

Bellomo v Howard W. Weeden, PLS, PC
2024 NY Slip Op 35113(U)
October 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 61394/2022
Judge: Thomas Quiñones
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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 – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

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PAOLO BELLOMO and VELOUSE ALEXIS,

Plaintiff(s)

-against-

HOWARD W. WEEDEN, PLS, PC;
HOWARD W. WEEDEN and
WESTCHESTER MODULAR
HOMES CONSTRUCTION CORP.,

Defendant(s).

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DECISION AND ORDER

Index No. 61394/2022

Motion Sequence No. 1, 2

The following papers filed to the New York State Court Electronic Filing System (NYSCEF) as NYSCEF Doc. 44-94 were read and considered on (i) Motion Seq. No. 1 filed by Defendant, WESTCHESTER MODULAR HOMES CONSTRUCTION CORP. for summary judgment pursuant to CPLR § 3212; and (ii) Motion Seq. No. 2 filed by Defendants, HOWARD W. WEEDEN, PLS, PC, and HOWARD W. WEEDEN, Individually for summary judgment pursuant to CPLR § 3212.

Upon the foregoing papers, the motion is determined as follows:

Plaintiffs, Paolo Bellomo and Velouse Alexis ("Plaintiffs"), commenced this action against Defendants by the filing of a Summons and Verified Complaint on June 8, 2022. The Complaint alleges three causes of action against Defendants, HOWARD W. WEEDEN, PLS, PC, and HOWARD W. WEEDEN, individually (hereinafter, "Weeden Defendants") sounding in breach of contract, negligence, and professional malpractice. The Complaint further alleges one cause of action against WESTCHESTER MODULAR HOMES CONSTRUCTION CORP. (hereinafter, "Westchester Modular") for breach of contract.

By way of background, Plaintiffs are the owners of the subject property located at 45 Stone Cabin Road, New Rochelle, New York. Prior to the closing of title to the subject property, and at the request of Plaintiff's title insurance company, the Weeden Defendants prepared and certified the survey of the subject property to Plaintiffs and their title company, First American Title Insurance Company. Plaintiffs purchased the subject property on December 14, 2017. On April 6, 2019, Plaintiffs entered into a contract (the "Contract") with Westchester Modular for, inter alia, the

construction of "a dwelling house on the [Premises]". Westchester Modular contends that it contacted Plaintiffs, who advised that a recent survey was prepared by the Weeden Defendants and provide that survey to Westchester Modular. On April 8, 2019, Westchester Modular entered into an Independent Contractor Agreement (the "IC Agreement") with Defendant, Howard W. Weeden, PLS, PC. Westchester Modular constructed the house on the property, within which Plaintiffs have been residing since January 2021.

On or about February 15, 2021, the Weeden Defendants provided a final survey showing the home was in compliance with the City of New Rochelle's 30-foot front yard setback requirement. Later in 2021, Plaintiffs were informed that the front yard was not set back 30 feet but was in fact set back approximately 22.7 feet. Plaintiffs alleged that they sustained financial harm as a result of the rear setback error, including incurring additional expenses associated with the delay, obtaining a temporary certificate of occupancy and variance, as well as \$20,000.00 in diminution of value resulting from the reduction in rear yard space. (NYSCEF Doc. 83 ¶25).

As to procedural posture of this case, pleadings were filed, answers interposed, discovery has been certified as complete, and Note of Issue was filed on February 14, 2024. Thus, this matter is ripe for dispositive motions.

Motion Seq. No. 1 [Westchester Modular]:

Westchester Modular filed a motion for summary judgment asserting the following contentions. First, counsel contends that the Plaintiffs-Westchester Modular Contract did not require Westchester Modular to provide an accurate survey to Plaintiffs; rather, Westchester Modular was provided and relied upon the Weeden Defendants' survey. Second, counsel contend that Westchester Modular entered into an Independent Contractor Agreement (the "IC Agreement") with Defendant, Howard W. Weeden, PLS, PC which included an indemnification provision whereby Howard W. Weeden, PLS, PC is contractually obligated to indemnify Westchester Modular for any such claims that arise. Based on the foregoing, Westchester Modular argues that there are no material issues of fact that preclude the Court from dismissing Plaintiffs' breach of contract cause of action as against Westchester Modular, dismissing the Weeden Defendants' indemnification cause of action as against Westchester Modular, and granting Westchester Modular's crossclaim for contractual indemnification in its entirety.

