

Macleod v Rare Retractable NY Inc.
2024 NY Slip Op 35667(U)
August 13, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 622067/2023
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 622067/2023

CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 06/27/2024SUBMIT DATE 07/18/2024

Mot. Seq. # 03 - Mot D

ALAN MACLEOD and SHANNON
MACLEOD,

Plaintiffs,

-against-

RARE RETRACTABLES NY INC. and SEDA
AYDINLI,

Defendants.

SHANNON MACLEOD, ESQ.*Attorneys for Plaintiff*975 Sunrise Highway
West Babylon, NY 11704**PETER L. BLODNICK, ESQ.***Attorneys for Defendants*2459 Ocean Avenue
Ronkonkoma, NY 11779

Upon the following papers read on this motion for summary judgment; e-filed on the NYSCEF system as documents 47 - 60, it is,

The plaintiffs seek an order (1) granting a default judgment against the defendants, (2) granting summary judgment against defendants pursuant to CPLR 3212, (3) dismissing defendants' counterclaims, (4) awarding maximum costs and fees to plaintiffs for defendants frivolous counterclaims and affirmative defenses, and (5) awarding plaintiffs statutory interest. The defendants oppose these applications in all respects.

Motion for Default and Dismissal of Defendants Counterclaims and Affirmative Defenses

Plaintiffs contend that they are entitled to default judgment against the defendants along with dismissal of defendants' counterclaims and affirmative defenses since defendants did not verify their answer or counterclaims. The Court notes that defendants filed their answer with cross claims on May 22, 2024, after this Court issued an Order dated February 29, 2024, ordering that the defendants file an answer to the amended complaint within twenty days of the entry of the order. While no entry of the order dated February 29, 2024 was ever filed, defendants timely filed their answer, albeit without verification. Following defendants filing of their answer on May 22, 2024, plaintiffs did not object to the answer and merely filed the instant motion on June 10, 2024. The plaintiffs acceptance

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of the answer, without objection, constituted a waiver of the late service and default. Furthermore, plaintiffs failure to object with due diligence to the lack of verification, as required by CPLR 3022, operated as a waiver of that defect. *Ligotti v. Wilson*, 287 A.D.2d 550, 551, 731 N.Y.S.2d 473 (2d Dept. 2001). Thus, plaintiffs' motion for default and for dismissal of defendants counterclaims and affirmative defenses for failure to provide verification is denied.

However, plaintiffs also argue for dismissal of defendants' counterclaims pursuant to CPLR 3211(a). To succeed on a motion to dismiss pursuant to CPLR 3211 for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting defendants every favorable inference which may be drawn from the pleading, defendants can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; *see also Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If 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 (*see Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the claim (*see Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the pleading as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the moving party has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the pleading (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636).

The Court concludes that, accepting as true the factual averments of the defendants' counterclaims and granting defendants every favorable inference which may be drawn from the pleading, the defendants have not pled causes of action cognizable at law as against plaintiffs since a lack of license as a home improvement contractor bars recovery in either contract or quantum meruit. *Millington v. Rapoport*, 98 A.D.2d 765, 469 N.Y.S.2d 787 (2d Dept. 1983). *See also Matter of Schwartz*, 74 A.D.2d 638, 425 N.Y.S.2d 41 (2d Dept. 1980); *George Piersa, Inc. V. Rosenthal*, 72 A.D.2d 593, 421 N.Y.S.2d 91 (2d Dept. 1979); *Segrete v. Zimmerman*, 67 A.D.2d 999, 413 N.Y.S.2d 732 (2d Dept. 1979); *Flax v. Hommel*, 40 A.D.3d 809, 835 N.Y.S.2d 735 (2d Dept. 2007). Section 563-3 of the Suffolk County Code states, "It is unlawful for any person, other than those exempt under the provisions of 563-4, to engage in any business in the County regulated by this

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chapter without obtaining a license therefor from the Office in accordance with and subject to the provisions of this chapter.” Therefore the plaintiffs’ motion to dismiss pursuant to CPLR 3211(a) is granted and the defendants’ counterclaims are dismissed.

Motion for Summary Judgment

CPLR §3212(b) states that a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission.” If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; *aff’d* 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

The proponent of a summary judgment motion 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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *aff’d*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

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The plaintiffs (buyers) commenced this action to recover \$60,562.00 which was paid to defendants (sellers) on a contract for a motorized retractable pergola at the plaintiffs' residence in Babylon, New York. It is uncontested that the plaintiffs paid a total of \$60,562.00 to defendants as a deposit for defendants to construct the retractable pergola over their existing deck. The parties entered into an agreement for installation of the pergola dated July 7, 2022 and signed by the plaintiffs on July 8, 2022. Pursuant to the contract, the defendants were to complete and finish all installation by the estimated date of September 30, 2022. According to plaintiffs, they removed their deck's railings and the staircase from the deck to the backyard in anticipation of the pergola's construction but defendants substantially delayed performing any work, despite their repeated requests. On April 18, 2023, plaintiffs sent defendants a letter requesting defendants to immediately begin work on the pergola with an assurance of a completion date of no later than May 31, 2023 as plaintiffs intended to host a graduation party and needed the pergola completed, or in the alternative, requesting a full refund of the \$60,562.00 which plaintiffs had thus far paid to defendants. On April 26, 2023, defendants sent a letter back to plaintiffs indicating that they wanted a project deadline of June 30, 2023, or if the project was not completed per the terms of the contract, the defendants would offer a full refund of the deposit. To date, the defendants have failed to build the pergola or refund plaintiffs' deposit and the plaintiffs allege that defendants are and were unlicensed to perform this project. The plaintiffs commenced this action on September 5, 2023 alleging multiple causes of action for misrepresentation and fraud, negligence, void contract, action for money had and received, breach of contract, and quantum meruit and unjust enrichment.

In opposition, the defendants argue that plaintiffs are not entitled to summary judgment as numerous triable issues of fact exist. Defendants submit the Affidavit of defendant Seda Aydinli wherein she states that due to a third-party delay, the completion date of the project needed to be adjusted. Defendant Aydinli also states that defendants were ready to arrange for the installation of the pergola in March or April of 2023, however, plaintiff was having issues with their new spa and wanted to move the date to the end of May 2023. Moreover, defendant states that she arranged for defendants to also pour the footings for the custom pergola, despite the fact that this was not part of the contract. After the footings were poured, plaintiffs texted defendant advising they were not happy with the footings since they were not flush with the existing deck. According to defendant, she attempted to assure plaintiffs that the project would be completed according to the contract and she argues that plaintiffs claims that no work has been performed is refuted by the written communications between the parties.

Based upon a review of the motion papers, the Court concludes that the plaintiffs have not established entitlement to judgment as a matter of law for the causes of action sounding in misrepresentation and fraud, negligence, void contract, breach of contract, and quantum meruit and unjust enrichment. There are material and triable issues of fact presented, including but not limited to, which party effectively breached the contract, whether said contract is void or unenforceable, whether the pouring of fittings at the plaintiffs' home constituted performance under the contract, and whether plaintiffs should have conducted their own due diligence regarding licensure of the

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defendants business. Even assuming, arguendo that plaintiffs sustained their initial burden on these causes of action, the defendants have proffered sufficient facts to necessitate a trial.

Notwithstanding, the plaintiffs have met their prima facie burden with regard to the cause of action for money had and received. The defendants were then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition, the defendants agreed that plaintiffs paid a total of \$60,562.00 to defendants as a deposit for defendants to construct the retractable pergola over their existing deck, yet that work was never completed. Moreover, defendants failed to show they did not benefit from the receipt of the money. Thus, defendants failed to raise triable issues of fact as to that cause of action.

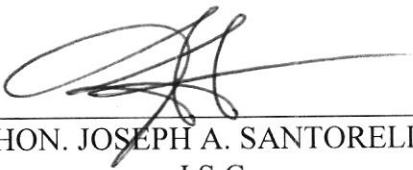
ORDERED that the motion by plaintiffs' for summary judgment is granted in part and denied in part, and it is further

ORDERED that the Clerk of the County of Suffolk is hereby directed to enter a judgment in favor of the plaintiffs against the defendants in the amount of \$60,562.00, plus interest, costs and disbursements, *Litvinoff v. Wright*, 150 A.D.3d 714, 54 N.Y.S.3d 22 (2d Dept. 2017), and it is further

In light of the granting of summary judgment for plaintiffs on the cause of action for money had and received, the plaintiffs' remaining causes of action are moot and plaintiffs' remaining contentions are without merit.

The foregoing shall constitute the decision and Order of this Court.

Dated: August 13, 2024


HON. JOSEPH A. SANTORELLI
J.S.C.

☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION