At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of February 2023

HONORABLE FRANCOIS A. RIVERA

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INOUSSA HAROUNA,

Plaintiff

DECISION, ORDER & JUDGMENT AFTER TRIAL

-against-

Index No. 19199/2012

VIEWMONT BUILDER'S CORP.,

Defendant

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The following is the decision, order, and judgment after a non-jury trial in the instant action by plaintiff Inoussa Harouna (hereinafter plaintiff) against defendant Viewmont Builder's Corp. (hereinafter defendant or Viewmont) for, inter alia, breach of contract.

BACKGROUND

On September 25, 2012, plaintiff commenced the instant action for, inter alia, breach of contract by filing a summons and verified complaint with the Kings County Clerk's Office. The complaint is four pages and contains sixteen allegations of fact in support of two denominated causes of action.[1] The first is for breach of contract and the

[1] The first twelve allegations of fact are numbered one through twelve. The next four allegations of fact are numbered thirty-six through thirty-nine. Based on the pagination of the complaint, the Court concludes that there

second is for breach of implied duty of good faith and fair dealing. The verified complaint alleges in pertinent part the following salient facts. On June 27, 2011, the defendant sold the plaintiff a property located at 674 Sheffield Avenue, Brooklyn, New York, Block 4297 Lot 23 (hereinafter the subject property). At the closing of the subject property, defendant promised in writing to complete certain outstanding repairs on the subject property no later than seven days after the closing. The defendant did not complete the outstanding repairs on the subject property. As a result, the plaintiff was forced to expend $60,000.00 to complete the outstanding repair that the defendant promised to complete. The plaintiff expects to expend another $60,000.00 to complete the repairs. The plaintiff seeks damages of $120,000.00 as well as costs, disbursements and attorney's fees.

By verified answer filed on November 28, 2012, the defendant joined issue.

UNDISPUTED FACTS

It is undisputed that on June 27, 2011, the defendant sold the subject property, a four-family house, to the plaintiff. The plaintiff did not proffer into evidence the contract of sale between the parties. The president of Viewmont, Frank Tehrani (hereinafter Tehrani), the plaintiff, and their respective attorneys were in attendance at the closing. At the closing a punch list was generated of certain repairs that the defendant agreed were to be made to the subject property no later than seven days after the closing. The first page of the punch list contained preprinted and handwritten text. It also contained the plaintiff

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are no missing allegations of fact, and that the plaintiff simply made a mistake in the numbering of the paragraphs. The mistake is disregarded pursuant to CPLR 2001.

and Tehrani's signature as president of Viewmont. The handwritten text on the first page stated the following: "In the event that the repairs are not completed within one week, purchaser may complete the repairs himself and submit the bills to seller's attorney for payment." The plaintiff and Tehrani agreed that the defendant did some, but not all, of the repairs within seven days after the closing.

THE TRIAL

A non-jury trial was conducted virtually on May 20, 2022. The plaintiff and Tehrani were the only individuals who testified. The plaintiff admitted into evidence a copy of the deed for the subject property, a copy of the summons and verified complaint, a copy of the punch list agreement (hereinafter the PLA), a copy of an invoice from Shah Buliders Inc., (hereinafter SBI), a copy of Tehrani's deposition transcript conducted on May 30, 2018, and a document from the Department of State regarding the defendant. The defendant admitted the transcript of the plaintiff's deposition conducted on May 30, 2018.

The invoice from SBI stated, among other things, that total cost for materials and labor was $50,500.00. One of the items on SBI's invoice stated, "put in a new sky light". Another item stated seven windows replaced in apartments 2-R, 2-F, and 1-R. The invoice contained a certificate of acknowledgment dated April 20, 2016.

The PLA was admitted into evidence over the defendant's objection. It was three pages. The PLA stated that the sky light leaked but did not state that it needed total replacement. The PLA list did not allege broken windows in apartment 2-F and 1-R.

The first page of the PLA contained preprinted and handwritten text. It also contained the plaintiff and Tehrani's signature as president. The second and third pages of the punch list were typed, contained pagination numbers one and two, and had thirty-one bullet points broken down as follows. The first eight bullet points were denominated as exterior repairs. The remaining bullet points were denominated as interior repairs.

The handwritten text on the first page stated the following: "In the event that the repairs are not completed within one week, purchaser may complete the repairs himself and submit the bills to seller's attorney for payment." Tehrani testified that list of repairs he had agreed to were all in handwriting, not typewritten. He did not recognize the second and third page of the punch list that was admitted evidence. The plaintiff testified that the defendant completed some, not all, of the items on the punch list within a week of the closing date as agreed. He further testified that the defendant offered him $1500.00 to finish the unfinished items on the punch list himself. The plaintiff first testified that SBI completed the repair work in 2011 or 2012. He then later testified that SBI did not complete the work until April 20, 2016.

At the time that he signed the punch list, Tehrani had estimated that the total cost of all the repairs on the punch list was approximately $3,000.00. Tehrani testified that he completed most of the items on the handwritten punch list which consisted of minor repairs within seven days of the closing and offered the plaintiff $1,500.00 to complete the work himself.

The plaintiff alleged in his verified complaint that as of September 25, 2012, the date of the filing of the summons and complaint, he had already expended $60,000.00 to finish fixing the unfinished items on the punch list and expected to spend another $60,000.00. At the plaintiff's deposition conducted on May 30, 2018, he testified that he expended $80,000.00 to fix the unfinished items from the closing date to 2012. At the trial, the plaintiff produced the SBI's invoice purportedly reflecting that he made a total expenditure of $50,500.00 to finish fixing the unfinished items on the punch list.

At the conclusion of the trial the parties were directed to submit their respective request for findings of fact pursuant to CPLR 4213 (a) on or before July 22, 2022[2]. Both sides did so.

FINDINGS OF FACT

The plaintiff and the defendant dispute that the second and third pages of the punch list are the actual copy of the punch list which the defendant had agreed to address. The plaintiff has averred that it is, and the defendant has averred that the actual punch list was handwritten, not typed, and that it did not contain as many items that were contained in the punch list in evidence. Assuming arguendo that the punch list in evidence is a copy of the original, the plaintiff did not offer any testimony or documentary evidence establishing what specific items were handled by the defendant within seven days of the closing and what specific items were not. The plaintiff offered no photographs depicting

[2] The parties were originally directed to submit their respective findings of fact on or before July 8, 2022. However, the plaintiff requested an extension, there was no opposition to the extension by the defendant. Therefore, the Court directed the parties to submit their respective findings of fact on or before July 22, 2022.

the unfinished items. For this and other reasons, the court need not decide whether the second and third pages of the punch list was a copy of the original. Without specifying what was done and what was not done, the plaintiff cannot establish that the defendant breached the agreement.

Also, the plaintiff offered no testimony or documents demonstrating that he contacted the defendant's counsel regarding the unfinished items of the punch list. He offered no testimony that he spoke with Tehrani to demand reimbursement for the unfinished items that he fixed at his own expense. He also offered no written or oral estimates of the cost to fix the unfinished items on the punch list.

Additionally, the plaintiff's testimony regarding the cost of handling the unfinished items on the punch list varied widely. In the complaint, he averred expenditures of $60,000.00 with anticipated additional expenditures of another $60,000.00. At his deposition, the plaintiff claimed expenditures of $80,000.00 from the closing date to 2012, and at trial, he produced the SBI's invoice reflecting a total expenditure of $50,500.00.

LAW AND APPLICATION

The plaintiff's first cause of action is for breach of contract. The plaintiff's second cause of action is breach of implied duty of good faith and fair dealing.

The plaintiff does not allege a breach of the contract of sale of the subject property. Rather, he contends that the defendant breached the punch list agreement. To recover for a breach of contract, a party must establish the existence of a contract, the

party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach (*Adirondack Classic Design, Inc. v Farrell*, 182 AD3d 809, 811 [3rd Dept 2020]).

The defendant did not dispute the first page of the three-page punch list. It was signed by both sides, referred to an annexed punch list, and contained the following language: "In the event that the repairs are not completed within one week, purchaser may complete the repairs himself and submit the bills to seller's attorney for payment."

The defendant disputed, however, that pages two and three of the punch list in evidence was a copy of the original. He claimed that the original punch list which he had agreed to was handwritten and contained less items than the thirty-one items contained in the disputed list.

To recover on a cause of action for breach of contract, the plaintiff must establish the existence of a contract, the party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach. By not contacting the defendant's attorney at any time regarding the unfixed items on the punch list, before commencing the instant action, the plaintiff did not perform his obligation under the agreement.

The plaintiff admitted that the defendant fixed some, but not all, of the items on the punch list within the seven days after the closing. The plaintiff, however, did not offer any evidence of which items were fixed and which items were not. By failing to do, plaintiff could not and, therefore, did not make a prima facie showing that the defendant

breached the punch list agreement. On this basis alone the cause of action for breach of contract is subject to dismissal.

However, there were other substantive grounds why the plaintiff did not meet his burden of proof. In particular, the plaintiff's evidentiary showing to demonstrate the measure of his damages was inconsistent and unreliable. The verified complaint claimed that the plaintiff had already expended $60,000.00 to fix some of the unfixed problems before the action was commenced. Facts admitted by a party's pleadings constitute formal judicial admissions (*Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2nd Dept 2010], citing *Falkowski v 81 & 3 of Watertown*, 288 AD2d 890, 891 [4th Dept 2001]). Formal judicial admissions are conclusive of the facts admitted in the action in which they are made (*id.*)

The plaintiff testified at his deposition that expended $80,000.00 to fix some of the unfixed problems from the closing date to 2012. At trial, the plaintiff stated that he spent $50,500.00 to fix the unfixed problems. The plaintiff offered no explanation for the discrepancy between his verified pleading, deposition testimony and trial testimony. Earlier during his trial testimony plaintiff testified that SBI completed the repair work in 2011 or 2012. Later during his trial testimony, he testified that SBI did not complete the repair work until April 20, 2016. The amount that the plaintiff expended to fix the unfixed problems and the date he expended those funds are material facts. The different sworn allegation of fact regarding the amount of money that had been expended, the date

that the money was expended, and the date the repairs were done cannot be reconciled. Some of the plaintiff's sworn allegation must be untrue.

The falsus in uno doctrine permits a factfinder to disregard entirely the testimony of a witness who has willfully testified falsely with respect to any material fact. The doctrine, however, is not mandatory, and the court is free to credit any part of a witness's testimony that it deems true and disregard what it deems false (*see DiPalma v State*, 90 AD3d 1659 [4th Dept 2011]). Applying falsus in uno, the Court disregards plaintiff's testimony to the extent that it conflicts with Frank Tehrani's testimony regarding the defendant's performance of the punch list agreement and the amount of plaintiff's damages. Accordingly, the plaintiff's claim for breach of contract asserted against the defendant is dismissed.

The allegations of fact in support of the claim of breach of implied duty of good faith and fair dealing are identical to those for the breach of contract claim and seek the same damages. The cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained because it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract (*MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419–20 [1st Dept 2011], citing, *Hawthorne Group v. RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004]). It is therefore dismissed as duplicative of the breach of contract claim.

DECISION ORDER AND JUDGMENT

It is the Decision, Order and Judgment of this Court that the verified complaint by Inoussa Harouna against defendant Viewmont Builder's Corp. is dismissed.

ENTER:

Francois A. Rivera

J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.