Board of Mgrs. of 136 St. Marks Place Condominium v St. Marks Place Condominiums II, LLC
2014 NY Slip Op 33363(U)
December 10, 2014
Supreme Court, Kings County
Docket Number: 503989/13
Judge: Lawrence S. Knipel

At an IAS Term, Part Comm-4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of December, 2014.

P R E S E N T:

HON. LAWRENCE S. KNIPEL,
Justice.

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BOARD OF MANAGERS OF 136 ST. MARKS PLACE CONDOMINIUM,

Plaintiff,

- against -

Index No. 503989/13

ST. MARKS PLACE CONDOMINIUMS II, LLC, JOSEPH DABBAH and BUILDERS BANK,

Defendants.

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The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	26
Opposing Affidavits (Affirmations)	30
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Memoranda of Law	27

Upon the foregoing papers, defendant Builders Bank (Bank) moves, in sequence #3, for an order, pursuant to CPLR 2221, (1) granting reargument of its motion, in sequence #1, seeking dismissal of the claims by Board of Managers of 136 St. Marks Place Condominium

MS #3
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(plaintiff) as against it, which this court's March 5, 2014 decision and order denied, and, (2) upon reargument, granting that motion.

Background And Allegations

Plaintiff has alleged various causes of action against defendants St. Marks Place Condominiums II, LLC and Joseph Dabbah (collectively, Sponsor), alleging that they were responsible for various renovation defects in the condominium building at 136 St. Marks Place, in Brooklyn (the Building).[1] Plaintiff also asserted causes of action for negligence and declaratory judgment against Bank, which had stepped into Sponsor's position during the course of renovation and had completed that work.

Bank moved, in sequence #1, for an order dismissing plaintiff's claims against it for failure to state a claim. It argued that "the gravamen of [plaintiff's] allegations is that Builders failed to perform in a workmanlike manner" and that such a claim may sound only in breach of contract, not in tort. Even if plaintiff's negligence claim were viable, Bank contended, it could not recover the damages it sought, as they were purely economic loss. Bank further argued that plaintiff's declaratory-judgment claim warranted dismissal, as plaintiff brought it in response to, rather than as an effort to prevent, a purported wrong.

This court's March 5, 2014 decision and order denied Bank's motion. It explained that, though dismissing the negligence claim would be proper "[h]ad plaintiff asserted a cause of action against Bank for breach of contract," here plaintiff asserted only the

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[1] This court's January 31, 2014 order granted plaintiff default judgment, pursuant to CPLR 3215, as against St. Marks Place Condominiums II, LLC.

negligence claim and Bank admitted that no contract governed their relationship. It also found that the declaratory-judgment claim must survive, "since a prima facie claim to stabilize a disputed jural relationship with respect to present or prospective obligations has been adequately alleged."

The Instant Motion

Bank now moves, in sequence #3, for an order, pursuant to CPLR 2221, granting reargument of motion sequence #1 and, upon reargument, dismissing plaintiff's claims against it. It argues that the court misapprehended controlling case law, particularly the decision of the Appellate Division, Second Department, in *Park Edge Condominiums, LLC v Midwood Lumber & Millwork, Inc.* (109 AD3d 890 [2013]), which, Bank urges, required dismissing plaintiff's negligence cause of action as a claim based in unworkmanlike construction that may sound only in breach of contract. It also contends that the economic loss rule bars the damages plaintiff seeks. Bank additionally restates its prior arguments concerning the declaratory-judgment claim.

Plaintiff, in opposition, contends that Bank's motion constitutes an improper attempt to continue argument on issues already decided.

Discussion

The Second Department stated, in *Park Edge Condominiums*, among other decisions,

> "The gravamen of the negligence cause of action is that the work performed under the contract was performed in a less than skillful and workmanlike manner. Such a cause of action sounds in breach of contract, not negligence. The plaintiff's

> allegations of negligence are 'merely a restatement, albeit in slightly different language, of the . . . contractual obligations.'" (*id.* at 891, quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]; *see also Corrado v East End Pool & Hot Tub, Inc.*, 69 AD3d 900, 900-901 [2010]; *Staten Is. N.Y. CVS, Inc. v Gordon Retail Dev., LLC*, 57 AD3d 760, 763 [2008]).

The origin of this maxim lies in the Court of Appeals' decision in *Clark-Fitzpatrick, Inc. v Long Island Rail Road Company* (70 NY2d 382), in which the Court stressed that a breach of contract cannot be treated as a tort without showing violation of an independent legal duty (*id.* at 389). Such a legal duty, it explained, "must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*id.*). In affirming dismissal of two negligence claims, the *Clark-Fitzpatrick* Court, like recent Appellate Division opinions relying on *Clark-Fitzpatrick*, focused on the plaintiff's "restatement" of the allegations also included in a concurrent breach-of-contract claim (*see id.* at 390; *see also Park Edge Condominiums, LLC*, 109 AD3d at 891; *Corrado*, 69 AD3d at 900-901; *Staten Is. N.Y. CVS, Inc.*, 57 AD3d at 763).

Unlike those cases, however, plaintiff herein does not assert a contract claim against Bank, and both parties deny the existence of any contractual duties between them. The viability of a cause of action for negligent construction or for negligence related to services rendered, construction or otherwise, is well established by other controlling appellate decisions (*see Caceci v Di Canio Constr. Corp.*, 72 NY2d 52, 56 [1988] [affirming decision which rejected breach-of-contract theory but granted plaintiff award of repair costs for

negligent construction], *superseded on other grounds by* General Business Law art. 36-B; *Milau Assoc. v North Ave. Dev. Corp.*, 42 NY2d 482, 486 [1977] ["unless the parties have contractually bound themselves to a higher standard of performance, reasonable care and competence owed generally by practitioners in the particular trade or profession defines the limits of an injured party's justifiable demands"]; *Larchmont Nurseries, Inc. v Daly*, 33 AD3d 872, 874 [2006] ["'(a) person charged with performing work under a contract must exercise reasonable skill and care in performing the work and negligent performance of the work may give rise to actions in tort and for breach of contract'"], quoting *International Fid. Ins. Co. v Gaco W.*, 229 AD2d 471, 474 [1996]; *Aegis Prods. v Arriflex Corp. of Am.*, 25 AD2d 639, 639 [1966] ["[i]f the service is performed negligently, the cause of action accruing is for that negligence[;] [l]ikewise, if it constitutes a breach of contract, the action is for that breach"]).

Indeed, the *Clark-Fitzpatrick* Court even cited to Court of Appeals precedent acknowledging the potential negligence liability related to performance (or nonperformance) under a contract (*see* 70 NY2d at 389, citing *Meyers v Waverly Fabrics, Div. of Schumacher & Co.*, 65 NY2d 75, 80 n 2 [1985] ["(i)f in fact plaintiff sold only the right to use the design on fabric, the use of it in other and deceitful ways is no less a tort because it has its genesis in contract, for it is plain that a contracting party may be charged with a separate tort liability arising from a breach of duty distinct from, or in addition to, the breach of contract" (internal quotation marks omitted)], *North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 179

[1968] ["it is equally plain that a contracting party may be charged with a separate tort liability arising from a breach of duty distinct from, or in addition to, the breach of contract"] and *Rich v New York Cent. & Hudson Riv. R.R. Co.*, 87 NY 382, 390 [1882] ["it is conceded that a tort may grow out of, or make part of, or be coincident with a contract, and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*" (citation omitted)]).

"'The economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract and personal injury is not alleged or at issue'" (*126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc.*, 121 AD3d 651, 2014 NY Slip Op 06563, *1 [2014], quoting *Atlas Air, Inc. v General Elec. Co.*, 16 AD3d 444, 445 [2005], *lv denied* 6 NY3d 701 [2005]; *see also Archstone v Tocci Bldg. Corp. of N.J., Inc.*, 101 AD3d 1059, 1061 [2012], *lv dismissed* 21 NY3d 1035 [2013]). Although the rule precludes recovery for damages to the product itself and also consequential damages, such as repair, replacement or expectation losses, it raises no bar to recovery for damages to other property (*see 126 Newton St., LLC*, 121 AD3d at ___, 2014 NY Slip Op 06563 at *1; *see also Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.]*, 84 NY2d 685, 690 [1995] ["'(w)hen a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual

remedies are strong'"], quoting *East Riv. S.S. Corp. v Transamerica Delaval, Inc.*, 476 US 858, 871 [1986]).

Here, Bank failed to sufficiently establish, with its pre-answer dismissal motion, that it should be treated as a manufacturer in this instance or that plaintiff seeks from it exclusively damages that the economic loss rule bars (*see Sokol v Leader*, 74 AD3d 1180, 1182 [2010] ["a motion to dismiss pursuant to CPLR 3211 (a) (7) must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (internal quotation marks omitted)]). Accordingly, the March 5, 2014 order properly denied Bank's dismissal motion as to plaintiff's negligence claim.

A court may exercise discretion in determining whether it overlooked matters, but "a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue the issues previously decided, or to present arguments different from those originally presented" (*Ahmed v Pannone*, 116 AD3d 802, 805 [2014] [internal quotation marks omitted]; *see also Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2011]; *Woody's Lbr. Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 592-593 [2006]). The portion of Bank's motion seeking reargument as to plaintiff's declaratory-judgment claim fails to specifically allege the matter of fact or law that this court purportedly overlooked in rendering the prior decision (*see* CPLR 2221 [d] [2]; *Ahmed*, 116 AD3d at 805]), and it consequently appears as an improper attempt to continue arguing issues already

determined. Contrary to its contention, Bank did not raise, in motion sequence #1, its argument from the instant motion that a declaratory-judgment cause of action requires a "*proper* claim" as basis, and, accordingly, this theory merits no consideration herein. Accordingly, it is

ORDERED that Bank's motion, in sequence #3, to reargue motion sequence #1, which this court's March 5, 2014 decision and order denied in its entirety, is granted to the extent of permitting reargument as to dismissal of plaintiff's seventh cause of action, for negligence; and it is further

ORDERED that, upon reargument, the court adheres to the portion of its March 5, 2014 decision and order that denied Bank's dismissal motion as to plaintiff's negligence claim; and it is further

ORDERED that Bank's reargument motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. LAWRENCE KNIPEL