Plaintiffs' opposition asserts the following main arguments as to Westchester Modular. Plaintiffs argue that the Court should deny Westchester Modular's motion as directed to Plaintiffs because it is based upon Westchester Modular's "misconception" that it had no obligation to provide an accurate survey to Plaintiffs. Counsel contends that the contract at issue expressly provides that Westchester Modular would deliver four surveys to Plaintiffs over the course of fulfilling its obligations as the general contractor and builder of record. Moreover, the record includes numerous documents — many of which are part of the contract's referenced "plans and specifications" — that

highlight that Westchester Modular was responsible for site planning and foundation building, among many other duties. Simply stated, Plaintiffs contend that (i) Defendant Westchester Modular failed to comply with the terms of the Contract when it constructed a house that violated the applicable zoning code, such house could not be issued a certificate of occupancy and was not fit for “dwelling” purposes as called for by the Contract, and (ii) Defendant Westchester Modular breached its express obligation to provide several surveys and related services to Plaintiffs by delivering incorrect surveys and services based thereupon, which failures caused substantial financial harm to Plaintiffs.

Motion Seq. No. 2 [Weeden Defendants]:

The Weeden Defendants filed a motion for summary judgment asserting the following contentions. First, counsel contends Plaintiffs’ title company requested a survey, and thus there is no contract privity between Plaintiff and the Weeden Defendants to prepare the 2017 survey. Notwithstanding, counsel states that Plaintiffs secured title insurance for the purchase of the property through First American Title Insurance Company, which insured the accuracy of the 2017 survey. Second, counsel argues that Plaintiff failed to obtain their own survey of the property prior to its purchase and failed to have anyone investigate the feasibility of the contemplated renovations prior to purchasing the property. As a result of the contemplated renovations, Plaintiffs were advised that they would need to seek variances from the City of New Rochelle for the purposes of constructing the renovations, and the City of New Rochelle Resolution dated June 12, 2018 granted certain variance approvals (*see*, NYSCEF Doc. 67). Third, counsel contends that, upon securing Westchester Modular to erect the house on the property, Plaintiffs did not hire the Weeden Defendants to prepare a topographical survey; rather, they only referred Westchester Modular to the existing 2017 survey. On April 8, 2019 Westchester Modular hired Defendant WEEDEN PLS, PC to prepare a topographic survey of the property for the purpose of erecting a house thereon, same was prepared by WEEDEN PLS, PC (the “September 2019 Survey”), after which Westchester Modular erected the house on the property which was completed in January 2021 and Plaintiffs have resided therein.

Based on the foregoing, the WEEDEN DEFENDANTS argue that Plaintiffs’ first cause of action, although framed as “breach of contract,” is subject to the 3-year statute of limitations as set forth in CPLR § 214(6) for professional malpractice claims. Counsel argues that Plaintiffs’ first cause of action accrued when the WEEDEN DEFENDANTS completed the November 2017 Survey on November 9, 2017, not when the alleged inaccuracies were discovered. Thus, the 3-year statute of limitations for professional malpractice claims, predicated upon the November 2017 Survey, expired on November 9, 2020. Since the instant action was commenced on June 8, 2022 (*see*, NYSCEF Doc. 1, 2), the first cause of action, based wholly upon alleged inaccuracies contained in the November 2017 Survey, is time-barred. Counsel adds that the “continuous treatment” or, in this case, the “continuous representation” doctrine is inapplicable since there was no agreement for continuous services from the WEEDEN DEFENDANTS.

Plaintiffs asserted the following main argument in opposition as to the WEEDEN DEFENDANTS. Plaintiff argues that the Weeden Defendants' motion for partial summary judgment should be denied in its entirety. Plaintiffs' first cause of action was timely filed as the continuous representation doctrine applies in this matter, based on the Weeden Defendants' contained survey work on the property over time. As such, the Weeden Defendants are not entitled to partial summary judgment on the grounds that Plaintiffs' first cause of action is time-barred.

All other arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

Decision:

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). In applying the aforementioned legal standard of review, it is hereby

ORDERED that, as for Motion Sequence No. 1, the summary judgment motion filed by WESTCHESTER MODULAR is GRANTED TO THE LIMITED EXTENT that WESTCHESTER MODULAR is entitled to summary judgment thereby dismissing the Weeden Defendants' indemnification cause of action as against Westchester Modular and granting Westchester Modular's crossclaim for contractual indemnification in its entirety.

The IC Agreement between Westchester Modular and the HOWARD W. WEEDEN, PLS, PC includes an indemnification provision whereby HOWARD W. WEEDEN, PLS, in pertinent part, agreed to indemnify and hold harmless "WMHCC (referencing WESTCHESTER MODULAR) and its officers, directors, agents and employees from any and all claims, demands, causes of actions, actions, proceedings, liabilities, damages, losses, costs and expenses, including, without limitation, reasonable attorneys' fees of every kind and nature whatsoever arising out of or in connection with Independent Contractor's operations performed under this Agreement or anyone employed directly or indirectly by the Independent Contractor." (NYSCEF Doc. 76, Indemnification Clause). It is also noteworthy that the WEEDEN DEFENDANTS did

not file opposition to WESTCHESTER MODULAR's motion and WEEDEN DEFENDANTS' motion for summary judgment requested relief limited to Plaintiffs (*see*, NYSCEF Doc. 60, page 13 of 15, "Wherefore" Clause). It is further

ORDERED that, as for Motion Sequence No. 1, the summary judgment motion filed by WESTCHESTER MODULAR as it relates to Plaintiffs' breach of contract cause of action as against Westchester Modular is DENIED.

The motion record raises issues of fact as to liability arising from the Plaintiffs-Westchester Modular Contract wherein Westchester Modular agreed, in pertinent part, "to build in a workmanlike manner, a dwelling house on the above described real estate, owned by Owner(s), and located at the address above; in accordance with plans and standard specifications signed by Contractor and Owner(s)..." wherein "Surveying" is further defined as "Updated Survey with TOPO, Steak Foundation, Foundation as built, and Final survey showing all above ground structures" was "Included" as part of the scope of work under the Plaintiffs-Westchester Modular Contract. (NYSCEF Doc. 74, pages A-B 00111, A-B 00116). It is further

ORDERED that, as for Motion Sequence No. 2, the summary judgment motion filed by the WEEDEN DEFENDANTS is DENIED.

WEEDEN DEFENDANTS's contention that it initially contracted with First American Title Insurance Company (and not Plaintiffs) is unavailing since the 2017 survey was certified to Plaintiffs as well as First American Title Insurance Company. Contrary to movant's contention, Plaintiffs' first cause of action is not time-barred based upon the applicable continuous representation doctrine (*see generally, Anderson v. Pinn*, 185 A.D.3d 534 [2d Dept. 2020]). Here, the WEEDEN DEFENDANTS provided the 2017 Survey, 2019 Survey, and 2021 Survey, all of which collectively constitute the WEEDEN DEFENDANTS' continuous representation in connection with Plaintiffs' acquisition and development of the subject property, commencing with the 2017 survey provided for the title closing phase through the 2021 as-built survey provided at the post-construction phase. Moreover, there are issues of fact related to the allege rear yard setback measurement inaccuracies in the 2017 survey, 2019 survey, and 2021 as-built survey prepared by the WEEDEN DEFENDANTS and any liability that arises therefrom to be resolved by a trier of fact. It is further

ORDERED that, the Judge's Part Clerk will issue a separate court notice scheduling a Pre-Trial Settlement Conference shortly.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 8, 2024
White Plains, New York

ENTER:



HON. THOMAS QUIÑONES, J.S.C.

TO: *Filed to NYSCEF*