

Shildkret v Swimming Pools by Jack Anthony, Inc.

2017 NY Slip Op 30191(U)

January 31, 2017

Supreme Court, Suffolk County

Docket Number: 13-20929

Judge: James Hudson

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INDEX No. 13-20929
CAL. No. 16-00720CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 7-15-16
ADJ. DATE 9-7-16
Mot. Seq. # 001 - MD

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GEORGE SHILDKRET and JULIA SHILDKRET,

Plaintiffs,

- against -

SWIMMING POOLS BY JACK ANTHONY, INC.,

Defendant.

-----X

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 28 - 38 ; Replying Affidavits and supporting papers ____; Other memoranda of law 26 - 27, 39 - 40 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by the plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor as to the defendant's liability is denied.

This is an action sounding in breach of warranty involving the alleged failure of the defendant to construct a swimming pool and patio at the plaintiffs' residence in a workmanlike manner. In their complaint, the plaintiffs set forth two causes of action: the first for breach of contract and warranty, the second for attorney's fees. In their complaint, the plaintiffs allege, among other things, that "the swimming pool was not properly secured and thereafter, moved and the patio shifted and cracked." It is undisputed that the parties entered into a written contract dated October 22, 2009 (the contract) for the subject work, that the contract contained an express warranty, and that the warranty provision warrants that the defendant's work will be free from defects in material and workmanship for a period of ten years. It is further undisputed that the water table at the location where the pool was constructed is approximately three or four feet below the soil surface, that the soil conditions at lower levels consists of

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“bog,” and that the defendant returned to the plaintiffs’ residence twice to repair the patio prior to the commencement of this action.

The plaintiff now moves for summary judgment as to the defendant’s liability. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties’ competing interest must be viewed “in a light most favorable to the party opposing the motion” (*Marine Midland Bank, N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of their motion, the plaintiffs submit, among other things, the pleadings, the affidavit of the plaintiff Julia Shildkret (Shildkret), the transcripts of the deposition testimony of the parties, a copy of the parties’ contract, and various e-mail correspondence. At her deposition,¹ Shildkret testified that she solicited proposals from three swimming pool contractors in September 2009, that two of the three proposals included the use of a pile foundation in constructing the proposed pool, and that she had been working with a professional engineer, Michael Simon (Simon), prior to soliciting some, if not all, of said proposals. She stated that Simon completed the pile foundation plan on or about October 7, 2009, that one of the contractors informed her it would be cheaper to use a pile foundation than to excavate and pack the base of the pool with gravel, and that she thinks she sent Simon’s plan to all of the contractors. She indicated that she first emailed the defendant on October 11, 2009, soliciting a proposal and informing its representative, Michael Inzerillo (Inzerillo), that she already had the EPA permits and designs for the pool in hand. She acknowledged that the list of her requirements for the construction of the pool sent to the defendant did not include the use of a pile foundation, and that she did not transmit Simon’s pile foundation plan to Inzerillo in any of her emails to the defendant. She asserts that she handed said plan to Inzerillo at a meeting at her home. Shildkret further testified that she advised her engineer, Simon, in an email that she had decided to “go with the option of excavating all of the bog and replacing it with gravel,” that Inzerillo and his engineer had given her that option, and that Simon did not voice any concerns regarding her decision other than to have her request a lifetime warranty from the contractor. She stated that the plans for the pool were submitted with the professional seal of her architect, Charles Thomas, and that the architect put his seals on the defendant’s drawings. She indicated that the professional engineer she hired after the second repair was made by the defendant issued a written report wherein he determined that the cause of the damage to the pool was “water

¹ It is requested that parties refrain from submitting deposition transcripts printed on both sides of a page. If this is necessary, the depositions should be attached in a manner so that the deposition can be read without requiring the Court to “flip” the motion papers to enable it to read the exhibit. Pursuant to 22 NYCRR § 202.5 papers with writing on both sides of a page should be bound on the side.

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movement underneath the pool ... in connection with ... either the fill operation was completed improperly or inappropriate for the subsurface conditions.”

In her affidavit, Shildkret essentially swears to the same facts that she testified to in her deposition. She states that she specifically requested an increase in the warranty period from the one-year period originally set forth in the contract to a ten-year period, that problems with the pool and patio began almost immediately after the construction was completed, and that Inzerillo acknowledged that the subject problems might lie in the subsoil conditions at the property in an email dated December 8, 2009.

At his deposition, Inzerillo testified that he is the vice president of the defendant, that he was the “main point of contact” with the plaintiffs regarding this contract and the construction of the pool and patio, and that he met with Shildkret, her engineer, architect, and general contractor during this project. He indicated that he last visited the plaintiffs’ residence in the winter of 2013/2014, that the patio “seems to have settled,” and that he did not know if the pool “lifted out of the ground.” He stated that the defendant returned to fix the patio after issues arose, that, if the pool has lifted out of the ground, it is not due to poor workmanship but hydrostatic pressure, and that he believes that the defendant has honored the subject warranty. Inzerillo further testified that the contract called for the defendant to mitigate the movement of the pool by de-watering the pool area and installing six hydrostatic pressure valves, that said provision was one of the items that Shildkret and her architect and engineer wanted included in the contract, and that the pool was constructed within industry standards. He stated that hydrostatic pressure valves release outside water pressure into the pool to prevent movement of the pool, that the subject valves were installed properly, and that the architect’s drawing included with the permit application did not indicate the number of valves to be installed. He indicated that the defendant relied upon the architect’s drawing in constructing the swimming pool, that the scope of the defendant’s work under the contract did not include the design of the pool, and that he did not suggest a pile foundation plan to Shildkret because she already had the necessary permits, an architect and an engineer’s input, and multiple bids to choose from. Inzerillo further testified that he did not see Simon’s pile foundation plan before the commencement of this action, that regardless of said plan, the defendant was responsible for ensuring that the pool was “supported,” and that the number of hydrostatic pressure valves installed was his decision based on the size of the swimming pool. He declared that he did not tell Shildkret that she did not need piles to support the pool, and that he would have consulted with his engineer if he had been retained to design the plaintiffs’ swimming pool.

The defendant’s warranty, in a paragraph entitled “Guarantee,” provides in relevant part:

SWIMMING POOLS BY JACK ANTHONY INC. guarantees that all material used in completing the work contracted for herein will be of good quality and all work will be done in a competent and workmanlike manner. If any defects occur by reason of defective materials or work the Builder will repair or replace such defective materials or improper workmanship without cost to the Owner, provided the Owner notified the

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contractor of such defects in writing, by certified or registered mail, postmarked within 10 years after the completion of construction ...

When the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see Greenfield v Philles Records*, 98 NY2d 562, 750 NYS2d 565 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 565 NYS2d 440 [1990]; *Willsey v Gjuraj*, 65 AD3d 1228, 885 NYS2d 528 [2009]). Moreover, an individual who signs or accepts a written contract, absent fraud or other wrongful conduct on the part of the other contracting party, “is conclusively presumed to know its contents and to assent to them ...” (*Metzger v Aetna Insurance. Co.*, 227 NY 411, 416 [1920]; *see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 537 NYS2d 787 [1988]; *Da Silva v Musso*, 53 NY2d 543, 444 NYS2d 50 [1981]). The nature of the obligations undertaken in a contract is to be construed in accordance with the parties’ intent (*see generally Greenfield v Philles Records*, 98 NY2d 562, 569, 750 NYS2d 565 [2002]), and “the best evidence of what parties to a written agreement intend is what they say in their writing” (*see Slamow v Del County Law*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]).

Here, the plaintiffs have failed to establish their prima facie entitlement to summary judgment on the issue of the defendant’s liability. The plaintiffs have failed to submit any admissible evidence that the movement of the swimming pool is due to improper backfilling of the site by the defendant, or any other failure to construct the pool in a workmanlike manner. In addition, the plaintiffs have failed to submit any evidence as to the specific cause of the problems with the pool and patio beyond the clear indication that there is an issue with hydrostatic pressure at the site. There are questions whether, among other things, there are environmental conditions that created the post-construction problems, or whether the number of hydrostatic pressure valves was inappropriate.

In addition, there are issues of fact whether the defendant was retained to design the swimming pool and its support system, and whether the defendant had any responsibility to ensure the stability of the pool regardless of its alleged reliance on the design of the plaintiffs’ architect. It is well-settled that where a contractor must follow the architect’s plans and specifications provided by an owner, the contractor will not be responsible for the consequences of defects in those plans and specifications (*see United States v Spearin*, 248 US 132, 39 S Ct 59 [1918]; *Szatkowski v Turner & Harrison, Inc.* 184 AD2d 504, 584 NYS2d 170 [2d Dept 1992]; *County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 478 AD2d 305 [2d Dept 1984], *affd* 66 NY2d 642, 495 NYS2d 364 [1985]). There are additional issues of fact as to whether the plaintiffs and the defendant intended that the pool be constructed pursuant to the plans and specifications allegedly set forth by the plaintiffs and their representatives, and whether the parties intended the defendant to have any responsibility for those designs.

To the extent that the plaintiffs contend that the report of the defendant’s engineer dated May 17, 2016 establishes that the defendant’s allegation that it never received the report of their engineer, Simon, is irrelevant, and that said report resolves all issues of fact, it is without merit. While said report indicates that the pile foundation plan “would not have prevented hydrostatic uplift of the pool,” it does not indicate the cause of the subject damage, and the report states that the reason for the “uplift” is currently under review, and must await the completion of his investigation.

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Moreover, a review of the record reveals that the plaintiffs' submission has failed to address the issues raised in the defendant's answer. CPLR 3212 (b) provides in pertinent part: "A motion for summary judgment shall be supported by affidavit ... and by other available proof ... and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit." The plaintiff has failed to demonstrate the absence of triable issues of fact on every issue raised by the pleadings (*Aimatop Rest., Inc. v Liberty Mut. Fire Insurance. Co.*, 74 AD2d 516, 425 NYS2d 8 [1st Dept 1980]; *Stone v Continental Insurance. Co.*, 234 AD2d 282, 650 NYS2d 772 [2d Dept 1996]). Here, as an example only, the plaintiffs do not address the defendants affirmative defenses regarding the culpable conduct of third-parties and/or the plaintiffs.

The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med. Ctr., supra; Matinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, the plaintiffs' application for partial summary judgment in their favor on their first cause of action for breach of contract and warranty is denied.

The Court now turns to that branch of the plaintiffs' motion which seeks summary judgment on their second cause of action for attorney's fees. Generally, "an attorney's fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties" (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379, 912 NYS2d 504 [2010]; *see Degregorio v Richmond Italian Pavillion, Inc.*, 90 AD3d 807, 935 NYS2d 70 [2d Dept 2011]). The plaintiffs contend that the contract provision that permits the defendant to recover attorney's fees is made reciprocal by General Obligations Law § 5-327. Without commenting upon whether the language of the subject provision permits such a recovery by the plaintiffs, the undersigned declines to address the issue until such time, if any, that the plaintiffs succeed on their first cause of action for breach of contract and warranty. Accordingly, the plaintiffs' motion is denied in its entirety.

Dated: July 31st 2017


 A.J.S.C.
 HON. JAMES HUDSON

 FINAL DISPOSITION X NON-FINAL DISPOSITION