

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

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ALBERT HEFFEZ, JENNIFER LOMBARDO,
ALISON HEFFEZ AND NAOMI HEFFEZ,

Plaintiffs,

Decision and order

- against -

Index No. 16765/07

L & G GENERAL CONSTRUCTION INC.,
LEV NAMYOTOV, AND EUGENE NAMYOTOV,

Defendants,

December 17, 2007

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PRESENT: HON. LEON RUCHELSMAN

The defendants move pursuant to CPLR §3211(a)(7) seeking to dismiss the five causes of action of the plaintiffs complaint. The plaintiffs oppose the motion and papers were submitted by all parties. After reviewing the arguments of all parties this court now makes the following determination.

The plaintiffs Albert Heffez and Jennifer Lombardo hired defendant L&G General Construction Inc., to renovate their home located at 406 Greenwood Avenue in Kings County. The defendants Lev Nemyatov and Eugene Nemyatov are the president and vice-president of L&G Construction respectively. On March 11, 2005 the parties entered into a contract whereby L&G agreed to renovate the home of the plaintiffs for an agreed upon price of \$275,050 with an additional agreement for another \$33,960. The contract detailed the specific work that was required of the defendant L&G. The plaintiffs have instituted this lawsuit alleging that following the completion of the work there is a substantial leak caused by the defendant's work. The complaint alleges five causes of action,

namely, there was a breach of contract, a breach of warranty, gross negligence, fraud and fraudulent inducement. This motion seeking to dismiss the complaint followed wherein defendants allege these causes of action lack merit and must be dismissed. The defendants also seek summary judgement on their counterclaim that they were not fully paid. The plaintiffs have opposed the motion arguing there are substantial questions of fact which mandates discovery and a denial of the dismissal motion.

Conclusions of Law

To succeed on a motion to dismiss for failure to state a cause of action (CPLR §3211(a)(7)) the moving party must demonstrate that the complaint is devoid of any factual allegations which underlie wrongful conduct (Kamhi v. Tay, 244 AD2d 266 [1st Dept., 1997]). Therefore, if sufficient facts are alleged it then becomes the duty of the court to ascertain whether the facts in the complaint fit within any cognizable legal theory (Polonetsky v. Better Homes, 97 NY2d 46, Collins v. Telcoa Intern, 283 AD2d 128 [2d Dept., 2001]). The complaint must be liberally construed and a motion to dismiss will be denied where plaintiff has a valid cause of action (Weiner v. Lazard Freres & Co., 241 Ad2d 114 [1st Dept., 1998]). On a motion to dismiss pursuant to CPLR §3211, the court must accept as true the facts as alleged in the complaint and submissions in

opposition to the motion, accord plaintiff the benefit of every possible favorable inference and determine only whether the facts, as alleged, fit within any cognizable legal theory (Sokoloff v. Harriman Estates Development Corp., 96 NY2d 409, 729 NYS2d 405 [2001]).

Preliminarily, concerning the defendants Lev and Eugene Manyotov, the plaintiff has failed to present sufficient evidence at this time why they should be personally liable. It is true that if the defendant so dominated the activities of the corporation then piercing of the corporate veil would be permitted and defendant could then be liable personally (see, Matter of Morris v. New York State, 82 NY2d 135, 603 NYS2d 807 [1993]). While dominance of a corporation, standing alone is insufficient to pierce the corporate veil (First Capital Asset Management Inc., v. N.A. Partners, L.P., 300 AD2d 112; 755 NYS2d 63 [1st Dept., 2002]), the plaintiff has not offered any basis or any evidence of such dominance. Indeed, the plaintiffs did not address this issue in their opposition papers at all. Therefore, the motion seeking to dismiss the complaint as to the personal defendants is granted.

Turning to the specific causes of action, the defendant seeks to dismiss the claim for breach of contract on the grounds the contract did not call for waterproofing and that therefore they cannot be liable for any water leak. However, even if true,

the plaintiffs have submitted the reports of experts which certainly demonstrate at this early juncture that the defendants failed to fulfill their contractual duties concerning the construction techniques. It is well settled that an affidavit from an expert may raise questions of fact foreclosing summary dismissal of a case (Speller ex rel. Miller v. Sears Roebuck & Co., 100 NY2d 38, 760 NYS2d 79 [2003]). The plaintiff submitted affidavits from experts, Efraim Goldstein P.E. and George Wilson who both stated that the underpinning work performed by defendant was essentially inadequate. The opinions presented were not conclusory or speculative but were based on tests and observations at the location which were enumerated within the report (see, Mestric v. Martinez Cleaning Co., Inc., 306 AD2d 449, 761 NYS2d 504 [2d Dept., 2003]). Therefore, the plaintiff has sufficiently opposed the motion concerning the breach of contract claim and that portion of the motion is denied.

However, the claim for gross negligence is hereby dismissed. It is well settled that a breach of contract is not a tort unless a legal duty independent of the contract itself has been violated (Sargent v. New York Daily News L.P., 42 AD3d 491, 840 NYS2d 101 [2d Dept., 2007]). In this case the entire claim of negligence flows exclusively from the alleged breach, thus that cause of action is dismissed.

A cause of action for fraud may arise when one misrepresents

a material fact, knowing it is false, which another relies on to its injury (see, Ochs v. Woods, 221 NY 335, 338 [1917]).

However, where a claim to recover damages for fraud "is premised upon alleged breach of contractual duties and the supporting allegations do not concern misrepresentations which are collateral or extraneous to the terms of the parties agreement, a cause of action sounding in fraud does not lie" (McKernin v. Fanny Farmer Candy Shops Inc., 176 AD2d 233, 574 NYS2d 58, [2nd Dept., 1991]).

The exceptions to this rule were set forth in Coppola v. Applied Electric Corp., 288 AD2d 41, 732 NYS2d 402 [1st Dept., 2001]. The court acknowledged that if the claimed fraud is collateral or extraneous to the contract or damages are alleged that would not be recoverable under a breach of contract claim or a special relationship gave rise to a breach of duty, separate from the breach of the contract, then a plaintiff's claim of fraud would be accepted along with the original breach of contract claim. In this case the fraud stems exclusively from the alleged breach of the agreement and hence must be dismissed. Moreover, it is well settled that to successfully plead fraud, the fraud must be pled with specificity from which intent or reasonable reliance might be inferred (see, CPLR §3016(b), Goldstein v. CIBC World Markets Corp., 6 AD3d 295, 776 NYS2d 12 [1st Dept., 2004]). The plaintiff's complaint states nothing


more than the conclusory assertion that "defendants have defrauded the Plaintiffs, directly injuring Plaintiffs" which is clearly insufficient to satisfy the specificity requirements. Thus, the fraud cause of action is hereby dismissed. This reasoning likewise demands the dismissal of the fraudulent inducement claim as well (Raytheon Company v. AES Red Oak, LLC, 37 AD3d 364, 831 NYS2d 54 [1st Dept., 2007]).

Lastly, concerning the breach of warranty claim, it is clear in this case that the parties negotiated a home improvement which is governed by General Business Law §770(3) and which contemplates the warranty breach sough here (see, Garan v. Don & Walt Sutton Builders, Inc., 5 AD3d 349, 773 NYS2d 416 [2d Dept., 2004]). Thus, only the breach of contract and breach of warranty claims survive, the remaining three claims are hereby dismissed.

So ordered.

ENTER:

DATED: December 17, 2007
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC