

Russo v Westwood Homes Corp.

2007 NY Slip Op 31963(U)

June 25, 2007

Supreme Court, Suffolk County

Docket Number: 0000353/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-28-07
ADJ. DATE 3-29-07
Mot. Seq. # 001 - MotD

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JULIANNE RUSSO,	:	KREIG ASSOCIATES, P.C.
	:	Attorneys for Plaintiff
Plaintiff,	:	5 Heather Court
	:	Dix Hills, New York 11746
- against -	:	
	:	LAMB & BARNOSKY, LLP
WESTWOOD HOMES CORP.,	:	Attorneys for Defendant
	:	534 Broadhollow Road, P.O. Box 210
Defendant.	:	Melville, New York 11747-9034
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Upon the following papers numbered 1 to 50 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17 - 48; Replying Affidavits and supporting papers 49 - 50; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the Court, sua sponte, recalls and vacates its order, dated May 14, 2007 (Doyle, J.), and issues the following order in its place and stead:

ORDERED that the motion (001) by defendant, Westwood Homes Corp., for partial summary judgment dismissing certain allegations in the first cause of action and for summary judgment dismissing the second, third and fourth causes of action pursuant to CPLR 3212 is determined as follows.

Plaintiff, Julianne Russo, instituted this action to recover damages allegedly sustained in connection with the purchase of a home located at 54 Fourth Avenue, Kings Park, New York which was built by defendant, Westwood Homes Corp. On or about February 1, 2003, plaintiff and defendant's agent, non-party, Frank Mortimer, entered into a contract in which defendant agreed to construct a new single family residence on a parcel of land at the above location and to sell plaintiff that home and land for \$669,990.00.

The contract provides, in part,

(20) It is expressly understood and agreed that this contract states the entire agreement and that the Seller is not and shall not be bound by any stipulations, representations, agreements or promises, oral or otherwise, not printed or inserted into this contract. This

contract may not be changed orally. * * *

(21) Anything to the contrary herein contained notwithstanding, it is specifically understood and agreed by the parties hereto that the acceptance and delivery of the deed of conveyance at the time of the closing of title hereunder, without specific written agreement which by its terms shall survive such closing of title, shall be deemed to constitute full compliance by the Seller with the terms, covenants and conditions of this contract on its part to be performed. It is further agreed that none of the terms hereof except those specifically made to survive title closing shall survive such title closing. * * *

The attached Limited Warranty provides: "this Limited Warranty excludes all other warranties on the construction and sale of the home and its components, both express and implied. There are no warranties which extend beyond the face hereof." The limited warranty also lists the three categories of warranties and the timetable attached to each. Specifically, the limited warranty offers coverage for one year for latent defects due to defective workmanship, materials and/or design; two years for major system coverage, such as plumbing, electrical and heating; and six years for structural defects resulting in actual physical damage to load-bearing portions of the home to the extent that the home becomes unsafe, unsanitary or otherwise unlivable.

Plaintiff takes issue with defendants' use of nonconforming siding and a brick color not of her choice. Although she notified defendant of the discrepancies, the home was built using the builder's choices. During the final inspection on April 8, 2004, plaintiff stated that she noticed that the kitchen floor plan was not built to the specifications of the model home that she chose. Other problems were noted during the final inspection that the builder's representative would not add to the list of items to be repaired before closing, including: the range hood was the wrong color, the ice maker was not connected, a gutter was not draining correctly, the finish on the window sills was warped, there was mold in the garage from a leaking roof, and the tile floor in the kitchen had a different grout where a hole was repaired.

On April 14, 2004, defendant conveyed title to the land and structure to the plaintiff. Part of the proceeds from the sale were placed in escrow for the builder to modify the kitchen floor plan. After the closing, defendant's representative made another inspection of the premises and repairs were made to the items not placed on the survival list which were approved by plaintiff. However, since defendant did not acknowledge plaintiff's brick and siding selections, this action was commenced. Defendant moves for partial summary judgment dismissing the allegations in the first cause of action relating to the external siding and brick as well as allegations of leaks and for summary judgment dismissing the remaining three causes of action relating to breach of contract, breach of warranty and misrepresentation.

In support of the motion, defendant contends that plaintiff's color choices for the brick and siding are not included in the limited warranty inasmuch as the defects are patent. In

addition, all latent defects were repaired to plaintiff's satisfaction. Thus, defendant asserts that all of plaintiff's claims stem from breach of contract which cannot be maintained after the closing and acceptance of the deed has occurred. Defendant submits, inter alia, the pleadings; response to interrogatories; plaintiff's examination before trial transcript; a copy of the sales contract; a copy of the purchaser's final inspection; a copy of the deed; a copy of the escrow agreement; copies of repairs performed after closing on June 25, 2004; and a personal affidavit of Michael J. Bellas.

