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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3

NASSAU COUNTY

YUNILL AN and KYONG AN,

Plaintiffs,

-against-

NORTH HILLS HOLDING CO II LLC, CHATHAM DEVELOPMENT COMPANY, and CHATHAM AT NORTH HILLS HOMEOWNERS ASSOCIATION, INC.,

Defendants.

MOTION SEQ. NO.: 003, 004, 005
MOTION DATE: 11/10/11

INDEX NO.: 23742/09

The following papers having been read on the motion (numbered 1-):

Notice of Motion Seq. No. 003.....1
Motion for Summary Judgment Seq. No. 004.....2
Notice of Cross Motion Seq. No. 005.....3
Affirmation in Reply to Plaintiffs' Cross Motion.....4
Attorney's Reply Affirmation in Support of Motion for Summary Judgment.....5

Motion by defendants North Hills Holding Company LLC II ("NHHC") and Chatham Development Company ("CDC"), pursuant to CPLR 3212 (incorrectly denominated as 3211) for summary judgment, is **granted** as to the second and fourth causes of action against Chatham Development Company in the amended complaint, and **denied** as to the first and third causes of action against NHHC.

Motion by defendant Chatham at North Hills Homeowners Association Inc. ("HOA") pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it is also **denied**.

Cross-motion by plaintiffs for an order vacating the note of issue and certificate of readiness and compelling further discovery is **granted.**

Background

The Chatham at North Hills is a new development of luxury townhomes. The Chatham is run and maintained by HOA. The builder and sponsor is NHCC. On January 8, 2008, plaintiffs entered into a Purchase Agreement with NHHC to purchase 36

Hathaway Lane, North Hills, New York, also known as Unit 105 at The Chatham at North Hills. The purchase price was $1,750,000. The closing took place in November, 2008, and plaintiffs moved into the new townhome in late March, 2009.

On June 12, 2009, Mr. An states that he reported to Annemarie at NHHC's office that his new basement had flooded ("the first flood"). A worker came and used a wet-vac in the Ans' basement. On more than one occasion Mr. An also spoke to Joe, whom he believed to be an employee of NHHC, when he saw Joe working outside on other new townhomes.

In his affidavit herein Mr. An testifies that he also advised HOA of the water problems, and was told that if he had any problems to contact the builder (An affidavit, par. 16). In his deposition Mr. An testified that he had called HOA about "several different matters" and was told that "HOA has nothing to do with anything" (An transcript, p. 56).

On June 26, 2009, the Ans' basement was flooded again ("the second flood"). Mr. An states that, again, he advised NHHC.

On July 1, 2009, the basement flooded again ("the third flood"). Plaintiffs' photos show water and mud running down the walls into the basement from under the windows in the basement. Mr. An states that he spoke with Rudi Princi, one of the sponsors or builders from NHHC, who told him to call his insurance company.

On July 7-8, 2009, workers made changes to the drainage behind plaintiffs' home. Since the workers made the changes, there has been no further flooding in the basement. Mr. An recognized one of workers as Joe (An transcript, p. 29-30).

Harvey Gessin is the principal of one of the LLCs that formed defendant NHHC. He is also one of the directors on the Board of Directors of HOA (Gessin transcript, p. 17-18), and it was reported that he had three seats on the five-seat Board (Mehar transcript, p. 14).,

According to Mr. Gessin, NHHC has no employees (Gessin transcript, p.7). Annemarie was an employee of North Hills Building Systems, a builder "who did the project at the Chatham North Hills (Gessin transcript, p.8) It was Annemarie's job to direct work orders to "whoever has to take care of those issues" (Gessin transcript, p. 25). Mr. Gessin further testified that pursuant to the offering plan, the responsibility for the maintenance and repair of the storm water drainage system was with HOA (Gessin transcript, p. 18; Exhibit 3 at p.7). According to Rules and Regulations of The Chatham, HOA's responsibility included "sanitary maintenance of storm drainage sewers and water lines on the exterior of home."

Mr. Gessin testified that a blockage in the drainage pipe from the An home had

been caused by twigs and debris (Gessin transcript, p. 41) in the original pipe located between Mr. An's home and the area drain (Gessin transcript, 78). Mr. Gessin stated that Landscapes by Hugo dug a trench from the southeast corner of the An house about 15 feet to the south into a catch basin (Gessin transcript, p. 46-47), and the final fix of the problem with the An house was done by Hampton Drainage (Gessin transcript, p.61). Another larger section of piping was added (Gessin transcript, p. 30). HOA paid for that repair through their managing agent (Gessin transcript, p. 61).

Joe Hamberdi is a building supervisor at the property (Gessin transcript, p. 9-10). He manages the construction on the site (Gessin transcript, p. 49). It is unclear what entity is Mr. Hamberdi's employer, although Mr. Gessin did testify that Mr. Hamberdi works for a company owned by NHHC (Gessin transcript, p. 43).

The managing agent for HOA was Total Community Management, whose representative on the premises was Pat Mehar. According to Mr. Gessin, Ms. Mehar hired a person to put a camera in the pipe (Gessin transcript, p. 74), which revealed that leaves and twigs were clogging the pipe (Gessin transcript, p. 32). According to Ms. Mehar, she paid a bill from Landscapes by Hugo because she was told to do so by Mr. Gessin's secretary (Mehar transcript, p. 9-12).

Plaintiff commenced this action later in 2009. The amended complaint. dated October 22, 2010, contains five causes of action. The first and third causes of action are alleged against NHHC, and the second and fourth against CDC, for breach of warranty and breach of contract, respectively. The fifth cause of action is against HOA for breach of contract.

At this time both NHHC and HOA move for summary judgment. Plaintiffs cross-move to vacate the note of issue and certificate of readiness and compel discovery.

Summary Judgment Standard

Summary judgment is the procedural equivalent of a trial (*S.J.Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence must be viewed in the light most favorable to the non-moving party (*Branham v Loews Orpheum*

Cinemas, Inc., 8 NY3d 931 [2007]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]), and the court should refrain from resolving issues of credibility (*Forrest* at 315; *SJ Capelin Assoc., Inc.*, at 341).

The Motion by NHHC and CDC

At the outset, NHHC makes clear that on occasion it does business as Chatham Development. However CDC is not a distinct legal entity. Under these circumstances, and in the absence of any triable issues of fact raised by plaintiff as to a separate existence for CDC, the second and fourth causes of action against this alleged entity in the amended complaint must be summarily dismissed.

The first cause of action in the amended complaint alleges a claim for breach of a written limited warranty that NHHC provided to buyers. As NHHC has submitted only certain portions of the Limited Warranty (Exhibit J to NHHC's moving papers), the Court has looked to plaintiffs' more complete submission at Exhibit 2 to the cross-moving papers. The purpose of the Limited Warranty was to:

> identify the seller's responsibilities for CONSTRUCTION DEFECTS of a latent or hidden nature that could not have been found or disclosed on final inspection of the home.

(Exhibit 2 at p. A-1; emphasis added). The "First Year Basic Coverage" of the Limited Warranty provides, in pertinent part, that:

> the Home will be free from latent defects that constitute
> (a) defective workmanship by the Seller . . . and
> (c) defective design . . .

(Exhibit 2 at p.2). The Limited Warranty does not provide any more specific language under its "First Year Basic Coverage."

> "Exclusions from Coverages" in the Limited Warranty include:
> (m) damage caused by seepage of water unless such loss or damage is the DIRECT RESULT OF A CONSTRUCTION DEFECT;
> . . .
> and
> (s) consequential, incidental, special and indirect damages;

(Exhibit 2 at p. 4-5; emphasis added).

On this record defendant NHHC has not established that the admitted damage caused by the gushing of water into plaintiffs' basement (see photo at Exhibit 7 to the

cross-moving papers) was not "a direct result of a construction defect." Instead NHHC assumed that the breach of warranty claim addressed defects in the construction of the foundation or basement walls, which it then proved inaccurate. Consequently, NHHC has failed to make out a *prima facie* case that there has been no breach of the Limited Warranty. Under these circumstances the Court has no need to consider plaintiffs' opposition, including their expert's inadequate opinion, as the burden for summary judgment of the first cause of action has not shifted to plaintiff.

Moving on, NHHC argues that "even if we assume there was warranty coverage," such coverage would be limited to "the repair of the window well or foundation" (Spodek affirmation at par. 34). Here it relies upon the exclusion in the Limited Warranty for consequential damages.

As set forth in plaintiffs' Notice of Warranty Claim (Exhibit I to NHCC's moving papers), the damages sought include removal of damaged materials and rebuilding of the basement in the amount of $46,000, the cost of water remediation in the amount of $9,000, the cost of replacing destroyed electronic equipment in the amount of $5,000, and the cost of determining the cause of the problem in the amount of $1,000. (For the record, the last item is not recoverable, to the extent that the $1,000 at issue is a litigation cost, as the incidents of litigation are borne by the respective parties unless authorized by agreement, statute, or court rule (*AG Ship Maintenance Corp v Lezak*, 69 NY2d 1, 5 [1986])).

Here, again, NHHC has failed to establish that the damages sought by plaintiffs are not "the direct result of a construction defect," damages which are not excluded under the "Exclusions from Coverage."

