

Niblo v Ferraro

2016 NY Slip Op 32887(U)

June 24, 2016

Supreme Court, Rockland County

Docket Number: 030084/16

Judge: Gerald E. Loehr

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This opinion is uncorrected and not selected for official publication.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
KEVIN NIBLO and SUE NIBLO,

Plaintiffs,

DECISION AND ORDER

Index No.: 030084/16

-against-

JOHN ANTHONY FERRARO,
JOHN ANTHONY FERRARO ARCHITECT P.C.,
ET AL,

Defendants.

-----X

LOEHR, J.

The following papers numbered 1-4 were read on the above-captioned Defendants motion to dismiss all the causes of action in the Complaint, other than the First, as asserted as against them.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits	1
Memorandum of Law in Support	2
Affirmation in Opposition - Exhibits	3
Memorandum of Law in Reply	4

Upon the foregoing papers, and as alleged in the Complaint, in 2011 the Plaintiffs “endeavored to purchase a vacant lot at 50 Cliff Road, Tuxedo, New York and, in doing so, building a custom home there.” In a written agreement dated May 5, 2011, as amended by a

written agreement dated May 1, 2012, the Plaintiffs hired Defendants to provide “architectural services” with respect to such custom home. While Defendants also agreed to provide “assistance” in “choosing a qualified general contractor,” the Amended Agreement provided that Defendants would, inter alia, prepare a construction schedule and interface with the contractors. Whether a General Contractor was hired does not appear but the other named Defendants were construction companies hired to frame and construct the house – although who hired them does not appear. Be that as it may, what is alleged is that the architectural plans were so defective that the house could not be constructed; whereupon, in April 2013, Plaintiffs retained a new architect to redraw the plans and a new construction company to build it.¹ This action was commenced on January 8, 2016. The Complaint sets forth seven causes of action: breach of contract, breach of warranty, breach of implied warranty under General Business Law § 777-a, negligence, fraud, malpractice and negligent misrepresentation and sought contract, tort and punitive damages. The above-captioned Defendants now move to dismiss all the causes of action other than the First (breach of contract) as asserted against them.

The Second and Third Causes of Action are for breach of warranty. Prior to 1988, once a buyer accepted the deed, he absolved the vendor of all duties under the sales contract under the merger doctrine (McDaniel, *The New York Housing Merchant Warranty Statute: Analysis and Proposals*, 75 Cornell L Rev 754, 756 [1990]). In 1988, in *Caceci v Di Canio Construction Corp.* (72 NY2d 52 [1988]), the Court of Appeals found that “there is an implied term in the express contract between the builder-vendor and the purchasers that the house to be constructed would be done in a skillfull manner free from material defects.” (*Id.* at 56). In response, the Legislature enacted General Business Law article 36-B. Section 777-a(1) thereof provides that “a housing merchant implied warranty – inter alia that “the home will be free from defects due to a failure to have been constructed in a skillfull manner . . . [and] free from material defects – is implied in the contract or agreement for the sale of a new home” and Section 777-b(3) provides that a “housing merchant implied warranty may be excluded or modified by the builder of seller only if the buyer is offered a limited warranty in accordance with the provisions of this subdivision.” In *Fumarelli v Marsam Development, Inc.* (92 NY2d 298, 302 [1998]), the Court

¹ The original builders were named as Defendants based on their alleged failure “to appreciate the mistakes of Mr. Ferraro and mitigate [Plaintiffs’] damages.”

of Appeals held that General Business Law article 36-B is a full, effective, and realistic substitute for the protections and rational recognized in *Caceci v Di Canio Cosntr. Crop.*”

While this appears to be a straight forward statement of the law, it, in fact, raises numerous questions. Thus, if article 36-B does not apply, does that nevertheless mean that the common law implied warranty, that the statutory warranty was intended to replace, is no longer available? Thus, here, as Plaintiff apparently purchased the land before they contracted with Defendants for the construction of the house, this is a “ custom house,” covered by General Business Law § 770(7) and not a “new home” under General Business Law § 777(5) and, therefore, the new home warranty under section 777-a would not apply (*Security Supply Corporation v Ciocca*, 49 AD3d 1136, 1137 [3d Dept 2008]). But if the statutory warranty does not apply, what of the common law warranty (*compare Gorsky v Triou’s Custom Homes, Inc.*, 194 Misc2d 736 [Sup Ct, Wayne co 2002] *with Watt v Irish*, 184 Misc2d 413 [Sup Ct, Columbia Co 2000]). But the Court need not resolve these questions because whether the Plaintiffs seek to enforce the statutory or common law warranty because either warranty only flows from a builder and not an architect. An architect designs; a builder builds. As the warranty is that the home will be *constructed in a skillfull manner*, how could an architect, who designs but does not build, provide or breach such a warranty? As Defendants were the architect and not the builder, there is no warranty and those claims are dismissed.

The Fourth and Sixth Causes of Action are for negligence and malpractice, respectively. Defendants move to dismiss both upon the theory that breach of contract does not give rise to tort liability unless there is a legal duty independent of the contract. Of course, but the law imposes such duty on professionals, such as architects, to have the reasonable degree of skill usually possessed by a member of the architectural profession and therefore allows recovery of both tort and contract damages for such breach (*Sears, Roebuck & Co. v Enco Associates, Inc.*, 43 NY2d 389 [1977]; *see also Sommer v Federal Signal Corporation*, 79 NY2d 540, 551 [1992]). Accordingly, the motion to dismiss the malpractice claim is denied; the negligence claim is dismissed.

The fraud and negligent misrepresentation claims are dismissed without opposition, as was the prayer for punitive damages. The parties shall appear on July 13, 2016 at 10am for a preliminary conference. This constitutes the decision and order of the Court.

Dated: New City, New York
June 24, 2016



HON. GERALD E. LOEHR
J.S.C.

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