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Tenczar v. Indian Pond Country Club

Superior Court of Massachusetts, At Plymouth

June 13, 2019, Decided

PLCV2018-0757B

Reporter
2019 Mass. Super. LEXIS 2262 *

ERIK TENCZAR & another[1] v. INDIAN POND COUNTRY CLUB, INC. & others 2

Core Terms

golf ball, alleges, warranty, Repair, deed, covenant, parties, survive, fail to state a claim, express warranty, good faith, motion to dismiss, fair dealing, golf course, habitability, disclose, strikes

Judges: **[*1]** Maynard M. Kirpalani, Justice of the Superior Court.

Opinion by: Maynard M. Kirpalani

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS, SPECTRUM BUILDING CO., INC'S AND PAUL M. BISCEGLIA'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED VERIFIED COMPLAINT

Plaintiffs Erik and Athina Tenczar filed this action to enjoin a continuing trespass and nuisance and recover damages caused by golf balls that strike their home and prevent the use and enjoyment of their property. For the reasons discussed below, Defendants, Spectrum Building Co., Inc.'s and Paul M. Bisceglia's Motion to Dismiss is **ALLOWED** in part and **DENIED** in part.

BACKGROUND

The following facts are taken from the First Amended Verified Complaint and documents referenced therein, and are assumed to be true for the purposes of this motion. See *Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 (2004)* (under Rule 12(b)(6), court may consider documents of which plaintiffs had notice and on which they relied in framing complaint).[2] Defendant Indian Pond Country Club, Inc. ("IPCC") owns and operates the Indian Pond Country Club on a parcel of land located off of Country Club Way in Kingston, Massachusetts. The Tenczars own and reside at 294 Country Club Way ("the Property"), which abuts the fifteenth hole of the Country Club's **[*2]** golf course. Defendant Spectrum Building Co., Inc. constructed the Tenczars' home on the Property. Before the Tenczars purchased the Property on April 27, 2017, the home was repeatedly struck by golf balls, causing property damage. Neither Paul Bisceglia, Spectrum's sole officer, director and shareholder, nor anyone else from Spectrum disclosed to the Tenczars that golf balls regularly entered the yard and struck the home on the Property.

On April 12, 2017, the Tenczars and Spectrum executed a Repair Agreement which states: "The Buyer is purchasing the Premises from the Seller with the following items to be completed by the Seller in a good and workmanlike manner and at Seller's sole cost before closing. Seller to provide Buyer with copies of all receipts for such work." The Agreement lists 32 items of work, then states: "Sellers agree to hire a licensed professionals [sic] (if required by law or state building code) to complete items in a good and workmanlike manner and provide evidence of same for said work. BUYER will then have an additional opportunity [to] inspect any work performed under this Repair Agreement to confirm that the above items have been completed."

The Property is **[*3]** subject to a Declaration of Protective Covenants and Restrictions, paragraph 16 of which states:

Any lot adjacent to or in close proximity to golf

[1] Athina Tenczar

[2] Spectrum Building Co., Inc. and Paul M. Bisceglia

> course areas shall be subject to a perpetual right and easement for the sole and exclusive use of providing reasonable foot access to golfers to retrieve errant golf balls on unimproved areas of such residential lots. Boundary or peripheral fences or walls on such lots shall be prohibited.

Prior to the sale, the Tenczars were informed that IPCC had a right to retrieve errant golf balls from the unimproved portion of their property beyond a retaining wall and fence.

The Tenczars purchased the Property for $750,000 on April 27, 2017. Paragraph 11 of the P&S states:

> The acceptance and recording of a deed by the BUYER or his nominee, as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation herein contained or expressed, except such as are, by the terms hereof, to be performed after or are as stated in this Agreement to survive the delivery of such deed.

Paragraph 21 of the P&S states:

> The BUYER acknowledges that the BUYER has not been influenced to enter into this transaction nor has he relied upon **[*4]** any warranties or representations not set forth or incorporated in this agreement or previously made in writing, except for the following additional warranties and representations, if any, made by either the SELLER or the Broker(s): **NONE whatsoever, neither direct nor implied**.

Paragraph 36 of the P&S states:

> This agreement supersedes any other prior agreement of the parties concerning the transaction contemplated hereby with any such prior agreements, offers, listing sheets, and disclosure sheets, becoming null and void upon the execution of this agreement. This agreement henceforth represents the complete and full agreement of the parties hereto, except as the agreement may be modified or altered by a written agreement signed by all the parties hereto.

