

Patel v Villages W. Dev. Corp.

2008 NY Slip Op 31158(U)

April 14, 2008

Supreme Court, Suffolk County

Docket Number: 0012225/2006

Judge: Martin J. Kerins

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SUPREME COURT - STATE OF NEW YORK
IAS PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. MARTIN J. KERINS
Justice of the Supreme Court

MOTION DATE 11/30/07 (#001)

MOTION DATE 2/7/08 (#002)

ADJ. DATE 2/14/08

Mot. Seq. #001 - MotD

Mot. Seq. #002 - XMD

-----X	
AJAY PATEL AND RITA PATEL,	:
	:
Plaintiffs,	:
	:
- against -	:
	:
THE VILLAGES WEST DEVELOPMENT	:
CORP.	:
	:
Defendant.	:
-----X	

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Upon the following papers numbered 1 to 27 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers 8; Answering Affidavits and supporting papers 9-19; 20-22; 23-26; Replying Affidavits and supporting papers 27; Other pleading exhibit; plaintiffs' memorandum of law; plaintiffs' reply memorandum of law; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant for an order granting summary judgment dismissing the complaint or, in the alternative, dismissing the complaint for failure to state a cause of action, is granted to the extent of dismissing the plaintiffs' first and second causes of action for failure to state a cause of action and granting summary judgment dismissing the plaintiffs' fourth cause of action, and is otherwise denied; and it is further

ORDERED that the cross motion by plaintiffs for an order, *inter alia*, granting summary judgment on their first, second, and third causes of action and permitting them to withdraw with prejudice their fourth cause of action, is denied.

This is an action to recover damages for breach of contract and breach of warranty, *inter alia*, based on the defendant's failure to install certain "insulation upgrades" in conjunction with the construction of the plaintiffs' house.

On May 23, 2003, the plaintiffs, as Purchaser, and the defendant, as Seller, entered into a contract for the purchase and sale of a single-family house to be constructed on land owned by the defendant in Melville, New York, at a base price of \$690,000.00. Annexed to and made a part of the parties' contract was a limited warranty replacing all other warranties on the construction and sale of the house. The limited warranty provided, in part, coverage for a period of one year from the date of delivery of the deed for "latent defects that constitute defective workmanship," and required the defendant, in the event of a defect in an item covered by the warranty, to "repair, replace, or pay the Purchaser the reasonable cost of repairing or replacing the defective item." As part of the transaction, the plaintiffs also ordered a number of options and upgrades for the house, including sound-proofing insulation to be installed in the interior walls and in the ceiling between the first and second floors at an additional cost of \$3,250.00.

Closing of title and delivery of the deed took place on January 24, 2006. After moving into the house, the plaintiffs discovered that the sound-proofing insulation had never been installed. On March 7, 2006, the plaintiffs sent to the defendant written notice of their warranty claim. The defendant subsequently offered a refund of the amount paid for the insulation, citing a limited remedy set forth in paragraph 17 of the parties' contract.¹ The plaintiffs rejected the offer, demanding instead that the defendant install the insulation. The defendant, in turn, rejected the plaintiffs' demand. This action followed.

The plaintiffs allege four causes of action in their complaint: the first, sounding in breach of contract, the second, for breach of the statutory housing merchant implied warranty set forth in General Business Law § 777-a, the third, alleging the defendant's breach of its express limited warranty that the work performed would be free from latent defects that constitute defective workmanship, and the fourth, alleging that the defendant committed deceptive acts and practices within the meaning of General Business Law § 349. The plaintiffs seek damages in an amount no less than \$64,791.00,² representing the cost of installing the insulation in the completed house, including the cost of removing and reinstalling certain sections of the sheetrock covering the walls and ceilings.

Now, discovery having been completed and a note of issue having been filed, the defendant seeks the entry of summary judgment dismissing the complaint or, in the alternative, an order dismissing the

¹ Paragraph 17 provides, in part, as follows:

17. Extras. Any extras or changes ordered by Purchaser directly from Seller, Seller's contractors or sub-contractors shall be signed by the Purchaser and must be paid for in accordance with the payment schedule established by Seller, Seller's contractors or sub-contractors, as applicable. If for any reason the Seller or Seller's contractors fail to install said extras in accordance with the work order, the limit of the Seller's or Seller's contractors' liability is a refund of the amount of the charge and same shall not be deemed an objection to title * * *.

² In their complaint, the plaintiffs allege damages in the amount of \$87,998.00, apparently based on an estimate provided by TJC Development LLC. Now, according to the affidavit of Rita Patel dated December 10, 2007, it appears that the plaintiffs have reduced their claim for damages, based on an estimate provided by Joseph W. Wallwork, PE, CCE, PSP, to reflect this "more carefully computed" amount.

complaint for failure to state a cause of action.

The Court finds that the plaintiffs failed to state a cause of action to recover damages for breach of contract. The doctrine of merger provides that once title to real property is closed and a deed is delivered, all provisions in the contract of sale merge into the deed and are thereby extinguished, absent the parties' clear intent that a particular provision survive the delivery of the deed (*e.g.*, *Hunt v Kojac*, 245 AD2d 858, 666 NYS2d 330 [1997]; *Davis v Weg*, 104 AD2d 617, 479 NYS2d 553 [1984]). Here, the plaintiffs do not allege such an intent, nor is it evident from the contract itself. Paragraph 17 of the contract, which directly addresses the Seller's responsibility and liability with respect to extras and upgrades ordered by the Purchaser, does not provide that its terms shall survive delivery of the deed. By contrast, there are at least three other paragraphs in the contract—paragraph 14, relating to the issuance of a certificate of occupancy and the Seller's obligation to complete certain unfinished items after the closing, paragraph 19, concerning the execution of required documents, and paragraph 22, incorporating the Seller's limited warranty—which, unlike paragraph 17, do expressly provide that their terms are to survive delivery of the deed.³ As there is no evidence that the parties intended the defendant's contractual obligation regarding the installation of extras and upgrades to survive the transfer of title, the Court finds that this obligation merged into the deed and was extinguished. Accordingly, the plaintiffs' first cause of action is dismissed pursuant to CPLR 3211 (a) (7) (*see, Ka Foon Lo v Curis*, 29 AD3d 525, 815 NYS2d 131 [2006]; *Crowley Mar. Assoc. v Nyconn Assoc.*, 292 AD2d 334, 738 NYS2d 681 [2002]; *Noufrios v Murat*, 193 AD2d 791, 598 NYS2d 82 [1993]).⁴

As to the plaintiffs' second cause of action, the defendant contends that it excluded the statutory

³ Although the plaintiffs now claim that paragraph 14 “actually covers the breach in question,” the Court reads its provisions as relating not to incomplete items generally but rather to those unfinished items specifically listed on a pre-title inspection form as to which the Seller retained responsibility to repair and complete after the closing. Paragraph 14 provides, in relevant part, as follows:

Purchaser will inspect his Home with a representative of the Seller during normal business hours approximately three (3) days prior to the closing date and will sign and deliver to Seller on or before closing date a Pre-Title Inspection Statement supplied by Seller, acknowledging the condition of his Home. The receipt of the executed pre-Title Inspection Statement shall be a condition precedent to closing. The Pre-Title Inspection Statement will provide that the Seller shall agree to complete all unfinished items within one hundred and twenty (120) days from the date of the closing of title, weather permitting.

The pre-title inspection form annexed to the affidavit of Rita Patel dated December 10, 2007 does not, of course, make mention of the lack of insulation, as the plaintiffs concede they did not discover the defect until March 7, 2006, more than a month after the closing.

⁴To the extent that the plaintiffs may be found to allege breach of contract based on the defendant's refusal to correct the defective condition, this likewise fails to state a cause of action, as the limited warranty excluded any common-law implied warranty (*see, Pinkus v V.F. Bldrs.*, 270 AD2d 470, 705 NYS2d 283, *lv denied* 95 NY2d 758, 713 NYS2d 2 [2000]; *Fumarelli v Marsam Dev.*, 238 AD2d 470, 657 NYS2d 61 [1997], *aff'd* 92 NY2d 298, 680 NYS2d 440 [1998]).

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housing merchant implied warranty (General Business Law § 777-a) by offering the limited warranty in its stead. To validly exclude the housing merchant implied warranty, the limited warranty offered to a purchaser must meet or exceed the standards set forth in subdivisions (4) and (5) of General Business Law § 777-b (General Business Law § 777-b [3] [d]; *accord, Latiuk v Faber Constr. Co.*, 269 AD2d 820, 703 NYS2d 645 [2000]; *Fumarelli v Marsam Dev., supra*). Upon review of the warranty terms, the Court finds that they comply in all material respects with the statute⁵ and, therefore, this cause of action is dismissed as well.

The Court, however, finds the plaintiffs' third cause of action sufficient to withstand the defendant's motion. The defendant claims that its inadvertent failure to install the insulation—as opposed to installing the insulation incorrectly, or using the wrong type of insulation—does not constitute “defective workmanship.” The Court finds this claim wanting. The defendant was charged with the responsibility of installing the insulation and failed to do so. Had the defendant installed only a fraction of the insulation, there would be no question but that such workmanship was defective. Nevertheless, the defendant would have this Court find that a complete abdication of its responsibility is somehow excusable, *i.e.*, that doing its job poorly enough would relieve it of liability under the warranty—an argument the Court is constrained to reject as fundamentally illogical. Whether, as the defendant also contends, the failure to install the insulation was inadvertent has no bearing on the issue of coverage under the limited warranty. The defendant's further attempt to analogize the failure to install insulation with a failure to install an appliance such as a stove (for which, according to the defendant, the remedy would be nothing more a refund of the price of the stove) is unpersuasive as well; it is because the failure to install a stove would be a patent defect that the limited warranty would not apply. Accordingly, the defendant's showing is insufficient to warrant summary dismissal of the third cause of action.

Insofar as the defendant's motion is addressed to the plaintiffs' fourth cause of action, the plaintiffs have offered to withdraw this cause of action, with prejudice. Since the plaintiffs have conceded that this cause of action lacks merit, and to obviate the need for a stipulation or order of discontinuance (*see*, CPLR 3217), the Court hereby grants summary judgment dismissing the plaintiffs' fourth cause of action, and the corresponding branch of the plaintiffs' cross motion is denied as academic.

⁵ Although the limited warranty leaves blank the name and address of the Purchaser, so that its statement that it is “given to the Purchaser” would seem to discount the requirement that it identify the party or parties to whom it is extended (*see*, General Business Law § 777-b [4] [c]), the Court notes that it is annexed to and incorporated in the parties' contract, and that the contract does identify the plaintiffs as Purchaser.

The Court further notes that paragraph 22 of the parties' contract satisfies the requirements of General Business Law § 777-b (3) (a)-(c) insofar as it (i) reflects the plaintiffs' acknowledgment that a copy of the limited warranty was provided for their examination a reasonable time prior to their execution of the contract, (ii) provides that a copy of the limited warranty is annexed to and incorporated in the contract, (iii) “conspicuously” mentions the housing merchant implied warranty, (iv) provides that the defendant makes no housing merchant implied warranty or any other warranties in connection with the contract, and (v) provides that there are no warranties, apart from the limited warranty, which extend beyond the face of the contract.

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The remaining branch of the plaintiffs' cross motion, which is for summary judgment, is denied as untimely, the cross motion having been made more than 120 days after the filing of the note of issue without any showing of good cause for the delay (*see*, CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

The Court directs that the remaining claim in this action, the plaintiffs' third cause of action, be severed and continued (*see*, CPLR 3212 [e] [1]).

Dated: April 14, 2008
RIVERHEAD, NY

Mark Keri
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION