Brach v Classic Turf Co., LLC
2022 NY Slip Op 32369(U)
July 20, 2022
Supreme Court, Kings County
Docket Number: Index No. 520952/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

ZIGMOND BRACH, JENNIE BRACH and EXACT EQUITIES, LLC,

Plaintiffs,

- against -

CLASSIC TURF COMPANY, LLC,

Defendant.

X

DECISION/ORDER

Index No. 520952/2019
Motion Seq. No. 5
Date Submitted: 6/9/2022

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion to dismiss the plaintiffs' amended complaint

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed……	71-89
Affirmation in Opposition and Exhibits Annexed.....	91-96
Reply Affirmation.....	99-100

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

In Motion Sequence #5, defendants timely move, pre-answer, to dismiss plaintiffs' amended complaint. Plaintiff made a motion (Seq. #2) to amend the complaint to, *inter alia,* add a plaintiff, Exact Equities, LLC, which was granted by order dated 1/3/22. The amended complaint was filed the next day, and this motion was filed a few weeks later. Defendant answered the original complaint, but was granted time to answer the amended complaint. As the motion is addressed to all six causes of action, the court will discuss them one at a time.

This action arises from a contract for the installation of a replacement tennis court on the roof of a building in Brooklyn, NY. Plaintiffs Zigmond Brach and his wife Jennie Brach live in an adjacent property which has access to this rooftop tennis court. The

tennis court is on the roof of a building owned by the new plaintiff, Exact Equities, LLC. Plaintiff Zigmond Brach testified at his EBT that he is the managing member of this LLC. Plaintiffs claim the defendant's work was defective, which caused leaking into the space below, and that they sustained damages. A different company had installed the first tennis court, which Mr. Brach testified at his EBT did not cause leaking, but the surface "bubbled" with air pockets so he wanted to replace it with a flat new tennis court [Doc 75 Page 22].

The first cause of action is for breach of contract. Defendant claims it must be dismissed as it is time barred [CPLR 3211(a)(5)]. The amended complaint states that the work was completed "in or about November 2012" and "in or about January 2015 the tennis court began to delaminate and to leak." The action was commenced on September 24, 2019.

At the time the work was done, the roof was on a building owned (since 2009) by plaintiff Exact Equities LLC. The contract was signed by plaintiff Zigmond Brach, and provides that he is the owner. He testified at his EBT that he is the owner of the LLC and could not say if any other people were owners [Doc 75 Page 11]. The access to this rooftop tennis court is from an adjacent property, 5911 15th Avenue, which was initially owned by Mr. Brach and his wife, then he transferred it to his wife alone in 2004, then she transferred it to an LLC in August of 2013. Thus, on the date the contract was signed by Mr. Brach alone, and on the dates that the work was done, she was the sole owner of their home. When the suit was commenced, however, non-party 5911 15th Avenue LLC was the sole owner. But the tennis court was installed on the roof of the adjacent property, Exact Equities' property, 1501 60th Street, Brooklyn, New York.

The alleged breach of the contract is (¶24) the alleged failure to install waterproofing on the top of the roof and under the tennis court. The contract, Doc 39, states at paragraph (A)(5) "first water-proofing and priming will be installed." Defendant states that the work was completed in 2012, so this claim is time barred. The court agrees. The plaintiff acknowledges that the roof started leaking in 2015. The "continuing wrong doctrine" does not apply to this claim, as plaintiffs allege.

The second cause of action is for breach of warranty. The contract states at Par. D that "The Classic Turf Company will guarantee the above stated work for a duration of 10 years from cracking, peeling, or delamination of the Classic Turf rubber mat from the concrete slab, as long as the Classic Turf maintenance guidelines are followed. Please see enclosed." The amended complaint states (¶11) that "in or about January 2015 the tennis court began to delaminate and to leak." Defendant claims that this cause of action is time barred, and also that it fails to state a cause of action. The court disagrees. First, the claim is not time barred, as there is a ten year warranty/guarantee in the contract. Thus, "plaintiff may recover for all of the defendants' derelictions of duty that it can prove took place between . . . six years prior to the institution of suit . . . and the date on which the [agreement] expired" *Bulova Watch Co. v Celotex Corp.,* 46 NY 2d 606 (1979). Here, the claim is that the defendant did not repair the problem of the leaking and the delamination during the warranty period. With regard to the claim that plaintiffs fail to state a cause of action for breach of warranty pursuant to CPLR 3211(a)(7), the court also disagrees.

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action.

Frank v Daimler Chrysler Corp., 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. *See also Leon v Martinez,* 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg,* 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens,* 273 AD2d 193 [2nd Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, "but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.,* 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg,* 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC,* 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City of New Rochelle v County of Westchester,* 282 AD2d 561, 562. The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez, 84* NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

The third cause of action is for breach of the implied warranty of good workmanship. Defendant claims this is also time barred [CPLR 3211(a)(5)] and fails to

state a claim [CPLR 3211(a)(7)]. The court agrees that it fails to state a claim. There is no such cause of action in New York. This was not a contract for a new home built by a builder covered by the housing warranties in NY law. It is not a products liability lawsuit against the manufacturer. There is no implied warranty of good workmanship cause of action for a tennis court. This cause of action is dismissed.

The fourth cause of action is for fraud. Defendant claims it must be dismissed for failing to state a cause of action and for failing to plead justifiable reliance with the requisite particularity. The court agrees. Mr. Brach was replacing a prior tennis court. He testified [Doc 75 Page 11] that he owned so many pieces of real estate that if he were to correctly answer the question "Do you know approximately how many?" he responded that he would "ask my lawyer and we will start preparing a list." The complaint alleges that the fraud is that after plaintiff complained about the leaks, "defendant represented to plaintiff that it had installed waterproofing beneath the tennis court surface. These representations were false, were known to defendant to be false, and were made with the intent to cause plaintiffs to rely on the statements to its detriment." This is illogical. After the leaking started, plaintiffs' reliance on defendant's alleged statements that they had installed waterproofing cannot be considered to have been reasonable.

While one court, a long time ago, concluded that it is a viable cause of action where "plaintiff was induced by defendant not to bring its lawsuit in a timely manner," and the complaint alleged "that defendant had misled plaintiff by lulling plaintiff into inactivity and had induced plaintiff to continue settlement negotiations until after the expiration of the time allowed by law to commence the action" (*Atkins & Durbrow, Ltd. v Home Indem. Co.*, 84 AD2d 637, 637 [3d Dept 1981]) the Appellate Division dismissed

the action, and said that since the plaintiff waited eighteen months after all communication between the parties had stopped before filing suit "plaintiff failed, as a matter of law, to sustain its burden of proving that the action was brought within a reasonable time after the conduct relied on." (*Atkins & Durbrow, Ltd. v Home Indem. Co.*, 84 AD2d 637, 637-638 [3d Dept 1981].)

In this case, plaintiffs' attorney states in his opposition affirmation that (¶6) "Between February and August of 2018 there was an exchange of emails between the parties concerning leakage under the tennis court. In September 2018 defendant met with plaintiff at the rooftop, along with plaintiff's roofing contractor, and undertook to perform repair and replacement work after the roofing contractor repaired the leaks. That agreement was memorialized in a letter dated September 6, 2018, a copy of which is annexed as Exhibit A [Doc 92]. Defendant's principal, Tumer Eren, also testified [at his EBT Doc 76 page 103] that Classic Turf agreed to replace the rubber subsurface, acrylic coating and repaint the lines, and never claimed at that time that the work was beyond the scope of the original agreement."

To be clear, after the water damage to the premises below had occurred, and after plaintiffs had engaged a roofer who removed part of the tennis court, and waterproofed the roof and installed new flashing, defendant agreed [Doc 92] to replace the tennis court and re-paint it "at a reasonable additional cost." Defendant's letter states that the lower part of the deck did not have enough "spot drains to adequately drain, causing damage to the concrete and waterproofing." It also says that the roof needed to have been waterproofed with proper flashing "in the beginning". No part of this 2018 situation addressed the plaintiffs' claims for damage from the 2015-2018 water infiltration, and cannot be claimed to have caused plaintiffs to detrimentally rely on

defendant's statements. It is also possible for a fraudulent misrepresentation to be a basis for an equitable estoppel barring a defendant from invoking the statute of limitations. There is no indication of this here. There is nothing in admissible form that establishes that defendant made any misrepresentations to plaintiffs after the tennis court was completed. Mr. Brach testified that defendant's representative, whose name he could not remember, told him after the leaks started that they had not put waterproofing material down, and that they weren't supposed to [Doc 75 Page 182-183].

The fifth cause of action is for the return of the funds paid for the work solely based on the fact that the defendant is not licensed by the NYC Department of Consumer Affairs as a Home Improvement Contractor. Defendant avers that it fails to state a cause of action. The court agrees. Such a license is not applicable to the installation of tennis courts on the roof of a purely commercial building. See GBL §770 et seq. and NYC Administrative Code §20-387. The fact that Mr. Brach had access to the tennis court from an adjacent residential property does not change this fact.

The sixth cause of action is plaintiff Exact Equities LLC's claim for money damages for the damage caused by the water which infiltrated the roof and leaked into the commercial space below. Defendant claims this cause of action is time barred. The court disagrees. While it would have been prudent for Mr. Brach to have signed the contract as the managing member of this LLC, as he testified he was, the owner of the commercial property is clearly a beneficiary of the warranty/guarantee in the contract. Thus, as stated above with regard to the second cause of action, "plaintiff may recover for all of the defendants' derelictions of duty that it can prove took place between . . . six years prior to the institution of suit . . . and the date on which the [agreement] expired" *Bulova Watch Co. v Celotex Corp.,* 46 NY 2d 606 (1979).

Accordingly, it is **ORDERED** that the motion is granted with regard to the first, third, fourth and fifth causes of action, which are dismissed, and is denied with regard to the second and sixth causes of action.

This constitutes the decision and order of the court.

Dated: July 20, 2022

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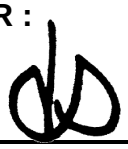

Hon. Debra Silber, J.S.C.