To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are required to serve a copy of this order, with notice of entry, upon all parties.

Disp __x___ Dec ____ Seq. No. _____ Type__post trial___

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

PRESENT: HON. LINDA S. JAMIESON

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MITCHELL SCHIMKO d/b/a SUPERIOR INTERIOR,

Plaintiff,

-against-

Index No. 33262/11

DECISION AND ORDER

DERON J. HALEY and BARBARA C. HALEY,

Defendants.

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After extensive efforts to resolve this matter failed, the Court tried this case on October 9 and November 28, 2012. The Court took testimony from three witnesses, the parties. Given that the amount in dispute is only $21,106.25, the Court did not require post-trial submissions from the parties.

Background

This case arises out of an agreement in March 2011 between the parties for plaintiff to fabricate and install window shades in defendants' new apartment that was under construction in Manhattan. The window shades were to be custom-made, with special fabric selected by the Haleys. The window shades were also to be motorized. The agreement between the parties, introduced at trial, shows that the electrical work to wire the units and outlets was to be done by defendants' electricians. Defendants were also responsible for the soffet (to hide the electrical work).

The agreement provides for a downpayment of $15,000, which defendants paid, with the balance of $21,106.25 to be paid upon completion. Plaintiff delivered and installed ~~ten~~ certain window shades at the apartment on August 4, 2011. At that time, Barbara Haley wrote plaintiff a check in the total amount of $21,106.25. Later that same day, defendants cancelled that check. The next day, Deron Haley wrote and mailed a check to plaintiff in the amount of $16,000. Defendants also cancelled this check. On August 9, 2011, Deron Haley wrote yet another check to plaintiff and mailed it to him, this time in the amount of $13,000. Defendants also cancelled this third check. None of the above facts are in dispute.

During his testimony, plaintiff explained that the fabric for the shades had to be ordered, the shades and rollers had to be cut, and the motors had to be assembled and prepared for programming. Plaintiff testified that when he took measurements, the apartment was "gutted," so he was only able to take partial measurements. He testified that he needed to return to the apartment to finish measuring to the eighth of an inch.

By the end of July 2011, defendants told plaintiff that he had to come to install the shades. Plaintiff testified that when he went to install them, they were approximately a half inch too wide. Plaintiff claims that this resulted from the installation of the sheetrock, which was a quarter inch too wide on each side.

Plaintiff testified that the floors were not yet finished at this time.

Plaintiff testified that he brought the shades back to his shop to adjust them, and returned a week later, on August 4, 2011, to reinstall them. He testified that the apartment was not yet painted. Plaintiff testified that he installed 19 shades; the 20th shade had a defective motor, which he said that he would fix. Plaintiff testified that the shades all needed adjustments, which was typical immediately after installation. Although Barbara Haley wrote plaintiff a check for the full amount, about 40 minutes later, Deron Haley called plaintiff and said that he was going to stop the check. Plaintiff testified that Mr. Haley said that he had seen the defects, and wanted them fixed before he would pay the full amount. Plaintiff testified that he said that he would stand behind his work, and would remedy all problems.

Plaintiff testified that when he received the August 9th check, he told defendants that he was ready to come and install the 20th shade, and make the adjustments on the others. Mr. Haley told him not to come at all, and that he had hired someone else to finish the project. Plaintiff testified that one of Mr. Haley's complaints was that the bottom rail for the shades was not what he wanted. Plaintiff testified that the contract was silent as to the bottom rail of the shade. Plaintiff further testified that at the initial visit, he brought a sample of the

bottom rail that he usually used. He testified that if defendants had told him that they wanted a different bottom rail, he would have had to get the shades sewn elsewhere. Plaintiff further testified that defendants complained to him that there were stains on the shades; that they were too narrow, so that light could get in; and that they were too long. Plaintiff testified that he tried to explain that all of these issues could be remedied by the final adjustments that he was not allowed to make.

Barbara Haley testified that one shade was hitting the wall, and that they lost confidence in plaintiff because he claimed that the ceiling was not level. Ms. Haley also testified that plaintiff told her that the creases in the shades would straighten out over time. Ms. Haley testified that she felt that plaintiff was not taking responsibility for the shade touching the wall, or for the creases.

In contrast to plaintiff's testimony that the apartment was not finished at the time that plaintiff took the measurements, Mr. Haley testified that the window boxes were finished at the time of plaintiff's initial measurements. Mr. Haley also testified as to the defects in the window shades: that the edges were not straight; that the fabric was frayed on some of them; that the bottom rail should not be there, because it prevents complete blockage of the light; and that the shades were not straight in the window boxes. Mr. Haley testified that he

cancelled the third check because, by that time, he had asked his general contractor to find someone else to finish the job. Mr. Haley testified that the new contractor was able to remedy the defects, and that the shades are fine now.

The Court finds that while there is evidence that the shades, as initially installed, were not perfect, there is also no dispute that defendants refused to allow plaintiff to attempt to remedy those defects. There is no way to determine whether plaintiff's work ultimately would have been sub-par had defendants allowed him back in to make the adjustments.

Legal Issues

Defendants argue that they need not make any further payments to plaintiff because at the time that he entered into their contract, and performed their work, he was not licensed as a "home improvement contractor" in New York City. There is no dispute that plaintiff did not obtain this license until August 23, 2011, after defendants had fired him. Defendants argue that the New York City Administrative Code, Section 20-386, expressly provides that an unlicensed home improvement contractor need not be paid. While this is true in most circumstances, *Kamco Supply Corp. v. JMT Brothers Realty, LLC*, 98 A.D.3d 891, 950 N.Y.S.2d 701 (1st Dept. 2012), the first question here is whether plaintiff is a "home improvement contractor." If he is not, then he was not required to be licensed. *Great American Restoration*

Services, Inc. v. Lenti, 94 A.D.3d 1053, 943 N.Y.S.2d 547 (2d Dept. 2012).

Pursuant to New York City Administrative Code § 20-386(2),

> "Home improvement" means the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building . . . and shall include but not be limited to the construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures or upon land which is adjacent to a dwelling house.

The Section goes on to exempt from "home improvement" the "painting or decorating of a building, residence, home or apartment, when not incidental or related to home improvement work as herein defined." However, "without regard to the extent of affixation, 'home improvement' shall also include the installation of central heating or air conditioning systems, central vacuum cleaning systems, storm windows, awnings or communication systems." It is quite clear that the installation of window shades is not the "construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures." Nor is it "the installation of central heating or air conditioning systems, central vacuum cleaning systems, storm windows, awnings or communication systems." Instead, the Court finds, as a matter of law, that the fabrication and installation of motorized window

shades is part of the "decorating" of the apartment. The window shades, while custom-made and expensive, are not permanently affixed to the window boxes; they can moved to another unit, or modified to suit another residence. They are cosmetic, decorative finishes that do not fall under any definition of "home improvement." *See generally Precision Mirror & Glass v. Dicostanzo*, 17 Misc.3d 30, 844 N.Y.S.2d 568 (App. Term 2007). Defendants argue that window shades are akin to awnings, because they both "are devices to shield the interior of the home from the sun." While this may well be true in a broad sense (and would also cover an angled patio umbrella), awnings are cantilevered structures that could fall on top of a person sitting below and injure him or her. The window shades are not such cantilevered structures. As the First Department explained it, "no license is required for merely decorative additions such as painting, installation of appliances, and the arrangement of furniture and decorative objects." *Raywood Associates, Ltd. v. Seibel*, 172 A.D.2d 154, 567 N.Y.S.2d 474 (1st Dept. 1991). The installation of the window shades is akin to the installation of appliances.

Defendants also argue that the window shades are not cosmetic, and should be considered a "home improvement" because

they were incidental or related to a renovation project.[1] The Court disagrees. Plaintiff here did not have any involvement with any of defendants' renovation plans; the window shades were not part and parcel of the whole renovation scheme from plaintiff's perspective. The fact of the matter is that as defendants define it, a window shade installation would only be a "home improvement" if the owners were having other renovation work done at the same time. That is to say, if a person had window shades installed at the same time that he were replacing a rug, buying a new sofa, and moving furniture, the window shades would not be a "home improvement." But if that same person were also remodeling the kitchen, and converting the stove from electric to gas, then the window shades that he was also installing at the same time would be a "home improvement." Given the inconsistent results attendant to defendants' interpretation, the Court must reject it.

The Court thus finds, as a matter of law, that the installation by plaintiff of the motorized window shades was not a "home improvement," or related to a "home improvement" such that plaintiff had to be licensed pursuant to New York City Administrative Code § 20-386(2). *See, e.g., Coggeshall Painting*

[1]The Court notes that according to Mr. Haley, the window boxes were complete at the time that plaintiff took the measurements. If this were true, query whether it would favor defendants in arguing that the window shades were incidental or related to a renovation project.

& Restoration Co., Inc. v. Zetlin, 282 A.D.2d 364, 723 N.Y.S.2d 656 (1st Dept. 2001) ("limited carpentry work undertaken by plaintiff was **decorative in nature** and incidental to the extensive preparation, painting and refinishing work performed by plaintiff on defendant's duplex apartment" and thus not "home improvement") (emphasis added); *Power Cooling, Inc. v. Wassong*, 5 Misc.3d 22, 783 N.Y.S.2d 741 (App. Term 2004) (the installation of room air conditioners not a "home improvement").

Accordingly, the Court rejects defendants' defense, and orders defendants to pay plaintiff the remaining sum on the contract, $21,106.25. This payment shall be made within 30 days of receipt of this Decision and Order.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
February 4 2013

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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