

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

2023 NY Slip Op 32435(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, NANCY M.
SMITH 2019 IRREVOCABLE TRUST,
Plaintiffs,

MOTION SEQ. NO. 004

- 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 004) 82, 83, 84, 85, 86, 87, 90, 91, 92

were read on this motion to/for

DISMISSAL

In this action seeking to recover damages based on the purchase of a townhouse, defendant Old House Inspection Company, Inc. ("Old House"), a licensed inspector, moves, pursuant to CPLR 3211(a)(1) and (a)(7) for dismissal of claims asserted by plaintiffs in their complaint, to wit: claims premised on breach of contract, private nuisance, General Business Law ("GBL") § 777 and RICO. In the alternative, Old House seeks to dismiss that portion of plaintiffs' claim for damages which exceed the cost of the inspection and report on the ground that such damages are barred by the limitation of liability claim in the second contract between plaintiffs and Old House.

The underlying allegations in plaintiffs' complaint have been set forth in detail in the decision and order resolving Mot. Seq. 001 and, thus, shall not be repeated here.¹ However, as relevant here, plaintiffs allege, in sum, that Old House was retained to conduct two (2) pre-purchase home inspections and that, in breach of its contract with plaintiffs, Old House represented at the second inspection that defects and deficiencies noted during the first inspection had been corrected. Old House maintains that, as argued by plaintiffs in opposition to the dismissal motions filed by other defendants, the alleged defects and deficiencies were latent and concealed. Pursuant to the second contract executed between the parties, Old House was only required to make a visible inspection of the premises and, thus, the latent defects complained of fall outside the scope of the second agreement.

¹ This motion is decided together with Mot. Seqs. 001; 002; and 003.

Furthermore, their agreement required plaintiffs to notify Old House of any defects before undergoing repairs, which it failed to do. Old House references the inspection agreement, which states that “[i]n the event of a claim by the [c]lient that an installed system or component of the premises which was inspected by the [i]nspector was not in the condition reported by the [i]nspector, the [c]lient agrees to notify the [i]nspector at least 72 hours prior to repairing or replacing such system or component.” The agreement further states that “[i]f repairs or replacement is done without giving the Inspector the required notice, the Inspector will have no liability to the Client.” (NYSCEF Doc. No. 85 ¶¶ 7, 8).

Old House contends, similarly to its co-defendants, that the remaining claims warrant dismissal because plaintiffs fail to either set forth facts sufficient to sustain the claims or have asserted claims that are inapplicable to the facts alleged here. In the alternative, it argues that that portion of the claims which seek damages in excess of the amount plaintiffs paid for the inspection should be dismissed because the second contract between the parties contains a provision that expressly limits plaintiffs’ damages arising from the home inspection to the fee paid for the inspection, which in this case is \$750.00. Specifically, Old House relies on language in the inspection agreement that states, “[t]he client further agrees that the [i]nspector is liable only up to the cost of the inspection.” (NYSCEF Doc. No. 85 ¶ 7, *inspection agreement*). This contractual provision, claims Old House, is enforceable and bars any recovery beyond the \$750.00 paid by plaintiffs.

In opposition to the motion, plaintiffs argue that they have sufficiently alleged facts to support a claim for breach of contract against Old House. Plaintiffs maintain that Old House was tasked with two inspections of the Townhouse pursuant to written agreements and that, despite Old House’s representation that all defects and deficiencies previously noted had been corrected, problems immediately emerged at the Townhouse, many of which stemmed from the noted defects and deficiencies. Plaintiffs also argue that the contract produced by Old House does not warrant dismissal because, although it states that “latent and concealed defects and deficiencies are excluded from the inspection”, other items, including “structure, exterior, heating, plumbing, electrical & ventilation systems” fall within the purview of the agreement. Since they have asserted in their complaint defects and deficiencies with those systems, plaintiffs assert that they have stated a valid claim for breach of contract. Plaintiffs further claim that compliance with a condition precedent may be excused when, as here, it would be futile. Plaintiffs confirm that the remaining causes of action are not pleaded as against Old House. (NYSCEF Doc. No. 91, *memorandum of law in opposition*).

In reply, Old House argues that the alleged defects discovered by plaintiffs after the closing were unrelated to those discovered by Old House during its first inspection of the Townhouse. It further reiterates that the concealed defects are explicitly outside the scope of the second contract and that plaintiffs have abandoned claims that Old House was responsible for discovering defects outside the scope of the inspection. Addressing the argument with respect to the condition precedent, Old House argues that plaintiffs’ contention that notice would have been futile should be rejected by this court as lacking in merit. It argues, in part, “[n]othing in the Second Contract required Old House to authorize [p]laintiffs to perform necessary repairs or consent to same. As such, [p]laintiffs’ argument that it would have been futile to simply notify

Old House prior to performing any repairs is utterly baseless.” (NYSCEF Doc. No. 92, *reply memorandum of law*).

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].) Moreover, a motion to dismiss a complaint, pursuant to CPLR 3211(a)(1), may be granted only when the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law. (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d at 134; *Ladenburg Thalmann & Co. v Tim’s Amusements*, 275 AD2d 243, 246 [1st Dept 2000].)

As an initial matter, although not raised in this motion, 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 as against defendant QRS Construction, Inc.

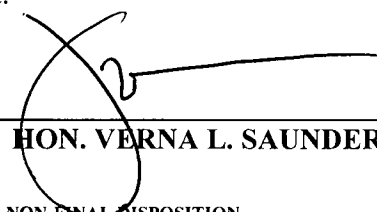
Notwithstanding the standing issue, this court finds that dismissal is nevertheless warranted as against Old House on the ground that plaintiffs have failed to establish a condition precedent as expressly provided for in the second contract. The agreement expressly provides that, “[i]n the event of a claim by the [c]lient that an installed system or component of the premises which was inspected by the [i]nspector was not in the condition reported by the [i]nspector, the [c]lient agrees to notify the [i]nspector at least 72 hours prior to repairing or replacing such system or component.” Plaintiffs concede that they did not comply with said provision of the contract and their conclusory argument that any such notice would have proved futile since the defects “were emergent in nature and repairs were required”, is rejected. Plaintiffs fail to establish that the alleged conditions in the Townhouse were such that they could not comply with the notice requirement in the contract to allow Old House the opportunity to observe and document the conditions complained of before alterations and repairs. Plaintiffs agreed that “[i]f repairs or replacement is done without giving the [i]nspector the required notice, the [i]nspector will have no liability to the [c]lient”. Thus, this court finds that Old House has established its entitlement to dismissal of the breach of contract claim against it. Given the foregoing, this court need not address the remaining arguments raised. Accordingly, it is hereby

ORDERED that the motion of defendant Old House Inspection Company, Inc. seeking dismissal of the complaint against it is granted and it is hereby dismissed as against said defendant; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon plaintiffs.

This constitutes the decision and order of this court.

July 14, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE