

Frost v Christiana

2019 NY Slip Op 32077(U)

July 17, 2019

Supreme Court, New York County

Docket Number: 153279/2014

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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DAVID FROST,

Plaintiff,

- v -

INDEX NO. 153279/2014

MOTION DATE _____

MOTION SEQ. NO. 008

FRANK CHRISTIANA, DAWN CHRISTIANA, THE
LINER SPECIALISTS, INC.,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 173-203, 205 were read on this motion to/for summary judgment.

By notice of motion, the remaining defendant in this action, The Liner Specialists, Inc. s/h/a The Liner Specialists, moves pursuant to CPLR 3212 for an order dismissing all of plaintiff's causes of action except for breach of contract, and his claim for damages for lost rent. Plaintiff opposes.

This action arises from a contract by which plaintiff hired defendant to perform work on an in-ground pool on plaintiff's rental property. The background is set forth more fully in a decision and order dated July 15, 2015, by which plaintiff's motion for a default judgment against defendant was granted only as to his claims for breach of contract and a violation of General Business Law (GBL) § 771 and was otherwise denied. (NYSCEF 177). The default judgment was subsequently vacated and defendant was permitted to answer the complaint. (NYSCEF 178). On December 1, 2017, the complaint was dismissed as against the individual defendants. (NYSCEF 141).

Plaintiff does not oppose dismissal of his claims for breach of warranty of fitness, fraud,

and violations of GBL §§ 349 and 771-773. (NYSCEF 192).

I. NEGLIGENCE, GROSS NEGLIGENCE, UNJUST ENRICHMENT CLAIMS

Generally, a cause of action for negligence that arises from the same facts as a cause of action for breach of contract is dismissed as duplicative, especially where identical damages are sought for each claim. However, a tort claim may arise from the breach of a legal duty independent of the contract.

As defendant demonstrates that plaintiff's cause of action for negligence is essentially one for the negligent performance of the contract, it sustains its burden of proving *prima facie*, that the cause of action for negligence is not legally cognizable. (*See Dormitory Auth. v Samson Constr. Co.*, 30 NY3d 704 [2018] [dismissing negligence claim as duplicative of breach of contract claim where no injury alleged that was not encompassed in contract claim and identical damages sought]).

Plaintiff argues that defendant's act of draining the water from his pool, which led to the alleged damages, was neither contemplated by nor part of the parties' contract, relying on the testimony of defendant's principal. That testimony, however, reflects that while the draining of water from the pool is not part of the parties' initial contract, it is provided for in a subsequent agreement covering extra work, and is reflected in an email sent by Christiana to plaintiff before the work commenced. (NYSCEF 186). Moreover, plaintiff offers no authority for the proposition that defendant's alleged online guarantee as to the quality of its services creates a legal duty, much less one independent of their contract.

Plaintiff thus fails to raise a triable issue as to whether defendant had a legal duty independent of that underlying his breach of contract claim.

As plaintiff does not prove the existence of a duty independent of the contract or the

existence of catastrophic consequences arising from defendant's failure to perform services competently or that the nature of the services affected a public interest, he fails to raise an issue of fact for trial. (*See e.g., Massena Towne Ctr. Assocs. v Sear-Brown Group, Inc.*, 255 AD2d 893 [4th Dept 1998] [dismissing negligence claim where defendant breached contract by failing to provide useable water tank, resulting in release of 300,000 gallons of water from tank into detention pond, causing landslide]).

And, as there is a valid and enforceable agreement between the parties, there can be no unjust enrichment claim. In any event, as plaintiff provided no services to defendant, the claim has no legal basis. (*See Skillgames, LLC v Brody*, 1 AD3d 247 [1st Dept 2003] [*quantum meruit* inapplicable to provision of money rather than services]).

II. DAMAGES FOR LOST RENT

Defendant denies liability for the claimed loss of rental income from August 2013, given plaintiff's claim on his homeowner's insurance for repairs and damages caused by Hurricane Sandy in 2012 and continued claim that the repairs prevented him from renting the property in August 2013. Moreover, the person whose tenancy was allegedly delayed due to the pool's condition testified that renovations to the interior of the property were ongoing during the summer of 2013, which defendant alleges constitutes the reason that the tenant did not move in until September 2013. (NYSCEF 174).

Plaintiff denies that his 2012 homeowner's claim is relevant to his damages here, and observes that a functioning pool is required in the lease. (NYSCEF 192).

Defendant offers the tenant's deposition wherein he testified that he was unable to recall why he delayed his tenancy from August 2013 to September 2013, although he remembered having asked plaintiff to repair and renovate the house before he moved in on August 1, 2013,

and that the commencement date of his lease was changed to September 1, 2013. (NYSCEF 188). Moreover, defendant demonstrates that plaintiff attempted to recover the rent for August 2013 through his insurance claim related to Hurricane Sandy but was unsuccessful.

As this evidence permits a reasonable inference that repairs to the property, not including the pool, were ongoing in August 2013, and absent evidence establishing that the tenancy was delayed due to the damaged pool, plaintiff fails to raise a triable issue as to his claim for lost rent.

III. TAX RETURNS

Defendant's motion related to plaintiff's tax returns was resolved by decision and order dated July 11, 2019. (NYSCEF 206).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted to the extent of dismissing: (1) all of plaintiff's claims except for his breach of contract claim, and (2) his claim for damages for lost rental income for August 2013; and it is further

ORDERED, that the clerk of the trial support office is directed to restore the matter to the trial calendar for the earliest possible date.

7/17/2019
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE