SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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ANDRZEJ BIALOCERKIEWICZ, d/b/a ANDREW BIALOCERKIEWICZ,

Plaintiff,

- against -

THE 400 REALTY CO., DAVID FRANKEL REALTY, INC., and DAVID FREDERICK FRANKEL,

Defendant.

- x

Index No.: 24871/10

Motion Date: 3/17/11

Motion No.: 7

Motion Seq.: 1

The following papers numbered 1 to 8 read on this motion by defendants pursuant to CPLR 3211(a)(1), (5), (7) and (10), and CPLR 3013, to dismiss plaintiff's complaint and to award defendants costs and expenses, including reasonable attorneys' fees.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-8

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action on September 30, 2010, for an account stated, unjust enrichment, an equitable lien against property and a declaratory judgment that a settlement agreement is null and void. In the complaint, plaintiff alleges the following: he is in the business of home repair and renovation, concentrating on general residential and commercial building renovations, with an emphasis on painting and decorating.

Starting from January of 2002 through January of 2010, at the behest of defendant David Frederick Frankel, in his individual capacity and as an agent or representative of defendants Frankel Realty and 400 Realty, his employees performed several repair and renovation services at defendant 400 Realty's premises located at 44 East 57th Street, Manhattan, New York (44 East 57th), as well as, at other properties in Manhattan at 160 East 65th, 315 East 68th Street, 19 East 80th Street, 444 East 75th Street, 19 East 65th Street, 3 East 65th Street, and 21 East 65th Street. On or about November of 2009, following completion of the renovation and repair of more than 400 holes in hallways and corridors of 44 East 57th, he submitted an invoice in the amount of $237,684.00. Defendant 400 Realty paid that bill in full by check, dated November 20, 2009. Shortly thereafter and after deposit of that check, defendants contacted plaintiff seeking a partial refund based on lower third-party estimates for that work. In the interest of maintaining a long term business relationship, he agreed. At the time he tendered the $50,000.00 check, he was induced to sign a letter which he did not understand because he is a Polish immigrant who struggles with conversational English and is otherwise unable to read and comprehend English in its written form. He was told that the letter acknowledged his return of $50,000.00. The letter dated December 15, 2009, also included a provision entitling defendant 400 Realty to a credit of $100,000.00 against plaintiff's other future and unpaid invoices. Plaintiff later objected to that credit provision citing his overt inability to comprehend English in its written form and the fact that he never agreed to any such term. Thereafter, plaintiff has presented a number of invoices for materials and labor provided at the behest of defendants, and completed without objections by defendants, which invoices have a combined total of $448,966.00. No part has been paid although duly demanded since January of 2010. Most of this work was performed at 44 East 57th.

Defendants assert that plaintiff's complaint should be dismissed pursuant to CPLR 3013 and 3211(a)(1), (5), (7) and (10).

Pursuant to CPLR 3013, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced.

Defendants here failed to demonstrate that the complaint has been insufficiently pled or that it includes any such "scandalous or prejudicial" matters. (See CPLR 3013, 3024[b].)

Accordingly, the branch of defendants' motion to dismiss plaintiff's complaint pursuant to CPLR 3013 is denied.

On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. (*See Leon v Martinez*, 84 NY2d 83 [1994]; *see also Breytman v Olinville Realty, LLC*, 54 AD3d 703 [2008]; *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408 [2005].) It is well established, however, "that bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one." (*Meyer v Guinta*, 262 AD2d 463, 464 [1999]; *see also Ahmed v Getty Petroleum Marketing, Inc.*, 12 AD3d 385 [2004]; *Doria v Masucci*, 230 AD2d 764 [1996].) Similarly, to succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (*See Goshen v Mutual Life Insurance Co. of New York*, 98 NY2d 314 [2002]; *see also Leon v Martinez, supra*; *Paramount Transportation Systems, Inc. v Lasertone Corp.*, 76 AD3d 519 [2010].)

While defendants here may have valid defenses to this action, plaintiff's complaint does sufficiently allege causes of action for account stated, unjust enrichment, equitable lien and declaratory judgment. In addition, contrary to defendants' assertions, the documentary proof failed to resolve all issues as a matter of law and conclusively dispose of all of plaintiff's claims. (See *Farber v Breslin*, 47 AD3d 873 [2008]; *see also Mendelovitz v Cohen*, 37 AD3d 670 [2007]; *Martin v New York Hosp. Med. Ctr. of Queens*, 34 AD3d 650 [2006].) The proof did not refute plaintiff's allegations of duress and false inducement with regard to the settlement agreement, and of nonpayment of invoices for work performed at defendant 400 Realty's premises, 44 East 57th. The proof, however, did refute plaintiff's allegations that defendants owned the properties in Manhattan at 160 East 65th, 315 East 68th Street, 19 East 80th Street, 444

East 75th Street, 19 East 65th Street, 3 East 65th Street, and 21 East 65th Street.

Accordingly, the branch of defendants' motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7) is denied.

The branch of defendants' motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) is granted only to the extent of dismissing plaintiff's claims with regard to the properties in Manhattan at 160 East 65th, 315 East 68th Street, 19 East 80th Street, 444 East 75th Street, 19 East 65th Street, 3 East 65th Street and 21 East 65th Street, and is otherwise denied.

In light of the foregoing, the issue of failure to join the owners of the properties located in Manhattan at 160 East 65th, 315 East 68th Street, 19 East 80th Street, 444 East 75th Street, 19 East 65th Street, 3 East 65th Street and 21 East 65th Street as necessary parties is moot. Moreover, where, as here, complete relief may be accorded between the parties and the absent parties will not be inequitably affected by a judgment in the action, the absentees are not deemed to be necessary parties. (*See* CPLR 1001[a]; *see also Strough v Incorporated Village of West Hampton Dunes*, 78 AD3d 1037 [2010]; *Matter of Figari v New York Telephone Co.*, 32 AD2d 434 [1969].)

Accordingly, the branch of defendants' motion to dismiss plaintiff's complaint for failure to join necessary parties is denied.

The branch of defendants' motion to dismiss the first, second and third causes of action in plaintiff's complaint pursuant to CPLR 3211(a)(5) on the grounds that they are barred by the statute of limitations is granted only to the extent that plaintiff's claims related to work performed prior to September 30, 2004, are dismissed, and this branch is otherwise denied.

When an officer or agent enters into a contract on behalf of a corporation, he or she will not be held personally liable for breach of that contract unless there is clear and explicit evidence that he or she intended to be personally bound. (*See Weinreb v Stinchfield*, 19 AD3d 482 [2005].) Further, where an agent signs a contract without any language limiting his or her signature is of no consequence where the party alleging personal liability was aware that the agent was acting for the disclosed corporation. (*See Leonard Holzer Associates, Inc. v Orta*, 250 AD2d 737 [1998].) Plaintiff here offered no clear and explicit evidence of the intention of defendants Frankel Realty or David

Frederick Frankel to be personally bound, and therefore, the branches of defendants' motion to dismiss the complaint as and against defendants Frankel Realty and David Frederick Frankel are granted.

Dated: Long Island City, N.Y.
July 7, 2011

ROBERT J. MCDONALD
J.S.C.