

Gold v 22 St. Felix LLC
2020 NY Slip Op 32258(U)
May 26, 2020
Supreme Court, Queens County
Docket Number: 719280/19
Judge: Leonard Livote
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into contract (the "Contract") with Defendant 22nd Saint Felix LLC (the "LLC") to purchase, for \$2,795,000, a new home constructed by said LLC, located at 22 Saint Felix Street, Brooklyn, New York (the "Home"). The Home was to be used by Gold, the sole beneficiary of the Trust, as her permanent residence.

Plaintiff alleges that, soon after the closing of title, water repeatedly infiltrated the Home because of Defendants' failures to install continuous water resistive barriers and otherwise skillfully waterproof the Home, provide proper drainage, and convey the Home free from defects that are due to a failure to construct the Home in a skillful manner.

The infiltration of water due to Defendants' failures: (a) caused toxic mold spores to grow throughout the Home; (b) caused significant damage to the Home and the personal property contained therein; (c) rendered the Home uninhabitable; (d) forced Gold to find alternative living arrangements; (e) required Gold to arrange for, coordinate, and supervise remediation of the mold and repair of the construction defects in the Home; and (f) required Gold to obtain medical treatment for skin and eye irritations, anxiety, and depression.

Defendants move to dismiss the First, Third, Fourth and Fifth causes of action in the Complaint, and to dismiss all causes of action asserted as against the individual defendant, Guy Assaf.

As a general rule, when considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7), the plaintiff's complaint is to be liberally construed in the light most favorable to the plaintiff's; and all factual allegations are accepted as true. (See, *Lo Pinto v. Mays, Inc.* 107 AD2d 582 [1991]). In the within action the plaintiff claims that the subject lease should be invalidated as an unreasonable restraint on alienation for the various reasons stated above. Where the ultimate question in an action is whether or not an act is unreasonable, there is a question of fact presented that should be determined at trial. (See, *Colonial Co-op Ins. Co. v. Desert Storm Const. Corp.*, 305 AD2d 363 [2nd Dept. 2003]).

To grant a motion to dismiss due to "a defense that is founded upon documentary evidence" pursuant to CPLR §3211(a)(1), the evidence in question must "utterly refute the plaintiff's allegations and establish a defense as a matter of law." (See, *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, [2002]). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

The first cause of action alleges breach of contract. However, the Rider expressly states that the "guarantee[s]" for "plumbing, heating, electric and roofing pursuant to the General Business Law, Article 36-B, Section 777(a)" "shall survive the delivery of the deed." (emphasis added.) Paragraph 3 of the Rider provides that when a basement is constructed, as was the case here, "the seller guarantees that the basement of these premises will be free [sic] from water seepage for a period of one (1) year from the date of the closing of title." Plaintiff also alleges that the Supplemental Rider contains the representation by Seller that "the Premises do not violate any applicable zoning ordinances, building or other codes." Paragraph R6 of the Supplemental Rider contains the representation and warranty by Seller that "all alterations to the Premises have been made in accordance with all applicable laws, statutes, rules and regulations." The movant has not made a sufficient showing that documentary evidence utterly refutes the plaintiff's allegations and has created a defense as a matter of law.

Accordingly the motion to dismiss the first cause of action is denied.

The third cause of action alleges a violation of the building code. As a general rule, if a statute does not explicitly provide for a private cause of action, recovery may be had under the statute only if a legislative intent to create such a right of action is fairly implied in the statutory provisions and their legislative history (see, *Albright v. Metz*, 217 A.D.2d 123, 129). The building code does not provide for a private right of action and a private right of action is not implied in its terms.

Accordingly, the motion to dismiss the third cause of action is granted.

The fourth cause of action alleges that the defendants made negligent repairs. To the extent that defendants may have negligently performed repairs that resulted in additional damages, the complaint adequately alleges a negligence action.

Accordingly, the motion to dismiss the fourth cause of action is denied.

The fifth cause of action alleges that defendants violated GBL § 349. A party seeking to recover under GBL § 349 must allege that the defendant's acts or practices have a broad impact on consumers at large (*Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 344 [1999]). " '[P]rivate contract disputes unique to the parties ... would not fall within the ambit of the statute' " (see *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308, 320,,

quoting Oswego, 85 N.Y.2d 20, 25). Plaintiff's claim does not allege a broad impact on consumers at large.

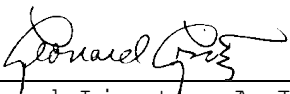
Accordingly the motion to dismiss the fifth cause is action is granted.

In conclusion, the motion is granted to the extent that it is,

ORDERED, that the third and fifth causes of action are dismissed.

This constitutes the Order of the Court.

Dated: May 26, 2020



Leonard Livote, A.J.S.C.

**FILED
5/27/2020
12:51 PM
COUNTY CLERK
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