these claims as a defense here.

(Perlstein v Kullberg Amato Piacone, 158 AD2d 251, 252; see also, Malsin v Stockman, 265 AD2d 533). The plaintiff New York Fire

Detection's Inc.'s motion for summary judgment is granted in its entirety. Settle judgment on notice.

In view of the foregoing, so much of defendant F.J.F. Electric Inc.'s motion for a joint trial including New York Fire Detection, Inc. v F.J.F. Electric, Inc. and Frank Foronjy (Index No. 03-004639) is denied as moot.

F.J.F. Electric seeks in F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc. (Index No. 03-010033) to recover of both Captree Electric Supply and New York Fire Detection for the alleged kickback scheme. It advances causes of action sounding in detrimental reliance, fraud and conspiracy to defraud. In the earlier commenced action Captree Electrical Supply v Foronjy and FJF Electric Co. (Index No. 003991-03), Captree seeks to recover for goods sold and delivered and for diversion of trust funds pursuant to New York Lien Law §77 for equipment purchased by FJF Electric and Foronjy.

The claims advanced by F.J.F. Electric Co., Inc., against defendant Captree Electric Supply in F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc. (Index No. 03-010033) are duplicative of the counter-claims advanced by it in the earlier commenced action, Captree Electric Supply Individually and as Representative of others Similarly Situated Under New York Lien Law §77 v Foronjy and FJF Electric Co. (Index No. 003991-03). The complaint by F.J.F. Electric Co., Inc., against defendant Captree Electric in F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc. (Index

No. 03-010033) is dismissed as against defendant Captree Electric Supply. F.J.F. Electric's attempt to amend its complaint in that action was done without leave of court and that complaint is a nullity.

F.J.F. Electric Inc.'s motion to try F.J.F. Electric Co., Inc. v Captree Electric Supply and New York Fire Detection, Inc. (Index No. 03-010033) jointly with Captree Electrical Supply Individually and as Representative of others Similarly Situated Under New York Lien Law §77 v Foronjy and FJF Electrical Co. is denied. Other than similar legal theories, there is nothing that links those two cases and a joint trial could unduly prejudice either or both of them. (See, Gittino v LCA Vision, Inc., 301 AD2d 847; DeAngelis v New York University Medical Center, 292 AD2d 237; Bankers Trust Co. v Hogan, 196 AD2d 469).



J.S.C.

Dated: October 15, 2003

ENTERED

OCT 21 2003

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**