

**503 Evergreen Ave. LLC v Metropolitan Realty  
Exemptions Inc.**

2023 NY Slip Op 33776(U)

October 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 521876/2022

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8  
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503 EVERGREEN AVENUE LLC,

Plaintiff,

Decision and order

- against -

Index No. 521876/2022

METROPOLITAN REALTY EXEMPTIONS INC.,

Defendants,

October 24, 2023

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PRESENT: HON. LEON RUCHELSMAN

Motion Seq. #1

The plaintiff has moved seeking summary judgement pursuant to CPLR §3212 arguing there are no questions of fact the defendants breached the contract. The defendants oppose the motion. Papers were submitted by the parties and arguments held and after reviewing all the arguments this court now makes the following determination.

On November 7, 2019, the plaintiff hired the defendant to prepare and file applications for tax abatements pursuant to RPTL §421-a(16) regarding property located at 499 Evergreen Avenue in Kings County. The property that was the subject of the contract contained eight dwelling units. The defendant erroneously submitted an application for a nine dwelling unit property. The defendant sought to remedy the mistake and obtain the tax abatements. Thus, on March 10, 2022 Martin Joseph the chief executive officer of the defendant submitted an affidavit to the New York City Department of Housing Preservation and Development [hereinafter 'HPD'] admitting the mistake, acknowledging the mistake was solely due to the defendant and that the plaintiff

should be afforded an opportunity to correct the mistake to take advantage of the tax abatements (see, Affidavit of Martin Joseph [NYSCEF Doc. No. 12]). HPD declined the ability to correct the mistake whereupon this lawsuit was commenced. The complaint asserts causes of action for breach of contract and negligence. The plaintiff has now moved seeking summary judgment arguing there are no questions of fact the defendant breached the contract and committed negligence.

#### Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

It is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1<sup>st</sup> Dept., 2010]).

Generally, merely alleging the breach of a contract duty

arose from a lack of due care will not transform a breach of contract claim into a tort claim (Sommer v. Federal Signal Corp., 79 NY2d 540, 583 NYS2d 957 [1992]). The court in Sommer explained that legal duties independent of contract claims could be imposed upon professionals, common carriers and bailees as a matter of policy where there is a duty owed by the professional independent of the duty imposed by the contract. Indeed, while some states recognize the tort of negligent breach of contract (see, Hayton Farms Inc., v. Pro-Fac Corp., Inc., 2010 WL 5174349 [Western District of Washington 2010]) in New York there is no tort cause of action for the negligent performance of a contract (see, Attallah v. New York College of Osteopathic Medicine, 189 AD3d 1324, 134 NYS3d 793 [2d Dept., 2020]).

Thus an examination of the two causes of action is necessary. The breach of contract claim against the defendant is essentially contained within paragraph 21 of the Complaint. That paragraph states that "Defendant breached the Contract when Defendant's error in drafting and filing the Workbook for 499 Evergreen resulted in the denial of the 421-a tax abatement for 499 Evergreen" (see, Verified Complaint, ¶21 [NYSCEF Doc. No. 1]). The allegations supporting the professional negligence cause of action is essentially contained within paragraph 30 of the Complaint. That paragraph states that "by making the material misrepresentation in the Workbook for 499 Evergreen,

Defendant failed to conform to the standard of care and duty with respect to the Plaintiff" (see, Verified Complaint, ¶30 [NYSCEF Doc. No. 1]). However, the negligence cause of action does not contain any specific conduct that is different from the breach of contract allegation. As the court held in Dormitory Authority of the State of New York v. Samson Construction Co., 30 NY3d 704, 70 NY3d 893 [2018] where the negligence allegations are merely a "restatement" of the breach of contract allegations the negligence action must be dismissed (see, Board of Managers of Beacon Tower Condominium v. 85 Adams Street LLC, 136 AD3d 680, 25 NY3d 233 [2d Dept., 2016]).

Therefore, the motion seeking summary judgement regarding the negligence cause of action is denied.

Turning to the breach of contract claim, there is no question that a breach of contract may be established even, like here, where the breach was inadvertent. Thus, the plaintiff has sufficiently demonstrated a breach of the agreement which is not even disputed.

Therefore, while there is no issue regarding liability, there are significant questions regarding damages which cannot be summarily decided. Therefore, the parties must engage in discovery, including expert testimony, if sought, and if necessary a trial on the issue of damages may follow.

Thus, the motion seeking summary judgement on the first

cause of action on the issue of liability only is granted.

So ordered.

ENTER:

DATED: October 24, 2023  
Brooklyn N.Y.



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Hon. Leon Ruchelsman  
JSC