

Verch v Consumers Warehouse Ctr. Inc.

2010 NY Slip Op 32238(U)

August 11, 2010

Supreme Court, Nassau County

Docket Number: 26701/09

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

JILL VERCH and ERIC VERCH,

Petitioners/Judgment Creditors,

- against -

CONSUMERS WAREHOUSE CENTER INC.,
NORCRAFT COMPANIES, LP a/k/a
NORCRAFT COMPANIES d/b/a FIELDSTONE
CABINETRY, MID CONTINENT CABINETRY,
STAR MARK CABINETRY and/or
ULTRACRAFT CABINETRY and NORCRAFT
HOLDINGS, LP, d/b/a FIELDSTONE
CABINETRY, MID CONTINENT CABINETRY,
STAR MARK CABINETRY and/or
ULTRACRAFT CABINETRY,

Respondents/Judgment Debtors.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 26701/09

Motion Sequence No. 001, 003,
004

The following papers having been read on this motion:

Notice of Petition, Affidavits, & Exhibits	<u>1, 2, 3</u>
Answering Affidavits	<u>4, 5, 6</u>
Replying Affidavits	<u>7, 8</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The petitioners seek a judgment, in Motion Sequence No. 1, directing the payment by the respondents, jointly and severally, to the petitioners, as judgment creditors, for \$65,000.00 on account of judgments entered in court on April 4, 2009, in favor of the judgment creditors and against the judgment debtors, Norcraft Companies, LP, Norcraft

Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., together with interest from February 4, 2009, plus costs, expenses and reasonable fees. The petitioners claim the respondents are fraudulent transferees, alter egos or otherwise affiliated with the judgment debtors, are indebted to the judgment debtor, or are successors in interest to the judgment debtor, in an amount in excess of the judgment.

The respondents Norcraft Companies, and LP, Norcraft Holdings, LP respond to this petition. They pointed out Norcraft Companies, and LP, Norcraft Holdings, LP never contracted with the plaintiff, and note an inquest against Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. resulted in a judgment against Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., which respondents' counsel for Norcraft Companies, and LP, Norcraft Holdings, LP indicated to petitioners' counsel was not a legal entity, so any default would be a nullity. Norcraft Companies, and LP, Norcraft Holdings, LP assert Nassau County Supreme Court Justice Randi Sue Marber determined on October 28, 2009 there was no contract between the petitioners and Norcraft Companies, nor LP, Norcraft Holdings, LP. The respondents Norcraft Companies, and LP, Norcraft Holdings, LP aver this petition should be dismissed.

The petitioners reply to the response by Norcraft Companies, and LP, Norcraft Holdings, LP. The petitioners contend, despite the protestations of these respondents, they must be held responsible for the liabilities of Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., and assert the petitioners' judgment against Ultracraft

Cabinetry a/k/a Frankel-Randolph Group, Inc. is enforceable against Norcraft Companies, and LP, Norcraft Holdings, LP. The petitioners aver Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. is a subsidiary of Norcraft Companies, and LP, Norcraft Holdings, LP.

The respondent Consumers Warehouse Center, Inc. moves, in Motion Sequence No. 3, to transfer the instant proceeding to Justice Marber for determination, to dismiss pursuant to CPLR 3211 (a) (5) the first cause of action in the amended complaint against this respondent; to dismiss pursuant to CPLR 3211 (a) (7) the second cause of action in the amended complaint against this respondent; for costs and sanctions against the petitioners and petitioners' counsel for instituting this frivolous litigation, and to dismiss the petitioners' verified petition against this respondent. Consumers Warehouse Center, Inc. contends the petitioners' causes of action against this respondent should be precluded under the doctrines of res judicata and collateral estoppel. Consumers Warehouse Center, Inc. asserts the petitioners fail to state causes of actions against Consumers Warehouse Center, Inc., and there is no privity of contract by this defendant with the petitioners.

The petitioners oppose the motion by Consumers Warehouse Center, Inc. asserts the instant proceeding alleges claims against this respondent which were never previously alleged by the petitioners. The petitioners claim the collateral estoppel and res judicata does not apply to dismiss this proceeding. The petitioners contend the claims in breach of contract and unjust enrichment were never pled against Consumers Warehouse Center,

Inc., so the October 28, 2009 court order cannot operate to preclude the instant action in breach of contract and unjust enrichment against Consumers Warehouse Center, Inc. The petitioners seek \$10,000.00 in sanctions against Consumers Warehouse Center, Inc. and its counsel plus reasonable attorney's fees and costs.

Consumers Warehouse Center, Inc. reply to the petitioners' opposition to the cross motion by Consumers Warehouse Center, Inc. This respondent reiterates its contentions, and adds there is no contract between the petitioners and it. Consumers Warehouse Center, Inc. argues costs and sanctions should be granted to it.

The respondents Norcraft Companies, LP and Norcraft Holdings, LP cross move, in Motion Sequence No. 4, to transfer the instant proceeding to Justice Marber as the facts alleged arise from the same facts and circumstances as a matter previous before Justice Marber, to dismiss pursuant to CPLR 3211 (a) (5) and (7) this action against this defendant; and to grant costs and sanctions to Norcraft Companies, LP and Norcraft Holdings, LP as a result of this frivolous litigation. Norcraft Companies, LP and Norcraft Holdings, LP contend the petitioners' causes of action against these respondents should be precluded under the doctrines of res judicata and collateral estoppel. Norcraft Companies, LP and Norcraft Holdings, LP assert the petitioners fail to state causes of actions against them, and there is no privity of contract by these respondents with the petitioners.

