**DISTRICT COURT OF NASSAU COUNTY**
**FIRST DISTRICT: CIVIL PART 3**

----------x

GREAT AMERICAN RESTORATION SERVICES, INC.,

**INDEX NO. CV-034890-10**

Plaintiff,

against

**Present:**

**Hon. Fred J. Hirsh**

LEO MANNING,

Defendant.

----------x

The following named papers numbered 1 - 8
submitted on this motion on May 9, 2011

| | Papers Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1-2 |
| Notice of Cross-Motion and Affidavits Annexed | 3-4 |
| Reply in Support of Motion and in Opposition to Cross-Motion | 4-5 |
| Reply in Support of Cross-Motion | 6 |
| Defendant's Memorandum of Law | 7 |
| Plaintiff's Memorandum of Law | 8 |

Defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) and CPLR 3211(a)(7). Plaintiff cross-moves for summary judgment, for sanctions, for an order compelling defendant to comply with plaintiff's discovery demands and/or an order granting plaintiff leave to serve an amended complaint.

BACKGROUND

On March 4, 2009, Leo Manning ("Manning") sustained fire and smoke damage to his residence and personal property located in his residence.

After the fire, defendant spoke with David Latourel ("Latourel") who indicated he was an employee of Great American Restoration Services Inc. ("GARS").

At this point, Manning retained GARS to secure the property and clear the debris and damaged property. Subsequently, GARS was retained to reconstruct the damaged premises. Manning claims GARS indicated the work would be completed by June 2009.

Manning avers GARS did not begin to do the work needed to reconstruct Manning residence. Manning believes a mutual friend who knew members of GARS brokered an agreement under which GARS hired another contractor to perform the work at Manning's

home. Manning asserts the amount GARS is suing for is the "broker's fee" relating to the agreement between GARS and the third party.

Manning claims GARS billed him for work not performed. He asserts he was charged for items he purchased and provided to GARS. He also claims work was not done properly. (See, Exhibit K to defendant's motion). Manning has counterclaimed to recover damages resulting from GARS alleging GARS failed to perform its contractual obligations and caused other damage to Manning's residence and property.

Manning moves to dismiss the action pursuant to CPLR 3211(a)(8) on the grounds the court lacks personal jurisdiction over him because he was not properly served.

The affidavit of service indicates service was made pursuant to CPLR 308(4). Manning states the copy of the summons and complaint was not affixed to the front door of the entrance. He asserts that at the times the process server asserts he attempted to make service, someone was at the residence. He states someone was present at his residence on each occasion the process server purportedly came to the premises. Had the process server rang the doorbell or knocked on the front door, service could have been made pursuant to CPLR 308(1) or (2).

Manning also asserts a copy of the summons and complaint was not affixed to the door of his residence. He asserts that when his fiancé returned home at approximately 5:30 p.m. on September 22, 2010, she observed papers affixed to a partition between two street level garage doors. She told Manning about theses papers. Manning went outside and retrieved the papers and found they were the summons and complaint in this action.

Manning claims the process server did not use due diligence in attempting to make service pursuant to CPLR 308(1) or (2) and/or that affixing a copy of the summons and complaint to the partition between his garage doors is improper affixing.

Manning further asserts the complaint should be dismissed pursuant to CPLR 3211(a)(7) because the complaint fails to state a cause of action because CPLR 3015(e) requires the complaint to state the plaintiff is a licensed contractor, the agency that licensed the contractor and contractor's license number.

David Pinto ("Pinto"), GARS president, avers Manning entered into a written agreement with GARS. The agreement provides for the work to commence on July 13, 2009 and to be completed by September 4, 2009. The price for the work was $132,523. The payment provisions provided for payment of 40% to begin the work, 30% upon completion of the drywall, 20% upon completion of the cabinetry and tile and 10% upon completion. GARS sues to recover the 10% due on completion.

On September 4, 2009, Pinto and Manning did a walk-through of the premises. Manning signed a letter dated September 10, 2009 acknowledging the work had been done to his satisfaction, $13,273 was due on completion and this amount was due immediately. The September 10, 2009 letter provides that a monthly finance fee of 1.8% would be applied to the amount due if the amount due on completion was not paid immediately.

