Sachem Cent. Sch. Dist. v Manville

2013 NY Slip Op 30039(U)

January 2, 2013

Supreme Court, Suffolk County

Docket Number: 14704-2011

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NO.: 14704-2011

COPY

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

PRESENT:
HON. EMILY PINES
JUSTICE SUPREME COURT

Motion Date: 08-05-2011
Submit Date: 01-02-2013
Motion Nos.: 001 MOTD

[ ] Final
[x] Non Final

X

SACHEM CENTRAL SCHOOL DISTRICT, ON ITS OWN AS ASSIGNEE OF AURORA CONTRACTORS, INC.,

Plaintiff,

-against-

JOHNS MANVILLE, GIAQUINTO MASONRY, INC., RESTOR TECHNOLOGIES, INC., HST ROOFING , INC., CORD CONTRACTING CO., INC, INTERCOUNTY GLASS, INC., and VIPA RESTORATION, INC.,

Defendants.

X

ORDERED that the motion (Mot. Seq. # 001) by defendant Johns Manville to dismiss the complaint as asserted against it is decided as set forth herein.

Factual and Procedural Background

According to the Verified Complaint, in 2002 Sachem Central School District

("Sachem") entered into a construction contract with Aurora Contractors, Inc. ("Aurora"), that included the installation of the roof and the exterior wall system at a new high school building. Aurora then entered into subcontracts with HST Roofing, Inc. ("HST"), Giaquinto Masonry, Inc. ("Giaquinto"), Restor Technologies, Inc. ("Restor"), Cord Contracting Co. ("Cord"), Intercounty Glass, Inc. ("Intercounty") and VIPA Restoration, Inc. ("VIPA"), for wall, roof, and other construction work and material production at the high school. Aurora subcontracted the roof work to HST, a roofing contractor allegedly certified and approved by Johns Manville ("JM"), the manufacturer of the roofing system installed on the building. Sachem further alleges that at the completion of the installation of the roofing system, Aurora was required to furnish Sachem with a written guarantee from JM for the roof. Sachem claims that in 2004, JM issued a 20-year guarantee agreement entitled "UltraGard Roofing Systems Guarantee" ("Guarantee") after JM inspected the roof installation. The Guarantee allegedly provides, among other things, that JM would:

> "pay for the materials and labor required to promptly repair the roofing system to return it to a watertight condition if leaks occurred due to: ordinary wear and tear, or deficiencies in any or all of the component materials of the roofing system, or workmanship deficiencies in the application of the roofing system."

Sachem alleges that since 2004, the high school has been plagued with water leaks from the roof and wall systems, as well as widespread disbonding of the roof system. From 2004 until October 2008, JM responded to Sachem's requests for repairs to the roof. However, after October 2008, JM allegedly refused to recognize that the Guarantee was in effect and failed to inspect and/or repair the roof. Sachem alleges that the leaks and resulting property damages were the result of defects in the roofing system and/or construction/workmanship and/or material deficiencies by the defendants. Additionally, Sachem claims that the wall systems and roof system were improperly prepared, installed and/or constructed by Giaquinto, Restor, HST, Cord, Intercounty and VIPA causing extensive water/wind damage at the high school.

In August 2006, Aurora commenced an action in this Court under Index No. 21012/06 against Sachem to recover damages for work performed for which it claimed it was not paid ("Aurora Action"). Sachem asserted a counterclaim against Aurora to recover damages for defective work. On August 28, 2009, Sachem commenced a third-party action against JM for breach of warranty and negligence. JM counterclaimed against Aurora for indemnification or contribution. In reply, Aurora asserted claims against JM for, among other things, indemnification, contribution and breach of contract. Thereafter, Aurora commenced a fourth-party action against Giaquinto, Restor, HST, Cord, Intercounty and VIPA ("Fourth-Party Defendants") for breach of contract, negligence, indemnification and contribution.

