

Levine v Cross

2007 NY Slip Op 30544(U)

March 29, 2007

Supreme Court, New York County

Docket Number: 0117817/2006

Judge: Carol R. Edmead

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD
J.S.C.
Justice

PART 35

Index Number : 117817/2006

LEVINE, RISA

INDEX NO. 117817/06

vs

CROSS, KEIN

MOTION DATE 2/26/07

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS ACTION

MOTION CAL. NO. _____

The following papers, numbered _____ motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
APR 12 2007
NEW YORK
COUNTY CLERK'S OFFICE

In accordance with the annexed Memorandum Decision, it is hereby

ORDERED that the motion by the defendants Kein Cross and Kein Cross, Inc. for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the second, third, fourth, fifth, and sixth causes of action in the Complaint as against Kein Cross and dismissing the entire Complaint against Kein Cross, Inc. is granted; and it is further

ORDERED that the motion by the defendants Kein Cross and Kein Cross, Inc. for an order, pursuant to CPLR 325(d), removing the remaining causes of action to the New York City Civil Court is granted in accordance with the annexed 325 (d) order; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: 3/30/07

[Signature]
CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION [* 1]

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
RISA LEVINE and DEAN SHULMAN,

Plaintiffs,

-against-

KEIN CROSS, KEIN CROSS, INC., and GIOVANNI
MARTINI PAINTING CORP.,

Defendants.
-----X

HON. CAROL ROBINSON EDMEAD, J.S.C.

Index No. 117817-2006

DECISION/ORDER
Motion Sequence # 001

MEMORANDUM DECISION

Before this Court is the motion of Kein Cross (“Mr. Cross”), an individual, and Kein Cross, Inc. (“KCI”) (together, the “Cross Defendants”) for an order pursuant to CPLR 3211(a)(1) and (7) dismissing: (1) the second, third, fourth, fifth, and sixth causes of action set forth in the Verified Complaint (the “Complaint”) against Kein Cross; (2) the Complaint against KCI; and (3) the removal this action to Civil Court, New York pursuant to CPLR 325(d) upon dismissal of the second, third, fourth, fifth, and sixth causes of action against Kein Cross and the Complaint as against KCI .

For the reasons set forth below, the motion is granted.

FACTUAL BACKGROUND

In November 2005, Kein Cross entered into a contract (the “Contract”) with plaintiffs Risa Levine and Dean Shulman (“Plaintiffs”) in which he agreed to provide interior design services to Plaintiffs’ residence, an apartment located at 435 East 65th Street, New York, New York (the “Apartment”). Pursuant to the undisputed terms of the Contract, the following services were to be provided: (1) interior “design of each area” of the Apartment, (2) “all wall and floor

FILED
11/13/07
NEW YORK
COUNTY CLERK'S OFFICE

coverings selections,” (3) selection of all furniture and fabrics, (4) selection of all accessories, (5) design and execution of window treatments, (6) all “necessary ordering,” (7) “supervision of major installations,” and (8) “any additional work required in the completion of the design and decoration of all of the rooms” in the Apartment.

The following tasks were completed with respect to the project. The Apartment was repainted (with the exception of the master bedroom, master bathroom, and the guest room), light fixtures were changed throughout, drawers were added to the foyer, the guest bathroom vanity was replaced, and a shelved cabinet was added in the living room. Furnishings were selected for the living room and dining room, window treatments were replaced, and the flooring was replaced in the kitchen, dining room, and living room.

After receiving two estimates for flooring installation, Plaintiffs chose to hire Giovanni Martini Painting Corp. (“Giovanni,” together with the Cross Defendants, the “Defendants”) to supply and install a bamboo floor in the kitchen (the “Kitchen Floor”). Giovanni was also hired to paint the Apartment and to perform other work, including the construction of shelving and the alteration of closet space. The entire project was completed by January 2006.

Following completion, in January 2006, a water leak developed in the Apartment’s kitchen. Water pooled underneath the Kitchen Floor, which in turn caused the floor to warp, damaging it. Giovanni subsequently repaired the Kitchen Floor; however, the warping continued.

Plaintiffs subsequently brought the instant matter alleging six causes of action against

Defendants and seeking damages totaling \$166,000.00.¹

Cross Defendants' Contentions

Plaintiffs' second, third, fourth, fifth, and sixth causes of action against Mr. Cross, as set forth in the Complaint, should be dismissed because they fail to state a cause of action and/or are barred by documentary evidence.

As to the second cause action for breach of contract, Mr. Cross contends that he did not breach the Contract by failing to properly install the Kitchen Floor, complete construction and repair a hole in the bedroom closet, and installing a kitchen cabinet in the incorrect color because the Contract did not provide that he was obligated to perform such functions.

Since the third cause of action for breach of the implied covenants of good faith and fair dealing arises from the installation of the bamboo floor and other construction performed in the Apartment, actions to which Mr. Cross was not obligated, Plaintiffs cannot establish a breach of the covenants.

Plaintiffs' fourth cause of action for breach of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose lacks merit because these warranties

¹ The following causes of action were brought against Defendants: (1) Breach of contract for failing to provide Plaintiffs with accurate invoices, resulting in overcharging to Plaintiffs in an amount over \$1,000.00;

(2) Breach of contract for the improper installation of a bamboo floor, failing to complete construction work to Plaintiffs' closet, failing to repair a hole in the ceiling of Plaintiffs' closet, and the inadequate and improper installation of cabinet doors of an incorrect color in the kitchen;

(3) Breach of an implied covenant of good faith and fair dealing for the improper installation of a bamboo floor, failing to complete construction work to Plaintiffs' closet, failing to repair a hole in the ceiling of Plaintiffs' closet, and the inadequate and improper installation of cabinet doors of an incorrect color in the kitchen;

(4) Breach of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose for the improper and inadequate installation, design, and construction of the bamboo flooring, the closet space, and the kitchen cabinets;

(5) Negligence for the improper and inadequate installation, design, and construction of the bamboo flooring, the closet space, and the kitchen cabinets; and

(6) Attorneys' fees because Plaintiffs have been forced to retain legal counsel to protect their interests.

only apply to the sale of goods; the Contract only obligated Mr. Cross to provide services.

Plaintiffs cannot establish negligence because Mr. Cross had no duty to perform any construction in the Apartment; he was contractually obligated to perform interior design related services only.

Further, the sixth cause of action for attorneys' fees is unsupported by any statute, court rule, or contract bestowing such an obligation upon the defendants.

As to KCI, the complaint fails to state a cause of action because KCI was not a party to the Contract. Accordingly, the Complaint as it applies to KCI should be dismissed in its entirety.

Upon dismissal, the case should be removed to the New York City Civil Court for the remaining cause of action to be adjudicated.

Plaintiffs' Opposition

In opposition, Plaintiffs' maintain that the Contract was between Plaintiffs and the Cross Defendants, not Mr. Cross individually. Additionally, Plaintiffs maintain that the second cause of action is based upon the provisions in the Contract stating that the Cross Defendants' would execute "the design of each area," "all necessary ordering," the supervision of major installations," and "any additional work required in the completion of the design and decoration of all rooms in [the Apartment]." The Complaint alleges that these contractual duties were breached by the Cross Defendants by the improper installation of the Kitchen Floor, failing to complete construction work to Plaintiffs' closet, failing to repair a hole in Plaintiffs' closet, and the installation of cabinet doors of an incorrect color in the kitchen.

Likewise, Plaintiffs' third cause of action is based upon the Contract's terms and the Complaint contends that the breach is based upon the same failures alleged in the second cause

of action.

Plaintiffs' fourth cause of action is founded upon the Cross Defendants' "selecting" and "ordering" of goods to be provided to Plaintiffs and the fact that the fee was based, in part, upon the shopping services and the goods provided as a result of these shopping services.

Accordingly, the Cross Defendants cannot deny that they knew the purpose for which their work product was required and that Plaintiffs relied upon the Cross Defendants' skill and judgment in the selection and ordering process.

