

**Short Form Order**

**NEW YORK SUPREME COURT -QUEENS COUNTY**

**PRESENT: ORIN R. KITZES**  
**Justice**

**PART 17**

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**ORCHID CONSTRUCTION CORP,**  
**Plaintiff,**

**Index No.: 3320/10**  
**Motion Date: 6/30/10**  
**Motion Cal. No.: 30 & 32**

**-against-**

**ADAM GOTTBETTER and JOHN MALABRE,**  
**Defendants.**

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The following papers numbered 1 to 22 read on these motions by Defendants for orders pursuant to CPLR 3015 (e), 3016 (b), 3211 (a) (1) and (a) (7), and 3211 ( c ) dismissing the complaint as against them. For purposes of disposition, the motions under calendar numbers 30 and 32 are consolidated.

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Upon the foregoing papers it is ordered that these motions by Defendants for an order pursuant to CPLR 3015 (e), 3016 (b), 3211 (a) (1) and (a) (7), and 3211 ( c ) dismissing the complaint, as against them, is decided as follows:

According to the pertinent sections of the complaint, this is an action for money damages arising out of Breach of Contract, Conversion, Account Stated, Unjust Enrichment, Fraud in Inducement, and Tortious Interference of Contract, in the amount of \$96,880.00, for work performed by Plaintiff at the behest of Defendants, for labor and material for the renovation of defendants' residence, on or about April 2009. Although Plaintiff has demanded payment, Defendants have failed to pay. Plaintiff alleges that it is a domestic corporation and

Defendant Gottbetter is made a part of this action by virtue of the fact that certain construction work was performed at his residence, located at 995 5<sup>th</sup> Avenue, Unit 7S, New York, New York 10028, on April 2009 in the amount of \$96,880.00. Defendant John Malabre is alleged to have brokered and profited from this work. Plaintiff also alleges that on or about April 2009, it and Gottbetter entered into a contract for labor and material for the renovation of his residence for the amount of \$96,880.00. Plaintiff provided labor and materials for the construction work at said premises and was not paid the agree upon price for this work. Consequently, Plaintiff brought the instant action.

The complaint contains seven causes of action. The first cause of action is for Breach of Contract and claims that although duly demanded, Adam Gottbetter has failed and refused to pay ORCHID the total sum of \$96,880.00, which breached the agreement with ORCHID. The Second Cause of Action is for Quantum Meruit and claims that “ORCHID has furnished labor and materials to said Project having a fair and reasonable value of Ninety Six Thousand Eight Hundred and Eighty Dollars (\$96,880.00) and has not been compensated.” The Third Cause of Action is for Account Stated and claims that Plaintiff sent multiple invoices to Adam Gottbetter and he accepted and retained said invoices without objection. Said invoices constitute an account stated to which Adam Gottbetter did not object. The Fourth Cause of Action is for Unjust Enrichment and claims that Adam Gottbetter is the fee owner of certain real property known as 995 5<sup>th</sup> Avenue, Unit 7S, New York, New York 10028, and Orchid provided labor and materials in connection with the improvements project therein. Gottbetter benefitted from the labor and materials provided by Orchid and he has not remunerated or compensated Orchid for such labor and materials and has thus been unjustly enriched. The Fifth Cause of Action is for Conversion and claims Defendant Malabre is in possession of the amount of \$96,880.00, that was given to him for the purposes of compensating Plaintiff for labor and materials provided by Orchid to Gottbetter. Despite Plaintiff’s demand for the return of this money, Malabre has refused to return the money tendered for the services provided by Plaintiff. Plaintiff claims this conversion, damaged it in the amount of \$96,880.00 plus interest from the 31<sup>st</sup> day of April 2009, in addition to consequential damages and punitive damages. The Sixth Cause of Action is for Fraud in Inducement, and claims Malabre initiated said construction work to be performed with the promise and agreement that Plaintiff would be compensated for construction work performed and Plaintiff reasonably relied on these promises. However, Malabre was aware that he did not have the capacity to compensate Plaintiff for the work it performed, and he intentionally and fraudulently represented to plaintiff that he had the capacity to pay plaintiff so that plaintiff would perform the work thereby creating the opportunity to come into possession of the money directly from the beneficiaries of the work performed by plaintiff. The Seventh Cause of Action is for Tortious Interference of Contract, and claims that Plaintiff entered into a contractual agreement or beneficial business relationship with Defendant Gottbetter to procure construction work at his residence and Malabre had actual knowledge of said relationship. Malabre had specific intent to induce Adam Gottbetter to breach said agreement despite his not having any privilege to induce such breach of agreement.

Defendants now seek to dismiss the complaint on the grounds that, inter alia, Plaintiff cannot recover because it was not a licensed home improvement contractor when it renovated the subject premises, and consequently, all of the causes of action must be dismissed. Plaintiff opposes this motion and claims that during the “Stanhope Project Plaintiff Orchid. . . worked directly with Extel’s Project Manager, Co-Defendant, John Malabre. During the . . . Project, and as various apartment units were beginning to be sold, John Malabre approached Plaintiff. . . with specific requests made by recent purchasers for additional work to be performed at their apartments. Co-Defendant John Malabre negotiated the terms of the additional work to be provided and told Plaintiff. . ., that they are not to have any direct contract with apartment owners and that all additional work orders are to be monitored by Mr. Malabre. Therefore, a Home Improvement License was not required.”

The branches of Defendants’ motion pursuant to CPLR 3211 (a)(7) are granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy’s East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy’s East Inc., supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, supra, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

CPLR 3015 (e), in pertinent part, sets forth the following:

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 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.

Defendant Gottbetter is the owner of the premises in the City of New York where Plaintiff performed renovation work on and alterations to the property pursuant to a contract, but the defendants allegedly failed to pay the full contract price. Administrative Code of the City of New York § 20-386(2) defines "home improvement," inter alia, as the replacement, remodeling, alteration, conversion, rehabilitation, or renovation of any land or building, and specifically excludes the construction of a new home. It is not disputed that Plaintiff's work under the contract constituted "home improvement" under the Administrative Code of the City of New York and that Plaintiff did not allege or have a home improvement license. Contrary to Plaintiff's assertion, it was required to obtain a home improvement contracting license. Plaintiff's claim regarding Malabre negotiating the terms of the work directly with Plaintiff does not create an exception to the license requirement. Significantly, Plaintiff has not set forth any reason why such should be an exception nor has it set forth any support for this proposition.

Accordingly, the Court finds that Plaintiff was an unlicensed contractor, who may neither enforce a home improvement contract against an owner nor seek recovery in quantum meruit" J.M. Bldrs. & Assoc., Inc. v Lindner, 67 A.D.3d 738 (2d Dep't 2009.) Since the Plaintiff did not have a home improvement contracting license, the breach of contract, quantum meruit, account stated, and unjust enrichment must be dismissed as they are all premised upon an enforceable home improvement contract. Similarly, the causes of action for conversion, and tortious interference of contract must be dismissed as well since they too depend upon an enforceable home improvement contract. *Id.*

Similarly, the cause of action alleging fraud in the inducement cannot be sustained. "A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud" (WIT Holding Corp. v Klein, 282 AD2d 527, 528 (2d Dept 2001.) The complaint fails to allege that the defendants harbored a present intent to deceive the plaintiff but, rather, alleges only that defendant Malabre misrepresented his intention to perform in the future under the contract, to wit, make payments owed to Plaintiff. J.M. Bldrs. & Assoc., Inc. v Lindner, supra. Based on the above, the branches of the motions seeking dismissal of the complaint pursuant to CPLR 3211 (a) (7) are granted.

Similarly, the branches of the motions seeking dismissal pursuant to CPLR 3211 (a) (1) are granted. This section provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence . . ." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves

all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim . . . " (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

Here, as set forth above, Defendants submissions in support of its motion have established that Plaintiff was performing pursuant to a home improvement contract and it did not have a home improvement license. The Court finds that these submissions constitute documentary evidence and establish, as a matter of law, that Plaintiff cannot enforce the contract it seeks to enforce in its complaint. Plaintiff's claims that seek to carve out an exception to its requirement for such license are unsupported in law. Accordingly Plaintiff has failed to prevent a finding that resolves all issues in Defendants favor and the branches of Defendants' motions based upon CPLR 3211(a)(1) are granted and the complaint is dismissed as against defendants. The Court need not address any other issues raised in Defendants' papers.

**Dated: July 6, 2010**

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**ORIN R. KITZES, J.S.C.**