

Patterson v Saddle Ridge Homes, Inc.

2014 NY Slip Op 32898(U)

June 20, 2014

Supreme Court, Westchester County

Docket Number: 54849/2011

Judge: Orazio R. Bellantoni

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

ALLEN PATTERSON,

Plaintiff(s),

- against -

SADDLE RIDGE HOMES, INC., LARRY TAMBINI,
GERARD FARINELLA, RAYEX DESIGN GROUP,
WILLIAM BESHARAT, ROY A. FREDRIKSEN,

Defendant(s).

ORDER

Index No.: 54849/2011

Motion Date: 4/16/14

Defendants Saddle Ridge Homes, Inc. (Saddle Ridge) and Larry Tambini (Tambini) move for an order, pursuant to CPLR 3212, granting summary judgment in their favor. Defendants Rayex Design Group (Rayex) and William Besharat (Besharat) also move for an order, pursuant to CPLR 3212, granting summary judgment in their favor.

The following papers were read:

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Memorandum of Law	19
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By way of background, in or about January 2010, Saddle Ridge purchased certain real property located at 11 Liberty Street, Hawthorne, New York (11 Liberty Street). Thereafter, Saddle Ridge undertook to improve 11 Liberty Street by performing certain renovations and/or additions (11 Liberty Street Project) with a view to reselling the property. To that end, Saddle Ridge engaged Rayex to produce construction plans for the

11 Liberty Street Project. Prior to submitting the plans for the approval of the Mount Pleasant Building Department (Building Department), Rayex purportedly conferred with and received the approval of defendant Roy A. Fredriksen (Fredriksen) for the plans. After the Building Department approved the plans and issued a permit, Saddle Ridge undertook and completed the 11 Liberty Street Project. When the 11 Liberty Street Project was in the final stages of completion, 11 Liberty Street was listed for sale. Subsequently, plaintiff and Saddle Ridge executed a contract of sale for 11 Liberty Street in or about July 2010. As part of this transaction, Saddle Ridge warranted certain aspects of the 11 Liberty Street Project for certain periods of time (Limited Warranty). The Limited Warranty provided certain procedures for bringing any issues to Saddle Ridge's attention and provided how these issues were to be resolved. In or about August 2010, Saddle Ridge transferred title and possession of 11 Liberty Street to plaintiff. Over the next year, plaintiff notified Saddle Ridge several occasions about issues with 11 Liberty Street, which plaintiff asserted were covered by the Limited Warranty and required Saddle Ridge's attention.

On August 25, 2011, plaintiff commenced this action, alleging that certain renovations and/or additions were not performed properly and/or were accomplished with inferior, defective, or unsuitable materials and/or were not in compliance with the applicable building code provision(s). Plaintiff's complaint asserts four causes of action: (1) negligence as against all defendants, (2) breach of contract as against all defendants, (3) breach of the Limited Warranty as against all defendants, and (4) negligence as against Rayex and Fredriksen. Saddle Ridge/Tambini and Rayex/Besharat now move for summary judgment.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]). The Court addresses the motions in order.

The Motion for Summary Judgment Filed by Saddle Ridge/Tambini

According to Saddle Ridge/Tambini, plaintiff has asserted three causes of action against them: (1) negligence in the construction as regards certain materials used and certain work performed thereon; (2) breach of contract based on the same allegations; and (3) breach of the Limited Warranty in that Saddle Ridge/Tambini has failed to address alleged issue and/or compensate plaintiff for the same.

Initially, Saddle Ridge/Tambini contends that all claims against Tambini individually must be dismissed. Saddle Ridge/Tambini argues that at all times relevant to this action, Tambini acted in his capacity as a representative of Saddle Ridge. As regards the first cause of action, Saddle Ridge/Tambini contends that Saddle Ridge/Tambini owes no duty plaintiff outside the contract relationship and, therefore, this claim must be dismissed. As regards the second cause of action, Saddle Ridge/Tambini contends that the breach of contract claim must fail because the provisions of the contract were merged into the deed and thereby extinguished, except those arising under the Limited Warranty. As regards the breach of the Limited Warranty, Saddle Ridge/Tambini contends that each of plaintiff's claims that were properly submitted to Saddle Ridge/Tambini have been reviewed and addressed. The only issues not addressed are claims that do not properly fall within the scope of the Limited Warranty or that should be excluded because plaintiff did not afford Saddle Ridge/Tambini an opportunity to inspect and remedy the alleged claims as required by the Limited Warranty. In support of this position, Saddle Ridge/Tambini proffers the affidavit of Tambini as well as an affidavit of Wheldon Abt, a registered architect.

In response, plaintiff concedes that corporate officers are generally not liable for the actions of the corporation, but notes that this rule is not absolute. Here, plaintiff contends that there is sufficient evidence to demonstrate that Tambini used his position of dominion and control over Saddle Ridge to commit various wrongs against plaintiffs in the work performed on the Premises and by virtue of not making any provision of the payment of liability in regards thereto. As such, plaintiff contends, there is sufficient evidence to warrant piercing the corporate veil and permitting the claims against Tambini personally.

Plaintiff concedes that a negligence claim must be founded on a legal duty independent of a breach of contract claim. Here, plaintiff asserts, Saddle Ridge/Tambini's deviation from the approved building plans, use of certain materials, and failure to comply with applicable codes and regulations is a sufficient basis to find a duty independent of the contractual relationship.

Next, plaintiff contends that he has fully complied with the notice requirements of the Limited Warranty and that the opportunity to inspect, test, and repair any alleged defect is not a condition precedent to commencing an action for breach of the Limited Warranty. As to the specifics of the breach of warranty cause of action, plaintiff proffers the affidavit of Louise Grigg, a licensed professional engineer.

Saddle Ridge/Tambini has established, *prima facie*, that Tambini, at all times relevant to this action, acted solely in his corporate capacity and, therefore, there is no basis to hold him individually liable. In opposition, plaintiff failed to raise a triable issue of fact. As noted above, plaintiff contends that there is sufficient evidence to warrant piercing the corporate veil. However, "[t]he party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the

corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene” (*see Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 142 [1993]). Even assuming that plaintiff established Tambini’s dominion over Saddle Ridge, plaintiff has offered no evidence that Tambini abused the privilege of doing business in the corporate form. Indeed, plaintiff’s contention on this point is merely a recitation of some of the same actions, which plaintiff alleges support his claims for negligence, breach of contract, and/or breach of the limited warranty. Accordingly, Saddle Ridge/Tambini’s motion is granted and plaintiff’s claims against Tambini individually are dismissed.

Saddle Ridge/Tambini has also established, *prima facie*, that plaintiff’s negligence claim must fail because Saddle Ridge/Tambini owes no duty to plaintiff outside their contractual relationship. “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” (*see Atkins Nutritionals, Inc. v Ernst & Young, LLP.*, 301 AD2d 547, 549 [2d Dept 2003], quoting *Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]). In opposition, plaintiff failed to raise a triable issue of fact. Again, plaintiff offers nothing more than a restatement of his allegations that plaintiff breached the parties contract and Limited Warranty. This is insufficient to establish the existence of an independent legal duty. Accordingly, Saddle Ridge/Tambini’s motion for summary judgment as to plaintiff’s first cause of action for negligence is granted and that cause of action is dismissed as to Saddle Ridge.

Saddle Ridge/Tambini has also established, *prima facie*, that plaintiff’s breach of contract claim must fail because the provisions of the contract were merged into the deed and thereby extinguished. It is well settled that the general rule is that “the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title” *Novelty Crystal Corp. v PSA Institutional Partners, L.P.*, 49 AD3d 113, 115 [2d Dept 2008], quoting *Davis v Weg*, 104 AD2d 617, 619 [2d Dept 1984]). This rule does not, however, apply when there is clear evidence of the parties’ intent that certain provisions should survive the delivery of the deed (*id.*). Only the Limited Warranty, Saddle Ridge/Tambini asserts, survived the delivery of the deed. In opposition, plaintiff fails to raise a triable issue of fact. Accordingly, Saddle Ridge/Tambini’s motion for summary judgment as to plaintiff’s second cause of action for breach of contract is granted and that cause of action is dismissed as to Saddle Ridge.

Saddle Ridge/Tambini has also established, *prima facie*, that plaintiff’s breach of the Limited Warranty must fail because each of plaintiff’s claims that were properly submitted to Saddle Ridge/Tambini have been reviewed and addressed and the only issues not addressed are claims that do not properly fall within the scope of the Limited Warranty or that should be excluded because plaintiff did not afford Saddle Ridge/Tambini an opportunity to inspect and remedy the alleged claims as required by the Limited Warranty. In opposition, plaintiff raises a triable issue of fact by submission of the affidavit of an

expert that undermines Saddle Ridge/Tambini's position. It is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dep't 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dep't 2001] ["Resolution of issues of credibility of both expert and lay witnesses and the accuracy of their testimony are matters within the province of the jury."]). Accordingly, Saddle Ridge/Tambini's motion for summary judgment as to plaintiff's third cause of action for breach of the Limited Warranty is denied.

The Motion for Summary Judgment Filed by Rayex/Besharat

In support of their motion for summary judgment, Rayex/Besharat proffers an affidavit of Besharat who avers that he is the sole owner of Rayex. Besharat further avers that in or about January 2010, Saddle Ridge employed Rayex to prepare construction plans for the 11 Liberty Street Project. Once complete, Besharat avers that the plans were submitted to Fredriksen, a professional engineer, for his review and certification that the plans were "code compliant." After Fredriksen certified the plans, Besharat avers he filed them with the Building Department. The Building Department approved the plans and issued a permit, authorizing Saddle Ridge to begin construction. Besharat notes that, since filing the plans, no notice has been filed indicating that the plans were not in compliance with the applicable building codes. In addition, Besharat avers that after filing the plans, Rayex was not asked to make any modifications to the plans. Besharat notes that Rayex/Besharat had no contract with plaintiff and never had any contact with plaintiff in the preparation of the plans. In fact, Besharat avers that, as of the filing of the plans with the Building Department, Saddle Ridge owned 11 Liberty Street. Citing to, among other things, the foregoing, Rayex/Besharat contends that plaintiff may not maintain its causes of action against them for negligence, breach of contract, and breach of the Limited Warranty.

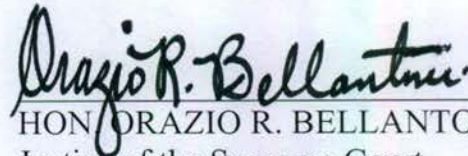
In opposition, plaintiff proffers, among other things, Fredriksen's deposition testimony and points out that Fredriksen testified that the signatures on the plans and drawings filed with the Building Department are not his. Plaintiff further contends that Rayex/Besharat may be liable for conduct notwithstanding the absence of privity of contract.

Rayex/Besharat has established, *prima facie*, that there is no privity of contract between plaintiff and Rayex/Besharat and, therefore, they are entitled to summary judgment as to plaintiff's second and third causes of action. In opposition, plaintiff fails to raise a triable issue of fact. Accordingly, Rayex/Besharat's motion for summary judgment as to plaintiff's second and third causes of action is granted and those causes of action are dismissed as to Rayex/Besharat.

Rayex/Besharat has established, *prima facie*, that the subject plans were not negligently prepared. Plaintiff succeeds in raising a triable issue of fact, by noting, among other things, the testimony of Fredriksen where he testified that the signatures on the filed plans were not his. This undermines any assertion that the plans were not negligently prepared because they were certified by Fredriksen. Accordingly, Rayex/Besharat's motion for summary judgment as to plaintiff's first and fourth causes of action is denied.

To the extent not specifically addressed herein, the Court finds the remaining arguments of the parties to be without merit. This matter is scheduled for a Settlement Conference on August 8, 2014 at 9:15 a.m. in Room 1600 at the Westchester County Courthouse, 111 Dr. Martin Luther, King, Jr. Boulevard, White Plains, New York.

Dated: June **20**, 2014
White Plains, New York


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Justice of the Supreme Court

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