Privilege Underwriters Reciprocal Exch. v Boniello Land & Realty, Ltd.
2019 NY Slip Op 34775(U)
August 21, 2019
Supreme Court, Westchester County
Docket Number: Index No. 69060/2016
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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PRIVILEGE UNDERWRITERS RECIPROCAL EXCHANGE, as subrogee of TRION AND COLLEEN JAMES,

Plaintiff,

-against-

BONIELLO LAND & REALTY, LTD., BONIELLO DEVELOPMENT CORP. and BONIELLO EQUITIES LLC,

Defendants.

--X

DECISION & ORDER
On Motion for
Summary Judgment
Index No.: 69060/2016
Sequence No. 2

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 69-93, were read in connection with the motion for summary judgment by defendants Boniello Land & Realty Ltd., ("Boniello Land"), Boniello Development Corp. ("Boniello Development"), and Boniello Equities LLC, ("Boniello Equities"). Plaintiff, Privilege Underwriters ("PURE") as subrogee of Trion and Coleen James ("homeowners"), commenced this action to recover monies it paid to the homeowners pursuant to an insurance policy, for damages arising after a claimed water loss at the homeowner's residence at 65 Middle Patent Road in Bedford ("the premises") in 2014.

NOW, based on the foregoing, the motion is decided as follows:

It is well settled that "a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Moreover, issue finding, as opposed to issue determination, is the key to summary judgment (Krupp v Aetna Life & Cas. Co., 103 AD2d 252, 261 [2d Dept 1984]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320,324 [1986]).

According to the Summons and Complaint, defendants constructed the premises, including the inspection, installation and construction of the shower pan and related component parts, and installation of roof venting, insulation and waterproofing systems. During the construction of the home, and prior to May 12, 2016, defendants failed to properly install the shower pan and related component parts, by not waterproofing or placing a cement board behind the tile of a seat/shelf located within the shower, causing water leaks throughout the premises, and the resulting water leak caused substantial damages to the homeowners' real and personal property. Following the water leaks, pursuant to its obligation under its policy of insurance, PURE paid the homeowners for their loss and damage to their real and personal property, and now seeks that payout to be paid by the tortfeasors.

Defendants argue that they are not liable for the homeowner's losses. In support of their motion for summary judgment, defendants offer the affidavit of Gus Boniello, who represents the following: Gus Boniello is an officer of Boniello Land, which performs residential construction. He is also familiar with Boniello Development as he was the past president of that entity, which also performed residential construction. He is also familiar with Boniello Equities, as he is a member of that entity, which is the buys and sells and rents properties. Boniello further attests that he is familiar with the premises, which is a single family residence. Boniello Land purchased the property in 2009, a new house had been completely framed, and none of defendants at that point had framed out the new structure. To complete the house, Boniello Land hired plumbers, electricians, roofers and others. The subcontractors work was reviewed either by Gus Boniello or one of his brothers, but they did not direct the particular sub-contractor in the manner which they performed their work. He did not observe the work done at the master bath. Following the completion of the construction of the house, the Town of Bedford conducted an

inspection and issued a Certificate of Compliance on October 14, 2011 for a Certificate of Occupancy. After the completion of the house, Boniello Land sold the house to Boniello Equities, which then listed the house for sale or rent. The house was rented for approximately two years, during which time the renter did not make any complaints to any of the Boniello entities concerning any issues with the residence. At the end of the rental period the house was listed for sale. On March 11, 2014, Boniello Equities and the homeowners entered into a residential contract of sale regarding the premises ("the Contract", NYSCEF Doc. No. 73). The Contract permitted the homeowners as purchasers to conduct an inspection of the residence prior to purchase and further indicated that the purchasers were purchasing the property "as is". None of the Boniello entities had entered into any contract with the homeowners to build and develop a new residence at the property. The closing was held on April 1, 2014.

The homeowners claim that they had problems with the premises almost immediately. Trion James noticed a leak in the ceiling of the kitchen pantry,.and observed dripping. James contacted his insurance company, which responded by sending an adjuster to inspect the home. PURE retained origin and cause expert Michael Walsh (forensic engineering consultant), to investigate the source of the water damage throughout the home. Walsh found that both the original leak which started in the master bathroom before spreading to the pantry below, and the damage to the wooden floors in the game room, were the result of the home's poor construction. Specifically, the shower pan for the master bathroom shower had been improperly installed, and was too short, allowing water to seep into the mortar joints. Without any flashing membrane behind it, the water was able to infiltrate the mortar and leak. Walsh observed that the leak and the water damage would not have occurred had the shower bench seat been installed with solid waterproofing membrane placed behind it.

Also, damage was found to be the result of improper construction of the roof. Ice damming was occurring under the roof and soffit located immediately above the damaged area. Water appeared to be entering through the closet and moving under the finished wood in the larger room. It was surmised that had the roof been properly vented and adequate external air flow permitted, the ice damming condition and subsequent water damage would not have occurred.

