

**37 Bridge St. LLC v Certainteed Corp.**

2015 NY Slip Op 31266(U)

April 16, 2015

Supreme Court, New York County

Docket Number: 157413/2014

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 45

-----X  
37 BRIDGE STREET LLC,

Plaintiff,

-against-

CERTAINTEED CORPORATION, FRANK  
BENISH, FVB ASSOCIATES, INC.  
PEARL CONTRACTINC INC., and IMTIAZ ALI,

Defendants.

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DECISION AND  
ORDER

Index Nos.  
157413/2014

MOTION sequence 2

HON. ANIL C. SINGH, J.:

In this action for breach of warranty, defendant Certainteed Corporation (“Certaintteed”) moves for an order dismissing plaintiff’s verified complaint pursuant to CPLR §3211 (a)(1) and CPLR §3211(a)(7). Plaintiff opposes. (Mot. Seq. 001). Defendants Frank Benish (“Benish”) and FVB Associates, Inc (“FVB”) move for an order dismissing the second and third causes of action in plaintiff’s verified complaint pursuant to CPLR 3211(a)(7). Plaintiff’s oppose. (Mot. Seq. 002).

Motion Sequence 001 and 002 are consolidated for disposition.

Plaintiff alleges defendants Frank Benish and FVB Associates, Inc represented themselves to be agents of defendant Certainteed and offered a 20 year warranty on a roofing system which was procured by plaintiff.

## Motion Sequence 001:

### First Cause of Action for Declaratory Judgment

Plaintiffs First Cause of Action asserts a claim against CertainTeed for a declaratory judgment (i) that the Alleged Warranty is valid; and (ii) directing CertainTeed to honor the terms of the Alleged Warranty. (Compl. at ¶ 20-21.)

This claim is dismissed as duplicative of the breach of contract claim. A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract (Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 54 [1st Dept 1988]).

### Second Cause of Action

Plaintiffs Second Cause of Action asserts a claim for breach of contract against CertainTeed for disclaiming the Alleged Warranty, and seeks damages not to exceed five million dollars. (Compl. At ¶ 22-27.)

Defendant argues that the conditions precedent did not occur in order to trigger the enforceability of the warranty, however that is a factual question which may be determined during discovery. (J.A. Lee Elec., Inc. v City of New York, 119 AD3d 652, 654 [2d Dept 2014]).

Plaintiff cited, Promo-Pro Ltd. v Lehrer McGovern Bovis, Inc., 306 AD2d 221 [1st Dept 2003], to stand for the proposition that when a condition precedent is

not complied with, dismissal is warranted however the decision in Promo-Pro was rendered on a summary judgment motion which is inapplicable herein.

Defendant CertainTeed further argues that Defendant Frank Benish and FVB Associates, Inc were not their agents and it did not have a record of the alleged warranty at 37 Bridge Street.

Defendant cites Flame Cut Steel Products Co., Inc. v Performance Foams & Coatings, Inc., 46 F Supp 2d 222 [EDNY 1999], in support of their argument for dismissal arguing the facts are similar in the instant matter. Again, the court in Flame Cut dismissed plaintiff's complaint on a summary judgment motion thus Flame Cut is not applicable herein.

Assuming the truth of the matter asserted in the complaint, plaintiff contends that Defendants Frank Benish and FVB Associates, Inc communicated to them on Defendant CertainTeed letterhead specifying the roofing system would be approved for a 20 year NDL warranty. The issue of apparent authority is a factual one not appropriately determined at this stage (Arol Dev. Corp. v Whitman & Ransom, 215 AD2d 145, 146 [1st Dept 1995]).

Lastly, defendant CertainTeed has failed to proffer documentary evidence which may be considered within the meaning of CPLR 3211 (a) (1). (Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]).

Accordingly, plaintiff has sufficiently asserted a claim for breach of contract against defendant Certainteed.

Motion Sequence 002:

Defendants Benish and FVB argue that no substantive allegations have been made that they knew about or participated in a fraud, and therefore no personal liability can attach. The complaint states that “[i]f Benish and FVB accepted money from defendants Pearl and Ali and later failed to turn that money over to Certainteed but instead provided a fraudulent twenty-year warranty, then Benish and FVB engaged in fraud upon the plaintiff” (Compl. at ¶29). Issues of state of mind are left to the trier of fact. (Oggioni v Oggioni, 46 AD3d 646, 649 [2d Dept 2007]).

Defendants Benish and FVB also argue that the allegation concerning payment are speculative. These arguments are likewise inappropriate at the motion to dismiss stage. Accordingly defendants Benish and FVB’s motion to dismiss plaintiff’s complaint is denied.

This constitutes the decision and order of the Court.

Date: April 16, 2015  
New York, New York

  
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Anil C. Singh