

**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

***Present:*** **HON. EMILY PINES**  
J. S. C.

Original Motion Date: 08-15-2011  
Motion Submit Date: 09-20-2011  
Motion Sequence No.: 001 MG

**FINAL**  
 **NON FINAL**

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**MANJIT KHINDRI, AMITA KHINDRI AND  
HORSEBLOCK, INC.,**

**Plaintiff,**

**-against-**

**GETTY PETROLEUM MARKETING, INC., AND  
ALBERT SALIB,**

**Defendants.**  
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Defendant Getty Petroleum Marketing Inc moves, by Notice of Motion (motion sequence # 001) for an Order granting it Summary Judgment, dismissing the Plaintiff's case against that party. Plaintiffs, Manjit Khindri and Amita Khindri and Horseblock Inc oppose the motion, setting forth their claim that issues of fact preclude granting such relief.

**FACTUAL AND PROCEDURAL BACKGROUND**

In April, 2007 the Plaintiffs purchased a business, consisting of a gas station

from individual Defendant Albert Salib. The moving Defendant (“Getty”) owned the real property on which the station was located ; leased the gas station to the seller (“Salib”); and following the purchase, entered into a lease with the Plaintiffs. After the Plaintiffs signed the purchase agreement but prior to closing on the purchase, New York State scheduled a public hearing regarding the widening of a road that would acquire a portion of the property, on which the gas station was located, which would have the effect of preventing its continued use as a gas station. This proposal along with the notice of hearing was published in several local newspapers approximately one month prior to the closing date. Plaintiffs state they were not told of the claimed condemnation and that both Defendants knew about it and purposely concealed the same. The Defendants assert that they were not aware of the issue until the closing date; while the Plaintiffs set forth a different view.

Following the closing, Plaintiffs commenced the current action alleging that the Getty Defendants defrauded them into purchasing the business from Mr Salib. The first two causes of action sound in fraud and the third is for negligent misrepresentation. The gravamen of the complaint is that Getty Marketing knew about the public condemnation and somehow concealed it from the Plaintiffs and that Getty had promised to upgrade the gas station and failed to do so.

In the current motion, the Defendants assert that Getty had no duty, as they had solely a contractual relationship with plaintiffs, to disclose information to the Plaintiffs. Moreover, they assert that as this information was publicly available, via newspapers, television and local radio stations approximately one month before the closing, such undisputed facts defeat the concealment argument as a matter of law. In addition, as the records demonstrate that Plaintiffs signed their purchase agreement with Salib seven months before the State DOT scheduled the

condemnation hearing, and before Plaintiffs even communicated to Getty, they had no possibility of reliance on anything Getty said or did.

With regard to the “false promise” by Getty to upgrade the facility, the lease agreement with Getty, in writing, according to that Defendant, states that the Plaintiffs accept the property “AS IS” and the document sets forth that it constitutes the entire understanding of the parties. Accordingly, such claim is barred, as per Getty, by documentary evidence.

In opposition to the Summary Judgment motion, Plaintiffs assert that Getty sheperded the Plaintiffs through a complex process for purchase of a gasoline station and that it is beyond dispute that the purchase was conditioned upon Getty’s approval. In addition, although Getty now states that the lease was signed after the public hearing had been noticed, it had been presented to the Plaintiffs prior to that date but had to be forwarded to Getty’s corporate offices for appropriate signatures. Accordingly, Plaintiffs dispute the allegation that Getty can avoid having known about the lease until after the DOT public notices went out. With regard to the issue of an upgraded gas station, the lease provides that Getty must comply with Suffolk County mandates for the sale of gasoline and this did require the installation of new tanks prior to December 31, 2009 and the repaving of the station. The lease was for a three year term, from April 2007 through April 2010; it was clearly for the retail sale of gasoline. Thus, Plaintiffs argue, how can Getty state that if it is prohibited from such sale under County Law, Defendant’s actions did not constitute an intention not to replace the tanks once the DOT notice went out. Plaintiffs assert in addition, that Getty’s motion is untimely as it was made over 120 days following the filing of the Note of issue.

In reply, the Getty Defendant asserts that Plaintiffs cannot demonstrate fraudulent concealment of the DOT's proposed action, even if Getty knew of the plan because it is uncontroverted by Plaintiffs that such information was published in Newsday and Suffolk Life; and was the subject of a press release to 45 newspapers, 13 radio stations and 7 television stations, all before the closing occurred. Thus there is no information peculiarly within that Defendant's knowledge. Even if Getty knew about the proposal at the time it signed the lease, which it denies, it avers the Plaintiffs fail to state fraud claim, since there is no detrimental reliance by the Plaintiffs. It is the purchase of the station that constitutes the detrimental reliance not the signing of the lease. With regard to the misrepresentation claim, the written "as is" clause within the lease bars any such claim according to Getty. Moreover, it asserts that the allegation that it promised to install new tanks by December 2009 involves future actions, which cannot give rise to a fraudulent misrepresentation claim. With regard to negligent misrepresentation, premised upon Getty's alleged superior knowledge of the facts, Getty asserts that it had no obligation to provide such information, otherwise publicly available, to the Plaintiffs, as the parties had no fiduciary relationship, solely that of an arms length agreement between landlord and tenant. With regard to the late filing of the motion, Getty points out that such was caused by the Plaintiffs constant delay in scheduling depositions, which were permitted in the certification and subsequent orders of the Court.

In order to obtain Summary Judgment, the moving party must make the requisite prima facie demonstration of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberger v Brick & Ballerstein**, 217 AD 2d 682, 629 NYS 2d 813 (2d Dep't 2005) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating

the existence of material issues of fact which preclude the granting of the Summary Judgment relief. **Zayas v Half Hollow Hills Central School District**, 226 Ad 2d 701 ( 2d Dep't 1996).

In order to recover in an action for fraud, the plaintiff must prove a misrepresentation or material omission of fact, which was false and known to be false by defendant, made for the purpose of inducing such plaintiff to rely upon it, justifiable reliance of the other party on such misrepresentation or material omission, and injury. **Ross v Louise Wise Services**, 8 NY 3d 478, 836 NYS 2d 509, 868 NE 2d 169 ( 2007) ; **Lama Holding Co v Smith Barney Inc**, 88 NY 2d 413, 646 NYS 2d 76, 668 NE 2d 1370 (1996); **Tanzman v LaPietra**, 8AD 3d 706, 778 NYS 2d 199, (3d Dep't 1999). Simply stated, the elements of fraud in the inducement are a misrepresentation of a material fact, falsity, scienter, reasonable reliance and injury. **Small v Lorillard Tobacco Co, Inc**, 94 NY 2d 43, 698 NYS 2d 615, 720 NE 2d 892 (1999); **Vermeer Owners v Gutterman**, 78 NY 2d 1114, 578 NYS 2d 128, 585 NE 2d 377 (1991). Conduct that amounts to active concealment can give rise to an action for fraud. **Commander Oil Terminals LLC v Commander Oil Corp**, 71 AD 3d 623, 897 NYS 2d 151 (2d Dep't 2010).

A claim for fraudulent inducement requires the plaintiff to allege that the defendant first had a duty to disclose material information. **E B v Liberation Publications, Inc**, 7 AD 3d 566, 777 NYS 2d 133 (2d Dep't 2004). However, a purchaser cannot rely upon conscious ignorance, for example, limited knowledge of a discoverable condition, as a basis for recovery under this theory. **Vandorvort v Higgenbotham**, 222 Ad 2d 831, 6734 NYS 2d 800 (3d Dep't 1995); **Slavin v**

**Hamm**, 210 Ad 2d 831, 621 NYS 2d 393 (3d Dep't 1994). In addition, since justifiable reliance is an element of the cause of action, the question of whether plaintiff was justified in relying on the material misrepresentation is critical to the analysis. Such reliance must be "justifiable" in the sense that the party claiming to have been defrauded was justified in both believing the representation and in acting upon such. **Lanzi v Brooks**, 54 AD 2d 1057, 388 NYS 2d 946, **aff'd**, 43 NY 2d 778, 402 NYS 2d 384, 373 NE 2d 278 (1977). Reliance is not "justified" as required when the plaintiff reasonably could have discovered the true facts with due diligence. **P Chimento Co v Banco Popular de Puerto Rico**, 208 AD 2d 385, 617 NYS 2d 157 ( 1<sup>st</sup> Dep't 1994). The prevailing rule today is that justifiable reliance does not exist when plaintiff has failed to inspect public records, meaning that such party had the means to discover the true nature of the transaction entered into by the exercise of ordinary intelligence and failed to make use of such means. Thus, no justifiable reliance was found involving failure to inspect public records: **Urstadt Biddle Properties Inc v Excelsior Realty Corp.** 65 AD 3d 1135, 885 NYS 2d 510 (2d Dep't 2009); **Goldman v Strough Real Estate Inc**, 2 AD 3d 677, 770 NYS 2d 94 (2d Dep't 2003); **Shao v 39 College Point Corp**, 309 AD 2d 850, 766 NYS 2d 75 (2d Dep't 2003); **Culver & Thesen Inc v Starr Realty Co**, 307 AD 2d 910, 763 NYS 2d 84 (2d Dep't 2003). In the case of condemnation, any failure of a vendor or vendor's agent to the prospective purchaser of real property of proposed municipal condemnation thereof does not constitute actionable fraud even where such vendor or agent makes no representation regarding the status of the property since condemnation is matter of public record which a purchaser could reasonably discover with the use of due diligence. **see, Beach 104 St Realty Inc v Kisslev-Mazel Realty LLC**, 76 AD 3d 661, 906 NYS 2d 614 (2d Dep't 2010). Moreover, failure to provide a publicly available document to a purchaser does not give rise

to a cause of action against the seller or agent thereof for negligent misrepresentation, which also requires reliance. **Hensen v Mitchell**, 328 AD 2d 263, 733 NYS 2d 449 (2d Dep't 2001).

In this case, the Getty Defendant has clearly sustained its prima facie showing of entitlement to Summary Judgment dismissing the Complaint, consisting of three causes of action for fraud, intentional misrepresentation and negligent misrepresentation, all invoking the Defendants' knowledge and concealment of the pending the DOT condemnation of the property they leased from Getty. The pending of such action was clearly a matter of widespread public notice well before the Plaintiffs closed on the subject commercial property. Upon the shifting of the burden, Plaintiffs' allegation that Getty promised to provide improvements, such as paving and new gas tanks, even if true, could not be relied upon in a justifiable manner in view of the pending State condemnation of a significant portion of the property. Due diligence on the part of the Plaintiffs would have revealed this obvious fact as set forth in the case law cited above. Therefore, upon the shifting of the burden, the Plaintiffs have failed to set forth the existence of any material issue of fact. Only issues of law are presented herein, upon which Plaintiffs' complaint may not proceed.

Since Getty has made this motion pursuant to **CPLR § 3212 (a)**, the Court has the ability thereunder to search the record and grant Summary Judgment if necessary to a non moving party. Albert Salib ("Salib") has not participated in this motion, although he is a party Defendant as the seller of his business to the Plaintiffs herein. Based upon the law set forth above, the same causes of action which are alleged against the Getty Defendant are likewise the basis for the lawsuit against Salib. For the same reasons set forth above, upon the Court's search of entire record

herein, the Plaintiffs have no claim against that Defendant. Again, the matter of the condemnation, even if known and concealed by Salib, was a matter of public record before the closing and widely publicized.

For all of the foregoing reasons, Getty's motion is granted; the Complaint against that Defendant is dismissed and the Complaint against the remaining Defendant Salib is likewise dismissed for the reasons set forth upon the Court's search of the record.

This constitutes the **DECISION** and **ORDER** of the Court.

**Dated: October 13, 2011**  
**Riverhead, New York**

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**EMILY PINES**  
**J. S. C.**

**FINAL**  
 **NON FINAL**