

**Notias Constr., Inc. v Genesis Y15 Owners, LLC**

2021 NY Slip Op 31749(U)

May 19, 2021

Supreme Court, New York County

Docket Number: 656397/2020

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

|                            |                             |                        |                      |
|----------------------------|-----------------------------|------------------------|----------------------|
| <b>PRESENT:</b>            | <u>HON. ARLENE P. BLUTH</u> | <b>PART</b>            | <b>IAS MOTION 14</b> |
|                            | <i>Justice</i>              |                        |                      |
| -----X                     |                             | <b>INDEX NO.</b>       | <u>656397/2020</u>   |
| NOTIAS CONSTRUCTION, INC., |                             | <b>MOTION DATE</b>     | <u>05/14/2021</u>    |
| Plaintiff,                 |                             | <b>MOTION SEQ. NO.</b> | <u>003</u>           |

- v -

GENESIS Y15 OWNERS, LLC, GENESIS Y15 MANAGERS  
LLC, GENESIS Y15 MEMBER LLC, GENESIS Y15  
DEVELOPER LLC, HP GENESIS Y15 HOUSING  
DEVELOPMENT FUND COMPANY, INC., KARIM HUTSON,  
IN HIS INDIVIDUAL CAPACITY

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63,  
64, 65, 69, 70, 71, 72, 73, 74, 76

were read on this motion to/for DISMISSAL.

The motion by plaintiff to dismiss defendants' counterclaims is granted in part.

**Background**

This case deals with a construction project in which plaintiff entered into a contract with defendant Genesis Y15 Owners ("Genesis Owners"). Plaintiff contends that it was hired to renovate 358 apartments across 28 buildings in New York City. Plaintiff claims that it is owed money arising out of the construction project and defendants contend that plaintiff did an incomplete and unsatisfactory job. Defendants bring four counterclaims for breach of contract, breach of express warranty, breach of implied warranty and for a judgment declaring that the mechanic's lien is willfully exaggerated.

Plaintiff claims the breach of contract counterclaim should be dismissed because defendants failed to comply with the procedure in the construction contract. It insists that this

process is a condition precedent before defendants can bring a lawsuit. It argues that defendants did not identify the terms of the express warranty that plaintiff allegedly violated. Plaintiff asserts that the counterclaim for breach of an implied warranty is inapplicable because this was a contract for services.

Plaintiff maintains that the counterclaim seeking relief under Lien Law § 39 for willful exaggeration must be dismissed because that relief is only available where a lienor moves to foreclose on a lien; here, plaintiff has not moved for foreclose on a lien.

In opposition, defendants emphasize that they brought the counterclaims to recover the \$1.5 million in remediation and completion costs they incurred as a result of plaintiff's allegedly deficient and incomplete performance. Defendants contend that they did comply with the notice provision and procedure in the construction contract that governs this case. They also insist that their causes of action should remain.

### **Discussion**

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

### **First Counterclaim- Breach of Contract**

The Court denies this branch of the motion. Defendants assert that they satisfied all of their obligations under the contract (NYSCEF Doc. No. 57, ¶ 42) and that they informed plaintiff about the defective work. While plaintiff is correct that the contract contains a notice of claim procedure, the Court cannot (on a motion to dismiss) find that defendants failed to state a cognizable counterclaim. Defendants assert that they gave the required written notice and plaintiff disagrees—the Court must accept defendants' claims as true on a motion to dismiss their counterclaims. Discovery may reveal that the contractual provision regarding claim procedures was not followed but the Court is unable to reach that conclusion on these papers.

Plaintiff's claim that the affidavit of Karim Hutson (NYSCEF Doc. No. 69) is insufficient does not compel a different outcome. Hutson's affidavit is sufficient to defeat a motion to dismiss—he asserts that notice about the purportedly deficient work was provided to plaintiff.

### **Breach of Express Warranty**

The Court declines to dismiss the express warranty counterclaim. Defendants identified a number of promises made by plaintiff in the contract and these representations state a cognizable cause of action for an express warranty. For instance, defendants pointed to Section 12.2.2.1 of the General Conditions, which obligates plaintiff to correct work not completed in accordance with the contract and to fix the issue if the request is submitted within one year of the substantial completion date. “[W]here the party rendering services can be shown to have expressly bound itself to the accomplishment of a particular result, the courts will enforce that promise” (*Milau Assoc. v N. Ave. Dev. Corp.*, 42 NY2d 482, 487, 398 NYS2d 882 [1977]). That there is a dispute over whether a particular warranty (paragraph 3.5) was removed does not defeat the entire claim.

Defendants adequately pled that plaintiff did not comply with various representations contained the construction contract.

Plaintiff is free, of course, to use discovery devices such as a demand for a bill of particulars, document requests and depositions to explore the extent to which defendants can support this counterclaim. On a motion to dismiss, however, the Court can only consider whether a counterclaim was stated and the Court concludes that this counterclaim was adequately pled. Moreover, defendants were not obliged to plead this counterclaim with the same level of specificity that is required for claims such as fraud (which requires a heightened pleading standard).

### **Implied Warranty**

The Court dismisses this counterclaim. A party cannot maintain a cause of action for an implied warranty in a contract for services (*see Aegis Productions, Inc. v Arriflex Corp. of Am.*, 25 AD2d 639, 639, 268 NYS2d 185 [1st Dept 1966]). In contrast to the second counterclaim for breach of an express warranty (where defendants allege that plaintiff made a number of representations about specific things related to the contract), an alleged breach of an implied warranty relates exclusively to the sale of goods. The instant matter deals with a construction contract; therefore, this counterclaim is severed and dismissed.

### **Fourth Counterclaim- Willful Exaggeration**

Plaintiff claims that this cause of action is inapplicable because it has not sought to foreclose on a lien. The Court grants this branch of the motion. The First Department has held that “In this connection, section 39-a [of the Lien Law], by its terms, only permits a willful exaggeration claim to be asserted in an action ‘to enforce a mechanic's lien,’ namely, a foreclosure action. Where the lien has been discharged prior to trial, the action is no longer one

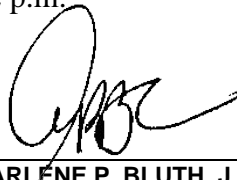
seeking to enforce a mechanic's lien. The action is, at that juncture, merely one in contract”  
(*Wellbilt Equip. Corp. v Fireman*, 275 AD2d 162, 166, 715 NYS2d 203(Mem) [1st Dept 2000]).

There is no question that the instant case is not an action to enforce a mechanic’s lien and defendants do not cite any caselaw with a contrary holding that would permit them to pursue this counterclaim. Certainly defendants’ assertion that it should not have to wait for plaintiff to bring a claim to foreclose on a mechanic’s lien in order to raise a willful exaggeration claim makes practical sense. However, that is not what the Lien Law provides or what the First Department has held on this issue.

Accordingly, it is hereby

ORDERED that the motion by plaintiff to dismiss the counterclaims is granted only to the extent that the third and fourth counterclaims are severed and dismissed and denied as to the remaining requests for relief.

Already Scheduled Remote Conference: May 27, 2021 at 2 p.m.



5/19/2021  
DATE

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ARLENE P. BLUTH, J.S.C.

|                       |                          |                            |                                     |                       |                          |
|-----------------------|--------------------------|----------------------------|-------------------------------------|-----------------------|--------------------------|
| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |                          |
|                       | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       | <input type="checkbox"/> |
|                       |                          |                            | DENIED                              |                       | OTHER                    |
| APPLICATION:          | <input type="checkbox"/> | SETTLE ORDER               |                                     | SUBMIT ORDER          |                          |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN |                                     | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
|                       |                          |                            |                                     |                       | REFERENCE                |