Initially, the record fails to support any involvement by Boniello Development with the building of the home. Gus Boniello's affidavit reflects that Boniello Development had no role in ownership or building of the residence after the property was purchased by Boniello Land in 2009 (Affidavit of Gus Boniello, NYSCEF Doc No. 71). Accordingly, summary judgment is granted to Boniello Development Corp., and the complaint and any and all cross claims against it are dismissed as well.

As for the remaining defendants, they argue that PURE's cause of action for negligence should be dismissed, as none of the Boniello entities owed a duty to the homeowners. In order to prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (Pasternack v. Lab. Corp. of Am. Holdings, 27 NY3d 817, 825, [2016]). In addition, as relevant here to Boniello Equities, a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated (Kallman v Pinecrest Modular Homes, Inc., 81 AD3d 692 [2d Dept 2011]).

The record shows that defendants made a prima facie case for entitlement to summary judgment as there is no duty of defendants to the homeowners. In opposition, PURE offers no competent proof that a duty exists, and has not raised a triable issue of fact. The record shows

that the homeowners did not enter into a contract with any of the defendants to build a home. Boniello Equity, which was a party to the Contract with the homeowners for the sale of the premises, was not in the business of building homes but was in the business of buying, selling, and renting of properties. Notably, the homeowners had no dealing with any of defendants until the Contract of Sale was signed at the closing, and a Certificate of Occupancy for the premises had been issued in 2011. In the absence of a duty, as a matter of law, there can be no liability (Pasternack v Lab. Corp. of Am. Holdings, 27 NY3d 817, 825 (2016). Under these circumstances, there has been no showing that any of the defendants owed a legal duty to the homeowners, and thus this cause of action is dismissed.

As for PURE's cause of action against defendants for breach of warranties, General Business Law §777-a, provides that a housing merchant warranty is implied to new homes to protect new owners from the negligence of the home's builders and contractors. Specifically, each sale of a new home is subject to a housing merchant implied warranty, shall survive the passing of title. The statute reads:

1. A housing merchant implied warranty shall mean that:

(a) for one year from and after the warranty date, the home will be free from defects due to a failure to have been constructed in a skillful manner;

(b) for two years from and after the warranty date, the plumbing, electrical, heating, cooling, and ventilation systems of the home will be free from defects due to a failure by the builder to have installed such systems in a skillful manner; and

(c) for six years from and after the warranty date the home will be free from material defects. (GBL §777-a).

The statute defines "warranty date," the date the warranty period begins, as the "date of the passing of title to the first owner for occupancy by such owner or such owner's family as a residence, or the date of first occupancy of the home as a residence, which ever first occurs" (GBL §777[8]).

Contrary to PURE's contention, the six-year warranty period in the limited warranty is inapplicable, since the defects alleged in the complaint do not relate to a "major structure," in that they do not affect the building(s) load-bearing functions to the extent that any if homeowners' home became unsafe, unsanitary, or otherwise unavailable (GBL §777[4]). PURE complains of alleged defects to the installation of a shower pan and seat in a shower and the failure to install roof venting or water venting above the garage. Therefore, PURE may only avail itself of either the one-year or two-year warranty period in the limited warranty (Finnegan v Brooke Hill, LLC, 38 AD3d 491, 492 [2d Dept 2007]).

PURE contends that since the passing of title did not occur until June 11, 2014, when the deed was signed, they are within the two year warranty period for their claim with respect to the plumbing system. Defendants claim very unconvincingly that the contract called for a closing date of April 1, 2014 (Gus Boniello affidavit at paragraph 7, Christopher Walsh Affirmation at paragraph 16 [states incorrectly that the closing was held April 1, 2014]). In fact, a closer look at the "Purchaser's Rider to Contract of Sale", at paragraph Q(v) states: "Modifying provision no. 15 of Contract of Sale: Closing date shall be 'on or about May 1, 2014.'" Defendants' attempt to argue that the "on or about"closing date set forth in the contract of sale was the actual closing date is horsefeathers, and it is surprising that defendants that buy and sell real property as a business, or any attorney familiar with real estate closings would make such an argument. By

definition, title cannot pass any sooner than the date that the deed to plaintiffs was executed by James Boniello, Managing Member of Boniello Equities, which was June 11, 2014[1], which would be the Warranty Date, which has expired under the one year category, but not the two year category, as a notice of warranty claim was sent on May 27, 2016.

Pursuant to General Business Law §777–a(4)(a), "written notice of a warranty claim for breach of housing merchant implied warranty must be received by the builder... no later than [30] days after the expiration of the applicable warranty period." Here, the homeowners closed title no earlier than June 11, 2014. Counsel for PURE sent notice to Boniello Land and Boniello Equity on May 27, 2016, and again on June 7, 2016, sufficiently providing notice that its investigation revealed that damages to the home were as a result of defendants' negligent construction and renovation work, and offering the opportunity to conduct an investigation. Thus, the notices of claim were timely.

Turning next to the breach of contract cause of action, it is well settled that "the interpretation of a written agreement is within the province of the court and, if the language of the agreement is free from ambiguity, its meaning may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence" (Penguin 3rd Ave. Food Corp. v Brook Rock Associates, 174 AD2d 714, 715 [2d Dept.1991]). "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, giving practical

[1]The deed could certainly have been pre-signed on June 11, 2014 and the closing held at a subsequent date, but title cannot have passed before June 11, 2014.

interpretation to the language employed and the parties' reasonable expectations (Westchester County Corr. Officers Benevolent Assn., Inc. v County of Westchester, 99 AD3d 998 [2d Dept 2012]); (Obstfeld v Thermo Niton Analyzers, LLC, 112 AD3d 895, 897 [2d Dept 2013]). Courts have also considered the reasonable expectation and purpose of the ordinary business person in the factual context in which terms of art and understanding are used, often recognizing the level of business sophistication and acumen of the particular parties (Uribe v Merchants Bank of New York, 91 NY2d 336 [1998]).

The Contract is a garden variety real estate agreement in which none of the sellers' representations survive the closing of the transaction, and that the acceptance of the deed by the purchasers is deemed and construed as conclusive acknowledgment of the full performance by the sellers of all of the terms, covenants and provisions of the Contract, unless expressly stated to the contrary. No pertinent representations were to survive the closing. The Contract also states, among other things, that the homeowners agreed to accept a $500 credit against the purchase price at closing pursuant to the Property Condition Disclosure Act ("PCDA"), and the homeowners agreed to accept the $500 credit in lieu of all remedies afforded under PCDA and in lieu of any other remedies. There is no evidence that defendants thwarted the homeowners' ability to inspect the house or hid any defects.

It is well-settled that "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment " (Hecker v Paschke, 133 AD3d 713, 716 [2d Dept 2015])."If however, some conduct (i.e., more than mere silence) on the part of the seller

rises to the level of active concealment, a seller may have a duty to disclose information concerning the property" (Hecker v Paschke, 133 AD3d at 716).

The record shows that prior to signing the Contract, and even afterwards, there is no competent evidence that homeowners were blocked from the opportunity to conduct an inspection of the house. The buyers had an inspection done, and it revealed no issues (EBT of Trion James, at 22).

Specifically, the Contract contained a provision that the homeowners were fully aware of the condition of the house based upon their own inspection and investigation, and not based upon any information or representations, written or oral, made by the sellers. The Contract provides that "Except as otherwise expressly set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this contract shall survive closing (Contract, at 11(c)). It also provides that the homeowners were "fully aware of the physical condition and state of repair of the house and all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data statements or representations, written or oral, except as otherwise set forth herein....and shall accept the same "as is" (Contract, at 12).

The Contract evidences the arm's-length nature of the transaction at issue. Under these circumstances, the obligations and provisions of the Contract and the disclosure statement were merged in the deed and extinguished upon closing of title.

In conclusion, defendants demonstrated their entitlement to summary judgment as to the contract claims, which are dismissed. Defendants also demonstrated their entitlement to summary judgment as to the warranty claims pursuant to GBL §777-a(1)(a) and GBL §777-

a(1)(c) which are dismissed. However, summary judgement is denied as to the warranty claims under GBL §777-a(1)(b).

The court has considered the remainder of the factual and legal contentions of the parties, and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this Decision and Order. This constitutes the Decision and Order of the Court.

Accordingly, it is hereby:

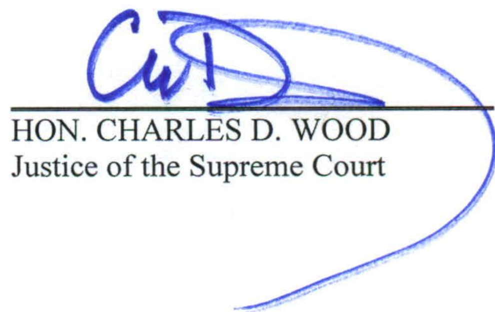
ORDERED, that the motion for summary judgment of Boniello Development Corp. is granted, and the complaint is dismissed as against it; and it is further

ORDERED, that the motion for summary judgment of Boniello Land & Realty, LTD., and Boniello Equities is granted in part and denied in part in accordance with this Decision and Order; and it is further

ORDERED, that the remaining parties are directed to appear on 9/10, 2019, at 9:15AM, in Courtroom 1600, the Settlement Conference Part, at the Westchester Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The Clerk shall mark his records accordingly.

Dated: August 21, 2019
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF