

**Rosen v Tile Boutique Inc.**

2022 NY Slip Op 34001(U)

September 16, 2022

City Court of Rye, Westchester County

Docket Number: Index No. SC22-039

Judge: Joseph L. Latwin

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CITY COURT : CITY OF RYE  
WESTCHESTER COUNTY

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KENNETH ROSEN,

SC22-039

*Plaintiff,*

*-against-*

DECISION AND ORDER

TILE BOUTIQUE INC.,

*Defendant.*

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Appearances:

Plaintiff *Pro Se*

Defendant by Clifford H. Greene, Esq., Scarsdale, NY

This is a small claims action for breach of warranty in connection with the tiling of plaintiff's bathroom by defendant.

At the trial, plaintiff testified that on about February 21, 2021, defendant installed 96" x 48" tiles in plaintiff's home bathroom. Some three months later, in May, 2021 when plaintiff first used the shower, the tiles cracked. Plaintiff said during a steam shower, he heard a pop and saw the tiles were cracked. Plaintiff said defendant's principal agreed to fix the tile but did not do so. The evidence showed that the cost for replacement tiles was \$1,516.81.

Plaintiff offered no evidence as to what caused the tiles to crack.

While plaintiff claimed the installation method used to install the tiles was incorrect and inconsistent with good practice in the trade, plaintiff did not have the requisite knowledge or expertise to testify as an expert. Instead, plaintiff sought to introduce articles from the Internet, but the Court did not permit their introduction.

Defendant's principal also testified but did not explain why the tiles cracked but offered several possible explanations – none of which sufficient to

identify the cause of the cracking.

Plaintiff claims the defendant breached a warranty. No written warranty, in fact no writing at all, was introduced. Plaintiff claims there was an implied warranty, relying on *Lange v. Blake*, 58 AD2d 1034, 397 NYS2d 290 [4<sup>th</sup> Dept 1977.]

*Lange* involved the construction of a septic system for a new home. The Appellate Division did not actually decide that there was any implied warranty for services. It found the defendant

urges that under *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792, there is no liability for implied warranty on a contract for services, only on the sale of goods. Although there is support for defendant's position (see *Sears, Roebuck & Co. v. Enco Associates*, 83 Misc.2d 552, 370 N.Y.S.2d 338, *affd* 54 A.D.2d 13, 385 N.Y.S.2d 613; *Aegis Productions, Inc. v. Arriflex Corp. of America*, 25 A.D.2d 639, 268 N.Y.S.2d 185), as well as for the opposing view (*Centrella v. Holland Construction Corp.*, 82 Misc.2d 537, 370 N.Y.S.2d 832; *Town of Ogden v. Earl R. Howarth & Sons, Inc.*, 58 Misc.2d 213, 294 N.Y.S.2d 430; *Staff v. Lido Dunes, Inc.*, 47 Misc.2d 322, 262 N.Y.S.2d 544), there is no need to decide that question.

It is beyond cavil that there are implied warranties for the sale of goods. UCC 2-314 (Implied Warranty of Merchantability and Usage of Trade) & UCC 2-315 (Implied Warranty of Fitness for Particular Purpose). These warranties apply only to goods. UCC 2-102. (Article applies to transactions in goods). “No warranty attaches to the performance of a service” (*Rochester Fund Muns. v. Amsterdam Mun. Leasing Corp.*, 296 A.D.2d 785, 787, 746 N.Y.S.2d 512 [2002] [internal quotation marks and citation omitted]; see *Torok v. Moore's Flatwork & Founds., LLC*, 106 A.D.3d 1421, 1423, 966 N.Y.S.2d 572 [2013]. *Markel Ins. Co. v Bottini Fuel*, 116 AD3d 1143, 1147, 983 NYS2d 637 [3d Dept 2014].

In *Aegis Productions, Inc. v. Arriflex Corp. of America*, 25 AD2d 639, 268 NYS2d 185 [1<sup>st</sup> Dept 1966) the Appellate Division said warranties are limited to sales of goods and do not attach to performance of service and if a service is performed negligently, a cause of action accruing is for that negligence and if performance of services constitutes breach of contract, the action accruing is for that breach but there is no cause of action for breach of warranty in connection with services.

Separating the tile from the installation to consider the transaction the sale of goods and thus fall within the UCC provides no comfort for plaintiff. For a product to flunk the UCC 2-314 merchantability test, it must contain an inherent defect. The courts find goods to be unfit for their ordinary purposes when they can identify one of three general types of defects: manufacturing defects, design defects, and failure to give the buyer proper instructions with respect to the goods. 1 The Law of Product Warranties § 5:5. Here, there was no evidence the tiles were inherently defective, contained a design defect, or came with any warnings.

Thus, there is no basis for a claim of breach of implied warranty. There might be a claim for a breach of contract but there was no evidence of any contract terms, let alone any breach of any term. Plaintiff's claim could also sound in negligence in that it might be claimed that defendant negligently installed the tiles. However, there was no proof that the defendant deviated from the ordinary standard of care or that that deviation was the proximate cause of the cracking of the tiles.

This appears to be yet another example that Small Claims is often a snare for the unwary. Perhaps beguiled by televised simulated court programming, the public are misled into the belief that in a 22-minute segment, if you tell your story and it seems unfair, then you will prevail. Here, the plaintiff appears to have done extensive research. He intelligently presented his arguments. However, his unfamiliarity with the laws of evidence and what and how to frame and prove his case was his downfall. Unfamiliarity with what the law required to sustain the burden of proof and the need for witnesses or sufficient evidence in admissible form to prove the case creates false expectations that reduce the chances of a settlement and may result in falling short of the desired outcome at trial. If you don't know what you need to prove and what evidence is needed to prove it, you are working blindfolded and as likely to have success hitting your target as would a blindfolded archer. To avoid the expenses of an attorney with training and knowledge of the law and how to prove the required facts, he lost his claim. This is unfortunate and unjust.

This Court, at the initial conference advises *pro se* small claims claimants that proceeding without knowledge of the law, what facts might need to be proved to establish the claim, and how to prove those facts, may result in failure. But of course, everybody is confident in their lawyering ability despite the admonitions.

In providing the parties with substantial justice according to the rules and principles of substantive law (UCCA 1804, 1807; *see Cosme v Bauer*, 27 Misc3d 130(A), 910 NYS2d 404 [App Term, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2010]; *Ross v Friedman*, 269 AD2d 584, 707 NYS2d 114 [2<sup>nd</sup> Dept 2000]; & *Williams v Roper*, 269 AD2d 125 [1<sup>st</sup> Dept 2000]) and under a fair interpretation of the evidence (*see WRG Acquisition XIII, LLC v. Strasser*, 55 Misc3d 129(A), 55 NYS3d 695 [App Term, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2020] with this Court having had the opportunity to observe and evaluate the testimony and demeanor of the witnesses and to evaluate the credibility of the witnesses, (*Trimble v Hughes*, 67 Misc3d 143(A) [App Term, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2020]; *Gupta v Janiesch*, 67 Misc3d 135(A) [App Term, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists 2020] (*see also, Vizzari v. State of New York*, 184 AD2d 564 [2<sup>nd</sup> Dept 1992]; *Kincade v. Kincade*, 178 AD2d 510, 511 [2<sup>nd</sup> Dept 1991]; & *Rotem v. Hochberg*, 28 Misc3d 127(A), 957 NYS2d 639 [App Term, 9<sup>th</sup> & 10<sup>th</sup> Jud Dists, 2010]), the Court finds that plaintiff has not proven his claim under either an breach of an implied warranty or negligence theory.

Accordingly, it is,

ORDERED and ADJUDGED that the defendant have judgment dismissing the plaintiff's claim.

September 16, 2022

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JOSEPH L. LATWIN  
Rye City Court Judge

ENTERED

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Clerk