

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER**

Index No. 9698/06

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PASQUALE ALFANO,

Plaintiff,

-against-

HECTOR AVILA,

Defendant.

**AFFIRMATION IN  
SUPPORT**

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HECTOR AVILA,

Third-Party Plaintiff,

-against-

GRACE TAVARES,

Third-Party Defendant.

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**R. DAVID MARQUEZ**, an attorney duly licensed to practice law before the Courts of the State of New York, affirms the truth of the following statements subject to the penalty of perjury:

1. I am trial counsel to the firm of Annette Rodriguez-Soriano, P.C., the attorney or record for HECTOR AVILA, and as such I am fully familiar with the facts and circumstances contained in the litigation files pertaining to the within action.

**RELIEF REQUESTED**

2. This affirmation is offered in support of the instant application for an order (1) pursuant to CPLR § 3211(7)(a) dismissing the first party action for plaintiffs failure to state a cause of action for which relief may be granted based upon plaintiff's failure to comply with CPLR § 3015(e), and (2) for a further order pursuant to CPLR § 3212 granting defendant summary judgment on the grounds that plaintiff did not possess a home improvement license issued by either the City of Milford Connecticut or the County of Westchester when he undertook to, and performed, home improvement work, at defendant's former residences situated

in the Towns of Milford, Connecticut and Elmsford, New York.

### **PRIOR PLEADINGS AND PROCEEDINGS**

3. This action was commenced by plaintiff, PASQUALE ALFANO, hereafter referred to as “ALFANO”, for home improvement work he paid for, contracted, and/or performed at two separate residences previously owned by defendant, HECTOR AVILA, hereafter referred to as “AVILA”, and his estranged wife and third-party defendant, GRACE TAVERAS, hereinafter referred to as “TAVERAS”, from April 1998 through April of 2006. The first of these two residences was located at 121 Lexington Way in North Milford, Connecticut. The second residence referred to was located at 20 Prospect Street, Elmsford, New York. Plaintiff filed his Summons and Verified Complaint with the Westchester County Clerk on, May 22, 2006 and thereafter effectuated service of process upon the first-party defendant, AVILA.

4. Subsequently ALFANO served upon AVILA an Amended Verified Complaint dated, January 30, 2007. Both the original Verified Complaint and the Amended Verified Complaint allege in sum and substance that ALFANO engaged in home improvement activities at both of the aforementioned residences, neither of which were personally owned or occupied by him, and that he arranged for work to be undertaken at said locations and financed “permanent improvements” to said residences. Attached hereto as exhibit “A” are copies of ALFANO’s Verified Complaint and Amended Verified Complaint for the Court’s review.

5. The Court will observe that nowhere in either the Verified Complaint or the Amended Verified Complaint is there any allegation stating that ALFANO possessed a home improvement license issued or authorized by either the City of Milford Connecticut or the County of Westchester at the time said work was performed at AVILA’s residences as required

by the Consumer Protection Laws and the Consumer Affairs Laws, respectively, of each of the two jurisdictions where home improvement activities were performed by ALFANO. The pleadings are also silent as to his possessing such licenses upon commencing the within action. Consequently, the Complaints fails meet the requirements of CPLR § 3016(e), namely, that the plaintiff plead that he is duly licensed to perform the work he undertook to perform and that he state the name and number described on such licenses, as well as, the name of the government agencies that issued the licenses to him.

6. On June 22, 2006, AVILA joined issue by serving ALFANO, and filing with the Westchester County Clerk's office, a copy of his Verified Answer dated, June 15, 2006. AVILA's Verified Answer states as a First Affirmative Defense that, "Plaintiff's Complaint fails to state a cause of action upon which relief can be granted." A second Affirmative Defense states that Plaintiff has failed to obtain personal or subject matter jurisdiction over the AVILA. Subsequently, AVILA served upon ALFANO, and filed with the Westchester County Clerk's office, a copy of his Amended Verified Answer, dated, May 2, 2007. The Amended Answer also contains, inter alia, an affirmative defense alleging that ALFANO has failed to state a cause of action upon which relief can be granted. Copies of both the Verified Answer and the Amended Verified Answer are attached hereto under exhibit "**B**".

7. On January 5, 2007, AVILA filed, and served a Third-party Summons and Complaint dated, January 3, 2007, upon his estranged wife, TAVERAS. From the materials included in the files provided by AVILA's former attorneys, the firm of Gallo, Feinstein & Naishtut, no Answer on behalf of TAVERAS is found, and therefore it is undetermined whether she has ever appeared in this action as of this writing. A copy of AVILA's Third-Party Summons and Complaint is attached hereto as exhibit "**C**".

8. On or about June 15, 2006, AVILA served a demand for a Bill of Particulars, a copy of which is attached hereto as exhibit “D”. In response to this demand, ALFANO served a Verified Bill of Particulars dated, October 1, 2006, a copy of which is also annexed hereto under exhibit “D”. It is interesting to observe, that ALFANO’s Bill of Particulars is also silent as to his ever possessing a home improvement license.

9. Along with AVILA’s demand for a Bill of Particulars, he served a Notice for Discovery and Inspection dated, June 15, 2006, a copy of which is attached hereto as exhibit “E”. In response to this demand, ALFANO served a Response to Defendant’s Demands, a copy of which is annexed hereto under exhibit “E”. In ALFANO’s response, he includes various pictures of himself performing home improvement work at AVILA’s former residences, including excavating and constructing a stone stairs leading to an outdoor patio at one of the houses. A close inspection of the invoices annexed to ALFANO’s response reveals six (6) receipts for purchases made by ALFANO for goods and services used to improve AVILA’s Connecticut residence that are dated beyond the six year statute of limitations applicable to contractual obligations in both the states of New York and Connecticut<sup>1</sup>. These invoices come to

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<sup>1</sup> The statute of limitations for contractual obligations in the state of Connecticut is defined by Sec. 52-576, *Actions for account or on simple or implied contracts*, and it states as follows: “(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section.

(b) Any person legally incapable of bringing any such action at the accruing of the right of action may sue at any time within three years after becoming legally capable of bringing the action.

(c) The provisions of this section shall not apply to actions upon judgments of any court of the United States or of any court of any state within the United States, or to any cause of action governed by article 2 of title 42a”.

Article 2 of title 42a entitled, *Sales*, in pertinent part, provides:

Sec. 42a-2-725, *Statute of limitations in contracts for sale*, (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the

the total sum of seventeen thousand four hundred seventy-seven dollars (\$17,477.00). Copies of the invoices are segregated and reproduced at exhibit “F”. Furthermore, it is noteworthy to observe that missing in the discovery response proffered by ALFANO is any sign of an invoice or statement by ALFANO to AVILA for the home improvement work ALFANO arranged for and performed at AVILA’s homes. No demand letter sent to AVILA by ALFANO for the services rendered by ALFANO is included as an attachment to ALFANO’s discovery response. No periodic statements or invoices, not even ones made to the attention of AVILA’s estranged wife, TAVERAS who allegedly requested that the home improvement work be performed appears to have ever been sent.

10. On August 24, 2006, a Preliminary Conference was held. A Preliminary Conference Order resulted that set forth a discovery schedule to be completed over the ensuing twelve (12) months.

### **PROPOSED SETTLEMENT**

11. On or about July 24, 2007, a conference before the Honorable Justice Richard B. Liebowitz was scheduled in which AVILA’s former attorney and the attorney for ALFANO were to appear. They reported to the Court that an agreement in principle had been reached settling the within action for the amount of twenty thousand (\$20,000.00) dollars, when

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original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

1.(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach ...”.

in actuality, the Settlement Stipulation circulated between the attorneys provided for ALFANO to receive the sum of one-hundred-eleven thousand two hundred eighty-eight dollars and forty-four cents (\$111,288.44) in full satisfaction of his claim against AVILA. Attached hereto as exhibit “G” is a copy of a printout from the official website for the New York State Unified Court System, in particular, the Court Appearance record for the instant action showing that a settlement for twenty thousand dollars (\$20,000.00) was reported to Justice Liebowitz. Also provided under exhibit “G” is a copy of the Stipulation of Settlement dated, July 2007, that was executed by both ALFANO and TAVERAS and presented to AVILA, who refused to execute it.

#### **ALFANO’S DEPOSITION TESTIMONY**

12. On January 5, 2007, ALFANO appeared for deposition and testified about his performing home improvement work at AVILA’s homes pursuant to the requests of TAVERAS. Attached hereto as exhibit “I” is a copy of ALFANO’s deposition testimony for the Court’s review. As the Court can see for itself, ALFANO never states that he possessed a license to perform any of the home improvements that he undertook to do at AVILA’s homes nor did he testify to fulfilling any of the requirements of law to furnish AVILA with any written contract or other documents required in association with the performance of home improvement jobs at AVILA’s homes. In fact, ALFANO’s testimony describes a total lack of interest or concern by AVILA as to the home improvement work ALFANO performed at TAVERAS’ s request. It seems clear from ALFANO’s testimony that all of the home improvements were arranged solely between TAVERAS and ALFANO.

#### **THE PROMISSORY NOTES EXECUTED BY TAVERAS**

13. According to ALFANO, he claims that AVILA is obligated to pay him for the costs he incurred performing home improvement work at AVILA's prior residences as a result of TAVERAS executing a series of six (6) promissory notes valued in the aggregate at one hundred fifty-one thousand five hundred ninety one (\$151,591.00) dollars. Copies of said promissory notes are attached hereto as exhibit "H" for the Court's review. However, UCC§ 3-403(2) sets forth the general rule that one who signs a negotiable instrument without indicating that his signature is made in a representative capacity will be held personally obligated on the instrument. This section, provides in pertinent part as follows: "...(2) An authorized representative who signs his own name to an instrument (a) *is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity*; (b) *... is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity*, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity. (Emphasis added).

14. There is no indication on the face of the note that TAVERAS signed the promissory notes in a representative capacity on behalf of AVILA, and therefore she alone, and not AVILA is personally liable for payment of the notes to ALFANO<sup>2</sup>. While AVILA's is named on the note, the unqualified signature by TAVERAS binds no one but herself<sup>3</sup>.

### INHERENT CONFLICT OF INTEREST

15. It is also noteworthy to point out that the firm of Calano & Culhane

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<sup>2</sup>See, *Schmitz v. MacDonald*, 250 A.D.2d 533, (1<sup>st</sup> Dept. 1998); see also, *Republic National Bank v. GSO, Inc.*, 177 A.D.2d 417 (1<sup>st</sup> Dept. 1991).

<sup>3</sup>*Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y. 2d 223 (1978).

represent the interests of both ALFANO and TAVERAS, who's interests are adverse to each other as a consequence of ALFANO being the first party plaintiff and TAVERAS being a third-party defendant in the same action. According to the Third Affirmative Defense described in AVILA's Amended Answer, ALFANO and TAVERAS have conspired together to AVILA's detriment in an attempt to engorge themselves of AVILA's portion of the marital assets owned by AVILA and TAVERAS.

**ALFANO FAILED TO COMPLY  
WITH THE REQUIREMENTS OF  
CPLR § 3015(E)**

16. CPLR § 3015(e), entitled, *Particulars as to Specific Matters*, states in pertinent part that, “[W]here 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 ...Westchester county of department of consumer affairs/weight-measures... 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...[T]he failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven (7) of subdivision (a) of rule thirty-two hundred eleven of this chapter.”

17. In the instant action, ALFANO, was required to be registered and/or licensed to perform home improvement work in the City of Milford Connecticut and the County of Westchester where AVILA owned residences that ALFANO improved. In accordance with CPLR § 3015(e), ALFANO was required to plead that he possessed such license at the time he performed home improvement work, or in the case of the work performed in Milford

Connecticut, that he was registered with the City of Milford. ALFANOS' Complaints and Bill of Particulars, as well as, his response to AVILA's discovery demands lack any indication that he ever complied with any registration or licensing laws before undertaking to perform the home improvement work for which he now seeks compensation. Moreover, not only did ALFANO fail to plead compliance with any licensing laws, he does not even purport to have a home improvement license at the time he commences the within action. As stated in CPLR § 3015(e) failure to plead compliance with the licensing laws results in a fatal defect in the pleading that is reason enough to warrant dismissal of the first party action brought by ALFANO against AVILA in as much as ALFANO is seeking money for work he was not licensed to perform.

### **THE LAWS REGULATING HOME IMPROVEMENT CONTRACTORS**

18. Article XVI of the Consumer Affairs Laws of Westchester County entitled, *Licensing of Persons Engaged in the Home Improvement Business*, more particularly, Section 863.311, entitled, *Legislative Findings*, in pertinent part says, "...it has become desirable to safeguard and protect such residents by regulating the home improvement, remodeling and repair business and by licensing persons engaged in such business." Article XVI at Section 863.312, entitled, *Definitions*, defines a "Contractor" as, inter alia, "...any person who ...offers to undertake or agrees to perform any home improvement." "Home Improvement" is defined as work including "... decks, patios, garages...driveways and walkways...masonry...exterior painting...landscaping and gardening...tile setters...and other similar improvements." Home improvement Contract" is defined as, "an agreement between a contractor and an owner for the performance of a home improvement, and includes all labor, services, and materials to be furnished and performed thereunder, either directly by the contractor or by another person under

