

Cole v Apollo Bldrs. LLC
2018 NY Slip Op 31338(U)
June 22, 2018
Supreme Court, New York County
Docket Number: 655059/16
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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JESSE COLE and PATRICIA COLE

Plaintiffs

Index No. 655059/16

v

DECISION AND ORDER

APOLLO BUILDERS LLC and ROBERT BAGDADI

Defendants.

MOT SEQ 001

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action alleging, inter alia, breach of a home renovation contract, the defendants, Apollo Builders, LLC (Apollo), and Robert Bagdadi, the contractor and its principal, move (1) to dismiss the second (breach of covenant of good faith and fair dealing as against Apollo), third (gross negligence as against Apollo and Bagdadi), fourth (unjust enrichment as against Apollo), and sixth (conversion as against Apollo and Bagdadi) causes of action of the complaint on the grounds that they fail to state a cause of action (CPLR 3211[a][7]), (2) to dismiss the fifth (fraudulent representations as against Apollo and Bagdadi) cause of action on the grounds that it fails to state a cause of action (CPLR 3211[a][7]) and that it is not plead with sufficient particularity (CPLR 3016[b]), and (3) to dismiss the seventh (wrongfully filed mechanics lien as against Apollo and Bagdadi)

cause of action as against Bagdadi on the grounds that the plaintiffs fail to state a cause of action (CPLR 3211[a][7]). The plaintiffs oppose the motion. The motion is granted in part.

II. LEGAL STANDARD

On a motion to dismiss for failing to state a cause of action under CPLR 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994).

III. DISCUSSION

A. Withdrawal of Second and Fourth Causes of Action

As stated in Footnote Two of the plaintiffs' memorandum in opposition to the instant motion, the plaintiffs seek to withdraw the second and fourth causes of action, which respectively seek to recover for breach of the covenant of good faith and fair dealing and unjust enrichment against Apollo. The court permits those causes of action to be withdrawn without prejudice. Accordingly, the only remaining claims that the defendants seek to dismiss are the third, fifth, and sixth causes of action in

their entirety, and the seventh cause of action as against Bagdadi.

B. The Plaintiffs' Third, Fifth, and Sixth Causes of Action

The defendants assert that the third, fifth, and sixth causes of action are inadequately pleaded because they are duplicative of the plaintiffs' first cause of action, which seeks to recover for breach of contract. "It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." Dormitory Authority v Samson Construction Co., 30 NY3d 704 (2018) (citation omitted). However, the Court of Appeals has also recognized that "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171 (1968); see also Sommer v Federal Signal Corp., 79 NY2d 540 (1992).

1. Gross Negligence

The Court of Appeals has noted that

[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties. In these instances, it is

policy, not the parties' contract, that gives rise to a duty of care.

Sommer v Federal Signal Corp., supra. Nonetheless, "merely alleging that the breach of contract duty arose from a lack of due care will not transform a simple breach of contract into a tort." Id. "[T]he nature of the injury, the manner in which the injury occurred and the resulting harm" are all relevant factors in considering whether claims for breach of contract and tort may exist side by side." Verizon New York, Inc. v Optical Communications Group, Inc., 91 AD3d 176 (1st Dept. 2011) (citing Sommer v Federal Signal Corp., supra). The First Department has described the nature of the harm, "particularly whether it is 'catastrophic,' as 'one of the most significant elements in determining whether the nature of the type of services rendered gives rise to a duty of reasonable care independent of the contract itself.'" Verizon New York, Inc. v Optical Communications Group, Inc., supra (quoting Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegal & Assoc. Architects, 192 AD2d 151, 154 [1st Dept. 1993]). Accordingly, parallel actions sounding in contract and tort have been found to exist only where a defendant's failure to perform contractual duties competently can have "catastrophic consequences" affecting a significant public interest. For example, the First Department found that a negligence claim was stated, in addition to a claim to recover for breach of a construction contract, where defective

construction work on the facade of a city building caused a part of the concrete facade to fall into a courtyard regularly used by college students. See Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegal & Assoc. Architects, *supra*. Similarly, a landlord's reduction of heat of a commercial building that caused a burst pipe and \$500,000 in flood damage was held to give rise to a negligence claim. See Duane Reade v SL Green Operating Partnership, LP, 30 AD3d 189 (1st Dept. 2006).

