Rush v Jack Anthony, Inc.

2011 NY Slip Op 31230(U)

April 25, 2011

Supreme Court, Nassau County

Docket Number: 003617/2007

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

JACQUELINE and JOHN RUSH,

Plaintiffs,

- against -

SWIMMING POOLS BY JACK ANTHONY, INC.,

Defendant.

INDEX NO.: 003617/2007
MOTION DATE: 2/7/11
SEQUENCE NO .: 01, 02

The following documents were read on this motion:

Motion by Defendant for Summary Judgment Dismissing Complaint 1.
Cross-motion by Plaintiffs for Summary Judgment .... 2.

PRELIMINARY STATEMENT

Defendants move to dismiss the complaint on the ground that the plaintiffs cannot establish a breach of the contract in that the contract did not provide for a specific depth of the vinyl-lined pool which defendant constructed for plaintiff. Plaintiff cross-moves for summary judgment and counsel fees on the ground that the contract, prepared by defendant, neglected a material term, specifically the depth of the pool, failed to properly supervise the installation of the pool, and was negligent in the construction of the pool. They further assert that the re-construction of the pool by defendant contained deficiencies which required the installation of a gunnite pool as substantially greater expense.

BACKGROUND

This action arises from the installation of a vinyl in-ground pool at plaintiffs' residence in Water Mill. In or about December 2005 plaintiffs met with Michael Inzerillo of Swimming Pools by Jack Anthony, Inc. ("Jack Anthony") at their home in Water Mill to discuss the installation of a pool. About a month later, Jack Anthony forwarded a proposal to them. The 3-page proposal (Exh. "G" to Motion), referred to an 18' x 45' vinyl in-ground pool, itemized extras, and a spa package. Two proposals followed, although plaintiff John Rush does not recall seeing the third. None of the proposals referred to the depth of the pool.

Early in 2006 plaintiffs agreed to proceed with the installation of the pool, and executed a contract which was submitted to them by defendant. (Exh. "J"). The provisions for "minimum depth" and "maximum depth" are blank. Plaintiffs made two modifications to the contract, providing for the installation of an 8' fiberglass diving board and a "U-Stand" platform for the board. According to the deposition testimony of Michael Inzerillo, the installation of a diving board required a minimum depth of 8' for the diving area, with a break line, where the shallow section begins to descend to the bottom of the deep area, 24 ' from the deep end side of the pool.

Defendant excavated for the pool on February20, 2006, and installed the steel walls from the pool kit on February 27. The spa was located mid-point on the long wall of the pool, with a overhang that spilled water into the pool. The pool was completed and filled with water on July 3, 2006. Things were going swimmingly until Mr. Rush entered the pool, and learned for the first time that the shallow end was less than 4' in depth, and the deep end less than 10'. Despite it being the 4th of July weekend, he proceeded directly to the defendant's office and demanded to speak with Michael Inzerillo's father, who was reached by telephone.

He complained about the depth of the steps leading into the pool, the fact that the top step was slippery, the low end was too shallow, the length of the low end was too long; the spillover from the Jacuzzi extended 8" — 10" over the pool; the water did not spillover properly into the pool; the water pressure from the Jacuzzi jets was inadequate; there were chipped bricks and cement coating some of the bricks on the patio; and a rebar protruded from the concrete slab for the pool house.

The parties met some time thereafter at the Rush home. Defendant agreed to disassemble

the pool, re-excavate it to increase the depth of both the deep and shallow areas. The cost of labor would be split evenly between them, and Rush would pay $4,800 for a custom liner. This agreement was reduced to writing and signed by Mrs. Rush. (Exh. "O"). Defendant sent drawings for Rush to sign and Mrs. Rush did so. At this point, defendant re-dug the pool, and installed an additional step. Plaintiffs, however, remained unsatisfied and further drawings were prepared and sent, but plaintiffs failed to respond.

When plaintiffs came to the house, they claim that there were holes under the steel walls, and contacted an engineering firm to look at the pool, and then a second engineering firm, both of whom issued reports. The first company that came to inspect the pool was Haven Swimming Pools, Inc. On September 8, 2006 Mr. Rush entered into a contract with them to install a gunite pool at a cost of $91,750. (Exh. "Q"). By letter dated September 30, 2006 defendant advised plaintiffs that it was imperative that they finalize the situation with the pool because the condition in which it was constituted a hazard. Plaintiffs returned the letter with a notation that they were weighing their options and directed defendants not to go to the property.

The Complaint

The Amended Verified Complaint is annexed as Exh. "B". It contains Six Causes of Action as follows:

First: Breach of Contract alleging expenditures of $130,891.67 for the installation of the original pool and $152,870 to remove and reinstall the pool. Damages are claimed to be $183,870;

Second: Breach of express and/or implied warranty of fitness for the purpose intended, for which damages of $183,870 are claimed;

Third: Failure to provide services in a workmanlike manner, for which the same damages are alleged;

Fourth: Defendant was not licensed to engage in the installation of pools, and are not entitled to retain the sum of $130,891.67 paid to them;

Fifth: Plaintiffs are entitled to legal fees in the amount of $8,000 pursuant to General Obligations Law § 5-327;

Sixth: As a result of the work performed in accordance with the contract, plaintiffs

sustained property damage for which they assert a claim for $183,870.

