SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CAYUGA

S.L. AUBURN, INC.,

Plaintiff,

vs.

JOSEPH M. SOLON, and
JAMES W. SOLON, as co-executors of
the Estate of JOSEPH J. SOLON,

Defendants.

DECISION
Index No. 02-1053
Assigned Justice:
HON. MARK. H. FANDRICH

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FANDRICH, MARK H., Acting Justice

Plaintiff, S.L. Auburn, Inc., commenced this action for damages for breach of contract arising out of the sale of premises at 89 York Street, Auburn, New York (the "premises"), to the defendant, Joseph J. Solon, by plaintiff. Defendants deny liability and assert several affirmative defenses, including, without limitation, fraud in the failure to disclose environmental concerns. The parties stipulated to a number of exhibits, and the Court held a hearing on December 13, 2005.

The Court finds that the parties did enter into a series of contracts with regard to the purchase and sale of the premises. The contracts consisted of several documents which were executed by the parties over a period of time. These documents included the following: 1) contract entered into by the parties in June 2001, which included a Sales Contingency Addendum (Trial Exhibit "Tr. Ex." 9); 2) Letter agreement to renew prior contract entered into by the parties in April 2002 (Tr. Ex. 24); and 3) contract to proceed with the transaction, minimize damages and preserve claims and defenses, entered into by the parties in July 2002 (Tr. Ex. 41).

The June 2001 contract obligated the defendant Solon to purchase the premises for the price of $250,000.00. The contract contains a Sales Contingency Addendum under which Defendant Solon specifically acknowledges the likely presence of environmental contaminants on the premises and accepts the premises "as is".[1] Defendant Solon was given 14 days to cancel the contract after reviewing a Phase II Environmental Review which the plaintiff provided him. The contract also contained a

[1] The relevant portion of the Sales Contingency Addendum states as follows: "Buyer hereby agrees that it is purchasing the Property 'as is' without any representations of warranty as to the environmental condition of the Property. Buyer shall have the responsibility to undertake all environmental remediation of the Property and shall e[a]ffect all necessary filings and other communications with the New York State Department of Environmental Protection with respect thereto." (Tr. Ex. 9, p. 3).

clause stating that the buyer has inspected the premises, understands that it is purchased "as is" except as otherwise provided, and has the right to further inspect the premises prior to closing. (Tr. Ex. 9, p. 2).

Thereafter, defendant Solon exercised his right to cancel the contract by a letter from defendant Solon to plaintiff's agent (Tr. Ex. 14), which included a counteroffer. Plaintiff rejected the counteroffer and accepted the cancellation in correspondence from plaintiff's agent to defendant Solon (Tr. Ex. 15).

In April, 2002, defendant Solon sent a letter to plaintiff to renew the June 2001 contract to purchase the property for $250,000.00. The parties agreed to the renewal and also agreed that defendant Solon waived "all environmental contingencies" and that he would obtain environmental insurance for the premises naming plaintiff as an additional insured. (Tr. Ex. 24). Prior to the April 2002 letter agreement, defendant Solon received a series of documents with regard to environmental issues affecting the premises. These included correspondence from O'Brien & Gere Engineers, Inc., to NYSDEC regarding NYSDEC Spill No. 00-02414 (Tr. Ex. 17), correspondence from NYSDEC to O'Brien & Gere Engineers, Inc., regarding NYSDEC Spill No. 00-02414 (Tr. Ex. 18), and a Memo from plaintiff's agent to defendant Solon with draft letters from NYSDEC relating to NYSDEC Spill Nos. 00-02414 and 02-60004. (Tr. Ex. 19).

Thereafter, defendants' prior counsel received correspondence from NYSDEC, dated June 13, 2002, confirming closure of NYSDEC Spill No. 002414 and that no further remediation was necessary with regard thereto; confirming closure of NYSDEC Spill No. 79-01147; and confirming the existence of an access agreement with plaintiff to allow NYSDEC to monitor a well on the premises relating to contamination from

adjoining property. (Tr. Ex. 31). By correspondence from defendants' prior counsel dated June 20, 2002, defendants acted to rescind the agreement to purchase the premises, stating, in part, that environmental issues concerning the premises were not resolved; that obtaining environmental insurance would not be affordable; that there remained considerable exposure due to a 1979 spill by plaintiff; and that there was an open well on the premises which was under investigation by NYSDEC. (Tr. Ex. 33).

This Court holds that an agreement between the parties for the purchase and sale of the premises for $250,000.00 existed and that defendants have breached it. This agreement is evidenced by and embodied in the contract entered into by the parties in June 2001, which included a Sales Contingency Addendum (Tr. Ex. 9), and the letter agreement to renew the prior contract entered into by the parties in April 2002 (Tr. Ex. 24). The June 2001 contract and April 2002 letter agreement set forth the contractual rights and obligations of the parties with regard to this transaction.[2]

It is disingenuous to state that defendants were defrauded by plaintiff with regard to environmental issues affecting the premises. From the outset, defendants had full knowledge that the premises were subject to environmental concerns. On July 17, 2001, plaintiff's agent sent defendant Solon copies of the Phase I and Phase II Environmental Reports of the premises. On July 26, 2001, Leader Environmental submitted a proposal to defendant Solon to review the site information and prepare a remedial scope of work and cost estimates to address lubricating oil contamination at the premises. (Tr. Ex. 10); and on August 21, 2001, Leader Environmental sent a memo to defendant Solon with the cost estimates for the most expensive remedial action. (Tr. Ex. 13). Thereafter, defendant

[2] The July 2002 agreement merely allowed the parties to consummate the transaction in order to mitigate damages, without affecting any claims or defenses each party may have with regard to the matter.

Solon renewed his efforts to purchase the premises and further documentation regarding the environmental issues was obtained by him. (Tr. Exs. 17, 19 & 31).

Plaintiff did not engage in conduct that "amounts to a false representation or concealment of material facts". (Amherst Magnetic Imaging Assocs., P.C. v. Cmty. Blue, 286 A.D.2d 896, Fourth Dept., 2001). Therefore, plaintiff's claim is not barred by the doctrine of equitable estoppel. (Amherst Magnetic Imaging Assocs., P.C. v. Cmty. Blue, *supra*.). Moreover, defendants took the premises in "as is" condition and waived "all environmental contingencies". (Tr. Exs. 9 & 24). The disclaimer and merger clauses in the June 2001 contract and the April 2002 letter agreement were specific and conclusive. Any so-called misrepresentations were covered by these disclaimers and merger clauses. (Mosca v. Kiner, 277 A.D.2d 937, Fourth Dept., 2000).

Finally, defendants maintain that even if a valid contract existed between the parties, plaintiff has suffered no loss since there are no environmental issues with the premises at this point in time. Defendants argue that there is no need for environmental insurance. However, the agreement between the parties imposes an absolute duty upon defendants to provide environmental insurance and to name plaintiff as an additional insured. (Tr. Ex. 24). Furthermore, the purpose of insurance is to protect a party from unforeseeable and unintended harm that may occur from time to time, independent of the risks of such harm.

By reason of the foregoing, plaintiff is entitled to damages from defendants for breach of contract as follows: 1) the sum of $75,000.00 plus interest at the rate of 9% from July 18, 2002, for the difference between the purchase price of $250,000.00 less the amount of $175,000.00 paid at closing; 2) the sum of $67,058.00 plus interest at the rate

of 9% per year from July 18, 2002, for environmental insurance, which contains a $1,000,000.00 limit of liability and a $50,000.00 deductible[3]; and 3) costs and disbursement of this action.

SUBMIT ORDER.

Dated: MAY 26, 2006
At Auburn, New York

ENTER,

HON. MARK H. FANDRICH
Acting Supreme Court Justice

[3] Only plaintiff submitted estimates with regard to the cost of environmental insurance.