Short Form Order **Index Number: 28601-2005**

Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:
Hon. Emily Pines
Justice Supreme Court

Motion Date: 04-05-2007
Submit Date: 06-06-2007
Motion No.: 001 MG

_____X

TATIANA ENDLIN,

Plaintiffs,

-against-

JOHN CHIARELLI, VINCENT HORCASTAS and MOON BAY DEVELOPMENT CORP.,

Defendants.

_____X

Robert H. Kouffman, Esq.
300 Pantigo Place
East Hampton, New York 11937

Fredrick P. Stern & Associates, PC
54 West Main Street
East Islip, New York 11730

Defendants move by Notice of Motion (motion sequence number 001) for an Order, granting Defendants Summary Judgment and dismissing Plaintiff's complaint, pursuant to **CPLR § 3212**, on the ground that, under the terms of the various contracts between the parties hereto, no issues of fact remain entitling the Plaintiff to maintain her action.

In her Verified Complaint (complaint), filed November 30, 2005, Plaintiff, Tatiana Endlin, alleges that she contracted in March 2005 with Vincent Horcasitas and John Chiarelli to purchase a home in East Hampton, N.Y., to be constructed by co-Defendant Moon Bay Development Corp. Plaintiff asserts that Defendants breached the contract in several regards, including failure to complete the premises as required; failure to construct a home in accordance with the plans and specifications; failure to comply with applicable warranties resulting in mold caused by drainage and leakage problems; and negligent construction.

Defendants move for Summary Judgment, dismissing all of Plaintiff's claims based on the following arguments. First, Defendants assert that Plaintiff's claims for completion of the premises is governed by the contract provision which gives the Sellers sixty days to complete all "minor unfinished

items" ; requires the sellers to post an escrow for that purpose and directs the purchaser to bring an action to enforce rights under that escrow agreement within "(n)inety days after the time in which seller has to complete such items". Since the closing occurred on August 8, 2005 and the Defendants had until August 7, 2005 to complete the "punch list" work, Defendants argue that Plaintiff had only ninety days thereafter (i.e., November 5, 2005) to commence an action for enforcement of the punch list requirement. This action was commenced on November 30, 2005; therefore, Defendants opine that Plaintiff has waived the contractual limitations period. With regard to Plaintiff's claims that the house was not built to specifications (concerning the size of the dwelling , the location of the driveway, inadequate leaders and gutters, insulation, and landscaping) , Defendants argue that such claims are extinguished since they were all allegedly patent defects and the terms of the contract vis a vis the nature and extent of the property conveyed merge into the deed upon the closing of title. With regard to Plaintiff's claim for repair as a result of drainage and leakage, Defendants assert that the contract limited such claims to be brought solely against the corporate Defendant and, in any event, precluded "(c)onsequential damages of any kind". Finally, Defendants move to dismiss Plaintiff's negligence claim under the doctrine set forth by the Court of Appeals in **Clark-Fitzpatrick v Long Island Rail Road Co,** 70 NY 2d 382, 516 NE 2d 190, 521 NYS2d 653 (1987), since the claim does not state that Defendants breached a legal duty separate and apart from their obligations under contract.

In opposition to the motion for Summary Judgment, Plaintiff asserts that Defendants misinterpret the provision of the contract of sale concerning punch list work, since another paragraph of the contract gives the purchaser the unilateral option to make repairs on her own after the sellers' sixty day period has expired. Plaintiff also states that when Defendants asked for and received an extension of time to complete punch list items, Plaintiff's ninety day limitations period was also extended. If, as Plaintiff asserts, this provision is in conflict with the Plaintiffs' interpretation concerning the ninety period to commence an action, Plaintiff argues that it is unenforceable and, in any case, is being asserted by Defendants in an unjust manner, as all parties agree that the punch list has, in fact, not been competed. With regard to the lack of compliance with the plans and specifications as set forth, Plaintiff argues that such representations survive the closing, since Defendants have signed a limited warranty representing that the home would be in substantial conformity with the plans . The limited warranty itself, according to Plaintiff does provide that Plaintiff's basement will be free from water seepage due to defective workmanship and materials for a period of two years from closing. With regard to the mold condition, Plaintiff argues that any attempts by Defendants to avoid liability on this issue are violative of **GBL § 777- b(4)** since they provide an exception to the required limited warranty that render her home unsafe.

Moreover, Plaintiff asserts that she did not receive the Limited Warranty, which individual Defendants assert exculpates them from any liability, until well after the closing, in violation of **GBL § 777 -b(3) (a)** and **(b)**. In any event, Plaintiff opines that any attempt to limit liability that would render her home unsafe due to the mold condition runs afoul of the Court of Appeals decision in **Caecci v DiCanio Construction Corp**, 72 NY2d 52, 526 NE 2d 266, 530 NYS 2d 771 (1988).

A party moving for Summary Judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. **Winegrad v New York University Medical Center**, 64 NY 2d 85, 487 NYS 2d 316, (1985); **Zuckerman v City of New York**, 49 NY 2d 557, 562, 404 NE 2d 718, 427 NYS 2d 595 (1980). Once the *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish issues of fact which require a trial. **State Bank of Albany v McAullife**, 97 AD 2d 607, 467 NYS 2d 944 (3d Dep't 1983). In addition, where there exist issues of fact which are in the control of a particular party, the other party should be afforded a reasonable opportunity to complete discovery. **see, Morris v Hochman**, 296 AD 2d 481, 745 NYS 2d 549 (2d Dep't 2002). The role of a court in deciding a motion for summary judgment "(i)s not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist." **Dyckman v Barrett**, 187 AD 2d 553, 590 NYS 2d 224 (2d Dep't 1992).

With regard to contracts, the issue of whether the terms of a contract are clear or ambiguous is, in the first instance, one for the court as a matter of law. **see, Fetner v Fetner**, 293 AD 2d 645, 741 NYS 2d 256 (2d Dep't 2002). In construing an agreement, the document must be read in order to determine the parties' purpose and intent and, so that, by giving practicable interpretation to the terms employed, the parties' reasonable expectations can be met. **see, Snug Harbor Square Venture v Never Home Laundry, Inc**, 252 AD 2d 520, 675 NYS 2d 365 (2d Dep't 1998).

General Business Law **(GBL) § 777-a** provides, in pertinent part, that there exists an implied "housing merchant warranty" in all contracts for the sale of new homes that survives the passing of title. Such implied warranty requires that the home be "(f)ree from defects due to failure to have been

constructed in a skillful manner" for a period of one year; that the "(p)lumbing, electrical, heating, cooling and ventilation systems of the home be free from defects due to a failure by the builder to have installed such systems in a skillful manner" for a period of two years; and that the home "(s)hall be free from material defects" for a period of six years. **GBL § 777-a(5)** allows for the modification of such implied warranty under the procedure set forth under **GBL § 777-b. GBL § 777-b** provides, as relevant hereto, that, "(a) housing merchant implied warranty may be excluded or modified by the builder or seller of a new home only if the buyer is offered a limited warranty in accordance with (the following) . . . (a) A copy of the express terms of the limited warranty shall be provided in writing to the buyer for examination prior to the time of the buyer's execution of the contract or agreement to purchase the home; (b) A copy of the express terms of the limited warranty shall be included in, or annexed to and incorporated in, the contract or agreement". In addition, **GBL § 777-b (4) (b)** requires that such modified limited warranty clearly disclose "(t)he identification of the names and addresses of all warrantors". Finally, **GBL § 777-b(4)(e)** requires that even a modified limited warranty is void to the extent that it excludes a "(r)elevant specific standard of the applicable building code" or "(r)enders the home unsafe". Such statutory provisions have essentially overruled the common law protections set forth in the **Caecci** decision cited in Plaintiff's brief. **see, Fumarelli v Marsam Development**, 92 NY 2d 298, 703 NE 2d 251, 680 NYS 2d 440 (1998).

Allegations stating that construction was performed in a less than skillful manner by a party to a contract, do not constitute a negligence cause of action. **Clark-Fitzpatrick v Long Island Rail Road**, 70 NY 2d 382, 521 NYS 2d 653, 516 NE 2d 190 (1987). Such assertions are said to constitute merely a restatement, albeit in a slightly different manner, of the contractual obligations . **Id.**

UNCOMPLETED WORK

Applying these principles to this case, the Court finds as follows. The provisions of the contract regarding the completion of the "punch list" work are, in fact, somewhat ambiguous. While paragraph "7" gives the seller sixty days to complete punch list work and gives the purchaser ninety days thereafter to commence a litigation regarding such work, paragraph "9" also provides that "(o)nce a Certificate of occupancy is issued for the Home, the Purchaser(s) agree(s) to accept a letter of agreement from the Seller wherein the Seller shall agree to complete all minor unfinished items within sixty (60) days from the date of the closing of title, weather permitting. After said period, Purchaser(s) shall make said

repairs and make claim against Seller for cost of same". This paragraph does not set forth a time limitation and Plaintiff asserts herein that she has complied with the provisions of paragraph 9. As set forth in Plaintiff's papers in opposition to the motion, Plaintiff also asserts that by correspondence and Defendants' actions , the Defendants' time to complete such work was extended by 120 days. Thus Plaintiff argues that, at the very least, such actions also extended Plaintiff's time to commence an action for the punch list work. Under the circumstances, there exist issues of fact both as to the meaning of the contract as well as to whether the actions of the parties modified it concerning punch list items and how they were to be handled.

FAILURE TO PROVIDE HOME AS SPECIFIED

With regard to Plaintiffs' claims of improper placement of a driveway, inadequate litters and gutters, as well as a portico and home size failing to conform to the specifications , the contract states as follows: "(a)nything to the contrary herein notwithstanding, it is specifically understood and agreed by the parties hereto that the acceptance of the delivery of the deed at the time of closing of title hereunder shall constitute full compliance by the Seller with the terms of this Agreement and none of the terms hereof except for any items which remain incomplete at closing and as otherwise herein expressly provided, shall survive delivery and acceptance of the deed". Upon delivery of the deed by Defendants and acceptance thereof by Plaintiff, the terms of the contract relating to the nature and extent of the property conveyed merged into the deed and were extinguished. **see, DRT Construction Co v BH Associates**, 269 AD 2d 783, 702 NYS 2d 738, (2d Dep't 2000); **Boser v Boser**, 237 AD 2d 924, 654 NYS 2d 509, (4th Dep't 1997), lv. dism., 90 NY 2d 1008, 666 NYS 2d 102, 688 NE 2d 1385 (1998). Accordingly, Defendants have demonstrated entitlement to Summary Judgment on the Second Cause of Action, which sounds in breach of contract and relates to alleged patent defects.

BREACH OF IMPLIED WARRANTY

Plaintiff' s third cause of Action alleges a claim against the Defendants for breach of an Implied Warranty. In this regard, the contract is, in the Court's opinion, far from clear. Paragraph 19 states that the terms of a limited warranty by the "Builder" are "(I)NCORPORATED INTO THIS AGREEMENT AND THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FACT THEREOF.

PURCHASER HEREBY ACKNOWLEDGES THAT A WRITTEN COPY OF THE TERMS OF THE ANNEXED LIMITED WARRANTY AND ACCEPTED STANDARDS HAS BEEN PROVIDED BY BUILDER TO PURCHASER FOR PURCHASER'S EXAMINATION AND THAT A REASONABLE PERIOD OF TIME FOR ITS EXAMINATION BY PURCHASER HAS BEEN AFFORDED TO PUCHASER(S) PRIOR TO THE TIME OF PURCHASER(S) EXECUTION OF THIS AGREEMENT." The next paragraph goes on to state that the purchaser accepts this limited warranty "(I)N LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTIES". Yet, this printed provision is followed by a handwritten notation that "THE WARRANTY SHALL BE PROVIDED TO PURCHASER AT CLOSING FROM THE BUILDER, MOON BAY DEVELOPMENT CORP AND NOT FROM THE SELLERS"

Plaintiff has asserted that she received the "Limited Warranty" after the closing. The Limited Warranty annexed to the moving papers states that the "(w)arrantor is the builder or seller whose name and address is set forth near the beginning of the first page of this contract". This raises several issues. As set forth above, **GBL § 777-b** allows the statutorily required "housing merchant implied warranty" covering the sale of new homes to be modified only under certain conditions. These require, inter alia, that the modified limited warranty be provided to the buyer prior to the time of the buyer's execution of the contract of sale and be annexed thereto. The handwritten notation contained in paragraph 19 raises issues of fact concerning whether a modified limited warranty was provided to the Plaintiff as required. In addition, as set forth, the modified warranty must identify the names and addresses of all warrantors. If, as Plaintiff claims, she neither saw the "LIMITED WARRANTY" annexed to Defendants' motion papers until after the closing and in the form they set forth, such fails to comply with the provisions set forth. Thus, there are questions of fact concerning whether there is a modified limited warranty as Defendants' claim or whether the parties are governed by the provisions of **GBL § 777-a.** There also exists confusion in the manner in which the contract was written, if the Limited Warranty was, in fact later provided, concerning whether the sellers as well as the builder are responsible for its terms. In addition, Plaintiff has asserted that Defendants have breached the statutory warranty in providing a new home constructed in a less than skillful manner, in violation of local code building specifications and with material defects.

As set forth, Plaintiffs have raised factual issues at this stage of the litigation and should be afforded the opportunity to complete discovery. Summary Judgment dismissing the third Cause of action is therefore denied.

NEGLIGENCE

Applying the law as described above, Plaintiffs have not set forth a cause of action for negligence and the Defendants are entitled to Summary Judgment dismissing Plaintiff's Fourth Cause of Action. **Clark-Fitzpatrick, *supra*.**

Accordingly, for the reasons set forth herein, Defendants' motion for Summary Judgment, dismissing the Plaintiff's Second and Fourth causes of action, as set forth in Plaintiff's complaint is granted. Defendants' motion for Summary Judgment dismissing Plaintiff's First and Third Causes of Action as set forth in Plaintiff's complaint is denied. This constitutes the ***DECISION*** and ***ORDER*** of the Court. Submit Judgment on Notice in accordance with the terms of this ***DECISION.***

Dated: August 8, 2007
Riverhead, New York

EMILY PINES
J. S. C.