Moreover, plaintiffs have raised an issue as to whether consequential damages are recoverable when they are the natural and probable consequence of the breach (*Bi-Economy Market, Inc v Harleysville Ins. Co. of New York*, 10 NY3d 187, 192 [2008], quoting *Kenford Co. v County of Erie*, 73 NY2d 312, 329 [1989]). Plaintiffs further raise an issue as to the enforceability of the prohibition against consequential damages if they can establish that NHHC executed its responsibilities under the Limited Warranty in bad faith (see *Cayuga Harvester Inc v Allis Chalmers Corp.*, 95 AD2d 5, 16-17 [4th Dept 1983]; see also *Kalisch-Jarcho Inc v City of New York*, 58 NY2d 377, 385 [1983] (an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing). The alleged failure of NHHC to respond promptly to Mr. An's complaints certainly raises a triable issue of fact as to bad faith and/or intentional conduct. Such conduct may be reasonably inferred from plaintiffs' allegation that NHHC's denial of the

warranty claim was improper (amended complaint, par. 26).

In the third cause of action for breach of contract plaintiffs allege that pursuant to the offering plan NHHC promised to build the premises according to building codes (amended complaint, par. 34). Defendant NHHC complains that plaintiffs allege no specific actionable departure, and that the construction passed all inspections by the Village. On this breach of contract claim NHHC has made out a *prima facie* case for judgment in its favor.

In opposition plaintiff points to the Long Island Builders Institute Performance Standards (Excerpts from the Offering Plan, annexed as Exhibit 3, at p.1), wherein it states that it was the contractor's job to "ensure proper drainage away from the home." Plainly, the photos showing water gushing under plaintiffs' basement windows, barely three months after they moved into the brand new townhouse, raise a triable issue of fact as to whether NHHC breached its obligation to "ensure proper drainage away from the home."

Based on the foregoing, NHHC's motion for summary judgment dismissing the first and third causes of action against it in the amended complaint must be denied.

The Motion by HOA

HOA seeks dismissal of the breach of contract claim against it on the grounds that it did not build or design plaintiffs' unit or the surrounding grounds. It further seeks to escape liability on the grounds that it was never notified of the flooding problems that plaintiffs were experiencing.

In opposition plaintiffs point to the offering plan (Exhibit 3 at p.7) wherein it is provided that "maintenance and repair of the storm drainage system will be the responsibility and expense of " HOA. In view of Mr. Gessin's unequivocal testimony that a blockage in a drainage pipe caused the Ans' water problem, a question of proper maintenance and repair by HOA is clearly presented.

As to notice, plaintiffs argue that, one way or another, HOA was notified of the water problem in the Ans' basement. Mr. An testified at his deposition that he had initially called HOA about different matters. "They said, don't call us, HOA has nothing to do with anything" (An transcript, p. 56). So Mr. An proceeded to notify the builder through Annemarie and Joe (An transcript, p. 74). In his affidavit, Mr. An testifies that he did call HOA about the water problems, and he was told to contact the builder regarding any problems. In addition plaintiffs argue that notice to NHHC constituted notice to HOA, since three of NHHC's were also board members of HOA.

At the very least, triable questions of fact are presented as to notice to HOA. Annemarie's job was to direct work orders to whatever entity was "to take care of those

issues" (Gessin transcript, p.25). If HOA was responsible for all drainage issues, a jury could find that it was Annemarie's job to direct Mr. An's complaint to HOA, or to someone who would direct the complaint to HOA. In addition, if NHCC had no employees, questions are presented as to who was Joe Hamberdi's employer, and what his role was vis-a-vis NHHC and HOA. All of these questions regarding notice mandate denial of HOA's motion for summary judgment.

The Cross-Motion by Plaintiffs

Plaintiffs filed and amended note of issue and certified that all discovery had been completed on August 16, 2011. They later realized that this was "a complete oversight" (Blasie affirmation, par. 95), because no response had been submitted to their Notice for Discovery and Inspection dated May 19, 2011 (Exhibit 18). In that discovery demand plaintiffs sought information regarding the new drainage pipe that was installed to correct the water problem in plaintiffs' basement.

Defendants object and insist that discovery is now closed, although they do not mention any prejudice.

A motion to vacate the note of issue and certificate of readiness made more than 20 days after their filing will be granted only where "a material fact in the certificate of readiness is incorrect" or upon "good cause shown" (22 NYCRR 201.21[e]; *Torres v Saint Vincents Catholic Medical Centers*, 71 AD3d 873 [2nd Dept 2010]). While research has not revealed a similar case where a mistake or oversight by counsel was found to constitute "good cause" for the purpose of vacating a note of issue and certificate of readiness, law office failure does not preclude a finding of "good cause" for the purposes of CPLR 2004, extensions of time generally (*Tewari v Tsoutsouras*, 75 NY2d 1, 11-12 [1989]). Especially here where the defendants will experience no prejudice by the delay that will result, the Court concludes that plaintiffs have made a showing of "good cause" as required for the requested vacatur. Accordingly, the Court hereby **grants** plaintiffs' motion to vacate the note of issue and certificate of readiness. Defendants are hereby directed to comply with plaintiffs' outstanding discovery demand within ten days of service or receipt of a copy of this Order.

This constitutes the Order of the Court.

Dated: February 29, 2012

J.S.C.