

Foss v Hamlet at Willow Creek, LLC

2008 NY Slip Op 32563(U)

September 19, 2008

Supreme Court, Suffolk County

Docket Number: 0032180/2007

Judge: Elizabeth H. Emerson

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SHORT FORM ORDER

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NO.: 32180-07

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. EmersonMOTION DATE: 6-2-08
SUBMITTED: 6-12-08
MOTION NO.: 001-MOT D

_____ x
LORAINÉ FOSS individually, and as
administrator of the estate of LAWRENCE S.
FOSS, deceased, and RICHARD SEIDELL,

Plaintiffs,

KUSHNICK & ASSOCIATES, P.C.
Attorneys for Plaintiff
445 Broadhollow Road, Suite 124
Melville, New York 11747

-against-

THE HAMLET AT WILLOW CREEK, LLC,
HAMLET AT WILLOW CREEK
DEVELOPMENT, CO., LLC, HAMLET AT
WILLOW CREEK DEVELOPMENT CORP.,
HOLIDAY ORGANIZATION, INC. and
HOLIDAY MANAGEMENT ASSOCIATES,
INC.,

ROSENBERG & FORTUNA, LLP
Attorneys for Defendants
666 Old Country Road
Garden City, New York 11530

Defendants.

_____ x

Upon the following papers numbered 1 34 read on this motion for summary judgment ; Notice of Motion and supporting papers 1-8 ; Notice of Cross Motion and supporting papers _____ ; Answering Affidavits and supporting papers 9-32 ; Replying Affidavits and supporting papers 33-24 ; it is,

ORDERED that this motion by the defendants for summary judgment dismissing the complaint is granted to the extent indicated below; and it is further

ORDERED that the motion is otherwise denied.

The defendant The Hamlet at Willow Creek, LLC (hereinafter Hamlet) is the sponsor of a condominium development located in Mt. Sinai, New York, known as The Hamlet at Willow Creek Golf Villa Condominium (hereinafter Willow Creek). On October 28, 2002, the

plaintiff Loraine Foss and her husband, Lawrence Foss, entered into an agreement with Hamlet to purchase a condominium home in the Willow Creek development. The purchase agreement provided, inter alia, that Hamlet would construct the home in accordance with the requirements of the Town of Brookhaven Building Department regarding materials and workmanship and that the construction would be in substantial accordance with the plans filed with the Building Department. A limited warranty was annexed to the purchase agreement as a rider and incorporated therein by reference. The offering plan was also incorporated by reference in and made part of the purchase agreement, which provided that the offering plan would survive delivery of the deed. On May 26, 2004, title to the premises was conveyed to the Fosses. Lawrence Foss passed away on November 19, 2005, and the plaintiff Loraine Foss was appointed the administrator of his estate on December 21, 2005. On May 1, 2006, the plaintiff Richard Seidell moved into the subject premises. His name was added to the deed on June 22, 2007.

After moving in, the Fosses discovered a variety of purported defects including, but not limited to, windows that were difficult to open and close and that leaked, air infiltration through the windows and doors, improper or inadequate insulation and vapor barrier, cracks in the sheetrock and concrete, and defective or negligently installed floor trusses. Defects from poor workmanlike construction were so pervasive throughout Willow Creek that a committee was formed in November 2005 for the purpose of compiling data on the construction problems experienced by the homeowners. Pursuant to the terms of the limited warranty, the Fosses notified Hamlet of the aforementioned defects by completing and submitting numerous notice-of-warranty claim forms. Between 2004 and 2007, Hamlet attempted to remediate and repair the purported defects. However, the plaintiffs contend that the repairs were performed in a negligent and poor workmanlike manner, resulting in additional damages and unsafe or hazardous conditions. The Town of Brookhaven Building Department issued a stop work order on March 13, 2007, due to the failure to obtain a building permit and the failure to comply with the New York State Fire Prevention and Building Code and the Codes of the Town of Brookhaven. This action ensued.

The plaintiffs commenced this action on October 22, 2007, against Hamlet and several related entities. The complaint contains nine causes of action sounding in breach of contract, breach of warranty, restitution, and fraudulent inducement, among other things. Issue was joined on November 13, 2007. The defendants now move for summary judgment dismissing the complaint in its entirety.

Summary judgment is warranted when there are no issues of fact to be resolved by the trier of fact (*see, Hartford Accident & Indemnity Co. v Wesolowski*, 33 NY2d 169, 172; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see, Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Sillman v Twentieth Century Fox Film Corp.*, *supra* at

404). To defeat the motion, the opponent must present evidentiary facts sufficient to raise a triable issue of fact (*see*, **Freedman v Chemical Constr. Co.**, 43 NY2d 260, 264). Mere conclusions, expressions of hope, or unsupported allegations or assertions are insufficient to defeat a motion for summary judgment (*see*, **Zuckerman v City of New York**, *supra* at 562).

Breach of Contract

The first cause of action seeks to recover damages for breach of contract. In order for someone to be liable for a breach of contract, that person must be a party to the contract. Privity or its equivalent remains the predicate for imposing liability for nonperformance of contractual obligations (*see*, **Danica Plumbing & Heating v Amoco Constr. Co.**, 18 Misc 3d 1137[A], at *3). The record reflects that the plaintiff Richard Seidell had no contractual relationship with any of the defendants, nor was he an intended third-party beneficiary of the purchase agreement between the Fosses and Hamlet (*see*, **Hamlet on Olde Oyster Bay Home Owners Assoc. v Holiday Organization**, 12 Misc 3d 1182[A] at *22). Accordingly, the first cause of action is dismissed insofar as it is asserted by the plaintiff Richard Seidell.

While the limited warranty contained in the Fosses' purchase agreement precludes the plaintiffs' assertion of a cause of action sounding in common-law breach of contract (*see*, **Respecki v Parex Inc.**, 300 AD2d 292), the plaintiffs allege that the defendants violated specific provisions of the purchase agreement other than the warranty provisions (*see*, **Tiffany at Westbury Condominium v Marelli Dev. Corp.**, 40 AD3d 1073, 1076; **Taggart v Martano**, 282 AD2d 521, 522). The plaintiffs allege that the defendants breached their contractual obligation to construct the plaintiffs' home in accordance with the requirements of the Town of Brookhaven Building Department regarding materials and workmanship and in substantial accordance with the plans filed with the Building Department. Additionally, the offering plan, which was incorporated by reference into the purchase agreement and survived delivery of the deed, provided that the sponsor comply with all applicable laws, rules, regulations, and other governmental requirements including, but not limited to, the Building Code of the Town of Brookhaven and that construction of the Willow Creek homes be in substantial accordance with the plans filed and approved by the Town of Brookhaven. Since the offering plan and purchase agreement contained specific provisions regarding how the plaintiffs' home was to be constructed that are separate and apart from the limited warranty, the plaintiffs are entitled to assert a common-law breach-of-contract cause of action with respect to those provisions. (*see*, **Tiffany at Westbury Condominium v Marelli Dev. Corp.**, *supra* at 1076). Accordingly, the court declines to dismiss the first cause of action insofar as it is asserted by the plaintiff Loraine Foss.

Negligence

The second cause of action seeks to recover damages for the defendants' purported negligent repair of the premises. A simple breach of contract is not to be considered a

tort unless a legal duty independent of the contract itself has been violated (*see*, **Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, 70 NY2d 382, 389). The plaintiffs have failed to allege or demonstrate that the defendants owed it a legal duty independent of the contractual duty and that the defendants breached that independent duty (*see*, **Clemens Realty v New York City Dept. of Educ.**, 47 AD3d 666, 667). When, as here, the plaintiff is essentially seeking enforcement of its bargain, namely economic loss under the contract, the action should proceed under a contract theory (*see*, **Sommer v Federal Signal Corp.**, 79 NY2d 540, 552; **17 Vista Fee Assocs. v Teachers Ins. & Annuity Assoc. of Am.**, 259 AD2d 75, 83). The plaintiffs may not sue in tort notwithstanding the use of familiar tort language in the complaint (*see*, **17 Vista Fee Assocs. v Teachers Ins. and Annuity Assoc. of Am.**, *supra* at 83). Accordingly, the second cause of action is dismissed.

Breach of the Covenant of Good Faith and Fair Dealing

The third cause of action alleges that the defendants breached their implied duty of good faith and fair dealing. In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance (*see*, **511 W. 232nd Owners Corp. v Jennifer Realty**, 98 NY2d 144, 153). Since this cause of action is predicated on the same conduct as the plaintiffs' breach-of-contract claim and alleges the same damages, it is duplicative of the first cause of action for breach of contract (*see*, **Pludeman v Northern Leasing Sys.**, 40 AD3d 366, 368, *affd* 10 NY3d 486; **Board of Mgrs. Of the Arches at Cobble Hill Condominium v Hicks & Warren, LLC**, 18 Misc 3d 1103[A] at *8). Accordingly, the third cause of action is dismissed.

Restitution

The fourth cause of action seeks to recover damages for unjust enrichment. A cause of action pursuant to a quasi-contract theory only applies in the absence of an express agreement (*see*, **Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.**, 70 NY2d 382, 388). When there is no dispute regarding the existence of a contract and the contract covers the dispute between the parties, the plaintiff may not proceed upon a theory of quantum meruit as well as seek to recover damages for breach of contract (*see*, **Alamo Contract Builders v CTF Hotel Co.**, 242 AD2d 643). Without removing the express contract from the picture in the normal fashion (i.e., rescission, abandonment, etc.), it is not possible to ignore it and proceed in quantum meruit (*see*, **SAA-A, Inc. v Morgan Stanley Dean Witter & Co.**, 281 AD2d 201, 203; **Unisys Corp. v Hercules Inc.**, 224 AD2d 365, 367). Since the plaintiffs do not contend that the purchase agreement and offering plan are unenforceable, they cannot establish their claim for damages thereunder based on the theory of unjust enrichment (*see*, **Unisys Corp. v Hercules Inc.**, *supra* at 367). Accordingly, the fourth cause of action is dismissed.

Fraudulent Inducement

The fifth cause of action alleges that the plaintiffs were fraudulently induced to

contract with the defendants. It is well established that a cause of action for fraud may not be maintained when the only fraud charged relates to a breach of contract (*see, Alamo Contract Builders, Inc. v CTF Hotel Co.*, 242 AD2d 643; *McKernin v Fanny Farmer Candy Shops*, 176 AD2d 233). To maintain a claim of fraud in such a situation, the claimant must (i) demonstrate a legal duty separate from the duty to perform under the contract (*see, Van Neil v Berger*, 219 AD2d 811), or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract, or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages (*see, Deerfield Communications Corp. v Cheesebrough-Ponds, Inc.*, 68 NY2d 954). It is also well established that general allegations that the defendant entered into a contract with the intention not to perform it are insufficient to support a claim for fraud (*see, Gupta Realty Corp. v Gross*, 251 AD2d 544, *see also, New York Univ. v Continental Ins. Co.*, 87 NY2d 308). Here, the allegations contained in the plaintiffs's fifth cause of action to recover damages for fraudulent inducement are duplicative of the allegations contained in the first cause of action to recover damages for breach of contract (*see, Rosen v Watermill Dev. Corp.*, 1 AD3d 424; *Jim Longo, Inc. v Rutigliano*, 251 AD2d 547; *Mastropieri v Solmar Constr. Co.*, 159 AD2d 698). Since the alleged misrepresentations relating to the construction of the plaintiffs' home are not sufficiently distinct from the breach-of-contract allegations, they do not constitute a separate cause of action sounding in fraud (*see, Gupta Realty Corp. v Gross, supra; Rubinberg v Correia Designs, Ltd.*, 262 AD2d 474). Accordingly, the fifth cause of action is dismissed.

Violation of the Building Code

The sixth cause of action seeks to recover damages for the defendants' alleged violations of the Building Code of the Town of Brookhaven. This cause of action is duplicative of the first cause of action to recover damages for breach of contract. Moreover, the court is unpersuaded that there is a private right of action to recover damages arising from building code violations. It is the general rule that, if a statute does not explicitly provide for a private cause of action, recovery may be had under the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history (*see, Albright v Metz*, 217 AD2d 123, 129, *affd* 88 NY 2d 656). The court finds no such legislative intent. While the New York State Uniform Fire Prevention and Building Code Act (Executive Law § 370 et seq.) permits any person aggrieved by a building code violation to apply for relief in the Supreme Court, the remedies are limited to removal of the building or an abatement of the violation (Executive Law § 383 [3]). Accordingly, the sixth cause of action is dismissed.

Breach of Warranty

The seventh cause of action seeks to recover damages for breach of the limited warranty contained in the parties' purchase agreement. The limited warranty provides, in pertinent part, as follows:

This limited warranty is given to the Purchaser named on page 1 while the Purchaser owns the Home. IT DOES NOT EXTEND TO SUBSEQUENT OWNERS, HEIRS, TENANTS OR MORTGAGEES IN POSSESSION OF THE HOME, ANY ONE WHO MAY SUCCEED TO THE RIGHTS OF THE PURCHASER OR ANY OTHER PERSONS.

The plaintiff Loraine Foss is one of the purchasers named on page one of the parties' purchase agreement. The defendants' contentions to the contrary notwithstanding, the addition of the plaintiff Richard Seidell to the deed did not change her status as one of the original purchasers of the subject premises. She continued to be an owner even after her husband died and Seidell acquired an ownership interest therein. Seidell, on the other hand, is a subsequent owner of the premises, and the limited warranty, by its terms, does not extend to him. Accordingly, the seventh cause of action is dismissed only insofar as it is asserted by the plaintiff Richard Seidell.

The eighth cause of action seeks to recover damages for breach of the statutory housing merchant implied warranty found in General Business Law § 777-a. The statutory warranty may be excluded or modified by the builder of a new home only if the buyer is offered a limited warranty that meets or exceeds the standards provided in General Business Law § 777-b (4) and (5) (*see*, General Business Law § 777-b[3][d]; **Latiuk v Faber Constr. Co.**, 269 AD2d 820). The limited warranty contained in the parties' purchase agreement excludes all other warranties, both express and implied. The court finds that, contrary to the plaintiffs' contentions, it meets or exceeds the standards provided in General Business Law § 777-b (4) and (5). Accordingly, the eighth cause of action is dismissed.

General Business Law § 349

The ninth cause of action alleges that the defendants violated General Business Law § 349. General Business Law § 349 is a consumer protection statute that prohibits deceptive acts and practices in the conduct of any business, trade or commerce, or in the furnishing of any service in this state (*see*, **Scott v Bell Atlantic Corp.**, 282 AD2d 180, 183, *mod* 98 NY2d 314). To state a claim, the plaintiff must allege that the defendant has engaged in an act or practice that has an impact on consumers at large, that is deceptive or misleading in a material way, and that the plaintiff has been injured as a result thereof (**Id.** at 183-184; *see also*, **Solomon v Bell Atlantic Corp.**, 9 AD3d 49, 52). The test is whether the deceptive or misleading representations or omissions are likely to mislead a reasonable consumer acting reasonably under the circumstances, i.e., the plaintiff's circumstances (*see*, **Solomon v Bell Atlantic Corp.**, *supra* at 52; **Scott v Bell Atlantic Corp.**, *supra* at 184).

The defendants, relying on **Green Harbour Homeowners' Assoc. v G.H. Dev. & Constr.** (307 AD2d 465 [3d Dept]) and **Thompson v Parchester Apts. Co.** (271 AD2d 311 [1st

Dept)), contend that General Business Law § 349 does not apply to deceptive practices in the sale of condominiums. Those cases are contrary to **Breakwaters Townhomes Assoc. of Buffalo v Breakwaters of Buffalo, Inc.**, 207 AD2d 963 [4th Dept]) and **Board of Managers of Bayberry Greens Condominium v Bayberry Greens Assocs.**, 174 AD2d 595 [2d Dept], upon which the plaintiffs rely, permitting the maintenance of a private cause of action in the advertisement and sale of condominium units. Since this court is bound to follow **Board of Managers of Bayberry Greens Condominium v Bayberry Greens Assocs.** (*supra*), the controlling precedent in the Appellate Division, Second Department (*see*, **Board of Managers of the Arches at Cobble Hill Condominium v Hicks & Warren**, 14 Misc 3d 1234[A] at * 11; **Hamlet on Olde Oyster Bay Home Owners Assoc. v Holiday Organization**, *supra* at *11), dismissal of the ninth cause of action must be denied insofar as it is asserted by the plaintiff Loraine Foss. However, the court finds that any injury to the plaintiff Richard Seidell, a subsequent purchaser of the premises, is too remote for purposes of General Business Law § 349 (*cf.*, **Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.**, 3 NY3d 200; **Dimich v Med-Pro, Inc.**, 34 AD3d 329, 330). Accordingly, the ninth cause of action is dismissed insofar as it is asserted by the plaintiff Richard Seidell.

The Remaining Defendants

The defendants concede that Hamlet, as the sponsor of Willow Creek, is a proper defendant. However, they seek dismissal of the complaint insofar as it is asserted against the remaining defendants. The court finds that the defendants have established, *prima facie*, their entitlement to such relief.

In opposition, the plaintiffs contend that they are third-party beneficiaries of the contract between Hamlet and the defendant Hamlet at Willow Creek Development Corp. (hereinafter “Hamlet Development Corp.”) to construct the condominium units at Willow Creek. A third-party may sue to enforce a contract made for its benefit. In order to maintain an action to recover as the third-party beneficiary of a contract, the third-party must establish that it was the specific intent of the contracting parties to benefit the third-party (*see*, **Hamlet on Olde Oyster Bay Home Owners Assoc. v Holiday Organization**, *supra* at *22). Generally, an ordinary construction contract, i.e., one that does not expressly state that the intention of the contracting parties is to benefit a third-party, does not give third-parties the right to enforce the contract (*see*, **Board of Managers of the Arches at Cobble Hill Condominium v Hicks & Warren**, 14 Misc 3d at *2). Such third-parties are considered incidental beneficiaries of the contract and may not sue to enforce it (*Id.* at *2; **Hamlet on Olde Oyster Bay Home Owners Assoc. v Holiday Organization**, *supra* at *22). The conclusory and unsupported contention by the plaintiffs that they are the intended third-party beneficiaries of the contract between Hamlet and Hamlet Development Corp. is insufficient to defeat the defendants’ motion. Accordingly, the complaint is dismissed insofar as it is asserted against the defendant Hamlet Development Corp.

The plaintiffs seek to hold the defendants Holiday Organization, Inc., and Holiday

Management Associates, Inc. (hereinafter “the Holiday defendants”), liable by piercing Hamlet’s corporate veil. In support thereof, the plaintiffs contend that the Holiday defendants appear to be the parent corporations of Hamlet and that they appear to be owned by the same individuals as Hamlet and the other defendants. The corporate veil will not be pierced simply because the same person or persons controlled multiple entities (*see, Hamlet on Olde Oyster Bay Home Owners Assoc. v Holiday Organization*, *supra* at *15), and a parent corporation’s ownership of a controlling interest in the shares of its subsidiary, standing alone, cannot be a basis for liability (*see, Nassau County v Richard Dattner Architect, P.C.*, 15 Misc 3d 1140(A) at *3). It must be shown that the parent corporation’s control over the subsidiary disregards the subsidiary’s corporate independence and that the parent corporation exercises complete dominion and control over the subsidiary’s daily operations for liability to attach (*Id.* at *3). The plaintiffs have failed to provide the court with sufficiently particularized support, as required, that the Holiday defendants were doing business through Hamlet in disregard of the corporate form to suit their convenience (*Hamlet on Olde Oyster Bay Homeowners Assoc. V Holiday Organization*, *supra* at *15; *Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 211). Moreover, the record reflects that the defendant Holiday Management Associates, Inc., was the initial managing agent for Willow Creek. As such, it was not responsible for the alleged defective design and construction of the plaintiffs’ home (*see, Tiffany at Westbury Condominium v Marelli Dev. Corp.*, *supra* at 1077), nor can it be held liable for the purported negligent repair thereof since it was at all times acting as an agent for a disclosed principal (*see, Brasseur v Speranza*, 21 AD3d 297, 299). Accordingly, the complaint is dismissed insofar as it is asserted against the Holiday defendants.

The plaintiffs also seek to hold the defendant Hamlet at Willow Creek Development Co., LLC (hereinafter “Hamlet Development LLC”) liable by piercing Hamlet’s corporate veil. It is undisputed that Hamlet Development LLC is a member of Hamlet. Although a member of a limited liability company cannot be held liable for the company’s obligations by virtue of its status as a member thereof (*see, Limited Liability Company Law* §§ 609, 610; *Matias v Palma*, 43 AD3d 367), the doctrine of piercing the corporate veil is applicable to limited liability companies (*see, Retropolis, Inc. v 14th St. Dev. LLC*, *supra* at 210). It is well settled that when individual business owners and affiliated businesses ignore or abuse the corporate form, courts will preclude them from hiding behind it in order to shield themselves from liability to third parties (*see, Board of Managers of the Arches at Cobble Hill Condominium v Hicks & Warren*, 18 Misc 3d at *4). Additionally, when a related business holds itself out as creating, controlling, or being responsible for certain premises, it may be held liable for claims asserted against it under a veil-piercing theory (*Id.* at *4). In opposition to the defendants’ motion, the plaintiffs have submitted documentary evidence that Hamlet Development LLC held itself out as the sponsor or developer of Willow Creek in letters to the plaintiffs. The court finds that, under these circumstances, the plaintiffs have raised a triable issue of fact as to whether Hamlet Development LLC is Hamlet’s alter ego. Accordingly, the court declines to dismiss the complaint insofar as it is asserted against Hamlet Development LLC at this time.

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Conclusion

The plaintiff Loraine Foss may maintain the first, seventh, and ninth causes of action for breach of contract, breach of warranty, and violation of General Business Law § 349, respectively, against the defendants Hamlet and Hamlet Development LLC.

Dated: September 19, 2008

HON. ELIZABETH HAZLITT EMERSON

J.S.C.