

**J. Carey Smith 2019 Irrevocable Trust v 11 W. 12
Realty LLC**

2023 NY Slip Op 32433(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 651000/2021

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36

Justice

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 INDEX NO. 651000/2021
 MOTION SEQ. NO. 002

J. CAREY SMITH 2019 IRREVOCABLE TRUST, NANCY M. SMITH 2019 IRREVOCABLE TRUST,
 Plaintiffs,

- v -

11 WEST 12 REALTY LLC,
 ICON REALTY MANAGEMENT, LLC,
 TERENCE LOWENBERG,
 TODD COHEN,
 QRS CONSTRUCTION, INC.,
 N B PLUMBING & HEATING INC.,
 Y.S. ELECTRIC CO.,
 ACE SOLUTIONS,
 ARROW ELEVATOR INC., and
 OLD HOUSE INSPECTION COMPANY, INC.
 Defendants.

**DECISION + ORDER ON
 MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 52, 58, 61, 77

were read on this motion to/for DISMISSAL.

The underlying facts of this case are set forth in detail in the decision and order dated July 14, 2023, which granted the motion of defendants 11 West 12 Realty LLC, Icon Realty Management, LLC, Terrence Loewenberg, and Todd Cohen, dismissing the complaint against them pursuant to CPLR 3211(a)(1) and (a)(7) (Mot. Seq. 001).¹ Therefore, the facts of this case will not be repeated here.

Defendant Y.S. Electric Co. (“YS Electric”) now moves, pursuant to CPLR 3211(a)(1) and (a)(7), for dismissal of all claims asserted against it. In its complaint, plaintiffs allege that YS Electric performed electrical and related services at the Townhouse, and they assert the following claims against YS Electric: fraudulent concealment (fourth cause of action); private nuisance (seventh cause of action); violation of NY General Business Law § 777 (eighth cause of action); RICO claims premised on 18 USC § 1962(c) and (d) (NYSCEF Doc. No. 1, *complaint*).

In its memorandum of law, YS Electric argues that plaintiffs fail to meet the heightened pleading requirement required to establish a claim for fraudulent concealment. YS Electric contends that “[t]here is not a single allegation of fraudulent concealment” against it. As to this cause of action, the complaint states: “. . . the [d]efendants concealed the fact that the mechanical, electrical and plumbing systems at the Townhouse were not working . . .”; “[t]he [d]efendants worked together to conceal the fact that the mechanical, electrical, and plumbing systems at the Townhouse were not working . . .”; “[d]efendants took affirmative steps to conceal the defects by hiding them behind

¹ This motion is decided together with Mot. Seqs. 001; 003; and 004.

closed walls and ceilings.” (NYSCEF Doc. No. 1 ¶¶ 113-126). YS Electric also argues that plaintiffs fail to allege scienter; justifiable reliance resulting in damages; and a fiduciary or confidential relationship that would impose a duty upon YS Electric to disclose information. Addressing the civil RICO claim, YS Electric argues that this claim “is duplicative of [plaintiffs’] barren fraud claims, without any specifics whatsoever and with added boilerplate language for a civil RICO claim” and that “[p]laintiffs have also failed to allege a specific agreement between the [d]efendants to commit the predicate acts nor have they alleged a pattern of racketeering.” As to the private nuisance claim, YS Electric contends that it “lawfully entered the [p]remises with the required permits from the [Department of Buildings] and is certainly not actively interfering with [p]laintiffs’ use and enjoyment derived from occupying the [p]remises.” Finally, the claim premised on General Business Law § 777 should be dismissed, argues YS Electric, because the specific section applies to the sale of a new home. (NYSCEF Doc. No. 52, *memorandum of law*).

Plaintiffs oppose the motion on the grounds that the complaint satisfies the heightened pleading requirements for fraudulent concealment and that, at the very least, there is an inference of scienter. Plaintiffs also argue that they relied on the representations of defendants that “that the mechanical, electrical and plumbing systems were in working order” and that “the construction was performed in a proper and skillful manner, and that the necessary sign offs to close permits with the Department of Buildings (DOB) [were obtained].” With respect to the claim that the complaint fails to allege a fiduciary or confidential relationship between YS Electric and plaintiffs, plaintiffs argue that duty to disclose arises where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair and that “Y.S. Electric had superior knowledge of the defects with the electrical system, the latent nature of which rendered the transaction inherently unfair.” They further claim that the fact that DOB allegedly signed off and closed the electrical permits is not conclusive proof that would relieve YS Electric of liability. Therefore, plaintiffs maintain that the fraudulent concealment claim should not be dismissed.

