

Beiter v Farrell Homes, Inc.

2008 NY Slip Op 31572(U)

June 10, 2008

Supreme Court, Greene County

Docket Number: 0020041/0971

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

KEVIN BEITER and THERESA BEITER,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 04-1097
RJI NO. 19-06-2418

FARRELL HOMES, INC. and
MODULAR STRUCTURES OF
PENNSYLVANIA, INC.,

Defendants.

FARRELL HOMES, INC. and
MODULAR STRUCTURES OF
PENNSYLVANIA, INC..

Third-Party Plaintiffs,

-against-

LUCCI CONSTRUCTION, INC.
and TIMOTHY STEHLIN,

Third-Party Defendants.

Supreme Court Greene County All Purpose Term, April 14, 2008

APPEARANCES:

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June F. Johnston, Esq.
Attorney for Third-Party Defendant Stehlin
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TERESI, J.:

Third-party defendant Lucci Construction, Inc. (Lucci) moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) for failing to state a cause of action and also moves to dismiss the cross claim of the third-party defendant Timothy Stehlin (Stehlin). Stehlin cross-moves to dismiss the third-party complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Defendant/third-party plaintiff, Farrell Homes, Inc. (Farrell) opposes the motions of Lucci and Stehlin. Third-party plaintiff, Modular Structures of Pennsylvania, Inc. (Modular) oppose the motions of Lucci and Stehlin and cross-move for leave to amend the third-party complaint pursuant to CPLR § 2215.

In July 2001, the plaintiffs contracted to purchase a modular home from Farrell Homes. Farrell ordered the materials from Modular. The plaintiffs entered into separate contract with

Lucci to construct the foundation. The plaintiffs entered into a separate contract with Stehlin for the installation of hardwood floors. On November 18, 2004, the plaintiffs commenced an action against Farrell and Modular alleging causes of action for negligence, breach of contract, breach of express and implied warranties and fraud. In November 2007, Farrell and Modular commenced a third-party action against defendants Lucci and Stehlin seeking indemnification and contribution for the negligent construction of the home. The defendants interposed various affirmative defenses and cross claims.

Lucci and Stehlin seek the dismissal of the third-party complaint alleging there is no express indemnification agreement between them and the third-party plaintiffs. The defendants contend contribution is available only when a defendant in the underlying complaint is subject to damages in tort for personal injury, injury to property or wrongful death pursuant to CPLR § 1401. The defendants allege since the plaintiffs seek damages for breach of contract for economic loss as a result of the defects in the modular home, there is no basis for contribution. The defendants contend the plaintiffs have failed to state an actionable cause of action

Third-party plaintiffs, Farrell and Modular allege they are entitled to indemnification and contribution from Lucci and Stehlin for the negligent installation of the foundation and flooring for causes of action in negligence and breach of warranty.

In response to a motion pursuant to CPLR 3211, the pleadings shall be liberally construed, the facts alleged accepted as true, and every possible favorable inference given to plaintiff. See, Leon v. Martinez, 84 NY2d 83 (1994); Manupella v. Troy City Zoning Board of Appeals, 272 AD2d 761 (3rd Dept. 2000). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action. See, Guggenheimer v. Ginzburg, 43

NY2d 268 (1977). In examining the sufficiency of the pleading, the court must accept the facts alleged as true and interpret them in the light most favorable to the plaintiff. See, Matter of Board of Education v. State Education Dept., 116 AD2d 939 (3rd Dept. 1986). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint. See, Leon v. Martinez, *supra*, 87-88; Pietrosanto v. NYNEX Corp., 195 AD2d 843 (3rd Dept. 1993).

After a review of the record, the Court will grant the motions of the third-party defendants Lucci and Stehlin and dismiss the third-party complaint in all respects. The Court also dismisses the cross-claim of Stehlin against Lucci. The third-party plaintiffs have not presented a cognizable legal theory of recovery by alleging contribution and indemnification in a breach of contract action. The plaintiffs allege a breach of contract and breach of warranty for economic loss for a defective modular home. CPLR § 1401 limits contribution to instances where "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death..." A defendant may not seek contribution from other defendants when the alleged tort is essentially a breach of contract. See, Westbank Contracting, Inc. v. Rondout Valley, 46 AD 3d 1187 (3rd Dept. 2007); Tempforce, Inc. v. Municipal Hous. Auth. Of City of Schenectady, 222 AD 2d 778 (3rd Dept. 1995); *lv denied* 87 NY 2d 811 (1996)). "One is entitled to implied indemnification where he or she has committed no wrong but is held vicariously liable for the wrongdoing of another." See, Westbank Contracting, Inc. v. Rondout Valley, *supra* 1189. However, There is no relationship between Lucci and Stehlin with Farrell and Modular that would create a claim based on vicarious liability as Lucci and Stehlin contracted directly with the plaintiffs. See, Kozerski v. Deer Run Homeowners Assn., 217 AD 2d

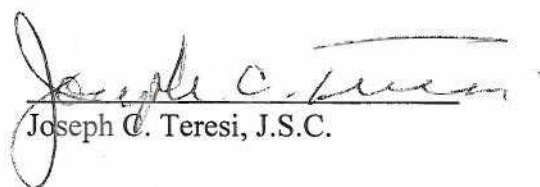
841 (3rd Dept.1995).

The third-party plaintiffs seek to amend the third-party complaint against Lucci and Stehlin. The amended complaint again seeks contribution and indemnification. The motions to amend the complaint are deemed moot as this Court dismissed the third-party complaints.

All papers, including this Decision and Order are being returned to the attorneys for the third-party defendant, Lucci Construction, Inc. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 10, 2008



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated February 28, 2008;
2. Affidavit of Conor E. Brownell, Esq. dated February 28, 2008 with attached exhibits 1-5;
3. Defendant Lucci's Memorandum of Law dated February 28, 2008;
4. Notice of Cross-Motion dated March 31, 2008;
5. Affirmation of June F. Johnston, Esq. dated March 31, 2008 with attached exhibits A-H;
6. Defendant Stehlin's Memorandum of Law dated March 31, 2005;
7. Affirmation of Robert A. Becher, Esq. dated April 3, 2008 with attached exhibit A;
8. Affirmation of June F. Johnston, Esq. dated April 7, 2008;
9. Notice of Cross-Motion dated March 27, 2002;
10. Affirmation of Carol C. Pierce, Esq. dated March 27, 2008 with attached exhibits A-J;
11. Notice of Cross-Motion dated April 2, 2008;
12. Affirmation of Carol C. Pierce, Esq. dated April 2, 2008 with attached exhibits A-H;
13. Defendant Lucci's Reply Memorandum of Law dated April 6, 2008;
14. Affirmation of June F. Johnston, Esq. dated April 7, 2008.