

Ramsarup v H. Ramjit Home Improvement Inc.

2007 NY Slip Op 33813(U)

November 19, 2007

Supreme Court, Nassau County

Docket Number: 3280-06/

Judge: Leonard B. Austin

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No. 13280-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 7-20-07
Submission Date: 8-17-07
Motion Sequence No.: 002/MOT D

_____ x
DOREEN RAMSARUP, ROBBIE
RANSARUP and TRECIA RAMSARUP,

Plaintiffs,

COUNSEL FOR PLAINTIFFS
Marc M. Isaac, PLLP
210 Moore Avenue
Freeport, New York 11520

- against -

H. RAMJIT HOME IMPROVEMENT INC.,
H. RAMJIT HOME IMPROVEMENT
CORP. and HEMCHANDRA RAMJIT,

Defendants. .

COUNSEL FOR DEFENDANTS
Law Office of Dennis P. Biancanello
P.O. Box 607
Mineola, New York 11530

_____ x

ORDER

The following papers were read on Plaintiffs' motion for summary judgment:

- Notice of Motion dated June 29, 2007;
- Affirmation of Marc M. Isaac, Esq. dated June 29, 2007;
- Affidavit of Trecia Ramsarup sworn to on June 27, 2007;
- Affidavit of Robbie Ramsarup sworn to on June 27, 2007;
- Affidavit of Doreen Ramsarup sworn to on June 27, 2007;

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Affidavit of Giuseppe Giovanniello sworn to on June 27, 2007;
Plaintiffs' Memorandum of Law;
Affirmation of Dennis P. Biancanello, Esq. dated August 4, 2007;
Affidavit of Hemchandra Ramjit sworn to on August 3, 2007;
Affirmation of Marc M. Isaac, Esq. dated August 17, 2007.

Plaintiffs move for summary judgment.

BACKGROUND

Plaintiff, Doreen Ramsarup ("Doreen"), is the owner of real property located at 174 Rockmart Avenue, Elmont, New York (the "Property"). When Doreen purchased the Property, it was improved with a one family dwelling (the "Structure").

Doreen purchased the Property as a home for her son, Plaintiff Robbie Ramsarup ("Robbie") and her daughter-in-law, Patricia Trecia Ramsarup ("Trecia"). The Plaintiffs are collectively referred to as "Ramsarup".

The Property is located in Elmont which is an unincorporated area within the Town of Hempstead.

The Structure was constructed prior to the Town of Hempstead enacting building codes and zoning ordinances. The Structure was designated as a pre-existing non-conforming use. This exempts the Structure from complying with the otherwise applicable building codes and zoning ordinances.

The Structure did not comply with the side and rear set back requirements of the zoning ordinances and/or building codes. Set backs are the distance required between a structure and the Property line. More specifically, the side and rear of the Structure

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were closer to the Property line than the building codes and/or zoning ordinances permitted.

After Doreen purchased the Property, and before Robbie and Trecia moved in, Doreen wanted to have the Structure renovated and expanded.

Doreen retained GG Design, Inc. ("Design") to prepare plans for an exterior extension to the front of the Structure.

Design prepared plans for the extension and submitted them for approval to the Town of Hempstead Building Department. On April 12, 2006, the Town of Hempstead issued a building permit. The building permit described the work proposed as "Construct 1st and 2nd fl additions w/basement and bath." The building permit made no mention of any work being performed in or to the Structure.

The Structure would have retained its status as a pre-existing non-conforming use had the only work performed been the construction of the addition in accordance with the Design plans.

By written agreement dated April 19, 2006 (the "Contract"), Doreen retained Defendant, H. Ramjit Home Improvement Inc. to perform the construction at the Property. The Contract provided that the work was to be performed in accordance with the "the Architect/Architectural drawing provided and in accordance with the existing Building Department Codes and Regulations for the City and State of New York." The Contract contains this provision even though the Property is not located in New York City.

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The Court has searched with the New York State Department of State website which reflects the incorporation of H. Ramjit Home Improvement **Corp.** (emphasis added) in October 2000 as a domestic corporation. The Secretary of State's records reflect this corporation is presently inactive.

The records of the Secretary of State do not reflect the incorporation of H Ramjit Home Improvement, **Inc.** (emphasis added), the entity listed on the Contract as the contractor.

The Contract provides for payment of \$30,000 upon signing. This sum was paid. Doreen made an additional payment of \$20,000 on account on May 13, 2006.

Defendant, Hemchandra Ramjit ("Hemchabdra"), is alleged to be the principal of Defendants, H. Ramjit Home Improvements, Inc., H Ramjit Home Improvements Corp. (collectively the "Contractor").

