

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 609001/16
MOTION DATE: 9/15/16
MOTION NO.: 001

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RAHEEM MILLER, JACLYN LARKIN and MIA
RENEE MILLER, an infant, by her parent and
guardian, RAHEEM MILLER,

Plaintiffs,

PLAINTIFFS' ATTORNEY:
THE LAW OFFICES OF
CHRISTOPHER J. CASSAR, P.C.
13 East Carver Street
Huntington, New York 11743

-against-

ANTHONY FALCO, as Executor of the Estate of
PAULINE FALCO,

Defendant.
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DEFENDANT'S ATTORNEY:
GANFER & SHORE, LLP
360 Lexington Avenue
New York, New York 10017

Upon the following papers numbered 1 to 19 read on this motion to dismiss : Notice of Motion/ Order to Show Cause and supporting papers 1-6 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 7-17 ; Replying Affidavits and supporting papers 18-19 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the pre-answer motion (motion sequence no. 001) of defendant Anthony Falco as Executor of the Estate of Pauline Falco for an order pursuant to CPLR R. 3211(a)(1), (5) and (7) dismissing plaintiff's verified complaint dated June 11, 2016 with prejudice; pursuant to CPLR §6514, cancelling and vacating the notice of pendency filed in this action; and, pursuant to 22 NYCRR Part 130 and CPLR §6514(c), imposing sanctions on plaintiffs and their counsel for frivolous conduct in filing and refusing to discontinue this action and the notice of pendency, is granted to the extent that the complaint is dismissed with prejudice; and it is further

ORDERED that a hearing will be held before the undersigned on January 26, 2017 at 11:00 a.m. to determine the amount of fees, costs and sanctions to be assessed against plaintiff and his attorney for frivolous conduct pursuant to 22 NYCRR §130-1.1; and it is further

ORDERED that upon service of a copy of this order with notice of entry thereof, the Suffolk County Clerk is directed to vacate and cancel of record the notice of pendency previously filed herein against the property designated as District 0400, Section 025.00, Block 02.00, Lot 035.000 and known as 21 Blackberry Lane, Huntington, New York.

In February 2015, Raheem Miller ("Miller"), by his attorney, filed a mechanic's lien against residential property previously owned by Pauline Falco, who had died in January 2015. The mechanic's lien stated that Raheem Miller had performed major improvements and renovations to the home located at 21 Blackberry Lane, Huntington, New York, in connection with which he had furnished materials including roofing, siding, sheetrock, lumber, fixtures, flooring, paint, shrubbery, gravel, doors, windows, hardware, etc., for a total agreed price of \$160,000.00. In response to the filing of the mechanic's lien, Anthony Falco (Pauline Falco's

son), as Executor of the Estate of Pauline Falco (the “Executor”), commenced an action¹ (hereinafter referred to as the “prior action”) to vacate the mechanic’s lien, and to recover for damages incurred as a result of the Executor’s inability to sell the house, in which Raheem Miller was then residing with his girlfriend Jaclyn Larkin (Pauline Falco’s granddaughter) and their two children, Mia Renee Miller and Cameron Larkin Miller.

After the Executor moved in the prior action for a default judgment against Miller, who had not answered the complaint, Miller appeared in the action by counsel (the same attorney who had filed the mechanic’s lien on Miller’s behalf) and cross-moved to dismiss the complaint on the ground that he had never been served with process. Miller’s cross-motion did not substantively oppose plaintiff’s motion for default judgment and sought no other affirmative relief. On May 26, 2016, after a traverse hearing, this Court issued an order sustaining jurisdiction in the prior action. On June 22, 2016 this Court issued an order granting plaintiff’s substantively unopposed motion for a default judgment against Raheem Miller on plaintiff’s causes of action for a judgment declaring the mechanic’s lien invalid and unenforceable on the ground that Raheem Miller was not a licensed home improvement contractor as required by Suffolk County Code §563-3(A) (first cause of action), and for fraud and prospective tortious interference (second and third causes of action). Pursuant to the order granting the default judgment, an inquest was held before the undersigned on August 11, 2016; a determination of the Estate’s damages against plaintiff as a result of the wrongfully filed mechanic’s lien is pending.

On June 14, 2016, Raheem Miller commenced the instant action against the Executor. Also named as plaintiffs are Jaclyn Larkin, and Mia Renee Miller, an infant, by her parent and guardian, Raheem Miller. Shortly after the commencement of the action, the Court was advised by separate counsel that Jaclyn Larkin is not represented by plaintiff’s attorney and did not consent to being named as a plaintiff herein. Accordingly, so much of plaintiff’s complaint as purports to be interposed on behalf of Jaclyn Larkin is dismissed, as neither Raheem Miller nor his attorney has any authority or standing to assert any such claim on her behalf.

In his verified complaint, Miller alleges an oral agreement with Pauline Falco whereby she promised to transfer ownership of the premises to Mia Renee Miller and Jaclyn Larkin in exchange for his promise to perform renovations and repairs to the premises located at 21 Blackberry Lane, Huntington, or to pay him the reasonable value of such work, labor and materials if the property was ever sold. Plaintiff alleges that from September 2010 until January 2015, at the special instance and request of Pauline Falco, he performed work and labor and furnished materials for the renovation of the subject premises and that the reasonable value of the work, labor and materials furnished is \$160,000.00. Plaintiff alleges that Pauline Falco failed to transfer title to the property to Jaclyn Larkin and Mia Renee Miller before she died, and that the Executor has refused to pay plaintiff the amount allegedly owed to him. Plaintiff has asserted three causes of action sounding in quantum meruit, unjust enrichment and constructive trust. Simultaneously with the filing of the summons and complaint, plaintiff filed a notice of pendency against the premises.

¹ *Anthony J. Falco, as Executor of the Estate of Pauline, Falco, Deceased v. Raheem Miller*, Index No. 606648/2016.

Rather than filing and serving an answer to the verified complaint, the Executor interposed the instant motion to dismiss the complaint on the grounds of, *inter alia*, res judicata, collateral estoppel, documentary evidence, and failure to state a cause of action.

In determining a pre-answer motion to dismiss a complaint pursuant to CPLR R. 3211(a)(7), “the standard is whether the pleading states a cause of action,” and, in considering such a motion, “the court must accept the facts as alleged in the complaint as true and determine only whether the facts as alleged fit within any cognizable legal theory” (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Where a motion to dismiss a complaint is predicated on documentary evidence pursuant to CPLR R. 3211(a)(1), the motion may be granted “only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law” (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162-1163, 920 NYS2d 166 [2011]). Where the doctrines of res judicata or collateral estoppel are invoked as a basis for dismissal, the movant must establish that the claims were actually litigated or could have been litigated in the earlier action (res judicata), or that the identical issue was actually decided in the prior issue and applies to the current action (collateral estoppel), and, as to both, that the party against whom the doctrine is invoked had a full and fair opportunity to contest the prior determination (*People of the State of New York v Evans*, 94 NY2d 499 [2000]; *DaimlerChrysler Corp. v Spitzer*, 6 Misc 3d 228 [Sup Ct Albany Cty 2004], *aff’d*, 26 AD3d 88 506 [3d Dept 2005], *aff’d*, 7 NY3d 653 [2006]).

Although Raheem Miller appeared in the prior action for the purpose of contesting the Court’s jurisdiction over him, he did not otherwise oppose plaintiff’s motion for a default judgment, which this Court granted. A default judgment is generally not considered to be a determination on the merits for the purposes of res judicata or collateral estoppel as the invocation of these doctrines contemplates that the parties to the prior litigation had a “full and fair opportunity” to litigate the initial determination (*Amalgamated Bank v Helmsley-Spear, Inc.*, 109 AD3d 418 [1st Dept 2013]; *People of the State of New York v Evans*, 94 NY2d 499, 502 [2000]). Where, as here, however, the defendant intentionally defaulted in the prior action, it cannot be said that he did not have a full and fair opportunity to contest the prior determination, whether or not he availed himself of that opportunity (*Amalgamated Bank v Helmsley-Spear, Inc.*, 109 AD3d 418 [1st Dept 2013]).