separate agreement with the contractor.” Section 863.313, entitled, *License Required; Home Improvement Business*, says, “[N]o person shall maintain, conduct, advertise, operate, or engage in the home improvement business within the county of Westchester, or hold himself out as being able to do so, unless such person is licensed pursuant to this Article.” Section 863.25, entitled, *Disclosure Required of Certain Home Improvement Contractors; Penalties*, provides that, “ (1) If a licensee or an affiliate directly or indirectly arranges or facilitates the financing of a home improvement contract, then prior to executing the home improvement contract, said licensee must: (a) Disclose to the owner, in writing, any payments made or received by the licensee in connection with the financing, including the amount of such payments, on forms provided by the sealer; (b) Provide an appropriate Consumers’ Bill of Rights, prepared by the sealer; and (c) Obtain the owner’s written acknowledgment of receipt of the written disclosure or any payments and the appropriate Consumers’ Bill of Rights on forms provided by the sealer. (2) Within five (5) business days of executing a home improvement contract, any licensee is required to comply with the provisions of subdivision 1, must also file with the sealer: (a) A copy of the home improvement contract; (b) A copy of the owner’s Acknowledgment of Receipt of the written disclosure and the appropriate Consumers’ Bill of Rights.”

Similar to the Law in Westchester County, the City of Milford Connecticut has consumer protection statutes that require the registration of contractors and their salesmen involved in performing home improvement services. Section 20-420, entitled, *Registration of Contractors and Salesmen Required*, states in pertinent part that, “(a) No person shall hold himself or herself out to be a contractor or salesperson without first obtaining a certificate of registration from the commissioner as provided in this chapter....”. In the case herein ALFANO had neither a license from Westchester County when he performed home improvement work at AVILA’s home in

Elmsford nor was he registered with City of Milford Connecticut when he undertook and performed home improvement work at AVILA's house in Connecticut. On both occasions ALFANO was a rouge home improvement contractor at best performing home improvement work without a license or registration, without a written agreement, and without any disclosure or representation that he was not authorized by any governmental authority to engage in the activities that he undertook to perform. As for any financing services that ALFANO provided, he was also apparently lacking any legal authority to engage in such financial activity since he acted without adhering to any of the formalities of law by not reducing an agreement to writing or complying with any disclosure requirements described in the consumer protection laws. Regarding the work ALFANO performed in Connecticut, as described in the six (6) invoices shown at exhibit "F", any claims based on the six (6) invoices dated prior to May 22, 2000, are outside the statute of limitations and not collectable in this action for a multitude of reasons, including the statute of limitation.

### **THE APPLICABLE CASE LAW**

19. It is well established that the licensing statutes, such as the ones discussed above pertaining to home improvement contractors, are to be strictly construed and an unlicensed home improvement contractor cannot recover for services rendered either on the contract or in quantum meruit<sup>4</sup>. The weight of the applicable case law pertaining to unlicensed home improvement contractors holds that a home improvement contractor who is unlicensed at the time of the performance of the work for which he or she seeks compensation forfeits the right to recover

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<sup>4</sup>*Intrepid Electrical Contracting Co., Inc., v. Serure*, 34 A.D.3d 430 (2<sup>nd</sup> Dept. 2006).

damages based on either breach of contract or quantum meruit<sup>5</sup>. Moreover, a home improvement contractor who fails to possess and plead a valid license as required by relevant local laws may neither sue, nor recover damages for breach of a construction contract by a consumer, nor recover in quantum meruit<sup>6</sup>. Accordingly, it is apparent that New York has taken a strict approach on this area of the law and our Courts have been adamant in their refusal to permit recovery under a contract where the contractor is not licensed<sup>7</sup>. In the instant action such as in other similar cases, for a home improvement contractor to recover damages for breach of contract under quantum meruit theory, he must possess a valid license at the time of performance for which he seeks compensation, and a valid license at the time of pleading. In this case ALFANO possesses no home improvement licenses for the jurisdictions where he provided home improvement related services and consequently, he too is not entitled to recover any damages in this action, muchless even bring the action, against AVILA. For this reason alone, the first party claim must be dismissed with prejudice forthwith.

**WHEREFORE**, defendant AVILA requests that this honorable Court grant the relief requested in the instant application in accordance with all of the foregoing.

Dated: Great Neck, New York  
March 3, 2008

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R. David Marquez

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<sup>5</sup>See, *Flax v. Hommel*, 40 A.D.3d 809 (2<sup>nd</sup> Dept. 2007), citing, *B & F Building Corp. v. Liebig*, 76 N.Y.2d 689 (1990).

<sup>6</sup>See, *Al-Sullami v. Groskie*, 40 A.D.3d 1021 (2<sup>nd</sup> Dept. 2007); See also, *Ben Krupinski Builder and Associates, Inc. v. Baum*, 36 A.D.3d 843 (2<sup>nd</sup> Dept. 2007), and *Kaspi v. Eddie's Home Remodeling Services, Inc.*, 12 Misc. 435 (N.Y. Sup. 2006).

<sup>7</sup>*Ellis v. Gold*, 204 A.D.2d 261 (2<sup>nd</sup> Dept. 1994).