

75 First Ave. Club LLC v United Glass Sys. Corp.

2023 NY Slip Op 31842(U)

May 31, 2023

Supreme Court, New York County

Docket Number: Index No. 652658/2022

Judge: Arlene P. Bluth

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

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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75 FIRST AVENUE CLUB LLC,

Plaintiff,

- v -

UNITED GLASS SYSTEMS CORP., UNITED GLASS
SYSTEMS, METAL YAPI INC., METAL YAPI USA CORP.,
METAL YAPI NORTH AMERICA, LLC, SAFTI FIRST

Defendant.

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INDEX NO. 652658/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 55

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 88

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Motion Sequence Numbers 001 and 003 are consolidated for disposition. Defendant Safti First (“Safti”)’s motion (MS001) to dismiss is granted in part. Plaintiff’s motion (MS003) to amend is granted in part.

Background

This case arises out of a contractual dispute after faulty glass panels were installed in a residential building owned by plaintiff. After installation, the glass became distorted and allegedly looked like a “fun house.” Plaintiff initially contracted with United Glass Systems to install the 168 glass panels at 75 First Avenue, New York, New York. United Glass subsequently contracted with Safti to obtain the glass panels for the project. United Glass then entered into an agreement with Metal Yapi Holding A.S., based in Turkey, to provide curtain wall systems for

the project. Safti purportedly admitted the glass was faulty and assisted in replacing the glass panels, allegedly at plaintiff's expense. Plaintiff brought this action to recover damages for the cost of replacing the glass (i.e., taking down the faulty panels and installing the replacement panels).

The Court observes that it previously denied the Metal Yapi defendants' motion (MS002) to dismiss on the ground that plaintiff submitted a purchase order with United Glass/Metal Yapi on the letterhead and a six-year warranty with the same exact letterhead (NYSCEF Doc. No. 66 at 3).

Plaintiff now moves to amend to add United Glass-Metal Yapi (a joint venture) as a defendant to this action and to supplement the allegations based on a joint venture liability against the Metal Yapi defendants (Metal Yapi, Inc., Metal Yapi USA Corp., and Metal Yapi North America, LLC). It also seeks to amend the caption to reflect that defendant Safti First, Inc. should be listed as "Okeeffe's, Inc. d/b/a Safti First" as that is the correct entity name.

The Court observes that after an initial oral argument, counsel for Safti sent a letter withdrawing the branch of its motion to dismiss based on improper service (NYSCEF Doc. No. 55).

The remaining portions of the motion, MS001, present certain procedural hurdles. Often, when a Court grants a motion for leave to amend, a pending motion to dismiss is deemed moot in light of the fact that the pleading that the movant sought to dismiss is no longer operative. Here, plaintiff made a subsequent motion to amend (MS003). However, the Court will consider the merits of Safti's motion to dismiss because the parties agreed to make substantive arguments on this motion at a subsequent oral argument and the proposed amended pleading did not materially

change the causes of action alleged against Safti. In fact, the claims and allegations are nearly identical.

The only substantive change is that plaintiff moved to amend the name of Safti. That renders the portion of Safti's motion to dismiss for failure to name the right party as moot. Plaintiff was entitled to rectify the name of the party against whom it seeks relief.

MS001

Safti moves to dismiss the causes of action alleged against it. These are breach of express warranty, breach of implied warranty, breach of contract, breach of implied contract, fraud, and violation of General Business Law § 349.

“[T]he sole criterion in reviewing a CPLR 3211(a)(7) motion to dismiss is whether, from the four corners of the pleading, factual allegations are discerned which taken together manifest any cause of action cognizable at law” (885 3rd Ave. *Realty Owners LLC v Alden Glob. Capital LLC*, 210 AD3d 570, 571, 179 NYS3d 208 [1st Dept 2022] [internal quotations and citation omitted]).

Warranty Claims

Safti argues that the claims for breach of an express and implied warranty should be dismissed because there was a limited warranty included with the glass panels.

This warranty provided that:

“Seller's standard form of warranty supersedes any and all other warranties. The warranty in effect on the date of shipment shall apply. EXCEPT TO THE EXTENT PROHIBITED BY APPLICABLE LAW, SELLER MAKES NO OTHER REPRESENTATION OR WARRANTY OF ANY KIND WITH RESPECT TO ANY OF THE GOODS, WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR USE OR PURPOSE. UNDER NO CIRCUMSTANCES SHALL SELLER BE LIABLE TO BUYER OR ANY THIRD PARTY UNDER TORT, CONTRACT, OR ANY OTHER THEORY FOR LOSS OF BUSINESS OR PROFIT OR ANY OTHER

ECONOMIC LOSS, OR ANY INCIDENTAL, DIRECT, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES. THE FOREGOING WARRANTY DOES NOT APPLY TO PRODUCTS WHICH HAVE BEEN ALTERED, CONVERTED, OR CHANGED BY BUYER” (NYSCEF Doc. No. 11 ¶ 13).

Safti also argues that it replaced the glass panels and so this issue is, essentially, moot.

Plaintiff contends that the warranty failed its essential purpose and is therefore void. It points out that it lost the benefit of the bargain by having to spend more than \$3 million to replace the glass panels through no fault of its own. It also argues that the issue here is that the panels became distorted over time—in other words, this is not a situation in which plaintiff could have recognized that there was something wrong with the panels when it first received the shipment and rejected the goods immediately upon receipt.

Plaintiff also argues that the warranty is unconscionable as it allows Safti to deliver defective panels and leave plaintiff to spend millions to fix it. It maintains that the provision about consequential damages is unconscionable where there are questions of fact about the enforceability of an exclusive remedy provision.

“A limited or exclusive remedy contained in a warranty will be upheld unless it fails of its essential purpose” (*Solomon v Canon USA, Inc.*, 31 Misc 3d 30, 32 [App Term, 1st Dept 2010] [citing the Uniform Commercial Code]).

The Court declines to dismiss these warranty causes of action (18 and 19) because there are questions of fact about whether the warranties can be enforced. Plaintiff’s theory in this case is that it received glass panels that, initially, looked to be the items for which it bargained. But, over time, the panels became distorted to the point that the residents inside the apartment building could not see outside. Of course, that is the essential purpose (and largely the only purpose) of glass panels in a residential apartment building- to look out at the city below.

Plaintiff says its residents could not do that. That compels the Court to deny this branch of Safti's motion.

The Court also finds that plaintiff stated a cognizable argument that the damages limitation is unconscionable. The UCC provides that "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable" (UCC 2-719[3]). Plaintiff correctly points out that the damages limitation would leave it paying the bill to remove and reinstall glass panels that were defective through no fault of its own. That raises a legitimate question about whether the limitation on damages in the warranty is unconscionable. Safti's argument that it replaced the panels is not sufficient, at this point, to compel dismissal of these claims as it does not account for the additional expenses incurred by plaintiff as a result of the allegedly defective panels.

Put another way, Safti's position is that the Court should enforce a warranty that would (if plaintiff's allegations are true) allow it to deliver defective glass panels that were not fit for use and remedy this error simply by delivering replacement panels regardless of the logistics involved with completing the replacement process. In this Court's view, that position impermissibly attempts to shift the burden to remedy the issue onto plaintiff. Plaintiff owns a large, multi-story building, and ordered 168 glass panels. It would be fundamentally unfair, at this point of the litigation, to find (as Safti suggests) that plaintiff has to bear the sole burden to fix a problem it did not create and could not have found upon inspection before the installation.

Breach of Contract

Safti insists that the breach of contract claim should be dismissed because the contract disclaims third-party beneficiaries and it maintains that the contract does not recognize plaintiff as a third-party beneficiary. Safti emphasizes its contract was with United Glass and not plaintiff.

Safti also argues that even if plaintiff could be considered a third-party beneficiary, plaintiff's exclusive remedy was a glass replacement, which Safti already provided. Finally, Safti argues that the breach of contract claim is duplicative of the warranty claims.

In opposition to this branch of the motion, plaintiff insists it is a third-party beneficiary under the purchase order. It argues it received the benefits of the contract—the glass panels—and so it is entitled to bring a breach of contract claim. With respect to the assertion that this claim is duplicative, plaintiff acknowledges that it did not bring this cause of action in the alternative but that it could cure such a defect in an amended complaint. Plaintiff did not specifically assert that this claim was not duplicative.

The Court dismisses this claim as duplicative. For some reason, plaintiff (in its proposed amended complaint [NYSCEF Doc. No. 62] filed in MS003) did not make clear that this cause of action is sought in the alternative. That yields the conclusion that this claim is duplicative as it arises from the same purchase order as the warranty causes of action.

Implied-in-Fact Contract

The Court denies the branch of the motion to dismiss this cause of action. Plaintiff argues that Safti's representatives asserted that they had changed their manufacturing process to eliminate the distortion at issue here and that they would discuss a way "to make it right." It asserts that Safti agreed to replace the panels and pay for the costs associated with that replacement. Plaintiff contends that the consideration for this implied-in-fact contract was plaintiff's decision to refrain from bringing an immediate lawsuit. It argues that Safti agreed to pay the installation costs for the new glass panels.

Safti's arguments that these discussions constituted settlement negotiations is simply an issue of fact. At this stage of the litigation, plaintiff adequately pled that it believed there was an implied-in-fact contract that Safti would pay for the costs associated with replacing the panels.

Safti's reference to the existence of an express contract—the purchase of the original panels—does not compel the Court to grant this branch of the motion because the alleged implied-in-fact contract arose from subsequent actions. In other words, although Safti is correct that a valid contract may preclude a plaintiff from asserting an implied-in-fact contract, the Court finds that the implied-in-fact contract contained materially different terms and a different subject matter (who would pay the cost to replace the panels).

To the extent that Safti argues that plaintiff offers only hearsay allegations based on surreptitiously recorded conversations, the Court observes that this is a motion to dismiss and plaintiff need only state a cognizable cause of action. Plaintiff need not prove its claims as a matter of law in order to sustain this cause of action.

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]).

The Court severs and dismisses this cause of action. As an initial matter, the Court observes that plaintiff's opposition to motion sequence 001 does not really oppose the branch of Safti's motion to dismiss this claim. Instead, plaintiff argues that it “intends to amend the complaint” to add certain statements made by Safti to United Glass. However, the proposed

amended complaint does not contain those statements. It is not a valid opposition to a motion to dismiss to assert that a party might do something in the future. And, as Safti points out, this claim is not pled with the required particularity.

The Court points out that the affidavit from Mr. Farsura (a shareholder of plaintiff) suggests that the distortion in the panels was a mistake, not any material misrepresentation made to induce reliance. Mr. Farsura claims that when he spoke with Safti representatives, they claimed they had not seen anything like this and that their new manufacturing process should eliminate any distortion (NYSCEF Doc. No. 33 at 2). In other words, plaintiff failed to plead facts that suggest that Safti knew it was delivering defective panels and attempted to induce the buyer to purchase the panels anyway. And plaintiff does not dispute that Safti provided replacement panels once plaintiff complained about the distortion.

General Business Law §§ 349 and 350

“New York's Consumer Protection Act—General Business Law article 22–A—was enacted to provide consumers with a means of redress for injuries caused by unlawfully deceptive acts and practices (see General Business Law §§ 349, 350)” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 323, 746 NYS2d 858 [2002]).

Safti argues that this cause of action should be dismissed because its alleged actions were not consumer oriented. It points out the glass panels at issue were custom ordered and are not part of the consumer-facing conduct that implicates these statutory provisions.

Plaintiff claims it is entitled to discovery about whether or not Safti has sent distorted glass panels to other customers.

The Court severs and dismisses this cause of action. “[A] plaintiff claiming the benefit of either section 349 or 350 must charge conduct of the defendant that is consumer-oriented or, in

other words, demonstrate that the acts or practices have a broader impact on consumers at large” (*Plavin v Group Health Inc.*, 35 NY3d 1, 10, 124 NYS3d 5 [2020] [internal quotations and citation omitted]). The conduct at issue here, supplying custom glass panels for a specific building, does not constitute a consumer-oriented activity contemplated by these statutory provisions. Plaintiff failed to meet its burden to show that the allegedly defective glass panels, custom made for plaintiff’s building, have a broader impact on consumers at large.

MS003- The Motion to Amend

The Court grants plaintiff’s motion (MS003) to amend to the extent that it seeks to add the joint venture claims and allegations against Metal Yapi and to the extent it seeks to include the correct entity name for Safti.

CPLR 3025(b) requires that “leave [to amend] shall be freely given.” Here, plaintiff is merely supplementing its allegations concerning the alleged joint venture and identifying the correct entity name for a defendant. There is no prejudice to either defendant based on this proposed amendment given the early stage of this action. That plaintiff may have spelled O’Keeffe’s Inc.’s name incorrectly in its moving papers is of no moment and plaintiff can upload an amended pleading that contains the correct spelling.

Metal Yapi’s opposition is without merit as it largely contains a rehashing of the arguments it raised in support of its motion to dismiss (MS002), which the Court denied. In any event, Metal Yapi did not meet its burden to show that plaintiff’s claims in the amended complaint fail to state cognizable causes of action.


Accordingly, it is hereby

ORDERED that Safti’s motion (MS001) to dismiss is granted to the extent that plaintiff’s claims against it for breach of contract, fraud, and the cause of action based upon the General

Business Law are severed and dismissed and the motion is denied with respect to the remaining causes of action; and it is further

ORDERED that plaintiff’s motion (MS003) for leave to amend is granted to the extent it complies with the Court’s decision in motion sequence 001 and plaintiff shall upload a proposed amended complaint that conforms with this decision (i.e., eliminates the claims dismissed by the Court and identifies the correct name for Safti) on or before June 7, 2023 and defendants shall answer or otherwise respond pursuant to the CPLR.

See NYSCEF Doc. No. 66 for directives about the next conference, including the July 11, 2023 deadline to upload a discovery update.

<p><u>5/31/2023</u> DATE</p>	 <hr/> <p>ARLENE P. BLUTH, J.S.C.</p>	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED</p>	<p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER</p>
<p>APPLICATION:</p>	<p><input type="checkbox"/> SETTLE ORDER</p> <p><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE</p>
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