

Nash v Baumblyt Constr. Corp.

2009 NY Slip Op 30072(U)

January 8, 2009

Supreme Court, Nassau County

Docket Number: 19542/06

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

PART 10

-----X
MARK NASH and JACQUELINE NASH,

Plaintiffs,

INDEX NO. 19542/06

-against-

MOTION DATE: 11/5/08
SEQUENCE NO. 002, 003, 004

BAUMLIT CONSTRUCTION
CORPORATION, DML MECHANICAL,
INC., HUMBERTO PILOTO
CONSTRUCTION, INC. and ADMIRAL
INSURANCE COMPANY,

Defendants.

-----X

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Upon the foregoing papers, it is ordered that the motion by defendant Admiral Insurance Company for an order granting summary judgment dismissing the cross-claims of defendant Baumblit Construction Corporation is denied.

The motion by plaintiffs for an order granting summary judgment as to liability against defendant Baumblit Construction Corporation is granted. The branch of the

plaintiffs' motion seeking to dismiss defendant Baumblit Construction Corporation's counterclaims numbered fifth, sixth, seventh, eighth and ninth is denied.

The cross-motion by defendant Baumblit Construction Corporation for an order directing plaintiffs to permit inspection of the premises by defendant Baumblit Construction Corporation is granted on the issue of damages without opposition. Plaintiffs shall accommodate Baumblit Construction for an inspection upon 5-days notice within 20 days of the date of this order.

The Court notes that plaintiffs have discontinued the action against Vladimir Baumblit eliminating the references in the aforementioned three motions to relief sought by and about Vladimir Baumblit. The parties are directed to remove Vladimir Baumblit from the caption in this case henceforth. Plaintiffs have also discontinued their action as against defendant Admiral Insurance Company; the cross-claims by Admiral remain in this case.

Plaintiffs are seeking \$228,092.00 in damages for negligent home improvement work by subcontractors DML Mechanical, Inc., Humberto Pilato Construction, Inc. and contractor Baumblit Construction Corporation; Admiral Insurance Company is the general liability carrier for Baumblit. The work was performed on plaintiffs' residence in Merrick, N.Y. pursuant to an oral November 2003 contract for \$409,300.00.

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 issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

Plaintiffs' motion for summary judgment against defendant Baumblit Construction on the issue of liability is supported by the report of professional engineer Brian Flynn detailing the defective construction conditions at the premises. Plaintiffs also submit the July 17, 2007 Town of Hempstead Inspection Report indicating numerous inspection and certificate irregularities in conflict with building codes and the building permits were revoked. Plaintiffs also submit the sworn statement of licensed general contractor, Neil Atieh, after an inspection and remedial construction of the house on July 1, 2007. He concluded that the work he was hired to correct did not coordinate with the original building plans nor did the work meet the Town of Hempstead Building Code.

The affidavit of plaintiff Jacqueline Nash listed in detail the numerous opportunities defendant Baumblit Construction was given to observe and correct or challenge building defects as perceived by plaintiffs.

In opposition by attorney's affirmation, Baumblit Construction Corporation incorporates the cross-motion's request for further discovery and challenging the veracity of the affidavit of contractor Neil Atieh. The sworn statement of Baumblit Construction's principal, Vladimir Baumblit, notes a balance of \$75,000 due from plaintiffs as well as a denial of interacting with Jacqueline Nash on structural issues.

Defendant Baumblit Construction has not met its burden of demonstrating questions of fact with respect to liability; plaintiffs' motion is granted as to liability against Baumblit Construction Corporation..

With respect to plaintiffs' motion to dismiss the fifth through ninth affirmative defenses (defamation, libel, slander, slander per se and punitive damages) the Court

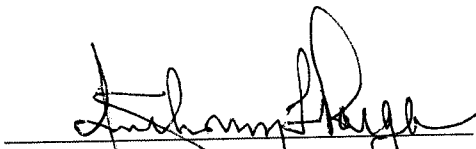
has examined the pleading in a manner consistent with uncontested law. "To determine whether a pleading is sufficient to withstand a challenge under CPLR 3211[a][7], the court must consider whether the pleading, taken as a whole, fails to state a cause of action. Looseness, verbosity and excursiveness, must be overlooked on such motion if any cause of action can be spelled out from the four corners of the pleading" (*Foley v. D'Agostino*, 21 AD2d 60 (1st Dept., 1964)). "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts alleged in the complaint and afford the plaintiffs the benefit of every possible favorable inference in determining whether the plaintiff states any legally cognizable cause of action" (*Schenkman v. NY College of Health Prof.*, 29 AD3d 671 (2nd Dept., 2006)). The affirmative defenses shall remain at this time.

In support of its motion for summary judgment dismissing the Baublitt Construction cross-claims defendant Admiral Insurance Company notes that the Baublitt Construction cross-claims allege that Admiral improperly denied coverage to Baublitt Construction, Admiral is in breach of contract and Admiral must indemnify Baublitt Construction pursuant to the general liability policy. Admiral argues that repeated requests for claim information were not answered by Baublitt Construction and that "There is no coverage under the policy because the allegations for breach of contract do not fall within the policy's insuring agreement for damages as a result of an 'occurrence'."

Specifically, Admiral interprets the policy to exclude injuries caused by "defective work" as alleged in plaintiff's Complaint. Admiral has not met its initial burden of demonstrating the absence of any questions of fact regarding the basis of plaintiff's losses and Baublitt Construction's liability thereto.

The parties shall appear for the Certification Conference on February 10, 2009 at 9:30 A.M. Part 10, Nassau County Supreme Court.

Dated: January 8, 2009.



Anthony L. Parga, J. S. C.

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