DISCUSSION

Plaintiffs have not established that defendant did not substantially perform its obligations pursuant to the contract between the parties. They annex to their cross-motion reports from two swimming pool contractors who examined the pool, not in the condition in which defendant completed it, but during the course of the re-excavation, as requested by plaintiffs. They do not allege that the original construction was incomplete, or failed to meet industry standards. When a contractor establishes that they have substantially performed, they are entitled to payment. (*Windjammer Homes, Inc. v. Lieberman,* 278 A.D.2d 411 [2d Dept.2000]). The Court there concluded that in the face of uncontroverted evidence that the overall workmanship on the newly constructed home was below industry standards, and that between 14% and 43% of contract was incomplete, the builder had not substantially performed.

"It is well settled that '[i]n order to recover for substantial performance, the plaintiff must establish that its failure to perform was inadvertent or unintentional and that the defects were insubstantial' ". (*Carefree Building Products, Inc. v. Belina,* 169 A.D.2d 956 [3d Dept.1991]) (internal citation omitted). The complaints registered by plaintiffs, other than the depth of the pool, were clearly insubstantial. The depth of the pool, however, was not stated in the contract. The installation was of a standard non-custom vinyl-lined pool, and can hardly be said to be unfit for the use for which it was intended: swimming and diving. The chipped masonry, concrete on brickwork, possibly excessive extension of the spill-over from the Jacuzzi, and the exposed rebar in the pool house floor could certainly have been easily remedied.

The motion to dismiss the First Cause of Action is granted.

The motion to dismiss the Second Cause of Action is also granted. The claim is that defendant breached an express or implied warranty of fitness for a particular purpose. There is no express warranty identified, and an implied warranty only when a seller, at the time the contract of sale is made, has reason to know the particular purpose for which the buyer requires the goods, and that the buyer is relying on the seller's skill or judgment to furnish or select goods suitable to the buyer's particular purpose. Implied warranties of merchantability and fitness for a particular purpose are governed by Uniform Commercial Code §§ 2-314 and 2-315 respectively,

both of which deal with "goods". The term "goods" is defined as " . . . all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107)". UCC 2-105 (a). A completed swimming pool is not "goods" within the meaning of the UCC. While the component parts making up a pool kit may constitute goods, it is the fully assembled product of which plaintiffs complain.

The Third Cause of Action alleges failure to perform services in a workmanlike manner. The gravamen of the negligence cause of action is that the work performed under the contract was performed in a less than skillful and workmanlike manner. Such a cause of action sounds in breach of contract, not negligence. As such, this cause of action is " 'merely a restatement, albeit in slightly different language, of the . . . contractual obligations asserted in the cause[s] of action [alleging] breach of contract' ". (*Corrado v. East End Pool & Hot Tub, Inc.*, 69 A.D.3d 900 [2d Dept.2010], quoting *Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 390 [1987]).

The motion to dismiss the Third Cause of Action is granted.

The Fourth Cause of Action asserts, upon information and belief, that defendant was not licensed to install swimming pools. There is no basis for this assertion, and defendant annexes as Exh. "S" to the motion a copy of the license issued to Swimming Pools by Jack Anthony, Inc., effective March 7, 1997 and expiring on March 1, 2009. Defendant was licensed by Suffolk County Office of Consumer Affairs at the time of installation of the swimming pool. The motion to dismiss the Fourth Cause of Action is granted.

Plaintiff is not entitled to legal fees pursuant to General Obligations Law § 5-327. The statute provides for an award of counsel fees to a consumer in which a seller has such a right under the terms of a consumer contract. It provides as follows:

> 2. Whenever a consumer contract provides that the creditor, seller or lessor may recover attorney's fees and expenses incurred as the result of a breach of any contractual obligation by the debtor, buyer or lessee, it shall be implied that the creditor, seller or lessor shall pay the attorney's fees and expenses of the debtor, buyer or lessee incurred as the result of a breach of any contractual

> obligation by the creditor, seller or lessor, or in the successful defense of any action arising out of the contract commenced by the creditor, seller or lessor. Any limitations on attorney's fees recoverable by the creditor, seller or lessor shall also be applicable to attorney's fees recoverable by the debtor, buyer or lessee under this section. Any waiver of this section shall be void as against public policy.

If plaintiffs were to succeed on a breach of contract action against defendants, they would be entitled to the benefit of this statute if the consumer contract called for payment of legal fees by the consumer to the seller. ¶ 8 of the contract (Exh. "C" to Cross-motion) provides that if the builder places the matter in the hands of an attorney, purchaser shall be responsible for an additional 15% of the judgment awarded to account for legal fees. Of course, in order to recover legal fees, the party claiming them must be the successful party. In this case, the plaintiffs are not the successful parties.

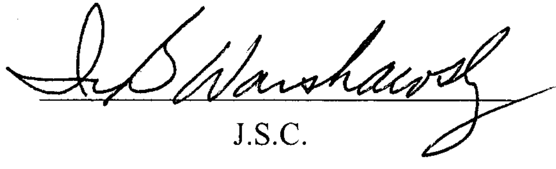
The motion to dismiss the Fifth Cause of Action is granted.

The Sixth Cause of Action alleges damage to the plaintiffs property as a result of the conduct of defendants with respect to the installation and re-excavation of the pool. ¶ 4 of the contract specifically provides that "(t)he Builder will not be responsible for damage to lawn, shrubs, flowers or trees, patios or fences, curbs, sidewalks, and underground utilities caused as a result of the construction work called for in this contract by the Builder". Plaintiffs have waived any claims for damage, acknowledging as they have, that a certain degree of damage is inherent in the process of pool installation, and that they agree not to hold the Builder responsible.

The motion to dismiss the Sixth Cause of Action is granted.

This constitutes the Decision and Order of the Court.

Dated: April 25, 2011



J.S.C.

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