Maddock v Haines
2020 NY Slip Op 31657(U)
May 7, 2020
Supreme Court, Suffolk County
Docket Number: 601995/17
Judge: Carmen Victoria St. George

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

ORIGINAL

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

RICHARD MADDOCK and BARBARA MADDOCK,

Plaintiffs,

-against-

DENISE HAINES, as ADMINISTRATOR OF THE ESTATE OF MICHAEL HAINES, MICHAEL R. HAINES AGENCY, INC., SCDS ENTERPRISES, LLC, AKG2, INC., COOL-TEMP MECHANICAL, INC., AMERICAN PLUMBING SOLUTIONS, INC., PETER ALBINSKI, R.A., LLOYD HOWELL, P.E., JOSEPH LAUTERBORN, BUILT CONSULTING CORP., and WALTER GIGLIO,

Defendants.

Index No.
601995/17

Motion Seq:
001 MG

Decision/Order

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	26-30
Answering Papers.....	38-39; 40-42
Reply.....	62-66
Briefs: Plaintiff's/Petitioner's.....	43
Defendant's/Respondent's.....	31; 67

Defendant SCDS Enterprises, LLC (SCDS) seek dismissal of the causes of action asserted against them in the complaint pursuant to CPLR §§ 3211 (a)(1) and (a)(7). SCDS owned and developed the property located at 62 North Captains Neck Lane in Southampton, New York, constructing a single-family home thereon that SCDS eventually sold to the plaintiffs. The closing occurred on January 4, 2017, and the home was substantially destroyed by a fire that occurred on January 5, 2017, the day after the plaintiffs took title to the premises. The plaintiffs were not insured for their losses.[1]

[1] Plaintiffs also sue their insurance agent, co-defendant Haines, for, *inter alia*, alleged failure to procure homeowner's insurance.

The original complaint, filed on February 1, 2017, alleges that SCDS breached the builder warranty, and that SCDS was negligent in its design and construction of the building, especially in the design and installation of the boiler and venting systems within the building. The amended complaint, filed on April 2, 2019, asserts the same causes of action against SCDS.[2] The plaintiffs seek to recover damages for property damage to the house and to their personal property, plus consequential damages for the cost of their temporary living arrangements incurred while repairing the subject premises.

In support of its motion, SCDS submits the affidavit of its managing member, Donna Stanza, the residential contract of sale, rider and purchaser's rider, and the new construction limited warranty/2-10 Home Buyers Warranty (2-10 warranty). Essentially, SCDS asserts that the contract of sale for the subject property and the limited/2-10 warranty expressly excludes and disclaims all other warranties, including the implied housing merchant warranty provided in General Business Law (GBL) § 777-a, and that the limited warranty excludes damage caused or made worse by fire. As to the cause of action sounding in negligence, SCDS asserts that there is no cause of action for negligence as a matter of law because SCDS did not owe any duty of care to plaintiffs and plaintiffs have not alleged a breach of any duty independent of the contract of sale between the parties.

CPLR 3211 (a)(1) and (a)(7) Standards

In order to succeed on a motion to dismiss based upon documentary evidence, "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (***Scadura v. Robillard***, 256 AD2d 567 [2d Dept 1998]).

"[I]t is clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence'" (***Fontanetta v. John Doe 1***, 73 AD3d 78, 84-85 [2d Dept 2010]).

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiffs the benefit of every favorable inference (*see* ***Marcantonio v Picozzi III***, 70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail" (***Guggenheimer v Ginzburg***, 43 NY2d 268, 275 [1977]; *see also* ***Miglino v. Bally Total Fitness of Greater New York, Inc.***, 20 NY3d, 342, 351 [2013]; ***Leon v Martinez***, 84 NY2d 83, 87-88, [1994]; ***Sokol v Leader***, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; ***Gershon v Goldberg***, 30 AD3d 372, 373 [2d Dept 2006]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19 [2005]).

"A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a)(7) [citation omitted]" (***Sokol***, ***supra*** at 1181). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a

[2] The instant motion to dismiss was made well prior to plaintiffs' filing of the amended complaint.

cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it...dismissal should not eventuate" (***Guggenheimer***, ***supra*** at 275; *see also* ***Vertical Progression, Inc. v. Canyon Johnson Urban Funds***, 126 AD3d 784 [2d Dept 2015]; ***YDRA, LLC v. Mitchell***, 123 AD3d 1113 [2d Dept 2014]; ***Korsinsky v. Rose***, 120 AD3d 1307 [2d Dept 2014]).

"In sum, in instances in which a motion to dismiss made under CPLR 3211 (subd [a], par 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems after the amendment of 1973 affidavits submitted by the defendant will seldom if ever warrant the relief he seeks *unless too the affidavits establish conclusively that plaintiff has no cause of action*" (***Rovello v. Orofino Realty Co.***, 40 NY2d 633, 636 [1976] [emphasis added]). The instant motion is being treated as it is noticed, as a motion for dismissal pursuant to CPLR § 3211, pursuant to the so-ordered stipulation issued by the Hon. Linda Kevins on May 28, 2019.[3]

The Breach of Warranty Claim Against SCDS (Plaintiffs' Second Cause of Action)

It is undisputed that construction of the subject single-family home was completed in 2015, and that the plaintiffs executed the contract of sale on December 16, 2016. The contract of sale incorporated and included a new construction limited warranty/2-10 limited warranty. The 2-10 warranty is a standard limited warranty form provided by an independent company, 2-10 Home Buyers Warranty, LLC that was not drafted by SCDS (*see* ***Uribe v. Merchants Bank of New Yor***k, 91 NY2d 336 [1998]).[4]

The contract of sale, riders and the 2-10 warranty constitute documentary evidence (*see* ***Lakhi General Contractor, Inc. v. New York City School Construction Authority***, 147 AD3d 917, 919 [2d Dept 2017]). Paragraph 40 of the rider to the contract of sale for the subject premises expressly disclaims and excludes the statutory housing merchant implied warranty provided by GBL § 777-a by stating, in pertinent part that the "seller makes no housing merchant implied warranty or any other warranties express or implied. . .and all such warranties are excluded except as provided in the 2-10 homebuyers warranty annexed to this contract of sale. . .The express terms of the 2-10 hereby incorporated in this contract of sale and there are no warranties which extend beyond the face thereof."

The specific language contained in paragraph 40, "there are no warranties which extend beyond the face thereof" is taken from GBL § 777-b (3)(c), providing in relevant part that, "[t]he 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.'"

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[3] Co-defendant Cool-Temp's opposition is stated to be opposition to a summary judgment motion, and it is argued as such, which arguments are inapposite to the issues raised by the instant motion. Furthermore, this Court will not consider the plaintiffs' sur-reply or SCDS's response to the sur-reply since the Court did not grant permission for those submissions.

[4] This warranty can be purchased by a seller re-selling an existing home, or by a builder who offers it as part of the builder's limited warranty for a newly-constructed home.

In addition, Section V of the 2-10 warranty itself reads, "[y]ou have accepted this express limited warranty provided in this warranty booklet. All other implied warranties, including oral or written statements or representations made by Your Builder/Seller or any implied warranty of habitability, merchantability or fitness, are disclaimed by Your Builder/Seller and waived by You to the extent possible under the laws of Your state." The 2-10 warranty provides notations that, in California and Kansas, the 2-10 warranty is not in limitation of any other rights provided to the buyer under California law, and that implied warranties are not waived by the 2-10 warranty in Kansas. There is no such notation about New York, because as noted, the implied warranty may be waived as discussed above.

Furthermore, the plaintiffs acknowledged in the purchaser's rider dated December 14, 2016 that the 2-10 limited warranty was incorporated into the contract of sale. The Court notes that SCDS and the plaintiffs were each represented by counsel of their choice during the pendency of this real estate transaction.