Plaintiffs contend that their fifth cause of action sufficiently alleges that the Cross Defendants had a contractual duty to design, install, construct, and complete all improvements made to the Apartment in a competent and workmanlike manner. Accordingly, the Cross Defendants breached this duty and are liable for the negligent design, installation, construction, and completion of the bamboo flooring, closet space, and kitchen cabinets.

Lastly, Plaintiffs contend that the Cross Defendants should be responsible for attorney's fees because Plaintiffs were forced to resort to litigation in order to address the problems associated with the work performed to the Apartment.

Based upon the language contained in the Contract, accepting the allegations contained in the Complaint and in Plaintiffs' opposition papers as true, and according Plaintiffs the benefit of every possible inference, the Cross Defendants' motion to dismiss must be denied.

Cross Defendants' Affirmation in Further Support

In reply, the Mr. Cross reiterates that the second cause of action is barred by the Contract. According to Mr. Cross, Plaintiffs merely repeat the allegations found in the Complaint and upon deeming the allegations to be true, claim that the Complaint states a cause of action. However,

assuming the allegations are true, the Complaint states that Giovanni installed the Kitchen Floor and performed the other construction. Plaintiffs also failed to identify the provisions of the Contract that Mr. Cross allegedly breached. Plaintiffs failure to do so is fatal to their claim.

As to the third cause of action, Mr. Cross notes that Plaintiffs oppose dismissal by reiterating allegations in the Complaint.

With regard to the fourth cause of action, Plaintiffs do not dispute that the implied warranties only apply to goods. Although Plaintiffs admit that the Contract was for services they now contend that Mr. Cross agreed to provide goods as well because his compensation was based upon a percentage of the total cost of the renovation, which included the purchase of goods. However, Mr. Cross only provided services and there are not goods even mentioned in the fourth cause of action.

Additionally, Plaintiffs cannot establish a cause of action for negligent installation, construction, and completion of the Kitchen Floor and the other construction because Mr. Cross was not obligated to perform such functions. In support, Mr. Cross notes that Plaintiffs do not dispute that a water leak, unrelated to his design of the Apartment, caused the Kitchen Floor to warp, or that Giovanni installed the Kitchen Floor and performed the other construction work. Moreover, Mr. Cross notes, that Plaintiffs do not allege a cause of action for negligent supervision.

As to Plaintiffs' cause of action for attorney's fees, Plaintiffs do not dispute that in order to recover such costs there has to be a statute, court rule, or agreement between the parties.

Cross Defendants note that Plaintiffs do not attempt to assert an independent cause of action against KCI.

DISCUSSION

I. Cross Defendants' 3211 Motion to Dismiss

In determining a CPLR 3211 motion to dismiss, the pleading should be construed liberally, and the facts as alleged in the complaint are presumed to be true and accorded the benefit of every possible favorable inference (*see Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] citing *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314 [1976]; CPLR 3026). The standard on a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR 3211(a)(7) is not whether the party has artfully drafted the pleading, but whether, deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994]; *Stendig, Inc. v Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 A.D.2d 205 [1st Dept 1997]). However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *aff'd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590

NYS2d 460 [1st Dept], lv denied 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]). Further, where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]).

Pursuant to CPLR 3211(a)(1), a party may move for dismissal of one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." The test on a CPLR 3211(a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88 [1994]; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]). Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211(a)(1) (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

A. *Second Cause of Action: Breach of Contract*

To state a cause of action for breach of contract, the proponent of the pleading must specify the making of an agreement, the performance by that party, breach by the other party, and resulting damages (*Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071, 816 NYS2d 702 [Supreme Court New York County 2006], *citing Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). The essential terms of the parties' purported contract, including the specific provisions of the contract upon which liability is predicated, must be alleged either by reference to or by or attaching a copy of the contract to the complaint (*Atlantic Veal & Lamb, Inc. v. Silliker, Inc.*, 11 Misc 3d 1072, 816 NYS2d 693 (Supreme Court New York County 2006] *citing Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [1987]; *Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 *citing Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

Here, the Complaint alleges that Mr. Cross breached the Contract by the improper installation of the Kitchen Floor, failing to complete construction work to Plaintiffs' closet, failing to repair a hole in Plaintiffs' closet, and the inadequate and improper installation of cabinet doors of an incorrect color in the kitchen in contravention to the terms of the Contract. However, the Complaint refers to the Contract and the provisions upon which liability is predicated. Additionally, a copy of the Contract was presented in response to the Cross Defendants' motion to dismiss and the terms therein are undisputed and unambiguous. None of the items of work to be performed by Mr. Cross include work to install the Kitchen Floor, perform construction work to Plaintiffs' closet, repair the hole in the closet, install the cabinet

doors, or paint the kitchen. Instead, Mr. Cross' work was limited to designing the Apartment and ordering goods and services to implement the design. Thus, the undisputed terms of the parties' Contract flatly contradict the allegations in Plaintiffs' second cause of action, warranting dismissal of same against Mr. Cross (*Baystone Equities, Inc. v Gerel Corp.*, 305 AD2d 260, 759 NYS2d 78 [1st Dept 2003] [finding that contracts, rationally construed, are not consistent with plaintiff's contention]).

Additionally, the Contract is clearly between Plaintiffs and Kein Cross, in his individual capacity. Nothing in the Contract makes any reference to KCI and there is no indication that Mr. Cross signed the Contract on behalf of KCI. Moreover, it is undisputed that Mr. Cross and KCI maintain separate addresses and that the address at the bottom of the Contract is Mr. Cross' personal address.

Therefore, Cross Defendants' motion to dismiss the second cause of action against Mr. Cross is granted.

B. Third Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing

Every contract contains an implied covenant of good faith and fair dealing (*see 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131, 135 [2002]; *Dalton v. Educational Testing Service*, 87 NY2d 384, 389, 639 NYS2d 977 [1995]; *Miller v. Almquist*, 241 AD2d 181, 184 [1st Dept 1998] quoting *Greenwich Vil. Assocs. v. Salle*, 110 AD2d 111, 115 [1st Dept 1985]). A breach occurs when a party acts in a manner that deprives the other party of the right to receive the benefits of their agreement (*see 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131, 135 [2002]; *Dalton v. Educational*

Testing Service, 87 NY2d 384, 389, 639 NYS2d 977 [1995]). In order for a complaint to state a cause of action for breach of an implied covenant of good faith and fair dealing, “the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff” (*Aventine Investment Management, Inc. v. Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514, 697 NYS2d 128, 130 [2d Dept 1999]).

The third cause of action to recover damages for breach of an implied covenant of good faith and fair dealing cannot be maintained, in light of the express terms of the Contract. Given that the breach of Contract cause of action fails, consequently, the third cause of action for breach of implied covenant of good faith and fair dealing fails. .

Accordingly, Plaintiffs’ third cause of action is dismissed.

C. *Fourth Cause of Action: Breach of the Implied Warranties of Merchantability and Fitness for a Particular Purpose*

Under the Uniform Commercial Code (“UCC”), a warranty of merchantability is implied in all sales of goods by a merchant (*see* NY UCC § 2-314[1]). It is a guarantee by the seller that its goods are fit for the ordinary purpose for which they are used (*see* NY UCC § 2-314[2][c]). This does not mean that the goods have to be perfect; rather, they need only be of medium quality or goodness (*see Saratoga Spa & Bath, Inc. v Beeche Sys. Corp.*, 230 AD2d 326, 331, 656 NYS2d 787, 790 [3d Dept 1997], citing *U.S. Leasing Corp. v. Comerold Associates, Inc.*, 101 Misc2d 773, 777, 421 NYS2d 1003, 1005 [New York City Civ. Ct. 1979]). As noted, the seller must meet the definition of a “merchant” or an implied warranty of merchantability generally will not arise (NYPRAC-COMM § 66:18). A “merchant” is any person who regularly deals in the

type of goods involved in the transaction or who, by his occupation, holds himself out as having knowledge or skill relating to such goods (*see* NY UCC § 2-104[1]).

For an implied warranty of fitness for a particular purpose claim to arise, the buyer must establish that the seller had reason to know, at the time of contracting, the buyer's particular purpose for which the goods are required and that the buyer justifiably relied upon the seller's skill and judgment to select and furnish suitable goods, and that the buyer did in fact rely on that skill (*see* NY UCC § 2-315).

It is a well settled principle in New York that implied warranties, such as those found in the UCC, are limited to the sale of goods; they do not include the performance of services, work, or labor, nor transactions deemed to be predominantly service oriented (*see Milau Associates, Inc. v North Ave. Development Corp.*, 42 NY2d 482, 485, 398 NYS2d 882 [1977]; *Castillo v. Tyson*, 268 AD2d 336, 337, 701 NYS2d 423, 425 [1st Dept 2000] citing *Aegis Productions, Inc. v. Arriflex Corp. Of America*, 25 AD2d 639, 639, 268 NYS2d 185, 186 [1st Dept 1966]; *Resnick v Lebovitz*, 28 AD3d 533, 534, 813 NYS2d 480, 481 [2d Dept 2006]; *Lino Del Zotto & Son Builders Inc. v Colombe*, 216 AD2d 778, 778-79, 628 NYS2d 444, 445 [3d Dept 1995]; *Capital Wireless Corp. v Deloitte & Touche*, 216 AD2d 663, 665, 627 NYS2d 794, 796-97 [3d Dept 1995]; *Amendola v. Basement Waterproofing Co. of Flushing, Inc.*, 203 AD2d 403, 610 NYS2d 313 [2d Dept 1994]). If a service is performed negligently then a cause of action for negligence accrues (*see Milau Associates v. North Ave. Development Corp.*, 42 NY2d 482, 486, 398 NYS2d 882, 885 [1977]; *Aegis Productions, Inc. v. Arriflex Corp. Of America*, 25 AD2d 639, 268 NYS2d 185 [1st Dept 1966]; *Rochester Fund Municipals v. Amsterdam Municipal Leasing Corp.*, 296 AD2d 785, 746 NYS2d 513 [3d Dept 2002]). Likewise, if it constitutes a breach of contract

the action accruing is for that breach (*Id.*).

In the instant matter, Plaintiffs have failed to establish breach of either warranty. The allegations set forth in the Complaint freely admit that the Contract was for the rendition of services (Complaint at ¶5); something for which the UCC clearly does not apply. Mr. Cross performed the service of interior design and decoration. As part of the Contract, Mr. Cross made purchases necessary to effectuate the design and decoration of the Apartment and may have been responsible for overseeing the construction meet the design choices made. Nonetheless, Mr. Cross was a deliverer of services and not a seller of goods. Therefore, the fourth cause of action must fail for the lack of a predicate transaction—namely, the sale of goods.

Accordingly, the portion of the Cross Defendants' motion to dismiss Plaintiffs' fourth cause of action is granted.

D. Fifth Cause of Action: Negligence

A simple breach of contract cannot be considered a tort unless a legal duty independent of the contract itself has been violated (*see Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 NY2d 382, 389, NYS2d 656 [1987]; *Saint Patrick's Home for the Aged and Infirm v. Laticrete International, Inc.*, 267 AD2d 166, 166-67, 700 NYS2d 28, 30 [1st Dept 1999]). The legal duty must arise from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract (*Id.*). Simply put, “the focus is on whether a noncontractual duty was violated; a duty imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contractual agreement”

*(Apple Records, Inc. v. Capital Records, Inc., 137 AD2d 50, 529 NYS2d 279, [1st Dept 1988])*².

This principle applies with equal force to contracts that involve an element of construction and renovation (see *Saint Patrick's Home for the Aged and Infirm v. Laticrete International, Inc., 267 AD2d 166, 166-67, 700 NYS2d 28, 30 [1st Dept 1999]*; *Gordon v. Teramo & Company, Inc., 308 AD2d 432, 433, 764 NYS2d 144, 145 [2d Dept 2003]* [allegations that work was performed in a less than skillful and workmanlike manner states a cause of action for breach of contract, not negligence]).

Here, Plaintiffs seek only to impose liability in tort upon Mr. Cross for failure to perform duties allegedly owed to Plaintiffs pursuant to the Contract. Plaintiffs specifically allege that “[d]efendants had a duty to Plaintiffs to have the work provided to the [Apartment] designed, installed, constructed and completed in a competent and workmanlike manner, in accordance with the Contract...using all due care” (Complaint at ¶50). These allegations are merely restatements of the contractual obligations that Plaintiffs maintain were breached and do not evidence a duty of care beyond those contractual obligations (see *New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 316, 639 N.Y.S.2d 283 [1995]* [“where a party is merely seeking to enforce its bargain, a tort claim will not lie”]; *Saint Patrick's Home for the Aged and Infirm v. Laticrete International, Inc., 267 AD2d 166, 167, 700 NYS2d 28, 30-31 [1st Dept 1999]*). “Merely charging a breach of a ‘duty of care’, employing language familiar to tort law, does not, without more, transform a simple breach contract into a tort claim” (*Clark-Fitzpatrick, Inc. v.*

² For example, a special relationship of trust and confidence is born of the contractual relationship between bailor and bailee, lawyer and client, principal and agent, public carrier and passenger or innkeeper and guest so that when betrayed is made actionable in tort (*Apple Records, Inc. v. Capital Records, Inc., 137 AD2d 50, 529 NYS2d 279, [1st Dept 1988]*).

Long Island R. Co., 70 NY2d 382, 389, NYS2d 656 [1987]). Plaintiffs have failed to show that there was a legal duty imposed upon Mr. Cross independent from the Contract or that he engaged in tortious conduct.

Accordingly, the portion of the Cross Defendants' motion to dismiss Plaintiffs' fifth cause of action is granted.

E. Sixth Cause of Action: Attorney's Fees

It is well settled that a party is not entitled to an award of an attorney's fee absent an agreement between the parties, statutory authorization, or court rule (*Crispino v Greenpoint Mortg. Corp.*, 2 AD3d 478, 479-80, 769 NYS2d 553, 556 [2d Dept 2003] citing *Hooper Assocs. v AGS Computers*, 74 NY2d 487, 491-492, 549 NYS2d 365 [2d Dept 1998]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68, 669 NYS2d 651 [2d Dept 1998]). As there is no agreement, statute, or court rule applicable to the instant case, Plaintiffs are not entitled to attorney's fees.

Accordingly, the portion of the Cross Defendants' motion to dismiss Plaintiffs' sixth cause of action is granted.

II. Cross Defendants' 3211 Motion to Dismiss the Complaint Against KCI

Since KCI was not a party to the Contract and there is no evidence that KCI performed any part of the Contract, the entire complaint against KCI is dismissed.

III. Cross Defendants' 325(d) Motion to Remove

Since the sole remaining cause of action alleges an overcharge in amount of approximately \$1,000.00, the Cross Defendants' motion to remand this action to Civil Court, City of New York is granted as per the CPLR 325(d) order annexed hereto.

CONCLUSION

Based on the above, it is hereby

ORDERED that the motion by the Cross Defendants for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the second, third, fourth, fifth, and sixth causes of action in the Complaint against Kein Cross is granted; and it is further

ORDERED that the motion by the Cross Defendants for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the entire Complaint against Kein Cross, Inc. is granted; and it is further

ORDERED that the motion by the Cross Defendants for an order, pursuant to CPLR 325(d), removing the remaining causes of action to the New York City Civil Court is granted in accordance with the annexed CPLR 325(d) order.

This constitutes the decision and order of the court.

Dated: March 30, 2007



Hon. Carol Robinson Edmead, J.S.C.

FILED
APR 03 2007
NEW YORK
COUNTY CLERK'S OFFICE