Fallati v Concord Pools Ltd.
2016 NY Slip Op 32754(U)
February 9, 2016
Supreme Court, Albany County
Docket Number: 901113-15
Judge: Henry F. Zwack
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ORIGINAL

PAUL V. FALLATI,

Plaintiff,

-against-

CONCORD POOLS LTD.,

Defendant.

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: 01-15-119111 Index No. 901113-15

Appearances: Randolph J. Meola, Esq.
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DECISION/ORDER

Zwack, J.:

Defendant, Concord Pools, LTD., moves pursuant to CPLR 3211 for an order dismissing plaintiff Paul V. Fallati's complaint, whereby he seeks damages for breach of an express warranty of future performance and compensatory damages. Plaintiff asserts in his complaint that defendant failed to "properly construct the pool according to defendant's proprietary designs."

In the instant application, defendants seeks dismissal of the complaint, asserting that the subject contract for the installation of the pool entered into by the parties in 2002 bars any suit related to ground settling and subsequent damages, and contains no other warranty express or implied. In the alternative, should the Court not dismiss this action, defendant asserts that it is entitled to arbitration of this dispute. Plaintiff opposes the motion.

The parties entered into a sales contract for the construction of a swimming pool in 2002. In July, 2014, plaintiff determined that the pool had sunk noticeably and that a crack had developed in the liner. Arguing that the pool was warrantied, when built, to have been constructed with a "unitary rigid construction" that would not sink under any conditions, he sought relief from defendant. According to the record before the Court, defendant denied any breach of warranty — but did, in a gesture of good faith, offer to pay for one half of the

estimated $9,500.00 to $11,000.00 repair cost. Defendant rejected that offer and commenced this lawsuit on or around September 4, 2015.

Although a ground for dismissal under CPLR 3211 is not specified in the notice of motion, on its own review the Court may treat the motion as having specified the correct ground (*Dean R. Pelton Co., Inc. v Moundsville Shopping Plaza, Inc.*, 173 AD2d 201 (1st Dept 1991]). On this record, it appears that defendant is arguing for dismissal of the complaint upon three grounds: [1] it has a defense founded upon documentary evidence, CPLR 3211(a)(1); [2] the cause of action may not be maintained based upon the statute of limitations, CPLR 3211(a)(5); [3]the complaint itself fails to state a cause of action, CPLR 3211(a)(7).

For dismissal under CPLR 3211(a)(1), the documentary evidence must be unambiguous, of undeniable authenticity, and its contents undeniable and that it "resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim" (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). A contract action, express or implied, has a six year statute of limitations (CPLR 213[2]), and as a general rule, a breach of contract action for defective construction and design accrues upon the completion of performance (*Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242 [4th Dept 2012]).

When considering a motion to dismiss under 3211 (a)(7), the question is whether the plaintiff has a cause of action, not whether he stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). On such a motion the court must afford the complaint a liberal

construction, "accept the facts as true, confer upon plaintiff the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory (*Simkin v Blank*, 19 NY3d 46 [2012]).

Here, plaintiff's complaint must be dismissed. Even construing the complaint in the light most favorable to plaintiff, he has simply not set forth any special relationship or legal duty owed to him by defendants aside from the contractual relationship expressly set forth in an unambiguous contract. Particularly, plaintiff does not allege that the actual materials used were substandard, but rather that the work was performed incorrectly. It is axiomatic that no warranty attaches to the ***performance*** of a service (*Torok v Moore's Flatwork & Foundations, LLC.*, 106 AD3d 1421 [3d Dept 2013]). A warranty of future performance is one that guarantees that a product will work for a specified period of time (*Imperia v Marvin Windows of New York, Inc.* , 297 AD2d 621 [2d Dept 2012]).

Further, the plain language of the subject contract establishes the absolute defense to his causes of action. Defendant's counsel has appropriately introduced the contract in the motion to dismiss, and plaintiff has taken no issue with its terms or authenticity. It is clear and unambiguous on its face, and therefore the use of extrinsic evidence — plaintiff's conclusory assertions in his complaint that he was promised a rigid, sturdy construction that would never sink — cannot be considered (*Buff v Village of Manlius*, 115 AD3d 1156 [4th Dept 2014]). The relevant language is unambiguous, including: "This warranty does not extend to any shifting or settling of the earth in the excavation or pool area, under pool base,

deck or footing for any reason whatsoever..." Unlike the case law utilized by plaintiff in support of his argument, that Uniform Commercial Code 2-725 is applicable, the complaint does not set forth that he was provided with a written manufacturer's warranty. The complaint states only that literature concerning the pool contained the language that the patented brace would prevent settling "like no other brace in the industry." Language that it is the "strongest and most mechanically advanced wall and deck support in the industry" is mere advertising, and is materially different from a manufacturers warranty that "certi[fies] that this vault is free from material defects or faulty workmanship and will give satisfactory service at all times" (*Mittasch v Seal Lock Burial Vault, Inc.*, 42 AD2d 573 [2d Dept 1973]).

The Court has reviewed the remaining arguments of the parties and finds them unavailing given the determination that the complaint should be dismissed

Accordingly, it is

ORDERED, that defendant's motion to dismiss is granted, and the complaint is dismissed.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the defendant. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: February 9, 2016
Troy, New York

Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated November 4, 2015; Attorney Affidavit sworn to November 4, 2015 together with Exhibit "A"; Memorandum of Law, dated November 4, 2015;
2. Affirmation in Opposition of Rudolph Meola, Esq.., dated November 25, 2015, together with Exhibit "1";
3. Reply Affidavit of Richard Fenwick, sworn to on December 4, 2015, together with Exhibit "A"; Reply Memorandum of Law, dated December 8, 2015.