SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12
Justice

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LONNY LEVITZ & JENNIFER WALTHER,

Plaintiffs,

- v -

MORGAN FUEL & HEATING CO., INC., D/B/A BOTTINI FUEL,

Defendant.

INDEX NO. 150665/2018

MOTION DATE

MOTION SEQ. NO. 1

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23

were read on this motion to dismiss.

Defendant moves pursuant to CPLR 3211(a)(5) and (7) for an order dismissing the complaint.

I. COMPLAINT (NYSCEF 6)

Plaintiffs allege that prior to January 9, 2013, they had entered into a contract with defendant whereby it agreed to service their boiler, deliver oil, provide services with respect to the heating systems, oil tanks, and oil lines from the tank to the boiler, and that defendant had a duty to inspect, maintain, and repair those elements, and replace any defective parts of the heating system, and notify plaintiffs of any problems related thereto.

On January 9, 2013, plaintiffs discovered oil leaks at the premises which they attribute to defendant's failure to perform the services as agreed, advancing causes of action for negligence and breach of contract.

II. CONTENTIONS

A. Defendant (NYSCEF 4-9)

Given plaintiffs' allegation that they discovered the leaks on January 9, 2013, and having filed this action on January 23, 2018, defendant asserts that their cause of action for negligence is statutorily and contractually time-barred.

Defendant also observes that as no contract or contractual provision imposing a duty on it to inspect or repair oil lines or oil tanks is referenced in the complaint, plaintiffs fail to state a cause of action for breach of contract. It relies on an email sent by plaintiff Walther to the Department of Environmental Conservation in which she stated, "Attached please find the description of the 'standard plan.' There is no contract. I just paid the bill every year for the service agreement," and that attached to the email is a copy of defendant's boiler service plan and the Terms and Conditions of it reflecting, respectively, nothing about oil tanks or fuel lines, and no obligation to inspect oil lines or oil tanks. Defendant also points to paragraph eight of the Terms and Conditions which provides that the homeowner is responsible for "any oil discharges from leaking tanks or pipes." That paragraph also requires that the homeowner indemnify and hold it harmless from liability arising from an oil discharge other than those it "directly caused," and observes that the complaint contains no indication that defendants caused the oil discharge. It argues that plaintiffs attempt to recast a tort as a contract to avoid the time-bar.

B. Plaintiffs (NYSCEF 13-19)

By affidavit, Walther asserts that plaintiffs had a contract with defendant to inspect, maintain, and repair the heating system, including the unit, lines, and oil tanks, and an agreement with defendant's predecessor for automatic oil delivery and annual service including inspections, emergency maintenance calls, and needed and timely repairs. Pursuant to that contract, she "would always schedule an annual inspection with" defendant's office and was told that the entire system would be inspected, including the boiler, lines, tank, and sheet metal. After each inspection, she would contact defendant to inquire as to the system's condition and was regularly told that it was fine apart from occasional minor repairs. Walther explains that when she advised the Department of Environmental Conservation that there was no contract, she meant that there was no written contract, and she denies receipt of defendant's Terms and Conditions in advance of the leak. Rather, she acquired the copy attached to her email from defendant's office some time after the leak. Thus, she denies having accepted the terms and conditions referenced by defendant.

As evidentiary support for Walther's claims, counsel offers Detailed History Reports, dated from September 2010 through November 2012, reflecting that defendant did not charge plaintiffs for the labor performed over those years. Plaintiffs also argue that defendant fails to demonstrate *prima facie* that the parties agreed to a shortened time within which to sue for negligence absent evidence that the parties agreed to the terms and conditions relied on by defendant.

Based on the foregoing, plaintiffs argue that they state a cause of action for breach of a service contract for annual inspections, maintenance, and repair of plaintiffs' heating system, including lines and tanks.

C. Defendant's reply (NYSCEF 21)

Defendant observes that as the essence of plaintiffs' action is a failure to use due care in the performance of its alleged obligations, and absent any allegation in the complaint concerning any specific contractual terms set forth in any specific contract, the three-year statute of limitations for negligence applies, not the six-year statute of limitations for contracts. It also maintains that the sole contract between the parties was the Terms and Conditions of the Burner Service Plan attached to Walther's email, and notes that plaintiffs offer no other plan. Thus, defendant argues that having identified no other plan, the Terms and Conditions attached to Walther's email constitutes the sole agreement between the parties.

As a contractor called to perform specific repairs and inspections has no duty to inspect or repair unrelated defects, defendant argues that absent a demonstration that defendant failed to exercise reasonable care in performing requested repairs or inspections, plaintiffs state no cause of action for breach of contract, and relies on its Terms and Conditions as documentary evidence warranting dismissal of the cause of action for breach of contract. Moreover, absent a contract, any action brought after more than one year after performance of services would bring their cause of action within the statute of frauds. It also complains that plaintiffs seek relief based on unsupported conversations with unidentified employees.

III. ANALYSIS

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York,* 9 NY3d 825 [2007]; *Leon v Martinez,* 84 NY2d 83, 87 [1994]). The court

need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]).

Here, according non-movant plaintiffs the benefit of every possible favorable inference in favor of their allegation of a contract with defendant, they state a cause of action for breach of it notwithstanding their cause of action for negligence, which is in any event, time-barred. That defendant asserts that the sole contract is the document attached to plaintiffs' email does not disprove the existence of the contract alleged by plaintiffs, especially absent any evidence that defendant provided plaintiffs with its Terms and Conditions at any time before the alleged leak. Additionally, the Detailed History Reports offered in opposition support plaintiffs' allegations. To the extent that Walther's email constitutes evidence sufficient to demonstrate that the Terms and Conditions attached thereto constitute the sole contract between the parties, Walther states otherwise in her affidavit.

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is denied except with respect to plaintiffs' cause of action for negligence; it is further

ORDERED, that defendants serve and file an answer within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on November 14, 2018 at 2:15 pm, at 60 Centre Street, Room 341, New York, New York.

9/25/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	☐	CASE DISPOSED			☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE