

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEOFFREY D.S. WRIGHT PART 47
Justice

GARY CHASE and HEATHER CHASE,
Plaintiff/Petitioner,
- v -
360 GENERAL CONTRACTING, INC.,
Defendant/Respondent

INDEX NO. 153488/16
MOTION DATE _____
MOTION SEQ. NO 1
MOTION CAL. _____


The following papers, numbered 1 to 4 were read on this motion to/for strike the second, fourth and fifth counterclaims

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	2
Replying Affidavits _____	3
Memoranda _____	

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion to by the Plaintiff to dismiss the second, fourth and fifth counterclaims is granted, a/p/o.

Dated: Sept. 15, 2016


GEOFFREY D.S. WRIGHT
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

-----X
GARY CHASE and HEATHER CHASE,

Plaintiff-Petitioner(s),

-against-
360 GENERAL CONTRACTING, INC.,

Defendants.
-----X

Index #153488/16
Motion Cal. #
Motion Seq. #1
DECISION/ORDER
Pursuant To Present:
Hon. Geoffrey Wright
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the second, fourth and fifth counterclaims

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	
Cross-motion & Exhibits Annexed	
Supporting Affidavits	
Memoranda	3,4

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiffs, the owners of a cooperative apartment, hired the Defendant to renovate the apartment. The contract price was \$126,263.50. Of that price, the Plaintiffs have paid \$106,959.50. The Plaintiffs, however, express dissatisfaction with the quality of the Defendant's work, as well as apparent added costs of \$22,000.00 paid to correct allegedly defective work of the Defendant. The Plaintiffs are seeking \$90,000.00 in money damages and the voiding of the Defendant's mechanic's lien.

In response to the complaint, the Defendant asserted five counterclaims: (1) breach of contract; (2) fraud; (3) unjust enrichment; (4) breach of the implead covenant of good faith and fair dealing; (5) breach of fiduciary duty. The Plaintiffs now to dismiss counterclaims 2,4 and 5.

The second counterclaim, for fraud is attacked for not complying with CPLR 3016(b), which sets forth the requirements for the proper statement of facts in a claim sounding in fraud, and because a claim of fraud is not sustainable where the actual dispute is a breach of a contract.

The second counterclaim must be dismissed. In response to the motion, the only allegations of fraud are the Plaintiffs' alleged promises of payment. This is insufficient to avoid the overlap of the breach of contract claim [*LINEA NUOVA, S.A. v. SLOWCHOWSKY*, 62 AD3d 473 (1st Dept 2009), "The fraud claim was duplicative of the breach-of-contract claim, since the alleged misrepresentation of an existing fact was made in the context of merely assuring plaintiff that GF would comply with its contractual obligation and no additional duty was allegedly breached."]

In opposing the motion, the Defendant has only alleged a failure to pay as support for the counterclaim for breach of the covenant of good faith and fair dealing. A valid claim for the breach of good faith and fair dealing involves "any promise that a reasonable promisee would understand to be included...it may be in breach of the implied duty of good faith and fair dealing . . . when it exercises a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive the other party of the fruit [or benefit] of its bargain" (*Marion Scott Real Estate, Inc. v Rochdale Vil., Inc.*, 23 Misc 3d 1129[A], 2009 NY Slip Op 50997[U], *8 [2009]; see *Moran v Erk*, 11 NY3d 452, 456 [2008]; *Dalton v Educational Testing Serv.*, 87 NY2d at 389)." [*ELMHURST DAIRY, INC. v BARTLETT DAIRY, INC.*, 97 A.D.3d 781949 N.Y.S.2d 1152012 N.Y. Slip Op. 05720]. In this case, the issue is simply whether or not the Defendant performed under its contract with the Plaintiffs. As set forth above, the mere alleged failure to pay is insufficient [*LINEA NUOVA, S.A. v. SLOWCHOWSKY*, 62 AD3d 473 (1st Dept 2009)]. The Defendant has not set forth any fiduciary duty that the Plaintiffs might have owed to the Defendant. The second, fourth and fifth affirmative defenses are dismissed.

Dated: September 15, 2016


GEOFFREY D. WRIGHT
AJSC