Elizabeth Firehouse LLC v Castle Restoration & Constr., Inc.
2009 NY Slip Op 33450(U)
July 17, 2009
Supreme Court, New York County
Docket Number: 101281/09
Judge: Bernard J. Fried

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60
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ELIZABETH FIREHOUSE LLC,

Plaintiff,

-against-

Index No. 101281/09

CASTLE RESTORATION & CONSTRUCTION, INC.,
CHETWYND SYSTEMS, INC.
LAURENCO INCORPORATED d/b/a
LAURENCO SYSTEMS and
LAURENCO SYSTEMS OF OHIO LLC

Defendant (s).
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APPEARANCES:

For Plaintiff:

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For Defendants:

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Attorneys for Defendant Castle Restoration
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FRIED, J.:

Defendants Laurenco Incorporated ("Laurenco"), and Chetwynd Systems, Inc., ("Chetwynd"), move to dismiss the second cause of action which alleges negligence pursuant to CPLR 3211(a)(7).[1] For the purposes of this decision, Motion Sequence 001 and Sequence 002 are consolidated, and for the reasons that follow, both motions are granted.

Plaintiff is the owner of a building located at 209 Elizabeth Street, New York, New York ("the Building"). The Building is an 1868 three story, timber and brick firehouse. It is comprised of three roof levels and a one story extension. According to the Complaint, Laurenco, Chetwynd, and Castle Restoration & Construction Inc., ("Castle"), ("the Defendants"), were hired by Plaintiff to install a waterproof roofing system at the Building. Each defendant played a different role in the installation. Laurenco is a manufacturer and distributor of roofing materials and products, Chetwynd is Laurenco's representative, and Castle is a building contractor licensed to install Laurenco waterproofing systems. (Compl. ¶¶ 6-8, 14).

On August 26, 2005, Plaintiff sent a letter to Guido Capolino, ("Capolino") an "agent" of Laurenco and Chetwynd, regarding a project to convert the Building into a gallery and single family residence. (Compl. ¶ 10). The letter described the work needed for the installation of a roof system, and requested assistance in identifying a contractor to install Laurenco's products. (*Id.*). On September 7, Plaintiff received a proposal from Castle

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[1] Plaintiff, in its "Wherefore" clause (Compl. ¶ 76), seeks contract-based relief against all the Defendants in the first and third causes of action. Plaintiff, however, does not allege the existence of a contract with Chetwynd, and therefore, Chetwynd is only a party in the second cause of action.

detailing the work and materials required to install a Laurenco waterproofing system to the first floor roof of the Building ("the System"). (Compl. ¶ 12). On September 12, 2005, the proposal was signed by Plaintiff and became a contract between Plaintiff and Castle. (Compl. ¶ 17). The contract was amended on September 21, 2005 to include a provision that Castle agreed to install a 4 inch concrete wall over the System. (Compl. ¶¶ 20-21). Castle installed the System in September 2005. (Compl. ¶ 23). On December 7, 2005, Laurenco issued a guarantee to Plaintiff ("the Guarantee"). (Compl. ¶ 24). The Guarantee states that Laurenco and Castle agree "to cause to be repaired any leaks in the Laurenco System ... for a period of 20 years from the date of completion." (Laurenco's Notice Of Motion To Dismiss, Ex. B).

Plaintiff alleges that since the installation of the System, water has infiltrated and flooded the Building numerous times causing extensive damage. The first instance of flooding is alleged to have occurred in March 2006 as a result of water infiltration of the one story extension roof. (Compl. ¶ 25). Subsequently, Plaintiff met with Capolino and Castle to address the water infiltration. (Compl. ¶ 27). Plaintiff alleges that Laurenco, Castle, and Chetwynd agreed to increase the height of flashing at the rear wall of the one story extension. (*Id.*). In April 2006, Castle installed additional flashing and copper capping. (Compl. ¶ 29).

In June 2006, following heavy rainstorms, water again infiltrated the System, and flooded the Building at the rear wall of the extension. (Compl. ¶ 29). Plaintiff then retained Fen Wei Construction, to make repairs to the rear wall of the Building. (Compl. ¶¶ 30-31). In July 2006, Fen Wei Construction made the repairs, including the replacement of three courses of old brick. (Compl. ¶ 32).

Plaintiff further alleges that in August 2006, Laurenco and Chetwynd directed Castle to perform a flood test to identify the location of the leak. (Compl. ¶ 32). Castle performed the flood test in that same month. (Compl. ¶ 33). The flood test results indicated that there was a breach in the Laurenco membrane at the rear portion of the main building. (*Id.*).

In September 2006, Castle demolished a portion of the concrete topping at the junction of the main building and the extension, revealing two gaps in the membrane at the flashing between the horizontal extension of the roof and the vertical wall of the main portion of the Building. (Compl. ¶¶ 35-36). Castle subsequently patched the gaps in the membrane, and added termination bars to prevent future water infiltration. (Compl. ¶ 36). Neither Laurenco nor Chetwynd was present during the repair. (Compl. ¶ 39). After the repairs were completed, a second flood test was conducted by Castle, and indicated no further infiltration. (Compl. ¶ 37).

Plaintiff alleges that in October 2006, and during the winter of 2006 and summer of 2007, water infiltrated and penetrated the Building for a third time at the same location, the rear wall of the one story extension. (Compl. ¶ 40). Plaintiff verbally notified the Defendants of the ongoing water infiltration in October 2006. (Compl. ¶ 41).

On May 14, 2007, Plaintiff sent a letter to Castle describing the details of the water infiltration and ensuing damage, and demanding that corrective action be taken. (Compl. ¶ 42.) Plaintiff also sent notice to Castle and Laurenco of the continued failure of the System, and subsequent damage to Plaintiff's property as a result of its installation ("May 2007 Notice").[2] (Compl. ¶ 43). Plaintiff further alleges that Laurenco and Castle ignored the May

[2] It is unclear from the language of the Complaint whether Plaintiff sent one letter or two separate letters to Castle on May 14, 2007.

2007 Notice, and therefore, the System continued to leak and damage the Building as well as Plaintiff's property. (Compl. ¶ ¶ 44-45).

According to the Complaint, Plaintiff installed finished maple wood flooring on the second floor of the Building in August 2007. (Compl. ¶ 46). In September 2007, during a rain storm, water penetrated the Building again and caused the rear section the maple flooring to warp. (Compl. ¶ 47). Plaintiff was then forced to stop occupying the second floor of the Building. The warping continued to spread through August 2008. (*Id.*).

Plaintiff contacted Laurenco and Chetwynd in October, 2008 to address and correct the water infiltration. (Compl. ¶ 50). On October 22, 2008, Castle conducted another flood test. (Compl. ¶ 52). The test indicated that water was still infiltrating the System, and that Castle's previous attempts to cure the problem were unsuccessful. (*Id.*).

After a conference call with Laurenco on October 29, 2008 regarding the ongoing infiltration, Plaintiff retained Restor Technologies, a third party contractor, to conduct exploratory demolition on the Building. (Compl. ¶¶ 53-54). On November 11, 2008, following the demolition, a representative of Restor determined that an incorrectly installed termination bar, installed by Castle during the second repair, was the source of the infiltration. (Compl. ¶ 56). Restor was instructed by Laurenco and Chetwynd to correct the condition. (Compl. ¶ 57). After the repairs were completed, a flood test was conducted, and no water penetration occurred. (Compl. ¶ 59).

On December 16, 2008, Plaintiff retained a third party contractor to remove the warped maple flooring from the affected areas. (Compl. ¶ 60). Plaintiff further alleges that

during the removal of the flooring, it was revealed that the gypcrete base was saturated with water that the System permitted to infiltrate the Building. (Compl. ¶ 61).

On January 28, 2009, Plaintiff filed the Complaint, which contains three causes of action.[3] The second cause of action sounds in negligence, alleging that the Plaintiff has been damaged by the joint and several negligence of all the Defendants.

For the purposes of this motion, the allegations of the Complaint are presumed to be true, and accorded "every favorable inference," except insofar as they "consist of bare legal conclusions." *Beattie v. Brown & Wood*, 243 A.D.2d 395, 395 (1st Dept. 1997). Furthermore, It is well-established that, "on a pre-answer motion to dismiss brought pursuant to CPLR 3211(a)(7), the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor. *Gorelik v. Mount Sinai Hosp. Center*, 19 A.D.3d 319, 319 (1st Dept. 2005). The motion must be denied if, from the pleading's four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Id.* (*citing Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 54 (2001)).

Laurenco seeks dismissal of the second cause of action on the grounds that it fails to allege a separate legal duty, independent of Laurenco's obligation under the Guarantee. In support of its motion, Laurenco notes that Plaintiff's only elaboration on its negligence theory is that "Defendants owed and breached their duty to Plaintiff to exercise due care and install the System, and perform all related work, installations and repairs in a careful and workmanlike manner." (Compl. ¶ 64). According to Laurenco, absent an allegation of an

[3] The first cause of action for breach of contract against Castle and the third cause of action for breach of guarantee against Laurenco are not at issue on this motion.

independent duty to owed Plaintiff, the negligence claim is duplicative of the breach of guarantee claim, and must be denied.

Laurenco's argument is in accordance with New York law. "It is well-established under New York law that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company*, 70 N.Y.2d 382, 389 (1987).

Plaintiff, in its Affirmation in Opposition to Laurenco's motion, claims that Laurenco's participation in the repair efforts was the assumption of a separate duty actionable in tort. Plaintiff argues that Laurenco, through its repeated presence at the site of the Building, and by directing subsequent repairs, assumed a duty to use reasonable care in administering the repairs. (Affirmation in Opposition ¶¶ 11-12, 14). According to *Clark-Fitzpatrick*, however, such argument would be meritorious only if the duty alleged is not already imposed upon Laurenco by the terms of the Guarantee. The Guarantee states that:

> Laurenco Incorporated will cause to be repaired any leak(s) in the Laurenco System identified above for a period of 20 years from the date of completion, should leak(s) occur as a result of any of the following causes: 1.) Splits or breaks in Laurenco Neoprene asphalt membrane flashing, otherwise known as Laurenco System not resulting from settlement or structural failure of the building. (Laurenco's Notice Of Motion To Dismiss, Ex. B).

The Guarantee thus plainly states that Laurenco is obligated to perform repairs due to leaks in the System. Plaintiff seeks to limit the scope of the Guarantee by arguing that the Guarantee obligates Laurenco to pay for repairs in certain circumstances, but does not

alleviate Laurenco of onsite negligence. This argument is unpersuasive as it fails to explain why the alleged "onsite negligence," which was essentially faulty repair, is not encompassed by the clause in the Guarantee obligating Laurenco to cause the leaks to be repaired.

While plaintiff cites several cases in opposition, these cases do not warrant a conclusion that *Clark-Fitzpatrick* does not require dismissal of these claims, because each of these citations is distinguishable.

For example, in *Erie Ins. Co. v. Pronti*, 52 A.D.3d 1016 (3d Dept. 2008), an insurer brought a subrogation claim against a contractor who negligently failed to place a tarp over the roof of house, exposing the roof to rains that damaged the interior of the house. The Court rejected the defendant's claim that it could not be held liable for the subcontractor's negligence in failing to cover the roof, noting that "[t]he failure to place a tarp over an exposed roof and the potential damaging consequences as a result thereof was a risk inherent in the job which should have been patently apparent to defendant." *Id.* at 1017. There was no indication that the defendant was contractually required to cover the roof with a tarp. Thus the negligence claim in *Erie* was based on a separate obligation. Similarly, in *Chestnut Ridge Air, Ltd. v. 1260269 Ontario, Inc.*, 13 Misc. 3d 807 (Sup. Ct., N.Y. Cty. 2006), a defendant, who contracted to maintain and manage the plaintiff's aircraft, was sued for negligence and breach of contract after the plane was found to have extensive corrosion on its wings, and was rendered unairworthy. A motion to dismiss was denied because the plaintiff alleged that the defendant "failed to comply with accepted and established aviation practices and procedures in accordance with written manuals and instructions." *Id.* at 813. This negligence claim alleged an independent duty to comply with established aviation customs. Further,

- *Trustees of Columbia University in City of New York v. Gwathmey Siegel and Associates Architects*, 192 A.D.2d 151 (1st Dept. 1993), held that the plaintiff had alleged an independent duty to support a negligence claim, in addition to the claim for breach of contract. With respect to the claim for negligence, the court noted that "[w]hile not every construction project may be found to be so intimately affected with the public interest as to evoke such a separate duty, the one in this case, involving as it does housing and other facilities on a crowded and much-used college campus located in the heart of the largest city in the country, clearly must be said to affect a significant public interest." *Id.* at 155.

These cases stand for the unremarkable proposition that a claim for breach of contract does not bar a cause of action for negligence, or as Plaintiff's Affirmation in Opposition put it: "Laurenco raises the well won but meritless argument that because there is a contract, there can be no negligence claim. This is simply not the law." (Affirmation in Opposition ¶ 7). However, Plaintiff has failed to recognize that Laurenco's motion to dismiss is not based on the assertion of a breach of contract as well as a claim for negligence. Rather, Laurenco seeks dismissal because of the failure to allege an independent duty. Indeed, it is clear that "[m]erely charging a breach of 'a duty of care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim." *Clark-Fitzpatrick*, 70 N.Y.2d at 390.

Plaintiff urges that I follow *Trans Caribbean Airways, Inc., v. Lockheed Aircraft Services, Inc.*, 14 A.D.2d 749 (1st Dept. 1961). However, *Trans Caribbean* has been implicitly overruled by *Clark-Fitzpatrick*, which requires that there be an allegation of an independent duty of care.

Tellingly, at oral argument, when asked to point to the specific paragraph in the Complaint alleging a duty of care separate from the contractual obligation, Plaintiff's attorney was unable to refer me to any such paragraph. After several attempts to locate such a paragraph, Plaintiff's attorney finally responded that "the collective import of about a dozen or more paragraphs in the complaint show the existence of a legal duty." (Tr., at 10). This is not sufficient.

Because there has been the failure to allege a separate duty, Laurenco's motion to dismiss the negligence claim is granted.

Turning to Chetwynd's motion (Sequence 002), it seeks dismissal of the second cause of action pursuant to CPLR 3211(a)(7), arguing that no duty of care existed between Chetwynd and Plaintiff, because it never installed, repaired or performed any work on the Building. The Complaint only alleges a contract between Plaintiff and Castle, and the Guarantee between Plaintiff and Laurenco. Plaintiff does not allege that a contract existed between it and Chetwynd. Chetwynd further claims that the Complaint only contains allegations that Chetwynd's role was limited to (i) assisting Plaintiff in finding contractors licensed to install Laurenco products and (ii), "participating in subsequent inspections and roof leaks." (Defendant Chetwynd's Memorandum of Law, at 3). According to Chetwynd, the negligence claim must be dismissed because after Plaintiff used Chetwynd to find a suitable contractor, and notified Chetwynd of a potential roof leak, "the extent of Chetwynd's involvement is alleged by Plaintiff to be nothing more than a few site visits to inspect alleged roof leaks and Chetwynd's direction to others to correct alleged deficiencies in the Roof System." (*Id.* at 5).

Plaintiff, in response, argues that Chetwynd's motion ignores the allegations in the Complaint which set forth Chetwynd's active participation in the ongoing and allegedly negligent repair work. However, assuming all the facts set forth in the Complaint as true, Plaintiff fails to establish a duty of care owed to Plaintiff by Chetwynd. The Complaint alleges several times that repairs were performed at the direction of Laurenco and Chetwynd (Compl. ¶¶ 28, 32, 34, 55, 57). Merely alleging that Plaintiff directed others to act, however, is not tantamount to an allegation that Chetwynd had an independent duty of care. The Complaint contains further allegations that Chetwynd and Laurenco conducted a flood test on October 22, 2008, which indicated that water had infiltrated the Laurenco membrane. (Compl. ¶ 52). However, Plaintiff does not allege that it was harmed by the performance of the October 22 flood test. To the contrary, it was this flood test which revealed that previous repairs were unsuccessful, and ultimately led to correction of the defects in the Laurenco System.

Plaintiff does not allege that Chetwynd itself took part in any installation or repair of the System. Without a contractual obligation, and in the absence of allegations that Chetwynd actively engaged in the installation or repair of the System, it is clear that Chetwynd did not owe Plaintiffs a duty of care. *See Pulka v. Edelman*, 40 N.Y.2d 781 (1976) (holding that "In the absence of duty there is no breach and without a breach there is no liability"). Furthermore, "the existence and scope of that duty is a legal question for the courts to determine." Sheila C. v. Povich, 11 A.D.3d 120, 125 (1st Dept. 2004). Assuming all the facts alleged as true, the Complaint does not demonstrate a legal duty owed to Plaintiff by Chetwynd, and therefore, fails to "manifest any cause of action cognizable at law."

Gorelik v. Mount Sinai Hosp. Center, 19 A.D.3d 319, 319 (1st Dept. 2005). (*citing Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 54 (2001)). Thus, the second cause of action against Chetwynd, which alleges negligence, is also dismissed.

Accordingly, it is:

ORDERED that Laurenco's motion to dismiss the cause of action for negligence is granted; and it is further

ORDERED that Chetwynd's motion to dismiss the cause of action for negligence is granted; and it is further

ORDERED that the remainder of this action should continue.

DATED: 7/17/09

J.S.C.
HON. BERNARD J. FRIED