Manning asserts GARS is not entitled to this money. Manning claims he paid for items not of work that were not performed. He paid for a tankless hot water heater that was not installed. He was charged for kitchen appliances and cabinets, a marble counter top, a kitchen sink and faucet, a shower door, bathroom vanity and cabinets, sink, showerhead and tiles that he purchased. He was not given a credit for these items. Manning asserts he incurred expenses to repair and clean the air conditioning system. Finally, he claims that GARS did not install new electrical wiring, live wires in the bathroom were left dangling and switches did not work. Manning claims he incurred expenses to repair or remedy these latent defects that GARS refused to repair. Manning also claims GARS damaged portions of the premises that were not damaged in the fire. He claims he has incurred expenses to repair the items damaged by GARS during construction. Manning claims the costs he incurred to remedy these conditions exceed any amount he might owe GARS.

DISCUSSION

A. CPLR 3211(A)(8)

CPLR 3211(a)(8) permits the court to dismiss an action where the court lacks jurisdiction over the defendant. This provision permits the court to dismiss an action because (1) the defendant is not subject to the jurisdiction of the court or (2) the defendant was not properly served. Siegel *New York Practice* 5th §266.

Manning claims the court lacks jurisdiction over him because he was not properly served.

The defendant may raise the defense of lack of jurisdiction either by pre-answer motion or by pleading same as an affirmative defense in the answer. Siegel, *New York Practice* 5th § 274; and CPLR 3211(e). If lack of jurisdiction over the defendant is raised as an affirmative defense in the answer, the defense is deemed waived if the party fails to move to dismiss on this grounds within 60 days of service of the answer unless the court extends the time on the grounds of undue hardship. CPLR 3211(e).

The purpose of the amendment to CPLR 3211(e) requiring a motion to dismiss for

lack of jurisdiction be made within 60 days was "to require a party with genuine objections to service to deal with the issue promptly and at the outset of the action...ferret out unjustified objections...provide for prompt resolution of those that have merit" Senate Mem in support of L 1996 , ch. 501, 1996 McKinney's Session Law of NY at 2443. See, Wade v. Byung Yang Kim, 250 A.D.2d 323 (2nd Dept. 1998); and RAB Performance Recoveries, LLC v. Harari, 29 Misc.3d 129 (A); (App.Term 2nd, 11th & 13th Jud. Dists. 2010): and State v. Mappa, 24 Misc.3d 1149 (Sup.Ct. Kings Co. 2009).

A motion is made when the motion papers are served. CPLR 2211. Manning's motion to dismiss was served on February 4, 2011. Manning's answer was served on November 8, 2010. The motion to dismiss was made more than 60 days after the service of the answer.

In order to establish undue hardship, the defendant must establish the motion could not have been made within 60 days through the exercise of ordinary diligence. Abitol v. Schiff, 180 Misc.2d 949 (Sup.Ct. Queens Co. 1999); and Yellow Book Co., Inc. v. Rose, 182 Misc.2d 263 (Dist.Ct. Nassau Co. 1999).

Manning offers no factual explanation for his failure to make the motion to dismiss within 60 days. He asserts since case was called for trial less than 60 days after the answer was served he did not have time to serve the motion.

This is a peculiarity of calendar practice in the District Court. If a defendant appears *pro se,* the clerk is required to place the action on the trial calendar upon the filing of the answer. Uniform District Court Act §1301(a). The plaintiff does not have to serve or file a Notice or Trial or Statement of Readiness for Trial. This statutory requirement often results in the action being called for trial before any discovery has been taken place, before parties have had the opportunity to serve and respond to discovery demands, make motions for protective orders, before the parties have had the time to make appropriate motions relating to the merits of the action, affirmative defenses or counterclaims or to demand a jury trial. This often results in actions being adjourned so that parties can serve and respond to discovery demands and/or make appropriate motions.

This case was placed on the court's non-jury calendar on January 5, 2011, which is 58 days after the answer was served.