As for the RICO claims, plaintiffs argue that YS Electric is alleged to be a participant in one or more predicate acts and, thus, that this “is enough for it to [be] liable for the acts of the conspiracy”; that the pleadings satisfy the pattern of racketeering requirement; as well as, fraud. Thus, plaintiffs maintain that its RICO claim against YS Electric survives the present motion to dismiss. Plaintiffs also argue that they have pleaded sufficient facts to establish a claim for private nuisance because it has alleged the continuing problems that have rendered the Townhouse inhabitable since closing, which has substantially interfered with their use and enjoyment of the premises. They further allege that the conduct complained of was intentional and done with malice. Viewing the allegations in the light most favorable to the non-moving party, plaintiffs argue that it has properly alleged a cause of action under General Business Law § 777, which applies to the Townhouse that was “developed and gut renovated.” (NYSCEF Doc. No. 61, *memorandum of law in opposition*).

In reply, YS Electric argues, in relevant part, that plaintiffs ignore the heightened pleading requirements of CPLR 3016(b) and that they fail to set forth any allegations of YS Electric’s wrongdoing. They further reiterate the arguments raised in their moving papers with respect to the remaining claims (NYSCEF Doc. No. 77, *memorandum of law in reply*).

In determining a motion to dismiss pursuant to CPLR 3211, “the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as

alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) A pleading may be dismissed, pursuant to CPLR 3211(a)(7) if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (See CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) Furthermore, “[a] cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014], quoting *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002].)

As an initial matter, this court has already determined in the motion to dismiss of co-defendant QRS Construction, Inc. that plaintiffs lack standing to commence this action because, under New York law, “an express trust vests in the trustee the legal estate, subject only to the execution of the trust.” (EPTL 7-2.1[a]). Thus, “only the trustee can sue *or be sued* in a court of law.” (*Salanitro Family Trust v. Gorina*, 49 Misc 3d 153[A], 2015 NY Slip Op 51785[U], *1 [Appellate Term, 2d Dep’t 2015] [emphasis added]; see also *Liveo v Hausman*, 61 Misc 3d 1043, 1044-1045 [Sup Ct., Kings County 2018] [“A trust, however, is a legal fiction, and cannot sue or be sued itself], citing *Natixis Real Estate Capital Tr. 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 132 [1st Dept. 2017]; CPLR 1004). Thus, the action is dismissed.

Notwithstanding the standing issue, dismissal is nevertheless warranted on additional grounds.

“The elements of a claim for fraudulent concealment are: (1) an omission of a material fact; (2) intent to defraud; (3) duty to disclose, (4) reasonable reliance on the omission, and (5) damages suffered.” (*Katehis v Sovereign Assoc., Inc.*, 2014 NY Slip Op 51215(U), ****8 [Sup Ct, NY County 2014], citing *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011].) Here, this court finds that plaintiffs have failed to establish the heightened pleading standard set forth in CPLR 3016(b), which requires that “the circumstances constituting the wrong shall be stated in detail.” There are no specific allegations regarding YS Electric’s material misrepresentation and plaintiffs fail to establish that they relied on any such representation to their detriment. Moreover, insofar as the parties agreed that plaintiffs had the right to inspect the premises before closing and that it was entering the contract based solely on its inspection and investigation (NYSCEF Doc. No. 32, *Contract* ¶ 12), “[t]his renders untenable any claim that information regarding the condition of the building was peculiarly within the defendants’ knowledge” (*116 Waverly Place LLC v Spruce 116 Waverly LLC*, 179 AD3d 511, 512 [1st Dept 2020], citing *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]; *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 278-279 [2011] [if a party can discover “by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations”]).

Furthermore, as discussed in Mot. Seq. 001, plaintiffs’ complaint is bereft of any non-conclusory allegations that YS Electric was involved in an “enterprise” and that it engaged in a “pattern of racketeering” to defraud plaintiffs. Therefore, the RICO claim against said defendant is dismissed.

The private nuisance cause of action is equally lacking in merit. The claim for private nuisance must be dismissed for failure to state a cause of action. "A claim of private nuisance arises from an interest in the use and enjoyment of property. The elements of a common-law claim for a private nuisance are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.'" (*Berenger v 261 W. LLC*, 93 AD3d 175 [1st Dept 2012], quoting *Copart Indus., Inc. v Consol. Edison Co.*, 41 NY2d 564, 570 [1977].) This court agrees with YS Electric that, to make out a claim for private nuisance, plaintiff must show "a pattern of continuity or recurrence of objectionable conduct" (*Berenger v 261 W. LLC*, 93 AD3d 175 [1st Dept 2012]; *Frank v Park Summit Realty Corp.*, 175 AD2d 33, 35 [1st Dept 1991]), which plaintiffs fail to do here. Moreover, plaintiffs' bald and conclusory allegations that YS Electric intentionally participated in the "construction and installation defects in the mechanical, electrical and plumbing systems of the Townhouse", is insufficient to withstand dismissal of this cause of action.

Moreover, the gut-renovated townhouse is not a "new home" under General Business Law 777 (see *116 Waverly Place LLC v Spruce 116 Waverly LLC*, 179 AD3d 511, 512 [1st Dept 2020].) Thus, plaintiffs fail to state a cause of action under this section and the claim against YS Electric is hereby dismissed. The remaining arguments need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that the motion of defendant Y.S. ELECTRIC CO. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website)].

July 14, 2023



 HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER