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. 7, 8 & 9
Date Submitted: 3/9/2023

The following e-filed papers read herein:	**NYSCEF Doc. Nos.**
Notice of Motion, Affirmation and Exhibits Annexed……	112-118; 119-153; 154-157
Affirmation in Opposition and Exhibits Annexed…	154-157; 169-178; 162-168
Reply Affirmation.....	162-168; 180-181

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

In Motion Sequence #7, plaintiffs move for re-argument of this court's decision for motion sequence #5, dated July 20, 2022 [Doc 108], which granted, in part, the defendant's motion to dismiss the plaintiffs' complaint, and dismissed the plaintiffs' first, third, fourth and fifth causes of action. Plaintiffs seek re-argument of the court's decision regarding their first, fourth and fifth causes of action. Plaintiffs are also seeking leave to replead and amend their complaint to reflect what they contend to be the correct date that the work at issue was completed, which would then bring their first cause of action, for breach of contract, within the applicable statute of limitations.

Motion Sequence #8 is the defendant's motion for summary judgment, seeking dismissal of the plaintiffs' second cause of action for breach of warranty and of the plaintiffs' sixth cause of action for damage to property.

In motion Sequence #9, the defendant also seeks re-argument of this court's decision for motion sequence #5, dated July 20, 2022, which denied the portion of their motion which sought dismissal of plaintiffs' second and sixth causes of action, for breach of warranty and damage to property. The defendant also seeks an order denying the plaintiffs' motion to re-argue and to replead and amend their complaint (Mot. Seq. #7). The court notes that both of the defendant's motions seek the same relief: dismissal of the plaintiffs' two remaining causes of action, for breach of warranty and for damage to property.

This action arises from a contract for the installation of a replacement tennis court on the roof of a building in Brooklyn, NY. Plaintiffs claim the work was done defectively, which caused leaking into the space below, and property damage, which they seek compensation for.

In the July 20, 2022, decision on Mot. Seq. #5, the court discussed, analyzed, and determined the viability of each of the plaintiffs' causes of action, seriatim. In that decision, the court dismissed the plaintiff's first cause of action for breach of contract, the third cause of action for breach of the implied warranty of good workmanship, the fourth cause of action for fraud, and the fifth cause of action 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. In that decision, the court denied the part of the defendant's motion which sought dismissal of the plaintiffs' second cause of action, for breach of warranty and plaintiffs' sixth cause of action, which is plaintiff Exact Equities LLC's claim for money damages for the property damage caused by the water which infiltrated the roof and leaked into the commercial space below.

In their motion to re-argue [motion sequence #7], the plaintiffs contend that regarding their first cause of action, "[t]he Court misapprehended the facts as to the date when the work was completed and the pleadings should be conformed to the evidence," arguing that the date that should be used for the defendant's completion of work was either the date when the paint was applied to the court, or the date when the white lines were painted on the tennis court, in September and October of 2013, respectively. Plaintiffs contend that the parties dispute when the work was completed, and plaintiffs claim that "[t]he actual dates were the two dates in 2013 as agreed by the parties." In this portion of the motion, the plaintiffs also argue that, based on the dates when the paint was applied in 2013, they should be permitted to amend their complaint a second time, to include these factual allegations.

The plaintiffs also seek re-argument of the portion of the decision that dismissed their fourth cause of action, for fraud, seemingly repeating their arguments from their opposition to the underlying motion. Plaintiffs claim that the Court misapprehended the facts and law with respect to fraud, contending that "the fraud was not that the defendant failed to install waterproofing, but rather than at various times from 2015 until August 2018 the defendant misrepresented that it had installed waterproofing when plaintiff complained about leakage." The plaintiffs argue that the Court mistakenly held that such reliance on plaintiff Brach's part cannot be said to be reasonable, but that this "is a question of fact that should be left for trial, not a matter that should be decided on the pleadings."

Finally, the plaintiffs seek re-argument of the portion of the court's decision that dismissed their fifth cause of action, which seeks return of the sum plaintiffs 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. Plaintiffs claim that the court misapprehended the facts in dismissing their fifth cause of action and contend that the court was mistaken when it held that "the fact that Brach had access to the tennis court from his home did not make it a consumer matter." Plaintiffs argue that there is no "bona fide issue that the tennis court was exclusively for the personal and household use of Brach and his family, that was located on top of the commercial building only because it was a convenient location adjacent to Brach's home, and that the tenant of the commercial building did not have the use of the tennis court. The fact that it was located on the roof of the commercial building was immaterial, especially since the commercial building was owned by a Brach-owned entity."

The defendant opposes the plaintiffs' motion, arguing that with regard to plaintiffs' first cause of action, the court "properly observed that the amended complaint asserted that that the allegedly defective waterproofing work was completed in November of 2012, rendering the breach of contract claim untimely." The defendant additionally argues that the court properly determined that "the additional work performed by the defendant in 2013 did not toll or extend the limitations period."

The defendant further argues that "[t]he plaintiffs' fourth cause of action, sounding in fraud, "was properly dismissed since there is no way they can plead or prove the element of reliance." The defendant further contends that the court "properly held that since plaintiffs' belief and claim that Classic Turf Co. failed to install waterproofing was based solely on hearsay statements of someone 'whose name [Plaintiff Brach] could not remember, [who] told him after the leaks started that [Classic Turf Co.] had not put waterproofing material down,' that Plaintiffs could not possibly

plead or prove element of detrimental reliance with the requisite particularity (CPLR §3016(b)), further requiring dismissal of the fraud claim."

Regarding the plaintiffs' fifth cause of action, the defendant contends that "the Court properly determined that the Classic Turf tennis court was not a "home improvement," and that "[i]t is undisputed that the parties' contract involved the installation of a Classic Turf tennis court on Plaintiffs' commercial building, rendering the consumer protection statutes applicable to home improvement contracts inapplicable."

Finally, the defendant contends that "plaintiffs' request for further amendment of the complaint should be denied as patently without merit." The defendant initially argues that this portion of the plaintiffs' motion is defective, because "no version of the proposed amended pleading was attached showing the requested changes and additions, as mandated by statute." The defendant further contends that "[p]laintiffs cannot rely on the fact that white playing lines were painted on completed tennis court surface in October of 2013 as a basis to get around the expiration of the 6-year statute of limitations for breach of contract actions. Plaintiffs still do not dispute, in their motion or proposed amended pleading, that the allegedly defective waterproofing work occurred in 2012, well outside the limitations period."

In reply, the plaintiffs repeat and reiterate the arguments made in their motion papers, contending that "plaintiffs' claim for breach of contract was timely;" that "plaintiffs' cause of action for breach of warranty is timely;" that "the statute of limitations in this case was not governed by the Uniform Commercial Code;" that "the court should reinstate plaintiff's cause of action for fraud;" and that "the court misapprehended the facts with respect to plaintiff's claim for restitution."

In motion sequence #9, the defendant seeks re-argument of the portion of the court's July 20, 2022 decision which denied the branches of their motion which sought dismissal of the plaintiffs' second cause of action for breach of warranty and plaintiffs' sixth cause of action, which is plaintiff Exact Equities LLC's claim for money damages for the property damage caused by the water which infiltrated the roof and leaked into the commercial space below, contending that the court was mistaken on the law and the facts.

The defendant argues that the court misapprehended the law because it misread the Bulova Watch Co. case [*Bulova Watch Co v Celotex Corp*, 46 NY2d 606 (1979)], and that the Plaintiffs' remaining claims, based on an express warranty, are also time-barred and should also have been dismissed.

Defendant contends that the court read *Bulova Watch Co v Celotex Corp* "to stand for the proposition that a party providing any type of product warranty/guarantee is required to honor that guarantee during the entire period of time set forth in the guarantee agreement, no matter how long the party seeking to enforce the guarantee has sat on its rights" The defendant contends that the contrary is true, and that "the case actually only applies where the party furnishing the guarantee has additionally promised to perform repair services in the future, such that the failure to perform those services results in a separate breach of contract to provide the services, not breach of the promised performance of the product itself. Absent such an additional express promise to perform repair services, a product warranty/guarantee is controlled by the Uniform Commercial Code, which restricts express warranty claims to a four-year statute of limitations from when the defect 'is or should have been discovered.' N.Y. U.C.C. §2-725(1) and (2)."

The defendant also claims that the court misconstrued the facts when it rendered the decision on motion sequence #5, contending that "the Court misconstrued the parties' agreement as containing such a promise by Classic Turf Co. to perform roof repair work for 10 years following the installation of the tennis court. Quite the contrary, the parties' agreement did not contain any express warranty, guarantee, or promise by Classic Turf Co. to be responsible for any leaking in Plaintiffs' roof, when in fact, the 'Guarantee' did not cover any such issues, and the agreement otherwise disclaimed responsibility for leaking. The agreement provided an ordinary warranty/guarantee of the performance of the product—the Classic Turf tennis court—and nothing more, bringing the agreement squarely within the Uniform Commercial Code."

Finally, the defendant contends that, based on the foregoing, "the Court should have held, pursuant to CPLR §3211 and/or §3212: (i) that Plaintiffs' express warranty claims (Second and Sixth Causes of Action) failed to state a claim given that the parties' agreement contained no promise by Classic Turf Co. with respect to leaking in the roof, i.e. Plaintiffs' only real grievance; and (ii) regardless, the warranty claims accrued not later than January of 2015 pursuant to UCC §2-725 and applicable case law, rendering the claims time-barred."

The plaintiffs oppose the defendant's motion, arguing that "[t]he basis for the defendant's cross-motion is its argument that the statute of limitations is extended only if the defendant undertook an additional obligation. However, that is exactly what the defendant did." Plaintiffs' counsel continues "[d]efendant argues that the Court misapprehended the precedent set by the Court of Appeals in *Bulova Watch Co. v. Celotex Corp.* 46 NY2d 606 (1979), in that the Court in *Bulova* held that the bonds posted as security were a new and separate obligation from the original work. But that is

exactly what happened here. The September 6, 2018, letter created a new and separate obligation even if the original warranty referred to delamination. It is also untrue that the original agreement did not cover waterproofing. Plaintiff Brach testified that the defendant told him that the tennis court would include waterproofing, and that waterproofing was included in the contract (Exhibit B) as part of Classic Turf's scope of work." Plaintiffs aver that "[t]hese are questions that should be decided in the final trial of this action and not on a motion directed at the pleadings."

Plaintiffs further argue that "[t]he statute of limitations in his case was not governed by the Uniform Commercial Code," and that they disagree with the defendant's contention "that the plaintiff's claims on the warranty should have been governed by the four-year statute under Section 2-725 of the Uniform Commercial Code." Plaintiffs aver that "the Court of Appeals has held that in contract cases other than sales of goods and in cases based on guarantees, the statute of limitations is governed by contract law and runs for six years and not the four-year statute of limitations under the Uniform Commercial Code. *American Trading Co. v. Fish*, 42 N.Y.2d 20, 369 N.Y.S.2d 617, 364 N.E.2d 1309 (1977); *see also Movado Group, Inc. v. Caseiko Trading Co.*, 912 F.Supp 2d 109 (S.D.N.Y. 2012)." Plaintiffs contend that "UCC 2-725 governs warranties on the sale of goods and is not applicable here. The Courts have held that in cases involving construction where the sale was principally of the defendant's construction services and any sale of goods was incidental, the six-year statute under contract law governs rather than UCC 2-725. *Fallati v. Concord Pools, Ltd.*, 151 A.D.3d 1446, 54 N.Y.S.2d 345 (3rd Dept. 2017); *Gibraltar Mgt. Co., Inc. v. Grand Etrance Gates, Ltd.*, 46 A.D.3d 747, 848 N.Y.S.2d 694 (2d Dept. 2007). The

same rule applies here. The Court's original determination on this issue was correct, and the defendant's motion for reargument should be denied."

Discussion

A motion for leave to reargue is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at its earlier decision. (*Beverage Marketing USA, Inc. v. South Beverage Co., Inc*., 58 AD3d 657 [2d Dept 2009]); See CPLR § 2221. A motion for leave to reargue .. shall not include any matters of fact not offered on the prior motion" and "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Mazinov v Rella*, 79 AD3d 979, 980. [2d Dept 2010]; quoting *McGill v Goldman*, 261AD2d 593, 594 [2d Dept 1999]).

Specifically, CPLR § 2221 sets forth as follows: (d) A motion for leave to reargue: 1. Shall be identified specifically as such; 2. Shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. Shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

Upon consideration and review of the foregoing arguments, the Court finds that the moving parties have not established that there are any matters of fact or law which were overlooked or misapprehended by the court in determining the prior motion, and thus denies both parties' requests for leave to reargue. Both parties' arguments are erroneous, in this court's opinion.

However, the portion of the plaintiffs' motion which seeks leave to replead and file a second amended complaint is granted. Pleadings are freely amendable. Plaintiffs have thirty (30) days from entry of this order to file their second amended complaint in the form annexed to their motion. It shall be deemed served on defendant following such filing, and defendant shall timely answer the second amended complaint. While a red-lined version is generally submitted with a motion to replead, failure to do so is not a fatal defect where, as here, counsel has represented that the only change from the prior complaint is with regard to the date the work was allegedly completed.

Regarding motion sequence #8, the defendant's motion for summary judgment on the two causes of action that were not dismissed in the court's July 2022 order, this motion must be denied as premature, with leave to renew. The court notes that in the defendant's opposition to the portion of the plaintiffs' motion that seeks leave to file and serve an amended complaint, counsel requests that "that in the event the Court grants Plaintiffs any of the relief sought in their pending motion (Motion Seq. #7) -- whether reinstatement of any of the dismissed causes of action, and/or leave to serve a Second Amended Complaint -- then Classic Turf Co. should be granted a 60-day extension of time from the date of such a decision to move for summary judgment on the merits against any reinstated or new claims."

The court agrees that after the plaintiffs' second amended complaint is filed and the defendant interposes an answer thereto, the defendant should be permitted to move for summary judgment based on that amended complaint. As such, the defendant's motion for summary judgment [motion sequence #8], is denied with leave to renew. Any other outcome would violate the single motion rule which bars successive summary judgment motions (*Nunez v Yonkers Racing Corp*., 2023 N.Y. App. Div. LEXIS 3708).

Accordingly, it is

ORDERED that the branch of the plaintiffs' motion (#7) for leave to re-argue the decision of this court, dated July 20, 2022, is denied; and it is further

ORDERED that the branch of the plaintiffs' motion (#7) for leave to file a second amended complaint, is granted the extent that plaintiffs are granted leave to file a second amended complaint in the form annexed to the motion, within thirty (30) days of entry of this order; and it is further

ORDERED that the defendant's motion (#9) for leave to re-argue the decision of this court, dated July 2022, is denied in its entirety; and it is further

ORDERED that the defendant's motion for summary judgment (#8) on the two causes of action which remained in the complaint is denied as premature, with leave to renew after the plaintiffs have filed the second amended complaint and the defendant has interposed an answer thereto.

This constitutes the decision and order of the court.

Dated: July 14, 2023

E N T E R :

Hon. Debra Silber, J.S.C.