

Anthony Tranchina Gen. Contr. Corp. v Bennett

2013 NY Slip Op 34055(U)

November 22, 2013

Supreme Court, Queens County

Docket Number: 19491/10

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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ANTHONY TRANCHINA GENERAL CONTRACTING
CORP.,

Plaintiff(s),

- against -

Index No.: 19491/10

Motion Date: 6/14/13

Motion Cal. No.: 7

Motion Seq. No: 6

CYNTHIA W. BENNETT, KIMBERLY Y. BENNETT
and THEODORE BENNETT,

Defendant(s).

-----X

The following papers numbered 1 to 13 read on this motion by defendant for an order granting summary judgment dismissing the complaint. Plaintiff cross-moves in opposition and seeks an order striking the affirmative defense of statute of limitations, and consolidating the within action with the action entitled *Anthony Tranchina Contracting Corp. v Greco Brothers Concrete of L.I., Inc.* (Index No. 8894/2012).

Papers
Numbered

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Upon the foregoing papers it is ORDERED that the motion and cross motion are decided as follows:

At the outset, the court notes that the note of issue was vacated in this action pursuant to an order of the Hon. Jeremy Weinstein, J.S.C., dated February 28, 2013. Therefore, as the

action has reverted to pre-note of issue status, the within motion and cross-motion are timely.

Plaintiff commenced the within action on August 2, 2010 against Greco Bros. Ready Mix Concrete Co. Inc. (Ready Mix), and alleges causes of action for breach of contract, breach of the implied warranty of merchantability, fraud or intentional tort, and a violation of General Business Law §349(h). Plaintiff alleges that from 2002 to 2010, it contracted with the defendant, Ready Mix, for it to supply concrete to the plaintiff at various construction jobs, and that the defendant failed to supply concrete that was fit for this purpose. Defendant, Ready Mix, served an answer and interposed five affirmative defenses, including statute of limitations. On April 27, 2012, plaintiff commenced a separate action against Greco Brothers Concrete of L.I., Inc. (Concrete) under Index No. 8894/2012.

That branch of the plaintiff's cross-motion which seeks to consolidate the instant action with the action commenced under Index No. 8894/2012, is denied. Plaintiff has not submitted an affidavit of service and therefore has not established that the cross-motion was properly served on Concrete. Furthermore, the court is unable to determine whether these actions share common questions of law and fact, as plaintiff has failed to annex a copy of the pleadings in the action commenced under Index No. 8894/2012.

That branch of the cross-motion which seeks to strike the defendant's affirmative defense of statute of limitations and requests that the court apply the "relation back" doctrine to the action seeking to be consolidated, is denied. As the request to consolidate these actions is denied, no basis exists for striking the affirmative defense of statute of limitations. Additionally, plaintiff has failed to demonstrate that the doctrine of "relation back" is applicable here.

Turning now to defendant's motion, Ready Mix asserts that the plaintiff has sued the wrong entity. It is asserted that the only business conducted by Ready Mix is the ownership of real estate interests; that it is not in the concrete business, and that it did not participate in any transactions with the plaintiff. It is asserted that plaintiff purchased the subject quantities of concrete from Concrete, a separate and distinct corporation. Joseph Greco, Jr., the Secretary/Treasurer of Ready Mix, states in his affidavit that Ready Mix is in the real estate

business and "holds ownership interests" in real estate in Ozone Park, New York; that Ready Mix "does not engage in the concrete business and it has never supplied any ready mix concrete or other concrete products to the plaintiff; and that the corporation which transacted business with the plaintiff was Concrete, a separate and independent business incorporated in New York."

Defendant, in support of the within motion, has submitted a copy of Ready Mix's original certificate of incorporation, a 2009 amended certificate of incorporation, and a copy of Concrete's certificate of incorporation. Ready Mix's original certificate of incorporation states that among its purposes is to "manufacture, buy, sell and generally deal in brick, stone, lumber, cement and any and all materials capable of use in the construction of any kind of building...". The amendment to Ready Mix's certificate of incorporation, which was filed in December 2009, restated the purpose of the corporation to invest in, or acquire and develop real estate, and omits any reference to manufacturing, buying or selling cement or construction materials.

Plaintiff, in opposition, has submitted copies of printed delivery tickets bearing Ready Mix's names which state that quantities of concrete were delivered to "Anthony Tranchina G.C.Corp." on certain dates in 2006, 2007 and 2008, as well as excerpts from Mr. Greco's deposition. At the deposition, Mr. Greco stated that Ready Mix did not deliver concrete to the plaintiff, and that Concrete made the deliveries. He stated that Ready Mix and Concrete have the same shareholders; and that if an invoice was issued to the plaintiff for the delivery of concrete, it would have been issued by Concrete. Mr. Greco was shown the invoices and delivery tickets for the delivery of concrete to the plaintiff bearing Ready Mix's name, address and logo, and stated that these agreements were between the plaintiff and Concrete. Mr. Greco, however, acknowledged that none of the invoices or delivery tickets denoted Concrete, and when asked about the relationship between Ready Mix and Concrete, he stated that it was a "d/b/a". He stated that he did not know when a certificate of doing business was filed; that his deceased uncle would have filed the certificate when he owned the company; and that he had never seen a copy of the certificate. Mr. Greco further stated that Ready Mix and Concrete maintained their corporate offices at a concrete plant located at 87-13 Rockaway Boulevard, Ozone Park, New York, and that this property is owned by 87-13 Rockaway Boulevard Corp. He further testified that Concrete also conducted business at a concrete plant located at 381 Hamilton

Avenue, Brooklyn, New York; that said property is owned by 381 Hamilton Avenue Corp., and that its sole shareholder is Ready Mix.

Plaintiff's counsel states in his affirmation that although a demand for a copy of the certificate of doing business was made at the deposition, it was never provided, and that a "d/b/a" search was made and no such a filing was located. Plaintiff has submitted a copy of deed dated October 25, 2001, whereby the real property located at 87-13 Rockaway Boulevard was transferred from Ready Mix to 87-13 Rockaway Boulevard Corp.; a 2003 credit application from Ready Mix in which it stated that its business was "ready mix" ; and a 2012 print out from Ready Mix's website which states that it is a ready mix concrete producer.

The court finds that the documentary evidence presented in opposition to the defendant's motion, as well as statements made by Mr. Greco at his deposition, raise a triable issue of fact as to whether the subject concrete was supplied to the plaintiff by Ready Mix, and whether Ready Mix continues to hold itself out to the public as a manufacturer and supplier of concrete. The court notes that all of the invoices and delivery tickets submitted by plaintiff pre-date the 2009 amendment to Ready Mix's certificate of incorporation, and there is no evidence that either Ready Mix or Concrete was doing business under a registered trade name. Therefore, that branch of the defendant's motion which seeks summary judgment dismissing the complaint on the grounds that Ready Mix did not enter into any transaction with the plaintiff, is denied.

Defendant also asserts that each of plaintiff's claims are partially time-barred. Plaintiff commenced the within action on August 2, 2010. In the first cause of action for breach of contract plaintiff alleges that it contracted with the defendant to supply it with a specific concrete mix, in a series of transactions beginning in 2002 and continuing through 2010. Therefore, as a claim for breach of contract is governed by a six-year statute of limitations (CPLR §213), the claims for breach of contract which occurred prior to August 2, 2004, are time-barred.

The second cause of action alleges that the defendant conducted a "campaign of intentional wrongdoing so as to intentionally fail to provide concrete that did not conform to plaintiff's required specifications." This claim sounds in

intentional tort and is governed by a one-year statute of limitations (CPLR §215). Therefore, the claim for intentional tort is time-barred to the extent that it is based on transactions that are alleged to have occurred prior to August 2, 2009.

The third cause of action for breach of implied warranty of merchantability is governed by a four-year statute of limitations (UCC §2-725). Therefore, this claim is barred to the extent that it is based upon transactions alleged to have occurred prior to August 2, 2006.

The fourth cause of action for a violation of General Business Law §349, is governed by a three-year statute of limitations (CPLR §214[2]). Therefore, plaintiff's claims are time-barred as to any transaction that occurred prior to August 2, 2007. With respect to transactions that occurred after August 2, 2007, to successfully assert a claim under General Business Law §349 (h), "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]; see *Koch v Acker, Merrall & Condit Co.*, 18 NY3d 940, 941 [2012]; *Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205-206 [2004]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002]; *Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 55-56 [1999]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25-26 [1995]). Consumer-oriented conduct does not require a plaintiff to show that the defendant repeatedly committed the alleged acts. Instead, a plaintiff must demonstrate only that the acts or practices have a broader impact on consumers at large, in the sense that they are directed to consumers or potentially affect similarly situated consumers (See *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25; *Corsello v Verizon N.Y., Inc.*, 77 AD3d 344, 365-366 [2d Dept 2010]; *Flax v Lincoln Natl. Life Ins. Co.*, 54 AD3d 992 [2d Dept 2008]; *Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000]). The allegedly deceptive acts, whether misrepresentations or omissions, are governed by an objective standard: whether they were likely to mislead a reasonable consumer acting reasonably under the circumstances (See *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 324; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 26; *Andre Strishak & Assoc. v Hewlett Packard Co.*, 300 AD2d 608, 609 [2d Dept 2002]).

Plaintiff, in its fourth cause of action for a violation of General Business Law §349, alleges that the defendant knew that the concrete was provided for use in "residential applications for consumers;" that defendant engaged in deceptive business practices by failing to provide the required concrete; and that the defendant's failure to provide the proper mix of concrete had a broad impact on the consumers plaintiff serviced, and upon the general public. Plaintiff proffers no evidence in support of its claim that sale and delivery of the allegedly defective concrete was consumer-orientated. Rather, the series of invoices and delivery tickets relied upon by plaintiff establish that this was a private, arm's length business transaction between two sophisticated entities, each with substantial prior experience in construction (See *St. Patrick's Home for the Aged & Infirm v Laticrete Intl.*, 264 AD2d 652, 655 [1st Dept 1999]). The invoices and delivery tickets, although on pre-printed forms, were not addressed to consumers generally.

Furthermore, the parties' dispute over whether defendant breached any aspect of these invoices and delivery tickets, does not have broad, consumer-oriented ramifications (*cf. Gaidon v Guardian Life Ins. Co. of Am.* 94 NY2d 330 [1999]). No alleged act of the defendant was "directed at the consuming public" (*id.* at 343; see *Oswego v Laborers' Local 214 Pension Fund v Marine Midland Bank*, *supra*; *Revlon Consumer Prods. Corp. v Arnow*, 238 AD2d 223, 224 [1st Dept 1997]), and although defendant's alleged breaches may have had some tangential effect on members of the public or property owners who use the sidewalks, driveways and curbs installed by plaintiff, plaintiff cannot establish the existence of broad, consumer-oriented deceptive conduct. The fact that these sidewalks, driveways and curbs were being installed on private or church owned properties does not elevate this purely private construction dispute into one with broad consumer protection implications (see generally *U.W. Marx, Inc. v Bonded Concrete, Inc.*, 7 AD3d 856, 857-858 [3d Dept 2004]; *Cruz v NYNEX Info. Resources*, 263 AD2d at 290). Accordingly, that branch of the defendant's motion which seeks to dismiss the fourth cause of action, is granted.

In view of the foregoing, that branch of defendant's motion which seeks summary judgment dismissing the complaint on the grounds that it did not enter into any transactions with the plaintiff, is denied. That branch of defendant's motion which seeks summary judgment dismissing the fourth cause of action for a violation of General Business Law §349, is granted. That branch of the defendant's motion which seeks to dismiss portions of the

plaintiff's first, second and third causes of action on the grounds that they are time-barred is granted to the extent indicated herein. Plaintiff's cross-motion is denied in its entirety as there is no proof of service thereof, and it is, therefore a legal nullity.

Dated: November 22, 2013



JANICE A. TAYLOR, J. S. C.

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