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SHORT FORM ORDER

Action # **1**
index Number **02-15212**

SUPREME COURT - STATE OF NEW YORK
DCM PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

Motion Seq. 001
Motion RD August 27,2002
Adj D: September 13,2002
Mot D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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Leslie B. Rosen and Lauren Rosen,

Plaintiffs,

Decision and Order

-against-

Watermill Development Corp. and Gordon Kessler,

Defendants,

..... X

Plaintiffs Attorney	Defendant's Attorney
Rosenberg Calica & Birney, Esq.	McNulty & Spiess, Esq.
100 Garden City Plaza	633 East Main Street
Garden City, New York 11530	Riverhead, New York 11901

Upon the following papers read on this motion by Notice of Motion and supporting papers 1-19 and Exhibits A-C and Memorandum of Law. and amended answer ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers—_; Replying Affidavits and supporting papers 1- 8 ; Other —; it is

ORDERED application (001) by defendants Watermill Development Corp. (Watermill) and Gordon Kessler pursuant to CPLR §3211(a)(1) for an Order dismissing plaintiffs complaint based upon documentary evidence, is decided as follows:

A copy of the summons has not been provided to this Court. The complaint of this action is dated June 12, 2002 and arises out of claims of defective construction of a home by defendants and sets forth causes of action sounding in breach of the Housing Merchant Implied Warranty (General Business Law §777-1); breach of contract, fraud, negligence and seeks money damages. Defendant Kessler is asserted to be the president of defendant Watermill and entered into a residential home sale contract with plaintiffs on or about April 6, 2001 for the purchase price of $1,850,000.00. The contract provided that seller/builder would deliver a New Home Warranty, a separate pool warranty, and a tennis court warranty at the closing, and that $185,000.00 would be held in escrow. Plaintiff asserts that the tennis court and pool equipment, however, were installed in violation of various Town and Village ordinances in that they were installed without sufficient setbacks, and that there were numerous other defective workmanship, material, design and installation problems. It was determined that skilled labor would be required to remedy the various defects at a cost of approximately $50,000.00. Various monies had been paid to defendants, including all but $15,000.00 from the escrow account. At the closing on December 21, 2000, plaintiffs assert they were given a Limited Warranty which was not made a part of the contract of sale as required undler by General Business Law §777-a, and that defendants did not provide a separate warranty for the pool and tennis court. After the closing, it is asserted that defendants agreed to complete numerous items set forth on a "punchlist" within 45 days after the closing, but failed and refused to do so. Plaintiffs assert they were caused to hire a new contractor to complete the work to make the home habitable, but by April, 2002, numerous plumbing and roof leaks were

experienced in the home, as well as other problems, including dead landscaping at the cost of $7,100.00; the tennis court was the wrong size, having been cut to meet the rear setback requirement and the nets were moved and the court repainted to conceal the omission or error, costing $37,000.00 to correct; and the pool equipment did not have sufficient side setbacks, costing an estimated $22,450.00 to correct the error. Total costs and repairs are approximately $300,000.00.

Defendants argue that defendant Kessler is entitled to dismissal of all claims against him personally and that Watermill is entitled to dismissal of all claims against it. Kessler argues that he did not sign the contract of sale in his personal capacity; that Watermill did not receive a written Notice of Warranty Claim prior to the commencement of the action; the Economic Loss Doctrine bars tort claims as a matter of law in this contract action asserting only economic loss; the breach of contract claim merged at the time of the closing and that the contract specifically indicated that plaintiffs examined the premises and were taking it "as is"; the fraud cause of action for treble damages is precluded by the merger clause in the contract of sale; and the cause of action for attorney fees must be dismissed as there is no statutory or contractual basis for an award of attorney's fees in these circumstances.

In support of defendants' application, defendants have annexed a copy of the complaint, a purported copy of the contract of sale, a copy of a Limited Warranty, and a copy of an escrow agreement. Defendants have not annexed a copy of the warranties for the tennis courts or pools, and accordingly, the complete obligation of defendants to plaintiff cannot be determined. Therefore, that portion of defendants application to dismiss the cause of action for attorney's fees is denied.

The documents submitted in support of a dismissal of a complaint pursuant to CPLR §3211(a)(1) must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiffs claim, CPLR 93211(a) par. 1, ***Brown v. Solomon and Solomon, PC,*** 694 N.Y.S.2d 843. Defendants' documents do not resolve all the factual issues as a matter of law and do not conclusively and definitively dispose of the plaintiffs' claim. This Court is unable to determine pursuant to CPLR 93211(a)(1) that Gordon Kessler has no individual liability in this action. Defendant Kessler asserts that there is no individual liability which can be asserted against him by plaintiff because the contract was executed by him in his corporate capacity. However, it is determined that a corporate officer may be individually liable for fraudulent acts or false representations in which he participates, even though his actions may be in furtherance of the corporate business, ***Madison Home Equities Inc. v. Echeverria***, 698 N.Y.S.2d 703, 266 A.D.2d 435; or acts unjustly towards plaintiff, ***Morris v. New York State Department of Taxation and Finance,*** 82 N.Y.2d 135, 603 N.Y.S.2d 807; or where an individual owns and operates a corporation where the corporation held no meetings, issued no stock, paid no franchise taxes, filed no governmental reports and shared employees and equipment, ***State v. Della Villa,*** 717 N.Y.S.2d 831; and the corporate identity will be disregarded to prevent fraud, illegality or to achieve equity, ***Bowles v. Errico***, 588 N.Y.S.2d 734. In the instant action, it is not known if corporate formalities were observed, if separate corporate and individual bank accounts were maintained, if there was complete corporation domination, or if personal assets were commingled, ***Sumbax, Inc. v. Bingaman***, 631 N.Y.S.2d 829, 219 A.D.2d 552. It is not known whether defendant provided the work, labor, services and goods in bad faith with the intent not to correct defects due to asserted judgments against the corporation and financial obligations. There are factual issues as to whether defendant fraudulently concealed the improper setbacks for the pool and tennis courts and the fact that the size of the tennis court was cut back without advising plaintiff, and if defendant moved the nets on the tennis court and repainted the lines without advising plaintiff, in an attempt to deceive plaintiff. Therefore, that portion of defendants' application to dismiss the causes of action asserted against defendant Kessler in his individual capacity must be denied.

General Business Law §777-a(4)(a) requires that "[w]ritten notice of a warranty claim for breach of a housing merchant implied warranty must be received by the builder prior to the commencement of any action... and no later than thirty days after the applicable warranty period...." Defendants have not annexed copies of the warranties for the pool or tennis courts, raising further factual issues. There are factual issues concerning whether the "punchlist" given by plaintiff to defendants at, or immediately following the closing, gave notice, or sufficient notice, to defendants about defects and problems, and whether defendants thereafter breached any agreements to correct such defects or problems. The documents subrnitted by defendants do not resolve those issues. Therefore, defendants' application that the action must be dismissed for failure to provide notice to defendants prior to commencement of this action must be denied.

Defendants' claim that the purchaser is alleging negligence claims in a contractual action does not warrant dismissal of the complaint, ***Rushford v. Facteau,*** 669 N.Y.S.2d 681. However, plaintiff has not only assertecl negligence claims but has set forth a separate cause of action for negligence. In that the negligence cause of action is actually a duplication of the breach of contract cause of action, the seventh cause of action is hereby struck.

The Rider to the contract of sale provides at paragraph 41 that "At the closing of title, the Seller shall deliver to the Purchaser a New Home Warranty with a total liability equivalent to the construction cost of the residence, which warranty shall fully comply with the provision of Article 36-B of the General Business Law. Also the separate pool warranty and the tennis court warranty." Defendants have provided to this Court a copy of a Limited Warranty. There are factual issues as to whether defendants breached their obligation to provide a "New Home Warranty" by providing a limited warranty. The limited warranty does not show that the parties agreed to exclude all warranties other than those expressly agreed to within their purchase agreement, ***Fumarelli v. Marsam Development, Inc.*** 680 N.Y.S.2d 440, 92 N.Y.2d 298, thus creating further factual issues which are not resolved by the documents submitted in support of defendants' application. Therefore, that part of defendants' application must be denied as well.

Where evidentiary material is considered in connection with a motion to dismiss, criterion is whether proponent of pleading has cause of action, not whether he has stated one, and unless it has been shown that material facts as claimed by pleader to be one is not fact at all and unless it can be said that no significant dispute exists regarding, dismissal should not eventuate, ***Guggenheimer v. Ginzburg,*** 401 N.Y.S.2d 182, 43 N.Y.2d 268. Because it cannot be said that significant disputes do not exist regarding the facts alleged, unresolved by the documentation submitted by defendants, it is therefore

ORDERED that application (001) by defendants pursuant to CPLR §3211(a)(1) for an Order dismissing plaintiffs complaint is granted only to the extent that the seventh cause of action sounding in negligenice is dismissed, and the remainder of the application is denied. It is further

ORDERED that defendants are directed to serve an answer upon plaintiff within twenty days of the date of this Order. It is

ORDERED that all parties are directed to appear for a Preliminary Conference on November 14, 2002 at 10:00 o'clock a.m. at Supreme Court, DCM-J Part, Supreme Court Annex, Griffing Avenue, Riverhead. It is further

ORDERED that defendants shall serve a copy of this Order with notice of entry upon plaintiff within twenty days of the date of this Order.

Dated: October 24, 2002

Robert W. Doyle, J.S.C.