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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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ERIC GOLDSMITH,

Plaintiff(s),

-against-

THE HAMPTON SHIPYARDS, INC.,

Defendant(s).

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Index No. 12432/09

Motion Submitted: 6/23/11
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

Defendant, The Hampton Shipyards, Inc., moves, pursuant to CPLR § 3212, for an Order granting it summary judgment dismissing the plaintiff, Eric Goldsmith ("Goldsmith")'s complaint. The motion is denied.

This is a breach of contract action wherein plaintiff alleges that the defendant did not construct a vessel in a good and workmanlike manner. As best as can be determined from the papers submitted herein, the following facts are undisputed:

Plaintiff, Eric Goldsmith, is the purchaser of a 2006 Columbia II 25' Northsider model cruiser (hereinafter "the Boat").

The defendant is a domestic corporation engaged in the business of boat manufacturing in East Quogue, New York. Non-party Fred Scopinich is the owner and president of the defendant, The Hampton Shipyards, Inc.

On March 18, 2006, plaintiff contracted with the defendant for the purchase of the Boat for $91,545.00, plus tax. Pursuant to the agreement, the defendant was required to construct the boat according to the specifications as set forth in Schedule A which the parties incorporated into the purchase contract. According to the terms of the contract, in addition to the guarantees and warranties by manufacturers/suppliers, defendant unconditionally guaranteed all work, labor and material for one year from the date of delivery of the Boat , i.e., until June 20, 2007. In addition, the defendant also unconditionally guaranteed the hull for five years from the date of delivery of the boat, i.e., until June 20, 2011.

Specifically, the purchase contract stated in pertinent part as follows:

AGREEMENT TO BUILD A BOAT AT A SET PRICE

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NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the mutual covenants and agreements herein contained, and subject to the terms and conditions herein set out, the parties agree as follows:

1. The Builder agrees to sell [the Boat], in a good and workmanlike construction.

2. The Purchaser agrees to pay to the Builder the total sum of [$91,545] US $ . . . Plus Sales Tax if applicable.

   a) $10,000 on the signing of this Agreement and $10,000 when on completion of hull and deck;

   b) $20,000 on arrival of engine;

   c) $15,000 on installation of engine, tank and cockpit floor;

   d) Balance by official or certified funds, *upon completion of boat in new factory condition* ***only after boat has completed successful sea trials to Purchaser's satisfaction*** *and title is transferred at East Quogue, N.Y.* This represents the balance of the purchase price.

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5. The Purchaser and Builder hereby agree to the conditions and specifications to the construction of the boat specified in Schedule A hereto attached, which comprises the equipment to be installed in the vessel for the purchase price in full; as stipulated under section 2 of this agreement.

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8. In addition to the guarantees and warranties, by manufacturers/suppliers, the Builder unconditionally guarantees all work, labor, and material for one year and five years on the hull from the date of delivery of the boat.

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The Boat was delivered to the plaintiff on or about June 20, 2006.

In March 2007, plaintiff dry-docked the boat to perform yearly maintenance. He claims that it was then that he noticed defects to the Boat that he had not been able to see when the Boat was in the water. As a result, beginning in March 2007 through June 2007, plaintiff made complaints to the defendant about the defects in the construction of the Boat. He alleged that he spent approximately $2,700 out of pocket for repairs and hauling of the boat. Plaintiff alleges three main complaints with respect to the defendant's negligence in constructing the Boat: (1) that the gel coating of the boat is damaged and needs to be replaced; (2) that the defendant improperly installed hardware; and (3) that the defendant did not comply with the plaintiff's wishes regarding the installation of a dripless shaft packing log. Plaintiff claims that the defendant has breached the contract by its lack of quality and workmanlike manufacture of the vessel.

Defendant, by it's President, Fred Scopinich, opposes the motion and argues that "it is [his] considered opinion, that the boat in question was built properly that poor maintenance contributed towards the problems the plaintiff alleges" (Scopinich Affidavit, ¶27). Specifically, defendant argues that it is the standard practice in the marine industry that manufacturers do not cover gel crack stresses and that the reason for the stress cracks is the flexing of the hull surface that the gel coat is bonded to, flexed or moved an amount beyond the point that the gel coat can flex resulting in cracking (***Id.*** at ¶¶15, 17). Defendant argues that plaintiff's boat experienced thermal cracking of the gel coat due to expansion and constriction of the underlying structure because it was left uncovered over the cold, harsh winter seasons (***Id.*** at ¶19).

With respect to plaintiff's allegations surrounding the improper installation of the hardware, defendant argues that as his company used all stainless steel hardware, this claim falls by the wayside (***Id.*** at ¶20).

Finally, with respect to plaintiff's allegations regarding the problems involving the shaft log, defendant states that he had previously informed the plaintiff upon inspection of the Boat that it would be better to use the bronze box with flax packing and that when plaintiff refused, he went ahead and used the dripless packing, as a result of which, he claims, the boat suffered the subsequent damage (***Id.*** at ¶26).

Defendant seeks summary judgment dismissal of plaintiff's complaint.

Summary judgment is the procedural equivalent of a trial (***Capelin Assoc. Inc. v. Globe Mfg. Corp.***, 34 N.Y.2d 338, 313 N.E.2d 776, 357 N.Y.S.2d 478 [1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Once the party seeking summary judgment has made a prima facie showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (***Alvarez v. Prospect Hosp., supra; Zuckerman v. City of New York***, 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (***Zuckerman v. City of New York, supra***).

The issue of skillful and workmanlike manner in the sufficiency of performance of a contract generally comes up in the context of building and construction contracts. However, the requirement of performance in a skillful and workmanlike manner is not so limited (***Prudential Ins. Co. of America v. Dewey Ballantine, Bushby, Palmer & Wood***, 170 A.D.2d 108, 573 N.Y.S.2d 981 (1st Dept., 1991), *order aff'd on other grounds*, 80 N.Y.2d 377 [1992]). A person undertaking to perform work under a contract must exercise reasonable skill and care in the performance of the work (***Larchmont Nurseries, Inc. v. Daly***, 33 A.D.3d 872, 827 N.Y.S.2d 56 (2d Dept., 2006); ***International Fidelity Ins. Co. v. Gaco Western, Inc.***, 229 A.D.2d 471, 645 N.Y.S.2d 522 [2d Dept., 1996]). The failure to comply with an express or implied duty to perform in a skillful and workmanlike manner may entitle the other party to damages resulting from the unskillful and unworkmanlike performance (***Mohawk Overall Co. v. Brown***, 163 A.D. 157, 148 N.Y.S. 369 (3d Dept., 1914); ***Reale v. Linder***, 135 Misc.2d 317, 514 N.Y.S.2d 1004 (Dist. Ct. 1987), *judgment aff'd as modified on other grounds*, 143 Misc.2d 496 [App. Term 1988]).

Further, where plans and specifications are regarded as part of the contract (***Adams v. Indelli***, 146 A.D. 790, 131 N.Y.S. 519 (1st Dept., 1911), they must be complied with (***L'Hommedieu v. Winthrop***, 59 A.D. 192, 69 N.Y.S. 381 (2d Dept., 1901) in order to entitle the contractor to recover the contract price (***Acme Builders, Inc. v. Facilities Dev. Corp.***, 51 N.Y.2d 833, 413 N.E.2d 1164, 433 N.Y.S.2d 749 [1980]). Any claim that work is inferior to that required by the specifications must be established by the owners (***Thomas W.***

Finucane Co. v. Board of Educ. of City of Rochester, 28 Bedell 76, 190 N.Y. 76, 82 N.E. 737 [1907]).

In addition, under the provisions of a contract, the performance of one party may be required to be rendered to the satisfaction of the other party (***Crawford v. Mail & Express Publ. Co.***, 1 Bedell 404, 163 N.Y. 404, 57 N.E. 616 [1900]). Since such a contract provision is valid (***Matter of Associated Teachers of Huntington, Inc. v. Board of Educ., Union Free School, Dist. No. 3, Town of Huntington***, 33 N.Y.2d 229, 306 N.E.2d 791, 351 N.Y.S.2d 670 (1973), recovery on a contract may be precluded by its application in a case where performance is not satisfactory to the other party (***Sabarsky v. Drew***, 176 A.D. 80, 162 N.Y.S. 505 [1st Dept., 1916]). In the class of cases where the fancy, taste, sensibility, or judgment of the promisor is involved, the courts adhere to a subjective standard of reasonableness (***Edgewater Const. Co., Inc. v. 81 & 3 of Watertown, Inc.***, 252 A.D.2d 951, 675 N.Y.S.2d 722 (4th Dept., 1998); ***Fursmidt v. Hotel Abbey Holding Corp.***, 10 A.D.2d 447, 200 N.Y.S.2d 256 [1st Dept., 1960]). Where the subject of the contract is one which involves personal taste or feeling, an agreement that it must be satisfactory to the promisor necessarily makes the promisor the sole judge of whether it answers that condition; the promisor cannot be required to take it because other people might be satisfied with it, for that is not what he or she agreed to do (***Fursmidt v. Hotel Abbey Holding Corp., supra***). In cases involving operative fitness or mechanical utility, the subject matter of the contract is such that the satisfaction stipulated for must be held to apply to quality, workmanship, saleability, and other like considerations, rather than to personal satisfaction (***Blask v. Miller***, 186 A.D.2d 958, 588 N.Y.S.2d 940 (3d Dept., 1992); ***Cross v. Frezza***, 161 A.D.2d 927, 557 N.Y.S.2d 498 [3d Dept., 1990]).

In moving for summary judgment, the defendant, bears the burden of establishing it's prima facie entitlement to judgment as a matter of law; that is, the defendant is required to show that it did not negligently construct the boat, that it used correct and standard materials and that it constructed the vessel in a good and workmanlike manner. This, it has failed to do.

The facts here are clear that when plaintiff contracted with the defendant for the purchase of the Boat, the defendant was required to construct the boat according to the specifications set forth in the Schedule A. Schedule A specified, *inter alia*, that not only was "stainless deck hardware" required as part of the equipment on the Boat, but a "dripless shaft log" was also bargained for by the parties.

Yet, the evidence here confirms that the defendant did not provide the plaintiff with a dripless shaft log as part of the Boat as it was delivered to the plaintiff. In fact, the defendant, by Fred Scopinich, states in his affidavit, as follows: "Plaintiff wanted a dripless shaft packing installed; however it is my normal practice to install a bronze packing box"

(Scopinich Aff., ¶24). Defendant also testified that he "chose not to" provide plaintiff with the bargained for dripless shaft log, but instead provided him with a shaft packing, (Scopinich Tr., pp. 41-42) which he thought was a better piece of equipment than the one requested by the plaintiff. Defendant's admission that it did not use the correct materials as outlined in the agreement in constructing the Boat constitutes a breach of the agreement by and between the parties. He knowingly breached the agreement "choosing" to supply the plaintiff with materials other than those requested by him.

With respect to the requirement in the Agreement that the defendant, in constructing the vessel, use stainless steel for the sink, handrails, bow rail, rod holders and deck hardware, the defendant's own evidence again confirms that said requirements were not fulfilled. Scopinich states in his affidavit that "[t]he only exception to using stainless steel hardware which was used in the manufacture of said vessel was in the four engine vents" (Scopinich Tr., ¶21). Yet the evidence is clear that when plaintiff first started complaining in March 2007 (through June 2007) about the Boat to Scopinich, his complaints included that the vents were not stainless and were pitting and that the bow rail was of low grade stainless and was actually rusting. His complaints also included that the propellor shaft strut was affixed to the vessel with mixed metal bolts and washers, which he claims, caused the underwater hardware to degrade and rust. Obviously, said complaints by the plaintiff which remain undisputed particularly in light of the defendant's admission that stainless steel hardware was not exclusively used on the Boat (as agreed to in the purchase agreement), is evidence that the defendant constructed the Boat in a negligent manner or that the defendant did not use the correct or standard materials. In fact, the defendant's admission that it did not use stainless steel hardware in the four engine vents, by itself, constitutes an admitted breach of the agreement between the plaintiff and the defendant.

Further, the evidence is clear that according to the terms of the contract, in addition to the guarantees and warranties by manufacturers/suppliers, defendant *unconditionally* guaranteed all work, labor and material for one year from the date of delivery of the Boat , i.e., until June 20, 2007, and it also *unconditionally* guaranteed the hull for five years from the date of delivery of the boat, i.e., until June 20, 2011.

Specifically, the guarantee contained within the purchase agreement stated as follows:

> 8. *In addition to the guarantees and warranties, by manufacturers/suppliers*, the Builder unconditionally guarantees all work, labor, and material for one year and five years on the hull from the date of delivery of the boat.

(Purchase Agreement, ¶8 [Emphasis Added]).

Initially, it is noted that based upon a simple reading of this guarantee provision in the

parties' contract, it is plain to this Court that the defendant issued it's own guarantee on top of the manufacturer and supplier guarantees.

Moreover, because an express warranty is part of the "basis of the bargain", its interpretation is governed by the rules of contract interpretation (***Prudential Ins. Co. v. Premit Group, Inc.***, 270 A.D.2d 115, 704 N.Y.S.2d 253 (1st Dept., 2000), *lv. denied* 95 N.Y.2d 756 [2000]).

Here, defendant does not dispute that it issued an unconditional guarantee for the work, labor and material for one year and five years on the hull from the date of delivery of the Boat. Further, it does not contend that it is not bound by all of the provisions of the guarantee. In fact, in the absence of any evidence (or argument) by the defendant that the gel coating was *excluded* from it's warranty, there is no reason for this Court to not bind the guarantor, i.e. the defendant, to the promise of performance it made (***Milliken & Co. v. Stewart***, 182 A.D.2d 385, 582 N.Y.S.2d 127 [1st Dept., 1992]) particularly because the undisputed evidence herein is that the plaintiff began making timely complaints (all covered by the defendant's guarantee by reason of them not being excluded) to the defendant as early as March 2007, i.e., well within the covered time period of the guarantee.

That the standard practice in the industry may be to exclude gel coating from the guarantee is of no moment because the defendant's guarantee was on top of the manufacturer and supplier guarantees; it added additional protection to the plaintiff without exception. The gel coating, whether considered work, labor or material, is the responsibility of the seller in this case. Further the fact that the gel coating, which has been described by the defendant's expert, Allen Dannewitz, as coating placed on the hull, certainly falls within the five year unconditional guarantee of the hull.

More basically, the Agreement also clearly states that:

1. The Builder agrees to sell [the Boat], in a good and workmanlike construction.

Defendant has not established that he sold the boat in good and workmanlike construction. Defendant's evidence includes the expert affidavit of Allen Dannewitz, the owner of Professional Marine Services, LLC who, inspected the Boat on May 5, 2010, with the intent to "ascertain the extent of the gel coat cracks on the deck and superstructure" (Dannewitz Aff., ¶16). He stated that upon inspection, he noted several gel coat cracks, which he concluded "have been taken place over the years for various reasons" (***Id.*** at ¶23). He surmises that "[s]ome lineal cracks on the bow tow rails may have been caused by stress, banging on docks or piles [and] [o]thers may have been caused by thermal stress, uncovered exposure to winter weather conditions" (***Id***). While defendant's expert does not attribute the cracks to poor construction of the vessel, this Court cannot overlook the fact that the expert

also fails to pinpoint the actual cause of said cracks or even how long he thinks they were present on the boat.

That the agreement also stated that the balance of the purchase price would be provided by the purchaser to the seller "upon completion of boat in new factory condition only after boat has completed successful sea trials to Purchaser's satisfaction and title is transferred at East Quogue, N.Y." is irrelevant in light of the unconditional guarantees given by the seller to the buyer, supra.

In light of the defendant's failure to produce evidence demonstrating it's prima facie showing of entitlement to judgment as a matter of law, it's motion for summary judgment is herewith denied, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Center***, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]).

The foregoing constitutes the Order of this Court.

Dated: August 8, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.