

Kanas v Strategic Columbia Enters., LLC

2008 NY Slip Op 31436(U)

May 14, 2008

Supreme Court, New York County

Docket Number: 0602838/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Inching

PART 10

Index Number : 602838/2007
KANAS, JENNIFER
VS.
STRATEGIC COLUMBIA ENTERPRISES
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n 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
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED

MAY 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

MAY 14 2008

Dated: _____

HON. JUDITH J. GISCHE

HON. JUDITH J. GISCHE, S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate

DO NOT POST

REFERENCE

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

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

-----X
Jennifer Kanas,

Plaintiff,

-against-

Strategic Columbia Enterprises, LLC,
Strategic Construction Corporation,
Strategic Development Group, Inc.,
Strategic Development & Construction
Group, NYC Department of Housing
Preservation and Development a/k/a
NYC Housing Partnership-New Homes
Program, Scarno Archetects¹ PLLC and
NYC Partnership Housing Development
Fund Company, Inc.,

Defendants.
-----X

Decision/ Order

Index No.: 602838/07

Seq. No.: 002, 003

Present:

Hon. Judith J. Gische, JSC

FILED
MAY 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Papers

Numbered

MOTION SEQ 2:

- Strategic Defs' n/m (§3211) w/SDK affirm, JJF affid, exhs 1
- Pltff opp w/JK affid 2
- Strategic Defs' reply 3

MOTION SEQ 3:

- Def Scarno n/m (§3211) w/RMS affid, RTM affirm, exhs 4
- Strategic Defs' opp w/SDK affirm 5
- Pltff opp w/JK affid 6
- Def Scarno reply w/RTM affirm 7

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

This is an action for damages arising from a purchase agreement for land and the construction of a building on that land. Before the court are two pre-answer motions

¹This is the spelling in the Summons and Complaint.

to dismiss the complaint based upon the existence of documentary evidence [CPLR § 3211 (a) (1)]; that plaintiff's claims are time barred [CPLR § 3211 (a) (5)]; and that plaintiff has failed to state a cause of action [CPLR § 3211 (a) (7)]. Motion sequence number 2 is by the Strategic defendants, whereas motion sequence number 3 is by the architect. Plaintiff opposes each motion and the Strategic defendants oppose the architect's motion.

On a motion to dismiss pursuant to CPLR§ 3211, the pleading is to be afforded a liberal construction and the facts as alleged in the complaint must be accepted by the court as true, and are to be accorded every favorable inference. Leon v. Martinez, 84 NY2d 83 (1994); Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). In deciding these motions to dismiss the court will consider whether, accepting all of the plaintiff's facts, they support the causes of action asserted. Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976). The court will also consider whether the moving defendants have presented documentary evidence that conclusively establishes a defense to the cause of action, as a matter of law. Goshen v. Mutual Life Insurance Co., 98 NY2d 314 (2002); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995).

Since defendants also contend that even if plaintiff has pled viable causes of action, the case must nonetheless be dismissed because they were not timely commenced, the court will decide whether accepting all of plaintiff's facts as true, her claims are timely. Guggenheimer v. Ginzburg, 43 NY2d 268 (1977); Rovello v. Orofino Realty Co., supra; Morone v. Morone, supra; Beattie v. Brown & Wood, supra.

These motions are consolidated for consideration and decision in accordance

with the following:

Facts and Arguments Considered

Plaintiff entered into a purchase agreement dated December 28, 2001 with defendant Strategic-Columbia Enterprises, LLC s/h/a Strategic Columbia Enterprises, LLC ("SCE") to purchase land at 90 Kane Street, Brooklyn, with a three family home built on it ("purchase agreement"). This purchase agreement was part of an overarching development program involving NYC Partnership Housing Development Fund Company, Inc., previously a defendant in this action.² Under the purchase agreement, plaintiff is designated as the purchaser and SCE the owner.

The house was build for SCE by Strategic Construction Corporation ("Strategic Construction") as per a separate construction agreement dated May 31, 2001. In that construction agreement SCE is designated the "owner" and Strategic Construction the "contractor." Defendants Scarano Architects PLLC s/h/a Scarno Archetects (*sic*) PLLC are identified as the architects of the project ("architects"). Plaintiff is not a party to that agreement which predates her purchase agreement with SCE. The architects and Strategic Construction have a separate AIA contract for the project; it is dated July 19, 2000 ("architect's agreement"). Plaintiff is likewise not a party to that AIA contract which predates her purchase agreement with SCE.

Plaintiff contends that the house she bought has numerous defects. She contends that this is because the work done by the defendants was done in a defective, incompetent, and grossly negligent manner, causing her to sustain tens of thousands in

²The HDFC brought a prior motion to dismiss which the court granted. Order, Gische J., 11/26/07.

monetary damages.

Plaintiff contends that the roof has leaked from the beginning and the leak caused the ceilings on the upper floors to collapse, the floors to buckle and the accumulation of mold. She seeks the expenses attendant to these repairs, and those that still need to be made (1st cause of action).

Plaintiff has also had problems with the plumbing; the pipes have burst 3 times since she took possession. She contends it will cost thousands to repair/replace the plumbing system (2nd cause of action).

As a result of having filed claims with her insurance company, her home owner's insurance premiums have increased, and plaintiff seeks to recover the increased expense attendant to these premiums (3rd cause of action). Plaintiff contends she has suffered damages that include: lost rental income because her tenants have moved out, lost vacation time, etc. (4th cause of action); and losses due to destroyed property, mental anguish, loss of work, and loss of vacation time (5th cause of action). The 6th cause of action is for compensatory damages for mental anguish, etc., damaged credit, and being forced to live in uninhabitable conditions.

Plaintiff's claims that SCE defendants fraudulently induced her into believing the project would be handled by competent professionals who knew what they were doing. She contends further that SCE instead hired incompetents who failed to build a house that was up to code.

While conceding that her purchase agreement is with SCE, plaintiff nonetheless contends there is a legal basis to pierce the corporate veil so she can also hold the other named defendants liable for her damages. She contends that Strategic

Development & Construction Group ("SDCG") is the umbrella or "mother" company of the other Strategic defendants, including Strategic Construction, Strategic Development Group, Inc. ("Strategic Development"), and SCE the builder from whom she bought the land and house. Plaintiff states that the defendants have officers in common including John Frezza, who is not only SCE's managing member, but also the president of Strategic Construction and Strategic Development, and he performs "president-like" functions for SDCG, even though it does not formally have officers. She refers to the web site for SDCG and the statements contained therein, including the following:

"Through Strategic Development Group, Inc. [Development], we oversee all aspects of a project's development including: 1) identifying sites to be acquired, 2) formulating budgets, 3) analyzing the feasibility of a project, 4) negotiating construction and permanent financing, 5) marking the for-sale and/or rental units, and 6) managing the operation of property."

" Through our construction company, Strategic Construction Corporation [Construction], we act as the general contractor or construction manager on gut rehabilitations and new construction projects . . . We also retain the services of our own crews to directly execute portions of work, backup primary subs, and to consummate punch list activities in a timely manner."

Based upon Mr. Frezza's affidavit, the statements on the website, and the fact that the defendants have the same business address, plaintiff contends the defendants do not have distinct identities, but are so dominated by Mr. Frezza, that the companies are alter egos of each other. Though not expressly stated as such, plaintiff also makes claims that she is the third party beneficiary of SCE's contract with Strategic Construction and Strategic Construction's contract with the architect.

Plaintiff states that the defendants willfully, maliciously, and intentionally

constructed the home without any insulation between the interior sheet rock walls and the exterior siding which is why whenever it rains water seeps into the building. She claims that the fact that the roof leaks is yet another example of how the defendants defrauded her.

Plaintiff argues that the architects obtained the certificate of occupancy in August 2002 by submitting false statements to the Department of Buildings, including that the building was built to code when in fact it could not have been given all the leaks, etc., she has endured. Plaintiff contends that under their agreement with Strategic Construction, the architects assumed the obligation of supervising or inspecting the project as it progressed. While acknowledging that there is a three year statute of limitations on a claim for professional malpractice, she contends it is inapplicable to her claims because they are not based on contract, but tort based.

The architects argue that this action is time barred [CPLR § 214 (6)] because their services ended in August 2002, with the issuance of the certificate of occupancy. This action was not commenced until August 2007, after the time limitations had expired. They also argue that there is no basis for plaintiff's claim, that they were obligated to supervise the project.

SCE argues that plaintiff's claims against it are untimely because of the time limitations contained in the limited warranty ("warranty") of the purchase agreement. As per paragraph 12 (b) of warranty, any action based upon an alleged breach of the warranty has to be commenced within 90 days after the expiration of the applicable warranty coverage - or - within one (1) year after the last date the builder makes repairs in response to a claim under the warranty.

While acknowledging that it made repairs in October and December 2005, and again in Summer 2007, SCE nonetheless contends these repairs were made after the contractual limitations period had expired, and they did not revive plaintiff's already stale warranty claims.

SCE also contends that plaintiff cannot recover compensatory damages under the warranty because its liability is restricted to 100% of the actual cost to replace the home. SCE also contends that the warranty expressly "excludes all consequential, incidental, special and indirect damages, except as required by law or otherwise set forth herein . . ."

SDCG, Strategic Development and Strategic Construction argue that there is no contractual privity between themselves and the plaintiff, nor is she an intended third party beneficiary of SCE's contract with Strategic Construction. These defendants also rely upon the following language in the construction contract (Article 1.1.2, General Conditions):

"The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner [SCE] and a Subcontractor or Sub-subcontractor, (3) between the Owner [SCE] and Architect, or (4) between any persons or entities other than the Owner and Contractor."

The Strategic defendants argue that there is no basis for the corporate veil to be pierced because plaintiff has asserted no facts that any of the defendants abused the corporate form to commit a fraud against her. The Strategic defendants collectively argue that at most, plaintiff only has a contract based claim against SCE.

The Strategic defendants argue that plaintiff's only avenue of relief is under the

limited warranty, but not only did plaintiff fail to commence this action within ninety (90) days after the expiration of the warranty -or - within one year after the last repair was made in response to a claim, she failed to comply with the notice of claim procedures in the warranty.

Discussion

The architect's motion

Affording the complaint its most liberal interpretation, and accepting her facts as true, plaintiff has no cause of action against the architects not only because it is time barred, but also because there is no privity between them, and further because the architect's contract does not require it to supervise the construction project.

The architects filed for and obtained the certificate of occupancy five (5) years ago. Plaintiff's claim is that they either committed malpractice or defrauded her. A three year statute of limitations applies to a professional malpractice action, accruing on the date of the injury to the property. IFD Construction Corp. v. Corddry Carpenter et al., 253 AD2d 89, 92 (1st Dept 1999). The architects' services ended in August 2002 with the issuance of the certificate of occupancy, but this action was not commenced until August 2007. It is, therefore, time barred.

Even were the court persuaded that the action is not time barred, the architects and plaintiff have no direct contract, and any of plaintiff's claims are considered only upon principles attendant to third party beneficiaries. A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his/her benefit and (3) that the benefit to him/her is sufficiently immediate, rather than incidental, to indicate the

assumption by the contracting parties of a duty to compensate him if the benefit is lost.”

State of California Public Employees' Retirement System v. Sherman & Sterling, 95 NY2d 427, 435 (2000).

Plaintiff is not a third party beneficiary. As per the plain language in the architects' contract with Strategic Construction, the contract was for the direct benefit of the construction company: i.e. design a building we (the construction company) can construct. SCE and plaintiff did not even have a purchase agreement in place when the architects entered into the contract with Strategic Construction.

Plaintiff has also failed to identify any fraudulent statements that the architects made in order to obtain the certificate of occupancy. The elements of an action for fraud are a misrepresentation or an omission of fact, which is false, and known to be false by the defendant, scienter, reasonable reliance and injury. Small v. Lorillard Tobacco Co, Inc., 94 NY2d 43, 57 (1999). Plaintiff simply claims that the Department of Buildings never would have issued the certificate of occupancy for a building that is in the condition she claims it to be. She also claims the architects should have, but failed to, supervise the construction. The architect's contract with SCE, however, is not for supervision of the construction work, but for architectural services. Finally, plaintiff has not provided any information about which facts the architects knew were false, but were nonetheless misrepresented or omitted to the Department of Buildings.

The court has considered the Strategic defendants' argument, that the architects should be dismissed from the case only if they are also dismissed, otherwise the architects should remain as defendants because Strategic defendant intends to assert cross claims against them. This is not a valid legal reason to keep the architects in the

case as direct defendants. The court will, therefore, grant the architects' motion to dismiss but without prejudice to the remaining defendants asserted any claims against them in a 3rd party action. Consequently, all of plaintiff's claims against the architects are dismissed because they are time barred and even if timely, she has not stated a cause of action against them for professional malpractice.

Strategic-Columbia Enterprises, LLC

Affording the complaint its most liberal construction, plaintiff has stated a cause of action under the purchase agreement against this defendant, the builder/developer/owner of the land and building she purchased. Accepting plaintiff's factual claims, SCE has not, at this stage, proved that her claims are brought after the expiration of the time limitations set forth in the warranty. The court has also considered SCE's separate claims about whether plaintiff followed the procedure set forth in the warranty to notify SCE of claims. While there may be factual disputes, at this stage the court accepts plaintiff's facts, that she followed the procedure, or they were waived because SCE made repairs as recently as 2007.

Turning to the fraud claims against SCE, the court has considered whether plaintiff has pled a breach of duty separate from, or in addition to, a breach of the purchase agreement. First Bank of Americas v. Motor Car Funding, Inc., 257 A.D.2d at 291 (internal citations omitted). Courts have held that a fraud claim that merely restates a breach of contract claim is redundant and should be dismissed. First Bank of Americas v. Motor Car Funding, Inc., 257 AD2d 287, 291 (1st Dept. 1999).

Plaintiff's facts do not support a fraud claim against SCE. She has not identified any misrepresentations or omissions of fact that SCE made which were false, and

known to be false, when made and were therefore made to fraudulently induce her into signing a contract SCE had no intention in delivering. Small v. Lorillard Tobacco Co, Inc., supra. Even accepting her facts, that the defendant skimmed on materials, or did its job shoddily, the facts supporting her contract based cause of action are indistinguishable from those alleged in connection with her fraud cause of action. Therefore, plaintiff's fraud based claims against SCE are dismissed.

Strategic Construction Corporation, Strategic Development Group, Inc., and Strategic Development and Construction Group

In order to pierce the corporate veil, plaintiff must present facts tending to show that a parent corporation exercised complete domination and control with respect to the transaction attacked, and (2) such domination was used to commit a fraud or wrong against the plaintiff. Teacher's Ins Annuity Ass'n of America v. Cohen Optical, 45 A.D.3d 317, 318 (1st Dept 2007) (*internal citations omitted*). Plaintiff's fact do not support a claim for piercing the corporate veil for the reasons that follow.

The mere fact that the defendants have the same address, and officers in common is meaningless, unless there are facts tending to show the umbrella or "mother" company dominated the others such that they had no separate identities, and that this domination was used to commit a fraud or wrong against her. Thus, plaintiff would have to provide factual claims and allegations from which one could conclude SDCG had such complete control over its subsidiaries that the interests of the subsidiaries was being ignored to serve business interests of the dominating corporation. See generally: Morris v. NYS Dep't of Tax'n and Fin, 82 NY2d 135 (1993). Plaintiff has not pled any facts, let alone set forth particularized statements, detailing fraud or other corporate misconduct that support her claim, that the corporate form

must be disregarded in order for her to achieve equity. See: Bowles v Errico, 163 AD2d 771 (3rd Dept 1990).

The court also decides that for the same reason plaintiff has failed to state a claim against the architects (no privity, and she is not a third party beneficiary of any contract), plaintiff's claims against Strategic Construction also fail.

Since Strategic Construction, Strategic Development and SDCG are not in privity with plaintiff, and she has not pled any facts that support a cause of action to pierce the corporate veil, all the claims against these three defendants must be, and hereby are, dismissed as well.

Compensatory damages

Plaintiff contends that she is entitled to compensatory damages, notwithstanding the limitations in the warranty for recovery only of her actual damages. She has not pled a cause of action to set aside the contract, or the warranty, but argues that it should not be enforced because it is was for too short a period of time, and she had no say in the terms it contained. Plaintiff contends the agreement and warranty were presented to her on a "take it leave it" basis and she had to sign them or lose the deal. She urges the court to consider that she was a novice purchaser and did not know what she was doing when she entered into the contract.

A seller may exclude or modify all express and implied warranties, including housing merchant implied warranty created by statute or common law, provided that the purchase agreement contains a limited warranty in accordance with the General Business Law. Fumarelli v. Marsam Development, Inc., 238 A.D.2d 470 (2d Dep't 1997) aff'd, 92 N.Y.2d 298 (1998). The seller's ability to limit liability in a warranty is, however,

qualified by the doctrine of unconscionability under the Uniform Commercial Code and common law. Sablosky v. Gordon, 73 NY2d 133, 139 (1989). Generally, unconscionability requires a showing that the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and there was an inequality of bargaining power between the parties.

Even allowing plaintiff's factual claims the broadest latitude, she has not pled facts that support any claim against the defendants based upon unconscionability. She decided she wanted to purchase the property, and to do so she had to agree to the warranty. She has not described any high pressure tactics, or deceptive acts. In any event, the period of time does not appear on its face to be unconscionable and warranties of similar length have been enforced. See: Kassner & Co v. City of New York, 46 NY2d 544 (1979); Top Quality Wood Work Corp. v. City of New York, 191 AD2d 264 (1st Dept 1993).

The warranty limits plaintiff to her actual damages and in paragraphs 5, 6 and 7 identifies the types of damages that are excluded. The exclusions include, but are not limited to: loss or damage caused by seepage of water, loss or damage of personal property, and loss of use during repairs. Therefore, plaintiff cannot maintain this action to recover consequential, incidental, special or indirect damages, including compensation for: increased insurance premiums (3rd cause of action), lost rental income (4th cause of action), property damage, mental anguish, loss of work, loss of vacation time, inconvenience, pain and anguish (5th cause of action), and mental anguish, damaged credit, etc, and damages as a result of being forced to live in uninhabitable conditions (6th cause of action).

Conclusion

The motion by defendants Scarano Architects PLLC s/h/a Scarno Archetects (sic) PLLC to dismiss the complaint is granted and all claims against it are hereby dismissed, without prejudice to any third party that may be commenced by the defendants who remain in this action.

The motion by the Strategic defendants to dismiss the complaint is granted as follows: all claims against Strategic Construction Corporation, Strategic Development Group, Inc., Strategic Development & Construction Group are hereby dismissed. The fraud/ tort based claims against Strategic-Columbia Enterprises, LLC s/h/a Strategic Columbia Enterprises, LLC are hereby dismissed as are the 3rd, 4th, 5th and 6th causes of action, all of which seek consequential, incidental, and compensatory damages.

This action continues as to Strategic-Columbia Enterprises, LLC s/h/a Strategic Columbia Enterprises, LLC on the contract based claims. Its time to answer is extended by ten (10) days following the date of this decision/order.

The preliminary conference in this case will be held on JUNE 26, 2008 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122. No further notices will be sent.

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

This constitutes the decision and order of the court.

Dated: New York, New York
May 14, 2008

So Ordered

Hon. Judith J. Gissel

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