

<b>Kollatz v KOS Bldg. Group, LLC</b>
2017 NY Slip Op 33261(U)
August 7, 2017
Supreme Court, Westchester County
Docket Number: 52995/17
Judge: Linda S. Jamieson
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NYSCEF DOC. NO. 32

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Disp \_\_\_ Dec x Seq. No. 1 Type dismiss

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**PRESENT: HON. LINDA S. JAMIESON**  
-----X  
CHRISTOPH KOLLATZ,

Plaintiff, Index No. 52995/17

-against-

DECISION AND ORDER

KOS BUILDING GROUP, LLC and 9 SENECA  
ROAD, LLC,

Defendants.

-----X

The following papers numbered 1 to 5 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Memorandum of Law	2
Affidavit and Exhibits in Opposition	3
Memorandum of Law in Opposition	4
Reply Affirmation and Exhibits	5

Defendants, the builder and seller of a home purchased by plaintiff, bring their motion to dismiss the complaint. The facts are as follows. In April 2015, plaintiff and defendant 9 Seneca Road, LLC ("Seneca") entered into a contract for plaintiff to buy a house that defendant KOS Building Group LLC ("KOS") was in the process of building. The parties closed on the sale in June 2015, and plaintiff and his family moved in in August 2015.

The parties' contract included a Limited Warranty. The Limited Warranty provided that plaintiff was entitled to a final inspection for the purposes of discovering "any defects or flaws of a visible or obvious nature that may have occurred . . . or any unfinished work. . . ." This section further provides that "all defects or flaws found on final inspection of the Premises will be itemized on a Final Inspection Sheet, which will include a schedule for completion of each item that will be corrected." This was to be signed by each party before occupancy of the premises. However, plaintiff states in his affidavit that defendants "did not provide access to my real estate broker (who was acting in my stead) to inspect the House on the date of the closing." It does not appear that the parties ever completed the Final Inspection Sheet.

The Limited Warranty contains various warranties, divided into time periods. For example, in the "First Year Basic Coverage," Seneca warranted defective workmanship and materials; in the "Two Year Major System Coverage," Seneca warranted the plumbing, electrical, heating, cooling and ventilation systems. There was also a "Six Year Major Structural Defect Coverage" warranty, as well as an exclusion section.

Significantly, the Limited Warranty contains a section entitled "Step by Step Claim Procedures," which requires that any warranty claim must be made on an attached form (a blank one of

which plaintiff had signed), and had to be received by Seneca no later than 15 days after warranty coverage on the specific item expired. If the form was not sent within that time period, "the Warrantor will have no duty to respond to any complaint or demand and any or all claims may be rejected." In the section following, entitled "Legal Action," the Limited Warranty provides that no claim may be commenced or asserted in any legal proceeding "unless notice of the claim or cause of action has been received by the Warrantor in a timely manner and same is accompanied by a properly completed" form. There was also a limitations provision, which precludes any action after the later of the expiration of the applicable warranty provision or 60 days after Seneca had given written notice of rejection of the claim, whichever is later.

According to plaintiff's affidavit, after they moved in in August 2015, they began to notice "numerous defects and deficiencies" in the house. Some of these were obvious and apparent (such as missing screens for screen doors and windows; visible gaps between the stairs; concrete instead of bluestone for the basement stairs, among other things), and some of these were not (missing insulation in the walls and in the kitchen; usage of plain steel fasteners instead of galvanized steel; poor laying of the basement floor, among other things). Plaintiff

entered into a contract with KOS for additional work in October 2015.

Plaintiff admits that once he started noticing defects, instead of filing a claim against defendants, he "provided notice to Defendants of the various defects and deficiencies, and requested that Defendants rectify same." Plaintiff further states that he and his wife emailed, called and texted defendants, beginning within a month of moving in, which was "well within the warranty periods" set forth in the Limited Warranty. Plaintiff also asserts that through November 2015, defendants responded to them without objection. It was not until December 2015 that defendants suddenly refused to deal with plaintiff's problems. Plaintiff thereafter retained counsel. In February 2016, plaintiff learned that there was no insulation and/or inadequate insulation in the home, and at Easter 2016, plaintiff learned of the improper venting and connection of the stove and hood, among other alleged problems. Plaintiff commenced this action in March 2017.

Analysis

It is well-settled that "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.

Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss." *Tirpack v. 125 N. 10, LLC*, 130 A.D.3d 917, 918, 14 N.Y.S.3d 110, 112 (2d Dept. 2015).

The Court first looks at the General Business Law § 349 claim, the third cause of action. As the Court of Appeals has held, this section "declares unlawful deceptive acts or practices in the conduct of any business. To successfully assert a section 349 ... claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 883 N.Y.S.2d 772 (2009). Putting aside the issue of whether there was any materially misleading conduct, there was clearly no "consumer-oriented conduct" that was directed to the broader public at large. Indeed, the only one allegedly injured here is plaintiff.

As the Court of Appeals has further explained, "Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). See also *Yellow Book Sales and Distribution Co., Inc. v.*

*Hillside Van Lines, Inc.*, 98 A.D.3d 663, 950 N.Y.S.2d 151 (2d Dept. 2012). This is precisely the situation here, notwithstanding the cases that plaintiff cites - all of which are bare-bones decisions from the Third and Fourth Departments. Accordingly, the third cause of action must be dismissed, as a matter of law.

With respect to the first two causes of action, which seek damages for breach of contract and breach of warranty, respectively, the Court finds that plaintiff failed to follow the procedure for making claims that is expressly set forth in the Limited Warranty. Indeed, plaintiff himself admits that he did not follow this procedure when complaining about the alleged defects in the house to defendants. This is ground for dismissing the first two causes of action.<sup>1</sup> See *Pinkus v. V.F. Builders, Inc.*, 270 A.D.2d 470, 470, 705 N.Y.S.2d 283 (2d Dept.

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<sup>1</sup>Plaintiff argues that KOS agreed to certain specifications by which it then failed to abide (such as, for example, promising granite countertops, but using inferior composites; promising certain wiring, but using lesser materials). He claims that these specifications form the basis for a breach of contract claim "in addition to any breach of warranty claims." In support of this theory, he cites *Tiffany at Westbury Condo. By Its Bd. of Managers v. Marelli Dev. Corp.*, 40 A.D.3d 1073, 1076, 840 N.Y.S.2d 74, 77 (2d Dept. 2007). In that case, and its progeny, "the offering plan and purchase agreements contained specific provisions as to how Tiffany would be constructed, which are separate and apart from the limited warranty [so that] the owners are entitled to assert common-law breach of contract causes of action with respect to those provisions." This is not the case here. In this case, the specifications are set forth in a separate, unsigned, undated document that is not incorporated into the contract in any way. Although plaintiff asserts that this document binds the parties, there is no legal basis for so holding.

2000) ("We agree with the Supreme Court that the cause of action to recover damages for breach of a limited warranty was properly dismissed since the plaintiffs failed to comply with the notice requirements of the limited warranty."). Plaintiff's reliance on *Furino v. O'Sullivan*, 137 A.D.3d 1208, 1210, 28 N.Y.S.3d 700 (2d Dept. 2016), does not help him. In that case, the Court found that a letter was sufficient notice - but the warranty arose only under Gen. Bus. Law § 777-a, and not, as here, under a Limited Warranty with a detailed and very specific procedure for notification. To the extent that plaintiff argues that the contract of sale and Limited Warranty do not bar plaintiff's claims against KOS, the Court disagrees. If Seneca and KOS were alter egos in some fashion and/or Seneca was "an asset-less shell," as plaintiff argues, then plaintiff's failure to comply with the procedure set forth in the Limited Warranty would also bar the first two causes of action as to KOS. If, on the other hand, the two entities are separate, such that these documents do not apply to KOS, then there can be no claim for breach of contract or warranty since plaintiff's first two causes of action expressly arise out of the contract and Limited Warranty.

Plaintiff argues that regardless of the Limited Warranty, General Business Law § 777-a grants him an implied warranty which survives the closing. A review of that statute and the following

section shows that plaintiff is incorrect. Gen. Bus. Law § 777-b provides, in relevant part, that

A housing merchant implied warranty may be excluded or modified by the builder or seller of a new home only if the buyer is offered a limited warranty in accordance with the provisions of this subdivision. . . . The language of the contract or agreement for sale of the home must conspicuously mention the housing merchant implied warranty and provide that the limited warranty excludes or modifies the implied warranty. Language to exclude all implied warranties is sufficient if it states, for example, that "There are no warranties which extend beyond the face hereof."

This is exactly what the Limited Warranty here provides, such that the implied warranty was superceded by the Limited Warranty. (The Court notes that the Limited Warranty in many ways mirrors the implied warranty language set forth in Section 777-a.) See *Fumarelli v. Marsam Dev., Inc.*, 238 A.D.2d 470, 470, 657 N.Y.S.2d 61, 62 (2d Dept. 1997), *aff'd*, 92 N.Y.2d 298 (1998) ("Under New York General Business Law article 36-B, a builder-vendor may exclude or modify all express and implied warranties, including the housing merchant implied warranty created by the statute or by common law, provided that the purchase agreement contains a limited warranty in accordance with the provisions of General Business Law § 777-b."). The Court thus must dismiss the first and second causes of action.

Turning to the fourth and fifth causes of action, for common law fraud and negligence, respectively, these claims rely on defendants' alleged misrepresentations about the quality of

workmanship and materials used in the construction of the premises. Plaintiff states that the fraud claims arise out of the specifications, "despite being fully aware that those Specifications had not been met and would not be met," as well as alleged misrepresentations that plaintiff claims defendants made to his real estate agent. All of these claims arise out of the parties' contract, requiring the fraud cause of action to be dismissed "because plaintiffs failed to allege tortious conduct separate and distinct from their breach of contract claim." *Pine St. Homeowners Ass'n v. 20 Pine St. LLC*, 109 A.D.3d 733, 735, 971 N.Y.S.2d 289, 292 (1<sup>st</sup> Dept. 2013). See also *Mastropieri v. Solmar Const. Co.*, 159 A.D.2d 698, 700, 553 N.Y.S.2d 187, 189 (2d Dept. 1990) ("It is well settled that a cause of action to recover damages for fraud will not arise when the only fraud charged relates to a breach of contract."). Similarly, the negligence cause of action must also be dismissed because "the plaintiffs' allegations that the drainage and septic systems were improperly constructed sound in breach of contract rather than tort." *Rothstein v. Equity Ventures, LLC*, 299 A.D.2d 472, 474, 750 N.Y.S.2d 625, 627 (2d Dept. 2002). The fourth and fifth causes of action must be dismissed.

Finally, the Court examines the sixth cause of action, which relates to work that "defendants" did after the closing, pursuant to a separate contract between plaintiff and KOS dated October

14, 2015. Plaintiff contends that while doing this work, "defendants" "damaged, broke and/or incorrectly constructed certain items belonging to Plaintiff." There is no October 14, 2015 contract between plaintiff and Seneca, and no allegation that Seneca had any hand in performing any work pursuant to this contract. This contract thus does not bind Seneca, and it is dismissed from the action altogether. As for KOS, although plaintiff titles this claim "Negligence - Additional Work in and To the House," a review of the pleadings shows that it is actually a claim for breach of contract. Rather than dismiss this claim and require plaintiff to replead it in breach of contract, the Court ignores the heading pursuant to CPLR § 2001. As there is no basis for dismissing this breach of contract claim, which stands separate and apart from the Limited Warranty, the Court denies the motion to dismiss the sixth cause of action as to KOS.

The motion is thus granted in its entirety as to Seneca, and granted as to KOS with respect to all causes of action except the last. The remaining parties are directed to appear for a Preliminary Conference in the Preliminary Conference Part,

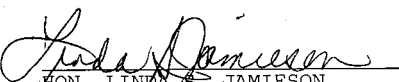
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Courtroom 800, on September 18, 2017 at 9:30 a.m.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York  
August 7, 2017

  
HON. LINDA S. JAMIESON  
Justice of the Supreme Court

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