

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

SCAN

MD

STEVEN P. BUGLINO and ANN BUGLINO,
Plaintiffs,

Motion Sequence #1
Submitted November 11, 2011

-against-

INDEX NO: 4760/10

WATER WORKS, LTD, WATER WORKS
GROUP INC., GARY RAMIS, personally and as
Chairman or Chief Executive Officer of Water
Works, Ltd., and LAWRENCE S. RAMIS, personally
and as Chairman or Chief Executive Officer
of Water Works Group, Inc.,

Defendants.

The following papers were read on this motion to dismiss:

Notice of Motion and Affs.....1-5
Affs in Opposition.....6&7
Affs in Reply.....8&9
Memoranda of Law.....10

Upon the forgoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3211(a)1. and 7. dismissing the plaintiffs' complaint is denied.

This is an action in which plaintiffs seek to recover money damages against two corporate defendants and two individual defendants alleged to be officers of the corporate defendants, arising out of plaintiffs' ownership of real property known as 1530 Laurel Hollow Road, Syosset, New York and an agreement entered into with defendant Water

Works Ltd for certain home improvements, in which said defendant was to construct two new garages and adjacent patio areas. Defendant was to provide the work, labor, services and materials for said improvements. The claim appears to be that defendants breached the terms of said agreement.

After the commencement of this action, before interposing an answer defendants Water Works Group, Inc., Gary Ramis and Lawrence S. Ramis herein moved for an order dismissing the plaintiffs' complaint upon the grounds that the complaint fails to state a cause of action against said moving defendants and that said defendants have a defense founded upon documentary evidence. This Court disagrees.

When a motion is made to dismiss a complaint based upon the failure to state a cause of action, the Court must liberally construe the pleading, accepting the allegations of the complaint as true to determine whether the substance of the allegations contained therein considered as a whole spells out a cognizable cause of action in the four corners of said pleading. (*Guggenheimer v Gingzburg*, 43 NY2d 268, 275, citing *Foley v D'Agostino*, 21 AD2d 60, 64; see also *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591; *Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326). It appears to the satisfaction of this Court that the pleading has satisfied said criteria.

As to the portion of the motion which seeks dismissal based upon documentary evidence, the movants rely heavily upon the affidavits of defendants Lawrence S. Ramis sworn to the 4th day of June, 2010, and Gary Ramis sworn to the 7th day of June, 2010. Said affidavits were made prior to joinder of issue and prior to discovery. They allege facts which may or may not be true and which are not substantiated by "documentary evidence". Although they might be considered in a "summary judgment" motion, where as here a

motion is made seeking dismissal pursuant to CPLR 3211(a)1, it may be granted "only where the documentary evidence utterly refutes [the complaints' factual allegation, conclusively establishing a defense as a matter of law" (*Id.* at p. 326; *Fleming v Kamden Properties, LLC*, 41 AD3d 781; see also *AG Capital Funding Partners, L.P.*, *supra* at p. 590-591). Defendants' motion fails to sustain that burden.

It is the opinion of this Court that upon the completion of discovery a motion for summary judgment may resolve some of the issues raised herein.

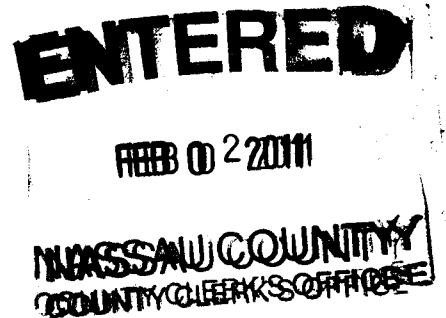
Dated: January 31, 2011



UTE WOLFF LALLY, J.S.C.

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