NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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January 15, 2021

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RE: *Szeliga v. Carter + Burton Architecture PLC*, Case No. CL-2019-13655

Dear Counsel:

This matter came before the Court on Defendants' Gabriel Nasser's and Ann Gamber's Motion for Summary Judgment. The Court has considered the briefs in support of and in opposition to the present motion, as well as the oral argument made by counsel. Following the hearing on January 8, 2021, the Court took the matter under advisement. For the reasons discussed below, the Court denies Defendants' Motion for Summary Judgment.

BACKGROUND

This action stems from a breach of contract and tort claim filed by Plaintiffs Keith and Jamaica Szeliga (hereinafter "Plaintiffs") against multiple defendants who were responsible for designing and constructing Plaintiffs' luxury home in Great Falls, Virginia. Defendants Ann Gamber and Gabriel Nasser (hereinafter "Defendants") are the principal agents of G.N. Contracting, Inc., the company selected to build Plaintiff's home. According to the Amended Complaint, Defendants allegedly conspired to commit fraud against Plaintiffs, causing Plaintiffs to pay G.N. Contracting, Inc. $23,103 for work that was never performed and that exceeded the limitations of progress payments included in the contract. Am. Compl. ¶¶ 155, 290.

On October 30, 2020, Defendants filed their Answer to Count III of the Amended Complaint. Ans. ¶¶ 1-16. In their Answer, Defendants "expressly request[ed] a reply to each new matter raised[,]" but they did not expressly raise any affirmative defenses. Ans. ¶¶ 8-11. Plaintiffs did not file a reply to Defendants' Answer until December 28, 2020. [1] Relying on the admittance of certain allegations in the Answer, Defendants now ask this Court to grant summary judgment as to Count III.

ANALYSIS

Because Defendants' Motion for Summary Judgment relies on the admittance of certain facts, as a threshold matter, this Court must consider whether Plaintiffs admitted to certain facts by failing to file a timely reply to the allegations contained in Defendants' Answer. According to the Rules of the Supreme Court of Virginia, "[i]f a pleading, motion or affirmative defense sets up a new matter and contains words expressly requesting a reply, the adverse party shall within 21 days file a reply admitting or denying such new matter." Va. Sup. Ct. R. 3:11.[2] Where the adverse party fails to file such a reply, the Court must consider the allegation of fact admitted. Va. Sup. Ct. R. 1:4(e). It is indisputable that, in this case, Defendants expressly requested a reply to paragraphs eight through eleven of their Answer. This motion therefore turns on whether Defendants raised new matters such that Plaintiffs were required to file a reply within twenty-one days.

Neither Rule 3:11 nor the minimal amount of case law in existence on this Rule, clearly define what may constitute a "new matter" under Rule 3:11. *See Rogers Elec. of Va., Ltd. v. Sims*, 93 Va. Cir. 484, 485 (2015) (noting "there is a dearth of case law on this particular point[.]"). In a footnote in *White v. Boundary Association, Inc.*, the Supreme Court of Virginia provided some guidance as to Rule 3:11 when it reversed a circuit court's entry of summary judgment. 271 Va. 50, 57, 57 n.4 (2006). Although the case dealt with the decision of whether to declare a parking policy void and unenforceable, in the footnotes, Justice Keenan stated:

> In holding in favor of the Whites, we also reject the Association's claim that it was entitled to summary judgment under Rule [3:11] because the Whites did not reply to the Association's allegation in its grounds of defense that the Board "properly adopted a parking rule and regulation effective October 9, 2003." Rule [3:11] which requires an adverse party to reply on request to a "new matter" contained in a plea, motion, or affirmative defense, is inapplicable here because, among other things, the "new matter" was asserted in the Association's general grounds of defense rather than in the portion of its pleading styled "Affirmative Defenses."

Id. at 57 n.4.

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[1] Pursuant to Court Order on December 21, 2020, Plaintiffs were required to substantively respond to paragraphs eight through eleven of Defendants' Answer by December 24, 2020. Plaintiffs filed their Reply instead on December 28, 2020. However, at the time, the Court did not make a finding as to whether any new matters had been raised in the Answer.

[2] Prior to January 1, 2006, the language of Rule 3:11 was contained in Rule 3:12. As of January 1, 2006, the Supreme Court of Virginia repealed the former Rule 3:12 and moved the language to Rule 3:11. Rule 3:12 became "Joinder of Additional Parties."

Additionally, the Circuit Court for the City of Williamsburg and James City County provided some guidance on Rule 3:11 when it denied a motion for summary judgment after finding that there existed a genuine dispute of material fact as to whether the counterclaim defendant committed fraud against the counterclaim plaintiff. *Exec. Homes Realty Corp. v. Mathews*, 38 Va. Cir. 486, 492 (1996). There, the counterclaim defendants asserted as an affirmative defense that the statute of limitations barred counterclaim plaintiffs' claims, and they expressly requested a reply to their defense. *Id.* at 490. In dicta, the court stated that "an allegation that an action is barred by the statute of limitations, an allegation that had not been previously raised before the court, is "new matter." *Id.*

Applying those cases, this Court holds that Defendants have not raised any new matters in their Answer. In their Answer, Defendants claim the following as "new matters":

> 8. The Defendants aver and state that as a result of the claims referenced in paragraphs 129 through 135 of the Amended Complaint, the Plaintiffs agreed to compensate GN Contracting, Inc. the sum and amount of $23,102.98, by adding such amount of the balance owning under the Home Build Contract (as such term is defined in the Amended Complaint). The Defendants expressly request a reply to the new matters raised in this paragraph.
>
> 9. The Defendants state and aver that on or after March 31, 2020,[3] the Plaintiffs made no payments to GN Contracting, Inc. pursuant to the Home Build Contract. The Defendants expressly request a reply to the new matters raised in this paragraph.
>
> 10. The Defendants aver and state that on or about December 17, 2017 the Plaintiffs engaged the services of Chris Wendowski (hereinafter referred to as "Wendowski") as an "owner's agent". The Defendants expressly request a reply to the new matters raised in this paragraph.
>
> 11. The Defendant[s], upon information and belief, state and aver that the duties assigned Wendowski, included, but were not limited to:
>
> a. Inspecting work performed by GN Contracting to [e]nsure compliance with the approved plans and any applicable building codes or ordinances.
> b. Reviewing all invoices, requisitions for payment and other such requests for payment made by GN Contracting, Inc.
> c. Recommending to the owner the nature of any requests for corrective actions needed to be undertaken with respect to construction performance on the project.

[3] At oral argument, Counsel for Defendants expressed that the March 31, 2020 date was a typo and Defendants intended to write March 31, 2018.

d. Recommending the payment of, or refusal to pay, any invoices, requisitions or other such payment requests made by GN Contracting, Inc. to the Plaintiffs.
e. That Wendowski was actually engaged by the Plaintiffs to review the "formal claims" (as such term is defined in the Amended Complaint).
f. That Wendowski actually reviewed the "formal claims" prior to any alleged agreement to pay those requests (as stated in paragraph 145 of the Amended Complaint).

The Defendants expressly request a reply to each new matter raised in this paragraph.

Ans. ¶¶ 8-11.

Paragraphs eight and nine do not raise new matters but merely respond to Plaintiffs' allegations that Plaintiffs agreed to pay $23,103 to Defendants, and in fact did so on April 27, 2018. Am. Compl. ¶¶ 289-90. Paragraph ten is not a new matter because Plaintiffs alleged in the Amended Complaint that they hired an "owner's representative to competently supplement the Architect Defendant's deficient Administration." Am. Compl. ¶ 219. Plaintiffs specifically alleged that fact as evidence of their attempt to mitigate damages. *Id.* Paragraph 11 does not raise a new matter because Plaintiffs already stated that they hired an owner's representative, and Plaintiffs further alleged that, under the contract, it was the responsibility of Defendant Carter Burton to review and approve the invoices. *Id.* ¶¶ 122-23, 140. Moreover, like the situation in *White*, Defendants did not include these allegations as affirmative defenses, but merely included them in the general answer section. *See* 271 Va. at 57 n.4. This case is also vastly different from *Mathews*, where the counterclaim defendants asserted a statute of limitations argument that the parties had not previously addressed. *See* 38 Va. Cir. at 490. Here, the concept of who is responsible for reviewing the invoices was a subject of the Amended Complaint and thus, Defendants' Answer does not raise new matters. Accordingly, this Court refuses to deem the facts alleged in paragraphs eight through eleven of the Answer admitted.

Summary Judgment

Now turning to the issue of whether to grant summary judgment, the Rules of the Supreme Court of Virginia state:

> Any party may make a motion for summary judgment at any time after the parties are at issue . . .. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, that the moving party is entitled to judgment, the court shall grant the motion. Summary judgment . . . may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute.

Va. Sup. Ct. R. 3:20. When reviewing a motion for summary judgment, the trial court "must consider inferences from the facts in the light most favorable to the nonmoving party." *Andrews v. Ring*, 266 Va. 311, 318 (2003). The Court should also keep in mind that "the decision to grant a motion for summary judgment is a drastic remedy which is available only where there are no material facts genuinely in dispute." *Turner v. Lotts*, 244 Va. 544, 556 (1992).

Under Virginia law, "an action for fraud requires a showing that there was a false representation of a material fact, made intentionally and knowingly with the intent to mislead, and relied upon by the party misled to his detriment." *Beck v. Smith*, 260 Va. 452, 457 (2000) (citing *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308 (1984)). Concealment of a material fact may constitute the element of misrepresentation. *Id.* (citing *Van Deusen v. Snead,* 247 Va. 324, 328 (1994)).

Here, Defendants argue that the Court must dismiss Count III because a claim for civil conspiracy requires an underlying tort, and Plaintiffs have failed to plead an underlying tort of fraud. In making this argument, Defendants rely on *Beck v. Smith*, where the Supreme Court of Virginia considered a case for fraud that involved a defendant who sold his property to the plaintiff without first disclosing the existence of an easement on the property. 260 Va. at 454-55. There, the court held that the plaintiffs were not entitled to rely on the defendant's misrepresentation when the plaintiffs had hired a settlement attorney who "would or should have discovered the existence and location of the Rappahannock easement." *Id.* at 457.

Defendants argument, however, relies on this Court having deemed paragraphs eight through eleven admitted, which this Court refuses to do. In light of this holding, it does appear that there is a genuine dispute as to whether Mr. Wendowski would have or should have discovered Defendants' alleged misrepresentations. While Defendants claim that Mr. Wendowski was obliged to inspect, review, and approve the claims, Plaintiffs argue that Mr. Wendowski was merely a "representative authorized to act on the Owner's behalf with respect to the Project." Mem. Opp. at 3. Plaintiffs dispute the notion that Mr. Wendowski conducted an investigation. Accordingly, this Court denies the Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is denied. Counsel shall prepare an appropriate order reflecting the Court's ruling and submit it to the Court for entry.

Sincerely,

[redacted]

Bruce D. White