

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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VATCO CONTRACTING LTD.,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 022814-07

Motion Seq. No: 1

**SANFORD KIRSCHENBAUM and
MYRA KIRSCHENBAUM ,**

Submission Date: 8/3/09

Defendants.

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Papers Read on this Motion:

**Notice of Motion, Affidavit in Support,
Affirmation in Support and Exhibits.....X
Affidavits in Opposition(2), Affirmation in Opposition and Exhibits.....X
Reply Affirmation and Exhibit.....X**

This matter is before the court on the motion filed by Defendants Sanford and Myra Kirschenbaum on April 30, 2009 and submitted on August 3, 2009, seeking an Order dismissing the Verified Complaint and directing that summary judgment be entered in favor of the Defendants and against the Plaintiff. For the reasons set forth below, the Court denies Defendants' motion, and directs Plaintiff to file and serve an Amended Verified Complaint within thirty (30) days of this decision.

BACKGROUND

A. Relief Sought

Defendants Sanford Kirschenbaum ("SK") and Myra Kirschenbaum ("MK") move, pursuant to CPLR § 3212, for an Order dismissing the Verified Complaint ("Complaint") and

directing that summary judgment be entered in favor of the Defendants and against Plaintiff Vatco Contracting Ltd. ("Vatco"). Plaintiff opposes Defendants' motion.

B. The Parties' History

In support of their motion, Defendants provide an Affidavit in Support of SK, who affirms the following:

He is the Husband of MK. On or about February 8, 2002, Defendants purchased a single family house located at One Ocean View Court, Long Beach, New York ("Property"),¹ for use as a weekend home. After purchasing the Property, Defendants decided to make improvements and employed an architect to draw plans for those improvements. Defendants subsequently hired Vatco to provide materials and labor necessary to complete those improvements. The Complaint alleges that Defendants and Plaintiff entered into their agreement on or about June 2005.

SK affirms, further, that as a result of Vatco erecting a wall at the Property that encroached on a neighbor's property, the Zoning Board of Appeals for the City of Long Beach, New York ("Zoning Board") revoked Defendants' building permit ("Permit") by a decision dated February 14, 2006 ("Revocation"). SK avers that the Revocation made it impossible for the work on the Property to be completed. At the time of the Revocation, SK affirms that Defendants had paid Plaintiff \$62,000, although Plaintiff had only completed work having a value of \$25,355.

SK affirms that he then terminated Vatco's services. Defendants obtained a restoration of their Permit and hired another contractor to correct allegedly defective work that Vatco had performed.

During the discovery phase of this litigation, Defendants asked Plaintiff to produce "[a]ll licenses issued to or held by plaintiff at any time between April 1, 2005 and January 30, 2008." In response to that demand, Plaintiff produced 1) a General Contractor's License # 2028, dated January 25, 2000 issued by the City of Long Beach ("Long Beach") to Thomas Tarantino on behalf of "Vatco Contracting," and 2) an Electrician's License # 3114, dated January 24, 2000 issued by Long Beach to Thomas Tarantino on behalf of "Vatco Contracting."

¹ Although SK affirms that the Property is located at "One Oceanview Court," the deed that SK provides reflects that the address is "One Ocean View Court."

SK submits that Vatco failed to obtain a home improvement license from Long Beach and, therefore, was not properly licensed when he performed home improvements on the Property. Thus, SK submits, Plaintiff may not recover, under either a contract or *quantum meruit* theory, for sums that Defendants may owe him for work that Plaintiff performed.

Plaintiff opposes Defendants' motion, and provides Affidavits in Support of Thomas Tarantino ("Tarantino"), President of Vatco, and Scott A. Kemins ("Kemins"), Building Commissioner of the City of Long Beach Building Department.

Tarantino affirms the following:

Defendants have paid Plaintiff the sum of \$62,000, but still owe Plaintiff \$76,742 for work that Plaintiff performed on the Property. Tarantino disputes SK's allegations regarding the erection of the wall. Tarantino affirms that Vatco built that wall in accordance with a survey that Defendants provided to Vatco, which proved to be incorrect by several feet. Tarantino avers that SK insisted that Vatco build the wall in accordance with the incorrect survey.

Tarantino submits that the Revocation was due to conditions that existed prior to Vatco performing work at the Property, and refers the Court to the Zoning Board's decision regarding the Revocation. In ¶ 12 of its decision, the Zoning Board found that "the determinations made in the May 4, 2005 decision and the issuance of Permit No. A36432 exceeded the Building Commissioners [sic] authority." The Zoning Board made certain determinations, also set forth in ¶ 12, including its conclusions that 1) the plans submitted in support of the Permit application contained misrepresentations regarding the true nature of the original retaining wall; 2) the proposed south deck exceeded permissible dimensions; and 3) Defendants failed to obtain a necessary variance for the construction of a rear yard staircase.

With respect to its licensing status, Tarantino affirms that Vatco has a general contractor license from Long Beach, License # 2028, that was originally issued on January 25, 2000. Tarantino also affirms that Vatco has renewed that license as required, and provides documentation in support, including copies of 1) Vatco's Application for Renewal of its General Contractor License # 2028, dated May 6, 2005, 2) Vatco's Long Beach General Contractor License # 2028, with an issuance date of May 6, 2005 and an expiration date of April 30, 2007, 3) Vatco's Long Beach General Contractor License # 2028, with an expiration date of April 30, 2009, 4) the June 13, 2005 Permit application regarding the Property, reflecting that the application was approved on August 2, 2005 and containing the number "2028" underneath

Vatco's name and address, and 5) the Permit, signed by Kemins, issued to Vatco by the Long Beach Building Department on August 2, 2005 with respect to the Property.

Tarantino also addresses the minor discrepancy between the actual name of Plaintiff company, which is "Vatco Contracting Ltd.," and the name listed on the License, which is "Vatco Contracting." Tarantino affirms that he tried, unsuccessfully, to obtain a copy of Vatco's original application that resulted in its license issued January 25, 2000. He affirms, however, that Long Beach was aware that Vatco was a corporation and submits that the absence of the letters "Ltd." is a technicality with no legal significance, and that Vatco complied with the spirit of the licensing laws. In support thereof, he provides copies of documentation that Vatco submitted with its application for a renewal license including 1) a Certificate of Liability Insurance for "Vatco Contracting Ltd.," and 2) a Certificate of Workers' Compensation Insurance for "Vatco Contracting Ltd."

Tarantino also submits that the work that Vatco performed at the Property, while technically "home improvements," was extensive. Vatco contracted to complete an "extensive alteration and modernization" of the Property that involved several construction trades including roofing, electrical work, excavation, carpentry and painting. Vatco affirms that Long Beach permits a person/entity with a general contractor license, who also has a home improvement license issued by the Nassau County Office of Consumer Affairs ("Consumer Affairs"), to perform home improvements without obtaining a separate home improvement license from Long Beach. In support thereof, he provides a letter dated May 12, 2009 from David W. Fraser, City Clerk of Long Beach, stating that "it is correct that a licensed General Contractor can perform Home Improvement jobs, provided that they possess a valid license from [Consumer Affairs]." Tarantino affirms that Vatco Contracting, Ltd. has held a home improvement license since 2004 and provides copies of licenses that Consumer Affairs issued to Vatco Contracting Ltd. for the periods of January 1, 2004 to December 31, 2005, and January 1, 2006 to December 31, 2007.

Finally, in response to Plaintiff's claims regarding Defendants' failure to file an "Assumed Name Certificate," Tarantino affirms that Vatco filed such a document on May 19, 2009. Tarantino provides a copy of that document, titled "Certificate of Assumed Name Pursuant to Section 130 of the General Business Law," that states that 1) the name of the entity is Vatco Contracting, Ltd. and 2) the entity's "assumed name" is Vatco Contracting.

In his Affidavit in Support, Kemins affirms as follows:

Kemins is the Building Commissioner of the Long Beach Building Department, which is the issuing authority for building permits for construction and demolition of buildings in Long Beach, and worked in that capacity when Long Beach issued the Permit for the Property on August 2, 2005.

Kemins affirms that, prior to issuing a permit, it is the practice of the Building Department to determine whether the contractor is licensed by Long Beach as a general contractor, and to require the contractor to furnish proof of liability and workmen's compensation insurance. The records of the Building Department reflect that, when Long Beach issued the Permit, Vatco Contracting Ltd. was fully and currently licensed as a general contractor, and had provided proof of insurance in the name of Vatco Contracting Ltd.

In addition, Vatco Contracting, Ltd. furnished proof to Long Beach that it was licensed by Consumer Affairs as a home improvement contractor. Kemins affirms that general contractors with a home improvement license from Consumer Affairs may make home improvements without obtaining a home improvement license from Long Beach. He also submits that the omission of the letters "Ltd." from the Permit is a clerical error that does not affect the validity of the Permit.

C. The Parties' Positions

Defendants submit that Plaintiff has failed to produce a home improvement contractor's license that was in effect when Vatco performed work at the Property and when Vatco commenced this action. Defendants also argue that the Court should reject Plaintiff's argument that a general contractor may perform home improvement contract work in Long Beach if that individual has a valid Nassau County home improvement license. Defendants submit that Plaintiff was required to obtain a home improvement license in Long Beach, and is now barred from recovery because of its failure to obtain that license.

Plaintiff opposes Defendants' motion, submitting that Vatco was not required to obtain a home improvement license from Long Beach because it had both a general contractor license issued by Long Beach and a home improvement license issued by the Nassau County Office of Consumer Affairs. Thus, Plaintiff argues, Vatco was properly licensed and may sue to recover damages that, it alleges, Defendants owe to Plaintiff.

RULING OF THE COURT

A. Standard for Summary Judgment

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). If the party moving for summary judgment fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Widmaier v. Master Products, Mfg.*, 9 A.D.3d 362 (2d Dept. 2004); *Ron v. New York City Housing Auth.*, 262 A.D.2d 76 (1st Dept.1999). CPLR § 3212(b) further requires that, in ruling on a motion for summary judgment, the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." In making this determination, the Court must view the evidence submitted by the moving party in a light most favorable to the non-movant. *Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dept. 1990). The Court may only grant summary judgment when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979).

B. Court Grants Plaintiff Leave to Amend Complaint to Allege Specifics of License

CPLR § 3015(e) provides as follows:

Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the department of consumer affairs of the city of New York, the Suffolk county department of consumer affairs, the Westchester county department of consumer affairs/weight-measures, the county of Rockland, the county of Putnam or the Nassau county department of consumer affairs, the complaint shall allege, as part of the cause of action, that plaintiff is duly licensed and shall contain the name and number, if any, of such license and the governmental agency which issued such license; provided, however, that where the plaintiff does not have a license at the commencement of the action the plaintiff may, subject to the provisions of rule thirty hundred twenty-five of this article, amend the complaint with the name and number of an after-acquired license and the name of the governmental agency which issued such license or move for leave to amend the complaint in accordance with such provisions. The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter.

The legislative purpose in enacting CPLR § 3015(e) was to benefit consumers by shifting the burden from the homeowner to the contractor to establish that the contractor was licensed. *B & F Building Corp. v. Liebig*, 76 N.Y.2d 689, 693 (1990). The statute was designed to provide additional protection to consumers, increase incentives for businesses to comply with licensing requirements and help raise revenue. *Id.*

The only language in the Complaint that addresses Vatco's licensing status is in ¶ 1, which reads as follows:

At all times hereinafter mentioned, the plaintiff was a domestic corporation duly organized and existing under the laws of the State of New York and duly authorized and licensed to transact business in Nassau County, City of Long Beach and the State of New York.

The Complaint is insufficient because it does not contain the information that CPLR §3015(e) requires, including the name and number of Plaintiff's license and the governmental agency which issued such license, although Plaintiff has established that it did possess a home improvement license. The Court, however, may permit a party to amend its pleading. Specifically, CPLR § 3025(b) provides as follows:

Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Vatco has established, *inter alia*, that it 1) obtained a general contractor license from Long Beach and a home improvement license from Nassau County; 2) filed required insurance documentation with Long Beach; and 3) reasonably believed it had complied with all licensing requirements. Defendants submit that, because Plaintiff did not possess a home improvement license issued by Long Beach, Plaintiff is foreclosed completely from recovery against Defendants for any sums they may owe Plaintiff. The Court concludes, under these circumstances, that such a rigid application of relevant case law would be inappropriate. Were the Court to grant Defendants' application, Defendants might receive a windfall by obtaining home improvement and other contracting services without paying for them, despite evidence that Plaintiff made every effort to comply with its licensing obligations.

In light of the foregoing, the Court grants Plaintiff leave to file and serve on Defendants an Amended Verified Complaint within thirty (30) days of this decision, and directs Defendants

to serve their Answer within thirty (30) days after service on them of the Amended Verified Complaint. The Court also directs counsel to appear for a Compliance Conference before the Court on November 24, 2009 at 9:30 a.m.

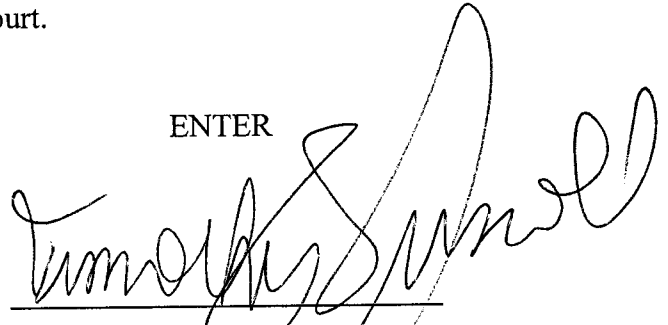
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY

September 15, 2009

ENTER


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
SEP 24 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE