Boutsouris v ENP Gen. Constr.Corp.
2015 NY Slip Op 32555(U)
April 7, 2015
Supreme Court, Nassau County
Docket Number: 23739/10
Judge: F. Dana Winslow
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3

ELENI BOUTSOURIS and SPIRIDON BABASSIKAS, NASSAU COUNTY

Plaintiffs,

-against-

MOTION SEQ. NO.: 003, 004
MOTION DATE: 1/3/15

ENP GENERAL CONSTRUCTION CORP. a/k/a
ENP GENERAL CONSTRUCTION CORP.

INDEX NO.: 23739/10

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion.....1
Notice of Cross Motion.....2
Affirmation in Opposition.....3
Reply Affirmation.....4
Affirmation in Support.....5

Motion by the defendant ENP General Construction, Corp. pursuant to CPLR 3211[a] and 3212, for an order dismissing the plaintiffs' complaint.

Cross motion by the plaintiffs Eleni Boutsouris and Spiridon Boutsouris for an order granting them summary judgment.

In December of 2010, the plaintiffs Eleni Boutsouris and Spiridon Boutsouris commenced the within action alleging, *inter alia,* that the defendants ENP General Construction, Corp. [" the defendant"], defectively and/or incompletely, performed renovation work on their Queens County residence (Arvanitakis Aff., Exh., "A"; Cmplt.,¶¶ 8-9; 16-17). According to the plaintiffs, they paid the defendant some $100,000.00 of the original $140,000.00 contract price before ultimately discharging the defendant from the project. Among other things, the plaintiffs contend the defendant's work – and its foundation work, in particular – was blatantly defective and also failed to conform with the project's written specifications with respect to, *inter alia*, certain waterproofing requirements, thereby allegedly preventing the plaintiffs from obtaining a

certificate of occupancy ["C of O"](Cmplt., ¶¶ 22-24; E. Boutsouris Aff., ¶¶ 10-12; 14-15, 19; Arvanitakis Aff., ¶¶ 10-12; 14-15, 19).

In December of 2011, this Court granted the defendant's prior motion pursuant to CPLR 3211[a][7] to the extent that all causes of action except the first, breach of contract cause of action, were dismissed (Order of Winslow, J., dated December 23, 2011, at 2).

Discovery has been conducted and the defendant now moves for summary judgment dismissing the complaint. According to the defendant, the complaint is dismissable as a matter of law because, during the course of discovery, the plaintiffs allegedly failed to produce any evidence demonstrating what the defendant contends is "a defined * * * difference between the contract price and the cost of completing the work" (Donnelly Aff., ¶¶ 12-13).

The plaintiffs have opposed the application and cross move for judgment on their remaining, breach of contract (first) cause of action. The parties' motions should both be denied.

In general, where defective construction is alleged, the "appropriate measure of damages is the [reasonable market] cost to repair the defects" (*Brushton–Moira Cent. School Dist. v. Thomas Assoc.*, 91 NY2d 256, 261–262 [1998]; *Hodges v. Cusanno*, 94 AD3d 1168, 1169; *Marino v. Lewis*, 17 AD3d 325 *Tapalaga v Gabrielli*, 284 AD2d 530; *Sarnelli v. Curzio*, 104 AD2d 552). Ultimately, however, the foregoing damages rule "is merely a recognition of the precept that damages are intended to place the injured party in the same position as if there had been no breach" (*Brushton–Moira Cent. School Dist. v. Thomas Assoc.*, *supra*, 91 NY2d at 262; *Hodges v. Cusanno*, *supra,* 94 AD3d 1168, 1169). Notably, "[i]n computing damages for breach of contract, mathematical certainty is rarely attained or even expected" (*Aqua Dredge, Inc. v. Stony Point Marina and Yacht Club, Inc.)*.

Viewing the evidence most favorably to the plaintiffs on the defendant's motion (*see*, *Vega v. Restani Const. Corp.*, 18 NY3d 499, 503 [2012]), the Court agrees that questions of fact exist with respect to plaintiffs' claims that they sustained damage arising out of the allegedly defective contract work. At bar, the gravamen of the plaintiffs' breach of contract theory is that the defendant improperly performed and delayed the contract work, failed to adhere to the

contract specifications and – in addition to a series of additional, construction errors – defectively installed the foundation, which was not properly waterproofed in accord with the project's written specifications.

The defendant's submissions have not *prima facie* established as a matter of law that the plaintiffs have sustained no compensable injury arising from the various breach of contract claims relied upon. Among other things, the affidavit submitted by the defendant's expert is insufficient to shift the summary judgment burden on the motion. In sum, the defendant's expert contends that nothing the defendant "did * * *or did not do" created the need for further remedial work or otherwise affected the plaintiffs' ability to obtain a certificate of occupancy (Peden Aff., ¶¶ 2[a]-[d]). However, the single paragraph in which the expert's opinions have been primarily articulated, is at best cryptic and oblique in its informational content (Peden Aff., ¶ 2[a]-[d])(*see*, *David v. County of Suffolk,* 1 NY3d 525, 526 [2003]; *Carrasco v. Weissman*, 120 AD3d 531; *Rodriguez v. D & S Builders, LLC,* 98 AD3d 957, 959). More particularly, the affidavit fails to provide an analytical basis or sustained, narrative discussion substantiating the conclusions reached (*see, Brown Bark I, L.P. v. Imperial Development and Const. Corp.*, 65 AD3d 510, 512); nor does the affidavit adequately identify and then link the foundational record facts relied upon, to the opinions ultimately rendered (*see generally*, *Butler v. City of Gloversville*, 12 NY3d 902, 904 [2009]; *Franchini v Palmieri*, 1 NY3d 536, 537 [2003]; *Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

The defendant's additional reliance upon, *inter alia*, snippets of disputed deposition testimony and/or excerpted statements culled from the various documentary materials in the record, similarly fail to create any conclusive inferences supporting an award of judgment as a matter of law (*cf., Elznic v Ferrara*, ___Misc.3d.___, Index No. 412-14, Slip Opn., at 5 [Supreme Court, Nassau County, January 28, 2015]). Although the defendant asserts that the plaintiffs' opposing submissions are incomplete or otherwise lacking merit, the defendant cannot not satisfy its initial burden by merely pointing to gaps in a plaintiff's case, but rather, must affirmatively demonstrate the merit of its own claims and defenses (*Collado v. Jiacono,* 126 AD3d 927; *Amendola v. City of New York*, 89 AD3d 775, 776).

Nor is the plaintiffs' expert report sufficient to shift the burden with respect to their separate cross motion for summary judgment. A review of the attached, expert submission report confirms that it is unsworn and therefore not in

admissible form (*Hoffman v. Mucci*, 124 AD3d 723). The plaintiffs' production of a sworn expert affidavit for the first time in reply – even if it were properly before the Court (*L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692) – would at best generate issues of fact which are not resolvable as a matter of law on the papers submitted. None of the plaintiffs' remaining submissions supports the granting of summary judgment with respect to their cross motion.

The Court has considered the parties' remaining contentions and concludes that they do not otherwise support the granting of judgment as a matter of law to either movant.

Accordingly, it is,

ORDERED that the motion by the defendant ENP General Construction, Corp., *et., al.*, pursuant to CPLR 3211[a] and 3212, for an order dismissing the plaintiffs' complaint, is **denied**, and it is further,

ORDERED that the cross motion by the plaintiffs Eleni Boutsouris and Spiridon Boutsouris, pursuant to CPLR 3212 for an order granting them summary judgment on their first cause of action, is **denied.**

This constitutes the Order of the Court.

Dated: April 7, 2015

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE