NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

TERRY COSENTINO,

Plaintiff,

-against-

TATRA RENOVATION, INC.,

Defendant.

Index No.: 653516/2016
DECISION/ORDER
Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's pre-answer motion to dismiss under 3211 (a) (1), (2), (7), and (10).

Papers	**Numbered**
Defendant's Notice of Motion	1
Plaintiff's Affirmation in Opposition	2
Defendant's Reply	3

Murtha Cullina LLP, Stamford (Taruna Garg of counsel), for plaintiff.
Marzec Law Firm, PC, New York (Darius A. Marzec of counsel), for defendant.

Gerald Lebovits, J.

Plaintiff commenced this action asserting five causes of action — breach of contract, breach of implied covenant of good faith and fair dealing, breach of express warranty, breach of implied warranty, and negligence — against defendant. Defendant now moves pre-answer to dismiss the complaint under CPLR 3211 (a) (1), (2), (7), and (10).

According to the complaint, on April 10, 2015, plaintiff hired defendant to construct, renovate, and remodel plaintiff's apartment. (Notice of Motion, Exhibit 1, Complaint, at ¶ 8; Exhibit A.) Defendant identified the services and materials it would provide to plaintiff. (Affirmation in Opposition, Exhibit A.) The parties' agreement provided that "[u]pon finishing of the project, for one full year Tatra Renovation, Inc. will provide you [plaintiff] with guarantee on performed work. In case that some problem should occur, Tatra Renovation Inc. will repair it at it's [sic] own expense." (Affirmation in Opposition, Exhibit A, at 2.) Defendant began work on or about May 19, 2015, and finished the work on or about October 8, 2015. (Affirmation in Opposition, Exhibit 1, Complaint, at ¶¶ 9, 11:)

On or about January 1, 2016, plaintiff notified defendant about "construction and installation defects in the wood flooring, including separation of the wood flooring boards." (Affirmation in Opposition, Exhibit 1, Complaint, at ¶ 13.) Defendant went to plaintiff's apartment in January and February 2016 to look at the problems with the floor. (Affirmation in Opposition, Exhibit 1, Complaint, at ¶¶ 13, 15.)

On February 8, 2016, plaintiff contacted defendant to "develop a remediation plan" to repair or replace the wood flooring according to the contract's warranty. (Affirmation in Opposition, Exhibit 1, Complaint at ¶ 14.) After inspecting the wood flooring, defendant sent plaintiff an email stating that the problem might be a manufacturing defect. (Notice of Motion, Exhibit 1, Complaint, at ¶ 15.)

On March 10, 2016, defendant submitted to plaintiff "a second proposal for additional renovations to, among other things, correct installation defects in the wood flooring boards." (Affirmation in Opposition, Exhibit 1, Complaint, at ¶ 16.) Defendant estimated the additional renovations at $92,094.88, which included a fee of $76,644.88 to demolish the existing wood flooring, provide and install new wood flooring to correct defendant's work, and cover ancillary costs. (Affirmation in Opposition, Exhibit 1, Complaint, at ¶ 16.) According to plaintiff, defendant has refused to repair or replace the wood flooring, at defendant's own expense, under the parties' agreement. (Affirmation in Opposition, Exhibit 1, Complaint, at ¶ 17.)

I. Defendant's Motion to Dismiss under CPLR 3211 (a) (7)

Defendant's CPLR 3211 (a) (7) motion to dismiss is denied. On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts a plaintiff alleges fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014] ["When documentary evidence is submitted by a defendant, the standard morphs from whether the plaintiff has stated a cause of action to whether he or she has one."].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nonnon*, 9 NY3d at 827; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].)

Plaintiff's First Cause of Action

To demonstrate a cause of action for breach of contract, a party must show "proof of (1) a contract; (2) performance of the contract by one party; (3) breach by the other party; and (4) damages." (*WorldCom, Inc. v Sandoval*, 182 Misc 2d 1021, 1024 [Sup Ct, NY County 1999] [citations omitted].) Plaintiff has adequately alleged that a contract exists between the parties, plaintiff's performance, defendant's alleged breach, and plaintiff's damages. (Affirmation in Opposition, Exhibit 1, Complaint.)

Defendant argues that it did not breach the agreement. Defendant states that plaintiff ordered the flooring material. According to defendant's affidavit and the emails attached to defendant's opposition papers, plaintiff ordered the lumber from Lumber Liquidators. Defendant argues, thus, that defendant installed the wood on top of the existing subfloor according to plaintiff's instructions. Defendant also argues that the agreement provides that defendant guaranteed its labor, not the quality of the materials.

Defendant's motion to dismiss the first cause of action is denied. Plaintiff has a cause of action for breach of contract. The court cannot tell at this preliminary phase whether the

problems with the floor, if any, were caused from a manufacturer defect, as defendant alleges, or because of defendant's quality of work. The court cannot tell whether plaintiff specifically requested this flooring.

Plaintiff's Second Cause of Action

The breach of implied covenant of good faith and fair dealing is necessarily included in all New York contracts: "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). The covenant "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" (*Id.* [citations omitted].) The duties of good faith and fair dealing "encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'" (*Id.* [citations omitted].) A breach of the implied covenant of good faith and fair dealing is "'a contract claim.'" (*Smile Train, Inc. v Ferris Consulting Corp.*, 117 AD3d 629, 630 [1st Dept 2014] [citations omitted].) A breach of an implied covenant of good faith and fair dealing is "intrinsically tied to the damages allegedly resulting from a breach of [a] contract." (*Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept.1995].)

Plaintiff has alleged that "Defendant's failure to repair and/or replace the wood flooring despite receiving notice of the problems relating to the wood flooring and requests to repair and/or replace the same by Plaintiff, constitutes bad faith, which has prevented Plaintiff from receiving the benefit of the Renovation Agreement." (Affirmation in Opposition, Exhibit 1, ¶ 26.) Plaintiff understood that under the renovation agreement, defendant would repair or replace the floor after plaintiff complained about it. Plaintiff has sufficiently pleaded a claim for breach of the implied covenant of good faith and fair dealing.

Defendant's motion to dismiss the second cause of action is denied.

Plaintiff's Third and Fourth Causes of Action

Plaintiff alleges that defendant breached an express warranty (third cause of action) and breached an implied warranty (fourth cause of action). Plaintiff alleges that the Renovation agreement contained the following clause: "**Warranty:** "Upon finishing the project, for one full year Tatra Renovation, Inc. will provide you with guarantee [sic] on performed work. In case that some [sic] problem should occur, Tatra Renovation Inc. will repair it at it's [sic] own expense." (Notice of Motion, Exhibit A. [emphasis in original].) Plaintiff alleges that he would not have entered into the Renovation Agreement.if not for defendant's warranties. (Affirmation in Opposition, Exhibit 1, at ¶ 40.)

In his complaint, plaintiff alleges that

> "Defendant's failure to repair and/or cure the construction and installation defects set forth above, including after notice was duly given by Plaintiff, constitutes a breach of

> an express warranty under the Renovation Agreement and a breach of express warranties by Defendant that the work would be suitable, fit and workmanlike for its intended purpose and would be competently and diligently completed, none of which occurred." (Affirmation in Opposition, Exhibit 1, Complaint, at ¶ 42.)

Plaintiff asserts similar allegations regarding defendant's breach of an implied warranty.

The renovation agreement provides that defendant "[p]rovide and install . . . [the] Bamboo" flooring. (Affirmation in Opposition, Exhibit A, Wood Flooring section.) The agreement also provides that defendant will "[u]se all materials guaranteed as specified and above work performed in accordance with the specifications submitted for above work and completed in a substantial workmanlike manner." (Affirmation in Opposition, Exhibit A, Tatra Renovation Inc. section.)

Defendant states that plaintiff chose the flooring because it fit plaintiff's budget and that defendant did not manufacture, sell, or distribute the flooring. (Defendant's Notice of Motion, Affidavit of Paul Barlik, at ¶¶ 10-11.).) Plaintiff's counsel, however, states that defendant never told plaintiff that the bamboo flooring was not suitable for the project or advised plaintiff not to use the flooring. (Affirmation in Opposition, at ¶ 19.)

According to the parties' renovation agreement's warranty provision, defendant agreed that its labor would be performed in a workmanlike manner. Thus, defendant warranted his labor.

It could be also interpreted from the renovation agreement that the warranty about the quality of the job applies to the labor as well as to the materials used. (*See Smith v Phillips*, 110 NYS2d 12, 14 [County Ct, Broome County 1952].) In *Smith*, the court held the following:

> "The painting contractor did not merely represent that the labor would be performed in a good and workmanlike manner, but agreed to furnish all material, tools, labor and equipment to complete the work in a good and workmanlike manner. By any reasonable construction of the phraseology used in this contract, it must be concluded that the warranty as to the quality of the job not only applied to the labor, but also to the material, tools and equipment. It seems to this Court that this clause clearly revelas [sic] the intention of the contractor to warrant the quality not only of the labor, but also the quality of the materials. No particular form of words is essential to a warranty, it is the question of the intention of the parties." (*Id.* [internal citations omitted].)

Although defendant states that he did not provide the flooring, the renovation agreement provides that defendant will provide the flooring. The court cannot ascertain at this early phase the parties' intent about the warranties that defendant agreed to provide.

In any event, plaintiff has adequately alleged a breach of express and impress warranties. Defendant's motion to dismiss the third and causes of action is denied.

Plaintiff's Fifth Cause of Action

Defendant alleges that plaintiff's negligence claim is duplicative of his claim for breach of contract and therefore must be dismissed. A court will dismiss a tort claim that is based on the same facts underlying a contract claim: "Generally, a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action, particularly where, . . . [the claims] both seek identical damages." (*Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 [1st Dept 2006].)

Plaintiff asserts the same facts in its negligence claim as it does in its breach of contract claim. Plaintiff's negligence claim duplicates its breach of contract claim.

Defendant's motion to dismiss the fifth cause of action is granted.

II. Defendant's Motion to Dismiss under CPLR 3211 (a) (10)

Defendant's CPLR 3211 (a) (10) motion is denied. A court may dismiss a case if a necessary party is absent from the case. (CPLR 3211 [a] [10].) And "'[t]he only time a court should dismiss the case for nonjoinder of a person is where a series of factors all coincide: 1. The person is not subject to jurisdiction and will not appear voluntarily; 2. No CPLR 1001 (b) alternative is available; and 3. Such person is so essential to the litigation that it cannot justly proceed in his absence.'" (*926 Port Chester Mgt. Group LLC. v Slabakis*, 52 Misc 3d 1203 [A], *7, 2016 WL 3546169, at *7, 2016 NY Slip Op 50982 [U], *7 [Sup Ct, Kings County 2016], quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., 3211:34.) Defendant argues that the floor manufacturer is an essential party and that this litigation cannot proceed in its absence. Other than this conclusory statement, defendant does not explain why the manufacturer is a necessary party or why absence warrants that this court dismiss this case.

III. Defendant's Motion to Dismiss under CPLR 3211 (a) (1)

Defendant's CPLR 3211 (a) (1) motion is denied. On a CPLR 3211 (a) (1) motion to dismiss, a defendant has the "burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim.'" (*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [citations omitted]; *accord Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994].) The documentary evidence must "be unambiguous and of undisputed authenticity." (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22.) Judicial records, mortgages, deeds, and contracts qualify as documentary evidence. (*Fontanetta*, 73 AD3d at 84.) Affidavits, examination before trial (EBT) transcripts, emails, and medical records are not the type of documentary evidence acceptable under CPLR 3211 (a) (1). (*Id.* at 85.) Affidavits and summary notes do not constitute documentary evidence within the meaning

of the rule; they raise issues of credibility for a jury to decide. (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014].)

In support of its motion to dismiss based on documentary evidence, defendant provides emails exchanged between defendant and plaintiff (Defendants' Notice of Motion Exhibit A, B), and an affidavit by Paul Barlik, an authorized agent for defendant. (Defendants' Notice of Motion.) The documents that defendant provides in support of its motion are not the type of documentary evidence acceptable under CPLR 3211 (a) (1). Defendant's motion to dismiss under CPLR 3211 (a) (1) is denied.

IV. Defendant's Motion to Dismiss under CPLR 3211 (a) (2)

Defendant's CPLR 3211 (a) (2) motion is denied. A court may dismiss a case under CPLR 3211 (a) (2) if it has no subject matter jurisdiction: "The question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it." (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997].) The New York State Supreme Court has general jurisdiction to hear cases: "Supreme Court is a court of general jurisdiction and it is competent to entertain all causes of actions unless its jurisdiction has been specifically prescribed." (*Thrasher v United States Liability Ins. Co.*, 19 NY2d 159, 166 [1967].)

Defendant's argument that this court has no subject-matter jurisdiction is unpersuasive. Defendant argues that because plaintiff should have brought this case against the manufacturer or distributor, plaintiff's claims are neither ripe nor justifiable. Defendant's argument is not about subject-matter jurisdiction. Whether the proper parties are before the court does not affect the court's subject-matter jurisdiction: "Whether the action is being pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it." (*Wells Fargo Bank Minn. v Mastropaolo*, 42AD3d 239, 243 [2d Dept 2007].) Defendant "confuse[s] a plaintiff's right to recovery with the court's power to hear the case. (*See id.*) This court has subject-matter jurisdiction over plaintiff's controversy: "A court lacks subject matter jurisdiction when it lacks the competence to adjudicate a particular kind of controversy in the first place." (*See id.*)

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted in part and denied in part: defendant's motion to dismiss plaintiff's negligence claim is granted, and the motion is otherwise denied; and it is further

ORDERED that defendants serve a copy of this decision and order with notice of entry on all parties; and it is further

ORDERED that defendants must serve and file its answer within 20 days of service with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on October 4, 2017, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: July 17, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.