

**Herschman v Sun Am. Dev., Inc.**

2015 NY Slip Op 32989(U)

September 22, 2015

Supreme Court, Nassau County

Docket Number: Index No. 602103/15

Judge: Julianne T. Capetola

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This opinion is uncorrected and not selected for official publication.



At a Term of the Supreme Court  
of the State of New York held in  
and for the County of Nassau,  
100 Supreme Court Drive,  
Mineola, New York, on the 22<sup>nd</sup>  
day of September 2015

P R E S E N T:

HON. JULIANNE T. CAPETOLA  
Acting Justice of the Supreme Court

-----X  
JESSICA HERSCHMAN,

Plaintiff,

- against -

**DECISION AND  
ORDER ON MOTION**

Index No: 602103/15  
Motion Sequence: 001, 002,  
003, 004

SUN AMERICA DEVELOPMENT, INC.,  
SUN U.S.A. CONSTRUCTION, INC.,  
RABCO ENGINEERING, P.C.,  
ROBERT BENNETT, P.E.,  
D'ALESSIO ARCHITECTURE, P.C.,  
HOUSEGUARD OF AMERICA, INC.,  
TOWN OF HEMPSTEAD,  
DAVID KIRSCHENBAUM,  
and SHOSHANA KIRSCHENBAUM,  
Defendants.

-----X  
The following papers were read on Motion Sequence 001:

Defendants Rabco Engineering and Robert Bennett's Notice of Motion and  
Supporting Documents  
Plaintiff's Notice of Cross-Motion  
Defendants' Reply Affirmation

The following papers were read on Motion Sequence 002:  
Defendants Sun America and Sun U.S.A.'s Notice of Motion and Supporting Documents  
Plaintiff's Notice of Cross-Motion

The following papers were read on Motion Sequence 003:  
Defendant Houseguard's Notice of Motion and Supporting Documents  
Plaintiff's Notice of Cross-Motion  
Defendant's Reply Affirmation  
Stipulation dated September 10, 2015

The following papers were read on Motion Sequence 004:  
Plaintiff's Notice of Cross-Motion and Supporting Documents  
Defendants Rabco Engineering and Robert Bennett's Reply Affirmation  
Defendant Houseguard's Reply Affirmation  
Stipulation dated September 10, 2015

Defendants Rabco Engineering, P.C. and Robert Bennett, P.E. (hereinafter referred to collectively as "Engineering Defendants") and Sun America Development, Inc. and Sun U.S.A. Construction, Inc. (hereinafter referred to collectively as "Sun Defendants") and Defendant Houseguard of America, Inc. (hereinafter referred to as "Defendant Houseguard") each move by notice of motion for an order pursuant to CPLR §3211 dismissing the complaint as against them. Plaintiff has opposed these motions and has cross-moved for leave to amend the complaint pursuant to CPLR §3025. The Engineering Defendants and Defendant Houseguard submitted reply papers, and all motions were deemed submitted on September 11, 2015.

The underlying action relates to initial construction of a home now owned by Plaintiff, who purchased said home from the original owners in or about 2004. Following Hurricane Sandy certain structural damage was discovered which was related to the original construction of the home's foundation.

The Engineering Defendants seek dismissal of the complaint pursuant to CPLR §3211(a)(5), which states, in relevant part that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds". The Engineering Defendants state that the causes of action as against them could be read to include non-medical malpractice, which carries a statute of limitations of three years pursuant to CPLR §214(6), fraud and/or misrepresentation which carries a statute of limitations of six years pursuant to CPLR §213. The Engineering Defendants point out that the acts which allegedly constituted the basis of the causes of action occurred on or before August of 2003, clearly placing the instant action well beyond the relevant statutes of limitations.

Plaintiff argues in opposition that her subsequent hiring of the Engineering Defendants to perform a site inspection of her property in November of 2013 was an act in perpetuation of the initial fraud and therefore created a continuous scheme upon which the claim for fraud is predicated.

Clearly Plaintiff's hiring of the original engineering company that had contracted with the prior owner for the purpose of having them perform unrelated work more than a decade after the original construction of the home does not constitute a continuous scheme and accordingly, the complaint as against the Engineering Defendants must be

dismissed pursuant to CPLR §3211(a)(5) as the complaint was filed well beyond all applicable statutes of limitations.

The Sun Defendants seek dismissal of the complaint pursuant to CPLR §3211(a)(7). In determining a motion for dismissal pursuant to CPLR §3211(a)(7), “the court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated”. *Board of Education v. County of Westchester*, 282 A.D.2d 561 (2d. Dept. 2001). A motion to dismiss for failure to state a cause of action “cannot be sustained simply by showing that facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that material facts are only argumentatively averred. The pleading may be deficient in technical language or in logical statement, but, as against a demurrer or a motion of this character at the trial, the pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendment”. *Kain v. Larkin*, 141 N.Y. 144 (N.Y.C.A. 1894).

The complaint as it relates to the Sun Defendants includes causes of action for breach of contract, breach of fiduciary duty, negligence, and fraud.

“The essential elements for pleading a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach”. *Dee v Rakower*, 112 A.D.3d 204 (2d. Dept. 2013).

In order to succeed on a cause of action for breach of fiduciary duty, “plaintiff must establish existence of fiduciary relationship, misconduct by defendant, and that misconduct induced plaintiff to engage in the transaction in question, directly causing the loss about which plaintiff complains”. *Ozelkan v. Tyree Bros. Env'tl. Servs., Inc.*, 29 A.D.3d 877 (2d. Dept. 2006).

“To prove a prima facie case of negligence, the plaintiff must establish the existence of a duty on the defendant's part to the plaintiff, the breach of the duty, and that the breach of the duty was a proximate cause of an injury to the plaintiff. Absent a duty of care, there can be no breach and no liability”. *Gordon v. Muchnick*, 180 A.D.2d 715 (2d. Dept. 1992)(internal citations omitted).

“In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury”. *Lama Holding Co. v Smith Barney*, 88 N.Y.2d 413 (N.Y.C.A. 1996).

The Sun Defendants argue that no contract existed as between these parties inasmuch as the contract referred to was between the prior homeowners and the Sun Defendants and related to work performed in or about 2003 prior to this Plaintiff owning the home. In accordance with that argument, the Sun Defendants further argue that they owed no duty whatsoever to Plaintiff as they contracted with the prior owner to perform construction over a decade ago and have had no contact with Plaintiff. Furthermore, in the absence of any relationship between Plaintiff and the Sun Defendants, the cause of action for fraud cannot survive inasmuch as no representations whatsoever were ever made directly to Plaintiff by the Sun Defendants.

Plaintiff has failed to adequately demonstrate a relationship of any kind between Plaintiff and the Sun Defendants which would give rise to those causes of action alleged in her complaint as against those defendants and accordingly, the complaint must be dismissed as to the Sun Defendants.

Defendant Houseguard has sought dismissal of the complaint as against them pursuant to CPLR §3211(a)(5) and CPLR §3211(a)(7). The complaint as against Defendant Houseguard includes causes of action for breach of contract, fraud, and professional malpractice. The claims as against Defendant Houseguard are predicated upon their performance of a home inspection of the subject property in or about “summer/autumn” of 2009 and their generation of a report in accordance therewith upon which Plaintiff based her purchase of the home.

As it relates to the claim for professional malpractice, which carries a statute of limitations of three years pursuant to CPLR §214(6). Accordingly, the cause of action for professional malpractice must be dismissed as it has been filed well beyond the statute of limitations.

With regard to the cause of action for fraud, Defendant Houseguard argues that the complaint does not contain sufficient detail as required by CPLR §3016(b) which states that “Where a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the

wrong shall be stated in detail”. “Bare allegations of fraud without any allegation of the details constituting the wrong are not sufficient to sustain such a cause of action . . . and plaintiff's characterization of the representations as being fraudulent is not sufficient to sustain the cause’. Plaintiff's allegations that defendant acted ‘fraudulently’ or ‘engaged in trickery’ or ‘chicanery’ are merely conclusions insufficient to allege causes of actions based on fraud”. *Biggar v. Buteau*, 51 A.D.2d 601 (3d. Dept. 1976).

In the instant matter, the complaint as it relates to the cause of action for fraud as against Defendant Houseguard contains nothing more than conclusory statements without sufficient facts alleged to support the claim and, accordingly, that cause of action must be dismissed.

Finally, as it relates to the cause of action for breach of contract as against Defendant Houseguard, sufficient triable issues of fact have been raised such that dismissal of that cause of action of the complaint on its face is not appropriate.

Plaintiff has cross-moved for leave to amend the complaint pursuant to CPLR §3025, which states that “A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. *Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading*”. (Emphasis added)

Plaintiff has failed to annex the original complaint to her moving papers, and has attached an Amended Verified Complaint which fails to clearly show the changes that have been made. Accordingly, the cross-motion is defective and must be denied.

It must be noted that, although Plaintiff's cross-motion also sought a default judgment against Defendant Houseguard, that branch of the motion was withdrawn pursuant to stipulation between the parties.

In accordance with the foregoing, it is hereby:

ORDERED, that the motion by Defendants Rabco Engineering, P.C. and Robert Bennett, P.E. (Mo. Seq. 001) is hereby granted in its entirety and the complaint is dismissed as against those defendants; and it is further

ORDERED, that the motion by Defendants Sun America Development, Inc. And Sun U.S.A. Construction, Inc. (Mo. Seq. 002) is hereby granted in its entirety and the complaint is dismissed as against those defendants; and it is further

ORDERED, that the motion by Defendant Houseguard of America Inc. (Mo. Seq. 003) is granted to the extent that the causes of action for fraud and professional malpractice are hereby dismissed, and denied to the extent that the remaining cause of action for breach of contract shall remain; and it is further

ORDERED, that the motion by Plaintiff (Mo. Seq. 004) is hereby denied in its entirety with leave to renew upon proper papers; and it is further

This constitutes the decision and order of the Court.

Dated: 9/22/15

ENTER



HON. JULIANNE T. CAPETOLA  
A.J.S.C.

**ENTERED**

SEP 30 2015  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE