Shapiro v Cave
2025 NY Slip Op 35637(U)
January 16, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 607827/2024
Judge: Joseph C. Pastoressa
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SUPREME COURT OF THE STATE OF NEW YORK
IAS/TRIAL PART 34 - SUFFOLK COUNTY

PRESENT: HON. JOSEPH C. PASTORESSA

DECISION AND ORDER

--X
KEITH SHAPIRO,

Plaintiff,

- against –

MICHAEL CAVE, WILLIAM DOLLARD, WILLIAM DOLLARD, JR., BRIAN DOLLARD, PROPERTY REHAB I, LLC, PORTRIDGE CONSTRUCTION CORP., STRONGARM VENTURES, and JOHN AND JANE DOES 1-10,

Defendants.
--X

Index No.: 607827/2024

Mot. Seq. 001: MotD

Robert J. Del Col, Esq., Hauppauge, NY, for plaintiffs

Pinks & White, Hauppauge, NY, for defendants

I. Facts and procedural history

This action has its genesis in a May 5, 2023 contract of sale between plaintiff, Keith Shapiro, and defendant Property Rehab I, LLC (PropRe). In that contract, PropRe sold Shapiro a newly-constructed house located at 106 Parkside Avenue in Miller Place, New York. Plaintiff alleges, inter alia, that defendants, all of whom were involved in construction of the house, delivered a house that (1) was so full of defects that it has not obtained a certificate of occupancy, (2) lacked many promised features, (3) is not code-compliant, and (4) was built with subpar building materials. Plaintiff interposed claims for breach of the covenant of good faith and fair dealing, fraud and fraud in the inducement, disgorgement, breaches of the implied warranty of fitness for a particular purpose and the housing merchant implied warranty (General Business Law [GBL] article 36-B), and breach of contract.

Defendants now seek to dismiss the complaint under CPLR 3014, 3024, 3211 (a) (1) and (7), and 3016. Plaintiffs oppose the motion.

II. Analysis

A. CPLR 3014 and 3024 (a)

CPLR 3014 states, as pertinent here, that "[e]very pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation." CPLR 3024 (a) states that "[i]f a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response[,] he may move for a more definite statement."

Defendants contend that the complaint does not comply with those statutes because it "pleads in a narrative fashion." The Court agrees that many of the complaint's paragraphs are too verbose and contain numerous allegations. The complaint must contain shorter, more concise paragraphs that contain a single allegation or, when appropriate, multiple allegations *only if* they may be practicably responded to when joined in a single paragraph. Accordingly, so much of the motion as seeks, essentially, a more definite statement is granted to the extent described above, and is otherwise denied.

B. CPLR 3024 (b)

CPLR 3024 (b) states that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." This means that scandalous or prejudicial material may be stricken from a complaint only if it is irrelevant (*see LG 101 Doe v Wos*, 216 AD3d 1393; *New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391).

Here, the allegations in the complaint related to other legal proceedings against any defendant are not necessary to plaintiff's claims in this proceeding and, therefore, are stricken (*see Ganieva v Black*, 216 AD3d 424). For the same reasons, the complaints from other legal proceedings against any defendant that are attached to the complaint in this action are stricken.

Defendants otherwise point to paragraphs 2, 7, 10, 13, 14, 15, 16, and 17 as being improper under section 3024 (b).[1] Paragraphs 13, 16, and 17 are not irrelevantly scandalous or prejudicial. In paragraph 1, the phrase "clown show" shall be stricken. In paragraph 2, the phrase "self-proclaimed thug lurked in the shadows" shall be stricken. In paragraph 7, the phrase "fly-by-night, disreputable shill and con artist," and the references to the Northfork Gateway project, shall be stricken. In paragraph 10, the phrase "has demonstrated a unique ability to make a disaster out of everything he touches, unless it means grifting innocent citizens, at this he is quite accomplished" shall be stricken. In paragraph 14, the references to a good cop/bad cop routine, and the phrase "steal millions," shall be stricken. All of paragraph 15 shall be stricken.

In addition, the complaint contains certain other verbiage that is manifestly improper for a legal pleading. Plaintiffs are ordered to remove it.

C. CPLR 3211 (a) (1) and (7)

CPLR 3211 (a) (1) allows a defendant to seek dismissal of the complaint when "a defense is founded upon documentary evidence." Dismissal on this ground "is warranted only if the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Krasnow v Catania*, 219 AD3d 1324, 1325 [quotation marks and citations omitted]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314). Affidavits, deposition testimony, and letters do not constitute documentary evidence (*Davis v Henry*, 212 AD3d 597; *J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652), as they can be challenged by other evidence (*Russo v Crisona*, 219 AD3d 920; *Phillips v Taco Bell Corp.*, 152 AD3d 806). Instead, "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Davis*, 212 AD3d at 597 [quotation marks, citations, and alterations omitted]; *see Varricchio v Big Bros. Big Sisters of Am., Inc.*, 220 AD3d 905).

CPLR 3211 (a) (7) allows a defendant to seek dismissal of the complaint for failure to state a cause of action. "When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal con-

[1] To the extent that defendants' argument is directed toward other portions of the complaint, defendants failed to specifically allege which other words, phrases, clauses, sentences, or paragraphs are improper.

struction, accept the allegations as true[,] and provide plaintiffs with the benefit of every favorable inference" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [quotation marks and citations omitted]; *see Sunyoung Jung v Reiner & Kaiser Assoc.*, 220 AD3d 643). However, the Court is not required to accept bare legal conclusions or facts that are utterly contradicted by documentary evidence (*Chic Realty 712, LLC v GSA Holding Corp.*, 220 AD3d 914; *Browne v Lyft, Inc.*, 219 AD3d 445). Whether a plaintiff can ultimately prevail is irrelevant (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30; *Grabowski v Orange County*, 219 AD3d 1314). "Although inartfully pleaded, a claim should not be dismissed when the facts stated are sufficient to make out a cause of action" (*Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662, 664). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint" for failure to state a cause of action, "the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*BT Holdings, LLC v Village of Chester*, 189 AD3d 754, 759 [quotation marks and citations omitted], *lv denied* 36 NY3d 912, 144 NYS3d 680 [2021]; *see Whelan v Cuomo*, 220 AD3d 979).

1. Breach of the covenant of good faith and fair dealing

All contracts contain an implied covenant of good faith and fair dealing, which "embraces a pledge that neither party shall do anything [that] shall have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Singh v City of New York*, 40 NY3d 138, 145-146 [quotation marks and citations omitted], *rearg denied* 40 NY3d 975; *see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144). In other words, parties to a contract must perform their obligations in a reasonable manner in accordance with "any promises [that] a reasonable person in the position of the promisee would be justified in understanding were included at the time the contract was made" (*Cordero v Transamerica Annuity Serv. Corp.*, 39 NY3d 399, 409 [quotation marks and citations omitted]; *see Cruz v Cruz*, 213 AD3d 805). However, no obligation can be implied if it is inconsistent with the contract's plain terms (*Singh*, 40 NY3d 138; *P.S. Fin., LLC v Eureka Woodworks, Inc.*, 214 AD3d 1).

Although a claim for breach of the implied covenant of good faith and fair dealing ordinarily requires privity (*Misamore v Godfrey*, 201 AD3d 474; *Coleman v Kirby*, 201

AD3d 402), here, the complaint contains veil-piercing allegations against all of the defendants (Complaint at ¶¶ 7, 8, 13, 17; *see Bibbo v Arvanitakis*, 145 AD3d 657; *Emposimato v CIFC Acquisition Corp.*, 89 AD3d 418). Defendants do not specifically challenge those veil-piercing allegations. Thus, contrary to defendants' argument, the lack of privity is not a barrier to this claim.

To the extent that this claim is duplicative of the breach of contract claim, it must be dismissed (*e.g. Astor Ben Sasha LLC v HFZ 235 W. 75th St. Owner LLC*, 215 AD3d 515). At this juncture, though, the duplicity doctrine applies only to PropRe, the sole signatory to the contract (*see Ambase Corp. v 111 W. 57th Sponsor LLC*, 221 AD3d 521; *see also Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288).[2] Given the allegations against PropRe's principals, they cannot avail themselves of the duplicity defense either (*see Ambase Corp.*, 221 AD3d 521; *see also Richbell Info. Servs.*, 309 AD2d 288).

In any event, not all of plaintiffs' allegations are duplicative of their contract claim. Plaintiffs allege, inter alia, that defendants did not receive needed approval from the Town of Brookhaven Highway Department, failed to build the house in accordance with the specifications filed with the Town of Brookhaven, failed to install appliances, and misappropriated money paid to them to procure certain features that they did not, in fact, procure (including plumbing fixtures and sod). These allegations, which are distinct from PropRe's contractual obligations as delineated in the contract (*see F&R Goldfish Corp. v Furleiter*, 210 AD3d 643; *A.D.E. Sys., Inc. v Quietside Corp.*, 188 AD3d 762), are sufficient to plead a breach of the covenant of good faith and fair dealing.

2. Breach of contract

Defendants' sole argument directed to the breach of contract claim is the lack of privity as to all defendants except for PropRe.[3] For the reasons explained above, this argument is not persuasive.

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[2] This is not inconsistent with the Court's earlier analysis of the complaint's veil-piercing allegations. Plaintiffs may plead inconsistently and in the alternative (CPLR 3014), and the veil-piercing allegations may or may not be meritorious (*see Jones Lang Lasalle Brokerage, Inc. v Epix Entertainment LLC*, 61 Misc 3d 1226 [A]; *Assured Guar. Corp. v EMC Mortg., LLC*, 39 Misc 3d 1207 [A]).

[3] Although defendants make certain arguments based on a merger clause and paragraph 28 of the contract, these arguments are directed only toward the claim for fraud and fraudulent inducement.

3. Fraud and fraudulent inducement

Defendants present several arguments directed toward the claim for fraud and fraudulent inducement. Initially, to the extent that it is duplicative of the claim for breach of contract, this claim must be dismissed (*e.g. Toobian v Toobian*, 209 AD3d 907). However, as explained above, this defense applies only to PropRe. Also as explained above, not all of plaintiff's allegations are duplicative (*see Scarola Zubatov Schaffzin PLLC v Dynamic Credit Partners, LLC*, 210 AD3d 605; *Tecchia v Bellati*, 203 AD3d 496).

Although group pleading does not satisfy the particularity requirements of CPLR 3016 (*RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678; *Jonas v National Life Ins. Co.*, 147 AD3d 610), this claim does not depend entirely on group pleading. The complaint contains specific allegations of fraud against specific defendants. Additionally, the complaint, which provides specific examples of defendants' allegedly shoddy work, clearly alleges damages due to defendants' allegedly fraudulent conduct. Thus, these arguments lack force.

Although misrepresentations of future expectations generally may not form the basis of a fraud claim (*e.g. Cimen v HQ Capital Real Estate L.P.*, 227 AD3d 587), the complaint here sufficiently alleges more. It alleges that defendants, as the construction project continued, consistently made misrepresentations of present facts to plaintiffs (*see IS Chrystie Mgt. LLC v ADP, LLC*, 205 AD3d 418), which misrepresentations are specifically pleaded.

Defendants also posit that this claim is barred by documentary evidence, to wit, the contract. Despite defendants' argument to the contrary, it is black-letter law that a general merger clause does not preclude a fraud claim (*International Bus. Machs. Corp. v GlobalFoundries US Inc.*, 204 AD3d 441; *Remediation Capital Funding LLC v Noto*, 147 AD3d 469). Defendants also rely on paragraph 28 of the contract, which states:

> Acceptance of the deed at the closing of title constitutes full compliance with and discharge of the Seller in performance of all the terms and conditions of this agreement and a waiver of any and all claims for defective performance and/or non-performance on Sellers [sic] part except as to Paragraph 9, 15, 17, 27, 29, 31, 33 and shall survive delivery of the deed.

As noted above, though, plaintiffs' claims are not entirely based on the contract between them and PropRe. And for the reasons stated above, at this procedural juncture, the non-contracting defendants cannot rely on paragraph 28. In any event, by its plain terms, paragraph 28 only insulates PropRe, the seller. Defendants also concede that under paragraph 28, "[t]he only surviving claims . . . would then potentially be any punch list items and warranty claims."

4. Disgorgement

Plaintiffs do not contest defendants' argument that they are not required to be licensed home improvement contractors under Suffolk County Administrative Code chapter 563, article II. Plaintiffs do not submit any argument directed toward preservation of their disgorgement claim. Thus, this claim is dismissed.

5. Breach of warranty

Defendants claim that they cannot be liable for breach of warranty because plaintiffs never provided them with written notice of any defects. Paragraph 57 of the complaint pleads that plaintiffs submitted a punch list to Larry Davis, a partner in PropRe.

Defendants rely on a limited warranty attached to the contract (GBL § 777-b) with a more restrictive notice provision, under which the notice allegedly provided by plaintiff would be insufficient. But the existence of a limited warranty is inconsistent with paragraph 29 of the contract, which states that "[t]he Housing Merchant Implied Warranty of the New York State General Business Law will apply to this agreement" (*see* GBL § 777-a [stating that "(a) housing merchant implied warranty shall mean" the warranty delineated in that statute]) and that "[t]he Seller makes no other warranties, express or implied, in connection with this agreement or the home, and all such other warranties are excluded." Given the contract's express language that the housing merchant implied warranty applies, and not the annexed limited warranty, this argument lacks force.[4] The Court cannot reconcile this contractual ambiguity at this procedural juncture (*see Upfront Megatainment, Inc. v Thiam*, 215 AD3d 576; *Unicorn Constr. Enters., Inc. v City of New York*, 166 AD3d 479), and the notice allegedly provided by plaintiff

[4] The limited warranty does not contain a "notwithstanding any other provision" clause (*cf. CNH Diversified Opportunities Master Account, L.P. v Cleveland Unlimited, Inc.*, 36 NY3d 1, *rearg denied* 36 NY3d 1043).

complies with the housing merchant implied warranty (GBL § 777-a [4] [a]).[5] Thus, this argument is not persuasive.

Defendants' lack of privity argument lacks merit for the reasons explained above.

III. Conclusion

Within 30 days of the date that this order is uploaded onto NYSCEF, plaintiff shall upload onto NYSCEF an amended complaint that complies with this order. The amended complaint shall be deemed served upon defendants as of the date that it is uploaded onto NYSCEF. Defendants shall answer the complaint or file a motion that extends their time to answer the complaint within 21 days of service of the amended complaint.

If defendants believe that the amended complaint still does not comply with CPLR 3014 and/or 3024, and move for any further relief based on either or both of those statutes, then the motion shall clearly set forth, seriatim and with specificity, the paragraph number for each objected word, phrase, clause, or sentence, and shall provide the individual basis for each objection. Any response by plaintiff shall be in the same format.

This shall constitute the decision and order of the Court.

Dated: JANUARY 16, 2025

Hon. Joseph C. Pastoressa, J.S.C.

Papers considered: NYSCEF documents 7 through 33

[5] The Court expresses no opinion on whether the limited warranty as written complies with GBL § 777-b or is otherwise valid.