

Skovera v Home Depot U.S.A, Inc.
2024 NY Slip Op 35091(U)
August 13, 2024
Supreme Court, Westchester County
Docket Number: Index No. 71429/2023
Judge: Nancy Quinn Koba
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
ELIZABETH SKOVERA and
ERIN BALLARD,

Plaintiffs,

DECISION AND ORDER

Index No. 71429/2023

Motion Seq, No. 1

-against -

HOME DEPOT U.S.A, INC. and
UNIQUE CHOICE,

Defendants.

-----X
QUINN KOBA, J.

By notice of motion (the "Motion"), defendant, Home Depot U.S.A., Inc. ("Home Depot"), seeks an order, pursuant to CPLR 3211(a)(7), dismissing plaintiffs' second, third, and fourth causes of action contained in the verified complaint, and for such other and further relief as this Court deems just and proper. Plaintiffs oppose the Motion.

The following documents have been considered on the Motion:

<u>PAPERS</u>	<u>NYSCEF DOC. NO.</u>
Notice of motion, Memorandum of law in support ¹ and attachments RJI	14-16
Affirmation in opposition	20
Reply Affirmation	26

¹This is actually an attorney affirmation in support of the Motion.

Upon the foregoing, the Motion is determined as follows:

This action arises from an alleged breach of a home renovation contract entered into by plaintiffs and Home Depot in or around late April of 2017. Plaintiffs commenced this action on or about November 28, 2023 by filing a summons and complaint.² Therein, plaintiffs seek to recover damages for causes of action sounding in breach of contract (first), breach of express warranty (second), breach of implied warranty (third), fraud (Home Depot) (fourth), and fraud (Unique Choice) (fifth). Plaintiffs also seek punitive damages on the fourth and fifth causes of action. Defendants were duly served with a copy of the commencement papers through the New York Secretary of State. Home Depot now brings this pre-answer motion to dismiss.

As a preliminary matter, the Court observes that all of the affirmations submitted on the Motion do not contain a certificate of compliance regarding length and word count as required by the Rules for New York State Trial Courts that went into effect on February 1, 2021 (see 22 NYCRR § 202.8-b). Although these omissions will be overlooked in this instance, counsel are advised that compliance with this rule is expected for all future motions.

The Court further observes that, in violation of Section III(A)(6) of the undersigned's individual part rules, Home Depot grouped multiple exhibits together with the affirmation in support. Counsel is advised to comply with the undersigned's individual part rules going forward.

CPLR 3211(a)(7) standard

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] 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]; see also *Oluwo v Sutton*, 206 AD3d 750 [2d Dept 2022]). "Accepting the allegations as true, [the Court's] sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Polonetsky v Better Home Depot*, 97 NY2d 46, 54 [2001] [internal quotation marks and citation omitted]; *Godino v Premier Salons, Ltd.*, 140 AD3d 1119 [2d Dept 2016]). Moreover, a plaintiff opposing a CPLR 3211 (a)

²Although referred to in the complaint as Exhibit A, a copy of the subject contract was not filed with the commencement papers.

(7) dismissal motion may submit evidence to remedy defects in an inartfully drafted but potentially meritorious complaint (internal citation omitted). Generally, the complaint need only contain '[s]tatements . . . sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action (CPLR 3013; see *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 125, 884 NYS2d 94 [2009], *affd* 16 NY3d 775, 944 NE2d 1135, 919 NYS2d 496 [2011])" *Detringo v South Is. Family Med., LLC*, 158 AD3d 609,609 [2d Dept 2018]).

Breach of express and implied warranties

"[N]o warranty attaches to the performance of a service [i]f the service is performed negligently, the cause of action accruing is for that negligence. Likewise, if it constitutes a breach of contract, the action is for that breach (internal quotation marks and citations omitted" (*Town of Poughkeepsie v Espie*, 41 AD3d 701, 706 [2d Dept 2007]). Here, the second cause of action is predicated on a breach of express warranty pertaining to the performance of the contractual services for which no such warranty lies. Accordingly, the second cause of action - breach of express warranty - fails to state a cause of action.

Next, the Home Depot argues that the third cause of action - breach of implied warranty - is time-barred. "A cause of action alleging breach of warranty is governed by a four-year statute of limitations (internal quotation marks and citations omitted). Generally, a breach of warranty action accrues when tender of delivery is made (internal quotation marks and citations omitted) (*Coakley v Regal Cinemas, Inc.*, 188 A.D.3d 796 799 [2d Dept 2020]).

Here, the roofing and siding materials for the home renovation project were delivered to plaintiffs' residence throughout 2017. Thus . . . any breach of an implied warranty due to defective goods would have ordinarily expired no later than August 22, 2021.³ However, due to the COVID-19 pandemic, then-Governor Andrew Cuomo issued Executive Order No. 202.8 which suspended the running of civil statutes of limitations and various other time periods that affected the litigation process. This directive, as extended, remained in effect from March 20, 2020 until November 3, 2020. Thus, plaintiffs' time to commence an action for breach of warranty due to defective goods was extended until no later than April 22, 2022. Further, although plaintiffs and Home Depot communicated

³This is the latest date in the complaint in which plaintiffs allege materials (siding) were delivered to their residence.

subsequent thereto and throughout 2019, the said communications as outlined in the complaint pertained to the quality of the services performed for which no breach of implied warranty cause of action lies (see *Town of Poughkeepsie v Espie, supra*) Thus, the third cause of action is time-barred as this action was commenced on November 28, 2023.

Fraud

" 'The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation . . . and damages' (*Eva Chen Fine Jewelry, Inc. v. Recovery Racing IX, LLC*, 222 A.D.3d 840,842 [2d Dept 2023])" (*Nieves-Schein v Permitech, Inc.*, 2024 NY Slip Op 03179, 228 AD3d 767[2d Dept, June 12, 2024]).

"A cause of action alleging fraud must be pleaded with specificity (see CPLR 3016[b]; *Brualdi v IBERIA, Lineas Aereas de España, S.A.*, 79 AD3d 959, 960-961 [2010])" (*Eva Chen Fine Jewelry, Inc. v. Recovery Racing IX, LLC*, 222 AD3d at 843).

Here, plaintiffs did not plead fraud with the requisite specificity, as the complaint did not identify any specific material misrepresentation of fact, the person or entity who made such alleged misrepresentation, or any alleged knowledge of any party who made the misrepresentation of its falsity (*id.*).

All other arguments raised, and evidence submitted, on the Motion have been considered, notwithstanding the specific absence of reference thereto.

Accordingly, it is hereby

ORDERED that defendant, HOME DEPOT U.S.A, INC.'s motion to dismiss the second, third, and fourth causes of action in the complaint is granted and the said causes of action are severed from the remaining causes of action, which shall continue; and it is further

ORDERED that all parties shall appear **in person** for a Preliminary Conference in Courtroom 1602, on September 13, 2024, 9:30 a.m.

The foregoing constitutes the order of this Court.

Dated: White Plains, New York
August 13, 2024

ENTER:



HON. NANCY QUINN KOBA, J.S.C.

TO ALL COUNSEL VIA NYSCEF