Paragraph 41 of the P&S states in relevant part:

> The closing of this sale and acceptance of the deed by the BUYER shall constitute an acknowledgement that the premises and systems contained therein are acceptable and the SELLER shall have no further obligation or responsibility subject to the Limited Warranty and Repair List attached hereto. This provision shall survive the closing.

The copy of the P&S submitted by the defendants does not **[*5]** appear to have any Limited Warranty and Repair List attached. Paragraph 61 of the P&S states:

> It is understood and agreed to by the Parties that the Premises abuts the Indian Pond Country Club golf course and as such, BUYER agrees to indemnify and hold harmless SELLER from any such occurrences that are the natural result of residing adjacent to a golf course including but not limited to errant golf balls and noise generated by landscaping equipment. This clause shall survive the delivery of the deed.

Beginning shortly after the Tenczars purchased the Property, golf balls from the fifteenth hole entered their front and rear yard, causing damage to the siding and deck, and multiple broken windows. Golf ball strikes also have occurred in the driveway near the parked cars of the Tenczars and their guests. The continuous threat of golf ball strikes prevents the Tenczars from using and enjoying the Property. They erected a wall to prevent injury to themselves and their minor child when sitting on their deck. The Tenczars met with IPCC principal Frederick Tonsberg and asked him to install protective landscaping or netting or to change the layout of the fifteenth hole to prevent golf balls from **[*6]** entering the Property. Following that meeting, IPCC failed to take corrective action. It would cost more than $55,000 to install protective netting from eighty foot tall telephone poles, and it is not guaranteed that no golf balls will get past the net.

On July 8, 2018, five golf balls entered the improved portion of the Property. One of them struck a window of the house, shattering the glass and terrifying the Tenczars' young daughter. The Tenczars called the Kingston Police, who spoke to IPCC. A representative of IPCC told police that he is aware of the situation but the Tenczars should have known of the problem before they bought the Property. The Tenczars are confined to the inside of their home during golfing hours in golf season, and the Property has been devalued.

The Tenczars filed this action on July 12, 2018. Count I of the First Amended Verified Complaint alleges trespass and Count II alleges nuisance by IPCC. Count III alleges that Spectrum and Bisceglia breached a contract to complete or remedy specific items of exterior and interior work at the time of the sale of the Property. Count IV alleges breach of the implied warranty of habitability based on the design and layout **[*7]** of the home that render it unfit for occupancy and unsafe during golf season. Count V alleges that Spectrum and Bisceglia breached an express warranty to complete

specific exterior and interior items at the Property. Count VI alleges that Spectrum and Bisceglia's failure to disclose the golf ball strikes violates the implied covenant of good faith and fair dealing. Finally, Count IX[3] seeks equitable relief and an injunction against IPCC.

DISCUSSION

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain factual allegations which, if true, raise a right to relief above the speculative level. *Golchin v. Liberty Mut. Ins. Co., 460 Mass. 222, 223 (2011)*. The plaintiff's allegations must be more than mere labels and conclusions and must plausibly suggest, not merely be consistent with, an entitlement to relief. *Coghlin Elec. Contractors, Inc. v. Gilbane Blds. Co., 472 Mass. 549, 553 (2015)*.

Breach of Contract

The defendants first contend that Count III fails to state a claim for breach of contract based on failure to level the back deck, caulk the backsplash, repair a ceiling crack, and reseal the living room window and basement sliding door. The acceptance of a deed ordinarily discharges all obligations contained in the purchase and sale agreement except those specified in the deed itself. *Albrecht v. Clifford, 436 Mass. 706, 716 (2002)*; *Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 441-442 (1975)*. However, the doctrine of merger **[*8]** by deed generally applies to title matters and not to construction problems. *Pedersen v. Leahy, 397 Mass. 689, 691 (1986)*. There is an exception where the parties manifest an intent that there be no merger of an obligation that is collateral or in addition to conveyance of the deed. *Albrecht v. Clifford, 436 Mass. at 716*; *Snyder v. Sperry & Hutchinson Co., 368 Mass. at 442*. See, e.g., *Holihan v. Rabenius Builders, Inc., 355 Mass. 639, 642 (1969)* (agreement to perform certain work on house not completed when title passed was not merged in deed); *Lipson v. Southgate Park Corp., 345 Mass. 621, 625 (1963)* (agreement to build house in accordance with detailed plans and specifications and in workmanlike manner was not merged in deed).

Here, paragraph 41 of the P&S states that upon acceptance of the deed, the defendants shall have no further obligation or responsibility "subject to the Limited Warranty and Repair List attached hereto . .. [which] shall survive the closing." This is a clear manifestation of the parties' intent that the doctrine of merger by deed not apply. Although no Repair List is attached to the P&S produced by the defendants, the parties executed a Repair Agreement two weeks before signing the P&S that listed numerous items to be completed. It can be inferred that the parties intended the defendants' obligation to complete those items to survive the closing. Accordingly, Count III alleges a plausible claim of breach **[*9]** of contract based on the failure to complete the items in the Repair Agreement and/or Repair List.

Implied Warranty

The defendants next contend that Count IV fails to state a claim upon which relief can be granted for breach of implied warranty. To recover under the implied warranty of habitability, the plaintiffs must prove that their new house contained a latent defect that manifested itself only after purchase; the defect was caused by the builder's improper design, material or workmanship; and the defect created a substantial question of safety or made the house unfit for human habitation. *Trustees of the Cambridge Point Condo. Trust v. Cambridge Point, LLC, 478 Mass. 697, 705 (2018)*; *Albrecht v. Clifford. 436 Mass. at 712*. The warranty is breached by a home that is unsafe because it deviates from the building code, is structurally unsound, or fails to keep out the elements because of construction defects. *Trustees of the Cambridge Point Condo. Trust v. Cambridge Point. LLC, 478 Mass. at 705-706*; *Albrecht v. Clifford. 436 Mass. at 711*. The implied warranty does not protect against any and all defects in a house or impose an obligation to deliver a perfect house. *Albrecht v. Clifford, 436 Mass. at 711*.

The First Amended Verified Complaint alleges that the design and layout of the house render it unfit for occupancy and unsafe during golf season. It further alleges a latent defect in that the home is subject to repeated damage by golf balls because the windows and siding cannot **[*10]** withstand the impact. These allegations do not state a plausible claim for breach of the implied warranty of habitability. The Tenczars were aware that the house abuts the fifteenth hole and indeed, Paragraph 61 of the P&S acknowledges that the natural result of residing adjacent to a golf course includes errant golf balls. There thus is no latent defect. See *Albrecht v. Clifford, 436 Mass. at 712* (latent defect is condition that is hidden or concealed and not

[3] This Court cannot, however, consider the Affidavit of Erik Tenczar in connection with a Rule 12(b)(6) motion.

discoverable by reasonable or customary observation or inspection). The complaint does not allege that the house deviates from the building code, is structurally unsound, or fails to keep out the elements because of construction defects. See *Trustees of the Cambridge Point Condo. Trust v. Cambridge Point, LLC, 478 Mass. at 705-706*. Accordingly, Count IV fails to state a claim upon which relief can be granted for breach of the implied warranty of habitability.

Express Warranty

The defendants contend that Count V of the First Amended Verified Complaint fails to state a claim for breach of express warranty. An express warranty claim is a contract claim in which the standard of performance is established by the defendant's promise of a specific result. *Bridgewood v. A.J. Wood Constr., Inc., 480 Mass. 349, 355 (2018)*; *Anthony's Pier Four. Inc. v. Crandall Dry Dock Engineers, Inc., 396 Mass. 818, 822-823 (1986)*. The complaint alleges that the defendants failed to complete in a good and workmanlike manner certain **[*11]** exterior and interior items. As discussed supra, the parties plausibly intended the promises in the Repair Agreement to survive acceptance of the deed, such that a breach of express warranty claim is not barred by paragraphs 11, 21 or 36 of the P&S.

Covenant of Good Faith and Fair Dealing

Finally, the defendants contend that Count VI fails to state a claim upon which relief can be granted for breach of the implied covenant of good faith and fair dealing. That covenant provides that in performing a contract, neither party will do anything to destroy or injure the other's right to receive the fruits of the agreement. *A.L. Prime Energy Consultant. Inc. v. Massachusetts Bay Transp. Auth., 479 Mass. 419, 434 (2018)*. A breach occurs when one party violates the other's reasonable expectations under the contract. *Id. at 434*. However, the implied covenant cannot create rights and duties that are not already present in the existing contractual relationship. *Id. at 435*.

The complaint alleges that the defendants' failure to disclose the golf ball strikes prior to the purchase of the Property violates the implied covenant of good faith and fair dealing. However, that covenant pertains to bad faith in the performance of a contract and not in its execution. *Sheehy v. Lipton Indust, Inc., 24 Mass. App. Ct. 188, 194 n.6 (1987)*. Cf. *Hawthorne's, Inc. v. Warrenton Realty, Inc., 414 Mass. 200, 211 (1993)* (implied covenant means that parties must deal honestly **[*12]** in performing contract). Nothing in the P&S imposes a duty on the defendants to disclose material information concerning the Property. Accordingly, the defendants' failure to disclose the golf ball strikes to the Tenczars before they purchased the Property does not establish a breach of the implied covenant of good faith and fair dealing. See *Desimone v. Compagnone, 2008 WL 4091260 at *2 (Mass. App. Ct. Rule 1:28)* (failure to disclose material information during execution of P&S cannot be basis of implied covenant claim unless P&S requires good faith disclosure). Count VI fails to state a claim upon which relief can be granted.[4]

Individual Liability

Bisceglia contends that the First Amended Verified Complaint fails to state claims against him individually. An officer of a corporation does not incur liability merely by virtue of the office he holds and is liable only if he personally committed some breach of duty. *Lyon v. Morphew, 424 Mass. 828, 831 (1997)*: *Refrigeration Discount Corp. v. Catino. 330 Mass. 230, 235 (1953)*. Cf. *Townsends, Inc. v. Beaupre, 47 Mass. App. Ct. 747, 751 (1999)* (corporate officer may be liable if he personally participated in tortious conduct). Corporate officers and directors have no liability for the corporation's contractual obligations, and a contract made by an authorized corporate officer is the corporation's contract. *Marsch v. Southern New. Eng. R.R. Corp., 230 Mass. 483, 498 0918*); *Williams v. Vanaria. 2000 Mass. App. Div. 162, 163-164*. The complaint alleges that Bisceglia is the sole officer, director **[*13]** and shareholder of Spectrum, but is devoid of allegations that he personally had any role in failing to make the repairs that form the basis of Counts III and V.[5] Bisceglia signed the P&S as President of

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[4] The complaint does not include a Count VII or VIII.

[5] Even if the implied covenant extended to pre-execution conduct, the claim for breach would fail because absent a fiduciary duty not alleged here, a seller of property is under no obligation to disclose defects in the property to the buyer. See *Urman v. South Boston Sav. Bank, 424 Mass. 165, 168 (1997)*. The complaint does not allege that the defendants made a partial disclosure about golf balls that was misleading. In any event, under paragraph 61 of the P&S, the Tenczars agreed to indemnify the defendants from occurrences that are the natural result of residing adjacent to a golf course,

Spectrum, and although his signature on the Repair Agreement does not indicate a corporate capacity, that agreement lists the Seller to be bound as Spectrum, not Bisceglia. See *Smith & Croyle, LLC v. Ridgewood Power Corp., 111 F.Supp. 2d 77, 83 (D. Mass. 2000)* (absent evidence that defendant signed contract in individual capacity rather than as corporate president, there was no legal basis for holding him personally liable). Thus, the complaint fails to plausibly allege that Bisceglia is individually liable for breach of contract or express warranty.

Nor does the complaint plausibly allege a basis for piercing the corporate veil. Disregard of the corporate form is appropriate only when necessary to remedy fraud or other injustice occasioned by an individual's use of a corporation for an improper purpose; the relevant factors are common ownership, pervasive control, confused intermingling of business assets, thin capitalization, non-observance of corporate formalities, absence of corporate records, no payment of dividends, insolvency at the time of the litigated **[*14]** transaction, siphoning away of corporate funds by the dominant shareholder, nonfunctioning of officers and directors, use of the corporation for transactions of the dominant shareholder, and use of the corporation to promote fraud. *Lipsitt v. Plaud, 466 Mass. 240, 253 (2013)*; *Scott v. NG US 1, Inc., 450 Mass. 760, 768 (2008)*. The First Amended Verified Complaint fails to allege even one of these relevant factors. Cf. *Lipsitt v. Plaud, 466 Mass. at 253-254* (claim to pierce corporate veil survived Rule 12(b)(6) motion where factual allegations touched on at least half of relevant factors). Accordingly, the plaintiffs have failed to allege a plausible basis for holding Bisceglia personally liable in contract and Counts III and V against him must be dismissed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** with respect to defendant Paul Bisceglia that the Motion to Dismiss be **ALLOWED** with respect to Counts III, IV, V and VI of the First Amended Verified Complaint. With respect to defendant Spectrum Building Co., Inc., it is **ORDERED** that the Motion to Dismiss be **ALLOWED** as to Counts IV and VI but **DENIED** as to Counts III and V.

SO ORDERED.

/s/ Maynard M. Kirpalani

Maynard M. Kirpalani

Justice of the Superior Court

DATED: June 13, 2019

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including errant golf balls. There can be no plausible claim for liability for nondisclosure.