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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: **Royal Beach Condominium Association, Inc. v Pelican Development, Inc. et al.**

DOCKET NO. **CPM L-491-15**

NATURE OF APPLICATION: **DEFENDANTS' PELICAN DEVELOPMENT, INC.'S, ALBERT MORELLI'S, ALBERT MUCHETTI'S, & DARLEEN HARDWOOD'S MOTION FOR SUMMARY JUDGMENT, PURSUANT TO R. 4:46-2**

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The Complaint in this matter was filed on October 19, 2015. The discovery end date was May 5, 2017. There were no previous extensions of discovery for a total of 450 days of discovery in this matter. Neither trial nor arbitration was scheduled for this matter. Defendants, Pelican Development, Inc., Albert Morelli, Albert Muchetti, and Darleen Hardwood, now move for summary judgment.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted).

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

MOVANTS' POSITION

Defendants, Pelican Development, Inc., Albert Morelli, Albert Muchetti, and Darleen Hardwood, request that this Court enter an Order for summary judgment dismissing all claims against them with prejudice.

Defendants assert the following undisputed facts: the underlying matter involves damages to the Royal Beach Condominium caused by allegedly defective construction resulting in water infiltration. On August 22,

2013, Plaintiff, Royal Beach Condominium Association, Inc., filed a claim with the New Jersey Department of Community Affairs, Bureau of Homeowner Protection (hereinafter, "DCA") under the New Jersey New Home Warranty and Builder's Registration Act, N.J.S.A. § 46:3B-1 et seq (hereinafter, the "Home Warranty Act"). See Exhibit F attached to Defendants' Brief. This claim was closed by the DCA on the same day because the allegedly improper installation of the roof system did not meet the DCA's definition of a "major structural defect." Id.

A second claim was filed with the DCA on September 12, 2013. See Exhibit C attached to Defendants' Brief (showing that the claim had been filed under the same warranty number "188183"). The second claim was supported by an expert executive summary report by Jeff Cannon of The Cannon Group. See Exhibit D attached to Defendants' Brief. On October 23, 2016, the DCA rendered its decision and denied Plaintiff's claim. See Exhibit G attached to Defendants' Brief.

Defendants first argue that Plaintiff is collaterally barred from filing the instant action because the Home Warranty Act explicitly states, "[The] initiation of procedures [under this Act] to enforce a remedy shall constitute an election which shall bar the owner from all other remedies." N.J.S.A. § 46:3B-9. See also N.J.A.C. 5:25-3.10 (an administrative regulation for the Home Warranty Act containing the same language of preclusion upon filing of a claim). Furthermore, the Informational Guide for Builders to the New

Home Warranty and Builder's Registration Act, created in June 2010, states that a dispute can be settled through arbitration or unilaterally by a decision of the DCA. Regardless, the decision is binding upon all parties. See Exhibit H attached to Defendants' Brief.

Defendants refer to Konieczny v. Micchiche, 305 N.J. Super. 375 (App. Div. 1997). There, the plaintiff was barred from filing in the Law Division after the DCA had rejected their claim under the Home Warranty Act for "dropping of the main beam" of a newly constructed home. The preclusion was due to N.J.S.A. § 46:3B-9 as well as principles of *res judicata* and collateral estoppel. Id. at 380. The court in Konieczny also noted the claim had gone to binding arbitration under the Home Warranty Act. Ibid.

Defendants note that Konieczny expanded the preclusive effect to any claims it had at the time of filing and not only to the ones addressed. Ibid. In other words, Defendants argue that although the DCA's decision only involved major structural defects of the roof, it further bars Plaintiff from seeking redress to all defects of the Royal Beach Condominium complex. Of course, a homeowner is permitted to file a new claim if "new facts arise which could not previously have been known with reasonable diligence." Ivashenko v. Katelyn Court Co., Inc., 401 N.J. Super. 99, 106 (App. Div.) (internal quotes omitted), certif. denied, 196 N.J. 464 (2008).

OPPOSITION

Plaintiff argues that New Jersey policy does not treat preclusive provisions such as N.J.S.A. § 46:3B-9 so strictly. Plaintiff distinguishes himself from Konieczny and Ivashenko in that it did not participate in binding arbitration, and therefore, as Plaintiff argues, it was not afforded a full proceeding that caused those courts to reference the principles of *res judicata* and collateral estoppel. Plaintiff argues that it is clear its matter was never adjudicated on the merits; at the outset, the DCA states it only reviewed major structural defects since the subject home was in its fifth year of warranty. See Exhibit G attached to Defendants' Brief.

In the alternative, Plaintiff requests that the preclusive effect only be given to the roof, since its claims to the DCA only involved defects in the roof. In support of its point, Plaintiff refers to Haberman v. W. Saddle Development Corp., 236 N.J. Super. 542 (App. Div. 1989). The Appellate Division in Haberman held, "[A]ny claim which is not the subject matter of a Warranty dispute under the policy and subject to the informal Dispute Settlement procedure cannot become the subject of a procedure 'to enforce a remedy' in contemplation of N.J.S.A. § 46:3B-9." Id. at 549-50. Here, Plaintiff asserts that the September 12, 2013 warranty claim only pertained to an improperly installed roof caused by a major structural defect. See Exhibit G attached to Defendants' Brief. Furthermore, N.J.S.A. § 46:3B-9 only applies to homeowners and builders, as the name of the Act implies. See Ivashenko,

401 N.J. Super. at 109 ("Because the architects are not builders … the election of remedies procedures do not apply to them."); see also Konieczny, 305 N.J. Super. at 384 ("[N]o other third party is subject to the warranty provisions."). Plaintiff argues that because Defendant, Pelican Development, Inc., is the only builder, this preclusive effect is given to them; it would not apply to the other individually named Defendants.

REPLY

Defendants first note that the conclusory "Denials" of Plaintiff are technically deficient for purposes of R. 4:46-5(a), and therefore, should be admitted. Second, Defendants submit that the DCA's decision encompassed much more than just the roofing system. It also addressed the building envelope.

Third, Plaintiff's argument that one must look to the warranty policy to determine whether filing a claim bars a lawsuit, as was cited in Haberman, supra, and Postizzi v. Leisure + Tech., Inc., 235 N.J. Super. 285 (App. Div. 1989), is irrelevant here. Those cases pertain to private home warranties, not the statutorily created home warranty such as the one before this Court.

Finally, Defendants submit correspondences that demonstrate Douglas Clayton, on behalf of Plaintiff, filed a claim and subsequently withdrew it at the advice of counsel "so that they may preserve, if necessary, their rights to have their claims litigated in an action in the Superior Court of New Jersey."

See Exhibits 1 & 2 attached to Defendants' Reply Brief. Therefore, Defendants assert that Plaintiff is fully aware of the preclusive ramifications of filing the claim with the DCA.

DISCUSSION

This Court finds that Defendants, Pelican Development, Inc., Albert Morelli, Albert Muchetti, and Darleen Hardwood, are entitled to summary judgment pursuant to R. 4:46-2(c).

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely

suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted).

This Court finds the following undisputed facts: the underlying matter involves damages to the Royal Beach Condominium caused by allegedly defective construction resulting in water infiltration. On August 22, 2013, Plaintiff, Royal Beach Condominium Association, Inc., filed a claim with the DCA under the New Jersey New Home Warranty and Builder's Registration Act, N.J.S.A. § 46:3B-1 et seq. (the "Home Warranty Act"). See Exhibit F attached to Defendants' Brief. This claim was closed by the DCA on the same day because the allegedly improper installation of the roof system did not meet the DCA's definition of a "major structural defect." Id.

A second claim was filed with the DCA on September 12, 2013. See Exhibit C attached to Defendants' Brief (showing that the claim had been filed under the same warranty number "188183"). The second claim was supported by an expert executive summary report by Jeff Cannon of The Cannon Group. See Exhibit D attached to Defendants' Brief. On October 23, 2016, the DCA rendered its decision and denied Plaintiff's claim. See Exhibit G attached to Defendants' Brief.

This Court finds that N.J.S.A. § 46:3B-9 of the Home Warranty Act precludes Plaintiff from filing the instant action in this Court. § 46:3B-9 provides:

> Nothing contained herein shall affect other rights and remedies available to the owner. The owner shall have the opportunity to pursue any remedy legally available to the owner. However, initiation of procedures to enforce a remedy shall constitute an election which shall bar the owner from all other remedies. Nothing contained herein shall be deemed to limit the owner's right of appeal as applicable to the remedy elected.

(emphasis added). In almost the exact same language, the administrative regulations to the Home Warranty Act provides, "[T]he filing of a claim against the warranty specified by this subchapter shall constitute the election of a remedy and shall bar the owner from all other remedies." N.J.A.C. 5:25-3.10. All other remedies shall mean "the filing of a complaint, counter-claim, crossclaim or third party complaint in any court that alleges matters covered by the warranty in particular or unworkmanlike construction in general." Ibid.

There is no dispute that Plaintiff filed a claim with the DCA under the Home Warranty Act. See Exhibit C attached to Defendants' Brief (under "Owner Name(s)", it is listed as "Owned by various individuals as members of the Royal Beach Condominium Association, Douglas N. Clayton, Trustee, James J. Rose, President, Jon Vogel, Vice President). Therefore, Plaintiff's argument that its claims do not fall within the scope of N.J.S.A. § 46:3B-9 because its claims are asserted against individual third-party architects in addition to the corporate builder is wholly irrelevant for purposes of the statute; the statutory language focuses on the owner, not the builder.

Furthermore, Plaintiff's argument that the decision by the DCA is incomplete or is otherwise not a full adjudication on the merits is also without merit. Plaintiff argues that the DCA only focused on major structural defects of the roof since the structure was in its fifth year of warranty and the matter was not sent to binding arbitration. First, § 46:3B-9 merely requires the *initiation* of administrative proceedings under the Act to yield preclusive effect. Second, Plaintiff has failed to show, contrary to the clear language of the statute, that the DCA must investigate the entirety of the alleged defect in order to constitute a full adjudication on the merits. Finally, the Informational Guide for Builders to the New Home Warranty and Builder's Registration Act, created in June 2010, states that a dispute can be settled through arbitration or unilaterally by a decision of the DCA. Regardless, the decision is binding upon all parties. See Exhibit H attached to Defendants' Brief. There is no allegation that Plaintiff was not afforded an opportunity to settle the dispute through arbitration. Therefore, Plaintiff cannot shield itself behind its failure to elect to participate in arbitration. Again, this discussion is irrelevant for purposes of § 46:3B-9, which only requires an initiation of procedures to bar an owner from all other remedies.

Next, Plaintiff argues that the warranty policy language is determinative in whether filing a claim acts as a bar to other remedies. See Postizzi v. Leisure + Tech., Inc., 235 N.J. Super. 285, 289-90 (App. Div. 1989). However, as Defendants correctly point out, Postizzi involves a *private* home

warranty plan, not a public plan created by statute, such as the one before the Court.

Plaintiff also argues in the alternative that any preclusive effect should be limited to the roofing system only, since the roofing system was the only part of the condominium association that the DCA investigated. This argument is also without merit. The Appellate Court in Konieczny v. Micciche held that a plaintiff would be barred from seeking additional relief from the courts to

> recover damages for defects submitted to the arbitrator, as well as for defects they knew about but did not submit to arbitration. Moreover, the election of remedies subsumed all of their claims for damages against [the general contractor], including common law fraud and alleged violations of the Consumer Fraud Act.

305 N.J. Super. 375, 380 (App. Div. 1997) (internal citations omitted and emphasis added). The only exception is where claims that are not within the scope of the Warranty Dispute are not contemplated within the preclusive scope of N.J.S.A. § 46:3B-9. Haberman v. W. Saddle Dev. Corp., 236 N.J. Super. 542, 549-50 (App. Div. 1989).

Here, Plaintiff's claims of negligence, negligent misrepresentation, violations of N.J.S.A. § 45:22A-37, and breaches of warranties, all involve the dispute of alleged construction defects under the Warranty, where they are therefore subject to the DCA's informal dispute procedures under the Home Warranty Act. Exhibit A, paragraphs 27, 28, 37, 41, 46, 49, 50, 57-61, 72, 74, 80, attached to Defendants' Brief (representing Complaint allegations

involving construction defects and representations and warranties as to the construction). Additionally, under Konieczny, Plaintiff was aware of the alleged defects outside of the roof issue, and its failure not to include those defects in its claim should not permit it to circumvent the preclusive statutory scheme set forth in N.J.S.A. § 46:3B-9.

Based on the foregoing, there is no issue of material fact that Plaintiff is precluded from bringing its action before this Court under § 46:3B-9. Therefore, Defendants are entitled to summary judgment as a matter of law pursuant to R. 4:46-2(c).

CONCLUSION

The motion is opposed.

The motion of Defendants, Pelican Development, Inc., Albert Morelli, Albert Muchetti, and Darleen Hardwood, for summary judgment pursuant to R. 4:46-2(c) is granted. All claims against these Defendants are hereby dismissed with prejudice.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

February 13, 2017