Manning is not the usual *pro se* litigant who is unfamiliar with court practices and procedures. Manning is an attorney. For 21 years, he was an attorney in the New York State Unified Court System. He is presently employed as a client specialist by a major, multinational law firm whose principal office is located in New York City. Manning offers

no explanation for his failure to make the motion to dismiss for lack of jurisdiction within 60 days of the service of his answer and does not provide the court with any reason why he was unable to make the motion timely.

Since the motion to dismiss for lack of jurisdiction was not made within 60 days of the date of the service of defendant's answer, the affirmative defense of lack of jurisdiction was waived. The motion to dismiss pursuant to CPLR 3211(a)(8) is denied.

B. CPLR 3211(a)(7)

Manning asserts the complaint must be dismissed because it fails to comply with CPLR 3015(e).

CPLR 3015(e) requires a business suing a consumer that is required to be licensed by the Nassau County Department of Consumer Affairs allege in the complaint that plaintiff is duly licensed, the name and number of the license and the governmental agency that issued the license. Paragraph 2 of the complaint alleges GARS is a duly licensed home improvement contractor and lists its license number. However, the complaint does not allege the agency that issued the license or the name of the entity to whom the license was issued.

Nassau County Administrative Code §21-11.2 requires home improvement contractors to be licensed by the Nassau County Department of Consumer Affairs.

An unlicensed home improvement contractor may not recover in either contract or *quantum meruit*. Ellis v. Gold, 204 A.D.2d 261 (2nd Dept. 1994); and Millington v. Rapoport, 98 A.D.2d 765 (2nd Dept. 1983).

A complaint that fails to allege what is required by CPLR 3015(e) fails to state a cause of action and is subject to dismissal pursuant to CPLR 3211(a)(7). Sorg v. Marple, 230 A.D.2d 841 (2nd Dept. 1996).

The complaint does not meet the requirement of CPLR 3015(e).

However, GARS attaches to its papers submitted in opposition to defendant's motion a copy of its Home Improvement Contractors license issued by the Nassau County Department of Consumer Affairs for the period June 1, 2009 through May 31, 2011. The license was issued to Great American Restoration Services, Inc. and states the license number. The license contains all the information required by CPLR 3015(e).

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider affidavits and other evidence submitted by plaintiff to remedy defects in the complaint. Leon v. Martinez, 84 N.Y.2d 83 (1994); and Corsello v. Verizon New York, Inc., 77 A.D.3d 344 (2nd Dept. 2010). In considering such affidavits and other evidence, the

court should preserve inartfully drafted but potentially meritorious actions. Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998); and AAA Viza, Inc. v. Business Payment Systems, LLC, 38 A.D.3d 802 (2nd Dept. 2007). Pinto's affidavit coupled with the copy of GARS license remedies the defect in the complaint relating to GARS failure to plead its license as required by CPLR 3015(e).

Under such circumstances, defendant's motion to dismiss should be denied. Plaintiff is granted leave to serve an amended complaint make the appropriate allegations regarding its license. AAA Viza, Inc. v. Business Payment Systems, LLC, *supra.*

C. Defendant's motion for Summary Judgment

The court should not award summary judgment to the plaintiff when the defendant has asserted a meritorious counterclaim in which the amount demanded is equal to or in excess to of the amount demanded in the complaint. Illinois McGraw Electric Co. v. John J. Walters, Inc., 7 N.Y.2d 874 (1959); and Titan Corp. v. Cellular Vision Technology & Telecommunications, L.P., 271 A.D.2d 437 (2nd Dept. 2000); and Tyree Brothers Environmental Services, Inc v. Ferguson Propeller, Inc., 247 A.D.2d 376 (2nd Dept. 1998).

While the amount of damages Manning sustained is not documented, The documentation supporting Manning's counterclaim is the subject of plaintiff's cross-motion to compel discovery.

Manning alleges he sustained damages in excess of the amount GARS seeks to recover in the complaint. Manning alleges he incurred expenses to correct work GARS did not perform properly, did not receive credits for items that he paid for himself and incurred expenses to remedy or repair items GARS damaged in the course of their work.

When deciding a motion for summary judgment, the court must determine if triable issues of fact exist. Matter of Suffolk County Dept. of Social Services v. James M., 83 N.Y.2d 178 (1994); and Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957). In this circumstance, triable issues of fact exist regarding the extent of Manning's counterclaim and whether Manning will be able to recover an amount in excess of the amount sued for in the complaint. Under these circumstances, plaintiff's cross-motion for summary judgment must be denied.

D. Discovery

Plaintiff served a Notice for Discovery and Inspection upon Manning dated December 30, 2010. The Notice for Discovery and Inspection required Manning to produce the demanded items at the office of plaintiff's attorneys on February 1, 2011 at

9:30 a.m.[1]

Manning did not produce any of the items demanded. Instead, he served what can best be described as general objections to each item.

A party upon whom a discovery demand is served has three ways to object to a discovery demand. The party can move for a protective order pursuant to CPLR 3103(a). The party may object by serving within 20 days of service of the Notice for Discovery and Inspection a response that states with "...reasonable particularity the reasons for each objection." CPLR 3122. Finally, if a party does not move for a protective order or timely object in the manner prescribed by CPLR 3122, the party need not produce material demanded in discovery if the material demanded is palpably improper. Saratoga Harness Racing, Inc. v. Roemer, 274 A.D.2d 887 (3rd Dept. 2000); and Titleserv, Inc. v. Zenobio, 210 A.D.2d 314 (2nd Dept. 2000). A discovery demand that seeks information that is not relevant to the issues involved in the action or which is confidential may be palpably improper. *Id.*

Defendant did not move for a protective order. His response does not comply with CPLR 3122. In fact, Manning does not provide a specific response or objection to any of the Discovery demands. He does not assert the discovery demand is palpably improper. However, a discovery demand must be sufficiently specific so that the party responding can identify the material or documents that would properly respond to the demand.

Manning assertion that discovery disputes will be resolved at a preliminary conference is without merit. There is no provision in the Uniform District Court Act or the Uniform Rules for the District Court, 22 NYCRR Part 212, for preliminary conferences to resolve discovery disputes or to schedule outstanding discovery.[2]

Demands 1 and 2 are clearly relevant to the action. Items 3, 4, 5 and 6 are vague and improper. Demand 7 requires Manning to itemize the damage claimed in the counterclaim. This is a proper demand. Demand 8 seeks expert information and seeks the information specifically discoverable pursuant to CPLR 3101(d).

Manning shall serve responses to plaintiff's Notice for Discovery Inspection

---

[1]The court believes the date for production of the material is a typographical error. The court is deciding the motion in regard to plaintiff's Notice for Discovery and Inspection as if the demanded material was required to be produced on February 1, 2011.

[2]22 NYCRR 202.12 provides for preliminary conferences in actions in Supreme and County Court.

Demands 1, 2, 7 and 8 within 30 days of service of a copy of this order with notice of entry.

E. Sanctions

The court may award sanctions to a party who engages in frivolous conduct as defined by 22 NYCRR 130-1.1. None of the arguments made or facts asserted were frivolous. 22 NYCRR 130-1.1(c). Therefore, both parties applications for sanctions are denied.

The motion and cross-motion are decided as follows:

`1. Defendant's motion to dismiss pursuant to CPLR 3211(a)(8) is denied;

2. Defendant's motion to dismiss pursuant to CPLR 3211(a)(7) is denied;

3. Plaintiff shall serve an amended complaint properly alleging its license within 20 days of the date of this order.

4. Plaintiff's cross-motion for summary judgment is denied;

5. Plaintiff's motion to compel defendant to comply with its Notice for Discovery and Inspection is granted to the extent that defendant shall serve a response to Items 1,2 7 and 8 within 30 days of service of a copy of this order with notice of entry. Items 3, 4, 5, and 6 are improper in their current form and are vacated;

6. Defendant's motion and plaintiff's cross-motion for sanctions are denied.

7. The attorney for the defendant and the plaintiff are directed to appear for a status conference in District Court, Nassau County, Civil Part 3, 99 Main Street, Courtroom 259, Hempstead, New York 11550 on August 30, 2011 at 9:30 a.m.

SO ORDERED:

Hon. Fred J. Hirsh
District Court Judge

Dated: June 27, 2011

cc: King & King, LLP
Leo Manning, Pro se