A defendant in default is deemed to have admitted all of the traversable allegations of the complaint and all reasonable inferences that flow therefrom (*Amusement Business Underwriters v American International Group, Inc.*, 66 NY2d 878 [1985]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2003]). Accordingly, plaintiff has conceded that, as alleged in the Executor’s complaint in the prior action (¶5), he “is not a licensed home improvement contractor in Suffolk County.” It is well established that an individual who performs home improvement services without being licensed in the municipality where the services are performed is barred from *any* recovery, whether for breach of contract or under any contractual or quasi-contractual theory such as quantum meruit or unjust enrichment (*Emergency Restoration Services Corp. v Corrado*, 109 AD3d 576 [2d Dept 2013]; *Enko Construction Corp v Aronshtein*, 89 AD3d 676 [2d Dept 2011]). Plaintiff’s complaint does not allege that he was a licensed contractor in Suffolk County at the time he allegedly performed the home improvement services, a necessary element of his causes of action to recover in quantum meruit or unjust enrichment (CPLR R. 3015(e)). Accordingly, plaintiff’s complaint fails to state a cause of action for quantum meruit or unjust enrichment.

Plaintiff's complaint also fails to allege the existence of a confidential or fiduciary relationship, an essential element for a constructive trust (along with a promise, a transfer in reliance on the promise, and unjust enrichment) (*Mazzei v Kyriacou*, 139 AD3d 823 [2d Dept 2016]). The pleaded fact that the defendant Executor is the uncle and great-uncle, respectively, of named co-plaintiffs Jaclyn Larkin and Mia Renee Miller is irrelevant, as there is no allegation that the Executor made the alleged promise(s) to Miller, or that there was a confidential or fiduciary relationship between Miller and Pauline Falco, who allegedly did make the promise(s) that plaintiff seeks to enforce herein. Accordingly, plaintiff's complaint fails to state a cause of action for constructive trust.

Moreover, in light of the Court's determination in the prior action, and the admissions deemed to have been made therein by Raheem Miller, together with the documentary evidence reflected in defendant's submissions and the Court's records, the Court is constrained to conclude that plaintiff is collaterally estopped from interposing in the instant action his claims arising out of the same alleged improvements and renovations to Pauline Falco's house that underlay his filing of the mechanic's lien in the prior action as the issue of his entitlement to recover on those claims has already been conclusively determined against him. Accordingly, the complaint is dismissed in its entirety, with prejudice, and the notice of pendency is vacated.²

In addition to the dismissal of the instant action, defendant seeks an order imposing sanctions on plaintiff and his counsel for frivolous conduct pursuant to 22 NYCRR §130-1.1. The Court is constrained to agree in the circumstances that plaintiff's commencement and maintenance of this action in light of the Court's determination in the prior action was "completely without merit in law." Moreover, the Court also agrees that plaintiff's filing of a notice of pendency in this action almost immediately after the mechanic's lien in the prior action was vacated was "undertaken primarily to...harass or maliciously injure another" by interfering with the marketing and sale of the property. A hearing will be held before the undersigned on January 26, 2017 at 11:00 a.m. to determine the amount of fees, costs and sanctions to be assessed against plaintiff and his attorney.

PAUL J. BAISLEY, JR.

Dated: December 14, 2016

J.S.C.

² The Court notes that the submissions reflect that Raheem Miller has also filed a claim in the Surrogate's Court of Suffolk County against the Estate of Pauline Falco wherein Miller alleges that he "performed major improvements to the [subject premises] including but not limited to renovations to the home. The materials furnished were roofing, siding, sheetrock, lumber, fixtures, flooring, paint, shrubbery[,] gravel, doors, windows[,] hardware and various necessary building materials. The total cost of labor and materials was [\$160,000.00]."