

Shuhy v Pucha
2024 NY Slip Op 35260(U)
June 13, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 606145/2024
Judge: Christopher Modelewski
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SHORT FORM ORDER

Index 606145/2024SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY**PRESENT:**HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme CourtMOTION DATE: 05/10/2024 (001)
ADJ. DATE: 05/20/2024
Mot. Seq. #001-MOTD-----X
ROBERT SHUHY and ANNE MARIE SHUHY,

Plaintiffs,

- against -

MANUEL PUCHA, PUCHA'S CARPENTRY :
CORP. and PUCHA'S CARPENTRY CORP. :
d/b/a EH PUCHA'S BUILDERS,Defendants.
-----XCREEDON & GILL, P.C.
Attorneys for Plaintiffs
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Northport, New York 11768THE LAW OFFICE OF JOHN J. LEONARD
Attorneys for Defendants
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Upon the E-file document list numbered 6 to 11 read and considered on the motion by defendants for an order pursuant to CPLR 3211 (a) (7) dismissing the second, third, fifth, and sixth causes of action in plaintiffs' verified complaint and striking plaintiffs' demands for exemplary damages; it is

ORDERED that the motion by defendants for an order pursuant to CPLR 3211 (a) (7) dismissing the second, third, fifth, and sixth causes of action in plaintiffs' verified complaint and striking plaintiffs' demands for exemplary damages, is granted in part and denied in part, for the reasons set forth herein.

Plaintiff commenced this action against defendants on March 11, 2024, alleging six causes of action sounding in willful exaggeration of mechanic's lien pursuant to section 39-a of the Lien Law, negligence, unjust enrichment, breach of warranty/contract, fraud, and unlawful conversion. The claims asserted herein involve a construction project at plaintiffs' premises in East Hampton, New York. Defendants now move to dismiss the second, third, fifth, and sixth causes of action on the ground that the complaint is based upon a breach of contract and the other claims in the complaint are duplicative of the contractual claim.

In determining a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), 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" (*Matneja v Zito*, 163 AD3d 800, 801, 81 NYS3d 174 [2d Dept 2018]; see also *Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test of the sufficiency of a pleading is "whether it gives sufficient notice of the transaction, occurrences, or series

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of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments' ” (*Hampshire Prop. v BTA Bldg. and Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v Martinez*, 84 NY2d 83, 88, 638 NE2d 511, 614 NYS2d 972 [1994]; see also (*JPMorgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [its] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11,19, 799 NYS2d 170 [2005]). However, “conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts” (*Muka v Greene County*, 101 AD2d 965, 965, 477 NYS2d 444 [4th Dept 1984]; see also *DiMauro v Metropolitan Suburban Bus Auth.*, 105 AD2d 236, 483 NYS2d 383 [2d Dept 1984]; *Melito v Interboro Mut. Indem. Ins. Co.*, 73 AD2d 819, 423 NYS2d 742 [4th Dept 1979]; *Greschler v Greschler*, 71 AD2d 322, 422 NYS2d 718 [2d Dept 1979]).

An alleged breach of contract cannot be considered a tort “unless a legal duty independent of the contract itself has been violated” (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389, 521 NYS2d 653, 656 [1987]; see also *298 Humboldt, LLC v Torres*, 197 AD3d 1081, 153 NYS3d 507 [2d Dept 2021]; *Michael Davis Construction, Inc. v 129 Parsonage Lane, LLC*, 194 AD3d 805, 149 NYS3d 118 [2d Dept 2021]). This legal duty “must spring from circumstances extraneous to, and not constituting elements of, the contract” (see *Michael Davis Construction, Inc. v 129 Parsonage Lane, LLC*, 194 AD3d at 806-807; *298 Humboldt v Torres*, *supra*; see also *Rich v New York Cent. & Hudson Riv R. R. Co.*, 87 NY 382 [1882]; *Riffat v Continental Ins. Co.*, 104 AD2d 301, 478 NYS2d 635 [1st Dept 1984]). Moreover, “absent a duty of care, there is no breach, and without breach there can be no liability” for negligence (*Cadet v James B. Nutter & Co.*, 133 AD3d 561, 562, 19 NYS3d 307 [2d Dept 2015]; see also *Bellevue S. Assoc. v HRH Const. Corp.*, 78 NY2d 282, 293-294, 574 NYS2d 165 [1991]). Where a plaintiff is seeking the contractual benefit of its bargain, such cannot be obtained in a claim sounding in negligence (see *Michael Davis Construction, Inc. v 129 Parsonage Lane, LLC*, *supra*; *298 Humboldt v Torres*, *supra*).

Here, the complaint does not allege facts that give rise to a duty owed to the plaintiffs that is independent of the duty imposed by the agreement between the parties. Moreover, there are no allegations of either personal injury or property damage claimed by plaintiffs other than recovery of the benefit of their bargain under the terms of their agreement. Therefore, the second cause of action for negligence is dismissed (see *Michael Davis Construction, Inc. v 129 Parsonage Lane, LLC*, 194 AD3d at 806-807; *298 Humboldt, LLC v Torres*, *supra*).

The fifth cause of action for fraud is dismissed as duplicative of the breach of warranty/contract claim (see *Tanglewood Terrace at Smithtown Corp. v Up Rite Constr. of L.I. Corp.*, 206 AD3d 687, 688, 170 NYS3d 130 [2d Dept 2022]; *Michael Davis Construction, Inc. v 129 Parsonage Lane, LLC*, 194 AD3d at 807, 149 NYS3d 118 [2d Dept 2021])[fraud claim does not lie where it is premised upon breach of alleged contractual duties]; *298 Humboldt, LLC v Torres*, 197 AD3d 1081, 153 NYS3d 507 [2d Dept 2021])[fraudulent concealment claim dismissed as duplicative of breach of contract claim]; *Oceanview Assoc., LLC v HLS Bldrs. Corp.*, 184 AD3d 843, 845, 126 NYS3d 755 [2d Dept 2020]; *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951-952, 965 NYS3d 597 [2d Dept 2013]). Moreover, the allegations of fraud are vague and lack the specificity required (see *Citimortgage, Inc. v Bustamante*, 107 AD3d 752, 968 NYS2d 513 [2d Dept 2013]). As such, the allegations of the complaint do not state a fraud cause of action (see e.g. *Nerey v Greenpoint Mortg. Funding, Inc.*, 144 AD3d 646,

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40 NYS3d 510 [2d Dept 2016]; *Sforza v Health Ins. Plan of Greater New York, Inc.*, 210 AD2d 214, 619 NYS2d 734 [2d Dept 1994]; *Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 608 NYS2d 445 [1st Dept 1994]).

Plaintiffs' sixth cause of action for conversion is dismissed as duplicative of the breach of warranty/contract and unjust enrichment claims and furthermore, there are "no independent facts...alleged giving rise to tort liability" (see *Crestview SPV, LLC v Crestview Financial, LLC*, 217 AD3d 473, 474, 191 NYS3d 361 [1st Dept 2023]; see also *Canzona v Atanasio*, 118 AD3d 841, 988 NYS2d 637 [2d Dept 2014]).

Punitive damages are not available to plaintiffs in the absence of allegations of "egregious conduct" that are "part of a pattern directed at the public generally" (see *Matter of Part 60 Put-Back Litigations*, 36 NY3d 342, 360, 141 NYS3d 110 [2020]; see also *Dash Windows of L.I., Inc. v Bivona*, 216 AD3d 915, 916, 188 NYS3d 675 [2d Dept 2023]). There are no such allegations in plaintiffs' complaint that would entitle them to exemplary or punitive damages and thus, the demands for such damages are stricken (see *Michael Davis Construction, Inc. v 129 Parsonage Lane, LLC*, 194 AD3d at 807, 149 NYS3d 118 [2d Dept 2021]).

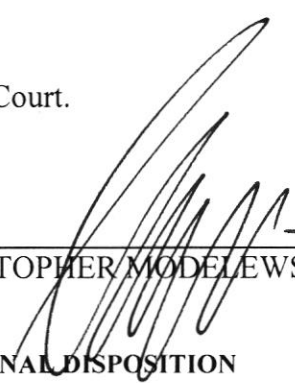
The third cause of action alleges a claim sounding in unjust enrichment. The elements of a cause of action for unjust enrichment are "(1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*GFRE, Inc. v U.S. Bank, N.A.*, 130 AD3d 569, 570, 13 NYS3d 452 [2d Dept 2015] quoting *Mobarak v Mowad*, 117 AD3d 998, 1001, 986 NYS2d 539 [2d Dept 2014]). "The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered" (*GFRE, Inc. v U.S. Bank, N.A.*, *supra* at 130 AD3d 570, quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, 334 NYS2d 388 [1972]). Unjust enrichment does not require the performance of any wrongful act by the one enriched as an element of the claim (see *Cruz v McAneney*, 31 AD3d 54, 59, 816 NYS2d 486, 491 [2d Dept 2006]). Here, plaintiffs allege they are "intended beneficiaries" of an agreement between the general contractor and the defendants and that the general contractor entered into this agreement with defendants on behalf of the plaintiffs. The existence of a valid agreement with respect to the same subject matter as the breach of warranty/contract claim generally would preclude a claim for unjust enrichment (see *CSI Group, LLP v Harper*, 153 AD3d 1314, 61 NYS3d 592 [2d Dept 2017]; *Weiss v Benetton U.S.A. Corp.*, 124 AD3d 633 [2d Dept 2015]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 [2009]; *Whitman Realty Group, Inc. v Galano*, 41 AD3d 590, 593 [2d Dept 2007]). However, no party has submitted a signed writing of unquestioned validity in this matter concerning the construction project. Thus, plaintiffs are not presently required to elect between a contract or quasi-contract remedy (see *Sforza v Health Ins. Plan of Greater N.Y.*, 210 AD2d 214, 619 NYS2d 734 [2d Dept 1994]). As such, at this time, the unjust enrichment claim is not subject to dismissal (see *Greenberg v Wiesel*, 186 AD3d 1336, 131 NYS3d 36 [2d Dept 2020]).

Accordingly, the motion by defendants is granted in part and denied in part.

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The foregoing constitutes the decision and Order of the Court.

Dated: June 13, 2024



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____ FINAL DISPOSITION X NON-FINAL DISPOSITION