In his affidavit, Michael Bellas avers that he is the President of Westwood Homes Corp. He states that during the course of performance of the contract, a dispute arose between the parties concerning the timeliness of plaintiff's selection and payment of the brick to be applied to the exterior of the premises which was more expansive than the brick ordinarily used in the construction of the model home she chose. Because the fall season was approaching, and construction had to proceed, he relied upon the contract clause which reserved to Westwood the ultimate right to determine the exterior color, design and materials of the home. The company then constructed the home with the usual specifications for the Hamilton model.

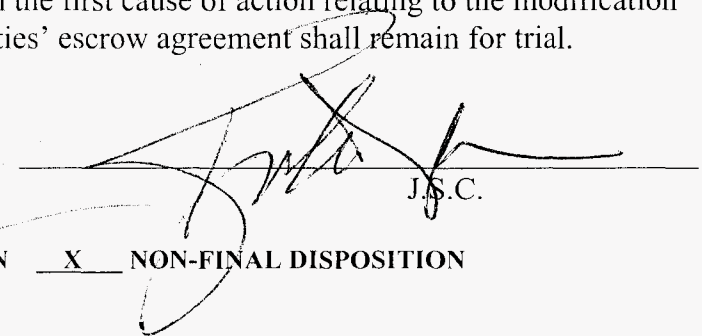
Bellas further states that although plaintiff and her attorney complained of certain items were installed incorrectly or not of her choosing, plaintiff appeared at the closing with counsel with the funds required to complete the transaction. During the course of the closing, a compromise was reached concerning the plaintiff's complaints. Defendant testified to the effect that he was quite lenient with plaintiff in waiting for her to make her color and material selections. The brick and siding installed at the premises are not claimed to be defective within the meaning of the limited warranty. For all other complaints, although plaintiff failed to submit a notice of warranty claim as required in the contract, Westwood inspected the premises and made further repairs. As for the complaints of mold in the garage, Westwood sent Michael Hanus to conduct a visual inspection of the premises. Michael Hanus avers in his personal affidavit that he inspected plaintiff's new home for defects alleged by plaintiff. He states that he found no evidence of water leaks, or mold and that all other complaints had been resolved.

Plaintiff testified at her examination before trial to the effect that she worked with Frank Mortimer regarding her color and material selections on May 31, 2003. She made most of her selections except the brick and wanted white brick. On or about August 14, 2003, she received a call from Mortimer who told her where to buy the white brick. She selected the brick she wanted and faxed her selection to the builder on or about August 14, 2003 and asked for a price quote. Plaintiff contested the quote as excessive and sent a check in the amount of \$6,800.00 on September 22, 2003. Plaintiff stated that after she sent her check to the builder, it was returned as too late. As to the kitchen cabinets, she testified that she chose longer cabinets like those in another style house, the Buckingham. She did not, however, request a change order for the kitchen to be in the Buckingham style, which had an island rather than a breakfast bar. Defendant has demonstrated its prima facie entitlement to judgement as a matter of law (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition, although plaintiff submits documents relevant to the sale of the premises, she fails to raise material issues of fact which would require a trial on the matter (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

A contractual liability is imposed on the home builder to construct the house in a skillful and workmanlike manner free from material defects. With respect to the existence of patent defects, those discovered or readily discoverable prior to closing, however, the law permits enforcement of the contractual merger clause, "because the purchaser can protect his interests by either demanding a specific written agreement covering the defect or refusing to close until it has been corrected" (*Staff v Lido Dunes, Inc.*, 47 Misc2d 322, 326, 262 NYS2d 544 [1965]; *Whitman v Lakeside Builders & Developers, Inc.*, 99 AD2d 679, 472 NYS2d 51 [1984]; *Centrella v Holland Constr. Corp.*, 82 Misc2d 537, 370 NYS2d 832 [1975]; *Milstein v Port Jefferson*, 154 AD2d 442, 546 NYS2d 13 [1989]). Inasmuch as plaintiff had knowledge of those defects prior to closing, the defects must be characterized as patent. In addition, plaintiff's cause of action for misrepresentation by defendant regarding the timeliness of her selection arises out of a breach of contract claim which would only have been viable prior to closing and is therefore dismissed.

Accordingly, the motion for partial summary judgment to dismiss the allegations in the first cause of action which relate to the external siding and brick and other allegations relating to leaks in the premises, and for summary judgment dismissing the second, third and fourth causes of action is granted. Only the allegations in the first cause of action relating to the modification to the kitchen layout as specified in the parties' escrow agreement shall remain for trial.

Dated: JUN 25 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION