

216 E. 83rd St., LLC v Apollon Waterproofing Corp.

2014 NY Slip Op 30786(U)

March 28, 2014

Supreme Court, New York County

Docket Number: 650834/12

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 63

216 EAST 83RD STREET, LLC, 218 EAST 81ST
STREET, LLC, 232-234 EAST 83RD STREET,
LLC, GBL 78TH STREET, LLC, FERL REALTY
COMPANY, 428 EAST 89TH STREET, LLC,
430 EAST 89TH STREET, LLC, 505-507
EAST 88TH STREET, LLC, 1371 FIRST
AVENUE, LLC, 1590-1592 FIRST
AVENUE, LLC, 1592 SECOND AVENUE, LLC,
315 AND 319 EAST 84TH STREET, LLC,
444-446 EAST 81ST STREET, LLC, and
450-452 EAST 81ST STREET, LLC,

Index No. 650834/12
DECISION AND ORDER

Plaintiffs,

-against-

APOLLON WATERPROOFING CORP. and
PANTELIS FAKIRIS, a/k/a PETER
FAKIRIS,

Defendants.

ELLEN M. COIN, J.:

In this action the owners of Upper East Side residential buildings sue a waterproofing corporation (Apollon) and its owner (Fakiris), contending that work was performed negligently, improperly, or not at all. The first four causes of action stem from punch list items left by another contractor, which Apollon agreed to complete, for most of the buildings (Portfolio Buildings).¹ The Fifth through Seventh Causes of Action relate

¹These are the buildings owned by plaintiffs 216 East 83rd Street, LLC, 218 East 81st Street, LLC, 232-234 East 83rd Street, LLC, GBL 78th Street, LLC, Ferl Realty Company, 428 East 89th Street, LLC, 430 East 89th Street, LLC, 505-507 East 88th Street,

to facade and roof work which Apollon contracted to perform for buildings owned by plaintiff 315 and 319 East 84th Street, LLC. The Eighth Cause of Action alleges that Apollon's workers intentionally clogged a waste line in the building owned by 444-446 East 81st Street, LLC, and seeks damages for intentional tort.

Plaintiffs also contend that defendant Fakiris abused the corporate form, using the accounts of Apollon as his personal piggy bank. Therefore, they claim, he is jointly and severally liable on all of their causes of action against Apollon.

Defendants assert counterclaims against plaintiffs 315 and 319 East 84th Street, LLC, 444-446 East 81st Street, LLC and 450-452 East 81st Street, LLC for breach of contract.

Plaintiffs move for summary judgment on their claims² and dismissing defendants' counterclaims.

First Cause of Action

Plaintiffs' First Cause of Action alleges breach of

LLC, 1371 First Avenue, LLC, 1590-1592 First Avenue, LLC, and 1592 Second Avenue, LLC.

²Plaintiffs have withdrawn their motion for summary judgment on their Fourth Cause of Action for unjust enrichment. Searching the record, the Court dismisses that cause of action, lying in quasi-contract, in light of the Court's grant to plaintiffs of summary judgment on their First Cause of Action for breach of contract. (CPLR 3212[b]; *Barnes v Jewish Assn. Found.*, 114 AD3d 613 [1st Dept 2014]; *Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987]; *New York City Educational Const. Fund v Verizon New York Inc.*, 114 AD3d 529 [1st Dept 2014]).

contract. The elements of a claim for breach of contract are the existence of a contract, plaintiff's performance under the contract, defendant's breach, and resulting damages. (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 150 [1st Dept 2013]).

It is undisputed that Apollon issued separate proposals for completion of punch list work to the agent for each owner of the Portfolio Buildings, and that the agent signed each proposal on behalf of his principal. (Ex B to the affidavit of Kevin Murphy sworn to August 2, 2013). It is also undisputed that the owners of the Portfolio Buildings paid Apollon for the punch list work (Murphy Aff. ¶5 at 3; Affidavit of Pantelis Fakiris ¶6 at 3-4).

In support of their claim that Apollon breached its contracts, plaintiffs submit letters from their engineer (Exs. C-0 to the Murphy Aff.) which contend that Apollon failed to complete the work that was the subject of its proposals. In response, defendants offer no proof, but contend that the fact that the owners of the Portfolio Buildings paid Apollon is proof that the work was properly completed.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd. (b)), and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New*

York, 49 NY2d 557, 562 [1980][internal quotation marks and citation omitted]; *SRM Card Shop v 1740 Broadway Assoc.*, 2 AD3d 136, 139 [1st Dept 2003]; *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968, 969 [2d Dept 1974]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Plaintiffs fail to offer affidavit proof in support of their contention that Apollon breached the parties' contracts. Their engineer's unsworn letters are hearsay, not competent to support a grant of summary judgment. (*Ulster County v CSI, Inc.*, 95 AD3d 1634, 1636 [3d Dept 2012]; *Arma Textile Printers, Inc. v Spectrachim, Inc.*, 254 AD2d 382, 383 [2d Dept 1998]).

Second Cause of Action

The Second Cause of Action relates to the same roof work that is the subject of the First Cause of Action, but alleges that such work as was done was performed negligently. Searching the record (CPLR 3212[b]), the Court dismisses this cause of action. (See *Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 389 [1987])["(i)t 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. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be

connected with and dependent upon the contract”][internal citations omitted]; *Wildenstein v 5H & Co., Inc.* 97 AD3d 488, 491-2 [1st Dept 2012]). Here even the alleged damages are identical in both causes of action.