The petitioners oppose the cross motion by Norcraft Companies, LP and Norcraft

Holdings, LP. The petitioners seek costs and sanctions against Consumers Warehouse Center, Inc. and Norcraft Companies, LP and Norcraft Holdings, LP as a result of their frivolous defenses. The petitioners take issue with the October 28, 2009 decision and order by Justice Marber, and contend they did not pled breach of contract against Norcraft Companies, LP and Norcraft Holdings, LP in the plenary action entitled *Verch v. Peter Charles Associates, et al*, under Index number 15067/06. The petitioners argue to pierce the corporate veil, to wit claiming Norcraft Companies, LP and Norcraft Holdings, LP is an alter ego of Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., and must be held accountable.

Norcraft Companies, LP and Norcraft Holdings, LP. reply to the petitioners' opposition to the cross motion by Norcraft Companies, LP and Norcraft Holdings, LP. These respondents reiterate their contentions, and add the petitioners never paid any money to them. Norcraft Companies, LP and Norcraft Holdings, LP. indicate Ultracraft is simply a cabinet brand, and neither a corporation nor a legal entity, so no judgment can be enforced against it. Norcraft Companies, LP and Norcraft Holdings, LP. argue costs and sanctions should be granted to them.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this petition, defense motion and defense cross motion. The underlying matter arises from design and renovation in the petitioners' home at 120 Ivy Lane, Lido Beach, New York. The petitioners claim damages from breach of contract,

delay in performance, defective and negligent workmanship, use of unlicensed contractors, subcontractors and workers, breach of express and implied warranties, fraud, defective design, and negligent misrepresentation. The respondents Consumers Warehouse Center, Inc. and Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. contend the petitioners claims are collaterally estopped by the October 28, 2009 decision by Justice Marber which also has res judicata effect with respect to this instant litigation.

The petitioners moved pursuant to CPLR 3215 (a) before Justice Marber for a default judgment against Consumers Warehouse Center, Inc. and Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., or in the alternative for the plenary action under Index number 15067/06 to be placed on the inquest calendar for an assessment of damages against these respondents. Consumers Warehouse Center, Inc. and Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. moved separately to deny the petitioners' motion for a default judgment, and to dismiss pursuant to CPLR 3211 (a) (7) the second cause of action in the amended complaint against the respondents. Justice Marber referred to the December 18, 2008 decision and order of former Nassau County Supreme Court Justice Kenneth A. Davis which granted the petitioners leave to serve and file a second amended verified complaint adding Norcraft Companies, LP, the purported parent company of

Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. as a defendant and suing Norcraft Companies, LP as a separate entity and doing business under “d/b/a s”: Norcraft Holdinger, LP, Fieldstone Cabinetry, Mid Continent Cabinetry and Star Mark Cabinetry. Justice Marber determined service was improper against Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., and denied the petitioners’ motion for default judgment, and granted the defense motions denying the petitioners’ motion for default judgment.

Justice Marber also addressed the defense motions to dismiss pursuant to CPLR 3211 (a) (7) the causes of action in the amended complaint against the Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. Justice Marber pointed out Justice Davis determined the petitioners’ claim for punitive damages was dismissed as it did not constitute a separate cause of action as a matter of law. Justice Marber noted on February 4, 2009, Nassau County Supreme Court Justice Anthony A. Parga granted the petitioners \$65,000.00 judgment plus interest, costs and disbursement against Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. after an inquest, and commented the petitioners could not be afforded any additional relief against Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. as alleged in the petitioners’ causes of action. On April 2, 2009, a judgment was entered in the Nassau County Clerk’s office upon motion of the petitioners’ attorney and the February 4, 2009 decision and order of Justice Parga, who signed that judgment. The judgment against

Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. was for \$65,000.00 with \$942.50 interest from February 4, 2009, making a \$65,942.50 total. Justice Marber decided, in meticulous treatment, the legal sufficiency of the petitioners' claims of negligent construction, breach of express warranty, and implied warranty against the Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., while affording the petitioners a liberal construction as to these causes of action, and according the petitioners the benefit of every possible inference to determine only whether the facts fit within any cognizable legal theory (*see Breytman v. Olinville Realty, LLC*, 54 AD3d 703 [2nd Dept 2008]). Justice Marber dismissed the petitioners' causes of action in the amended complaint against the Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., and found there was no contract between the petitioners and the Norcraft Companies, LP, Norcraft Holdings, LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc. Justice Marber also determined no action in breach of implied warranty or strict product liability will lie for the negligent performance of professional services in agreements to render architectural and construction services under New York law (*see Milau Associates, Inc. v. North Avenue Development Corp., Inc.*, 42 NY2d 482 [1977]), and dismissed the petitioners' breach of implied warranty claims. Thus, Justice Marber granted the defense motions to dismiss pursuant to CPLR 3211 (a) (7) the causes of action in the amended complaint against the Norcraft Companies, LP, Norcraft Holdings,

LP and Ultracraft Cabinetry a/k/a Frankel-Randolph Group, Inc., and denied the petitioners' motion for default judgment. Justice Marber further denied all matters not decided in the October 28, 2009 decision and order.

This Court finds the October 28, 2009 decision and order by Justice Marber collaterally estops the petitioners here. That prior determination has res judicata effect upon this proceeding. 22 NYCRR § 130-1.1 (a) provides:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Part.

22 NYCRR § 130-1.1 (c) provides:

For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

This Court has considered all of the criteria set forth in 22 NYCRR § 130-1.1 (c). The Court determines none of the parties, at this time, have met the burden with respect to this

provision sanctions for noncompliance.

Accordingly, the petition is denied and dismissed. The motion and cross motion by Norcraft Companies, and LP, Norcraft Holdings, LP and Consumers Warehouse Center, Inc. respectively are granted. This decision shall constitute the order and judgment of the Court.

So ordered.

Dated: August 11, 2010

ENTER:

ENTERED

AUG 13 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE



J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION