

Vinder v Fareri

2001 NY Slip Op 30051(U)

March 24, 2001

Supreme Court, New York County

Docket Number:

Judge: Louise Gruner Gans

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. LOUISE GRUNER GANS

PRESENT: Hon. _____

PART 61

Justice

Ron J. Vindes

INDEX NO.

104900/01

MOTION DATE

6/19/01

MOTION SEQ. NO.

01

MOTION CAL. NO.

~~101~~ Show Cause

Michael Faresi

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DETERMINED PURSUANT TO
ANNEXED DECISION AND ORDER

MOTION/ORDER IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 8/24/01

[Signature]
J. S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

HON. LOUISE GRUNER GANS

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61**

RON J. VINDER and MARCY L. VINDER,

Plaintiff,

Index No. 104900/2001

-against-

**MICHAEL FARERI, HOULIHAN/LAWRENCE IN.,
BARBARA GREER, and DAVIS& SINGER, P.C.,**

Defendants.

LOUISE GRUNER GANS, J.

In motion sequence 01, Plaintiffs Ron and Marcy Vinder move (1) to toll any declaration of default under the sales contract and to enjoin Defendant Davis & Singer from releasing the contract down payment; (2) to toll enforcement of the \$1,000 a day penalty provision of the sales contract if the closing does not occur on June 1, 2001; (3) pursuant to CPLR 3126(1) for an order that the issues for which Fareri did not produce information shall be determined in Plaintiffs' favor; (4) pursuant to CPLR 3126(2) barring Fareri from supporting his claims or offering into evidence documents which were requested by Plaintiffs but not produced by Fareri; (5) pursuant to CPLR 3126(3) striking Fareri's pleadings or dismissing Fareri's counterclaim because of his failure to produce requested documents; and (6) pursuant to CPLR 3124 compelling Fareri to comply with the amended notice of deposition. In motion sequence 02, Defendant Michael Fareri moves pursuant to CPLR 3211 to dismiss the action and pursuant to CPLR 3212 for summary judgment on his counterclaim or for an order transferring the action to Westchester County.

Mr. Fareri put real property located at 14 Sunrise Drive, Armonk, New York on

the market in 1999, retaining Defendant Houlihan Lawrence (“H/L”) as the broker. Judy Tarter was the first H/L broker to show Plaintiffs the property. Defendant Barbara Greer was the H/L listing broker. On November 18, 2000, Plaintiffs executed a contract to purchase for \$2,550,000. They tendered a down payment of \$255,000.

Plaintiffs allege that Defendants misrepresented the taxes. As of September 2000, the tax liability was listed by the broker on its website at \$25,071. However, on December 18, 2000 the tax liability was listed on the website as \$31,813. Plaintiffs claim to have inquired of Defendants about taxes on several occasions. Mr. Fareri does not dispute that he said he paid taxes around \$25,000. His records submitted with the motion show that he paid \$28,442.28 for the year 2000. In an affidavit dated June 18, 2001, Anna Maria Marrone, the assessor for the Town of North Castle states that she recalculated the square footage of the home in February 2001 and arrived at a new assessment. She states that the recalculation was necessary due to an error by her office in originally calculating the square footage. Plaintiffs claim that as a result of the reassessment, the taxes for 2001 are \$36,555.

Plaintiffs initiated this action in March 2001. The complaint consists of seven causes of action: (1) against Fareri for fraud in the inducement; (2) against Fareri for rescission based on unilateral mistake and fraud; (3) against Fareri for rescission for mutual mistake of fact; (4) against H/L and Greer for negligence; (5) against H/L and Greer for breach of fiduciary duty; (6) for fraud by H/L and Greer; and (7) for a preliminary injunction enjoining Davis & Singer from releasing the down payment and directing it to return the down payment. Plaintiffs seek the following relief: (1)

rescission; (2) return of the down payment plus interest; (3) an order directing Davis & Singer to return the down payment. Fareri's answer dated March 27, 2001 includes a counterclaim for breach of contract entitling him to keep the down payment.

Mr. Fareri's motion to change venue is denied. He does not allege that venue in New York County is improper. Rather, he moves to change venue based on the convenience of material witnesses. However, he fails to satisfy the requirements of CPLR 510 by failing to list the names addresses and occupations of witness, the facts to which the witnesses will testify, the witnesses willingness to testify and that they will in fact be inconvenienced. *O'Brien v VassarBros. Hosp.*, 207 AD2d 169 (2d Dept 1995).

Mr. Fareri seeks to dismiss the action against him based on paragraph 1 of the first rider which provides:

It is understood and expressly agreed that neither Seller nor any person purporting to act for Seller has made or no makes any representations or warranties covering the physical condition of, zoning of, or condition of title to the premises or concerning any other matter or thing affecting the premises except as expressly provided herein, and Seller expressly disclaims any such representations or warranties, except as expressly set forth herein. Purchaser hereby expressly acknowledges that no such representations or warranties have been made, and that Purchaser is not relying on any of same....

It is understood and agreed that all understandings and agreements heretofore had between the parties are hereby merged in this agreement, which alone fully and completely expresses their agreement and that same is entered into after full investigation, neither party is relying upon any statement or representation made by the other which is not embodied in this contract.

He argues that this action is precluded by the merger clause. "[A] general merger

clause is ineffective to exclude parol evidence of fraud in the inducement.” *Danann Realty Corp v Harris*, 5 NY2d 317, 320 (1958). Although the contract, in paragraph 18,¹ contemplates that taxes change from year to year, this is not sufficient to constitute a specific disclaimer of reliance on any oral representation about taxes. See *DiFilippo v Hidden Ponds Associates*, 146 AD2d 737 (2d Dept 1989).

However, Plaintiffs’ failure to investigate this issue for themselves is fatal to this action. *Id.* In his June 12, 2001 affidavit, Mr. Vinder states that sometime after he paid the down payment, the broker Judy Tarter checked the public records and discovered that the square footage listed with the town was incorrect. If the amount of local taxes was as important to them as Mr. Vinder states, then the Vinders could have, and should have, confirmed the assessment for themselves. Had they done so, they would have discovered, just as Tarter had, that the square footage used by the tax assessor was smaller than the actual square footage of the house. See, *Glazer v LoPreste*, 278 A.D.2d 198 (2d Dept 2000). Indeed, the reassessment was as a result of Tarter’s investigation. Accordingly, Plaintiffs’ failure to close is a breach of contract. Under the contract, Mr. Fareri is entitled to keep the down payment.

¹It provides:

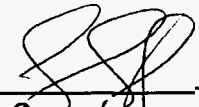
Apportionment and Other Adjustments; Water Meter and Installment Assessments. (a) To the extent applicable, the following shall be apportioned as of midnight of the day before the day of closing: (1) taxes, water charges and sewer rents, on the basis of the fiscal period for which assessed. (b) if Closing shall occur before a new tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the immediately preceding fiscal period applied to the latest assessed valuation.

Accordingly, it is

ORDERED, Mr. Fareri's motion to dismiss the complaint and for summary judgment on his counterclaim is granted; and it is further

ORDERED, that Plaintiffs' motion is denied as moot.

Dated: 9/24/01

ENTER: 

J.S.C.
HON. LOUISE GRUNER GANS