The 2-10 warranty, "Section VIII. Exclusions.," specifically excludes "[a]ny loss or damage that is caused or made worse by any of the following causes, whether acting alone or in sequence or concurrence with any other cause or causes whatsoever, including without limitation: 7. d. . . .fire, explosion, blasting or smoke. . ." This section of the 2-10 warranty also specifically excludes coverage for damage to personal property and for consequential damages as provided for in paragraphs 10 and 12. Accordingly, the 2-10 warranty excludes the type of liability and damages that the plaintiffs seek to recover from SCDS.

Section III of the 2-10 warranty instead provides the builder with the option to repair, replace or pay for the defect, but does not entitle the buyer to damages flowing therefrom; thus, even if the fire exclusion was unable to be successfully advanced by SCDS, the plaintiffs are still not able to recover the damages that they seek in the causes of action alleged against SCDS according to the plain reading of the 2-10 warranty that excludes coverage for damage to the subject property, personal property and consequential damages.

Moreover, the warranty in this case is the exclusive remedy for the plaintiffs, precluding causes of action for breach of common law or statutorily-implied housing merchantability warranties (***Fumarelli v. Marsam Development, Inc.***, 92 NY2d 298 [1998]; ***Gallup v. Summerset Homes, LLC***, 82 AD3d 1658, 1660-1661 [4th Dept 2011]).

The Negligence Claim Against SCDS (Plaintiff's Third Cause of Action)

The elements of negligence consist of a duty owed by the defendant to the plaintiff; a breach of that duty, and injury proximately resulting from the breach. Furthermore, the existence and scope of a duty is a question of law for the courts (***Abbott v. Johnson***, 152 AD3d 730 [2d Dept 2017]; *see also* ***Pulka v. Edelman***, 40 NY2d 781 [1976]).

Here, the parties' relationship is governed exclusively by the contract of sale, the riders and the 2-10 warranty. SCDS does not owe any general, non-contractual duty of care to the plaintiffs apart from the contract, and simply alleging a duty of care does not transform a breach of contract action into a tort (***Clark-Fitzpatrick, Inc. v. Long Island Railroad Co.***, 70 NY2d 382, 390 [1987]; ***Novelty Crystal Corp. v. PSA Institutional Partners, L.P.***, 49 AD3d 113, 119 [2d Dept 2008]; ***Public Service Mutual***

Insurance Company v. Tri-Con Construction Corp., 224 AD2d 508, 508 [2d Dept 1996]). The plaintiffs here do not allege the breach of any duty owed to them independent of the contract of sale or the 2-10 limited warranty; accordingly, they do not have a cause of action for negligence against SCDS as a matter of law.

Plaintiffs' Opposition

Plaintiffs' opposition is not persuasive in any respect. They claim that they never saw or received a copy of the 2-10 warranty booklet or certificate of warranty coverage within thirty days of the closing, and that receipt thereof is a condition precedent to creation of the express warranty. They reason that since the condition precedent was not met, the express warranty excluding loss for fire is not enforceable; therefore, the implied warranty under the GBL is applicable. The plaintiffs' argument in this regard is factually incorrect and it fails to defeat SCDS's motion on this basis. The Court notes that this theory is advanced for the first time in opposition through the affidavit of Richard Maddock, but it is not advanced in the complaint. In any event, his claim is unavailing for a number of reasons.

Delivery of the booklet and certificate are not conditions precedent to warranty coverage. There is nothing in the language of the 2-10 warranty that can be construed as a condition precedent, except that the builder, SCDS, was responsible to complete all enrollment requirements. SCDS did complete the application process required to enroll the subject premises in the warranty program, and the certificate itself that was submitted by SCDS upon its motion clearly states that the effective date of the 2-10 limited warranty is January 4, 2017.

Furthermore, plaintiffs admit in their memorandum of law in opposition that their real estate attorney "at closing may have received the 'Builder Copy' of the Certificate of Warranty." Also, the evidence submitted in reply to Richard Maddock's affidavit establish that the certificate of warranty was also emailed to plaintiffs' real estate attorney on January 5, 2017. Finally, as noted above, the plaintiffs signed a written acknowledgement that they read the 2-10 warranty booklet and consented to the terms of that document on December 30, 2016 (*see* ***Brian Wallach Agency, Inc. v. Bank of New York***, 75 AD2d 878, 879 [2d Dept 1980]), thereby undermining their claim that they never saw or received a copy of the 2-10 warranty booklet or certificate of warranty coverage until SCDS made the instant motion.

Plaintiffs' attempt to invoke the rule of construction known as *ejusdem generis* also fails in this case. "…[U]nder *ejusdem generis,* where several specific terms are followed by a more general term, the general term is deemed to share the characteristics of the specific terms that precede it" (***In re Enron Creditors Recovery Corp***., 380 BR 307, 322 [SDNY 2008]; *see also* ***Lawrence v. Town of East Fishkill***, 167AD2d 447, 448 [2d Dept 1990]). "The canon of *ejusdem generis* is employed to limit 'broad catch-all terms' in a manner consistent with other listed terms that are more specific" (***Id***. at 323 *quoting* ***Johnson & Johnson v. Guidant Corp.***, 525 FSupp2d 336 [SDNY 2007]). Here, the word "fire" is not a "catch-all" term requiring interpretation; it is plain and straightforward. Furthermore, there is nothing in the 2-10 warranty remotely suggesting that only a fire originating outside of the home would fall under the exclusion. Exculpatory provisions in a contract will ordinarily be enforced when the language thereof unequivocally relieves a defendant of liability, as is the case here (***Uribe***, ***supra*** at 340). When the terms of a contract are plain and clear, the terms are entitled to be enforced and "not to be subverted by straining to find an ambiguity which otherwise might

not be though to exist" (***Loblaw, Inc. v. Employers' Liability Assurance Corp., Ltd.***, 57 NY2d 872, 877 [1982]).

Nor is the fire exclusion void as against public policy as plaintiffs contend. The case relied upon by plaintiffs, ***Pesca v. Barbera Homes, Inc.***, (35 Misc3d 747 [Sup Ct Albany County 2012]) is distinguishable from the case at bar, because the builder in ***Pesca*** sought to avoid warranty coverage for the cost of remedying construction defects, not for consequential damages. SCDS states that it does not contend that the fire exclusion would excuse it from remedial work to ensure that the heating system in the subject premises complied with local building codes, or that the fire exclusion would exclude coverage for remedial work, but the plaintiffs do not request the cost of remedial work in their lawsuit. Plaintiffs in this case are seeking to recover for damage to the premises, to personal property, and for consequential damages, all of which are excluded by the terms of the 2-10 warranty that they acknowledged receiving and which was in effect on January 4, 2017, the day before the fire. Furthermore, the risk of damage was allocated to the plaintiffs as part of bargained-for arrangement wherein all parties to the contract of sale and riders that incorporated the 2-10 warranty were represented by counsel; accordingly, this Court determines that the limitation on consequential damages in this case is not unconscionable or void as against public policy (*see* ***Suffolk Laundry Services, Inc. v. Redux Corp.***, 238 AD2d 577, 579 [2d Dept 1997]).

Finally, plaintiffs' claim that SCDS may be liable for a dangerous condition on land where the new owner has not had a reasonable time to discover the condition and remedy it is inapposite to this case. Plaintiffs attempt to apply principles applicable to personal injuries suffered by third parties for conditions like broken sidewalks to this matter.

The causes of action against SCDS are dismissed based upon the documentary evidence presented and pursuant to CPLR § 3211 (a)(1) and pursuant to CPLR § 3211 (a)(7) because SCDS has demonstrated that plaintiffs do not have a cause of action against SCDS for damage to the subject premises and their personal property and for consequential damages as the result of an alleged breach of the builder's warranty, nor do they have a cause of action sounding in negligence against SCDS.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 7, 2020
Riverhead, NY

HON. CARMEN VICTORIA ST. GEORGE CS

CARMEN VICTORIA ST. GEORGE, J.S.C. SCC

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]