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Docket.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 03-00137

JEFFREY and PAMELA PALMUCCI,
Plaintiffs

vs.

LEONID BERKOVICH, Individually and as Trustee of
WOOD LANE NOMINEE TRUST,
Defendants

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT

The plaintiffs own a large home at 30 George Street, Brookline, which they purchased from a developer, defendant Leonid Berkovich, in January 2001. They bring this action for damages for essentially two reasons: 1) the cladding, or exterior walls of the building are constructed of a synthetic stucco known as Dryvit rather than what the plaintiffs say is the customary Portland cement based stucco as allegedly required by the specifications; and 2) three punchlist items agreed upon at the closing in January 2001 were not complete. The legal theories advanced are breach of contract (I), breach of express and implied warranties (II and III), negligent misrepresentation (IV), chapter 93A (V), and unjust enrichment (VI). I heard the case jury waived from July 31 to August 8, 2006. I viewed the premises with the attorneys. I now find and rule as follows.

1. The plaintiff Jeffrey Palmucci is a computer software engineer who graduated from MIT and achieved substantial success in a commercial application of production scheduling software.

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In 2000 he and his wife, Pamela Palmucci, about to begin a family, were looking to purchase a house in Brookline. In June 2000, a broker showed the plaintiffs a partially completed home at 30 George Lane, Brookline, owned by defendant and then under construction by Bay State Builders, Inc., a construction firm owned by James W. Nestor. The exterior of the house was complete; interior construction remained to be done.

2. When the plaintiffs were first shown the property, they were given by the broker a blue folder containing basic information about the property, including broker listing information, specifications, and the architect's building plans. The MLS information sheet and the specifications described the exterior as "stucco". The plans identified the exterior siding by the initials "E.I.F.S.", which stands for Exterior Insulation Finish System. EIFS is a proprietary system for exterior walls. The composite material which comprises the system is also known as "synthetic stucco". The largest manufacturer of EIF system cladding is Dryvit Systems, Inc. The Dryvit product was selected for the subject home by the architect (Alan Taylor), James Nestor, and the defendant.

EIF system cladding has certain advantages over cement based stucco. One advantage is its versatility; unlike cement based stucco, it can be used to construct trim pieces and decorative features for the house's exterior. Its insulation qualities are superior to cement stucco and it is more easily repaired. EIF systems may also require less labor to install than cement stucco, and thus are less costly.

The basic construction of an EIF system exterior wall consists of attaching a styrene foam board to the plywood or other sheathing material; applying what is called a basecoat to the styrene; immersing a fiberglass mesh in the basecoat for strength; and applying an acrylic finish coat. The outside appearance is the same as cement based stucco.

3. EIF system exteriors are generally adequate for the purpose, but are vulnerable to water intrusion if improperly installed. If water passes beyond the basecoat due to cracks or other defects, it may saturate the styrene and the sheathing behind it and lead to mold or rot. One possible drawback to certain EIF systems in general use, including the Dryvit system used at 30 George Lane, is that water that does intrude cannot drain out; it is trapped and thus potentially harmful to the sheathing of the building.

4. EIF system exteriors are acceptable under the state building code. The Town of Brookline issued a building permit for the house on December 8, 1999 (Exhibit 27). Mr. Nestor, in a letter to the Brookline Building Department dated December 8, 1999, advised that the exterior would be "E.I.F.S. (dryvet (sic) or better)". (Exhibit 25).

5. On June 27, 2000 the plaintiffs signed an offer sheet for the house for the asking price of $2,300,000.00, "subject to mutually acceptable P&S agreement." (Exhibit 155). Prior to extending the offer, the plaintiffs were unaware of the composite materials that made up the existing exterior. The word "stucco" as used in the broker listing sheet and in the specifications simply meant to the plaintiffs the look or appearance of the exterior.

6. The seller, Mr. Berkovich, accepted the offer. For his part he had little knowledge or familiarity with EIF system cladding or synthetic stucco. He chose a "stucco" exterior based on the advice of his brokers that that "look" would market well and after a review of similar "high end" homes in the neighborhood. Although the subject of an EIF system synthetic stucco was discussed between him, the architect, Mr. Nestor and the brokers, the "look" was the only matter of concern to him.

7. The relationship between Mr. Berkovich and Bay State Builders, Inc. was set forth in a

building contract dated November 15, 1999.

8. Neither Taylor, Nestor, Berkovich or any of the brokers was aware of any particular or significant defects in EIF system exteriors. Although EIF manufacturers had been subject to a class action lawsuit in North Carolina in about 1995 arising from claims of water intrusion in approximately 3,000 houses, the product was acceptable for use under the Massachusetts building code, and was not considered inherently defective or unsuitable. Mr. Nestor had not used EIF system cladding previously; virtually all of the residential houses which he had built contained Portland cement type stucco. A cement based stucco can come in many different forms and composites. It is generally more expensive than EIF system exteriors, more brittle and presents more repair difficulties.

9. The plaintiffs were not experienced homebuyers (this was their first house purchase) and had no special knowledge regarding construction methods and/or materials. They were, however, both highly intelligent, well educated, inquisitive, careful and blessed with considerable financial resources due to Mr. Palmucci's recent sale of his "high tech" company to a publicly traded firm. Plaintiffs employed experienced counsel to negotiate an acceptable purchase and sale agreement. They met with Mr. Nestor on numerous occasions to discuss construction details. They had full size architectural drawings reflecting the EIFS cladding. To be sure, most of the discussion prior to the closing dealt with construction to be done rather than what had already been done. Mr. Nester did, however, on at least one occasion explain to Mr. Palmucci that the exterior was "synthetic stucco."

10. Eventually, with the assistance of counsel, the parties worked out a mutually acceptable purchase and sale agreement which they signed in late July, 2000. (Exhibit 77). Of relevance to this litigation, the purchase and sale agreement provided:

a) that the seller will construct the home in accordance with the specifications (rider A, ¶ 31(a));

b) that the materials in the home will be of seller's choosing, unless otherwise specified. (rider A, ¶31(b));

c) that acceptance of the deed shall be deemed full performance of every obligation contained in the purchase and sale agreement, except such as are to be performed after the delivery of the deed (¶13);

d) that prior to the delivery of the deed, the buyer was entitled to inspect the premises to determine compliance (Rider A, ¶46);

e) that the seller would provide a limited warranty in the form annexed to the purchase and sale agreement and that no other warranties, express or implied, were made by the seller (rider A, ¶49).

11. The closing occurred on January 31, 2001. At the closing Mr. Palmucci and Mr. Nestor did a walk through of the house. Although they could have, the plaintiffs did not have the home inspected by a professional home inspector. In the basement Mr. Nestor pointed out an area where he had left construction materials for patching or repair work. Two large pails of Dryvit were among the construction materials left. At the closing a three ring binder of applicable warranties, including a five year Dryvit warranty and a one year warranty by the Dryvit installer, Todd Rivers, was given to the plaintiffs.

12. There was a punch list of items to be completed prepared at the closing as contemplated by ¶ 46 of rider A to the purchase and sale agreement. The parties agreed that the value of the items on the punch list was less than $10,000.00. (Exhibit 105). Of the several items on the punch list,

the following remain at issue:

a) "finish landscaping in spring";

b) "bookcases"; and

c) "install lantern lighting off of front walk".

If the work on the punch list was not complete on or before March 31, 2001, the buyer had the option, after written notice to the seller, to complete the work by employing contractors of the buyer's choice, and the cost of completion would be paid by the seller.

13. The Town of Brookline issued a certificate of occupancy for the house on January 30, 2001 (Exhibit 164).

14. Shortly after the plaintiffs occupied the home, a representative of Chubb Insurance Company inspected the home to do an appraisal. She submitted a written report to the plaintiffs which noted, among other things, that "the exterior walls are constructed of Dryvit over wood framing..." (Exhibit 108).

15. Also in the winter of 2001, after the closing, the Dryvit installer, Mr. Rivers, returned to the property and spoke with Mr. Palmucci who requested a quote for placing Dryvit over the visible foundation. Mr. Rivers provided a quote, but Mr. Palmucci did not contact him thereafter.

16. In March or April of 2001, Mr. Nestor met with Mr. Palmucci and a representative of the landscaping subcontractor (Treebusters) regarding the punchlist landscaping work. At that meeting several items were discussed to complete the landscaping including removing, regrading, and resodding in an area of the front lawn, replacing unhealthy sod in the front yard, fill and regrade areas of the back yard and side yard, re-seed rear and driveway side yard, replace a damaged shrub, relocate existing shrubs and plant pine trees. Mr. Palmucci agreed that this work would complete

the seller's punch list obligations. Palmucci explained that he was also hiring a landscape architect to redesign his yard and install a swimming pool in the rear yard. After Mr. Nestor's crew performed the work he agreed to perform, Mr. Palmucci did not call him to complain or request additional corrective work. Apparently not happy with the landscaping, Mr. Palmucci, on his own and without notice to defendant or Nestor, hired Treebusters to perform further regrading to alleviate what was perceived to be a flooding problem. This work was improperly done and had to be corrected by another contractor hired by Mr. Palmucci.

17. On January 29, 2002 the plaintiffs' lawyer sent a G.L. c. 93A demand letter to the defendant and to Bay State Builders, Inc. (Exhibit 118). The letter referenced the purchase and sale agreement and the one year warranty. The letter claimed that the seller breached the specifications of the agreement in the following respects:

1) Defective land grading and landscaping, causing water pooling especially by the foundation;

2) the foundation was cracking severely, thus raising serious questions concerning structural integrity;

3) the basement was flooding;

4) tiles of first floor bathroom cracking; and

5) seller provided seeded lawn instead of a sod lawn.

With respect to the punch list agreement, the plaintiffs' lawyer complained that defendant failed to provide a "raised cherry panel with cherry mantel and bookcases" but instead supplied only wall shelving; failure to provide lantern lighting off of the front walk; and failure to provide adequate landscaping. The letter invoked chapter 93A, and demanded immediate remedies.

Other than the landscaping and the bookcase, which remain at issue, the complaints either lacked merit or were corrected. The lawyer's letter did not complain of the exterior siding.

18. The major issue in this case is the exterior siding. In May or June 2002, Mr. Palmucci was talking to a neighbor who lived at 35 George Lane, and who had also recently constructed a stucco house. The neighbor volunteered that he did not think that the Palmucci's had a "stucco" house. Mr. Palmucci then went to the basement and observed the two large pails of Dryvit previously mentioned. He then discussed the subject with his wife who recalled reading a recent Boston Globe article which dealt with water intrusion problems of other houses with EIF system exteriors. Plaintiffs' counsel notified defendant's counsel of the siding issue by letter of July 26, 2002. I do not consider the letter to be a c. 93A demand.

19. On November 21, 2003 plaintiffs' expert, Richard Kroll conducted a site visit and an inspection of 30 George Lane. Mr. Kroll was there primarily to determine whether the exterior siding was EIF or Portland cement type stucco. Although he conducted two measurements of moisture saturation of the plywood sheathing, he repeatedly emphasized during his trial testimony that that was not his primary mission and that he did not attempt to comply with certain guidelines for moisture inspections promulgated by an EIFS review committee of which he was a member in August 1998. (Exhibit 167). For that reason I do not credit his moisture readings. Kroll also found a number of installation defects which, in his opinion, required a tear down and reinstallation of the exterior walls at an estimated cost exceeding $180,000.00. Although I am persuaded that there are defects in the installation of the EIF system on the house, I disagree with Kroll's testimony concerning the extent of the problem and the appropriate fix.

20. Defendant's expert, Richard Piper, also inspected the premises in August 2004, and

issued a report (Exhibit 147). Mr. Piper has had substantially more experience than Mr. Kroll in inspecting EIF system sidings, and I credit his assessment over Mr. Kroll's. Of primary significance, his moisture readings were all within the acceptable range. The majority of surfaces of the house surveyed by him were dry. The highest readings he found, on the north side of the building (front), were in the 15-17% range which is acceptable.

Mr. Piper did find defects in the installation which he detailed in his report, Exhibit 147. The defects were correctable, not indicative of a system failure, and do not require a complete redo. He characterized the overall installation as "above average." The installer, Mr. Rivers, present on site for the inspection, agreed to repair those defects which Mr. Piper pointed out to him. Piper concluded that the plywood sheathing was sound, dry and in good condition, and that the deviations in the installation from Dryvit's requirements were minor and/or easily repaired. I accept thse conclusions.

DISCUSSION

1. Count I of the complaint is for breach of contract. The plaintiffs' primary contention is that the defendant breached the contract by failing to provide a house with Portland cement type stucco, as opposed to EIF system cladding. I disagree, and find in favor of the defendant on this count for these reasons. First, "stucco" as used in the specifications is not a word that is clear and susceptible to only one meaning. In general, it refers to a type of exterior finish. It is clear that Mr. Berkovich meant no more than that by the word. He was concerned with the "look" of the exterior of the building, not the precise content of the building materials. His understanding was no different than the plaintiffs, who knew nothing of the composition of the exterior walls. Of course the plaintiffs wanted and expected a durable, functional exterior, but they had no expectation or

understanding about the precise building materials which were used. The parties' "meeting of the minds", the touchstone of contract law, centered on the "look", not the composition. Furthermore, the plaintiffs cannot successfully contend that they were misled about the exterior by anything that the defendant (or his builder or brokers) said about the siding. The plans referenced "E.I.F.S." Although I doubt that a layperson would understand the reference, it does indicate that the defendant had no intent to cover up or deceive the plaintiffs about the wall material. The plaintiffs could have had the plans reviewed by their own professionals had they wished to. Of course they were not obliged to do that, but the provisions of the plans and the reference on the plans negate any suggestion that the defendant was attempting to mislead the plaintiffs with respect to the exterior siding.

Moreover, Mr. Nestor did tell Mr. Palmucci that the walls were "synthetic stucco". Plaintiffs dispute this, and argue that the defendant (including Nestor and the brokers) intentionally withheld information about the siding because they knew that it was inferior and that the plaintiffs would walk away from the deal if they knew. The main evidence plaintiffs offer in support of this contention involves a prior potential purchaser of the house named Warren Recicar. When Mr. Recicar, a very experienced home purchaser, was looking at the house prior to the Palmuccis' involvement, he specifically asked among other things about the composition of the exterior wall. Mr. Nestor explained that it was Dryvit, and provided the warranty. Mr. Recicar did not purchase the property. From this, the plaintiffs urge me to infer that Mr. Recicar walked away because of the Dryvit, the defendant knew that that was why he walked away, and thus the defendant decided that it was best not to tell the next potential purchaser of the use of Dryvit. The problem with the argument is Mr. Recicar's own testimony, contained in Exhibit 178. Mr. Recicar recalled asking Mr. Nestor about

the siding, and that Mr. Nestor explained that it was a synthetic stucco product. (Exhibit 178, p. 15). But the primary reason Recicar did not buy the house was the additional cost that he would have had to incur to add certain features that he was looking for. Mr. Recicar said nothing in his deposition that would support the conclusions that he did not buy 30 George Lane because of the synthetic stucco, or that he said anything to the seller that would suggest that conclusion. Plaintiffs' argument, *post hoc, ergo, propter hoc*, simply has no merit. If anything, the dealings between Nestor and Recicar lead me to believe that Nestor's modus operandi was truthfully to respond to all questions posed by potential buyers.

In addition, it is undisputed that Mr. Nestor left construction materials, including two large pails of Dryvit, in the basement. Perhaps the plaintiffs did not see these pails, but it is not behavior by the builder or seller consistent with the argument that the seller or his alleged agents were trying to cover up the use of the Dryvit for fear that the Palmuccis would walk away.

Finally, even if the plaintiffs were ignorant of Dryvit when they bought the house, they knew or should have known of its use when they received the Chubb appraisal report in February 2001 which identified it. It did not concern them because it was not inconsistent with their understanding or expectation about the wall material. They raised no issue with the defendant concerning exterior siding until July, 2002.

The plaintiffs, per the purchase and sale agreement, had the right to have a home inspector examine the house before closing. Any qualified home inspector would have noted the composition of the exterior walls. If the plaintiffs were dissatisfied with such a revelation, they could have walked away from the deal and demanded their $230,000 deposit back. They chose not to have the home inspected by a professional. The purchase and sale agreement, ¶13, provides that the

"acceptance of a deed by the BUYER...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 the delivery of said deed". Even if the plaintiffs did have a contract claim arising from the use of stucco, a conclusion which I do not draw, they waived it.

The other claims under the rubric of Count I depend upon the punch list agreement, Exhibit 105. By that document, the defendant agreed to "[f]inish landscaping in spring". Mr. Nestor did do the additional work agreed upon. I accept his testimony in that regard. Under the punch list agreement, the plaintiffs had the option to retain their own contractor to complete the undone work at defendant's cost provided plaintiffs provided a detailed description of the incomplete items and an opportunity to complete such items within 15 days. The plaintiffs did not do that. For all that appears, they became impatient with Mr. Nestor's responsiveness, and went off on their own to retain contractors who, for the most part, did noncontract work (e.g. swimming pool). Not having observed the notice requirements of the punchlist agreement, the plaintiffs are not entitled to recover for inadequate landscaping under it. Furthermore, I am not persuaded by the evidence that the corrective work performed by Mr. Knight for approximately $17,000.00 was the result of Treebusters' poor work as a subcontractor of Nestor, as opposed to work Treebusters did under contract with plaintiffs.

As to the bookcase punch list item, the defendant did comply with his obligations. Mr. Palmucci rejected what he described as "shelving", but the proof is inadequate for me to determine that the cherry pieces fabricated and delivered for the installation of the bookcase in the study were not what was contemplated by the original contract. Moreover, the evidence is inadequate for me to determine what the reasonable cost of compliance would be.

The lantern installation item is de minimis. The plaintiffs had their own lantern lights which they wished to install. Mr. Palmucci told Mr. Nestor not to worry about it, they would attend to it.

2. Count II is for breach of express warranties. The express warranty of relevance here is the so-called Limited Warranty provided by the seller in the form attached as Exhibit D to the purchase and sale agreement. All other warranties were specifically disclaimed. Exhibit 77, rider A, ¶ 49. The Limited Warranty provides: "We warrant that any defects in workmanship or materials...will be repaired or replaced by the Contractor for a period of one year from the completion date." By the time the plaintiffs raised the Dryvit issue, July 2002, one year had expired. Therefore, plaintiffs cannot recover under the express warranty for the installation defects of the EIF system. Albrecht v. Clifford, 436 Mass. 706, 716-718 (2002).

3. Count III is for breach of implied warranties. Plaintiffs argue that the house violated the implied warranty of habitability established by Albrecht v. Clifford, 436 Mass. 706 (2002). This implied warranty is independent and collateral to the covenant to convey, survives the passing of title and possession, and cannot be waived or disclaimed. Id. at 711. "This implied warranty does not make the builder an insurer against any and all defects in a home, impose on the builder an obligation to deliver a perfect house, or protect against minor defects in workmanship, minor or procedural violations of the applicable building codes, or defects that are trivial or aesthetic. Its adoption is not intended to affect a buyer's ability to inspect a house before purchase, to condition the purchase on a satisfactory inspection result or to negotiate additional express warranties.... To establish a breach of the implied warranty of habitability, a plaintiff will have to demonstrate that (1) he purchased a new house from the defendant-builder-vendor; (2) the house contained a latent defect; (3) the defect manifested itself only after its purchase; (4) the defect was caused by the

builder's improper design, material, or workmanship; and (5) the defect created a substantial question of safety or made the house unfit for human habitation."

The defects in the installation of the siding in this case do not create "a substantial question of safety" or "make the house unfit for human habitation." The defects were relatively minor and correctable. The plaintiffs are not entitled to recover for breach of the implied warranty of habitability.

4. Count IV is for negligent misrepresentation. This count, likewise, must fail. Mr. Berkovich never made any representations to the plaintiffs about the siding. He never met with them until the closing, and the subject never came up. He had no reason to believe that the composition of the exterior siding was of concern to plaintiffs. Mr. Nestor, for his part, did describe the siding accurately to plaintiffs as "synthetic stucco". As described in more detail in the discussion on Count I, neither the seller nor anyone working on his behalf said or did anything that could be construed as a misrepresentation, negligent or intentional.

5. Count V is for violation of G.L. c. 93A. It follows from my previous findings and rulings that there was no c. 93A violation. Moreover, there was no legally sufficient c. 93A demand letter sent with respect to the siding issue.

6. Count VI is for unjust enrichment. This is an equitable doctrine that may provide a remedy in the absence of a remedy at law where it would be unjust to allow defendant to retain a benefit he obtained to the detriment of plaintiff. Here the parties were represented by competent counsel, and carefully negotiated a comprehensive contract. There is no basis for applying the unjust enrichment doctrine in this case.

ORDER

For the reasons stated above, judgment shall enter for the defendant on Counts I - VI of the complaint.

Patrick F. Brady
Justice of the Superior Court

DATED: August 11, 2006

NORFOLK SUPERIOR COURT
CIVIL OFFICE

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REMARKS: