

Hamilton v Skeldon

2013 NY Slip Op 30770(U)

April 11, 2013

Sup Ct, Suffolk County

Docket Number: 12-6947

Judge: Jerry Garguilo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 9-12-12
ADJ. DATE 1-16-13
Mot. Seq. # 001 - MG

-----X
KEVIN HAMILTON,

Plaintiff,

- against -

JAMES J. SKELDON
NORTH EAST HARD WOOD FLOORING,
INC.,

Defendants.
-----X

THE ZUPPA FIRM
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Upon the following papers numbered 1 to 20 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 8 - 11; Replying Affidavits and supporting papers 12 - 20; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion pursuant to CPLR 3211 (a) (1) and (7) by defendants for an order dismissing the complaint against defendant James J. Skeldon and dismissing the second, third, and fourth causes of action against defendant North East Hard Wood Flooring, Inc. is granted.

Plaintiff commenced this action against defendants to recover damages he allegedly sustained as a result of the installation of wood flooring in his residence which "cupped" at or shortly after its installation. It is uncontroverted that plaintiff entered into a contract with defendant North East Hardwood Flooring, Inc. ("flooring company") on or about December 4, 2008¹ for the installation of red

¹The estimate dated "10/15/2008", which was signed by plaintiff, indicates that \$5000 was to be paid "terms on contract", \$5000 was to be paid "terms on installation", and the balance of \$3119.50 was to be paid "terms on finish". Plaintiff paid to "Northeast Hardwood Flooring Inc." \$5,000.00 on December 4, 2008, to "Northeast Flooring" \$5,000.00 on December 19, 2008 and \$3,119.50 on March 4, 2009.

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oak flooring in and about plaintiff's St. James residence. Nor is it disputed that the flooring was installed by defendant flooring company and completed on or about March 4, 2009. Defendant James J. Skeldon ("Skeldon") admits that he formed the defendant flooring corporation in 2005, that it went out of business in 2009 "because it was losing money", and that he formed two new corporations which manufacture, sell, and install radiant heating in floors but do not install or finish hardwood flooring.

Plaintiff's wordy complaint, which he seeks to amend by an even more verbose amended complaint, alleges four causes of action against defendants. The 127 paragraph amended complaint (attached to his opposition papers) contains a cause of action for breach of contract, for "consequential damages", for common law fraud, and for negligence. Each of the causes of action plead are interposed against both the individual defendant Skeldon and the corporate flooring company defendant. Although plaintiff alleges that defendants "in the form of Defendant Skeldon" entered into a contract for the installation of the wood flooring, there are no allegations that defendant Skeldon intended to bind himself individually under the terms of the contract. Insofar as the fraud cause of action is plead, plaintiff's claims all refer to a purported scheme which allegedly occurred after the installation of the defective flooring and that plaintiff was "defrauded out of the replacement cost of the purchase and installation of hard wood flooring." Additionally, plaintiff seeks to recover damages in the amount of \$50,000.00 plus \$410.00 for legal expenses for having to live in a "home ... substantially covered by ugly flooring ... for three years with great consternation." In his final cause of action, plaintiff seeks to recover damages for the negligent installation and finishing work of the hardwood floors by defendants.

Defendants now move for an order dismissing the complaint against defendant Skeldon and dismissing the consequential damages, fraud, and negligence causes of action against defendant flooring company. Such relief is sought on the grounds that documentary evidence shows that no breach of contract action lies against defendant Skeldon, that the complaint fails to state cognizable causes of action in negligence and fraud against either defendant, and that there exists no separate and distinct cause of action for consequential damages.

The court may grant a motion to dismiss pursuant to CPLR 3211 (a) (1) "only where the documentary evidence utterly refutes plaintiff's allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 746 NYS2d 858 [2002]; *Sobel v Ansanelli*, 98 AD3d 1020, 951 NYS2d 533 [2d Dept 2012]; *Harris v Barbera*, 96 AD3d 904, 947 NYS2d 548 [2d Dept 2012]). In order to qualify as "documentary evidence" the printed materials "must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86, 898 NYS2d 569 [2d Dept 2010]). "A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211 (a) (1) has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Khiyayev v MikeSad Enterprises, Inc.*, 66 AD3d 845, 846, 886 NYS2d 610 [2d Dept 2009] *internal citations omitted*). Corporate officers who do not purport to bind themselves individually under a

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contract may not be held personally liable on the contract of their corporation (*Westminster Const. Co., Inc. v Sherman*, 160 AD2d 867, 554 NYS2d 300 [2d Dept 1990]).

Here, the documentary evidence submitted by the defendants, i.e., the subject contract entered into between plaintiff and defendant North East Hard Wood Flooring, Inc., established that the individual defendant did not execute the contract in his individual capacity and that he did not purport to bind himself individually under the contract. Additionally, plaintiff failed to allege that defendant Skeldon bound himself individually, thus the breach of contract claim must be dismissed as to the individual defendant James J. Skeldon pursuant to CPLR 3211 (a) (1).

In determining whether to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must assume to be true the facts plead, give every favorable inference to the allegations, and determine only whether the alleged facts fit any cognizable legal theory (*Dickinson v Igoni*, 76 AD3d 943, 908 NYS2d 85 [2d Dept 2010]; *Tsutsui v Barasch*, 67 AD3d 896, 892 NYS2d 400 [2d Dept 2009]). The test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]). In determining if a pleading states a cause of action, “the sole criterion” for the Courts is whether “from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). However, “[t]he court should not be compelled to wade through a mass of verbiage and superfluous matter in order to pick out an allegation here and there, which, pieced together with other statements taken from another part of the complaint, will state a cause of action. The time of the court should not be taken in a prolonged study of a long, tiresome, tedious, prolix, involved and loosely drawn complaint in an effort to save it” (*Barsella v City of New York*, 82 AD2d 747, 440 NYS2d 12 [1st Dept 1981] citing *Safer Beef Co., Inc. v Northern Boneless Beef, Inc.*, 15 AD2d 479 [1st Dept 1961]). “CPLR 3013’s liberal pleading provision notwithstanding, a pleading must still be particular enough to provide the court and parties with notice of the transaction or occurrences to be proved. ... Pleadings which are so devoid of factual substance require dismissal pursuant to CPLR 3211 (a)(7). Their factual inadequacy is not excused by the statutory policy allowing liberal amendment. Rather, deficient pleadings must be dismissed, if only to prevent their reassertion should amendment be granted” (*Travelers Insurance Co. v Ferco*, 122 AD2d 718, 719, 511 NYS2d 594 [1st Dept 1986] citations omitted). The complaint must “contain statements of sufficient particularity to give the court and the parties notice of the transactions and occurrences intended to be proved, along with the material elements of each cause of action (CPLR 3013) ... [a] complaint is insufficient if based solely on conclusory statements, unsupported by factual allegations” (*Melito v Interboro-Mut. Indem. Ins. Co.*, 73 AD2d 819, 820, 423 NYS2d 742 [4th Dept 1979])”.

It is well established that a breach of contract claim is not to be considered a tort or negligence claim where the gravamen of the complaint is breach of contract for substandard, shoddy, or incomplete work (*Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 521 NYS2d 653 [1987]; *Wiernik v*

Kurth, 59 AD3d 535, 873 NYS2d 673 [2d Dept 2009]). Here where plaintiff's fourth cause of action alleges that defendants were negligent in the preparation for installation, the installation, and in the finishing work performed with regard to the hard wood flooring it placed in plaintiff's home, he has not plead a violation of a duty independent of the contract and has failed to "transform a simple breach of contract claim into a tort claim" (*Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, *supra* at 390). Therefore, the fourth cause of action must be dismissed in its entirety pursuant to CPLR 3211 (a) (7). Similarly, as "consequential damages" are just that, a consequence of a wrong, no separate cause of action exists relative thereto. The said damages may flow from a contract claim but do not exist as an action in and of itself. Thus, the second cause of action is dismissed in its entirety.

Rule 3016 (b) of the CPLR mandates that where a cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." The elements of common law fraud, which include a misrepresentation of a material fact, falsity, scienter, reliance, and injury, must be set forth in order for the complaint to withstand a motion for its dismissal; a dismissal of the complaint is warranted if the pleadings do not set forth the factual details and circumstances of the alleged fraud and misrepresentation with sufficient particularity (*see Black Car and Livery Ins. Inc. v H&W Brokerage Inc.*, 28 AD3d 595, 813 NYS2d 751 [2d Dept 2006]; *68 Burns New Holding, Inc. v Burns St. Owners Corp.*, 18 AD3d 857, 796 NYS2d 677 [2d Dept 2005]; *Kline v Taukpoint Realty Corp.*, 302 AD2d 433, 754 NYS2d 899 [2d Dept 2003]). A cause of action alleging fraud which fails to comply with the pleading requirements of CPLR 3016 (b), because it does not allege that the defendant made a knowingly false misrepresentation of fact to the plaintiff, or omitted a material fact, for the purpose of inducing the plaintiff's reliance upon it should be dismissed (*see High Tides, LLC v DeMichele*, 88 AD3d 954, 931 NYS2d 377 [2d Dept 2011]; *Ladino v Bank of America*, 53 AD3d 571, 861 NYS2d 683 [2d Dept 2008]). Similarly, a vague expression of hope and a future expectation do not provide a sufficient basis upon which a fraud claim may be based (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]; *International Oil Field Supply Serv. Corp. v Festus Alani Fadeyi*, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Where the damages sought in a fraud claim arise out of the breach of contract or failure to perform under the contract, the relief should be sought in a breach of contract claim (*Pramco III v Partners Trust Bank*, 52 AD3d 1224, 860 NYS2d 775 [4th Dept 2008]; *Westminster Const. Co., Inc. v Sherman*, 160 AD2d 867, 554 NYS2d 300 [2d Dept 1990]), as "allegations of scienter will not transform what is essentially a breach of contract cause of action into one to recover damages for fraud, where ... the fraud charged has to do with alleged misrepresentations of the breaching party's abilities and intentions" (*Green v Dolphin Const. Co., Inc.*, 187 AD2d 635, 636, 590 NYS2d 228 [2d Dept 1992]).


Here, where plaintiff's allegations with regard to the alleged fraud committed by defendants refer to their misrepresentations with regard to their ability or intent, or that of their insurance company, to rectify the wrong caused by the breach of contract, no separate damages can be determined and the claim is essentially one of breach of contract. Therefore, the third cause of action alleging fraud must be dismissed.

Accordingly, defendant's motion is granted. The complaint is dismissed in its entirety against

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the individual defendant James J. Skeldon, and the second cause of action alleging consequential damages, the third cause of action alleging common law fraud, and the fourth cause of action alleging negligence against defendant North East Hard Wood Flooring Inc. are dismissed.

Dated: 4/11/13


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION