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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

INTERNATIONAL EXTERIOR FABRICATORS, LLC,

Plaintiff,

-against-

DECOPLAST, INC., EAST COAST WALL, LTD., FRANKLIN STUCCO SUPPLY, INC., JOHN DiSTEFANO, SR., JOHN DiSTEFANO, JR., FRANK DiSTEFANO and DANIELLE A. DeSTADIO, formerly known as DANIELLE FEDOR,

Defendants.

INDEX NO.: 016809/2008
MOTION DATE: 07/30/2010
MOTION SEQUENCE: 003

The following papers were read on this matter:

Notice of Motion, Rule 19-a Statement, Affirmation & Exhibits Annexed 1
Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment 2
Affidavit of Ed Harms in Opposition, Affidavit of Terry J. Willems, Rule 19-a Statement & Exhibits Annexed 3
Plaintiff's Memorandum of Law in Opposition to Motion for Partial Summary Judgment & Appendix Annexed 4
Affidavit of John DiStefano, Jr. in Further Support of Motion for Partial Summary Judgment & Exhibit Annexed 5
Reply Memorandum of Law in Further Support of Defendants' Motion for Partial Summary Judgment 6

PRELIMINARY STATEMENT

Defendants move for an order pursuant to CPLR § 3212 granting partial summary judgment on behalf of the individual defendants dismissing the Sixth Cause of Action and, on behalf of all Defendants, dismissing the claim for punitive damages. Plaintiff responds that the

Sixth Cause of Action, for fraud, is viable against the individual defendants based upon their personal fraudulent actions.

BACKGROUND

Plaintiff was the exterior wall sub-contractor on the Tanger Outlet Center at Arches (Arches). They acquired the exterior coat product from Decoplast. They were supplied two different products, the first of which was entitled "Fresco" with the term "Marblestone" on the label. The second product was entitled Stucco Veneziano Collection labeled "Pietra". Plaintiff understood from defendants that the products were identical and interchangeable; but the first batch of Pietra produced a failure to adequately adhere, with delamination, cracking, blistering and pocking when exposed to the elements.

Plaintiff alleges fraud in the Sixth Cause of Action and asserts that the individual defendants are liable for their participation in the fraudulent activities of Decoplast. A prior motion to dismiss the action against the individual defendants and to dismiss the Sixth Cause of Action for fraud was previously denied and the motion to dismiss the claim for punitive damages was denied without prejudice to renew.

Defendant now moves for partial summary judgment to dismiss the cause of action for fraud and to dismiss the action against the individually named defendants.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v.*

Garfield, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

In order to sustain a cause of action for actual fraud, plaintiff must prove:

- defendant made a representation , as to a material fact;
- the representation was false;
- the representation was known to be false by defendant;
- it was made to induce the other party to rely upon it;
- the other party rightfully relied upon the representation;
- the party relying upon the representation was ignorant of its falsity;
- the party suffered injury or damage based on its reliance. (*Otto Roth & Co. Inc., v. Gourmet Pasta, Inc.* 277 A.D.2d 293 [2d Dept. 2000]). Liability can also be premised upon representations which are recklessly made. (*Jo Ann Homes at Bellmore, Inc. v. Dworetz,* 25 N.Y.2d 112 [1969]).

Recklessness imports more than mere negligence. A person is reckless when they assert that something is true within their own personal knowledge, or makes such an absolute, unqualified, and positive statement as implies knowledge on their part, when in fact the person has no knowledge as to whether the statement is true or false, and the statement proves to be false, the person is equally as culpable as if they had willfully asserted something to be true which they absolutely knew to be false, and is equally chargeable with fraud. (*Daly v. Wise,* 132 N.Y. 306 [1892]).

Where, however, it appears that a party had reasonable grounds upon which to express their belief in the truth of the representation, fraud is negated. (*Kountz v. Kennedy,* 147 N.Y. 124 [1895]). One cannot be held liable for a misrepresentation which one believes to be true, provided the belief is based upon adequate information. *Id.* If, however, there is no reasonable foundation for the alleged belief, that may to be sufficient in itself to show that the truth of the statement was not truly entertained, and the representation is therefore a fraudulent one. (*State Street Trust Co. v. Ernst,* 278 N.Y. 104 [1938]).

Plaintiff's Sixth Cause of Action asserts claims of fraud against all defendants, including John DiStefano, Sr., John DiStefano, Jr., Frank DiStefano, and Danielle DeStadio, formerly known as Danielle Fedor. While individuals are usually not responsible for the actions of a corporation, corporate officers and directors may be held individually liable for fraud, if they participate, or have actual knowledge of it. (25 F.3d 1168, 1173 [2d Cir. 1994]).

The Court has previously determined that the complaint adequately stated a cause of action for fraud; but defendants now move pursuant to CPLR § 3212, claiming that on the basis of all of the facts discovered during the substantial document exchanges and deposition testimony, that there is no basis upon which plaintiff can succeed on the claims of fraud against any of the defendants.

Neither Danielle DeStadio nor John DiStefano, Sr. are officers or directors against whom the fraud of the corporation could be imputed. There is no evidence that any representative of plaintiff had any contact with John DiStefano, Sr. so as to reflect his active participation or awareness of misrepresentations made on behalf of Decoplast. While Danielle DeStadio was clearly involved in the transactions, she is a sales representative and not an officer or director.

A review of the deposition testimony of Danielle Fedor DeStadio, plaintiff by Edward Harms, John DiStefano, Jr., Frank DiStefano and the submitted inspection reports of CTL Engineers & Construction Technology Consultants, P.C., leads to the inescapable conclusion that the Stucco Veneziano Collection , which replaced the original Fresco product, was inadequate to perform the task for which it was intended. The technical data sheet, prepared by Decoplast, claimed that it was appropriate for both interior and exterior application, and that it contained acrylic additives which enhanced its rheological and adhesive qualities.

Essentially, defendants hitched their wagon to the Pied Piper of stucco, Athos Perin. He was the developer of Fresco, a product which Decoplast, or its associated companies, Franklin Stucco and East Coast Wall, had been selling from 1998 — 2006, when Perin created GFP, the manufacturer of Pietra Stucco Veneziano. The defendants' testimony is to the effect that they were advised by Perin that the productes were interchangeable. There is a problem with reliance on this testimony, in that it is contained in unsigned deposition testimony. (*Sewkarran v. De Bellis,* 11 A.D.3d 446 (2d Dept. 2004).

The results of testing produced by defendants indicate that Stucco Veneziano did not contain acrylic additives, which caused it to swell after short exposure to water, and to be hard and brittle upon drying. This was a different result than testing performed on the Fresco Marblestone. Defendants contends that the investigative reports should be disregarded because the Fresco that was tested was different than that sold by defendants. The difference, however, indicated by the letters "AD" after the term "Fresco Marblestone", relates to the granular size, not the chemical composition of the product.

The testimony of defendants as to their reliance on representations of the manufacturer of Stucco Veneziano Pietra is a significant issue which cannot be resolved, and could not be resolved even if contained in affidavits or sworn transcripts of their deposition testimony. It is obvious that Decoplast was in error in its representations that the products were identical and interchangeable. This was established both by the immediate failure of the product on site, and its failure to repel water in the laboratory.

Whether or not this was an intentional misrepresentation of material fact, or whether defendants were justified in relying on representations of the manufacturer as to the functionality of the product, is a factual question which requires resolution by the trier of fact. The motion for summary judgment dismissing the Sixth Cause of Action against John DiStefano, Sr. and Danielle Fedor DeStadio is granted. The motion to dismiss against all other defendants is denied without prejudice to renewal upon the trial of the action.

If fraud is established by clear and convincing evidence, the heightened standard of proof required, (*Vermeer Owners v. Guterman,* 78 N.Y.2d 1114 [1991]), whether or not plaintiff is entitled to punitive damages depends upon whether the fraud was aimed at the public, or was

limited to the transaction which is the subject of this action. Plaintiff points to the Technical Data Sheet for the Stucco Veneziano product, which, at the least, is in substantial portion, incorrect. Plaintiff further contends that defendant Decoplast continues to market the product for exterior as well as interior use.

Under these circumstances, the Court is not inclined to dismiss the claims for punitive damages. Whether or not there was a fraud, and if so, if it was directed at the public generally as opposed to solely the plaintiff in this action, is left to the trier of fact to conclude. The motion to dismiss the claim for punitive damages is denied without prejudice to renewal at the time of trial.

This constitutes the Decision and Order of the Court.

Dated: September 24, 2010

J.S.C.