

Yunill An v North Hills Holding Co. II, LLC

2010 NY Slip Op 32655(U)

August 31, 2010

Supreme Court, Nassau County

Docket Number: 23742/2009

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

YUNILL AN AND KYONG AN,

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 001, 002
MOTION DATE: 5/28/10**

**NORTH HILLS HOLDING CO II, LLC,
CHATHAM DEVELOPMENT COMPANY,
CHATHAM AT NORTH HILLS HOME
OWNERS ASSOCIATION, INC.,**

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Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....1
Notice of Cross-Motion.....2
Reply Affirmation.....3
Affirmation in Partial Opposition.....4

The motion by North Hills Holding Company II, LLC ("N.H.H.C.") to dismiss, pursuant to CPLR 3211(a)(7) certain causes of action in plaintiffs complaint and cross-motion by plaintiffs for leave to file pursuant to CPLR 3025(b) an amended complaint as proposed (see Exh. 4 annexed to plaintiffs' cross-motion) are decided as indicated herein.

Issue had not been joined and N.H.H.C. had not submitted an answer as of the making of N.H.H.C.'s motion.

N.H.H.C. is a developer of a residential subdivision known as Chatham at North Hills, North Hills, New York. Plaintiff purchased a new unit or home from N.H.H.C. on January 8, 2008. (see Exh. B annexed to N.H.H.C.'s motion). Plaintiffs state they closed on November 6, 2008. N.H.H.C. delivered a limited warranty at the title closing (see Exh. 2 annexed to plaintiffs' cross-motion).

While N.H.H.C. does not oppose plaintiffs' first cause of action for breach of warranty (see Exh. A annexed to N.H.H.C.'s motion), it does oppose plaintiffs' contract and negligence causes of action. N.H.H.C. contends the contract merged into the deed and the contract action would not succeed. N.H.H.C. also alleges the negligence causes of action are breaches of contract and not independent of the contract.

Plaintiffs commenced this action for damages allegedly sustained by them due to the faulty construction of their home that on a few occasions, allegedly caused extensive water damage to their basement (see Exh. 3 annexed to plaintiff's cross-motion).

In this proposed amended complaint, plaintiffs seek to add additional facts to demonstrate that the defendants (N.H.H.C., and Chatham Development or "C.D.C.") breached items contained in the offering plan that survive the merger of the purchase agreement and the deed.

First the court shall address the causes of action for negligence and gross negligence set forth in the proposed amended complaint (see Exh. 4 annexed to plaintiffs' cross-motion, ¶ 54-72 or causes of action 7-11).

Motion for leave to amend pleadings is liberally granted absent prejudice or surprise (*McCaskey, Davis & Associates v New York City Health and Hospitals Corp.*, 59 NY2d 755; *Long Island Title Agency, Inc. v Frisa*, 45 AD3d 649); in cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave to amend the pleadings should be denied (CPLR 30259b); *Rica v Valenti*, 24 AD3d 647).

Absent a violation of a legal duty independent of the contract, a plaintiff is limited to his or her contractual remedies (*see, Briar Contracting Corp. v City of New York*, 156 AD2d 628).

Merely alleging a tort in a cause of action to recover damages for breach of contract unless the representations are collateral or extraneous to the terms of the agreement, does not convert a breach of contract action into one sounding in tort

(see, *Crowley Marine Associates v Nyconn Associates, L.P.*, 292 AD2d 334).

A simple breach of contract is not to be considered a tort (such as negligence) unless a legal duty independent of the contract itself has been violated; the legal duty must thus spring from circumstances extraneous and not consisting of elements of the contract (see, *Clark-Fitzpatrick v Long Island Rail Road Company*, 70 NY2d 382).

Here, plaintiffs allegations of negligence and gross negligence are merely restatements of the contractual obligations asserted in the plaintiffs cause or causes of action for breach of warranty and/or breach of contract (see, *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954).

Simply alleging a duty of care does not transform a breach of contract into a tort claim (*Clemens Realty, LLC v New York City Dept. of Educ.*, 47 AD3d 666).

This is no comprehensive scheme herein that would convert an alleged contractual breach of contract to a breach sounding in tort (see, *Sommer v Federal Signal Corp.*, 79 NY2d 540), or a breach of a “statutory duty” (see *Reade v SL Green Operating Partnership, LP*, 30 AD3d 189) that would cause a breach of contract and a tort (such as negligence) to both exist herein.

Obligations and provisions of a contract for sale of land are merged in the deed and, as a result, are extinguished upon the closing of title unless there is a clear intent evidenced by the parties that a particular provision shall survive the delivery of the deed (*Dourountoudakis v Alesi*, 271 AD2d 640; *Davis v Weg*, 104 AD2d 617).

Here, there is no evidence that a particular provision of the contract (except the limited warranty) survived the merger into the deed.

The plaintiffs’ negligence causes of action are premised solely on defendants’ failure to perform obligations of the contract. Inasmuch as no independent legal duty is alleged to have been violated, the negligence causes of action must fall (see, *Venditti v Liberty Mutual Insurance Co.*, 6 AD3d 961).

When a limited warranty expressly excludes any common-law implied

warranty, it is exclusive and a cause of action sounding in common-law breach of contract may not be maintained (*Lantzy v Advantage Builders, Inc.*, 60 Ad3d 1254).

A vendor may exclude or modify all express or implied warranties, including the housing merchant implied warranty created by statute or common law (*Caceci v Di Canio Const. Corp.*, 72 NY2d 52); provided that the purchase agreement contains a limited warranty in accordance with the General Business Law (see, *Fumarelli v Marsam Development, Inc.* 238 AD2d 470).

N.H.H.C. contends the breach of contract actions set forth in the complaint are, indeed, breach of warranty claims.

N.H.H.C. seeks to dismiss the breach of contract actions to the extent that they assert breach of warranty claims. General Business Law Article 36-B creates certain statutory warranties for new construction (General Business Law §777-a) and permits the builder to exclude or modify certain warranties. (General Business Law § 777-b); see, *Fumarelli v Marsam Development, Inc.*, 92 NY2d 298).

A builder may exclude any common-law warranties and modify the statutory implied warranties provided that the builder complies with General Business Law § 777-b. (See, *Repecki v Parex, Inc.*, 300 AD2d 292; and *Pinkus v V.F. Builders, Inc.*, 470). The transaction herein involves new construction. Thus, the only warranties are those created by statute (see, *Fumarelli v Marsam Development, Inc.*, *supra*) or those substituted for the statutory warranties pursuant to General Business Law § 777-b. Since N.H.H.S. complied with General Business Law § 777-b, the only warranties in this case are those created by the purchase agreement.

The third and fourth causes of action in the plaintiffs' proposed amended complaint seek breach of a statutory warranty (GBL § 777-a & b) as to N.H.H.C. and co-defendant C.D.C.. Here the Limited Warranty, a rider to the purchase agreement, (see Exh. 2 annexed to plaintiff's cross-motion) is controlling, not the

statutory scheme.

Consequently, the court agrees with N.H.H.C. that plaintiffs' causes of action 3 and 4 are not viable.

The court notes Chatham at North Hills Home Owners Association, Inc. ("H.O.A.") alleges its, H.O.A.'s, cross-claims against N.H.H.C. contained in H.O.A.'s answer, should not be dismissed. At this point in the proceedings, the court must agree. H.O.A.'s cross-claims must be treated, as far as practicable as if they were contained in a separate complaint (CPLR 3019[d]; see, *Gilligan v Reers*, 255 AD2d 486, 487). Thus the status of plaintiffs' complaint would not necessarily affect H.O.A.'s cross-claim against N.H.H.C.

As to the twelfth proposed cause of action for breach of contract (see Exh. 4, p. 8-9 annexed to plaintiff's cross-motion), plaintiff alleges defendant H.O.A. did not keep the outside of the premises free of defects. The Limited Warranty does not cover or refer to landscaping and improvements not part of the home itself (see Exh. 2, p. 54, section 5[b]). Also, H.O.A. is not a signatory to the purchase agreement or the Limited Warranty. Thus, the court cannot now conclude that, the twelfth cause of action, is a not viable one. There are a Declaration of Comments and Restrictions, by-Laws and offering Plan of the Association (see Exh. 1, ¶ 5, p. 5 annexed to plaintiffs; cross-motion). Thus, plaintiffs' allegations as to H.O.A.'s alleged failure as to landscaping, etc., are, at this point, viable.

As to C.D.C. as a co-defendant, N.H.H.C. contends C.D.C. is a parent company and not a viable defendant. Plaintiffs suggest more discovery is needed. The court agrees. At this juncture of the proceedings, C.D.C. is a viable defendant. The fact that C.D.C. is a "parent" of N.H.H.C. does not, extinguish C.D.C.'s liability.

The fifth and sixth cause of the amended complaint allege that N.H.H.C. and C.D.C. failed to build the premises, specifically the premises' drainage according to building codes and approval (see Exh. 4, pgs. 5 and 6 annexed to plaintiff's cross-motion) of the Village of North Hills.

The Limited Warranty does discuss the fact that the premises will be free from latent defects that constitute defective design (see Exh. 2, p. 2 annexed to plaintiff's cross-motion). Such wording in the warranty should not bar the claim that the premises did not conform to the building codes and approval of the Village of North Hills.

Therefore, the fifth and sixth causes of action are viable.

The motion by N.H.H.C. sought dismissal of the original complaint. The papers submitted by N.H.H.C. seek dismissal of causes of action from plaintiffs' amended complaint as proposed (see Exhibit 4 annexed to plaintiffs' cross motion).

Based upon the foregoing, it is

ORDERED that, the motion by N.H.H.C. to dismiss the third, fourth, and seventh through eleventh causes of action of the proposed amended complaint pursuant to **CPLR § 3211(a)(7)** is **granted**; it is further

ORDERED, that the plaintiffs' cross motion to file an amended complaint as proposed is **granted**, but only to the extent of the first, second, fifth, sixth and twelfth causes of action.

Plaintiffs are directed to serve on defendants a copy of the amended complaint only with respect to the remaining causes of action within fifteen days of entry.

N.H.H.C.'s and plaintiffs' remaining assertions and case law references, to the extent not addressed herein, have been considered and found lacking in merit.

This constitutes the Order of the Court.

Dated: August 31, 2010


J.S.C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE