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

JUDITH J. GISCHE, J.S.C.

PRESENT

PART 10

Index Number : 102437/2006

AMSTERDAM HOSPITALITY LLC

VS.

NICOLOCK PAVING STONES LLC

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

tice

INDEX NO. 102437-06

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

ad 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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 2/7/08

J.S.C.

JUDITH J. GISCHE, J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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AMSTERDAM HOSPITALITY, LLC,

Plaintiff,

-against-

NICOLOCK PAVING STONES LLC, and NICOLIA CONCRETE PRODUCTS, INC., d/b/a NICOLOCK OF LONG ISLAND,

Defendants.

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DECISION/ORDER
Index No.: 102437/06
Seq. No. : 002

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's motion [SJ] w/KAM affid in support, exhs	1
Def's opp w/BDS affirm, exhs	2
Pltf's RJO reply affirm in further support, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This action is for breach of contract. Defendant now moves for summary judgment dismissing the complaint. CPLR § 3212. Plaintiff opposes the motion and cross-moves to amend the complaint. CPLR § 3025(b).

Summary judgment relief may be considered by the court since issue has been joined, and the note of issue has not yet been filed. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004).

Defendants are in the business of selling paving stones. On April 19, 2005, plaintiff entered into a contract with defendant Nicolia Concrete Products, Inc. d/b/a Nicolock of Long Island ("Nicolock"), whereby it purchased concrete paving stones (the "paving

stones"). These paving stones were thereafter delivered to plaintiff and plaintiff paid $16,948.50 to Nicolock.

Jay Podolsky ("Podolsky"), managing member of plaintiff, states that the paving stones were "defective because shortly after their installation [they] began to show excessive efflorescence and presently show significant rust." According to Podolsky, he informed Nicolock that the paving stones were defective and Nicolock "stated a simple cleaning by Ram Paver Sealing ("Ram") would resolve the problem." Podolsky thereafter claims that a representative of Ram sent to clean the paving stones "confirmed that the product was defective by noting that the pavers 'still show signs of efflorescence' on the back of the Ram invoice."

Plaintiff claims that the paving stones are still covered with a thick layer of efflorescence and have now begun to rust. Plaintiff states that it sought to have Nicolock replace the paving stones or reimburse plaintiff for same. Nicolock, however, has refused to do so.

Defendants contend that the paving stones are not defective. Defendants cite their catalogue, which states:

> Efflorescence is a whitish, powder like deposit that may sometimes appear on the surface of the paving stones. It may appear immediately or within a short time after installation. It may appear immediately or within a short time after installation. Left alone, normal wear and exposure to the elements will dissipate the efflorescence.
>
> Efflorescence is a normal occurrence in all cement based products. Because it is a natural reaction to the proper hydration of concrete, Nicolock accepts no responsibility or liability for replacement.

Defendants have also provided a brochure from The Interlocking Concrete

Pavement Institute (ICPI), which states that "Efflorescence is completely natural and will disappear with time. There's no reason to be concerned that your [paving stones] are damaged or defective. The [paving stones] are experiencing a natural process. It is a condition in all cement based products, as well as in many other paving products."

Discussion

The court will address the cross-motion to amend the complaint first since its outcome will bear upon the motion for summary judgment.

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 NY2d 934 (1978). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982). The moving party is required to show that it the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 (1st dept. 1990).

In evaluating prejudice, the court may look at any delay and its effect on the parties' positions in the underlying litigation. There should be some explanation for the delay, and prejudice may be found if some special right is lost by the passage of time or if undue expense is implicated. Barbour v. Hospital for Special Surgery, 169 AD2d 385 (1st dept.

1991).

Plaintiff's cross-motion is patently defective and must be denied. Not only has plaintiff failed to include the proposed amended complaint with its motion papers, nowhere in the moving papers has plaintiff even identified what claims it seeks to now assert. See, e.g., Plitt v. Illinois Surety Co., 165 A.D. 973 (1st Dept. 1914). Moreover, plaintiff has failed to establish a reasonable excuse for its delay in moving to amend, as this action was commenced on February 21, 2006.

Defendants move for summary judgment on the basis that the efflorescence does not constitute a defect and that efflorescence is expressly disclaimed. On a motion for summary judgment, the moving party has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

The elements of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage. Furia v. Furia, 166 A.D.2d 694 (2nd Dept. 1990). "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." Express Industries and Termianl Corp. V. New York State Dept. Of Transportation, 93 N.Y.2d 584 (1999).

Based on the record herein, defendants have met their burden in establishing that

the efflorescence is not a defect but rather a normal occurrence in all cement based products.

Nicolock warranties the paving stones that were sold to plaintiff. The warranty provides a lifetime warranty to the original purchaser on "the structural integrity of its manufactured product line used in residential applications." However, Nicolock's warranty specifically does not cover efflorescence.

Plaintiff has not put forth any evidence from which a trier of fact could reasonably conclude that efflorescence constitutes a defect and that the defendant therefore breached some contract provision, express warranty or implied warranty. Since plaintiff has failed to otherwise demonstrate any other viable cause of action against defendants with respect to the subject paving stones, defendants are entitled to summary judgment in their favor, dismissing the complaint.

Accordingly, defendants' motion for summary judgment is granted in its entirety and plaintiff's cross-motion to amend the complaint is denied. The complaint is hereby dismissed.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
February 7, 2008

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.