On July 8, 2010, this Court (Emerson, J.) heard oral argument on whether to dismiss the third- and fourth-party actions on the ground that they were procedurally improper.

As part of a settlement of the Aurora Action between Aurora and Sachem, Aurora assigned to Sachem its claims against all of its subcontractors and material men who performed work and/or furnished materials on the high school project, including its claims for indemnity, contribution and breach of contract asserted in the fourth-party action against the Fourth-Party Defendants.

By Decision After Oral Argument dated December 2, 2010, this Court (Emerson, J.) dismissed the third and fourth-party complaints in the Aurora Action "with leave to commence a new action pursuant to CPLR 205 in accordance herewith." In its Decision, the Court stated, in relevant part:

> Insofar as Aurora sought to recover from its subcontractors in the event that it was liable to Sachem on the counterclaims, Aurora properly impleaded the subcontractors. However, Aurora and Sachem have now settled the claims and counterclaims asserted by them in the main action with Aurora receiving $400,000 and assigning to Sachem all of its rights and claims against its subcontractors and material men.

> Thus, Aurora's claims against Manville and the subcontractors, as well as Sachem's claims against Manville, may now be asserted by Sachem in an action against Manville and the subcontractors, and Manville's claims against Aurora for indemnification and contribution may be asserted in a third-party action.
>
> In view of the foregoing, the court dismisses the third- and fourth-party actions with leave to commence a new action pursuant to CPLR 205 in accordance herewith.

On May 3, 2011, Sachem, on its own and as assignee of Aurora, commenced this action against JM, Giaquinto, Restor, HST, Cord, Intercounty, and VIPA. The Verified Complaint contains four causes of action. The first cause of action is asserted only against JM for breach of "the express and implied warranty and guarantee." The second cause of action is asserted against all defendants for negligence in the performance of construction and installation of the roofing and wall systems and the issuance of the guarantee. The third cause of action is asserted against all defendants for negligence in the "performance of the work, labor, service and furnishing of materials and equipment" at the high school. The fourth cause of action is asserted by Sachem, as assignee of Aurora, against Giaquinto, Restor, Cord, HST, Intercounty, and VIPA for breach of contract, warranties, and negligence in the construction and installation of the roofing and wall systems.

JM now moves, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the Verified Complaint as asserted against it.

In support of the motion, JM submits, among other things, a copy of the Guarantee and an affidavit from Donn Cornman, Lead for the Northeast Region of JM's Roofing Systems Group. Cornman states, among other things, that after installation of the roof was completed by HST on February 17, 2004, JM received an application for a twenty-year guarantee for the roofing system. On February 24, 2004, JM issued a Guarantee Application Confirmation to HST stating, in relevant part:

> We require the following information before issuance of your guarantee:
>
> * Please forward Tax Exemption Certificate.
> * Please forward roof plan and SPM sheet layout (if ballasted).
> * Final Inspection by Sales Rep. or Tech Rep.
> * (*Upon Issuance*) Payment of Balance Due: $21,300.00

Also on February 24, 2004, JM issued an invoice to HST reflecting a charge for the Guarantee of $12,425.00. Cornman states that JM's records reflect that JM never received payment for the Guarantee from or on behalf of Sachem. Nevertheless, annexed as an exhibit to Cornman's affidavit is an undated Guarantee issued by JM for the high school roofing system installed by HST. The Guarantee states, in relevant part:

> Johns Manville guarantees to the original Building Owner that during the Term commencing with the Date of Completion, JM will pay for the materials and labor required to promptly repair the Roofing System to return it to a watertight condition if leaks occur due to: ordinary wear and tear, or deficiencies in any or all of the component materials of the Roofing System, or workmanship deficiencies in the application of the Roofing System.
>
> * * *
>
> This Guarantee becomes effective when (1) it is delivered to Owner; and (2) all bills for installation, materials, and services have been paid in full to the Approved Roofing contractor and to JM. Until that time, this Guarantee is not in force and has no effect.
>
> * * *

[* 6]

TO THE FULLEST EXTENT PERMITTED BY LAW, JM DISCLAIMS ANY IMPLIED WARRANTY, INCLUDING THE WARRANTY OF MERCHANTABILITY AND THE WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, AND LIMITS SUCH WARRANTY TO THE DURATION AND TO THE EXTENT OF THE EXPRESS WARRANTY CONTAINED IN THIS GUARANTEE.

* * *

JM AND ITS AFFILIATES WILL NOT BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES TO THE BUILDING STRUCTURE . . . OR ITS CONTENTS, LOSS OF TIME OR PROFITS OR ANY INCONVENIENCE. JM AND ITS AFFILIATES SHALL NOT BE LIABLE FOR ANY DAMAGES WHICH ARE BASED UPON NEGLIGENCE, BREACH OF WARRANTY, STRICT LIABILITY OR ANY OTHER THEORY OF LIABILITY OTHER THAN THE EXCLUSIVE LIABILITY SET FORTH IN THIS GUARANTEE.

Cornman further states that although not obligated to do so, following a roof leak at the high school first reported on November 16, 2004, "JM assigned contractors to effect emergency repairs in a good faith effort to stabilize the situation and to avoid disruption of school activities." Cornman claims that "JM did so with a full and express reservation of rights based on the fact that no valid guarantee existed for the building because JM was never paid for one."

Cornman provides a copy of a letter dated December 13, 2006, he sent to Sachem stating, among other things:

> Johns Manville regrets that the school has experienced wind related problems with the roofing system on this project.
>
> As discussed during the December 7th roof top meeting, we

> are a fair company and understand the importance of not disrupting your students' education and protecting the contents of your facility. In good faith, we have chosen to affect emergency repairs with out full knowledge of the circumstances and with out investigation.
>
> The purpose of my visit was twofold: to direct Nationwide Contracting to perform emergency repairs and to stabilize the situation and to investigate and determine a root cause of the wind failure. At this writing, I am told that the emergency repairs have been completed. These repairs will be at no cost to the school.
>
> A review of [JM's] file indicates, however, that Johns Manville was never paid for the guarantee of this roofing system. As a result there is no valid guarantee on this building.

Cornman also provides copies of additional letters from JM to Sachem dated February 12, 2007, March 9, 2007, March 21, 2007, and November 14, 2008, each of which states, among other things, that the Guarantee never became effective because JM never received payment for it.

JM argues, among other things, that the Guarantee it issued to Sachem never became effective because JM never received payment for it and the Guarantee specifically provides that it only becomes effective after it is delivered and:

> "all bills for installation, materials, and services have been paid in full to the Approved Roofing Contractor and JM. Until that time, this Guarantee is not in force and has no effect."

Thus, JM contends that Sachem's claim for breach of express warranty should be dismissed. JM argues that Sachems' claim for breach of implied warranty should be

dismissed because the Guarantee expressly "disclaims any implied warranty, including the warranty of merchantability and the warranty of fitness for a particular purpose . . ." Additionally, JM contends that the first cause of action is barred by the four-year statute of limitations contained in UCC § 2-725, as the claim accrued no later than February 17, 2004, and Sachem did not commence an action against JM until August 26, 2009, when it commenced a third-party action against JM in the Aurora Action. With regard to the second and third causes of action for negligence, JM argues that it was a remote manufacturer and owed no duty of care to Sachem with respect to the issuance of the Guarantee or otherwise, and that any negligence claim against JM for property damage would be barred by the express terms of the Guarantee and by the economic loss doctrine, which JM contends precludes recovery under a tort theory for purely economic damages.

In opposition to JM's motion, Sachem submits, among other things, an affidavit from Bruce Singer, Sachem's Associate Superintendent for Business. Mr. Singer states, among other things, that at the time that JM issued the Guarantee, it did not notify Sachem that the Guarantee had not been paid for, nor did Sachem receive such a notification from Aurora or HST. Singer states that Sachem had already paid the minimal amount due for the Guarantee to HST, which he claims was JM's agent. According to Singer, in accordance with the terms of the Guarantee, Sachem contacted JM's Guarantee Services Unit on various occasions from 2004 to 2008 for repairs. Additionally, Singer states:

> Each time, Johns Manville dispatched an approved contractor to the site to inspect the roof. Repairs for leaks found by Johns Manville to be its responsibility were authorized and paid for by Johns Manville. On other occasions, where Johns Manville determined leaks were not its responsibility under the guarantee, Johns Manville recommended the method of repair and repairs would be made to the roof.
>
> 13. Johns Manville's own documents prove that it provided the School District with an "ACTIVE" guarantee and Johns Manville further provided services in accord with an active guarantee for nearly five years.

Sachem also provides copies of multiple complaint forms prepared by JM regarding complaints made by Sachem from 2004 through 2007, which, among other things, list the number assigned to the Guarantee and list its status as "Active." Additionally, Sachem annexes copies of Inspection Reports prepared by JM in 2004 and 2005 which identify the Guarantee by its number. Three of the Inspection Reports mention coverage under the Guarantee. Sachem also provides a copy of a letter from JM to Aurora dated April 7, 2005, which references the Guarantee by number and "the applicable Johns Manville Roofing Systems Guarantee or Warranty." Singer also states in his affidavit that when Sachem learned that JM claimed that it was never paid for the Guarantee, it offered to pay JM but JM refused.

Based upon the documentation showing the Guarantee was Active, Sachem argues that JM has failed to meet its burden of demonstrating that the documentary evidence utterly refutes Sachem's allegations that the Guarantee is valid and effective. With regard to the statute of limitations, Sachem argues that the Guarantee at issue is for a period of twenty years and that the four-year statute of limitations set forth in UCC § 2-275 is not applicable. Thus, Sachem contends its claims are timely. As to the second and third causes of action alleging negligence, Sachem argues that JM owed it a duty of care to protect the roof and interior of the building from harm, and that JM breached that duty in 2008 when it refused to fulfill its obligations under the Guarantee.

Discussion

"A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence submitted by the movant utterly refutes the plaintiff's allegations against it and conclusively establishes a defense as a matter of law" (*Cog-Net Bldg. Corp. v. Travelers Indem. Co.*, 86 AD3d 585 [2d Dept 2011]). "[A]ffidavits are not documentary evidence" (*Fontanetta v. Doe*, 73 AD3d 78, 85 [2d Dept 2010]). Additionally, letters do not constitute documentary evidence for purposes of CPLR 3211(a)(1) (*Id.* at 86; citing *Frenchman v. Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc3d 495 n. 2 [Sup Ct NY County 2009]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Id.*).

Here, the only "documentary evidence" relied upon by JM in support of that

branch of its motion pursuant to CPLR 3211(a)(1) is the Guarantee. The affidavit and other documents (Completion Notice, Guarantee Application Confirmation, invoice, and letters) are not documentary evidence within the intendment of CPLR 3211(a)(1) (*see Fontanetta v. Doe*, supra; *Jones v. Rochdale Village, Inc.*, 96 AD3d 1014, 1017 [2d Dept 2012]). The Guarantee in and of itself does not utterly refute Sachem's allegation that JM issued a written guarantee for the roof and that JM has failed to perform its obligations under the Guarantee. Thus, that branch of JM's motion which seeks to dismiss Sachem's complaint under CPLR 3211(a)(1) is denied. Although couched as a motion to dismiss under CPLR 3211(a)(1), JM's argument that the Guarantee never became effective because it was never paid for is really an argument for summary judgment pursuant to CPLR 3212, which is premature as issued has not been joined. Additionally, the parties dispute whether the Guarantee was paid for and became effective.

JM's contention that Sachem's claim for breach of implied warranty should be dismissed because the Guarantee expressly disclaimed all implied warranties is without merit. Presumably, JM bases this argument on CPLR 3211(a)(1) based upon the language of the Guarantee. However, if JM is ultimately successful in demonstrating that the Guarantee never became effective because it was never paid for, the terms of the Guarantee would not operate to bar a claim for breach of implied warranty, because it never became effective.

JM's alternative argument that the claims asserted in Sachem's first cause of action are time-barred is without merit. "An action for breach of contract for sale must be commenced within four years after the cause of action has accrued" (UCC § 2-725[1]). UCC § 2-725(2) provides:

> "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

However, for statute of limitations purposes, contracts to supply goods and contracts to provide subsequent repair services for such goods are distinguishable (*see Bulova Watch Co., Inc. v. Celotex Corp.*, 46 NY2d 606 [1979]). Here, contrary to JM's contention, the first cause of action for breach of "the express and implied warranty and guarantee" is not pled as based on a contract of sale between Sachem and JM for the roofing system materials. In fact, no such contract between the parties has been provided to the Court with the motion papers. Rather, Sachem claims that JM breached the Guarantee, which was allegedly issued in 2004 after installation of the Roofing System had been completed. The Guarantee is separate and distinct from any contract of sale for the Roofing System. In fact, JM issued a separate invoice for the cost of the Guarantee. Thus, the separate Guarantee, as an agreement contemplating repair services, is subject to the six-year statute of limitations set forth in CPLR 213(2), running separately for the damages each time a breach of the obligation to repair the Roofing System (*see Bulova Watch Co., Inc. v. Celotex Corp.*, supra at 611; *Meron v. Ward Lumber Co., Inc.*, 8 AD3d 805 [3rd Dept 2004]). However, to the extent that the first cause of action asserts breach of warranty claims premised upon a contract of sale for the Roofing System, they are time-barred (*see Board of Educ. Plainview-Old Bethpage Cent. School Dist. v. Celotex*, 151 AD2d 536 [2d Dept 1989]), as an agreement to repair does not amount to an explicit warranty of the future performance of the goods (*Shapiro v. Long Is. Lighting Co.*, 71 AD2d 671 [2d Dept 1979]).

That branch of JM's motion seeking dismissal of the second and third causes of action as asserted against is granted.

> "The economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract and personal injury is not alleged or at issue (*see Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.]*, 84 NY2d 685 [1995]; *Amin Realty v K & R Constr. Corp.*, 306 AD2d 230, 231 [2003]). The rule is applicable to economic losses to the product itself as well as consequential damages resulting from the defect (*see Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.]*, *supra* at 693; *Amin Realty v K & R Constr. Corp.*,

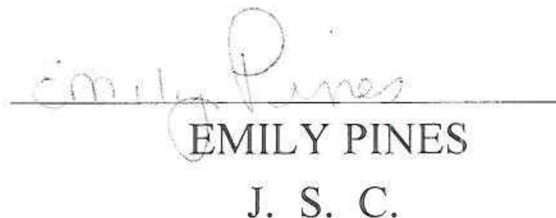
supra at 231).

(*Atlas Air, Inc. v General Elec. Co.*, 16 AD3d 444, 445 [2d Dept 2005]).

Here, Sachem claims economic losses with respect to its building and fixtures allegedly resulting from the failure of the Roofing System to perform properly in a watertight condition. Sachem's alleged losses constitute consequential damages resulting from the alleged defectively manufactured Roofing System and flow from damage to property which was the subject of its contract with Aurora. Accordingly, the economic loss rule bars Sachem's negligence causes of action against JM, and the second and third causes of action as asserted against JM are dismissed (*see Archstone v. Tocci Bldg. Corp. of N.J., Inc.*, — AD3d —, 2012 NY Slip Op 09015 [2d Dept 2012]).

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: January 2, 2013
Riverhead, New York



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