Neznek v Architectural Sys., Inc.

2012 NY Slip Op 32847(U)

October 10, 2012

Sup Ct, New York County

Docket Number: 116344/2008

Judge: Milton A. Tingling

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SCANNED ON 12/3/2012
[* 1]

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

PRESENT: HON. MILTON A. TINGLING J.S.C. Justice

PART 44

Neznek

INDEX NO. 116344/08

MOTION DATE 5/21/12

- v -

MOTION SEQ. NO. 7

Arch. Systems

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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

The motion is decided in accordance with the annexed decision and order.

FILED
NOV 09 2012
NEW YORK COUNTY CLERKS OFFICE

Dated: 10/10/12

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART 44

---X

KEVIN NEZNEK,

Plaintiff,

Index No. 116344/2008

- against-

DECSION AND ORDER

ARCHITECTURAL SYSTEMS, INC., WFI BAMBOO LLC, and EXOTECO, LLC

Defendants.

ARTCHITECURAL SYSTEMS, INC.

Third Party Plaintiff,

-against-

CITY LANDMARK CORP. and BNY CONSTRUCTION INC.

---X

FILED
NOV 09 2012
NEW YORK
COUNTY CLERK'S OFFICE

Hon. Milton A. Tingling, J.S.C.

I. BACKGROUND

By complaint dated November 21st, 2008, Plaintiff Kevin Neznek alleges that wood flooring which was used in the construction of Plaintiff's residence had to be replaced after the flooring allegedly began to split, crack and warp. A review of the various moving papers submitted by the parties demonstrates all parties acknowledge the flooring defects resulted from the flooring's incompatibility with the humidity levels in Plaintiff's residence. As a result of the alleged complications with the flooring, Plaintiff initiated this action against the distributor of the wood flooring, ARCHITECTURAL SYSTEMS, INC. (ASI), as well as the manufacturers of the flooring, WFI BAMBOO LLC and EXOTECO, LLC. Plaintiff alleges that Defendants supplied and

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manufactured the flooring negligently and in breach of implied and express warranties. After the complaint was filed, Defendant ASI, filed a third-party complaint against Plaintiff's contractor who installed the flooring, BNY CONSTRUCTION, as well as CITY LANDMARK CORP., a company allegedly affiliated with BNY.

NEZNEK, ASI, CITY LANDMARK CORP., and BNY CONSTRUCTION INC., all now move this court for summary judgment. The three motions, under sequence numbers six through eight are, are consolidated for decision herein. With respect to Plaintiff's motion for summary judgment, Plaintiff NEZENK argues that ASI breached warranties by allegedly failing to provide wood flooring fit for its intended use. As to Defendant ASI's motion for summary judgment, ASI asserts that (1) Plaintiff's tort claims are barred by New York's economic loss doctrine and (2) Plaintiff cannot maintain the breach of implied and express warranties claims, as Plaintiff lacks the requisite privity of contract to maintain a breach of warranty claim. Finally, with respect to third-party Defendants CITY LANDMARK and BNY's motion for summary judgment, third-party defendants assert they are entitled to summary judgment as there is no evidence which raises a triable issue of fact as to who selected the flooring to be used or as to the correctness of the installation.

For the reasons stated herein, Defendant and third-party Plaintiff ASI's motion for summary judgment is granted and Plaintiff's complaint against ASI is dismissed in its entirety. Accordingly, Plaintiff's NEZNEK's motion for summary judgment is denied and the third-party complaint against CITY LANDMARK CORP. and BNY CONSTRUCTION INC. is dismissed.

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II. DEFENDANT ASI'S MOTION FOR SUMMARY JUDGMENT

Summary Judgment Standard

The Court of Appeals has held that in order to grant summary judgment, "The movant must establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor." *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (198). Furthermore, the party opposing a motion for summary judgment "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.* at 598.

New York's Economic Loss Doctrine

In the first branch of its motion for summary judgment, Defendant ASI argues that Plaintiff's tort causes of action are deficient as a matter of law under New York's economic loss doctrine. ASI argues that because Plaintiff has only claimed damages with respect to flooring in question and consequential damages that allegedly resulted therefrom, Plaintiff's tort claims are untenable under New York law. The economic loss doctrine provides that "where only economic loss with respect to a product itself is alleged and the underlying transaction is a sale of goods, the purchaser is limited to contractual remedies and may not maintain the traditional tort causes of action of negligence or strict liability." *AKV Auto Transport, Inc. v. Syosset Truck Sales Inc.,* 24 A.D.3d 833, 835, 806 N.Y.S.2d 254 (3d Dept 2005). Furthermore, "this rule applies both to economic losses with respect to the product itself and consequential damages resulting from the alleged defect." *New York Methodist Hosp. v. Carrier Corp.,* 68 A.D.3d 830, 831, 892 N.Y.S.2d 110 (2d Dept 2009). In opposition to Defendant's motion, Plaintiff asserts that his tort claims are for negligent misrepresentation and negligent failure to disclose, which Plaintiff alleges are not contractually based

and therefore are not barred by the economic loss doctrine. Plaintiff claims that ASI made misrepresentations prior to and after the flooring being ordered and installed related to the quality and suitability of the flooring for the residence. Specifically, Plaintiff alleges that ASI knew or should have known that, due to the humidity levels in the New York area, the flooring would not be suitable for Plaintiff's residence, but failed to convey this information to Plaintiff's architect, Richard Khan, who is not a party to this action. Plaintiff explains in his deposition that the decision to use the flooring in question was made by the Plaintiff and his architect (See Deposition of Kevin Neznek, 37:3). Plaintiff's architect confirms in his deposition that Plaintiff selected the flooring in question based on the architect's recommendation (See Deposition of Richard Khan, 22:2). Plaintiff asserts that these alleged misrepresentations made by ASI to his architect are the basis of his tort claims and are not barred by the economic loss doctrine.

However, this court finds Plaintiff's argument to be unavailing. New York Courts have held "the economic loss rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort." *Bristol-Meyers Squibb, Indus. Div. v. Delta Star, Inc.* 206 A.D.2d 177, 181, 620 N.Y.S.2d 196 (4 Dept 1994) . Furthermore, "it is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated. The legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract". *Id.* at 179. In the instant case, Plaintiff attempts to establish that the alleged representations by ASI to Plaintiff's architect represent extraneous circumstances that are independent of the contract. However, issues related to the quality and suitability of the flooring are clearly covered in the contract of sale between ASI and Plaintiff's contractor, City Landmark Corp./ BNY Construction Inc. For example, Section 11 of the contract

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explicitly states that the seller does not warrant "that the goods are fit for any particular purpose." Furthermore, the contract expressly states that any of the contractual warranties contained in the contract will be void when damages result from "environmental factors, such as exposure to extreme sunlight, heat, moisture or dryness." Thus, issues regarding the quality and suitability of the flooring for use in the Plaintiff's residence, particularly as they relate to environmental conditions, are clearly covered in the contract of sale for the flooring, and therefore cannot be considered extraneous or independent of the contract. Therefore, as Plaintiff has only claimed an economic loss arising from an alleged failure of a bargained-for consideration to meet the Plaintiff's expectations, Plaintiff's tort claims are deficient as a matter of law. Accordingly, Plaintiff's tort causes of action (the first and fourth causes of action alleged in Plaintiff's complaint) are hereby dismissed.

Plaintiff's Status as a Third Party Beneficiary

In the second branch of ASI's motion for summary judgment, ASI asserts that Plaintiff is not a third- party beneficiary of the contract between ASI and City Landmark Corp. and BNY Construction. Accordingly, ASI's asserts that Plaintiff's causes of action based on ASI's alleged breach of warranties are deficient as a matter of law as Plaintiff lacks privity. Indeed, the flooring installed in Plaintiff's residence was purchased in accordance with contracts between ASI and CITY LANDMARK CORP./BNY CONSTRUCTION. However, a determination as to Plaintiff's status as a third-party beneficiary with respect to the contract between ASI and CITY LANDMARK CORP./BNY CONSTRUCTION is irrelevant as the terms of said contract specifically bar the type of contract claims now asserted by the Plaintiff. Thus, even if this court was to hold that Plaintiff is a third-party beneficiary of the contract, Plaintiff's breach of warranty claims would be barred.

The crux of Plaintiff's claims for breach of warranty is that (1) the flooring sold by ASI experienced defects as a result of the flooring being unsuitable for use in Plaintiff's residence due to environmental conditions present in the residence and (2) ASI failed to inform Plaintiff's architect of this information. Plaintiff asserts that as a result of ASI's alleged breach, Plaintiff sustained damages including the cost of replacing the flooring and consequential damages. As previously mentioned, Section 11 of the contract in question states, "seller warrants that the goods conform to the description stated on the face hereof. No other warranty, express or implied, is made by seller including warranty of merchantability or warranty that the goods are fit for any particular purpose." Furthermore, Section 12 of the contract specifically states that "seller shall not be liable for any indirect, special, incidental, consequential or punitive damages." Thus, even if this court was to allow Plaintiff to proceed as a third-party beneficiary of the contract, Plaintiff's claims for consequential damages, which account for a substantial portion of Plaintiff's total damage assessment, would be barred by the terms of the contract.

Plaintiff seeks to avoid the confines of the limited warranties and limitations on damages contained in the contract of sale by asserting that, if Plaintiff was held to be a third-party beneficiary, UCC 2-719 allows Plaintiff to avoid those contractual limitations. However, this court finds no such allowance in the UCC's provision. For example, UCC 2-719(3) states, "consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." Unconscionability "requires some showing of an absence of meaningful choice on the part of the parties together with contract terms which are unreasonably favorable to the other party." *State v. Avco Financial Service of New York Inc.,* 50 N.Y.2d 383, 429 N.Y.S.2d 181. In the instant case, Plaintiff has not alleged, nor has there been any evidence which suggest, that the contract of sale for the flooring was

unconscionable. Thus, without a showing of unconscionabilty, Plaintiff would be precluded from seeking consequential damages by the terms of the contract.

However, Plaintiff's causes of action based on breach of warranty must be dismissed in their entirety. Section 11 of the contract of sale for the flooring states, "seller warrants that the goods conform to the description stated on the face hereof. No other warranty, express or implied, is made by seller including warranty of merchantability or warranty that the goods are fit for any particular purpose." Furthermore, Section 11 explicitly states that any warranties for the flooring will be void under certain circumstances, including "environmental factors such as exposure to extreme sunlight, heat, moisture or dryness." Plaintiff's causes of action based on breach of warranty are based on Plaintiff's contention that flooring sold by ASI experienced defects as a results of local environmental conditions. However, the terms of the contract explicitly preclude recovery under any warranty that may have existed when environmental conditions, such as moisture or dryness, are the cause of the alleged damages. Thus, per the terms of the contract, Plaintiff cannot maintain a breach of warranty claim based on the flooring's alleged incompatibility with certain local environmental factors. Therefore, Plaintiff's causes of action for breach of warranty are hereby dismissed.

III. CITY LANDMARK CORP., AND BNY CONSTRUCTION, INC.'S MOTION FOR SUMMARY JUDGMENT

In support of their motion for summary judgment, third-party Defendants CITY LANDMARK CORP. and BNY CONSTRUCTION, INC. allege that there is no evidence that the flooring in question was either selected by them or improperly installed. Accordingly, third-party

Defendants' assert that ASI's third-party complaint for contribution and indemnification should be dismissed. However, given that this court is granting summary judgment to ASI with respect to the claims asserted against it by Plaintiff Neznek, ASI will not be found liable for the same. Thus, ASI's claims for contribution and indemnification are no longer relevant. Accordingly, ASI's third-party complaint is hereby dismissed.

IV. AS TO PLAINTIFF NEZNEK'S MOTION FOR SUMMARY JUDGEMENT

With respect to Plaintiff Neznek's motion for summary judgment, Plaintiff asserts, as he did in his opposition papers to ASI's motion for summary judgment, that ASI breached warranties by allegedly providing defective materials. However, given that this court has addressed precisely those issues in ASI's motion for summary judgment, there is no need for further discussion of the same. Accordingly, Plaintiff's motion for summary judgment is hereby denied.

V. CONCLSUION

For the reasons stated herein, Plaintiff's complaint against ASI is hereby dismissed. Furthermore, as ASI will not be found liable to Plaintiff, ASI's third-party complaint against CITY LANDMARK CORP. and BNY CONSTUCITION INC. is dismissed. Finally, Plaintiff's motion for summary judgment is denied. Clerk is directed to enter judgment accordingly.

Dated: October 10, 2012

HON. MILTON A. TINGLING

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