

Friedman v Cardinal Sales, Inc.
2011 NY Slip Op 32302(U)
August 18, 2011
Supreme Court, Nassau County
Docket Number: 8621/09
Judge: Michele M. Woodard
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
RON FRIEDMAN and AMY FRIEDMAN,

Plaintiffs,

-against-

CARDINAL SALES, INC.,

Defendant.
-----X

**MICHELE M. WOODARD
J.S.C.**

TRIAL/IAS Part 11

Index No.: 8621/09

Motion Seq. No.: 02 & 03

DECISION AND ORDER

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In motion sequence number two, defendant, Cardinal Sales, Inc. ("Cardinal") moves, *inter alia*, pursuant to CPLR §3212, for an Order of this Court, granting it summary judgment dismissal of the plaintiffs' complaint.

In motion sequence number three plaintiffs, Ron and Amy Friedman (collectively referred to herein as "Friedman"), cross move for an order, *inter alia*, pursuant to CPLR §3212, granting them summary judgment on their first and second causes of action and dismissing the defendant's counterclaims with prejudice.

This is a breach of contract action. Plaintiffs, Ron and Amy Friedman, allege that defendant, Cardinal Sales, Inc., breached it's contract with them in which the defendant agreed to supply and install kitchen cabinets at plaintiffs' home as part of a larger renovation project involving construction of the plaintiffs' home. According to the papers submitted in support of the motions, the facts are as follows:

Plaintiffs and the defendant entered into an agreement on or about October 26, 2006 (the "Agreement"). The Agreement was made by Amy Friedman on behalf of the plaintiffs and by Bill Tuotro, Sr. on behalf of the defendant. The Agreement dated October 26, 2006, states, in pertinent part, as follows:

(KITCHEN)
 SUPPLY & INSTALL CUISINE LAURIER CABINETRY AS PER PLAN

BASES & TALL CABINETS COLOR MATCH JAYA ON QUARTER SAWN OAK
 SHAKER NOY-OZ PEA - *WOOD GRAIN LAMINATE INT*
 DOVETAIL FULL EXT. BLUM MOTION DRAWERS -
 QUARTER SAWN OAK

ISLAND CABINETS *ALL STAINLESS EXTERIOR W/WOOD GRAIN LAMINATE INTER. & DOVETAIL,*
 FULL EXTENSION, BLUM MOTION P/O DRAWERS

WALL CABINETS *STAINLESS STEEL WITH SANDBLASTED GLASS & WHITE LAM. INTERIOR*

 BUTLER BUTLERS PANTRY
 PANTRY CABINETS HIGH GLOSS LAQUER ON BROADLINE (FLUSH) DOOR
 MATCH CLIENTS BENJ MOORE SAMPLE COLOR
 BLUM MOTION, FULL EXT, DOVETAIL DRAWERS

Pursuant to this Agreement, the purchaser, Friedman, agreed to pay the total price of \$56,980.60. On that date, Friedman made a deposit for \$29,980.00.

Subsequently, on August 27, 2007, the parties agreed to the following "Change Order:"

DOOR PANELS FOR 2 MIELE WARMING DRAWERS ESW4800FB INTEGRATED

1 FULL DOOR PANEL FOR 15" U LINE 2115WCOL
 1 FRAME DOOR PANEL FOR 24" U LINE 2175WCOL
 CHANGE 2ND SINK AREA

The total price for this Change Order was \$3,300.00.

Then on February 28, 2008, the following was added/amended to the Agreement:

DIFFERENCE BETWEEN EXISTING CABINET & LARGER CABINET WITH GLASS AND ALUMINUM & <i>STAINLESS SIDES</i>	
NEW CABINET TO BE 36" WIDE	\$2,071.00
FINISHED LEFT SIDE OF CABINET TO RIGHT OF HOOD (\$268)	N/C
BASE 9 ½ WIDE WOOD, FINISHED ON LEFT SIDE	\$797.00

The total price of this amendment/addendum was \$2,868.00. However, pursuant to a revision of this exact amendment/addendum, Ron Friedman, stated the following:

DIFFERENCE BETWEEN EXISTING CABINET & LARGER CABINET WITH GLASS AND ALUMINUM & <i>STAINLESS SIDES</i>	
NEW CABINET TO BE 36" WIDE	\$2,071.00
FINISHED LEFT SIDE OF CABINET TO RIGHT OF HOOD (\$268)	N/C
BASE 9 ½ WIDE WOOD, FINISHED ON LEFT SIDE	\$797.00

* Per Bill Sr.'s request please deduct \$2000 (Two Thousand Dollars) from this invoice. Please call me with any questions. (Signed Ron Friedman)

As a result of this change, \$2,000.00 was deducted from the total price of the amendment/addendum resulting in the total "price" of the amendment/addendum totaling \$868.00.

Ultimately, pursuant to the terms of the Agreement and additional amendments, plaintiffs agreed to pay defendant the total sum of \$62,388.00.

Furthermore, pursuant to the Agreement, plaintiffs made the following payments to the defendant: \$30,000.00 on or about September 28, 2006; \$27,500.00 on or about January 25, 2008; and \$868.00 on or about March 17, 2008.

In bringing this action, plaintiffs claim in the Verified Bills of Particulars dated March 2, 2010, that the defendant breached its contract, as follows: defendant supplied and installed inferior laminates rather than stainless steel cabinetry; defendant supplied and installed inferior compressed wood cabinetry; defendant failed to provide a tray divider of acceptable level of quality, additional roll out shelves, a wine cooler panel, wraparound exterior steel, covers for the lighting fixtures underneath the cabinets; panels to be placed over the appliances and the handles for such panels; defendant failed to properly install the wall cabinets such that they align flush against the wall and secure one of the drawer handles; defendant failed to properly install the panel that was made for the U-Line refrigerator which does not cover the entire refrigerator; defendant failed to properly install the corners of the

upper cabinets which have exposed and non-aligned seams; the handles on two of the upper cabinets which have visible screw holes on the inside of the cabinets when the cabinet doors are open; defendant failed to properly apply the finishing on some of the woodwork which is not aligned properly; and defendant failed to remove the glue from the top of the laminate).

These allegations form the basis of plaintiffs' complaint (and their cross motion for summary judgment) which alleges three causes of action; to wit, breach of contract, breach of warranty and fraud. Defendant denies the material allegations of plaintiffs' complaint and, in support of its own motion for summary judgment, argues that due to plaintiffs' failure to provide any documentary proof to substantiate their alleged estimation of damages in the sum of \$150,000.00, plaintiffs are unable to prove a *prima facie* case against defendant, thereby precluding summary judgment against defendant. To the contrary, defendant argues that plaintiffs' submissions entitle it to summary judgment.

Defendant maintains that plaintiffs have been unjustly enriched by their receipt and acceptance of the materials and work, service and labor performed by defendant Cardinal Sales, Inc. and are jointly and severally liable to the defendant in the sum of \$4,020.00 with interest from May 1, 2008, representing the outstanding balance on the contract.

On a motion for summary judgment pursuant to CPLR §3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, *supra*; *Winegrad v New York Univ. Med. Ctr.*, *supra*).

Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*Alvarez v Prospect Hosp.*, supra at 324). The evidence presented by the opponent of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (*Demishick v Community Housing Management Corp.*, 34 AD3d 518, 521 [2d Dept 2006], citing *Secof v Greens Condominium*, 158 AD2d 591 [2d Dept 1990]).

Plaintiffs claim that the chief and primary breach on the defendant's part is the defendant's alleged failure to supply and install cabinetry with an "all stainless" steel exterior; plaintiff submits that rather than provide cabinetry with "all stainless" steel exterior, the defendant supplied and installed cabinetry with "inferior" laminates and/or aluminum exterior. Plaintiff also submits that the interior of the cabinetry was to be quarter sawn oak and rather than provide the cabinetry with quarter sawn oak, the defendant supplied and installed cabinetry with an inferior pressed wood interior.

Initially, it is noted that plaintiffs fail to substantiate their claims with proof in admissible form that, put simply, the cabinets they ordered were not the cabinets they received. Plaintiffs' allegations as set forth in the affirmation of their attorney are self serving and cannot be accorded any credence or weight by this Court in the absence of an affidavit by an expert qualified to render an opinion as to external and internal cabinet material.

Moreover, despite plaintiffs' (unsubstantiated) allegations that the cabinets were improperly installed, this Court recognizes that plaintiffs' primary complaint in bringing this action is that the defendant breached the Agreement with them to provide specific goods.

Thus, New York's Uniform Commercial Code—Sales provisions and general contract principles also govern this action. Under these laws, to make out a claim for breach of contract, plaintiff must establish the (1) formation of a contract between plaintiff and

defendant, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage (*Furia v Furia*, 116 AD2d 694 [2d Dept 1986]).

In this case, there is no dispute that there was an Agreement (and subsequent amendments). Further, it is clear that the Agreement herein was a contract of sale – not a sale on approval (*cf.* UCC § 2-326). Pursuant to UCC § 2-601, a buyer of goods may reject the goods if they fail in any way to conform to the terms of the contract. The rejection must occur within a reasonable time after delivery or tender (UCC §2-513) and the buyer is required to, “seasonably notify the seller” (UCC §2-602[1]; *Matrix Intl. Textiles, Inc. v Jolie Intimates, Inc.*, 7 Misc.3d 1019(A) [Civ.Ct. Kings 2005]). In rejecting the goods the buyer cannot merely request a cure, it must perform a “clear and unequivocal act” (*Hooper Handling, Inc. v Jonmark Corporation*, 267 AD2d 1075 [4th Dept 1999]).

When the meaning of a contract is plain and clear, the agreement is not to be subverted by straining to find an ambiguity, but is to be enforced according to its terms (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]; *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 566 [2002]) and without resort to extrinsic evidence (*Master-Built Constr. Co., Inc. v Thorne*, 22 AD3d 535, 535 [2d Dept 2005]).

Here, the language of the contract and its subsequent amendments is clear. Specifically, the parties’ amendment to the contract, dated February 28, 2008, confirms two things: first, that with the exception of the noted changes made in said amendment, the plaintiffs otherwise approved the cabinets, if not also their installation, by the defendant. Plaintiffs’ failure to reject the delivery of the cabinets or allege that the cabinets were not the cabinets they selected and ordered at defendant’s showroom at the time of the delivery presents an issue of fact as to whether the plaintiffs approved the cabinets they received as the ones they ordered.

Second, the February 28 Change Order also makes clear that the new 36" cabinet that was to be installed was to be placed between the "EXISTING CABINET & LARGER CABINET WITH GLASS AND ALUMINUM & STAINLESS SIDES"; i.e., that not all cabinets (certainly not the "larger one with glass and aluminum") were "all stainless steel" as the plaintiffs claim they wanted. Some cabinets only had "stainless sides."

Without reaching the questions of whether, *inter alia*, the plaintiffs' failure to reject the cabinets constituted their "acceptance," and whether the plaintiffs performed a "clear and unequivocal action" in purportedly rejecting the cabinets they received, this Court finds that there remains questions of fact as to whether the defendant breached the Agreement with the plaintiffs by providing them with allegedly inferior materials and unsatisfactory work.

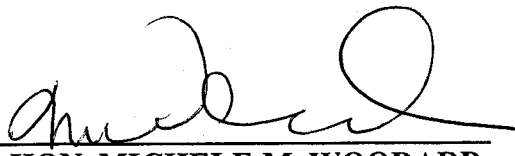
Defendant's motion for summary judgment is also **denied**. Defendant argues that there is no evidence that it did not furnish and install the cabinets that were ordered pursuant to the written contract between the parties. While as stated above, there is no admissible evidence of plaintiffs' claims that the defendant breached its end of the Agreement, in light of the numerous outstanding issues of fact surrounding the parties' Agreement and their consequent behavior, *supra*, this Court denies also defendant's motion for summary judgment. It is hereby

ORDERED, that the parties are directed to appear for trial on October 27, 2011 at 9:30 a.m. in Central Jury.

This shall constitute the decision and order of this Court.

DATED: August 18, 2011
Mineola, N.Y. 11501

ENTER:


HON. MICHELE M. WOODARD
J.S.C.