Short Form Order

Index No. 623638/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

x

JAMES V. ARGUTTO,

Plaintiff,

-against-

J.P. HUNTER CO., INC.,

Defendant.

x

Mot. Seq. No. 004 - MD
Orig. Return Date: 11/09/2021
Mot. Submit Date: 11/09/2021

PLAINTIFF'S ATTORNEY
Franklin C. McRoberts, Esq.
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400 RXR Plaza
Uniondale, NY 11556

DEFENDANTS' ATTORNEY
Andrea Sacco Camacho, Esq.
Camacho Mauro Mulholland, LLP
40 Wall Street, 41st Floor
New York, NY 10005

Upon the e-filed documents 94 through 162, it is

ORDERED that the motion (#004) by the plaintiff James V. Argutto for, *inter alia*, an ordering granting partial summary judgment in his favor on the issue of liability and for attorneys' fees is denied; and it is further

ORDERED that the Court, upon searching the record (*see* CPLR 3212 [b]), grants the defendant summary judgment dismissing the cause of action for negligence.

This is an action to recover damages for negligence and breach of contract. By his amended verified complaint, the plaintiff alleges, among other things, that he hired the defendant J.P. Hunter Co., Inc. in June 2018 to perform roofing work on his home in Remsenburg, New York, that the roofing work performed by the defendant was inadequate and caused flood damage to the home, and that he hired Rainbow International of Long Island to repair this flood damage. In particular, the plaintiff alleges that the defendant breached the June 2018 contract by failing to make the roofing areas weather tight at the end of each day, causing flood damage to the home when a rainstorm occurred on or about June 21, 2018. By its amended verified answer, the defendant generally denies the material allegations as set forth in the complaint, and it asserts several affirmative defenses. By stipulation dated July 14, 2021, the plaintiff discontinued his

cause of action for breach of contract as related to installation of copper leaders and gutters by the defendant. By order dated June 27, 2022, this Court granted a motion by Rainbow International of Long Island and Rainbow International, LLC ("Rainbow") for summary judgment dismissing the third party complaint asserted by the defendant, finding, among other things, that the defendant was not entitled to contribution or indemnification from these parties, as they did not have a part in causing or augmenting the injury for which contribution was sought, and any potential liability on their part would be premised upon its own wrongdoing and would not be purely vicarious.

The plaintiff now moves for partial summary judgment on the issue of liability for his negligence and breach of contract claims, arguing, *inter alia*, that there are no triable issues of fact as to whether the defendant is liable to him for these causes of action. In support, the plaintiff submits, among other things, a copy of an invoice from the defendant to the plaintiffs, dated June 1, 2018; excerpts of the parties' deposition testimony; photographs and video taken of the alleged property damage; video statements of the defendant's employee Victor Guevara with certified translations; reports of nonparty Sol Order, an adjuster for the defendant's insurance company; a statement of material facts; a memorandum of law; his own affidavit; and an affirmation of his attorney. The defendant opposes the motion, arguing, among other things, that the plaintiff failed to meet his prima facie burden as to his breach of contract claim, as he did not fully perform pursuant to the contract, and in any event, the defendant did not breach the June 2018 contact. In addition, the defendant argues that the plaintiff's negligence cause of action is duplicative of the breach of contract claim, and thus, should be dismissed. In opposition, the defendant submits several documents, including transcripts of the parties' deposition testimony, as well as of Mr. Guevara and Mr. Order; photographs taken by Rainbow and its insurance company; photographs and videos of the work performed by the defendant; affidavits of James Hunter, its president and chief operating officer, and Joseph Fischetti, a professional engineer; a counter statement of material facts; a memorandum of law; and an affirmation of its attorney. In reply, the plaintiff submits an affidavit of Joseph V. Palmieri, a professional engineer, as well as a report prepared by Mr. Palmieri.

The parties' submissions establish the following relevant facts, most of which are not in dispute. On June 1, 2018, the defendant provided an invoice to the plaintiff listing the remodeling work to be done on the plaintiff's home, totaling $149,600.00, toward which the plaintiff had made payments amounting to $125,000.00. The Court notes that the plaintiff argues that the total amount due was $141,600.00, as reflected by some handwritten notations on this invoice, though the defendant disputes this reduced amount. The defendant agreed to perform construction work on the roof of the plaintiff's home, and that "[t]he roof will be removed methodically, only removing sections of the roofing that will be made weather tight by the end of each work day." On June 20, 2018, the defendant's employees performed some construction work on the plaintiff's roof, and a rain storm occurred after they had finished their tasks for the day. On June 21, 2018, the plaintiff discovered that water had begun to leak into various areas of the home, including the kitchen, the family room, the fireplace, and the counter tops. The

defendant finished the project at the plaintiff's residence sometime before the July 4 weekend of 2018. At some point thereafter, the plaintiff then filed a claim against the defendant's insurance company for payments to make repairs to the residence caused by the flood damage. Mr. Order, on behalf of the defendant's insurance company, conducted an investigation, and sent several settlement offer to the plaintiff. On November 14, 2018, Mr. Order sent the plaintiff a final formal settlement offer of $34,496.59, which was rejected, and this litigation ensued.

At the outset, the Court finds that the cause of action alleging negligence is duplicative of the cause of action alleging breach of contract as a matter of law, and, thus, upon searching the record (*see* CPLR 3212 [b]), the defendant is granted summary judgment dismissing this cause of action (*see* ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 382, 389-390, 521 NYS2d 653 [1987] [internal citations omitted]; ***Gorelik v K & G Gekon, Inc.***, 188 AD3d 1010, 1012, 137 NYS3d 83 [internal citations omitted]). Here, the plaintiff alleges that the defendant breached the June 2018 contract by failing to make the roof areas worked on weather tight at the end of each work day, and that he suffered damages as a result. Therefore, as the plaintiff is merely seeking to enforce his bargain with the defendant, a tort claim does not lie (*see* ***New York Univ. v Continental Ins. Co.***, 87 NY2d 308, 316, 639 NYS2d 283 [1995] [internal citations omitted]).

As to the remaining portions of the motion, the proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

The elements of a cause of action to recover damages for breach of contract are: (1) the existence of a contract; (2) the plaintiff's performance pursuant to the contract; (3) the defendant's breach of its contractual obligations; and (4) damages resulting from the breach (*see* ***Weatherguard Contractors Corp. v Bernard***, 155 AD3d 921, 922, 63 NYS3d 692 [2d Dept 2017] [internal citations omitted]). Although, generally, rescission of a contract is permitted for such a breach as substantially defeats its purpose, this remedy is not permitted for a slight, casual, or technical breach, but only for one that is material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract (*see* ***Willoughby Rehabilitation & Health Care Ctr., LLC v Webster***, 134 AD3d 811, 813, 22 NYS3d 81 [2d Dept 2015] [internal citations omitted]).

At his deposition and by his affirmation in support, the plaintiff avers, among other things, that he paid a total of $125,000.00 to the defendant toward the construction work on his home, and that he refused to pay the balance owed to the defendant because of the flood damage at issue in this action. Accordingly, the plaintiff fails to establish, prima facie, that he performed pursuant to the June 2018 contract (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Weatherguard Contractors Corp. v Bernard***, *supra*). In addition, the Court finds that the defendant's alleged breach of the contract, namely by failing to make the areas it worked on weather tight as agreed,

was not so material so as to allow the plaintiff to invoke the remedy of rescission, especially given that the defendant continued to perform pursuant to the June 2018 contract after the alleged breach and until the project was finished in late June to early July 2018 (*see* ***Willoughby Rehabilitation & Health Care Ctr., LLC v Webster***, *supra*). Accordingly, this portion of the motion is denied, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Moreover, the portion of the plaintiff's motion seeking attorneys' fees, apparently pursuant to 22 NYCRR § 130-1.1, is also denied. A court, in its discretion, may impose financial sanctions against a party or attorney who engages in frivolous conduct after affording him or her a reasonable opportunity to be heard (*see* 22 NYCRR 130-1.1 [a], [d]; ***Merchant Cash & Capital, LLC v Blueshyft, Inc.***, 175 AD3d 603, 605-606, 104 NYS3d 907 [2d Dept 2019] [internal citations omitted]). The Court finds that the defendant's conduct in defending this litigation was not frivolous, as it was not undertaken primarily to delay or prolong the resolution of the dispute (*see* 22 NYCRR 130-1.1 [c][2]).

In light of the foregoing, the plaintiff's motion is denied.

ENTER

Date: September 21, 2022
Riverhead, New York

Martha L. Luft
HON. MARTHA L. LUFT, A.J.S.C.

____ Final Disposition ___X___ Non-Final Disposition