

October v Courtlandt Dev. Group LLC

2014 NY Slip Op 30536(U)

January 24, 2014

Supreme Court, Bronx County

Docket Number: 303705/08

Judge: Norma Ruiz

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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART 22

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 303705/08

DONNA OCTOBER

Plaintiff,

-against-

Decision and Order
HON. NORMA RUIZ

COURTLANDT DEVELOPMENT GROUP LLC,
COURTLANDT HOMEOWNERS ASSOCIATION, INC,
PROCIDA CONSTRUCTION CORP., PROCIDA
CONSTRUCTION CO., LLC, PROCIDA COURTLANDT
LLC, PRODICA REALTY & CONSTRUCTION CORP. OF
N.Y., EASTERN ABSTRACT CORP., EASTERN
ABSTRACT LLC, CITIMORTGAGE, INC., FIDELITY
NATIONAL TITLE INSURANCE COMPANY, and
FIDELITY NATIONAL TITLE COMPANY,

Defendants.

The following papers numbered 1 to 5 Read on this motion SUMMARY JUDGMENT
Noticed on and duly submitted as No. ___ on the Motion Calendar of _____

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion		
to:	Papers	Numbered
Notice of Motions and Affidavits Annexed.....		1-2
Answering Affidavits.....		3
Replying Affidavits		4
Memorandum of Law		5
Other:		

Upon the foregoing papers, the foregoing motion(s) [and/or cross-motions(s), as indicated below, are consolidated for disposition] and decided as follows:

Defendants Courtlandt Development Group LLC ("Courtlandt"), Procida Construction Corp., Procida Construction Co. LLC, Procida Courtlandt LLC and Procida Realty & Construction Corp of NY move for summary judgment on various grounds. Upon a review of

the moving papers and opposition submitted thereto, the motion is granted in part and denied in part as set forth below.

This is a breach of contract and negligence action which arises from the construction of a two family property. Plaintiff contends that the defendants sold her a defective home in violation of the parties contract of sale and the warranty contained therein.

In 2004 Courtlandt purchased property from the City of New York to build residential homes and retained non-party Magnus Architecture & Planning PC as the project architect for the project. The plans included building six three - family homes and six, two - family homes. Thereafter, it retained non-party Perkan Concrete Corp to build the 12 homes. A temporary certificate of occupancy was issued for the two - family house located at 361 East 159th Street ("subject property") on or about December 18, 2006.

Plaintiff entered into a written contract of sale for the subject property on January 23, 2007. The parties to the contract were plaintiff and defendant Courtlandt. Annexed to and made part of the contract was a Limited Warranty. Pursuant to the contract's terms, the plaintiff agreed to buy the home with a temporary certificate of occupancy ("C of O") and Courtlandt remained obligated to obtain the final Certificate of Occupancy ("C of O"). It is undisputed that the C of O was not obtained until June 4, 2009, however, the contract did not contain a time frame for the issuance of the C of O.

Shortly after moving into her new home, the plaintiff contacted Courtlandt and made numerous complaints regarding defects in the home. Courtlandt alleges it responded to each complaint and remedied the problem. Plaintiff testified at her deposition that certain defects remain.

On or about May 6, 2008, the plaintiff commenced this action. In her amended complaint she asserted the following claims: first cause of action for a breach of the housing merchant implied warranty, second cause of action for negligence, third cause of action for breach of the express warranty contained in the parties contract, fourth cause of action for breach of the implied warranty of habitability and implied warranty of fitness for a particular purpose and a fifth cause of action for breach of contract for failing to obtain a final certificate of occupancy for the home and for failing to correct the alleged defects.

Defendants move for summary judgment on various grounds. Defendants Procida Construction Corp., Procida Construction Co. L.L.C, Procida Courtlandt LLC and Procida Realty

& Construction Corp of NY allege they are not proper parties to this action because they are not a party to the contract, nor did they construct the property. In her affidavit, Christine Procida, a member of Courtlandt averred that Courtlandt did not retain any of these defendants for any services in connection with the construction of the subject property. Procida Construction Corp was retained to perform remedial work after the house was sold to the plaintiff. Procida Realty & Construction Corp of NY merely provided the form that Courtlandt used for the parties limited warranty and its name was inadvertently left on the top of the form. She further averred that defendants Procida Construction Co. LLC and Procida Courtlandt LLC have no connection with the subject property.

The plaintiff does not dispute that she contracted only with defendant Courtlandt. Notwithstanding, plaintiff opposes this branch of the motion by arguing that she was a third party beneficiary to the co-defendants' contracts and, as such, the complaint should not be dismissed as against them. The court finds plaintiff failed to establish she was a third - party beneficiary. Thus, this portion of the motion is also granted.

The court notes that the plaintiff did not oppose the motion to dismiss the first, second and fourth causes of action. As such, those branches of the motions are granted.

With respect to the third cause of action for breach of express limited warranty contained in the parties contract, the court finds that the conflicting accounts regarding whether or not all of the defects were repaired and Courtlandt's response to plaintiff's complaints, which did not conform to the written notice of claim requirement, raises issues of facts as to whether or not Courtlandt waived the notice of claim (see generally *Lupien v. Bartolomeo*, 799 NYS2d 161 (Sup. Ct. Westchester County 2004) and if the defendant Courtlandt breached the limited warranty.

Lastly, the fifth cause of action for breach of contract is dismissed. In the fifth cause of action, the plaintiff alleges that the defendants breached the subject contract in that they failed to remedy the alleged defects. Defendants contend that this claim is barred by the express language of the parties' limited warranty. This argument was not opposed by the plaintiff.

Plaintiff also contends that the defendants breached the subject contract by failing to obtain the C of O. Defendants essentially argue that this claim is now moot since the C of O was issued on June 4, 2009. While the plaintiff did not dispute this, she argues that the cause of action should not be dismissed because she is entitled to damages for the two and a half year

delay in which there was no C of O. The court notes there was no time frame in the contract for the C of O to be obtained. In addition, there is no evidence of any damages for this delay. As such, this branch of the motion is granted.

Accordingly, the motion is granted to the extent that this action is dismissed ONLY AS AGAINST THE FOLLOWING DEFENDANTS Procida Construction Corp., Procida Construction Co. LLC, Procida Courtlandt LLC and Procida Realty & Construction Corp of NY. Additionally, the plaintiff's first, second, fourth and fifth cause of action are dismissed. The branch of the motion which seeks to dismiss the third cause of action is denied.

This constitutes the decision and order of the Court.

Dated:

1/24/14

Bronx, New York



HON. NORMA RUIZ, J.S.C.