

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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ANTHONY PETRICCIONE and
VERONICA PETRICCIONE,

Plaintiffs,

-against-

BOWMAN BUILDERS, INC.,

Defendant.
-----X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION & ORDER

Index No: 032426/2014

(Motions#1&2)

HON. VICTOR J. ALFIERI, JR., A.J.S.C.

Plaintiffs move for partial summary judgment pursuant to CPLR§3212 on the issue of liability under the Breach of Warranty claim. Defendants cross-move for summary judgment and to dismiss the complaint in its entirety. The Court has considered the following papers on the motion:

1. Notice of Motion/Affirmation and Exhibits A through H attached thereto;
2. Notice of Cross-Motion/Affirmation/Affidavit of Robert H. Bowman/Exhibits A through F attached thereto/Memorandum of Law;
3. Affirmation in Opposition and Reply
4. Reply Affirmation.

Having reviewed the foregoing papers and due consideration having been given, it is hereby **ORDERED** that Plaintiff's motion for partial summary judgment is granted.

Plaintiffs have established their prima facie entitlement to summary judgment on the issue of liability by offering proof of a defect and that same is covered under the home warranty. The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden then shifts to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form. *See, Zuckerman v. City of New York*, 49 N.Y.2d 557 (1990).

Applied here, the plaintiffs have submitted expert reports and an expert affidavit establishing a defect in the floor system which constitutes a major structural defect relating to habitability. *See, Pl Opp, Affidavit of Mark S. Micucci, P.E.* Accordingly, plaintiff's Notice of Claim is timely under the six year major structural defect coverage of the limited warranty. Defendant has failed submit any proof in admissible form to raise any issues of fact. In fact, defendant admits that they were made aware of plaintiffs' complaints about the flooring and offered a remedy to the problem. *See, Reply Affirmation.*

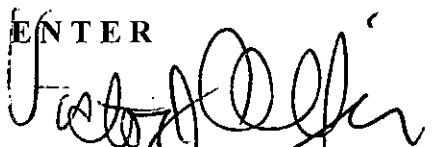
There is no dispute that plaintiffs contacted the defendant about the floors just a few months after closing and were told by the defendant that the floors needed to settle. Plaintiffs contacted the defendant again approximately ten (10) months after closing and the defendant arranged for the hardwood flooring subcontractor, Joseph Farkas, to inspect the floors which took place on several occasions thereafter. In the meantime, plaintiffs obtained a report from Micucci Engineering, P.C. which indicates more substantial defects requiring more substantial repairs than what had been offered by the defendant. *See, Pl's Notice of Motion, Exhibit D.* The Limited Warranty Form attached to the Contract of Sale contains limited coverage for the first year after closing. The warranty covers latent defects that constitute defective workmanship and defective materials. The Warranty became effective on May 18, 2012, the date of closing and the Notice of Warranty Claim Form is dated April 30, 2014.

Plaintiff has demonstrated a reasonable excuse for the delay in filing the notice of claim and defendant had actual notice of the facts constituting the claim and failed to show any prejudice. Accordingly, defendant is deemed to have waived their right to receive a written notice pursuant to General Business Law §777-a(4)(a). *Reis v Cambridge Development & Const. Corp.*, 2011 NY Slip Op 50321 (Appellate Term, Second Dept); and it is further

ORDERED that Defendant's motion to dismiss is denied.

Dated: New City, New York
September 29, 2015

ENTER



HON. VICTOR J. ALFIERI, JR.
Acting Supreme Court Justice

TO: Counsel of Record via NYSCEF