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

PRESENT: EDWARD H. LEHNER PART 19

Index Number : 600764/2004

25 BROADWAY REALTY

vs

UNITED TECHNOLOGIES

Sequence Number : 007

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
DEC 18 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: DEC 13 2007

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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25 BROADWAY REALTY CO., INC. and
25 BROADWAY REALTY, LLC,

Plaintiffs,

INDEX NO.
600764/04

- against -

UNITED TECHNOLOGIES CORP. and
CARRIER CORP.,

Defendants.

EDWARD H. LEHNER, J.;

Before the court is a motion by United Technologies Corp. ("United") and Carrier Corp. ("Carrier") (collectively "Defendants") for summary judgment dismissing the complaint against United as well as dismissing plaintiffs' product liability claims, and for other relief, and a cross-motion by PRP Mechanical Contractor, Inc. ("PRP") for summary judgment dismissing all claims against it.

Plaintiffs' complaint has two causes of action: i) breach of warranty and ii) product liability. They allege: that they are the owners of real property located at 25 Broadway (complaint ¶ 1); that they purchased condensor units (the "Units") from defendants on September 29, 2000 (Id. ¶ 3); that the Units were sold under a warranty (the "Warranty)" for a price of $119,075.00 (Id, Exhibit K); that the general contractor engaged to install the Units was Power Cooling, Inc. and the PRP was the subcontractor that installed the piping (Edmund Zajac EBT, pp. 23-26); that due to

freezing conditions, water in the Units froze causing damage to them on March 27, 2001 (Robert Rankel EBT, pp. 44-45); and that the damage was too expensive to repair and so the Units were replaced at full cost (Id. pp. 49-52).

The Warranty states that it is effective "against defects in material and workmanship for a period of one year from date of shipment, provided the equipment has been correctly applied and operated under intended design conditions, (and that the) Seller's obligation under (the) warranty is limited to the repair or replacement, at its option, of any part or parts which upon Seller's examination at its factory, shall appear to have become defective (and that) correction of such defects by repair or replacement, plus return freight via lowest common carrier shall constitute fulfillment of its obligation to the Purchaser."

Defendants contend: that Carrier is a wholly owned subsidiary of United; that United is not and never has been in the business of designing, manufacturing, assembling or servicing and conditioning equipment such as the Units (Robert Galli affidavit, ¶¶ 2, 4); that the Units were manufactured by Witt, a division of Carrier (Pitoniak EBT, pp. 8, 14); that the Units were manufactured in accordance with pre-purchase specifications prepared by plaintiffs' consulting engineer (Goldie Zlotnick EBT, pp. 11-12, 15); that the Warranty limits damages to replacement costs; and that plaintiffs' building engineer oversaw the installation (Id, p. 29).

The complaint against United is dismissed since it neither sold nor was in the

business of manufacturing air conditioning equipment such as the Units, and plaintiffs have not made any allegations that would warrant piercing the corporate veil.

Plaintiffs' second cause of action alleges that the Units were "defective and dangerous to the plaintiffs' property" (¶ 7) and they seek damages arising out of defendants' purportedly tortious conduct. However,

> "(w)hen a plaintiff seeks to recover damages for purely economic loss resulting from the failure or malfunction of a product, such as the cost of replacing or retrofitting the product, or for damage to the product itself, the plaintiff may not seek recovery in tort against the manufacturer or the distributor of the product, but is limited to a recovery sounding in breach of contract or breach of warranty" [Manhattanville College v. James John Romeo Consulting Engineer, P.C., 28 AD3d 613, 616 (2nd Dept. 2006)].

See also, 7 World Trade Center Company v. Westinghouse Electric, 256 AD2d 263 (1st Dept. 1998). Put another way, "where the claims at issue are, fundamentally and in all relevant respects, essentially contractual, (such as) product-failure controversies .... (t)ort law is not the answer for this kind of loss of commercial bargain" [Bocre Leasing Corp. v. General Motors Corp., 84 NY2d 685, 694 (1995)]. Since plaintiffs' allegations are that the Units failed, its second cause of action for product liability is dismissed.

Defendants also seek to limit plaintiffs' breach of warranty damages to replacement costs. The Warranty states that the Seller's obligation "is limited to the

repair or replacement (of the Units)". Generally "parties to a commercial contract, absent any question of unconscionability, may agree to limit the seller's liability for damages' (Mom's Bagel's of New York, Inc. v. Sig Greenbaum Inc., 164 AD2d 820, 822 (1st Dept. 1990)]. See also, Daily News, L.P. v. Rockwell International Corp., 256 AD2d 13 (1st Dept. 1998); Scott v. Palermo, 233 AD2d 869 (4th Dept. 1996). "A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made – i.e., some showing of an 'absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party'" [Gilman v. Chase Manhattan Bank, N.A., 73 NY2d 1, 10 (1988)]. Plaintiff has not alleged that the Warranty's provision is unconscionable and therefore it is binding and plaintiffs may not recover damages beyond replacement costs of $119,075.00 (Exhibit K) .

Lastly, the cross-motion of PRP to dismiss all claims against it is granted with respect to third-party causes of action that assert product liability claims against it and otherwise denied as issues of fact exist as to whether the alleged failure of the Units to properly perform was in any way the fault of the installation work it performed.

In sum: plaintiffs' complaint against United is dismissed and the Clerk is directed to enter judgment accordingly, severing the remaining action; plaintiffs' second cause of action for products liability is dismissed; plaintiffs' claim for damages on their first cause of action is limited to replacement costs; and the cross-

motion of PRP for dismissal of all claims against it is granted in part and denied in part. This decision constitutes the order of the court.

Dated: December 13, 2007

J.S.C.