

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

2023 NY Slip Op 32434(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

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

MOTION SEQ. NO. 003

- v -

11 WEST 12 REALTY LLC,
ICON REALTY MANAGEMENT, LLC,
TERRENCE 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 003) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 80, 81, 88, 89, 93, 94

were read on this motion to/for

DISMISSAL

The 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 and dismissed the complaint against them pursuant to CPLR 3211(a)(1) and (a)(7) (Mot. Seq. 001).¹ Therefore, the facts of this case shall not be repeated here.

Defendant QRS Construction, Inc. ("QRS") now moves, pursuant to CPLR 3211(a)(1) and (a)(3), (a)(7), and CPLR 1004 seeking an order dismissing the complaint against them. Of the eleven (11) causes of action asserted by plaintiffs in their complaint, the claims are asserted as against QRS are: fraudulent concealment (fourth cause of action); private nuisance (seventh cause of action); violation of NY General Business Law § 777 (eighth cause of action); violation of NY Unfair Trade Practices (ninth cause of action); RICO claims premised on 18 U.S.C. § 1962(c) and (d) (tenth cause of action); and unjust enrichment (eleventh cause of action).

As for the fraudulent inducement claim, QRS argues that it had no fiduciary relationship, special relationship with plaintiffs (nor is any such relationship pleaded), such that QRS owed plaintiffs any duty of warning or of disclosure. The claim, argues QRS, fails to comply with the heightened pleadings requirements of CPLR 3016(b) or allege facts sufficient to establish the elements of fraudulent concealment. As for the nuisance claim, QRS argues, *inter alia*, that

¹ This motion is decided together with Mot. Seqs. 001; 002; and 004.

although plaintiff purports to assert this claim against all defendants, there are no factual allegations regarding same, describing the acts of QRS that give rise to such a cause of action. QRS also argues that the RICO claims must be dismissed against it because they are premised on a single one-time transaction which are not alleged to have any other ongoing association and that this claim is an attempt by plaintiff “to transform a ‘garden variety fraud or breach of contract claim into a vehicle for treble damages by resorting to what has been referred to as ‘the litigation equivalent of a thermonuclear device’ — a civil RICO suit.” QRS contends that, although plaintiff purports to assert a claim for unjust enrichment against it, it must be dismissed because a review of the cause of action reveals that all the allegations address the “Sellers”, which do not include QRS. Furthermore, QRS contends that there is no allegation that QRS was “enriched” at plaintiff’s expense.² Additionally, QRS argues that the action must be dismissed because plaintiffs (two Trusts) lack the capacity to sue. The pleadings should also be dismissed, claims QRS, for failure to comply with CPLR 3013. (NYSCEF Doc. No. 64, *memorandum of law*).

QRS also moves to dismiss cross-claims asserted against it by defendants Arrow Elevator, Inc. and Ace Solutions. (NYSCEF Doc. No. 75, *memorandum of law*).

Addressing the arguments for the dismissal of the fraudulent concealment claim, plaintiffs argue that “the [d]efendants, including QRS as the general contractor, worked together to conceal the fact that the mechanical, electrical, and plumbing systems were not working, were not complete and were not installed properly. Such allegations are properly pleaded in the [c]omplaint.” They also argue that the pleadings sufficiently comply with CPLR 3016 and that additional discovery is needed to further detail and evidence QRS’s knowledge and conduct regarding the defects and its communications with the Icon defendants and various contractors.

Plaintiffs also argue that they have sufficiently alleged a claim for private nuisance because the complaint details the numerous, various, and continuous problems that have rendered the townhouse uninhabitable since closing. Defendants’ conduct, claim plaintiffs, continues to cause a substantial interference in plaintiff’s use and enjoyment of the Townhouse; the intentional/negligent construction has unreasonably interfered with plaintiffs’ ability to reside in the Townhouse; they further assert that this interference with plaintiff’s use and enjoyment of the Townhouse was intentional and done with malice. According to plaintiffs, viewing the allegations in the light most favorable to the non-moving party, the complaint sets forth a viable claim for General Business Law § 777-a.

Plaintiffs also argue that they have adequately alleged a RICO claim against QRS insofar as the complaint sets forth factual allegations showing that “[t]he [d]efendants schemed together to conceal shoddy construction and market it as a newly renovated Townhouse, of the highest quality construction, for which they profited handsomely at [p]laintiffs’ expense. This fraudulent conduct is not contractual, and clearly states a claim for relief.” Addressing the argument with respect to standing, plaintiffs reject QRS’ contention that they lack legal capacity to sue, arguing

² Since the ninth (“Violation of NY Unfair Trade Practices”) and eleventh (“unjust enrichment”) causes of action do not clearly identify against whom they are asserted, QRS also seeks dismissal of said claims to the extent they are asserted against it. However, in opposition to this motion, plaintiffs maintain that those causes of action are not being asserted as against QRS.

that plaintiffs, as the owners of the Townhouse, have standing to bring this action. Assuming, *arguendo*, this court is persuaded that the trustees should be the named plaintiffs in this action, plaintiffs maintain that QRS has cited no authority requiring dismissal of the complaint rather than an amendment of the caption. They also maintain that the complaint meets basic pleading requirements of CPLR 3013 (NYSCEF Doc. No. 81, *memorandum of law in opposition*).

In reply, QRS reiterates the arguments raised in its initial moving papers and further argue that, contrary to plaintiffs' representation that they have standing to commence this action by virtue of their ownership of the Townhouse, this contention is false. It annexes a copy of the deed, dated June 14, 2019, for the subject property, which identifies the grantees as "J. Carey Smith, as Trustees of Nancy Smith 2019 Irrevocable Trust." (NYSCEF Doc. Nos. 88, *reply*; 89, *deed*).

This court finds that plaintiffs lack standing to commence this action. 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). Insofar as this action is commenced by the trusts rather than the trustees, this court is persuaded that plaintiffs lack capacity to sue defendants in this action. Furthermore, for reasons fully set forth in the decision and order resolving Mot. Seq. 001, the causes of action premised on fraudulent concealment (fourth cause of action); private nuisance (seventh cause of action); violation of General Business Law § 777 (eighth cause of action); and RICO claims premised on 18 USC § 1962(c) and (d), do not lie.

The cross-claims asserted against QRS, sounding in contribution, common-law indemnification and contractual indemnification, and breach of obligation to procure insurance are likewise dismissed, without opposition. All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that the motion of defendant QRS Construction, Inc. 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 the cross-claims asserted against QRS Construction, Inc. are dismissed, without opposition; 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)].

This constitutes the decision and order of this court.

July 14, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER