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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/JAS, PART 18
NASSAU COUNTY**

MICHAEL CONWAY,

Plaintiff,

MOTION DATE: 2/27/01

- against -

**MOTION SEQ. NO. 002, 003, 004
INDEX NO.: 21622/99**

EMMA HALAVI and JANET HALAVI,

Defendant.

EMMA HALAVI A/K/A JANET HALAVI

Counterclaim Plaintiff,

-against-

**MICHAEL CONWAY, DON CONWAY,
D/B/A DON CONWAY CONSTRUCTION,
and EDWARD W. DICKMAN,**

Counterclaim Defendants.

The following papers read on this motion (numbered 1-5):

Notice of Motion 1

Notice of Motion 2

Notice of Cross-Motion. 3

Affirmation in Further Support of Halavi's
Motion for Summary Judgment and in
Opposition to Conway's and Dickman's
Cross-Motions. 4

Reply Affirmation in Further Support of
Cross-Motion and in Opposition to
Defendant's Motion to Dismiss 5

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In this action to foreclose a mechanic's lien, the Court will determine concurrently the following three motions:

- I. Motion of counterclaim defendant Edward W. Dickman for summary judgment pursuant to CPLR §3212 dismissing the counterclaim against him;
- II. Motion of Counterclaim Plaintiff Emma Halavi for an Order:
 - (i) granting summary judgment pursuant to CPLR §3212 declaring the mechanic's lien filed by Plaintiff Michael Conway void on the grounds of wilful exaggeration pursuant to Lien Law §39 or, alternatively, on the grounds of lack of standing;
 - (ii) granting summary judgment in favor of counterclaim plaintiff Halavi and against counterclaim defendant Conway on the issue of liability under Lien Law §39-a, and ordering an immediate trial for purposes of assessing damages pursuant to CPLR §3212(c);
 - (iii) granting summary judgment dismissing the Complaint against defendant Halavi; and
 - (iv) vacating the Lis Pendens filed by plaintiff Conway.
- III. Cross-motion by plaintiff Conway for an Order:
 - (i) pursuant to CPLR §3025(c) permitting Conway to amend his Verified Complaint to conform to the proofs;
 - (ii) pursuant to CPLR 3025(b) permitting Conway to amend the plaintiff's Verified Complaint to add a cause of action for breach of contract; and
 - (iii) pursuant to CPLR 3211 and 3212, granting Conway summary judgment, dismissing defendant Halavi's First and Second Affirmative Defenses.

Factual Background

The action arises out of a contract dispute between a homeowner and a contractor. In December 1998, defendant homeowner Emma Halavi, a.k.a. Janet Halavi, ("Halavi")

hired plaintiff Michael Conway, a.k.a. Don Conway, d/b/a Conway Construction Co., (“Conway”) to perform certain renovations at her home, in accordance with plans provided by architect and counterclaim defendant Edward W. Dickman (“Dickman”). The renovations included, among other things, the removal of an atrium and incorporating that area into the existing room, the remodeling of the kitchen and installation of new kitchen cabinets, and the installation of a new front door and new first floor windows. By contract dated December 30, 1998 (the “Contract”), the parties agreed to a price of \$35,000 for the labor and materials specified therein, with cost allowances for the front door and the kitchen cabinets.

Conway commenced work in January 1999 and continued without interruption until April 1999. In the interim, a dispute arose concerning payment of an additional \$14,370.00 for work and costs not included in the original Contract, as set forth on an undated Statement provided by Conway (the “Final Statement”). Halavi paid the original Contract price and approximately \$4,500.00 of the additional amount sought by Conway, but refused to pay the remaining balance. Conway asserts that the additional work was performed at Halavi’s request, and that Halavi selected a front door and kitchen cabinets knowing that the prices exceeded the Contract allowances and agreeing to pay the excess. Halavi claims that she never agreed to pay any amount over the original Contract price, but was coerced to pay the additional \$4,500.00 by Conway’s threats to abandon the job.

On April 12, 1999, Conway and Dickman went to Halavi's home, allegedly to settle the dispute. An argument ensued, culminating in the removal by Conway and his men of certain items, including a kitchen table and kitchen cabinet doors, that they had previously installed. On or about June 26, 1999, Conway filed a Mechanics Lien against the premises in the sum of \$10,000.00, representing the unpaid balance of his claim for labor and materials. On August 20, 1999, Conway brought the instant action to foreclose the lien, and filed a Notice of Pendency with the Nassau County Clerk.

In her answer, defendant Halavi interposed seven counterclaims against Conway and Dickman in the nature of property damage, assault, infliction of emotional distress, trespass, and unjust enrichment. Halavi claims that on April 12, 1999, Conway and a group of men, forcefully and without permission entered Halavi's home and removed items that were previously installed, causing "considerable" property damage to the work that they had done, and to other property belonging to Halavi. She claims that Conway and the men verbally harassed, shocked and terrorized her and her children, resulting in at least one offensive contact upon Halavi, and causing her to suffer "extreme emotional distress." Finally, Halavi claims that the amount she paid in excess of the original Contract price resulted in unjust enrichment to Conway and Dickman.

I. Motion of counterclaim defendant Edward W. Dickman

Halavi states no claim relating to Dickman's performance as an architect. Her counterclaims against Dickman are based solely on Dickman's association with Conway. She asserts that Dickman introduced Conway to Halavi, and collected payments from Halavi on Conway's behalf. Her claims for unjust enrichment against Dickman relate to Dickman's acting as an "agent" of Conway in these collection activities and acting together with Conway in the repossession of the installed items. Dickman does not deny that he acted as Conway's agent in collecting payments. He states that he did so as a favor to Conway. He also kept records for Conway of amounts collected and the balance due. Dickman asserts, however, and no evidence has been presented to the contrary, that he delivered the full amount of all payments to Conway. Halavi has presented no facts to show that Dickman has been unjustly enriched by these activities or by Conway's repossession of the kitchen table and cabinet doors. Her bare allegation that such benefit is "still undetermined" is not sufficient to raise an issue of fact. Nor has she presented any other basis for liability that can be adduced from the facts alleged. Thus, the Fifth and Sixth counterclaims must be dismissed to the extent that they are interposed against Dickman.

The other counterclaims asserted against Dickman are based on his alleged participation in the confrontation of April 12, 1999, which gave rise to the allegations of

trespass, assault, infliction of emotional distress, and property damage. Halavi asserts that Dickman was “part of the group of men who were present together when Conway and his men removed the installed cabinet doors, kitchen tables and assaulted Ms. Halavi.” However, in her deposition of July 19, 2000, Halavi states several facts that exonerate Dickman. She says that on April 12, 1999, Conway and Dickman came to her store, and that she, herself, suggested that they “go somewhere, sit down and talk about the paper [indicating the Final Statement].” They then proceeded to her home. Thus, at least the initial entry into Halavi’s home on that date was not by trespass, but rather by invitation. Halavi further admits that when the argument began to escalate, Dickman left the house and did not return. Thus, Dickman was not present when the alleged “terrorizing” conduct, assault and property damage occurred. These facts are corroborated in the deposition testimony of both Conway and Dickman. Thus, there is no factual basis to support Halavi’s claims against Dickman for trespass, assault, infliction of emotional distress, or property damage. The remaining counterclaims (First, Second, Third, and Fourth) must be dismissed as against Dickman.

II Motion of Defendant Halavi and Cross-Motion of Plaintiff Conway.

By virtue of the limited amount in controversy, as well as the nature of the claims asserted, the Court finds that this is not the appropriate forum for resolution of the

remaining motions. When it appears that the amount of relief that may be awarded under the complaint is insufficient to justify the retention of the matter in the Supreme Court, the Court may, in its discretion, transfer the case to the County Court, without the consent of the parties, provided that the County Court has jurisdiction over the subject matter and over the parties. **NY Const. Art. 6, §19; CPLR §325(d); 22 NYCRR §202.13.** The County Court has jurisdiction over an action for the enforcement or foreclosure of a mechanic's lien on real property situated within the County, or any other action in which the defendant resides in the county where the relief sought in the complaint does not exceed \$25,000. **NY Const. Art. 6, §11(a); Judiciary Law §190.** The instant action for foreclosure of a mechanics lien in the sum of \$10,000 on real property in Nassau County, against a Nassau County defendant, clearly falls within the jurisdiction of County Court. It is of no consequence that defendant has asserted several counterclaims for money damages in excess of \$100,000, given that the County Court's jurisdiction to enter judgment upon a counterclaim for the recovery of money only is unlimited. **NY Const. Art. 6, §11(c).** Further, the Court finds that the amount of damages claimed by defendant Halavi is unsubstantiated in the record, and that the amount ultimately sustained, if any, will unlikely exceed the jurisdictional limit of the County Court.

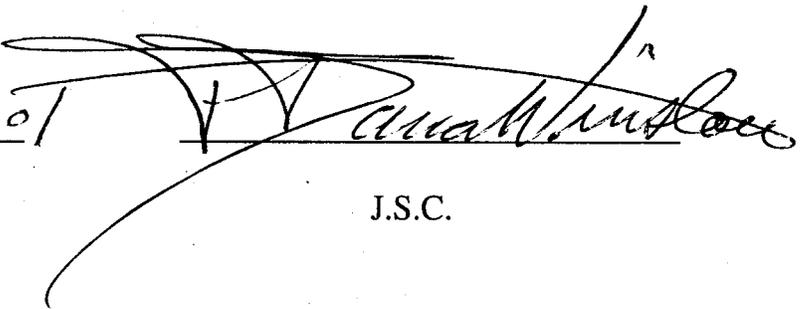
The Court finds that transfer to County Court of this action will promote the administration of justice. Accordingly, it is

ORDERED, that the First, Second, Third, Fourth, Fifth and Sixth Counterclaims be dismissed insofar as they are asserted against Edward W. Dickman; and

ORDERED, that this case be transferred to the Hon. Edward G. McCabe, Administrative Justice of the Supreme Court, for review and transfer of this action to the County Court.

The foregoing constitutes the Order of this Court. Counterclaim defendant Edward W. Dickman shall serve a copy of this Order on all parties within 15 days of entry.

Dated:

Sept 5, 2001 

J.S.C.

ENTERED

SEP 18 2001

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**