

STATE OF MAINE  
Cumberland, ss.

BUSINESS AND CONSUMER COURT  
LOCATION: Portland  
DOCKET NO: BCD-CIV-2021-00048

AMANDA LOWE,	)	
Plaintiff,	)	
	)	
v.	)	ORDER ON DEFENDANTS' MOTION
	)	TO DISMISS
SRT CUSTOM BUILDING, INC.,	)	
JASON M. THERIAULT, and	)	
SHAWN R. THERIAULT,	)	
Defendants.	)	

Plaintiff Amanda Lowe (“Plaintiff”) filed an eight-count Complaint<sup>1</sup> on June 14, 2021. On June 21, 2021, Defendants SRT Custom Building Inc, LLC., Jason M. Theriault, and Shawn R. Theriault (collectively referred to as “Defendants”) filed a joint Motion to Strike and for an Enlargement of Time to File Responsive Pleadings, which Plaintiff timely opposed. All three defendants filed individual Answers and Affirmative Defenses on July 8, 2021. Defendants’ Motion to Strike was denied, but their request for an enlargement of time was granted on August 6, 2021 (*O’Neil, J.*).

While the Defendants’ June 21, 2021 Motion was pending, they applied to have the action transferred to the Business and Consumer Court on July 16, 2021. The transfer was approved on August 12, 2021 (*Duddy, J.*). A scheduling order was issued on October 4, 2021 following a September 27, 2021 scheduling conference.

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<sup>1</sup> The eight counts in the Complaint are as follows: Breach of Contract (Count I), Breach of Expressed Warranties (Count II), Breach of Implied Warranties (Count III), Violations of the Home Constructions Contracts Act (Count IV); Constructions Contract (V), Conversion (VI), Uniform Deceptive Trade Practices Act (VII), and Maine Unfair Trade Practices (Count VIII).

This court received notice on November 30, 2021 that the parties had agreed to Alternative Dispute Resolution (ADR). The ADR Conference was held on February 14, 2022, and the parties were unable to come to a resolution.

On February 18, 2022, Defendants electronically filed their Motion to Dismiss pursuant to M.R. Civ. P. 12(b)(6) on the grounds that the Complaint fails to state a claim. Plaintiff filed a Memorandum of Law in Opposition to the Motion on March 2, 2022. Defendants filed a Reply on March 21, 2022 and a Supplement Reply Memorandum on March 29, 2022.

After careful review of Defendants' Motion to Dismiss, the court finds the motion to be untimely. Defendants brought their Motion pursuant to M.R. Civ. P. 12(b)(6). Rule 12(b) of the Maine Rules of Civil Procedure instructs:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted .... A motion making any of these defenses *shall be made before pleading if a further pleading is permitted.*

(emphasis added).

While the court recognizes a motion for failure to state the claim may be brought after the pleadings close, such a motion should be brought pursuant under M.R. Civ. P. 12(c), Motion for Judgment on the Pleadings.<sup>2</sup> In the Motion to Dismiss, neither Rule 12(c) nor a request for a judgment on the pleadings is mentioned. Therefore, the court treats the motion as it is presented, as a Rule 12(b)(6) motion. As a Rule 12(b)(6) Motion, Defendants' Motion to Dismiss is untimely. Due to

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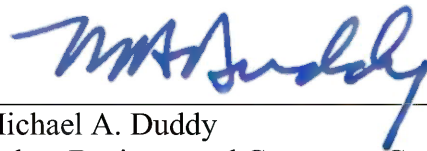
<sup>2</sup> "A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by a *motion for judgment on the pleadings*, or at the trial on the merits." M.R. Civ. P. 12(h)(2) (emphasis added).

the Defendants' having already filed pleadings, Defendants' Motion to Dismiss is DENIED for being untimely.

In accordance with the Scheduling Order, the deadlines for discovery, January 27, 2022, and the exchange of witness lists, February 11, 2022, passed before this motion was brought. The deadline for filing dispositive motions was on March 27, 2022 and has since passed. Therefore, this action is ready for the trial phase and a pretrial conference shall be scheduled.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order Dismissing Plaintiff's Filing of 32 M.R.S. § 11019 Action on the civil docket by a notation incorporating it by reference.

Date: April 12, 2022



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Michael A. Duddy  
Judge, Business and Consumer Court

Entered on the docket: 04/12/2022