Heller v Cottam Heating & A.C. Inc.
2023 NY Slip Op 31249(U)
April 13, 2023
Supreme Court, New York County
Docket Number: Index No. 656117/2017
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**
Justice

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MARTIN HELLER, MARGARET HELLER

Plaintiff,

- v -

COTTAM HEATING & AIR CONDITIONING INC.,

Defendant.

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INDEX NO. 656117/2017

MOTION DATE 01/10/2023

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In September 2017, plaintiff Martin Heller, individually and as administrator of the Estate of Margaret Heller (his wife) commenced this action against defendant Cottam Heating & Air Conditioning Inc. (hereinafter "Cottam Heating"), alleging that defendant failed to properly solder certain pipe joints when replacing PTAC heating and air conditioning units and installing new ones. Plaintiff commenced the instant action for a declaratory judgment (that an arbitration clause is unenforceable), breach of contract, negligence, fraud in the inducement, and consumer fraud in violation of Gen. Bus. Law §349. In this motion sequence, Cottam Heating moves for partial summary judgment pursuant to CPLR 3212 on plaintiff's negligence, fraud in the inducement, and consumer fraud causes of action, arguing that each is duplicative of the breach of contract claim, and, as specifically to the two fraud causes of action, that plaintiff failed to provide evidence of a material misrepresentation that Cottam Heating knew to be false. Plaintiffs oppose the motion in its entirety. For the following reasons, defendant's motion is granted in part.

In July 2016, the Hellers, on the advice of Chris Hricko (an employee of The Heller Group, which is owned by Martin Heller), entered into an agreement with Cottam Heating to replace nine PTAC heating and air conditioning units in Mr. and Mrs. Heller's apartment located at 733 Park Avenue ("the Apartment"). According to plaintiff, they entered the contract after Chase Cottam misrepresented the difficulty of the project and the extensive experience, skill, and expertise that he and his two employees had in removing and installing PTAC units. In February 2017, after removing the nine units and starting to install new ones, Cottam Heating allegedly failed to properly solder a copper water pipe connection attached to another heating cooling unit. As a result, the connection failed, and a substantial amount of water flooded the apartment. The water damage to plaintiff's apartment was extensive. Later, another PTAC unit, this one in the kitchen, burst after it froze, again allegedly due to Cottam Heating's faulty installation. After

four months, during which Mr. and Mrs. Heller lived in a hotel,[1] they hired another firm to correct the mistakes and finish the installation of each unit.

Thereafter, plaintiff commenced the instant action and asserted the previously described causes of action. Plaintiff seeks compensatory and consequential damages, interest, and costs and attorneys' fees for each cause of action. In November 2017, Cottam Heating served its answer, and after extensive motion practice, it now moves for partial summary judgment as to plaintiff's negligence, fraud in the inducement, and consumer fraud claims. Plaintiff opposes the motion as to each claim.

DISCUSSION

Summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact' and the opponent fails to rebut that showing." *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324; see also CPLR 3212 [b].) Once the proponent has made a prima facie showing, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Since summary judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) Where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence, summary judgment should be denied. (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

Plaintiff's Negligence Cause of Action

A negligence cause of action should be dismissed as duplicative of a contract claim where the plaintiff has failed to allege a duty independent of the contract. (*Von Sengusch v Les Bateaux De N.Y., Inc.*, 128 AD3d 409, 410 [1st Dept]; *320 W. 115 Realty LLC v All Bldg. Constr. Corp.*, 194 AD3d 511, 512 [1st Dept 2021] ["Absent allegations of a breach of duty independent of the contract, causes of action 'based on negligent or grossly negligent performance of a contract are not cognizable'" (citations omitted)].) The alleged independent legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract. (*Oceanview Assoc., LLC v HLS Bldrs. Corp.*, 184 AD3d 843, 845 [2d Dept 2020], *citing Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 389 [1987].) Where the damages alleged are 'clearly within the contemplation of the written agreement…[m]erely charging a breach of "a duty of care" …does not without more, transform a simple breach of contract into a tort claim." (*Dormitory Auth. of the State of N.Y. v Samson Constr. Co.*, 30 NY3d, 704, 701 [2018].)

Cottam Heating argues that the duty it allegedly breached toward plaintiff was contractual in nature and no different from the duty that underlies plaintiff's negligence claim. From Cottam Heating's perspective, plaintiff alleges that it failed to perform the construction

[1] During this time, Mrs. Heller was diagnosed with Stage IV cancer, received numerous rounds of chemotherapy, and underwent an operation to remove a tumor.

work in a workman like manner and all of plaintiff's injuries arise therefrom. In opposition, plaintiff argues that, in disentangling a tort duty versus a contract duty, courts consider "the nature of the injury, the manner in which the injury occurred, and the resulting harm" (*Sommer v Fed. Signal Corp.* (79 NY2d 540, 551 [1992]). Under such an analysis, he argues, the negligence claim, unlike the contract claim, seeks foreseeable damages related to the flooding that forced Mr. and Mrs. Heller to live in a hotel while she was undergoing treatment for cancer. Under this same theory, he contends that he is not, at least solely, seeking the benefit of its bargain. Moreover, the negligence claim arises not from failing to perform the project in a workman like manner but the duty to "provide adequate assignment and supervision of properly trained and experienced employees." (NYSCEF doc. no.101 at 11, memo in opp.)

The Court is persuaded that plaintiff has asserted a viable negligence cause of action. In *Sommer*, a fire in a building went undetected because the company that monitored the building's alarms negligently deactivated them. According to the Court of Appeals, the building's owner could bring both a breach of contract and negligence claim even as the monitoring company argued that its duty to the owner arose solely out of its contractual obligations. (*Sommer*, 79 AD2d at 550.) For the court, the monitoring company's argument did not accurately reflect the broader nature of the duty it owed. Apartment buildings in New York are subject to comprehensive fire-safety regulation, and the failure to perform the monitoring services carefully and competently could have catastrophic consequences to the public. (*Id.* at 552-553, *citing Bellevue South Assoc. v HRH Constr. Corp.*, 78 NY2d 282 [1991].) Moreover, the court contrasted the manner in which the injury arose to the plaintiff therein with that in *Clark-Fitzpatrick*: as opposed to the plaintiff in *Clark-Fitzpatrick* who sought the benefit of his bargain, the building owner instead sought damages for the "abrupt, cataclysmic occurrence" of the fire that spread out of control. (*Id.* at 553.) In the Court of Appeal's own words three years later, the monitoring company's duty "arose from the very nature of its services—to protect people and property from physical harm. (*New York Univ. v Cont'l Ins. Co.,* 87 NY2d 308 317 [1995].)

In *Reade v SL Green Operating Partnership, LP*, the First Department recognized that the fire damage in *Sommer* is more typical of a tort claim than a contractual claim both in respect to the manner in which it occurred and the harm that resulted. On this basis, the First Department found that a commercial tenant had a viable tort claim against its landlord, where the landlord allegedly reduced the heat in the building and the resulting freezing temperatures caused a sprinkler pipe to burst and damage tenant's property. (30 AD3d 189, 190-191 [1st Dept 2006].) According to the Court, the nature of the flood damage "removed the claim from the underlying contract." (*Id.* at 190-191.) These cases demonstrate that the injury suffered by Mr. and Mrs. Heller—the flood damage—sounds in negligence as well as contract since defendant owed a duty of care found outside the contract. (*See 99 Wal Dev., Inc. v Consigli & Assoc., LLC*, 2021 NY Slip Op 51061 [U] at *4 [Sup. Ct. NY County 2021] ["Shoddy construction work or failure of utility services to a building causing flooding or otherwise endanger occupants or bystanders states a negligence claim separate from breach of a construction contract"].)

Fraudulent Inducement Cause of Action

Cottam Heating's motion to dismiss plaintiff's fraudulent inducement cause of action is granted as duplicative of his breach of contract claim. For a fraudulent inducement claim to be

considered a separate, cognizable cause of action, the fraud or misrepresentations alleged must concern an interest collateral to the opposing party's contractual obligations. (*Cronos Group Ltd. v XCompIP, LLC*, 156 AD3d 54, 67 [1st Dept 2017]; citing *Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557 [1st Dept 2012].) Plaintiff's fraudulent inducement cause of action is based solely on defendant's alleged misrepresentation of his and his employees' experience and skill in removing and installing PTAC units. Such alleged misrepresentations and the expertise/skill that defendant actually brought to project, however, are not collateral or extraneous interests outside the terms of the parties' contract. (NYSCEF doc. no. 91 at 2, contract ["All work is to be completed in a workman like manner according to standard practice."].) In other words, the obligation to perform the removal and installations of the PCAT according to standard practice encompasses an obligation to perform with the requisite degree of skill and expertise as is standard in the industry. Moreover, plaintiff's allegations sounding in fraud amount to nothing more than a failure to perform under the contract: plaintiff does not allege being injured by defendant's misrepresentations other than the fact that defendant breached its contractual obligations in how it removed and installed the PCAT units. (*See Oceanview Assoc.*, 184 AD3d at 846.) Accordingly, defendant's motion as to this cause of action is granted.

Consumer Fraud Cause of Action

New York General Business Law Section 349 (a) provides, "Deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in this state are hereby declared unlawful." § 349 (h) provides a private right of action to any person who has been injured by a violation of § 349 (a). To recover under (h), the plaintiff must prove: (1) the act or practice was consumer oriented; (2) the act or practice was misleading; and (3) they were injured by the deceptive act or practice. (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000].) Plaintiff has not alleged that they were injured by any deceptive act or practice. As described above, the injury plaintiff suffered arises from a breach of contract and negligence. In this sense, plaintiff's consumer fraud claim is duplicative of his breach of contract cause of action as well. As such, plaintiff does not have an actionable consumer fraud claim.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendant Cottam Heating & Air Conditioning Inc.'s motion for summary judgment on plaintiff Martin Heller's fraud in the inducement and consumer fraud claims is granted; and it is further

ORDERED that plaintiff and defendant shall appear at 60 Centre Street, Courtroom 341, New York, New York at 10:00 a.m. on May 2, 2023, for a preliminary conference; and it is further

ORDERED that defendant shall serve a copy of this order, along with a notice of entry, on all parties within twenty (20) days of this order.

This constitutes the Decision and Order of the Court.

4/13/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE