

Gazzani v 17 Bldg. Corp.
2010 NY Slip Op 33719(U)
December 28, 2010
Sup Ct, Suffolk County
Docket Number: 23790-06
Judge: Peter Fox Cohalan
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INDEX # 23790-06
RETURN DATE: 7-30-09
MOT. SEQ. # 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x
MICHAEL GAZZANI,

-Plaintiff-

-against-

17 BUILDING CORP, KEN MCAVOY, MCAVOY
CONSTRUCTION CORP., THERESA ANN MARI,
ESQ., NORTH COUNTRY ELECTRIC CORP., THREE
RUGGIERI CORP. (d/b/a Reliable Home
Improvements), JULIO SAMPEDRO, AUTHENTIC
CONTRACTING, INC., STEVEN M. DEVITO
PLUMBING CORP., STEVE DEVITO, L&T KITCHEN &
BATH, INC., and LONG ISLAND ELECTRICAL
INSPECTION SERVICES INC.,

-Defendants.

CALENDAR DATE: April 14, 2010
MNEMONIC: MG

PLTF'S/PET'S ATTORNEY:

Edward A. Andrews, P.C.
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Glen Cove. NY 11542

DEFT'S/RESP ATTORNEY:

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Smithtown, NY 11787

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17 BUILDING COPR., KEN McAVOY and McAVOY
CONSTRUCTION COPR.,

Third-Party Plaintiffs,

-against-

ROBERT HENLE,

Third-Party Defendant.

Stephen Kunken, Esq.
6165 Jericho Turnpike
Commack, NY 11725

Upon the following papers numbered 1 to 14 read on this motion to dismiss _____;
Notice of Motion/Order to Show Cause and supporting papers 1-8 _____; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 9-12 _____; Replying
Affidavits and supporting papers 13-14 _____; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the defendants, Ken McAvoy, McAvoy Construction Corp., Theresa Ann Mari, Esq., Steven M. Devito and Steven M. Devito Plumbing Corp., seeking to dismiss the pro se plaintiff's complaint for failure to state a cause of action pursuant to CPLR §3211 (a)(7) and for summary judgment pursuant to CPLR §3212 is granted as to the defendants, Ken McAvoy, individually, Theresa Ann Mari, Esq., Steven M. Devito and Steven M. Devito Plumbing Corp., and the plaintiff's complaint as to these defendants is dismissed. The defendant McAvoy Construction Corp's motion to dismiss and/or for summary judgment is denied at this time.

The plaintiff instituted this action against the named defendants based upon a contract of sale with the defendant, 17 Building Corp., for the purchase and construction of a single

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family home located at 192-03 Rustic Road in Lake Ronkonkoma, Suffolk County on Long Island, New York. The plaintiff noted a number of deficiencies in the construction of his home and closed upon his residence on June 5, 2007 with 17 Building Corp. after entering into a "punch list" agreement with 17 Building Corp. to correct the deficiencies noted. The plaintiff claims that 17 Building Corp. failed to cure the defects in the home or fulfill the punch list agreement and that he was damaged in the amount of \$193,914.65. The plaintiff thereafter instituted this lawsuit pro se and as defendant's counsel noted made "claims against any entity which had anything to do with the home construction, including the Town of Brookhaven" for the deficiencies alleged as to the residence and because the Town of Brookhaven (hereinafter Town) granted a certificate of occupancy. The Town has been dismissed from this case in an order by my distinguished colleague, Mr. Justice Arthur Pitts, dated May 16, 2008, which granted the Town's motion for summary judgment for failure to serve the Town with a notice of claim or move for leave to file a late notice of claim.

The defendants, Ken McAvoy (herinafter McAvoy), McAvoy Construction Corp., Theresa Ann Mari, Esq., Steven M. Devito and Steven M. Devito Plumbing Corp. (hereinafter DeVito), now move for dismissal of the plaintiff's complaint pursuant to CPLR §3211 (a)(7) for failure to state a cause of action against these particular defendants and/or for summary judgment pursuant to CPLR §3212 because no factual issues are present to warrant any liability as to them. The plaintiff opposes the motion in an attorney affirmation only arguing that fraud was committed by these defendants and that these defendants "possessed superior knowledge to that of plaintiff" about the residence being built.

On a motion to dismiss pursuant to CPLR §3211 (a)(7) and §3212 the plaintiff is afforded the benefit of every reasonable inference to be drawn from the allegations contained within the complaint. In this case, the plaintiff has sued everyone perceived to be involved in the building of the residence in this lawsuit which in its sum and substance is a breach of contract claim between the plaintiff and 17 Building Corp., who contracted to build the home. CPLR §3016 (b) requires detailed specifications of the wrong alleged in a cause of action within the complaint as to fraud. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 (2009). The pleading requirements purposely require specificity so that each defendant is informed as to the specific conduct on which the complaint is based. See, *Pludeman v. Northern Leasing Systems, Inc.*, 10 NY3d 486, 860 NYS2d 422 (2008). Bare allegations of fraud in a complaint lacking details constituting the wrongs on which the lawsuit is based are not sufficient to sustain a cause of action. *Kline v. Taukpoint Realty Corp.*, 302 AD2d 433, 754 NYS2d 899 (2nd Dept. 2003).

Here, in the case at bar, the plaintiff's main claim is that upon closing of title to the residence, he provided 17 Building Corp., with a punch list of items of deficiencies requiring repair which 17 Building Corp. agreed to repair and the plaintiff claims that some remain unresolved and that new items have arisen since the closing. The plaintiff indicates that McAvoy is behind 17 Building Corp. and its building subcontractor, McAvoy Construction Corp. but McAvoy claims to be merely a building subcontractor of 17 Building Corp. and there is no indication of agreements by any of the moving defendants independent of the contract with 17 Building Corp. The plaintiff, solely through an attorney's affirmation, argues "corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud." citing to *Polonetsky v. Betrter Homes Depot*, 97 NY2d 46, 735 NYS2d 479 (2001). However, in that case the defendant steered the plaintiff to its own attorneys to perpetrate a fraud. Here, the plaintiff was represented at the contract signing and closing by

his own attorney, third party defendant, Robert Henle, Esq., and the contract clearly provided that no representations outside the contract would bind the defendants. In fact, DeVito was merely a plumbing subcontractor who was not involved in the closing and whose plumbing contract was with 17 Building Corp. and not with the plaintiff, the ultimate buyer of the home.

In ***Columbus 95th Street LLC v. Fitzmaurice***, 27 Misc3d 1223(A), 910 NYS2d 761 (2010) the Court in referencing to a motion to dismiss an allegation of fraud as against the defendants stated:

“To state a claim for fraud, plaintiff must allege ‘a **material** misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance ... and damages’ (***Eurycleia Partners, LP v. Seward & Kissel***, 12 NY2d 553,559 [2009]).
emphasis added.

The plaintiff herein has failed to state any of the requirements within his pro se complaint as to a claim for fraud against the defendants, McAvoy, individually, Theresa Ann Mari, Esq., Devito or Steven M. Devito Plumbing Corp. Further, the attempt to pierce the corporate veil of both 17 Building Corp. and McAvoy Construction Corp. to include McAvoy individually is unavailing. There has been no showing that McAvoy in his individual capacity was other than an employee/owner of McAvoy Construction Corp. or possibly a principal behind 17 Building Corp. and thus the action as against McAvoy individually is dismissed. The plaintiff's action against the attorney at the closing, Theresa Ann Mari, Esq., and Devito and Steven M. Devito Plumbing Corp. is dismissed as there has been no showing of a fraud with sufficient specificity as to these defendants to withstand the motion to dismiss.

The plaintiff claims these defendants possessed “superior knowledge” to his own and that he relied upon certain representations made by them even though the contract specifically prohibited such representations. Also, he was represented by competent counsel at the closing. His claim is insufficient as a matter of law to withstand a motion to dismiss and/or summary disposition. Moreover, Devito was a subcontractor for 17 Building Corp. not the plaintiff and made no representations as to the plumbing work to the plaintiff personally which would survive the closing. The alleged representations as to these defendants are general in nature and lack any evidentiary support.

However, the motion to dismiss as against McAvoy Construction Corp. is denied. The plaintiff claims that McAvoy Construction Corp is an “alter ego” of 17 Building Corp., and that both corporations which were involved in the building of his home are owned and controlled by McAvoy. The plaintiff further claims certain representations were made both as to a “punch list” of items needing repair in the home which survived the contract closing and the misrepresentation as to tree clearance. These claims are adequately stated so as to survive a motion to dismiss.

Upon a motion to dismiss a complaint for legal insufficiency, the test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action known to our law can be discerned from its averments. ***Frank v.***

DaimlerChrysler Corp., 292 AD2d 118, 741 NYS2d 9 (1st Dept. 2002); Gruen v. County of Suffolk, 187 AD2d 560, 590 NYS2d 217 (2nd Dept. 1992); Moore v. Johnson, 147 AD2d 621, 538 NYS2d 28 (2nd Dept. 1989); Conroy v. Cadillac Fairview Shopping Center Properties, 143 AD2d 726, 533 NYS2d 446 (2nd Dept. 1988). Furthermore, the complaint should be liberally construed in plaintiff's favor and the facts alleged in the complaint should be assumed to be true. P.T. Bank Central Asai v. ABN Amro Bank N.V., 301 AD2d 373, 754 NYS2d 245 (1st Dept. 2003); Palazzolo v. Herrick, Feinstein, LLP, 298 AD2d 372, 751 NYS2d 401 (2nd Dept. 2002); Holly v. Pennysaver Corp., 98 AD2d 570, 471 NYS2d 611 (2nd Dept. 1984). The nature of the inquiry is whether a cause of action exists and not whether it has been properly stated. McGill v. Parker, 179 AD2d 98, 582 NYS2d 91 (1st Dept. 1992); Marini v. D'Atolito, 162 AD2d 391, 557 NYS2d 45 (1st Dept. 1990). Here the complaint states a sufficient cause of action against McAvoy Construction Corp. to withstand the motion to dismiss.

As to McAvoy's claim that there are no factual issues which would warrant a denial of summary disposition, the Court notes that discovery has not been conducted as to McAvoy's interest and control of these two (2) corporations and how they operated within the framework of each other. Where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge of the party making the motion and the opposing party did not have reasonable opportunity for disclosure prior to the motion for summary judgment, the motion should be denied. Stevens v. Grody, 297 AD2d 372, 746 NYS2d 510 (2nd Dept. 2002); Urcan v. Cocarelli, 234 AD2d 537, 651 NYS2d 611 (2nd Dept. 1996); Campbell v. City of New York, 220 AD2d 476, 631 NYS2d 932 (2nd Dept. 1995); Baron v. Incorporated Village of Freeport, 143 AD2d 792, 533 NYS2d 143 (2nd Dept. 1988). There has been no disclosure in this case at all as to McAvoy and the manner in which McAvoy allegedly controlled both entities, 17 Building Corp. and McAvoy Construction Corp. and therefore the motion by McAvoy Construction Corp. is denied in its entirety.

Accordingly, the motion by the defendants, Ken McAvoy, Theresa Ann Mari, Esq., Steven M. Devito and Steven M. Devito Plumbing Corp., seeking to dismiss the plaintiff's complaint for failure to state a cause of action allegedly for fraud pursuant to CPLR §3211 (a)(7) and for summary judgment pursuant to CPLR §3212 is granted, and the plaintiff's complaint against these defendants is dismissed. The request to dismiss the plaintiff's complaint against McAvoy Construction Corp. on both CPLR §3211 (a)(7) and/or CPLR §3212 grounds is denied in its entirety as per the opinion heretofore stated.

The foregoing constitutes the decision of the Court.

Dated: December 28, 2010



J.S.C.