

Sole v New York Contr. Group 1 Corp.

2024 NY Slip Op 32487(U)

July 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 526319/2019

Judge: Francois A. Rivera

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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 16th day of July 2024

HONORABLE FRANCOIS A. RIVERA

-----X
ANDRES SOLE and INE LEUS.,

Plaintiff,

-against-

NEW YORK CONTRACTING GROUP 1 CORP.,
PULATANI BUILDERS INC.,
PULATANI BUILDERS GROUP CORP.,
ALEX PULATANI, a/k/a AFRIM PULATANI,
TOM PULATANI, LOU PULATANI,
and MARGO JOHNSON

Defendant.

-----X

DECISION & ORDER

Index No.: 526319/2019

Ms. 5 & 6

Recitation in accordance with CPLR 2219 (a) of the papers considered on notice of motion filed on November 12, 2023, under motion sequence number five, by New York Contracting Group 1 Corp, Pulatani Builders, Inc, Pulatani Builders Group Corp., Alex Pulatani a/k/a Afrim Pulatani, Tom Pulatani, Lou Pulatani, and Margo Johnson (hereinafter defendants) for an order pursuant to CPLR 3211 (a) (1) and (a) (7) for failure to state a cause of action and pursuant to CPLR 3212 granting defendant summary judgment dismissing the complaint of Andres Sole and Ine Leus (hereinafter the plaintiffs). The motion is opposed by the plaintiffs' cross-motion under motion sequence number six.

- Notice of motion
- Affirmation in support
- Memorandum of law in support
- Exhibits A-M
- Statement of material facts
- Affirmation in reply and in opposition
- Counter statement of material facts

Recitation in accordance with CPLR 2219 (a) of the papers considered on notice of cross-motion filed on January 18, 2024, under motion sequence number six, by Andres Sole and Ine Leus (hereinafter plaintiffs) for an order pursuant to CPLR 3212, granting plaintiffs' summary judgment as to liability on plaintiff's first, second, and fifth causes of action. The motion is unopposed.

- Notice of cross-motion
- Memorandum in opposition to motion and in support of cross-motion
- Affidavit in support
Exhibits 1-13
- Affirmation in support
Exhibits A-E
- Statement of material facts

BACKGROUND

On December 23, 2019, the plaintiffs commenced the instant action for, among other things, damages for breach of contract, by filing a summons and complaint with the Kings County Clerk's office (KCCO). On August 19, 2020, all the defendants interposed and filed a joint answer with the KCCO. On September 13, 2023, plaintiff filed a notice of issue with the KCCO.

The complaint alleges one hundred and six allegations of fact in support of ten denominated causes of action. The first cause of action is for breach of contract. The second cause of action seeks a declaration that plaintiffs' contract with the defendants was not valid according to General Business Law §771(d). The third cause of action is for negligence. The fourth cause of action is for breach of warranty. The fifth cause of action seeks cancellation of the plaintiffs' contracts with the defendants. The sixth cause of action seeks civil penalties against all the defendants for violations of many provisions of the General Business Law Article 36-A. The seventh cause of action seeks an

accounting. The eight cause of action is for alleged violations of New York General Business Law §§ 349 and 350. The ninth cause of action is asserted against defendants Alex Pulatani, Tom Pulatani, and Lou Pulatani and is denominated as piercing the corporate veil. The tenth cause of action is for breach of privacy.

The complaint alleges the following salient facts, among others. The plaintiffs own real property located at 249 Halsey Street, Brooklyn, New York 11216 (hereinafter the subject property). Plaintiffs retained NY Group, Pulatani Builders, Pulatani Group, and Margo Johnson for a home renovation project to be performed at the subject property. The agreement dated on or about November 13, 2017 (hereinafter the contract) between the plaintiffs and New York Contracting Group 1 Corp and Johnson involved a brownstone renovation project (hereinafter the project). The total contract amount for the Project was \$669,749.00. New York Contracting Group 1 Corp demanded and received an initial deposit totaling \$133,949.80. New York Contracting Group 1 Corp also billed for additional work in the amount of \$174,940.00. In total, plaintiffs paid New York Contracting Group 1 Corp \$861,782.00 for work on the project. Despite the additional payments, New York Contracting Group 1 Corp was unable and unwilling to complete the project, yet it has retained the funds that it received from the plaintiffs. Plaintiffs' claim, among other things, is that the defendants' incomplete and improper performance of their contract with the defendants caused the plaintiffs to sustain economic damages.

LAW AND APPLICATION

The defendants have moved for an order (1) pursuant to CPLR 3211 (a) (1) and (7) for dismissal of the complaint against New York Contracting Group 1 Corp, Pulatani Builders, Inc, Pulatani Builders Group Corp Alex Pulatani A/K/A Afrim Pulatani, Tom Pulatani, Lou Pulatani, and Margo Johnson. The defendants have also moved for an order pursuant CPLR 3212 granting all defendants summary judgment dismissing the plaintiffs' complaint.

Defendants' CPLR 3211(a) Motions

“To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*Bath & Twenty, LLC v Federal Sav Bank*, 198 AD3d 855, 855 [2d Dept 2021], citing *Burgos v New York Presbyt. Hosp.*, 155 AD3d 598, 599 [2017]). In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), a court must determine whether the allegations in the complaint set forth a cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), The allegations of the complaint are to be liberally construed in the light most favorable to the plaintiff, and the allegations therein are presumed to be true (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

The nonconclusory allegations of fact in the complaint an all reasonable inferences that can be drawn therefrom show that the plaintiffs entered into a contract with defendant New York Contracting Group 1 Corp and with no other party defendant. Consequently, the first, second, fourth, fifth and six cause of action which arise from the

existence of a contractual relationship are dismissed as against against Pulatani Builders Inc, Pulatani Builders Group Corp, Alex Pulatani, A/K/A Afrim Pulatani Tom Pulatani, Lou Pulatani and Margo Johnson for failure to state a cause of action.

The third cause of action is for negligence. The elements of negligence are a duty owed by the defendant to the plaintiff, a breach thereof, and injury proximately resulting therefrom (*Abbott v Johnson*, 152 AD3d 730 [2d Dept 2017], quoting *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). “The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors” (*Abbott v Johnson*, 152 AD3d 730 [2d Dept 2017], quoting *Church v Callanan Indus.*, 99 NY2d 104, 110-111 [2002]). A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party (*Spaulding v Loomis Masonry, Inc.*, 105 AD3d 1309, 1310 [4th Dept 2013]). There is an exception to that general rule, however, where the contracting party, in failing to exercise reasonable care in the performance of it] duties, launches a force or instrument of harm (*Espinal v Melville Snow Contrs*, 98 NY2d 136, 140 [2002]). The plaintiffs did not allege fact which would pleading a cause of action for negligence as against any defendant. Accordingly, the third cause of action is dismissed for failure to state a cause of action.

The seventh cause of action seeks an accounting. Generally, the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997], quoting *Palazzo v Palazzo*, 121 AD2d 261, 265 [2d Dept 1986]). The

nonconclusory allegations of fact in the complaint and all reasonable inferences that can be drawn therefrom do not plead the existence of a confidential or fiduciary relationship between the plaintiff and any defendant. Accordingly, the seventh cause of action is dismissed as asserted against all defendants for failure to state a cause of action.

The eighth cause of action is for the defendants' alleged violations of New York General Business Law §§ 349 and 350. General Business Law § 349 prohibits deceptive business practices. The elements of such a cause of action are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]). In determining whether a representation or omission is a deceptive act, the test is whether such act is likely to mislead a reasonable consumer acting reasonably under the circumstances (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]).

General Business Law § 350 prohibits false advertising. A plaintiff must demonstrate that the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 183-184 [1st Dept 2001]). Similarly, the test is whether the advertisement is likely to mislead a reasonable consumer acting reasonably under the circumstances (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]). The nonconclusory allegations of fact in the complaint and all reasonable inferences that can be drawn therefrom do not plead particularized facts of

deceptive advertising or conduct by any defendant. Accordingly, the eighth cause of action is dismissed for failure to state a cause of action.

The ninth cause of action is asserted against defendants Alex Pulatani, Tom Pulatani, and Lou Pulatani and is denominated as piercing the corporate veil. There is no independent cause of action for piercing the corporate veil (*245 E. 19 Realty LLC v 245 E. 19th St. Parking LLC*, 223 AD3d 604, 605 [1st Dept 2014], citing *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]). The ninth cause of action as asserted against defendants Alex Pulatani, Tom Pulatani, and Lou Pulatani is dismissed for failure to state a cause of action. The dismissal is without prejudice to proving facts which would support the piercing of the corporate veil in the underlying case.

The tenth cause of action is for breach of privacy. Civil Rights Law § 50 “makes it a misdemeanor to use a living person's name, portrait, or picture for advertising or trade purposes without having first obtained the written consent of such person, or if a minor of his or her parent or guardian” (*Messenger v Gruner + Jahr Print. & Publ.*, 94 NY2d 436, 441 [2000], quoting Civil Rights Law § 50 [internal quotations omitted]). Civil Rights Law § 51, as amended in 1921 adds the civil damages teeth and makes a violation of section 50 actionable in a civil suit (*see Arrington v New York Times Co.*, 55 NY2d 433, 438 [1982]). The nonconclusory allegations of fact in the complaint an all reasonable inferences that can be drawn therefrom do not plead particularized facts that any defendant used the plaintiffs name, portrait or picture for advertising or trade. Accordingly, the tenth cause of action is dismissed for failure to state a cause of action as to all defendants.

In sum, the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth cause of action are dismissed as against defendants Pulatani Builders, Inc, Pulatani Builders Group Corp., Alex Pulatani a/k/a Afrim Pulatani, Tom Pulatani, Lou Pulatani, and Margo Johnson pursuant to CPLR 3211 (a) (7) for failure to state cause of action.

Furthermore, the third, fifth, seventh, eighth and tenth cause of action are also dismissed as against defendant New York Contracting Group 1 Corp pursuant to CPLR 3211 (a) (7) for failure to state cause of action.

Defendants' CPLR 3212 Motion

Based on the forgoing, the defendants' motion for summary judgment applies solely against New York Contracting Group 1 Corp. on the first, second, fourth, and sixth cause of action. The first cause of action is for breach of contract, the second seeks a declaration that plaintiffs' contract with the defendants is not valid according to General Business Law §771(d). The fourth cause of action is for breach of warranty. The sixth cause of action seeks civil penalties against all the defendants for violations of many provisions of the General Business Law Article 36-A.

The defendants' evidentiary submission did not eliminate all material issues of regarding New York Contracting Group 1 Corp.'s entitlement to dismissal of the plaintiffs claims for breach of contract, breach of warranty, and for alleged violations of General Business Law §771. These issues remain for the trier of fact. The defendants' motion for summary judgment dismissing the causes of action asserted against it are denied. The denial is without regard of the sufficiency of the plaintiffs' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiffs' CPLR 3212 Cross-motion

By cross-motion filed on January 18, 2024, under motion sequence number six plaintiffs Andres Sole and Ine Leus sought an order pursuant to CPLR 3212 granting plaintiffs' summary judgment as to liability on plaintiff's first, second, and fifth causes of action. Pursuant to the Uniform Civil Term Rules of the Supreme Court, Kings County, the plaintiffs were required to make its motion for summary judgment no later than 60 days after the filing of the note of issue, unless they obtained leave of the court on good cause shown (Kings County Supreme Court Uniform Civil Term Rules, Part C, Rule 6; CPLR 3212 [a]; *Goldin v New York and Presbyterian Hosp.*, 112 AD3d 578, 579 [2d Dept 2013]). The plaintiffs did not seek leave of the Court on good cause shown to make a late motion for summary judgment. The motion is therefore denied as untimely.

CONCLUSION

The motion by defendants New York Contracting Group 1 Corp, Pulatani Builders, Inc, Pulatani Builders Group Corp., Alex Pulatani a/k/a Afrim Pulatani, Tom Pulatani, Lou Pulatani, and Margo Johnson for an order pursuant to CPLR 3211 (a) (1) and (a) (7) for failure to state a cause of action and pursuant to CPLR 3212 granting defendant summary judgment dismissing the complaint of Andres Sole and Ine Leus is granted in part and denied in part as follows:

The complaint is dismissed against Pulatani Builders Inc, Pulatani Builders Group Corp, Alex Pulatani, A/K/A Afrim Pulatani Tom Pulatani, Lou Pulatani and Margo Johnson for failure to state a cause of action.

As to defendant New York Contracting Group 1 Corp, the third, fifth, seventh, eighth and tenth cause of action are also dismissed as against defendant pursuant to CPLR 3211 (a) (7) for failure to state cause of action.

The defendants' motion for summary judgment as applied against New York Contracting Group 1 Corp. on the first, second, fourth, and sixth cause of action is denied.

The cross-motion by plaintiffs Andres Sole and Ine Leus for an order pursuant to CPLR 3212, granting plaintiffs' summary judgment as to liability on plaintiff's first, second, and fifth causes of action is denied as untimely.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.