Some time after April 19, 2006, the Contractor began to perform the work described in the Contract.

An inspection of the work performed by a Town of Hempstead building inspector in June 2006 revealed that more than 50% of the Structure had been demolished. As a result, the Town of Hempstead terminated the pre-existing, non-conforming use status of the Structure and revoked the building permit. The Town of Hempstead determined that what remained of the Structure was a safety hazard and directed its immediate demolition.

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When Doreen entered into the Contract, the Contractor did not have a home improvement contractor's license issued by the Nassau County Department of Consumer Affairs. Hemchandra asserts he advised Doreen, Robbie and Trecia that his contractor's license for Nassau County had expired. He claims that even though they were so advised, they insisted the Contractor perform the work.

The Contractor further asserts the work described in the contract differs significantly from the work contained in the plans and drawings prepared by Design and provided to the Town of Hempstead in connection with the application for the building permit. For example, the Contract provides for the demolition of the walls and floors within the structure except for the foundation. The plans filed with the Town of Hempstead do not provide for the demolition of any of the existing interior walls or floors except to the extent that they were needed to tie the extension into the existing structure.

The Contract provides for the excavation of the cellar floor an additional 6 inches and for the Contractor to pour a new concrete slab for the entire basement and the installation of new floor joists for the entire first floor. None of these items were reflected in the plans.

The Contract required the Contractor to perform several other items of work not reflected in the plans.

The Contract required that the work was to be performed in accordance with the New York City building codes even though the Property and the Structure are in the

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Town of Hempstead. The record does not reflect whether construction performed in compliance with the New York City building codes would be in compliance with the Town of Hempstead Building Code.

On June 23, 2006, a Town of Hempstead building inspector came to inspect the work. The inspector directed the work be stopped immediately. By that time, the Contractor had framed and erected the exterior walls of the extension. Sub-flooring in the extension had been installed. Most of the foundation repairs had been completed.

On July 11, 2006, Hemchandra, the Plaintiffs and Town of Hempstead personnel met at the Premises. Hemchandra believes the Town of Hempstead personnel directed the demolition of the Structure because rot in the first and second floors of the existing structure would not permit those structures to support the weight they would be required to bear.

Hemchandra asserts that he did not learn of Plaintiffs' failure to file amended plans containing the work he was performing in the Structure until the building inspector issued the stop work order.

Hemchandra asserts that he was ill for three days after the Town of Hempstead directed the demolition of the Structure. As a result, he was unable to arrange for and supervise its demolition. By the time he returned to the site, Ramsarup retained another contractor to demolish the remainder of the Structure.

The complaint alleges 4 causes of action, breach of contract, negligence, fraud and violation of General Business Law §349.

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DISCUSSION

A. Breach of Contract

The elements of a cause of action for breach of contract are the existence of a contract between the plaintiff and defendant, consideration, performance by the plaintiff, breach by the defendant and damages resulting from the breach. Furia v. Furia, 116 A.D.2d 694 (2nd Dept. 1986). Plaintiff must establish the provisions of the contract which the defendant is alleged to have breached. Sud v. Sud, 211 A.D.2d 423 (2nd Dept. 1995); and Atkinson v. Mobil Oil Corp., 205 A.D.2d 719 (2nd Dept. 1994).

Plaintiff alleges that the Contractor violated the contract by failing to perform the work in accordance with the architectural plans. Reduced to its simplest terms, Ramsarup alleges that the Contractors failure to comply with the contract because the building permit was revoked, the Structure lost its status as a pre-existing non-conforming use and the Town of Hempstead directed the demolition of the Structure.

The party seeking summary judgment must establish an entitlement to judgment as a matter of law. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); and Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). It fails to establish a *prima facie* entitlement to judgment as a matter of law, the motion must be denied. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Widmaier v. Master Products, Mfg., 9 A.D.3d 362 (2nd Dept. 2004); and Ron v. New York City Housing Auth., 262 A.D.2d 76 (1st Dept. 1999).

Plaintiffs have failed to establish a *prima facie* entitlement to judgment as a matter of law. Ramsarup fails to establish which specific provisions of the Contract

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were breached by the Contractor or how those breaches resulted in the Town of Hempstead revoking the building permit, the loss of the pre-existing non-conforming use status and/or the demolition of the Structure.

The Contract provides for the Contractor to perform work beyond the scope the Design's plans and drawings, much of which were unrelated to the construction of the extension. Most of the work not provided for in the plans in drawing was to be performed upon the Structure.

The "Demolition and Excavation" provisions of the Contract provide for the Contractor to demolish the existing roofs, walls and flooring within the Structure. This work is not shown on Design's plans or drawings and appears to be beyond the scope of the building permit.

The Contract requires the Contractor to remove the old heating system. Nothing in the architectural plans reflects the removal or installation of a new heating system in the Structure. This, too, is not reflected in the plans.

The Contract calls for the installation of new insulation and sheetrock over all the perimeter walls and the installation of the duct work for the new heating and air conditioning system. The plans do not provide for installation of any new insulation or duct work in the existing structure. The plans provided to the Court do not contain a new heating system for the Structure.

The Contract provides for the Contractor to install new floor joists from the front to the back of the second floor. The architectural plans do not provide for this work.

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The Contract provides for the Contractor to install new brickwork around the entire building in accordance with the architectural drawings. The bricks were to be properly tied and laid as per the building code. However, the architectural drawings do not show any exterior brick work. In fact, the architectural drawings specifically provide for the Structure to be covered in vinyl siding of a color to be selected by Ramsarup.

There is a significant amount of work the Contract indicates will be performed on the Structure that is not reflected in the architectural plans or drawings submitted to the Town of Hempstead Building Department in connection with the application for a building permit.

The question of whether an agreement is ambiguous is an question of law to be determined by the court. W.W.W. Assoc., Inc. v. Giancontieri, 77 N.Y.2d 157 (1990); and 9394 LLC v. Farris, 10 A.D.3d 708 (2nd Dept. 2004). Ambiguity exists where the terms of the agreement are susceptible to two reasonable interpretations. Uribe v. Merchants Bank of New York, 92 N.Y.2d 336 (1998); and Around the Clock Delicatessen, Inc. v. Larkin, 232 A.D.2d 514 (2nd Dept. 1996).

Ambiguity does not exist simply because the parties urge different interpretations of its terms. Bethlehem Steel Co. v. Turner Construction Co., 2 N.Y.2d 456 (1957); and Elletson v. Bonded Insulation Co., Inc., 272 A.D.2d 825 (3rd Dept. 2000).

Parol evidence will not be considered in interpreting a contract unless the contract is ambiguous. South Road Assocs., LLC v. IBM Corp., 4 N.Y.2d 272 (2005);

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and 767 Third Avenue, LLC v. Orix Capital Markets, LLC, 26 A.D.3d 216 (1st Dept. 2006).

This Contract is ambiguous. The Contract states the Contractor is to perform the work in accordance with the architectural drawings. However, the Contract provides for the Contractor to perform work well beyond the scope of the architectural drawings.

The affidavit of Giuseppe Giovanniello, Design's president and Ramsarup's architect, does not indicate which provisions of the Contract the Contractor violated. His affidavit only addresses issues regarding whether the construction of the extension would affect the Structure's status as a pre-existing non-conforming use. He does not address whether the Contract provides for work on the Structure that is beyond the scope of the plans he prepared or how that would affect the Structure's status as a pre-existing non-conforming use.

Since questions of fact exist as to the breach of contract action, summary judgment must be denied.

B. Fraud

The fraud cause of action alleges that the Contractor intentionally misrepresented that it had the required home improvement license. Doreen alleges that prior to entering into the Contract she asked Hemchandra whether he and/or his corporation had valid and existing home improvement contractor's license. She asserts Hemchandra advised her that he had the required license. Doreen alleges in her complaint that she did not learn that the Contractor did not have a valid Nassau County

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Home Improvement Contractor's license until after she had entered into the Contract and the problems with the work arose. She further alleges that, if she had known that the Contractor did not have a home improvement license as required by Nassau County, she would not have retained him to do the work.

Hemchandra avers that he advised Doreen prior to entering into the Contract his Nassau County Home Improvements Contractor's license had expired. Hemchandra asserts Doreen insisted he perform the work even though she knew he lacked the required license.

The elements of common law fraud are "misrepresentation of a material existing fact, falsity, scienter, deception and injury." Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403, 407 (1958). See also, Dalessio v. Kressler, 6 A.D.3d 57 (2nd Dept. 2004). One cannot claim to have misled when the misrepresentations consist of material that is public record or which could have been discovered through the exercise of due diligence. Danann Realty Corp. v. Harris, 5 N.Y.2d 317 (1959); Barrett v. Huff, 6 A.D.3d 1164 (4th Dept. 2004); Pais-Built Homes, Inc. v. Beckett, 297 A.D.2d 726 (2nd Dept. 2002); Reale v. Sotheby's, Inc., 278 A.D.2d 119 (1st Dept. 2000); and Cohen v. Cerier, 243 A.D.2d 670 (2nd Dept. 1997).

Nassau County Administrative Code §21-11.2 requires all home improvement contractors to be licensed by the Nassau County Department of Consumer Affairs. An unlicensed home improvement contractor is subject to penalties imposed by Nassau County Administrative Code §21-11.15 and may be enjoined from conducting such a

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business in the absence of the required license. Nassau County Administrative Code §21-11.7(3) requires the Nassau County Commission of Consumer Affairs to keep records of all home improvement contractor licenses issued, suspended or revoked.

Ramsarup could have determined whether the Contractor had the required license by checking the records of the Department of Consumer Affairs which are a public record. They failed to do this. Therefore, they cannot claim to have been defrauded by the contractor.

C. Negligence

It is unclear from the papers whether Plaintiffs' are moving for summary judgment on their negligence cause of action. The negligence cause of action is premised upon the Contractor negligently performing the Contract.

A breach of a contract does not give rise to a separate cause of action in tort unless the defendant violated a legal duty that is separate and apart from the its contractual obligations. Sommer v. Federal Signal Corp., 79 N.Y.2d 540 (1992); and Clark-Fitzpatrick v. Long Island Rail Road Co., 70 N.Y.2d 382 (1987); and Muldoon v. Blue Water Pool Services, Inc., 7 A.D.3d 496 (2nd Dept. 2004).

The complaint fails to allege, and the papers submitted in support of the motion fail to establish, that the Contractor had any obligations to Ramsarup other than those created by the Contract.

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D. General Business Law §349

Plaintiffs makes no mention of this cause of action in their moving papers.

General Business Law §349 prohibits deceptive business practices. The statute makes actionable conduct which does not rise to the level of common law fraud.

Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999) ("Gaidon I").

The statute provides a remedy to those who have been subject to deceptive or misleading acts or business practices that are consumer-oriented. Oswego Laborers

Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20 (1995). A

deceptive act or practice, for the purposes of the statute, is one which is likely to

mislead a reasonably prudent consumer. Karlin v. IVF, America, Inc., 93 N.Y.2d 282 (1999).

The elements of a claim under General Business Law § 349 " are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act. (Citations omitted)" Andre Strishak & Associ., P.C. v. Hewlett Packard Co., 300 A.D.2d 608, 609 (2nd Dept. 2002). See also, Solomon v. Bell Atlantic Corp., 9 A.D.3d 49 (1st Dept. 2004).

Private contractual disputes, unique to the parties, are not within the ambit of General Business Law §349(a). New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308 (1995); and Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, N.A., *supra*. To fall within General Business Law §349(a), the deceptive act cannot be limited to the parties. Teller v. Bill Hayes, Ltd., 213 A.D.2d 141 (2nd Dept. 1995).

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This case is clearly a private contractual dispute. The Contractor did not make any representations regarding his license to any person other than the Plaintiffs.

General Business Law 349(a) does not apply to this action.

E. Dismissal Against - Robbie Ramsarup and Trecia Ramsarup

Although Defendants did not cross-move to dismiss or for summary judgment, the Defendants request, in their opposition papers, that the Court dismiss the action brought by Robbie Ramsarup and Trecia Ramsarup on the grounds they lack standing to maintain the action.

The appropriate means for seeking such relief is a cross-motion. CPLR 2215. The Court may not grant affirmative relief to a party who does not cross-move. Hergerton v. Hergerton, 235 A.D.2d 395 (2nd Dept. 1997); and Thomas v. The Drifters, Inc. 219 A.D.2d 639 (2nd Dept. 1995). Therefore, Defendants application to dismiss the action of Robbie and Trecia cannot be considered.

Accordingly, it is,

ORDERED, that Plaintiffs' motion for summary judgment is **denied**; and it is further,

ORDERED, that counsel for the parties are directed to appear for a status conference on December 19, 2007 at 9:30 a.m.

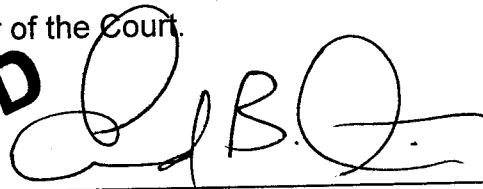
This constitutes the decision and Order of the Court.

Dated: Mineola, NY
 November 19, 2007

ENTERED

NOV 26 2007

NASSAU COUNTY
 COUNTY CLERK'S OFFICE



Hon. LEONARD B. AUSTIN, J.S.C.