

Misra v Yedid

2006 NY Slip Op 30277(U)

July 6, 2006

Supreme Court, New York County

Docket Number: 0603857/2003

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND **PART 48**

Justice

GEETANJALI MISRA,

Plaintiff,

-against-

SAMUEL YEDID et al.,

Defendants.

INDEX NO. 603857/03

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

FILED

JUL 17 2006

COUNTY CLERKS OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 003, 004, 005 and 006 are consolidated herein for decision. Plaintiff is a shareholder of defendant Master Apartments, Inc., a cooperative corporation which owns a building located on Riverside Drive in Manhattan. In January, 2003, plaintiff purchased an apartment located on the 27th floor of the building from defendants Samuel Yedid and Gregory Allen. The apartment is located directly below the building's ventilation system, which is housed in an equipment room on the 28th floor. Plaintiff claims that she did not discover that the ventilation system was above her apartment until after she purchased the unit. According to the plaintiff, the system created noise and vibrations which rendered her apartment uninhabitable. She brought this action against Yedid, Allen, Master Apartments, the real estate brokerage firm and its employee who procured the sale (Brown Harris Stevens Residential Sales, LLC and David Anderson), and the building's managing agent and property manager (Orsid Realty Corp. and Seth Jucovy).

The complaint asserted eight causes of action. By decision and order dated February 22, 2005, the court dismissed the second, sixth and eighth causes of action in their entirety. As to the remaining causes of action, the first cause of action is against Yedid, Allen and their real estate brokers, Brown Harris and David Anderson. It alleges that these defendants conspired to conceal from plaintiff the existence of the ventilation system and the fact that the system created noise and vibrations which rendered the apartment uninhabitable. Plaintiff alleges that one or more of the defendants improperly tampered with the building's ventilation system prior to her inspection of the apartment by lowering the fan speed so as to eliminate the noise and vibrations which were otherwise present. The first cause of action also asserts that the defendants misrepresented to plaintiff that the apartment did not have any noise and vibration problem. The third, fourth and fifth causes of action, asserted against Master Apartments, its managing agent (Orsid Realty) and property manager (Jucovy), allege that these defendants intentionally and negligently failed to disclose the apartment's noise and vibration problems to the plaintiff and also negligently failed to prevent Yedid, Allen and Anderson from gaining access to the ventilation system where they improperly lowered the fan speed. The seventh cause of action alleges that the coop and Orsid Realty failed to provide the plaintiff with a habitable apartment.

In motion sequence number 003, Brown Harris and David Anderson move for summary judgment dismissing all claims which have been asserted against them. Plaintiff cross-moves for summary judgment in her favor as against these same defendants. In motion sequence numbers 004 and 005, Yedid and Allen move, respectively, for summary judgment dismissing all claims which have been asserted against them. In motion sequence number 006, Master Apartments, Orsid Realty and Jucovy move for summary judgment dismissing all claims which have been asserted against them or, in the alternative, for partial summary

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judgment dismissing plaintiff's demands for damages except for partial rent abatement from the period of February, 2003 to April, 2005. Plaintiff has cross-moved for summary judgment in her favor on all claims which she has asserted against these three defendants.

Motion Sequence Number 003 - In moving for summary judgment dismissing all claims which have been asserted against them, Brown Harris and David Anderson contend that plaintiff has failed to adduce any evidence which can establish that Anderson, or anyone else at Brown Harris, was in any way responsible for adjusting the ventilation system and/or reducing the noise and vibrations in the apartment. They have also submitted an affidavit from Anderson in which he denies having ever adjusted the fan level. In addition, they point to the deposition of Jucovy, the building manager, who testified that the equipment room on the 28th floor where the ventilation system was located was always locked, that it would have been impossible for Anderson to gain access to the equipment room without assistance from someone from the building staff and that, to his knowledge, no one ever assisted Anderson in gaining access to the room in order to reduce the fan speed. Brown Harris and Anderson thus argue that if anyone adjusted the ventilation system to conceal the noise, there is no evidence that it was David Anderson.

The court disagrees. There is circumstantial evidence from which a jury could conclude that Anderson actively concealed the noise in the apartment from plaintiff by tampering with the ventilation system. First, Anderson conceded at his deposition that he was having great difficulty in selling the apartment because of the noise and vibrations emanating from the 28th floor ventilation system. He also conceded that he was aware that the owners of the apartment, defendants Yedid and Allen, were concerned about the noise and its impact on their ability to sell the apartment. Second, he acknowledged during his deposition that he had gained access to the equipment room without authorization from the building and that he had, in fact, visited the room on numerous occasions. Third, Jucovy acknowledged at his deposition that the lock to the equipment room appeared to have been tampered with on numerous occasions and that someone had improperly lowered the fan speed of the ventilation system. This circumstantial evidence, when viewed in the aggregate, raises a material triable issue of fact as to whether Anderson activity concealed the noise and vibrations caused by the ventilation system. *See Jablonski v. Rapalje*, 14 AD3d 484, 486 (2nd Dept. 2005); *Platzman v. Morris*, 283 AD2d 561, 562 (2nd Dept. 2001).

There is also an issue of fact as to whether Anderson fraudulently misrepresented the condition of the apartment. In order to recover damages for fraudulent misrepresentation, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury. *See Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 (1996); *Jabalonski v. Rapalje*, 14 AD3d at 487. Here, Anderson does not deny plaintiff's assertion that she specifically asked him what, if anything, was located directly above the apartment on the 28th floor and was falsely told that there was only a water tank.

Defendants argue, however, that plaintiff could not have justifiably relied on this misrepresentation since she had an ample opportunity to discover the presence of the ventilation system by inspecting the equipment room. In support of this argument, Brown Harris and Mr. Anderson have submitted an affidavit from Alan Fried, a real estate attorney, who claims that proper due diligence by plaintiff and/or her attorney would have uncovered the presence of the ventilation fan and the noise it created. However, this affidavit merely creates an issue of fact as to whether plaintiff justifiably relied on Anderson's alleged misrepresentation. Moreover, the court notes that plaintiff has claimed that her engineer attempted to inspect the water tank but was denied access to the 28th floor by a building employee. The motion for summary judgment by defendants Brown Harris Stevens and David Anderson must therefore be denied. Plaintiff's cross-motion for summary judgment against these same defendants is also denied.

Motion Sequence Numbers 004 and 005 - Yedid and Allen have moved, respectively, for summary judgment dismissing the claims asserted against them on the ground that there is no evidence that they themselves tampered with the ventilation system or made any direct misrepresentations to the plaintiff. However, in asserting a claim of misrepresentation and concealment against these defendants, plaintiff contends that, irrespective of whether there is any evidence of their direct involvement in such conduct, Yedid and Allen are nevertheless liable for the misrepresentations and fraudulent acts committed by Anderson since, as their real estate broker, he was acting as their agent. The court agrees.

It is well settled that a principal may be held liable for acts of fraud committed by an agent with apparent authority even if the agent commits the fraud solely for his own personal benefit. *See Parlato v. Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 113 (1st Dept. 2002); *Hatton v. Quad Realty Corp.*, 100 AD2d 609, 610 (2nd Dept. 1984). As principals, Yedid and Allen could thus be liable for Anderson's alleged misuse of his authority so as to defraud plaintiff, even if they themselves did not actually tamper with the ventilation system or make any direct misrepresentations to the plaintiff, so long as Anderson was acting within the scope of his apparent authority. *See Chubb & Son Inc. v. Consoli*, 283 AD2d 297, 298 (1st Dept. 2001). In this respect, plaintiff points to the testimony of the building manager, Seth Jucovy, who indicated that he had numerous conversations with Allen, Yedid and Anderson in which they all agreed that the noise in the apartment from the ventilation system could make it particularly difficult to sell the apartment. A jury could reasonably find that given the fact that Yedid and Allen were genuinely concerned about the noise created by the ventilation system and its effect on their ability to sell the apartment, any misrepresentation by Anderson about the presence of the system directly above the apartment and any action taken by Anderson to tamper with the system were within the scope of his authority. Thus, there is an issue of fact as to whether Yedid and Allen, as the principals for Anderson, gave him apparent authority to engage in the conduct which forms the basis of the first cause of action for fraud. *See Parlato v. Equitable Life Assur. Socy. Of U.S.*, 299 AD2d at 113; *Chubb & Son Inc. v. Consoli*, 283 AD2d 297, 298 (1st Dept. 2001). The motions by Yedid and Allen for summary judgment must therefore be denied.

Motion Sequence Number 006 - As already noted, plaintiff's third, fourth and fifth causes of action allege that Master Apartments, its managing agent (Orsid Realty) and the building's property manager (Jucovy) intentionally, fraudulently and/or negligently failed to disclose the apartment's noise problems to plaintiff and negligently failed to prevent Yedid, Allen and Anderson from gaining access to the ventilation system in order to reduce the noise in the apartment while plaintiff was inspecting the premises prior to purchase. In moving for summary judgment, these three defendants argue that the claim must be dismissed because they did not owe plaintiff a duty at the time she was a prospective purchaser. The court agrees. A cause of action for fraud may be predicated on acts of concealment only where the defendant had a duty to disclose material information. *See Kaufman v. Cohen*, 307 AD2d 113, 119-120 (1st Dept. 2003). Prior to the time that plaintiff became an actual shareholder in the building, no confidential or fiduciary relationship existed between the plaintiff and these defendants. They were therefore not under any duty to disclose to plaintiff the fact that the ventilation system created significant noise and vibrations in the apartment. Although plaintiff claims that Jucovy assumed this duty because, as he testified at his deposition, he told Anderson that he would discuss the noise and vibration problems with any prospective purchaser in order to alleviate any concerns the individual might have, the only duty arising out of any such statement was a duty owed to Anderson and not to plaintiff, a stranger to the cooperative.

For the same reason, none of these three defendants can be held liable for allegedly failing to prevent Anderson from tampering with the ventilation system. As a stranger to the cooperative with no relationship other than that of a potential purchaser, plaintiff cannot be heard to complain that the cooperative and its agents failed to adequately secure the equipment room. The third, fourth and fifth causes of action must therefore be dismissed.

As to the seventh cause of action, which alleges that Master Apartments and Orsid Realty breached the warranty of habitability, the court agrees that this claim is not viable against Orsid, the managing agent. As codified in Real Property Law § 235-b, the warranty of habitability provides that in any lease or rental agreement, the landlord or lessor shall be deemed to have warranted that the premises are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. Since there is no lessor-lessee relationship between plaintiff and Orsid Realty, the seventh cause of action must be dismissed as against this defendant.

As to the cooperative, plaintiff claims that the noise and vibrations caused by the ventilation system rendered the apartment uninhabitable for the period from January, 2003 to approximately April, 2005. According to the plaintiff, the ventilation system operated during this time at a sound level which was so excessive that it deprived her of the reasonable peace and quiet a residence is supposed to provide. She claims that despite having ample notice of the problem, the cooperative failed to take any effective steps to abate the problem until two years after her purchase of the apartment. In support of her claim, plaintiff has submitted various engineering reports from the cooperative's engineer, Jon Kadela, which indicate that the level of noise and vibrations created by speeding up the fan in the ventilation system violated the permissible level set forth under the Administrative Code of the City of New York. Kadela also recommended that the fan be replaced. The cooperative has not offered any evidence which would dispute Kadela's findings. It argues, instead, that plaintiff has failed to show that the noise and vibrations she complains of were so excessive that they deprived her of the essential functions of the apartment to which she was entitled. The cooperative also argues that it could have abated the condition by temporarily reducing the fan speed until a permanent replacement was installed but that it made no sense to do so since plaintiff had indicated that she intended to travel and work abroad while the apartment was undergoing substantial renovations and did not plan on occupying the apartment at that time. Finally, the cooperative argues that even if the noise condition breached the warranty of habitability, plaintiff is not entitled to any of her claimed damages except for rent or maintenance abatement for the period from February, 2003 to April 2005.

Clearly, the noise and vibration problems of the apartment rendered it uninhabitable. The fact that the cooperative took more than two years to eliminate the condition further supports the plaintiff's contention that the cooperative breached the warranty of habitability. Although the plaintiff may not have been residing in the apartment during some or all of the 26-month period subsequent to the closing, she nevertheless paid the requisite monthly maintenance to the building and was entitled to an inhabitable apartment. The court is therefore persuaded that, as a matter of law, the evidence establishes that the cooperative breached the warranty of habitability. The cooperative's motion for summary judgment dismissing this claim must therefore be denied and the plaintiff's cross-motion for summary judgment on her seventh cause of action must be granted.

As to damages, the cooperative has failed to establish that, as the appropriate remedy for its breach of the warranty of habitability, the plaintiff is only entitled to rent or maintenance abatement for the period between the closing on her apartment and the date the condition was eliminated. The plaintiff contends that she would have moved into the apartment at an earlier date but for the noise and vibration problems. She thus asserts that, in addition to her payment of maintenance for an uninhabitable apartment, she incurred expenses which she would not otherwise have incurred had the apartment been in a livable condition. Under the circumstances, the amount of damages which plaintiff suffered as a result of the cooperative's breach of the warranty of habitability should be determined at trial.

Accordingly, in motion sequence number 003, the motion for summary judgment by defendants Brown Harris Stevens and David Anderson is denied. Plaintiff's cross-motion for summary judgment

against these three defendants is also denied. In motion sequence numbers 004 and 005, the respective motions for summary judgment by defendants Samuel Yedid and Gregory Allen are denied. In motion sequence number 006, the motion for summary judgment by defendants Master Apartments, Orsid Realty and Seth Jucovy is granted to the extent that the third, fourth and fifth causes of action are hereby dismissed in their entirety and the seventh cause of action is dismissed as against Orsid Realty. The motion is otherwise denied. Plaintiff's cross-motion for summary judgment is granted as against Master Apartments on the seventh cause of action but is otherwise denied.

The remaining parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on August 2, 2006 at 10:00 a.m. for a pre-trial conference.

ENTER ORDER

Dated: 7/6/06



MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
JUL 17 2006
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NEW YORK