Third Cause of Action

The Third Cause of Action also duplicates plaintiffs’ First Cause of Action for breach of contract. It merely restates the breach of contract claim in terms of fraud and misrepresentation. While a false statement of intention can be sufficient to support a claim of fraud (see *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 122 [1995]), here the fraud alleged is based on the same facts underlying the contract claim and merely duplicates it. (See *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 305 [1st Dept 2003]; *Coppola v Applied Electric Corp.*, 288 AD2d 41, 42 [1st Dept 2001]). Since this claim is duplicative of the breach of contract claim, it must be dismissed. (CPLR 3212[b]).

Fifth Cause of Action

Plaintiffs’ Fifth Cause of Action arises from an agreement between plaintiff 315 and 319 East 84th Street, LLC (315) and defendant Apollon for Apollon to perform facade work (Phase I Work) and roof work (Phase II Work) at the 315 East 84th Street building. (Compl., ¶27). Plaintiffs allege that its engineer inspected the work and determined that Apollon performed the

Phase I Work negligently, improperly and incompletely. (Compl., ¶ 28). They allege that because of Apollon's poor performance, plaintiff 315 terminated the contract. (Ex. S to Murphy Aff.).

On this motion defendant Fakiris alleges that Apollon "substantially completed" the 315 contract. He claims that 315 terminated the contract because plaintiffs' then-Director of Operations, Timothy O'Keefe, hated him and determined "to exact vengeance" on Fakiris after they had an altercation in September 2011. (Fakiris Aff. ¶5 at 3). In essence, his contention is that 315 improperly terminated the contract without cause.

While Fakiris admitted in his deposition testimony that the Phase I work was not completed at the time of Apollon's termination, he has raised a factual issue as to the reason for the termination: his altercation with Mr. O'Keefe. However, plaintiff 315's proof on this point consists solely of an unsworn engineer's report. (Ex. R to Murphy Aff.). Thus, even without consideration of defendants' submission on this motion, plaintiffs' moving papers are insufficient to establish, as a matter of law, defendants' liability on the Fifth Cause of Action.

Sixth and Seventh Causes of Action

Even if plaintiffs' proof were adequate, it would not serve to support their Sixth Cause of Action for negligence and their Seventh Cause of Action for fraudulent inducement, both of which

emanate from the same facts as are alleged in the Fifth Cause of Action. Searching the record, the Court dismisses those causes as duplicative of their claim for breach of contract.

Eighth Cause of Action

Plaintiffs' Eighth Cause of Action alleges that Apollon's employees intentionally obstructed a waste line at the buildings owned by 315 and 319 East 84th Street, LLC, 444-446 East 81st Street, LLC, and 450-452 East 81st Street, LLC. Plaintiffs submit the affidavit of Kevin Murphy, who was employed by J. Lemle & Sons, LLC, managing agent for plaintiffs' buildings. He alleges that Apollon's workmen "apparently" inserted 2 x 4 planks into various sections of a waste line at the building owned by 444-446 East 81st Street, LLC. (Murphy Aff. ¶15 at 5). No proof is offered as to who observed the planks in the waste line. Instead, plaintiffs offer only a detailed invoice and photographs from their plumber (Ex. X to Murphy Aff.). These hearsay documents are not competent evidence to support summary judgment on this claim.

The Counterclaims

Apollon's First Counterclaim alleges breach of its contract to perform work at 315 East 84th Street. This is the subject of plaintiffs' Fifth Cause of Action for breach of contract, and part of their Eighth Cause of Action for intentional tort. Apollon's Second Counterclaim alleges breach of its contract to

perform work at 444 East 81st Street, which is the subject of plaintiffs' Eighth Cause of Action for intentional tort. Apollon's Third Counterclaim alleges breach of its contract to perform work at 450 East 81st Street, also the subject of plaintiffs' Eighth Cause of Action.

In opposing plaintiffs' motion for summary judgment on their causes of action and for dismissal of Apollon's counterclaims, Fakiris alleges that plaintiffs improperly breached the contracts because of an altercation he had with Timothy O'Keefe, their Director of Operations. Even assuming, *arguendo*, that Fakiris' allegations may be sufficient to raise a material issue of fact, plaintiffs' allegations that Apollon negligently performed the Phase I work at 315 East 84th Street, causing them to terminate the contract, rely on the unsworn report of their engineer (Ex. R to Murphy Aff.). Similarly, plaintiffs' allegations regarding Apollon's deficiencies in its work at the 450 East 81st Street building rely on an unsworn report of its engineer (Ex. AA to Murphy Aff.). Thus, they have failed to establish by competent evidence their entitlement to judgment dismissing the counterclaims. (See *Yoi-Lee Realty Corp. V 177th St. Realty Assoc.*, 208 AD2d 185, 189 [1st Dept 1995] [when viable counterclaim arises from same underlying transaction as is involved in main action and is inseparable from or inextricably intertwined with that transaction, summary judgment should be

denied]).


In accordance with the foregoing, it is

ORDERED that the motion for summary judgment is denied without prejudice to renewal upon competent evidence; and it is further

ORDERED that the Second, Third, Fourth, Sixth and Seventh Causes of Action are dismissed; and it is further

ORDERED that the First, Fifth and Eighth Causes of Action are severed and continued.

Dated: March 28, 2014


Ellen M. Coin, A.J.S.C.