SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X

AHMAD KAMAL ASLAM and AMNA KAMAL,

Plaintiffs,

-against-

FENWAY DEVELOPMENT, LLC, and DAVID PEYKAR,

Defendants.

----------X

TRIAL/IAS PART 17

INDEX # 3657/11

Motion Seq. 1
Motion Date 1.30.12
Submit Date 2.25.12

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	1
Answering Affidavit	2
Reply Affidavit	3
Memoranda of Law	4,5,6

Motion by defendants, Ahmad Kamal Aslam and Amna Kamal, for an order of this court, pursuant to CPLR §3211, dismissing the complaint of the plaintiffs, Fenway Development, LLC (Fenway) and David Peykar and staying the discovery schedule pending a determination of the instant motion, is **denied in part**.

The instant motion arises from the underlying real estate action, commenced in this court by the plaintiffs in June 2011. In their complaint, the plaintiffs allege causes of action sounding

in, *inter alia*, fraud, breach of contract, and violations of certain sections of General Business Law regarding its purchase of the improved real property located at 11 Fenway, Roslyn Estates, New York, County of Nassau.

In June, 2010, plaintiffs entered into a contract of sale (Contract) with Fenway, a limited liability company, with Peykar as its sole member, for the purchase of the subject real property, a newly constructed one-family home. The purchase price was set at $1,550,000. The contract provided that the defendant sellers were required to comply with all municipal laws and requirements prior to the closing of title and delivery of the premises to the purchasers. The certificate of occupancy was issued in March 2010.

Prior to the execution of the contract, the plaintiffs arranged for an inspection of the premises and such inspection was conducted by a "licensed home inspector." As a result of the inspection report, the parties agreed that the defendants would perform certain repairs and upgrades and the same was memorialized in the Second Rider to Contract. The rider provided that a "punch list" was to be prepared by both parties and such list was to be presented at the closing of title.

According to the defendants, in September 2010, the plaintiffs conducted a final inspection to determine whether the repairs and upgrades were completed, and plaintiffs were "satisfied with the inspection." According to plaintiffs, they were denied access to the premises for the final inspection and were not able to make such determination, and the repairs were not performed and/or completed.

The closing of title for the premises took place in October 2010, and after the closing, plaintiffs contacted defendants about various problems they were having with the premises.

There is dispute as to whether the problems were corrected. There is also a dispute as to whether "punch list"existed and whether the same was presented to the defendants.

Defendants argue that plaintiff's requested relief in piercing the corporate veil is based on conclusory allegations and bare conclusions made "upon information and belief." Additionally, factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion and are, therefore, insufficient to sustain a cause of action based on those claims. Further, as the home was constructed by Fenway and not Peykar, the causes of action run to the corporation and not the named individual.

In support of its motion, defendants submit the following evidence: copies of the Contract and its riders; copies of the pleadings; and e-mailed communication regarding repairs of the subject premises.

Plaintiffs argue that notwithstanding the corporate existence, Peykar is liable for wrongdoing as an individual in his own right, and the complaint sets forth allegations against him as an individual. Further, the complaint sufficiently pleads causes of action against the defendants for all seven of its causes of action. Plaintiffs, in opposition, incorporate the evidence already submitted by the defendants, by reference.

When a motion is based on a failure to state a cause of action, the complaint's legal sufficiency is judged solely on the face of the allegations and no consideration of the facts alleged in support of the motion will be permitted.

Said another way, the court's scope of review is narrow and it is limited to ascertaining whether the pleading states any cognizable cause of action (see *Hogan v. New York State Office of Mental Health,* 115 AD2d 638 [2nd Dept 1985]). In determining a motion to dismiss

pursuant to CPLR 3211 (a) (7), "the sole criterion is whether 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 *Heffez v. L & G General Const., Inc.*, 56 AD3d 526 [2nd Dept 2008]).

Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (see *Holly v. Pennysaver Corp.*, 98 AD2d 570 [2nd Dept1984], *Wayne S. v County of Nassau, Dept. of Social Servs.*, 83 AD2d 628 [2nd Dept 1981]). The nonmoving party is granted the benefit of every possible favorable inference (see *Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793 [2nd Dept 2011]).

CPLR §3013, states in relevant part, " statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions or series of transactions or occurrences intended to be proved, and the material elements of each cause of action or defense." According to the commentary following the statute:

> "[T]he basic requirement..is that the pleading be 'sufficiently particular' to give 'notice' to the other side of the 'transactions' or 'occurrences' as seen by the pleader. As long as the pleading may be said to give such 'notice', in whatever terminology it chooses, this aspect of the CPLR 3013 requirement is satisfied . . . the practitioner need only see to it that the material elements are somewhere verbalized within the four corners of the complaint [citing *Gershon v. Goldberg*, 30 AD3d, 372 (2nd Dept 2006)] . . . [citing Serio v. Rhulen, 24 AD3d 1092 (3rd Dept 2005; Pernet v. Peabody Eng'g Corp., 20 AD2d 781 (1st Dept 1964)] . . ."(see Practice Commentaries, CPLR §3013, Patrick M. Connors, C3013:2, C3013:3, C3013:8)

Further, as provided in David Siegel's, New York Practice:

> All pleadings must be liberally construed . . . Under the CPLR, if a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated and no motion lies under CPLR [§]3211(a)(7) based on a failure to plead one . . . [The court wants] only to know whether it states a cause of action — any cause of action. If it does, it's an acceptable CPLR pleading . . . It's not necessary that the claim pleaded be given any particular name. It can even be named wrong . . . It's sufficient if the pleading alleges any cause of action that the law recognizes and on which it offers relief . . . *Giving notice is the key* . . . Even more significantly, it adds that "[d]efects shall be ignored if a substantial right of a party is not prejudiced" (see N.Y. Prac. § 208 [5th ed.] *New York Practice*, David D. Siegel, Chapter 9. A. Basic Rules of Pleading).

The plaintiffs have set forth a detailed fact pattern in their complaint, and they have alleged that Fenway is ostensibly the alter ego of Peykar in that it has failed to operate in a manner consistent with corporate entities. Peykar, as sole member of Fenway, is alleged to have exercised complete dominion and control over the corporation and to have committed the wrongful acts on its behalf. Plaintiffs also allege that the corporate entity was formed solely for the purposes of the construction of the subject real property (see *9 East 38th Street Associates, L.P. v. George Feher Associates*, 226 AD2d 167 [1st Dept 1996]).

Even viewing the complaint liberally and in the light most favorable to plaintiff, this court finds that the complaint is sufficiently particularized to sustain an action for piercing the corporate veil and assigning personal liability to Peykar for Fenway's acts. A party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (*Mistrulli v.*

McFinnigan, Inc., 39 AD3d 606 [2nd Dept 2007]).

However, the court need not deliberate over this issue as the plaintiffs have alleged acts of wrongdoing against the corporate entity, Fenway *and* the individual, Peykar in their own right (see *P. P. X. Enterprises, Inc. v. Catala*, 17 AD2d 808 [1st Dept 1962]). Additionally, the plaintiffs alleged that Peykar's misconduct was committed in the course of rendering services on behalf of Fenway which is sufficient to sustain a cause of action against Peykar as an individual (see *Lichtman v. Estrin*, 282 AD2d 326 [1st Dept 2001], Aguirre v. Paul, 54 AD3d 302 [2nd Dept 2008]).

To determine the sufficiency of the complaint, it is imperative that the court examine each cause of action. The instant dispute is governed by a Limited Warranty, which was included in the Contract between the parties. The Court further finds that the Limited Warranty, which excluded consequential, incidental, special and indirect damages, also replaced and was "in lieu of" "[a]ll other warranties on the construction and sale of the home and its components, both express and implied (including any warranties of merchantability or fitness for a particular purpose) . . .," is proper and valid under General Business Law § 777–b. The statute provides in relevant part, ". . . the builder or seller of a new home may exclude or modify all warranties by any clear and conspicuous terms contained in the written contract or agreement of sale which call the buyer's attention to the exclusion or modification of warranties and make the exclusion or modification plain . . ."

As a general rule, the existence of a statutory limited warranty precludes common-law causes of action, including causes of action for breach of contract. A breach of contract action, however, is precluded *only to the extent it is based on the breach of warranty.* Here, plaintiffs have not set forth violations of specific provisions of the contract other than what has been provided in the Limited Warranty.

Plaintiffs cite the contract's Article 12, "Condition of Property", and its Second Rider, Article 1 as the basis for its complaint; however, those provisions are also set forth in the Limited Warranty. Accordingly, the breach of contract cause of action is dismissed (see *Gallup v. Summerset Homes, LLC*, 82 AD3d 1658 [4th Dept 2011]). Since the Limited Warranty excluded any common-law implied warranty, the cause of action sounding in breach of implied warranty, must also be dismissed (*see*, *Fumarelli v. Marsam Dev.*, 238 AD2d 470 [2nd Dept 1997]).

Based on the foregoing, as to the breach of warranty cause of action, the complaint effectively and sufficiently alleges that a contract, containing the Limited Warranty, existed between the parties which required the defendant sellers to repair and/or install certain items existing in and/or connected with the subject premises. As both defendants allegedly failed to correct the defects and allow for a final inspection, plaintiffs allege that such action or failure to act is a breach of the Limited Warranty (see *Quinones v. Schaap*, 91 AD3d 739 [2nd Dept 2012]).

As to the cause of action alleging fraudulent concealment, New York adheres to the doctrine of *caveat emptor* and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arms length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment. To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his responsibilities fixed by the doctrine of *caveat emptor* (see *Jablonski v. Rapalje*, 14 AD3d 484 [2nd Dept 2005]). Here, the plaintiffs sufficiently allege that defects were concealed, and that the defendants purposely thwarted any opportunity to discover the defects by refusing to allow the plaintiffs to make the final inspection of the subject premises.

Based on the foregoing, the complaint alleges that the defendants had peculiar and superior knowledge of the defects and their failure to adequately cure the same. They, therefore, prevented the plaintiffs from discovering the concealment through due diligence by refusing to allow them to conduct a final inspection (see *Platzman v. Morris*, 283 AD2d 561 [2nd Dept 2001]).

Regarding the cause of action sounding in negligence, the plaintiffs allege that the defendants negligently constructed the real property. Generally, a breach of contract claim does not give rise to a separate cause of action in tort unless the defendants breached a legal duty that is separate and apart from the defendants contractual obligations (see *Muldoon v. Blue Water Pool Services, Inc.*, 7 AD3d 496 [2nd Dept. 2004]).

The relationship and the legal obligations between the parties is contractual. The obligations of the defendants sellers are established by the contract and its riders. Plaintiffs have not pled nor have they in any other way established the existence, and a breach, of the legal duties imposed upon the defendants other than those imposed by the contract. Therefore, the negligence and gross negligence causes of action fail to state a cause of action and must be dismissed (see *Old Republic Nat. Title Ins. Co. v. Cardinal Abstract Corp.* 14 AD3d [2nd Dept 2005]).

As to the cause of action under General Business Law §349, the statute provides in relevant part, ". . . deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful . . ." Stating a cause of action to recover damages for a violation of General Business Law § 349 is fairly straightforward and should identify the consumer-oriented misconduct which is deceptive and materially misleading to a reasonable consumer, and which causes actual damages.

A plaintiff must allege that the defendant has engaged "in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" (see *Wilner v. Allstate Ins. Co.*, 71 AD3d 155 [2nd Dept 2010]). Incorporating the facts already set forth herein by reference, the plaintiffs have sufficiently alleged a cause of action under the statute.

Defendants argue that its evidence clearly establishes that the factual basis for the plaintiffs' allegations, are false but the only evidence provided is an affidavit claiming that the repairs were completed, that the plaintiffs conducted the final inspection, and that they were "happy" with the work. The court notes, however, that the defendant's own evidence indicates

the plaintiffs' displeasure with defendants' action regarding the defects in the property prior to the closing of title up until September 19, 2010 (See Notice of Motion, Exhibit F).

Additionally, the defendants, based on their submitted documents in the record, clearly have notice of the facts complained of, and are not prejudiced thereby.

As to the defendants' request that the discovery schedule be stayed pending determination of the instant motion, such request is rendered moot and the parties shall comply with the schedule as set forth by this court.

Accordingly, the defendants' motion is **granted to the extent** that the first cause of action for breach of contract, the third cause of action for breach of implied warranty, the sixth cause of action for negligence and the seventh cause of action for gross negligence, are dismissed.

All counsel shall appear for a conference on **May 23, 2012 at 9:30 a.m.**

The foregoing constitutes the decision and order of this court. All applications not specifically addressed herein are denied

Dated: Mineola, New York
April 24, 2012

ENTER:

HON. JEFFREY S. BROWN, JSC

Attorney for Plaintiff
Goetz Fitzpatrick, LLP
One Penn Plaza
New York, NY 10119

Attorney for Defendant
Patacca & Associates, PC
392 Hillside Avenue
Williston Park, NY 11596