In this case, the plaintiffs allege that the defendants failed to carry out their obligations under a home renovation contract between the plaintiffs and Apollo by, among other things, failing to install working locks, installing incorrect tile, installing a defective intercom system and non-functioning electrical outlets, failing to properly install electrical wiring in the kitchen, creating leaks in the guest bathroom resulting in \$50,000 in damages to the carpets, floor, and first floor ceiling, failing to properly install the heating, ventilation, and air conditioning system, installing two broken toilets, failing to fix windows that do not stay open, failing to hide electrical wires, and purchasing and attempting to install a stove that does not fit into the millwork. The plaintiffs contend that their allegations suffice to establish a gross negligence claim separate from their breach of contract claim. However, the facts that general contractors are subject to state

codes and regulations and home improvement licensure laws, and that there may be a public interest in compliance with such regulatory schemes, are not sufficient to create tort liability. Verizon New York, Inc. v Optical Communications Group, Inc., supra. None of the alleged breaches of the renovation contract yielded consequences rising to the level of seriousness and public effect described in the cases cited above.

Moreover, there is no basis for holding Bagdadi, an alleged agent of Apollo and not a party to the home renovation contract, individually liable for his alleged gross negligence. "A corporate officer is not subject to personal liability for actions taken in furtherance of the corporation's business under the well-settled rule that an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." Worthy v New York City Housing Authority, 21 AD3d 284, 286 (1st Dept. 2005). The plaintiffs' conclusory allegation that Bagdadi owed a duty of reasonable care and diligence in the performance of the work contracted for is wholly unsupported by any indication in the complaint that Bagdadi intended to so bind himself. Consequently, the plaintiffs' third cause of action, which seeks to recover for gross negligence must be dismissed as against both of the defendants.

2. Fraud

The plaintiffs' allegations in support of their fifth cause of action, alleging fraud, likewise fail to assert the breach of any duty distinct from, or in addition to, the breach of contract. The plaintiffs allege that Apollo made fraudulent representations, including statements that it was capable of performing and completing the renovation work contemplated by the contract, that the work was being performed properly while Apollo knew there were defects in the work, and that payment for the work was due while Apollo knew the work was not completed properly. The first alleged misstatement, which the plaintiffs assert in their reply papers is "amply demonstrated by the incompetence of the work performed," amounts to a claim that, in the plaintiffs' own words, was allegedly false inasmuch as "Apollo never had, or at least never committed to devoting, the skill or resources to complete the Project in a remotely satisfactory ... manner." This statement is a promissory statement of future performance, and does not amount to a misrepresentation of a present fact extraneous to the contract, as required to sustain a separate cause of action based on a fraud in the inducement. See The Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 (1st Dept. 2004); First Bank of Americas v Motor Car Funding, Inc., 257 AD2d 287 (1st Dept. 1999).

Furthermore, the only fraud claimed in relation to the remaining misstatements is based exclusively on the same facts, i.e., nonperformance, as underlie the breach of contract claims See Gordon v Dino De Laurentiis Corp., 141 AD2d 435 (1st Dept. 1988); MP Innovations, Inc. v Atlantic Horizon International, Inc., 72 AD3d 571 (1st Dept. 2010). In addition, the plaintiffs do not allege that they were induced by the defendants' misstatements to do anything outside of the written agreement, i.e., paying the amount agreed to.

Moreover, the plaintiffs' assertion that "Bagdadi personally participated in the fraudulent representations" is plainly insufficient to satisfy the statutory pleading requirements imposed by CPLR 3016(b). "Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings." Callas v Eisenberg, 192 AD2d 349 (1st Dept. 1993); see CPLR 3016(b).

Accordingly, the plaintiffs' fifth cause of action is dismissed as against both defendants.

3. Conversion

As to the plaintiffs' sixth cause of action, which is to recover for conversion, it is well established that "an action for conversion cannot be predicated on a mere breach of

contract." Yeterian v Heather Mills N.V. Inc., 183 AD2d 493 (1st Dept. 1992); see also Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883 (1st Dept. 1982). The plaintiffs state that Apollo received funds from the plaintiffs for "certain blue stone tile work" and that Apollo never used the funds for blue stone tile. Rather, the plaintiffs allege that Apollo effected a conversion by "exercising dominion over such funds in derogation of the [plaintiffs'] rights to the funds" and by "stealing excess tile that belonged to the [plaintiffs] for Apollo's own purposes." Inasmuch as the plaintiffs admit in their reply papers that it was a breach of the renovation contract to fail to purchase and install the blue tiles that the defendants agreed to provide, the claim that the defendants misappropriated funds for the purchase and installation of such tiles is duplicative of the breach of contract claim. However, plaintiffs' assertions that the defendants physically stole or misappropriated actual tile that "belonged to" the plaintiffs present an issue of fact as to whether the defendants committed a wrong independent from the contract claim. Accordingly, the plaintiffs' sixth cause of action survives only to the extent that it alleges Apollo's physical misappropriation of tiles, and is dismissed as to the alleged misappropriation of funds.

Inasmuch as the sixth cause of action is being dismissed to the extent that it asserts a misappropriation of funds paid for

tiles pursuant to the renovation contract, and the complaint does not allege that Bagdadi personally participated in the conversion of excess tiles, rather than funds, the sixth cause of action must be dismissed in its entirety as against Bagdadi.

C. The Plaintiffs' Seventh Cause of Action

The defendants seek to dismiss the seventh cause of action, which alleges a wrongfully filed mechanics lien as against Bagdadi, because the plaintiffs have not pleaded facts sufficient to support the imposition of liability against Bagdadi. While "[a] director or officer of a corporation does not incur personal liability for its torts merely by reason of his [or her] official character" (North Shore Architectural Stone, Inc. v American Artisan Const., Inc., 153 AD3d 1420, 1421 [2017] [citation omitted]), "[a] corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced." American Express Travel Related Servs. Co. v North Atl. Resources, 261 AD2d 310, 311 (1st Dept. 1999). Nonetheless, as previously stated, a corporate officer is not subject to personal liability for actions he took in furtherance of the corporation's business in the absence of any indication that such officer intended to assume personal liability for the

acts of his corporation. See Worthy v New York City Housing Authority, 21 AD3d 284 (1st Dept. 2005).

The plaintiffs' only allegation against Bagdadi with respect to the wrongfully filed lien is that Bagdadi "personally participated in filing the improper [mechanics] lien by signing the improper lien and causing it to be filed." In signing and filing the lien, Bagdadi acted in his capacity as agent for Apollo. No facts indicate that Bagdadi intended to assume personal liability for filing the lien. Consequently, the seventh cause of action is dismissed as against Bagdadi.

D. Dismissal of Complaint as Against Bagdadi

As all causes of action have been dismissed as against Bagdadi, the complaint is dismissed in its entirety as against Bagdadi.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiffs' second cause of action for breach of the covenant of good faith and fair dealing against Apollo Builders LLC, and the fourth cause of action for unjust enrichment against Apollo Builders LLC, are permitted to be withdrawn, without prejudice; and it is further,

ORDERED that defendants' motion, as modified, is granted to

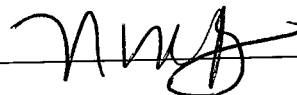
the extent that the complaint is dismissed in its entirety as against the defendant Robert Bagdadi, and the third cause of action, which seeks to recover for gross negligence, and the fifth cause of action, which seeks to recover for fraudulent misrepresentations, and so much of the sixth cause of action as seeks to recover for conversion based on the defendants' alleged misappropriation of funds, are dismissed as against the defendant Apollo Builders LLC, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiffs and the remaining defendant, Apollo Builders LLC, shall appear for a preliminary conference on July 12, 2018, at 2:30 p.m.

This constitutes the Decision and Order of the court.

Dated: June 22, 2018

ENTER: _____



J.S.C.

HON. NANCY M. BANNON