

**Torrenzano v Principi Bldrs. Inc.**

2023 NY Slip Op 33658(U)

October 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 520973/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13<sup>th</sup> day of October 2023

HONORABLE FRANCOIS A. RIVERA

-----X  
JAY TORRENZANO and JEANNE TORRENZANO

Plaintiff,

**DECISION & ORDER**

Index No.: 520973/2022

-against-

PRINCIPI BUILDERS INC. and CUSTOM BUILDING SYSTEMS LLC,

Defendants.

-----X  
PRINCIPI BUILDERS INC.

Defendant/Third-Party Plaintiff

- against -

OCEAN ELECTRIC CORP. and CABINETWORKS GROUP MICHIGAN LLC

Third-Party Defendant

-----X

Recitation in accordance with CPLR 2219(a) of the papers considered on the notice of motion of defendant Custom Building Systems, LLC (hereinafter CBS or movant), filed on November 30, 2022, under motion sequence number two, for an order: (1) pursuant to CPLR 3211(a)(7) dismissing plaintiffs', Jay Torrenzano and Jeanne Torrenzano (hereinafter plaintiffs), claims as asserted against CBS in their entirety; and (2) dismissing defendant Principi Builders Inc.'s (hereinafter PBI) crossclaims as asserted against CBS in their entirety.

This motion is opposed by the plaintiffs, defendant PBI, and third-party defendant Cabinetworks Group Michigan LLC (hereinafter Cabinetworks).

- Notice of Motion
- Memorandum of Law
- Affirmation in Support
  - Exhibit A to D
- PBI's Affirmation in Opposition
- Affidavit in Opposition by Richard J. Principi, Jr.
  - Exhibit A to E
- Cabinetworks' Opposition in Affirmation
- Plaintiffs' Affirmation in Opposition
- Affidavit in Opposition by Jay Torrenzano
  - Exhibit A
- Reply Affirmation

## BACKGROUND

On July 22, 2022, the plaintiffs commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). The original verified complaint contains eighty-seven allegations of fact in support of six causes of action. The first cause of action is asserted against defendant PBI for negligent construction. The second cause of action cause of action is asserted against defendant CBS for negligent construction. The third cause of action is asserted against defendant PBI for breach of contract. The fourth cause of action is asserted against defendant PBI for breach of implied warranty of fitness. The fifth cause of action is asserted against defendant CBS for breach of implied warranty of fitness. The sixth cause of action is asserted against defendant PBI for unjust enrichment.

On September 14, 2022, PBI interposed a verified answer to the plaintiffs' verified complaint with a crossclaim for common law indemnity asserted against CBS.

On November 22, 2022, PBI filed a third-party complaint against Ocean Electric Corp. (hereinafter OEC) and Cabinetworks Group Michigan LLC (hereinafter CGM).

On January 3, 2023, CGM interposed an answer to the third-party complaint of PBI with counterclaims asserted against PBI and crossclaims asserted against CBS and OEC.

On January 10, 2023, PBI interposed an answer to the crossclaims and counterclaims asserted against it by CGM.

On January 12, 2023, Ocean Electric Corp. interposed an answer to PBI's third-party complaint with counterclaims and crossclaims against PBI, CBS, and Cabinetworks Group Michigan LLC (hereinafter CGM).

On February 9, 2023, PBI interposed and filed an answer to CBS' counterclaim and crossclaim asserted in its answer to the crossclaims of third-party defendant OEC.

The verified complaint alleges the following salient facts. The plaintiffs are the owners of a certain real property in Montauk, New York (hereinafter the subject property). The plaintiffs retained PBI to design, deliver, install, and construct a newly built modular single-family home in compliance with the applicable building codes (hereinafter the modular home) and obtain a certificate of occupancy for the single-family home.

On November 8, 2020, the plaintiffs and PBI entered into an agreement regarding the construction of the single-family home (hereinafter the November 2020 Agreement). The agreement included a Building Contract, Construction Specification Agreement, Draw Schedule Agreement, and a Rider to Building Contract. The plaintiffs allege that pursuant to the November 2020 Agreement, PBI was to perform work, labor, and services, which included, among other things, the delivery of the modular home to the

subject property, setting the modular home, and completing all construction and excavation for the modular home. PBI contracted CBS for the supervision and installation of all materials and lumber for the construction and delivery of the modular home which included the installation of all Merillat<sup>1</sup> masterpiece cabinets in the kitchen, bathrooms, and laundry room.

The plaintiffs further allege that they liaised with Jim Gherardi (hereinafter Gherardi), a PBI representative, authorized to negotiate and make representations to the plaintiffs regarding the modular home. At Gherardi's direction, the plaintiffs' obtained a certified bank check in the amount of \$566680.00, which was made payable to CBS. On June 8, 2021, PBI gave this check to CBS's delivery agents in exchange for a modular home built by CBS. PBI failed to inspect the modular home before accepting delivery. PBI failed in its duties pursuant to the November 2020 Agreement, namely, protecting the modular home from weather conditions. PBI failed to seal and secure the modular home or to temperature control the modular home upon receipt of the delivery of the modular home. After its delivery, PBI allowed high humidity into the modular home for seven months after it was delivered. As a result of PBI's negligence, the cabinets including the boxes/frames, drawer fronts, doors, and shelves were damaged. PBI did not install the front door to the modular home until October 16, 2021. The heating system was not operational until October 18, 2021. The basement was not insulated until November 8, 2021. The basement underground garage ceiling was not installed until

November 1, 2021, which is 4½ months after the modular home was delivered. The air conditioning was not operational until September 24, 2021, which is 3½ months after the modular home was delivered.

On September 16, 2021, a representative from Merillat was sent to the home by CBS at the request of PBI after months of complaints by plaintiffs to observe and remedy the condition of the cabinets. The Merillat representative determined that there was humidity in the home and that the home was not conditioned causing humidity damage to the cabinets, the full extent of which would not be known at this time since the home was still not temperature controlled. Although the Merillat representative contended that the cabinets should "go back into place" after the air conditioning was operational, this did not occur.

The plaintiffs allege that all wood material within the home has been compromised and damaged by humidity due to the failure of PBI to secure, seal and temperature control the home during the months of June, July, August, September, and October. Particularly, the exposure to high humidity caused the kitchen mahogany door wood grills, installed by CBS, to warp and bow.

PBI notified the plaintiffs that the damage to the cabinets would not be covered by Merillat's warranty that came with the cabinets.

The plaintiffs allege that CBS failed to properly install all the Merillat masterpiece cabinets inside of the modular home prior to delivering the modular home on June 8, 2021. 34.

As a result of the damage caused by PBI and CBS, the plaintiffs were forced to pay for all new Merillat masterpiece cabinets and the installation of the new cabinets. Although the plaintiffs told PBI not to install countertops and sinks or electricity or plumbing to any of the cabinets until the issue of the damaged cabinets was resolved, PBI went forward with the installation against their wishes. Thereby causing the plaintiffs to incur more costs in having to remove these previously installed items to address the damage to the cabinets. During the removal of the cabinetry, mold was discovered on the kitchen wall.

PBI misrepresented to the plaintiffs that the damaged cabinetry would be removed and replaced but failed to do so, so the plaintiffs hired a servicer to inspect all the cabinets. The plaintiffs made claims to their insurance company, Zurich Insurance Company and to PBI's insurance company, Selective Insurance Company, as the plaintiffs were additional insured on the PBI policy. The Selective Insurance Company representatives inspected the cabinets and determined the cabinets to be damaged. Nevertheless, PBI did not take action to remedy the issues.

The plaintiffs undertook to remove and replace all cabinets to mitigate their damages and finish construction on the home.

Selective Insurance claims adjusters on behalf of PBI allowed the plaintiffs to remove all cabinets from the kitchen, bathrooms, and laundry room and store all cabinets in the basement after their engineer inspected the cabinets on January 28, 2022.

## LAW AND APPLICATION

CBS has moved pursuant to CPLR 3211(a)(7) for an order dismissing the plaintiffs' verified complaint and PBI's crossclaim for common law indemnity asserted against it. In support of the motion CBS has submitted a memorandum of law and an affirmation of its counsel which referred to four annexed exhibits labeled A through D. Exhibit A is a copy of the plaintiffs' verified complaint. Exhibit B is described as a copy of the Builder Registration Form and Terms, Conditions, and Covenants. Exhibit C is described as a copy of the purchase order submitted by Sound Builders Inc. to CBS. Exhibit D is described as a copy of the Home Acceptance Form.

The affirmation of the movant's counsel demonstrated no personal knowledge of the transactions or occurrences alleged in the verified complaint or of the business practice and procedures of its client, the movant's counsel averred that CBS provided counsel with exhibits B, C, and D. However, counsel did not and could not authenticate these documents. The movant's motion did not contain an affidavit of anyone with personal knowledge of the authenticity of these documents. An attorney's affirmation that is not based upon personal knowledge is of no probative value (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]). In sum, CBS proffered no documentary evidence in admissible form.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Delric Constr. Co., Inc. v New*

*York City Sch. Constr. Auth.*, 204 AD3d 750, 751–752 [2d Dept 2022], quoting *Palero Food Corp. v Zucker*, 186 AD3d 493, 495 [2d Dept 2020]).

Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), and such proof is considered but the motion has not been converted to one for summary judgment, the criterion is whether the proponent of the pleading has a cause of action, not whether the proponent has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (*see Marinelli v Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715–716 [2d Dept 2022], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss (*Litvinoff v Wright*, 150 AD3d 714, 716 [2d Dept 2017], quoting *Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Here, CBS' evidentiary submission submitted in support of its motion to dismiss the plaintiffs' verified complaint and PBI's crossclaim for common law indemnity as asserted against it was of no evidentiary value. Consequently, CBS failed to establish that any material fact as claimed by the plaintiffs in the verified complaint or by PBI in its crossclaim was not a fact at all and that no significant dispute exists regarding it.

**CONCLUSION**

The branch of defendant/third party plaintiff Custom Building Systems, LLC for an order pursuant to CPLR 3211(a)(7) dismissing plaintiffs' Jay Torrenzano and Jeanne Torrenzano verified complaint as asserted against it is denied.

The branch of defendant/third party plaintiff Custom Building Systems, LLC for an order pursuant to CPLR 3211(a)(7) dismissing defendant Principi Builders Inc.'s crossclaims as asserted against it is denied.

Custom Building Systems, LLC is directed to file an answer the verified complaint within thirty days after notice of entry of the instant decision and order.

The foregoing constitutes the decision and order of this Court.

ENTER:

*Francois A. Rivera*  
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J.S.C.

**HON. FRANCOIS A. RIVERA**  
**J.S.C.**