

<b>Furino v O'Sullivan</b>
2013 NY Slip Op 34050(U)
March 8, 2013
Supreme Court, Queens County
Docket Number: 23070/2004
Judge: Marguerite A. Grays
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Memorandum

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4

Justice

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ANTHONY FURINO and JOANN MADTES,

Index  
No.: 23070/2004

Plaintiff(s),

-against-

TIMOTHY O'SULLIVAN, O'SULLIVAN  
BUILDERS & DEVELOPERS, INC., ANNE  
O'SULLIVAN, ABC CORP., ABC COMPANY  
and JOHN DOES 1-20.

Defendant(s).

-----X  
Hon. Marguerite A. Grays

I. Overview

In this action, plaintiffs asserts causes of action against the defendants for: (1) breach of Housing Merchant Implied Warranty on sale of new home; (2) breach of contract; (3) fraud; (4) negligence and (5) punitive damages. Defendants countersued plaintiffs for breach of contract and slander. A trial was held in this action from April 16<sup>th</sup> through April 30<sup>th</sup>, 2012. By agreement of the parties, post-trial memoranda of law limited to the issue of damages were to be submitted by May 18, 2012. Upon further request of counsel for both sides, the post-trial memoranda of law submission date was extended to June 6, 2012.

## II. The Evidence Received at the Trial

The following witnesses testified on behalf of the plaintiff at trial, plaintiffs Anthony Furino and Joann Madtes, Harold Krongelb Heimer, Alan Caplan, Albert Perna, Robert Dujat and Gerard Rocco. Defendants Timothy and Anne O'Sullivan, Joseph Schmitt and David Gillan testified on behalf of the defendants.

### A. The Testimony of Anthony Furino

Plaintiff Anthony Furino ("plaintiff") testified as follows: Plaintiff purchased the property located at 28-43 215<sup>th</sup> Place, Bayside, New York ("the premises") from defendants Timothy and Anne O'Sullivan. The closing occurred on Friday, October 11, 2002. On Saturday, October 12 [2002], the basement in the premises flooded. There was two to three inches of water in the basement. Plaintiff hired Great American Restoration Services, Inc. (GARS), who extracted the water, removed the carpet and padding, and installed fans to dry out the basement. It took GARS two days to perform its work. Defendant Timothy O'Sullivan ("defendant") came to the premises with a plumber on Monday, October 14 [2002], however defendant never inspected the premises after the flood despite three scheduled inspections. Defendant suggested that a sump pump be installed into the sewer system, but since he could not tell plaintiff if it was legal to do so, plaintiff did not allow defendant to install the pump. On October 15, 2002, plaintiff contracted with Vulcan Basement Waterproofing Co. of Flushing, Inc. ("Vulcan"), which installed three sump

pumps around the perimeter of the basement.<sup>1</sup> Plaintiffs thereafter purchased tile from Parma Tile and hired Al Perna General Construction Corp. to re-tile the broken tiles in the basement.<sup>2</sup> On June 14, 2003, plaintiff contracted with Heimer Engineering, P.C. to inspect the premises. Plaintiffs also had to hire Rocco Bros. Construction Inc. to repair water damage to the first floor bathroom wall caused by a nail which had been driven into a pipe during the construction of the premises.

Plaintiff further testified that he had visited the premises on numerous occasions prior to the closing, and had access to the basement on those visits. He never observed any water penetration or any such problems on his prior visits. Plaintiff did not file a claim under his [home owners] insurance policy for the water damage to the premises because his insurance policy did not provide coverage for flood damage. Plaintiff further testified that he and defendant created a "30 Day Checklist" at the closing, which listed known defects that existed at the premises.<sup>3</sup> Plaintiff drafted the list<sup>4</sup>, however neither party signed it. Plaintiff wanted an escrow agreement to ensure completion of the checklist, but defendant refused. Defendant did not fix all of the items listed on the checklist, and plaintiff spent

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<sup>1</sup> Plaintiff testified that the Vulcan system was still working at the time of trial.

<sup>2</sup> Plaintiff acknowledged that the tile had been partially damaged prior to the closing.

<sup>3</sup>The enumerated list contains checkmarks admittedly made by plaintiff beside the items that have been completed. However, although the list shows check marks beside item numbers 3, 4, 10 and 16, plaintiff testified that items numbered 3, 5, 10 and 16 have been corrected.

<sup>4</sup> Except for the title "(30 Day Checklist)".

approximately \$3,000 fixing some of the items on the checklist.<sup>5</sup> The parties also signed an agreement at the closing whereby plaintiff agreed to pay defendant \$4,880 for concrete work in the rear of the property. Plaintiff did not make the \$4,880 payment since defendant did not complete the checklist.

On cross-examination, plaintiff testified that he never had any negotiations with defendant Anne O'Sullivan, and acknowledged that plaintiffs purchased the premises from Timothy O'Sullivan. Anne, however, had co-owned the premises with Timothy O'Sullivan, her husband. Plaintiff testified that defendant knew about the problems with the house prior to the closing but did not disclose same to plaintiff.

#### B. The Testimony of Harold Krongelb Heimer

Harold Krongelb Heimer ("Heimer") testified in relevant part as follows: at plaintiff's request, Heimer performed a physical inspection of the premises on June 14, 2003. He used a moisture meter to measure the level of moisture in the basement. He observed on-going water penetration into the basement and excessive levels of moisture in the walls. Heimer could not recall the weather condition on the day of his inspection, but testified that if it had been raining he would have indicated that in his report. Heimer concluded that the premises was negligently constructed with insufficient drainage, which allowed for water penetration. He stated that the Vulcan system installed after the flooding did not resolve the problem as there was still elevated levels of moisture in the basement at the time of the inspection.

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<sup>5</sup> Plaintiff testified he fixed item numbers 15 (\$1,625), 6 (no cost), and 12.

Heimer repeatedly stated that the defective conditions present at the premises were not typical to newly constructed houses, and the basement of a properly constructed house should be water tight.

Heimer testified that he also detected other deficiencies in the construction of the premises during his inspection, which included improperly laid hard wood flooring, a settlement crack in a wall, popping nail heads, misalignment of all of the doors, and pipes installed too close to the walls. Furthermore, the exterior basement steps were excessively damp indicating improper drainage, and there was no nosing on the basement steps which posed a tripping hazard and a violation of the relevant building code. Heimer also noted that the path to the back of the house, which was 18" wide, was too narrow for one to "safely traverse" and that the rear steps of the premises pull slightly away from the house.

On cross examination, Heimer stated that he could not determine the cause of the water penetration. He could not recall the weather condition on the day of the site visit, he acknowledged that his readings can be affected by anything that can have an effect on moisture.

#### C. The Testimony of Alan Caplan

Alan Caplan of Vulcan Waterproofing testified that the plaintiff and Vulcan entered into a contract on October 15, 2002. He further testified that there was 215 linear feet of water present in the basement of the premises, which was a tremendous amount of water in a relatively new house. The water was pouring in from where the floor and the wall join

together. He further testified that it was unusual to have that much water unless there was a problem in the construction of the property. The crew chief installed three sump pumps at the premises. Plaintiff paid Vulcan a \$2,000 down payment, and \$8,300 upon completion of the work.

On cross examination, Caplan averred that the weather has no bearing on this type of condition. In his opinion, the basement flooding was caused by faulty workmanship, and if the foundation was sound, no water should have entered the premises.

D. The Testimony of Albert Perna

Albert Perna testified that he has worked as a contractor since 1984, and is the owner of Al Perna General Construction. Perna further testified that he removed and re-laid tiles in the bathroom and in the laundry room at the premises due to water damage. Plaintiff paid Perna's \$3,260 bill in full.

E. The Testimony of Robert DuJat

Robert DuJat testified that he performed plumbing work at the premises. He fixed a hot water leak caused by a screw that went through a pipe. Plaintiff paid the \$150 bill on June 7, 2003.

F. The Testimony of Gerard Rocco

Next, Gerard Rocco of Rocco Bros. Construction, Inc. testified regarding the various items of work he performed at the premises, including re-setting the doors throughout the house. Plaintiff paid Rocco \$425 to break a portion of a wall, straighten out the edges, and

re-sheet rock and re-tile it. Additionally Rocco further testified that additional work was needed on the premises.

G. The Testimony of Joann Madtes

Plaintiff Joann Madtes testified, in relevant part, that it was raining on the day of the basement flood. After the flooding occurred, she called State Farm, her home owner's insurance company, but was told that this incident was not covered under the policy.

H. The Testimony of Timothy O'Sullivan

Defendant Timothy O'Sullivan testified that he is in the business of building single family homes. He built approximately 40 homes since 1996 or 1997, and approximately 12 prior to building plaintiffs' house. Defendant built plaintiffs' home pursuant to a contract of sale between himself and plaintiffs. The parties closed on the contract on October 11, 2002. Plaintiff called defendant on the evening of the closing regarding the flood, but defendant did not get the messages until 11 pm.<sup>6</sup> Defendant called plaintiff 8:30 a.m. the next day, but plaintiff told defendant that defendant did not need to come to the premises that day since the water had already been pumped out of the basement. Plaintiff told defendant to come to the premises the next day. When defendant went to inspect the premises on October 14<sup>th</sup> [2002], he observed water on the basement floor. Defendant opened the water/sewer trap which all the drain pipes lead to, and the water started going down. He returned to the premises that afternoon with a plumber. Defendant suggested, and plaintiff agreed, that a

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<sup>6</sup> Defendant O'Sullivan later testified that he was first contacted by plaintiff about the flood on October 12<sup>th</sup>.



floor drain and sump pump be installed near to the trap in order to pump water out of the premises. However, plaintiff called defendant that evening and told him not to come back, and that plaintiff would get the problem fixed and bill defendant. Defendant thus cancelled the plumbing job and plaintiff never gave defendant the opportunity to come back to fix the problem.

Defendant testified that a soil boring test, which shows water table levels and permeability of soil, was performed by Atlas Technical Association on the property prior to the premises being built.<sup>7</sup> Generally, french drains are installed on properties where there is a high water table. However, during the excavation of the subject property, defendant drilled 32 feet down and never saw any water. He never saw any water penetration at the premises until after the basement flood. On the night of the closing, there was a torrential rainfall and rain of that magnitude could cause the water table to rise. Defendant could not recall whether he provided plaintiffs with a copy of the boring test.

A pre-cast concrete dry well was installed in the backyard of the subject property before the foundation was laid. The dry well was installed at least 3 feet underground, and connected to pipes. The pool was installed after the dry well. Defendant was not present when the pool was being installed. He did not install the pool, nor did he install the barbeque or its gas line.

With regard to the parties' concrete agreement, defendant testified that at the closing,

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<sup>7</sup> At the time that the test was performed, there was an old house on the property that had since been demolished.

plaintiff signed an agreement dated October 11, 2002, promising to pay \$4,880 to defendant to lay concrete in the rear of the premises. Defendant was able to use the concrete and performed the work.

With regard to the "30 Day Checklist" or punch list, defendant testified that he did not sign the checklist. Defendant further testified that he had completed a punch list prior to the closing, however, plaintiff came to the closing with the checklist and wanted defendant to sign it and put money in escrow. Defendant completed some of the items on the list a few weeks after the closing and then signed the checklist, since he had either completed the items or explained to plaintiff why some of the items were not done. The words "30 Day Checklist" were not written on the sheet that defendant signed.

With regard to his counterclaim for slander, defendant testified that on or about the first weekend of November, 2002, he and his wife were leaving a restaurant when he saw plaintiff and plaintiff's brother. Plaintiff "got in [defendant's] face", and stated "I'll make you pay as long as it takes". Plaintiff then told defendant's wife, "your husband is a piece of garbage". Defendant felt threatened and humiliated. He went to the police station a day or two later and filed a report since plaintiff had a history of leaving verbally abusive messages on defendant's phone.<sup>4</sup> Defendant also installed an alarm system in his home following this incident.

#### I. The Testimony of Joseph Schmitt

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<sup>4</sup> Defendant did not produce a copy of the police report allegedly filed or proof of the alleged telephone messages.

Joseph Schmitt, a licensed civil engineer, testified in relevant part as follows: The results from a soil boring test are used to determine how to construct the foundation of a building. If water is found, the foundation should be raised or a de-watering device installed for drainage. A dry well, which is generally connected to gutters or storm catch basins, collects rain water and allows the water to run off a house and away from other properties. Soot, or excavation and construction performed near to a house, can effect the functioning of a dry well and cause saturation. Generally, the set back for dry wells is 10 feet from the structure and 5 feet from the property line.

With regard to the construction of the premises, Schmitt testified that silk, soot, excavation or construction nearby, could compromise a dry well. Additionally, Schmitt stated that settlement cracks are a common occurrence in newly constructed homes, as the green wood used in new construction eventually dries out, causing minimal shrinkage within the first year of construction. Nail pops also usually occur within the first year of construction as a result of wood shrinkage.

On cross examination, Schmitt testified that severe rain could cause a change in the water table. However, construction or excavation was unlikely to disturb the water table unless there was a change in the soil.

#### J. The Testimony of David Gillam

Finally, David Gillam testified that he has worked as a plumbing contractor for 25

years. He performed the initial plumbing work at the premises.<sup>9</sup> He went to the premises with defendant because there was a problem with water in the basement. Gillam could not remember whether plaintiff was present at the time of his visit. He looked in the traps and saw water in the pit. He and defendant discussed installing a drain and a sump in the pit that would pump out water whenever necessary. However, he did not discuss this with plaintiffs, and he never provided anyone with plans or sketches for this idea. Gillam got a call from defendant the next day and was told that the owner of the premises would not allow them back into the house. At some time within the following six (6) months, Gillam got a call from one of the plaintiffs asking him to come to the premises and fix a leak in the first floor bathroom. He went to the premises and had to break through the tile to fix the leak, which was caused by a screw that had penetrated a pipe.

On cross-examination, Gillam testified that he did not independently recall what date he returned to the house, nor did he have a copy of the warranty, business record, invoice or work order with him regarding any work done at the premises.

#### K. Documentary Submissions

The relevant documents tendered into evidence by plaintiffs include the October 11, 2002 Bargain and Sale Deed; the October 12, 2002 and October 14, 2002 GARS paid

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<sup>9</sup> Gillam initially testified that he could not remember if he gave defendant or plaintiffs a home owner's warranty for his work, but thereafter testified that he did not give plaintiff a copy of a warranty.

invoices in the amounts of \$1,121.00<sup>10</sup> and \$1,226.78, respectively; and the October 29, 2002 paid Vulcan receipt in the amount of \$10,300.00. The relevant documents tendered by defendants at trial included the December 2001 Residential Contract of Sale and the October 11, 2002 agreement signed by plaintiff and defendant.

### III. Burden of Proof

The burden of proof is on the plaintiff to prove by a preponderance of the evidence that the defendant breached a contract. (See, *Torem v 564 Cent. Ave. Rest., Inc.*, 133 AD2d 25). The court notes in particular that a plaintiff must establish his entitlement to damages by a fair preponderance of the evidence. (See, e.g., *Peak v Northway Travel Trailers, Inc.*, 27 AD3d; *Lory v Parsoff*, 17 AD3d 541). The Court further notes that plaintiffs' Third, Fourth and Fifth causes of action were dismissed at trial. The instant action was also dismissed as against defendant Anne O'Sullivan at the conclusion of the trial. The defendant's second counterclaim for slander was also dismissed at trial.

### IV. Analysis

Now, after consideration of the credible evidence submitted and the testimony of the witnesses adduced at trial, judgment is awarded in favor of plaintiffs and as against defendant Timothy O'Sullivan on plaintiffs' First and Second causes of action, in the amount of \$20,464.35, together with statutory interest from October 9, 2004.

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<sup>10</sup> The October 12, 2002 GARS invoice lists the grand total amount as \$1,121.02. However, the paid credit sale receipt shows \$1,121.00 was actually paid.

The elements of a cause of action sounding in breach of contract are (1) the existence of a contract between the plaintiff and defendant; (2) consideration; (3) performance by the plaintiff thereunder; (4) a breach by the defendant; and (5) damages to the plaintiff as a result of the defendant's breach (*J.P. Morgan Chase v. J.H. Electric of New York, Inc.*, 69 AD3d 802 [2010]). Here, it is undisputed that a contract existed between plaintiffs as buyers and defendant as builder and seller, and that plaintiffs performed their obligation thereunder by tendering the contract price to defendant. Through the credible testimony and evidence presented, plaintiffs established through a fair preponderance of the credible evidence, that the water penetration problem, which occurred one day after the parties' closing on the new home, would generally not occur in a newly constructed house absent faulty workmanship. Accordingly, plaintiffs are entitled to damages they incurred as a direct result of the water penetration, to wit, monies paid for the services provided by GARS and Vulcan, together with the replacement/repair costs for the damaged property. The court calculates the amount of damages based upon the following receipts received into evidence to wit: Paid receipt from GARS dated October 12, 2002 (plaintiffs' 3) in the amount of \$1,121.00; paid receipt from GARS dated October 14, 2002 (plaintiffs' 4) in the amount of \$1,226.78; paid receipts from Vulcan Waterproofing dated November 12, 2002 and November 13, 2003 in the total amount of \$10,300.00; paid receipt from Expo Design dated June 24, 2002 in the amount of \$3,053.65 (plaintiffs' 9, after giving defendant certain credits); paid receipt from Heimer Engineering dated June 14, 2003 in the amount of \$745.00 (plaintiffs' 11); paid receipt from Parma Tile dated November 19, 2002 in the amount of \$390.67 (plaintiffs' 12); paid receipt

from A) Perna Construction dated April 3, 2003 in the amount of \$3,260 (plaintiffs' 13); paid receipt from Kazalas Paint Supplied Co. dated October 18, 2002 in the amount of \$367.25 (plaintiff's 18A).

Furthermore, under General Business Law §777-a(1)(a), a housing merchant implied warranty is implied in the contract for the sale of a new home, guaranteeing that one year from and after the warranty date, the home will be free from defects due to unskillful construction. The Court notes that although defendant argued that plaintiffs did not give him an opportunity to repair the water penetration problem, such argument is inapplicable inasmuch as no award is made herein for any claims asserted by plaintiffs which relate to any plumbing, electrical, heating, cooling or ventilation system defects, which would require such notice (*Gen. Busi. Law §777-a(4)(a)*).

Plaintiffs also failed to demonstrate prima facie entitlement to judgment for damages sought regarding the checklist. The testimony adduced at trial was conflicting and unclear as to what, if any, agreement the parties had regarding the list, when any such agreement was made, and what accounted for the differences in the two lists tendered into evidence by the respective parties.

Defendants' post-trial motions to dismiss plaintiffs' First and Second causes of action are accordingly denied.

Defendant Timothy O'Sullivan is awarded judgment against plaintiff Anthony Furino on the First Counterclaim in the amount of \$4,880.00, together with statutory interest from

October 9, 2004. Plaintiff acknowledged the parties' October 11, 2002 agreement, signed by plaintiff and defendant, regarding plaintiff's payment of \$4,880.00 to defendant to lay concrete in the rear of the property. Plaintiff's contention that he did not make this payment because defendant did not complete the checklist is unavailing inasmuch as there was no proof adduced that the agreement was conditioned upon defendant's completion of the checklist. Indeed, a reading of the signed agreement reveals that the only condition precedent to plaintiff's obligation to make the payment was that the concrete be usable as a base for the pavers and not materially defective. There was un-controverted testimony from defendant that he was able to use the concrete for that purpose.

Defendants' Second counterclaim for slander was dismissed at trial. Additionally, the Court notes that defendant Timothy O'Sullivan failed to plead and prove that he sustained any special damages as a result of plaintiff's alleged statements, nor did defendant establish that plaintiff's alleged statements constituted slander *per se*. No evidence was adduced at trial that defendant suffered any economic loss, or any injury to his trade, business or profession as a result of plaintiff's alleged defamatory statements (*Rufeh v. Schwartz*, 50 AD3d 1002 [2008]).

#### V. Disposition

The plaintiff's are awarded judgment in the sum of \$20,464.35 on the first and second causes of action.

The plaintiff's third, fourth and fifth causes of action were dismissed at trial.

The plaintiffs' action is otherwise dismissed as against all other named defendants.



Defendant Timothy O'Sullivan is awarded \$4,800.00 on the first counterclaim.

Defendant Timothy O'Sullivan's second counterclaim was dismissed at trial.

Settle Judgments.

Dated:

MAR 08 2013



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MARGUERITE A. GRAYS  
J.S.C.