

Kahlon v Creative Pool and Spa Inc.

2014 NY Slip Op 30075(U)

January 6, 2014

Sup Ct, New York County

Docket Number: 652204/12

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JOSSEF KAHLON,
Plaintiff,

INDEX NO. 652204/12

- against -

MOTION SEQ. NO. 001

CREATIVE POOL AND SPA INC., DONALD FARICI, NINA PIVEN,
Defendants.

The following papers were read on this motion by plaintiff for specific performance and cross-motion by defendant to dismiss.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo)
Replying Affidavits (Reply Memo)

Table with 1 column 'PAPERS NUMBERED' and 3 empty rows.

Cross-Motion: Yes No

This is an action to recover damages for, inter alia, failure to properly install a pool cover at plaintiff's home located at 9 Stream Court, Great Neck, New York 11024. Before the Court is a motion by plaintiff seeking specific performance of the September 2, 2010 agreement and for an order compelling defendants to put the pool cover in good working order. Defendants are in opposition to plaintiff's motion and cross-move for an order (1) pursuant to CPLR 3212(a), dismissing plaintiff's negligence claim pursuant to the 'economic loss' rule; (2) pursuant to CPLR 3211(a)(7), dismissing plaintiff's breach of contract, breach of implied warranty of fitness, and fraud claims for failure to state a cause of action.

STANDARD OF LAW

CPLR 3211(a)(7) provides that:

"a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

[7] The pleading fails to state a cause of action,..."

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must look to make sure the plaintiff's statements can *sustain* a cause of action, not whether the plaintiff has "artfully drafted the complaint" (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"]). In doing so, the Court must "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Reality Co.*, 98 NY2d 144, 151-152 [2002]; see *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 97 [1994]; *Wieder v Skala*, 80 NY2d 628 [1992]), as well as "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 87-88; see *Guggenheimer*, 43 NY2d at 275 ["the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail"]); see also *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *511 W. 232 Owners Corp.*, 98 NY2d at 152; *Sokoloff*, 96 NY2d at 414; *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188, 188 [1st Dept 1999] ["The opposing party needs only to assert facts which 'fit within any cognizable legal theory'"]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]). "It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence...are not presumed to be true on a motion to dismiss for legal insufficiency" (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]; see also *Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991]).

DISCUSSION

A. Plaintiff's Motion

The Court first turns to plaintiff's motion seeking specific performance. It has long been recognized that specific performance is appropriate in situations involving unique articles of property "having a special and unascertainable quality" (*Matter of Reed Found., Inc. v Franklin D. Roosevelt Four Freedoms Park, LLC*, 108 AD3d 1 [1st Dept 2013]; see *Chabert v Robert & Co, Inc.*, 273 App Div 237, 238 [1st Dept 1948]). Despite plaintiff's contentions, the pool cover is not unique and money damages can be calculated. As such, plaintiff is not entitled to specific performance and plaintiff's motion is denied.

B. Defendants' Cross-Motion

The portion of defendants' cross-motion seeking dismissal of plaintiff's fraud claim is granted. "It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract" (*Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). Specifically, "[a] fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it" (*id.*). "A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract" (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291 [1st Dept 1999]). In this case, plaintiff alleges that "Defendant Creative fraudulently induced plaintiff into signing the September 2, 2010 addendum by making promises to Plaintiff it would not uphold" (Complaint ¶ 30). As plaintiff is only alleging that defendants were not sincere when they promised to perform under the contract, plaintiff's cause of action for fraud must be dismissed as redundant of his breach of contract claim (see *Gordon*, 141 AD2d at 436; *Queens Group v Martin Packaging Corp.*, 245 AD2d 183 [1st Dept 1997] [Cause of action for fraud against the

individual defendants is not viable since it relates solely to the purported breach of contract]; *Hynes v Griebel*, 300 AD2d 628, 629 [2d Dept 2002]).

Plaintiff's cause of action for negligence fails to state a cause of action. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Bristol-Myers Squibb, Indus. Div. v Delta Star*, 206 AD2d 177, 179). Plaintiff has not presented proof that defendants breached any legal duty independent of their contractual obligations. Nothing in the record suggests that defendants breached a duty of reasonable care distinct from or in addition to its contractual duty to install the pool cover in a proper manner. Thus, plaintiff's remedy is in contract and not tort (*see Bristol-Myers Squibb, Indus. Div.*, 206 AD2d at 179). Moreover, the economic loss rule bars recovery under a theory of negligence. "As a general rule, where a product fails to perform as promised due to negligence in either the manufacturing or installation process, a plaintiff is precluded from recovering tort damages for its economic loss" (*Suffolk Laundry Servs. v Redux Corp.*, 238 AD2d 577, 578 [2d Dept 1997]; *see Bristol*). "The economic loss rule is based on the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort, unless a legal duty independent of the contract itself has been violated" (*id.*). Plaintiff alleges that defendants negligently installed the pool by failing to properly lay the foundation, by failing to properly pressure check the piping and fittings for leaks before filling the pool, and by failing to properly install and check the motorized pool cover to ensure it was working properly thus as a result, plaintiff suffered actual damages in the amount of \$130,103.31. However, the alleged damages are not "outside the scope of the contractually based economic losses, attendant to the particular commercial transaction and subject matter" (*Archstone v Tocci Bldg. Corp. of N.J., Inc.*, 101 AD3d 1059, 1061 [2d Dept 2012] [internal quotation marks omitted]),

and as such, plaintiff's first cause of action for negligence is dismissed (*see Suffolk Laundry Servs*, 238 AD2d at 579). Since, there are no actual damages recoverable for negligent conduct, plaintiff cannot recover punitive damages.

The Court also finds that plaintiff's cause of action for breach of implied warranty of fitness is also dismissed for failure to state a cause of action. Pursuant to the Uniform Commercial Code § 2-315,

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Plaintiff has not pled that the defendant was hired to install the pool or pool cover with the knowledge that they would be used for anything other than the ordinary purpose, accordingly, plaintiff fails to state a claim for breach of the warranty of fitness for a particular purpose.

However, plaintiff's claim for breach of contract is not dismissed. "The elements of a breach of contract claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). In accepting the facts as alleged in the complaint and plaintiff's papers in opposition to defendants' cross-motion to dismiss (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 151-152), and in according the plaintiff the benefit of every possible favorable inference (*see Leon*, 84 NY2d at 87-88; *Guggenheimer*, 43 NY2d at 275), the Court finds that plaintiff has stated a cause of action against defendants for breach of contract.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion seeking specific performance of the September 2, 2010 agreement and for an order compelling defendants to put the pool cover in good working order is denied; and it is further,

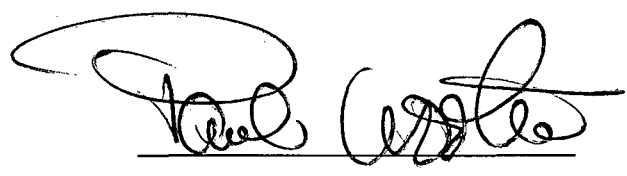
ORDERED that the portion of defendants' cross-motion seeking to dismiss plaintiff's negligence claim, pursuant to CPLR 3212(a), is granted and plaintiff's negligence claim is hereby dismissed; and it is further,

ORDERED that the portion of defendants' cross-motion seeking to dismiss plaintiff's claims for breach of contract, breach of implied warranty of fitness, and fraud is granted to the extent that plaintiff's claims for breach of implied warranty of fitness and fraud are hereby dismissed, but is otherwise denied; and it is further,

ORDERED that defendants are directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 1/6/14



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE