Alper v Seavey

2002 NY Slip Op 30059(U)

November 27, 2002

Supreme Court, New York County

Docket Number: 0109222/2001

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice PART 11

Marylin M. Alper

-v-

Robert W. Seavey

INDEX NO. 10f222/01

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for reargument.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ____

Dated: 11/21/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

MARILYN ALPER, Plaintiff,	)	
v.	)	Index No. 109222/2001
ROBERT W. SEAVEY, PHYLLIS N. SEAVEY, GILBRIDE, TUSA, LAST & SPELLANE LLC, and NEW YORK CITY DEPARTMENT OF BUILDINGS, Defendants.	)	

JOAN A. MADDEN, J.:

In this action arising out of an aborted purchase of Manhattan cooperative apartment, defendants Robert W. Seavey and Phyllis N. Seavey ("the Seaveys") move for reargument of this court's decision and order dated March 7,2002 ("the original decision"), to the extent that it denied their cross motion for summary judgment dismissing the complaint against them and for judgment on their counterclaim seeking to retain the contract deposit as liquidated damages. Plaintiff opposes the motion, which is granted in part and denied in part.

Background

On January 25,2001, plaintiff entered into a contract to purchase a cooperative apartment located at 565 Park Avenue ("the Apartment") from the Seaveys for $3.1 million ("Contract of Sale") . In connection with the Contract of Sale, plaintiff deposited $310,000 in escrow. Defendant Gilbride, Tusa, Last & Spellane LLC is the escrow agent.

Under section 6.2.1 of the Contract of Sale, plaintiff was required to "in good faith. ... submit to the Corporation or its Managing Agent within 10 business days ... an application for

approval of the sale..." Section 6.2.2 also required plaintiff "in good faith" ... "to attend ... one or more personal interviews, as requested by the Corporation." Plaintiff did not submit her application within 10 days of signing the Contract of Sale and on February 21,2001, counsel to the Seaveys wrote to plaintiff that she was in breach of the Contract of Sale and requested that she "cure her default." Plaintiff subsequently submitted her application on February 28, or about three weeks late. In her affidavit, plaintiff states that any delay was caused by her effort to "[make] sure the package was entirely complete." In addition, plaintiff states that although she had her broker call to reschedule an agreed upon interview with the Corporation, her reasons for missing the interview was not related to irregularities with the Apartment but because she was suffering an episode of depression due to the sudden loss of her husband and two sons.' The interview was never rescheduled, and plaintiff submits a letter from the Board of Directors indicating that the Board would not schedule an interview pending the outcome of the parties' disputes.

In the meantime, counsel for plaintiff and the Seaveys were exchanging correspondence regarding whether alterations to the Apartment performed by the Seaveys complied with the Building Code. Under section 4.1.8 of the Contract of Sale, the Seaveys represented that "there are and at the closing will be no violations of record which the owner of the Shares and Lease would be obligated to remedy under the terms of the Lease." The Seaveys also represented under section 4.1.9 that they did not "make any alterations or additions to the Unit without any required consent of the corporation."

'The letter sent by her lawyer stated the interview was reschedule due to an illness in plaintiffs family.

On March 23,2001, plaintiff's counsel wrote to Seaveys' counsel and informed him that plaintiff did "not believe that she can proceed with the transaction" as the "(i) the plans filed [for the alterations] are completely inconsistent with the actual work done, (ii) there never was a final approval by the Board, (iii) violations (which may not, as of the moment, be of record) actually exist, and (iv) your client omitted material information in connection with the contract of sale by failing to reveal the situation with respect to the plans and work done."

Plaintiff then commenced this action. The first cause of action, for fraudulent inducement, alleges that the Seaveys, with the intent to deceive, induced plaintiff to enter into the Contract of Sale by omitting various material facts, related to the renovation of the Apartment including, inter alia, that (i) there were two sets of plans, one filed with the City of New York, and one followed during construction, (ii) the work done in the Apartment was significantly and materially different than that which appeared in the plans filed with the City of New York, (iii) the building plans filed with the City of New York for renovation work done by defendants was never approved or "signed off' by the City of New York, (iv) the washer and dryer were not vented as required by law, (v) the electrical panel contains 47 breakers with no spares and the maximum permitted by the New York City Electrical Code is **42,** (vi) that the kitchen ventilation does not comply with the New York City Administrative Code, (vii) the maid's room does not comply with the Multiple Dwelling Law, and (viii) the final plans and work have not been approved by the Corporation's Board of Directors.

The second cause of action is for breach of contract, and seeks the return of the contract deposit, and alleges that the Seaveys breached section 4.1.9 the Contract of Sale by, inter alia, failing to obtain the consent of the Corporation to alteration or additions to the Apartment. The

third cause of action seeks an order enjoining the Seaveys from attempting to enforce the Contract of Sale until they permit an inspector from the Department of Buildings ("DOB") to enter and inspect the Apartment and compelling DOB to conduct the inspection.

The Seaveys answered and asserted a counterclaim which seeks the right to retain the contract deposit as liquidated damages for plaintiffs breach of the Contract of Sale based on her failure to submit her application in good faith within 10 days of receiving a fully executed contract and to attend an interview at the request of the Corporation.

Before any discovery was taken, the Seaveys cross moved for summary judgment dismissing the complaint and for judgment on their counterclaim.[2] Plaintiff also cross moved for summary judgment. In the original decision, this court denied the Seaveys' and the plaintiffs respective cross motions for summary judgment. The Seaveys now move for reargument of the original decision, asserting that (i) the fraudulent inducement claim must be dismissed as plaintiff agreed in the Contract of Sale to purchase the Apartment "as is," (ii) there are no violations of record, and the Contract of Sale does not require the them to permit DOB to inspect the Apartment for the purpose of creating violations of record, (iii) they did not breach section 4.1.9 of the Contract of Sale as the Corporation consented to all alterations to the Apartment, and (iv) they are entitled to summary judgment on their counterclaim as plaintiff breached the Contract of Sale by failing to timely submit her application and to attend an interview at the request of the Corporation.

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[2] The cross motions were made in response to defendant the DOB's motion to dismiss the complaint against it for failure to state a cause of action. By stipulation dated September 6, 2001, plaintiffs action against the DOB was discontinued and DOB agreed to conduct an inspection, thus rendering the DOB's motion moot.

Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). Here, reargument is granted and, upon reargument, the Seaveys' cross motion for summary judgment is granted to the extent of dismissing the first and third causes of action.

To demonstrate that the Seaveys fraudulently induced her to entered into the Contract of Sale, such as would warrant a remedy of rescission, plaintiff must show "a misrepresentation or a material omission of fact which was false and known to be false by defendant[s], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation, and injury." Lama Holding Co. v. Smith Barney, Inc. 88 N.Y.2d 413,421 (1996); see also, Davis v Generics Corp. of America, 58 AD2d 850 (2d Dept 1977). The first cause of action pleads these elements, and as noted in the original decision, the parties submitted conflicting affidavits in support of their respective cross motions regarding the condition of the Apartment and whether the renovations were properly performed.

Nonetheless, the court now finds that plaintiff does not have cognizable claim for fraudulent inducement. The Contract of Sale provides that "[s]eller makes no representations as to the condition of the Unit. Purchaser has inspected the Unit and shall take it 'asis'"[3] (Section 7.1). The Contract of Sale also contains a merger clause stating that all prior oral or written

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[3]The Contract of Sale contains a similar provision as to personal property. Section 3.4 provides that "[s]eller makes no representations as to the condition of the Property. Purchaser shall take the Property 'as is, as of the date of the contract."

representations are merged in the Contract of Sale which alone expresses the parties agreement. (Section 14.1). In general, when, as here, the contract contains a merger clause and provides that the purchaser has inspected the premises and agreed to take it "as is," there can be no cause of action for fraudulent inducement based on a purported material omission. See East 15360 Corn. v Provident Loan Societv, 177 AD2d 280,281 (1st Dept 1991)(dismissing claim for fraudulent inducement based on the seller's failure to obtain permits for the removal of an elevator, where this defect was discovered prior to the closing date but after the contract was signed containing a provision that the purchaser inspected the premises and agreed to take it "as is"); see also Danann Realtv Corn. v Harris, 5 NY2d 317 (1959).

Although this rule does not apply when there is deceptive conduct or a fiduciary relationship between the parties (East 15360 Corp. v Provident Loan Societv, 177 AD2d at 281), neither of these exceptions apply here. There was no fiduciary relationship between the parties and, in fact, the record indicates that they have never met. Moreover, the alleged defects are of a kind that could have been discovered had plaintiff and her professionals performed an inspection before signing the Contract of Sale. Additionally, plaintiff does not specify any deceptive conduct taken by the Seaveys to conceal these alleged defects before she signed the Contract of Sale. See, Kidd v Spector, 1998 WL 879698 (**SDNY** 1998). Notably, the Seaveys' purported wrongful conduct in preventing DOB from finding violations of record occurred after the Contract of Sale was signed.

Next, in the original decision, the court rejected the Seaveys' argument that the clause "no violations of record" means that there were no violations on file with governmental agencies at

the time that the Contract of Sale is signed.[4] The court also noted that, under Section 4.1.8, the Seaveys had a continuing obligation to correct any violations of record, since they warranted that at the closing there would be "no violations of record which the owner of the Shares and Lease would be obligated to remedy under the terms of the Lease."

On reconsideration, and after reviewing the additional case law submitted by the Seaveys, the court finds that the clause "no violation of record" should be interpreted as meaning violations on file with government agencies. See e.g. East 15360 Corp. v Provident Loan Society, 177 AD2d at 282; Salsone v Salzone, 212 NYS2d 492 (Sup Ct Nassau Co. 1961); Hattman v 212-214 South Ninth Street Corp., 147 *NYS* 2d 552 (Sup Ct Kings Co. 1955). Further, the court finds that the Seaveys' obligation to correct any violations of record until closing cannot be read as requiring them to permit governmental inspections at the request of the plaintiff, particularly as the clear and express terms of the Contract of Sale state that plaintiff has inspected the Apartment and is taking it "as is." This statement clearly indicates that prior to signing the contract, plaintiff inspected the Apartment and during such inspection had the opportunity to ascertain whether any violations existed, irrespective of whether violations were "of record." Having agreed to accept the Apartment "as is" after such inspection, plaintiff has no right to demand a government inspection to ascertain whether any violations exist. Accordingly, the third cause of action, which seeks to enjoin the Seaveys' attempting to enforce the Contract of Sale until they permit a DOB inspector to enter and inspect the Apartment, must be dismissed.

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[4]The original decision inadvertently stated that there were no violations of record at the time that the Contract of Sale was filed, instead of, signed.

In addition, to the extent the second cause of action, for breach of contract, is based on the Seaveys' purported breach of the provision relating to violations of record, it is also without merit.

The breach of contract cause of action is still viable, however, based on plaintiffs allegation that the Seaveys breached section 4.1.9 of the Contract of Sale, which warrants that the Seaveys have not made any alterations or additions to the Apartment without the required consent of the Corporation. Although the Seaveys contend that they received consent fiom the Corporation and point out that their $10,500 security deposit for the renovations was returned, these contentions are not sufficient to entitle the Seaveys to summary judgment. As noted in the original decision, absent fiom the record is an affidavit or other documentation from the Corporation as to what, if any, consent it gave. Additionally, while not providing a basis for a fraudulent inducement claim, plaintiffs allegations regarding inconsistencies between the renovation plans and the actual construction and other purported problems with the renovations suggest that an issue exists as to whether the Corporation gave prior consent to the alterations which were actually done. Moreover, the facts as to this issue are within the exclusion of knowledge of the Seaveys and the Corporation. Under these circumstances and as no discovery has been conducted, the court adheres to the original decision denying the Seaveys' summary judgment on the issue of whether the Corporation provide prior consent to the renovations.

Next, the Seaveys have not established entitlement to summary judgment as to their counterclaim seeking to retain the contract deposit based on plaintiffs failure to submit to the Corporation an application for approval of the sale within 10 days of execution of the Contract of

Sale and to attend a personal interview with the Corporation. The relevant provision requires plaintiff "in good faith" to submit the application within 10 days and to attend a personal interview(s) at the request of the Corporation. In its original decision, the court found that as the Contract of Sale does not provide that time is of the essence, that plaintiff was entitled to a reasonable adjournment of the time to provided in the application in the absence clear and unequivocal notice from the seller that time is of the essence. See e.g., Miller v Almauist, 241 AD2d 181 (1st Dept 1998). The court further noted that as Seaveys do not claim that either the original agreement or any subsequent notice made time of the essence it could not be said on the record before the court that the three week delay constituted a breach of the Contract of Sale. The court also held that it could not be found, as a matter of law, that plaintiffs failure to reschedule the interview was in bad faith.

In support of their argument that plaintiffs three week delay in submitting the application constitutes a breach of contract, the Seaveys rely on Glanzer v Altman, 267 AD2d 79 (1st Dept 1999). In Glanzer, the Appellate Division, First Department held that the failure of purchasers of a cooperative apartment to submit an application within 10 days was a breach of contract entitling the seller to recover the down payment as liquidated damages, and that a different interpretation was not required by the fact that the contract did not make time of the essence. The court further found the purchasers' misrepresentation of their bankruptcy status constituted a material breach of the contract. However, in Gaffin & Mayo P.C. v Mok. 106 AD2d 320 (1st Dept 1984), which the court in Glanzer did not mention or overrule, the First Department held that the purchasers of a cooperative apartment were not in breach based on their

failure to comply with the deadlines in the contract of sale where the circumstances indicated that time was not of the essence. Notably, the decision is Gaffin& Mavo P.C. is consistent with pnor decisions holding that the time provisions in a contract for the sale of real property or shares in cooperative apartments are subject to reasonable adjournments unless the contract specifies that time is of the essence. See e.g., Miller v Almquist, 241 AD2d 181; 4200 Ave. K Realty Corp v 4200 Realty Co., 89 AD2d 978 (2d Dept 1982). Moreover, in Glanzer as the purchaser misrepresented its bankruptcy status, it would appear that the court did not have to determine whether there was an issue of fact as to whether the purchaser acted in good faith with respect to submitting the application.

In contrast, the circumstances here do not warrant a finding that plaintiff breached the Contract of Sale, as there are issues of fact as to whether plaintiff acted "in good faith." Notably, the record indicates that when plaintiff failed to submit her application on time, the Seaveys requested that plaintiff "cure her default" by submitting her application, which she did. With respect to the interview, the court adheres to its previous determination that it cannot be said as a matter of law that plaintiff's decision to cancel the first interview date was in bad faith, and in light of the parties' dispute, it is unclear fiom the record whether the failure to reschedule a further interview constitutes a breach of the Contract of Sale.

Conclusion

In view of above, it is

ORDERED that the Seaveys' motion for reargument is granted and, upon reargument, the Seaveys' cross motion for summaryjudgment is granted to the extent dismissing the first and third cause of action and is otherwise denied; and it is further

ORDERED that the first and third causes of action are severed and dismiss; and it is further

ORDERED that the remainder of the action shall continue.

DATED: November 27, 2002

J.S.C.