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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 107010/2010

WEST 63 EMPIRE ASSOCIATES, LLC

VS.

WALKER & ZANGER, INC.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, It is ordered ~~that this motion~~ and adjudged that:

The court grants defendant's motion for summary judgment dismissing the complaint and denies plaintiff's cross-motion to amend its complaint, C.P.L.R. §§ 3025(b), 3212(b), pursuant to the accompanying decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/13/12

Lucy Billings

LUCY BILLINGS J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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WEST 63 EMPIRE ASSOCIATES, LLC d/b/a EMPIRE HOTEL,

Plaintiff

- against -

WALKER & ZANGER, INC.,

Defendant

Index No. 107010/2010

DECISION AND ORDER

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks to recover damages for breach of contract, unjust enrichment, and breach of implied warranty of merchantability based on an agreement through which defendant sold stone floor tiles to nonparty Goodman Charlton, to be installed in plaintiff's premises. Defendant moves for summary judgment dismissing all claims in the complaint. C.P.L.R. § 3212(b). Plaintiff cross-moves to amend its complaint, C.P.L.R. § 3025(b), to allege that plaintiff was an intended beneficiary of the contract and to add a claim for breach of implied warranty of fitness for a particular purpose. U.C.C. § 2-315. The court grants defendant's motion and denies plaintiff's cross-motion for the reasons explained below.

II. PLAINTIFF'S CROSS-MOTION TO AMEND ITS COMPLAINT

C.P.L.R. § 3025(b) permits amendments to a complaint as long as the they do not unfairly surprise or otherwise substantially prejudice defendants, Kocourek v. Booz Allen Hamilton Inc., 85

A.D.3d 502, 504 (1st Dep't 2011); Jacobson v McNeil Consumer & Specialty Pharms., 68 A.D.3d 652, 655 (1st Dep't 2009); Thompson v. Cooper, 24 A.D.3d 203, 205 (1st Dep't 2005); Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 354-55 (1st Dep't 2005), and the proposed claims, as alleged, are meritorious. Sabo v. Alan B. Brill, P.C., 25 A.D.3d 420, 421 (1st Dep't 2006); Thompson v. Cooper, 24 A.D.3d at 205; Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Fung-Yee Ng v. Barnes & Noble, 308 A.D.2d 340, 341 (1st Dep't 2003). Plaintiff bears the burden to demonstrate its proposed claims' merit through admissible evidence. Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d at 355; Pacheco v. Fifteen Twenty Seven Assoc., 275 A.D.2d 282, 284 (1st Dep't 2000); Non-Linear Trading Co. v. Braddis Assocs., 243 A.D.2d 107, 116 (1st Dep't 1998). See Spence v. Bear Stearns & Co., 264 A.D.2d 601, 602 (1st Dep't 1999).

First, plaintiff seeks to claim that it was a third party beneficiary of the contract April 11, 2007, between defendant and Goodman Charlton, an interior decorator plaintiff retained to remodel its hotel. To recover for breach of a contract as a third party beneficiary, plaintiff must establish that the contract between Goodman Charlton and defendant or one of the contract's provisions was intended for plaintiff's benefit, which was sufficiently immediate for the contracting parties to assume an obligation to compensate plaintiff if it lost that benefit. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 181-82 (2011); LaSalle Natl. Bank v. Ernst & Young, 285 A.D.2d 101, 108

(1st Dep't 2001). The benefit to plaintiff must be evident from the face of the contract. LaSalle Natl. Bank v. Ernst & Young, 285 A.D.2d at 108. See Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d 221, 226 (1st Dep't 2007).

The proposed amended complaint alleges that defendant knew or should have known that the tiles were for plaintiff's benefit. As evidence of this fact plaintiff relies on the invoice dated April 11, 2007, memorializing the contract between Goodman Charlton and defendant. The contract lists Empire Hotel as the place where the tiles would be installed, but does not indicate defendant's understanding that defendant was performing work for plaintiff or that it had any input in selecting the materials, which would demonstrate that it was a third party beneficiary. Gap, Inc. v. Fisher Dev., Inc., 27 A.D.3d 209, 211 (1st Dep't 2006); City of New York v. Seabury Constr. Corp., 4 A.D.3d 124, 125 (1st Dep't 2004). Plaintiff also points to other evidence defendant relies on to support its summary judgment motion: an inadmissible hearsay email September 7, 2006, to Jonathan Zanger, president of defendant, from another employee of defendant expressing concern with Goodman Charlton's choice of stone floor tiling for the lobby. E.g., Acevedo v. York Intl. Corp., 31 A.D.3d 255, 258 (1st Dep't 2006); Waiters v. Northern Trust Co. of N.Y., 29 A.D.3d 325, 327 (1st Dep't 2006). Even if plaintiff may rely on defendant's offered evidence despite its inadmissible form, however, it suffers from the same substantive deficiency as the invoice. More than defendant's mere awareness of plaintiff

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is necessary to establish plaintiff as a third party beneficiary. See Mendel v. Henry Phipps Plaza W., Inc., 6 N.Y.3d 783, 786 (2006); State of Cal. Pub. Employees' Retirement Sys. v. Shearman & Sterling, 95 N.Y.2d 427, 435 (2000).

Plaintiff also seeks to add a claim that defendant breached the implied warranty of fitness for a particular purpose. "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." U.C.C. § 2-315. The affidavit of Jay Podolsky, plaintiff's manager, that the tiles cracked and deteriorated under ordinary use, shows the tiles were not fit for their intended purpose. Deven Lithographers v. Eastman Kodak Co., 199 A.D.2d 9 (1st Dep't 1993); Jacobs v. Tile Shoppe Enters., Inc., 82 A.D.3d 1673, 1674 (4th Dep't 2011); Bimini Boat Sales, Inc. v. Luhrs Corp., 69 A.D.3d 782, 783 (2d Dep't 2010). Plaintiff presents no evidence, however, that it relied on defendant's expertise to select suitable tiles. Instead, plaintiff hired Goodman Charlton without specifying that defendant was responsible to select materials. The lack of evidence of plaintiff's reliance is fatal to its claim that defendant breached an implied warranty of fitness. Crump v. Times Sq. Stores, 157 A.D.2d 768, 769 (2d Dep't 1990). See Fallon v. Hannay & Son, 153 A.D.2d 95, 101 (3d Dep't 1989).

III. SUMMARY JUDGMENT STANDARDS

Defendant, to obtain summary judgment, must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If defendant satisfies this standard, the burden shifts to plaintiff to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of defendant's motion for summary judgment, the court construes the evidence in the light most favorable to plaintiff. Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004).

A. Breach of Contract Claim

Defendant claims that because it contracted with Goodman Charlton to provide stone floor tiles, plaintiff lacks standing to claim a breach of that contract. As discussed above, plaintiff fails to present admissible evidence that it was a third party beneficiary to that agreement. No other legal theory is available to plaintiff to sustain its breach of contract claim based on the contract between Goodman Charlton and defendant. Vargas v. New York City Tr. Auth., 60 A.D.3d 438, 440 (1st Dep't

2009); Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d at 226, 767 Third Ave. LLC v. ORIX Capital Mkts. LLC, 26 A.D.3d 216, 218 (1st Dep't 2006); American Express Co. v. Ogden Allied Bldg. & Airport Servs., 267 A.D.2d 3 (1st Dep't 1999). See Dinerstein v. Anchin, Block & Anchin, LLP, 41 A.D.3d 167, 168 (1st Dep't 2007).

B. Unjust Enrichment Claim

To prevail on an unjust enrichment claim, plaintiff must establish that defendant was enriched at plaintiff's expense, and it is inequitable and unconscionable to allow defendant to retain the enrichment. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d at 182; Georgia Malone & Co., Inc. v. Rieder, 86 A.D.3d 406, 408 (1st Dep't 2011); Abacus Fed. Sav. Bank v. Lim, 75 A.D.3d 472, 473 (1st Dep't 2010). See Sterlacci v. Gurfein, 18 A.D.3d 229, 230 (1st Dep't 2005); Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 119 (1st Dep't 1998). Plaintiff has failed to demonstrate that any benefit to defendant was at plaintiff's expense. Pollak v. Moore, 85 A.D.3d 578, 579 (1st Dep't 2011); Edelman v. Starwood Capital Group, LLC, 70 A.D.3d 246, 250 (1st Dep't 2009). See Balance Return Fund Ltd. v. Royal Bank of Can., 83 A.D.3d 429, 431 (1st Dep't 2011). Plaintiff also has failed to demonstrate a relationship with defendant that caused plaintiff's reliance or induced plaintiff's performance, as is required to sustain an unjust enrichment claim. Georgia Malone & Co., Inc. v. Rieder, 86 A.D.3d at 408.

C. Breach of Warranty Claim

Plaintiff claims defendant breached its warranty of merchantability by furnishing tiles that were not fit for their ordinary purpose, U.C.C. § 2-314(2)(c); Bradley v. Earl B. Feiden, Inc., 8 N.Y.3d 265, 273 (2007); International Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am., 46 A.D.3d 224, 231 (1st Dep't 2007). Although a seller of goods of the kind impliedly warrants their merchantability, U.C.C. § 2-314(1), a seller may disclaim this warranty. U.C.C. §§ 2-314(1), 2-316(2); Brampton Textiles v. Argenti, Inc., 162 A.D.2d 314 (1st Dep't 1990). Exclusion or modification of an implied warranty of merchantability must mention "merchantability" and "in case of a writing must be conspicuous." U.C.C. § 2-316(2). See Bimini Boat Sales, Inc. v. Luhrs Corp., 69 A.D.3d at 783. A disclaimer or modification is conspicuous "when it is so written that a reasonable person against whom it is to operate ought to have noticed it." U.C.C. § 1-201(10); ALH Props. Ten v. 306-100th St. Owners Corp., 191 A.D.2d 1, 11 (1st Dep't 1993). Capital lettering and larger sized or different colored type make terms conspicuous. See U.C.C. § 1-201(10). "Whether a term or clause is 'conspicuous' or not is for decision by the court." Id. See ALH Props. Ten v. 306-100th St. Owners Corp., 191 A.D.2d at 11.

To obtain summary judgment dismissing plaintiff's breach of warranty claim, defendant must show the validity of the disclaimer as a matter of law. See Lindsay v. Colton Auto, Inc., 48 A.D.3d 1262, 1263-64 (4th Dep't 2008); Brennan v. Shapiro, 12

A.D.3d 547, 548 (2d Dep't 2004); Naftilos Painting v. Cianbro Corp., 275 A.D.2d 975 (4th Dep't 2000); Verdier v. Porsche Cars N. Am., 255 A.D.2d 436, 437 (2d Dep't 1998). The contract's Conditions of Sale, paragraph 2, provides that defendant

> does not warrantee any product of any specific use nor any installation procedure or maintenance practice and expressly disclaims all claims including claims on the implied warrantee of merchantability asserted after client installation or usage.

and

> shall not be liable for any special or consequential damages arising from the ownership, use, possession, or maintenance of any product by any person.

Aff. of Jonathan Zanger Ex. 2. This disclaimer is conspicuous because it uses noticeable, bold typeface, Sky Acres Aviation Servs. v. Styles Aviation, 210 A.D.2d 393 (2d Dep't 1994), larger type, and capital letters. Travelers Ins. Cos. v. Howard E. Conrad, Inc., 233 A.D.2d 890, 891 (4th Dep't 1996).

Defendant did not undertake any express duties inconsistent with the warranty disclaimer to render it invalid. Norwest Fin. Leasing v. Parish of St. Augustine, 251 A.D.2d 125 (1st Dep't 1998); Deven Lithographers v. Eastman Kodak Co., 199 A.D.2d at 10. Instead, consistent with the disclaimer, the invoice also warns that stone is unique and "may require periodic maintenance." Id. Even if the disclaimer retained any validity, however, plaintiff's failure to demonstrate privity with defendant is also fatal to plaintiff's claim that defendant breached an implied warranty. Miller v. General Motors Corp., 99 A.D.2d 454 (1st Dep't 1984), aff'd, 64 N.Y.2d 1081 (1985);

Donahue v. Ferolito, Vultaggio & Sons, 13 A.D.3d 77, 79 (1st Dep't 2004); Lindsay v. Colton Auto, Inc., 48 A.D.3d at 1264.

D. Plaintiff's Claim That Summary Judgment Is Premature

Finally, plaintiff claims that a lack of disclosure renders summary judgment premature. "Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated," the court may deny or postpone defendant's motion for summary judgment to permit disclosure. C.P.L.R. § 3212(f). Mere hope that disclosure might uncover useful evidence, however, will not warrant such a denial or continuance. Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Barnes-Joseph v. Smith, 73 A.D.3d 494, 495 (1st Dep't 2010); MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010); Chalk & Vermillion v. Thomas F. McKnight, LLC, 303 A.D.2d 225, 226 (1st Dep't 2003). While plaintiff insists that factual issues may emerge regarding defects in defendant's tiles and the validity of defendant's disclaimer of implied warranties, plaintiff fails to identify any potential evidence raising such issues that disclosure would reveal. Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Griffin v. Pennoyer, 49 A.D.3d 341 (1st Dep't 2008); Brown v. Bauman, 42 A.D.3d 390, 393 (1st Dep't 2007); Global Mins. & Metal Corp. v. Holme, 35 A.D.3d 93, 103 (1st Dep't 2006).

IV. CONCLUSION

As explained above, the court grants defendant's motion for summary judgment and dismisses each of the complaint's claims: for breach of contract, for unjust enrichment, and for breach of the implied warranty of merchantability, due to plaintiff's failure to support them with admissible evidence in rebuttal to the defenses established by defendant. C.P.L.R. § 3212(b). The court denies plaintiff's cross-motion to amend its complaint due to its similar failure to support its proposed claims for breach of contract based on its third party beneficiary status and breach of the implied warranty of fitness for a particular purpose. C.P.L.R. § 3025(b). This decision constitutes the court's order and judgment of dismissal.

DATED: April 13, 2012

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.