Rivietz v Wolohojian

2006 NY Slip Op 30310(U)

April 19, 2006

Supreme Court, New York County

Docket Number:

Judge: Carol R. Edmead

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SCANNED ON 4/28/2006

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 115869/2005
RIVIETZ, ZECHARIAN
vs
WOLOHOJIAN, MICHAEL
Sequence Number : 001
DISMISS ACTION

INDEX NO. 115869/05
MOTION DATE 4/13/06
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

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

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

FILED
APR 28 2006
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

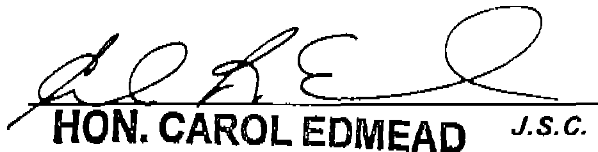
This motion is decided in accordance with the accompanying Memorandum Decision.

It is hereby

ORDERED that the motion of defendant Michael Wolohojian, for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the first, second, third and fourth causes of action of the Complaint of plaintiffs Zechariah Rivietz and Joelle Reboh, is granted in its entirety. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

Dated: 4/19/06



HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

ZECHARIAH RIVIETZ and JOELLE REBOH,

Plaintiffs,

Index No. 115869/05

DECISION/ORDER

-against-

MICHAEL WOLOHOJIAN,

Defendant.

---x

FILED
APR 28 2006
NEW YORK
COUNTY CLERK'S OFFICE

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Michael Wolohojian ("defendant") moves for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the first, second, third and fourth causes of action of the Complaint of plaintiffs Zechariah Rivietz and Joelle Reboh ("plaintiffs" or the "Rivietzes").

The Complaint

The first cause of action in the Complaint is breach of contract. On or about February 14, 2005, plaintiffs entered into a contract of sale in which plaintiffs agreed to purchase and defendant agreed to sell 125 shares of the two level cooperative apartment, Unit #1B/C located at 173 East 74th Street, New York, New York, in the cooperative building particularly described as Lot 32, Block 1409 (the "subject premises") (the "Contract"). No Seller's Disclosure Statement was provided to plaintiffs. Plaintiffs performed all conditions in accordance with the terms and conditions of the agreement. Plaintiffs closed and took possession of the subject premises on April 11, 2005. After closing, plaintiffs became aware of severe water leakage in the basement kitchen and substantial damages resulting from same.

The second cause of action in the Complaint is failure to disclose. Plaintiffs allege that

defendant knew that the lower level where the kitchen was located had leaked on occasions, that said leaks were severe, and that said leaks extensively damaged the kitchen cabinetry, wall studs and supporting beams in the kitchen. Defendant breached the Contract by failing to disclose material and important information regarding the condition of the apartment that was within his knowledge prior to the sale.

The third cause of action of the Complaint is fraudulent concealment. Plaintiffs allege that defendant knew the leak was of a long term nature, and the result of many years of neglect. The damage was covertly covered with a sheetrock patch in the kitchen cabinetry to hide the extensive water and structural damage. The severe damage to the outside drain pipe along the wall of the kitchen was also covered by an illegally constructed wooden deck, in violation of the local and State building codes. In addition, a main drain located in the center of the kitchen leading to the New York City sewer system was covered by an elevated 7" tile platform which occupied one half of the kitchen floor space. These problems have resulted in numerous floods. Defendants knowingly concealed the leaks and plaintiffs would not have entered into the contract or would have sought a reduced price if they had known of these problems.

The fourth cause of action of the Complaint is for fraudulent inducement and unjust enrichment.

Defendant's Contentions

Notwithstanding language in the Contract that no representations were being made about the conditions of the subject premises and that the subject premises were being sold "as is," plaintiffs now improperly set forth four causes of action against defendant regarding the condition of the subject premises.

Paragraph 7.1 of the Contract reads as follows:

7 Condition of Unit and Personalty; Possession
7.1 Seller makes no representation as to the physical condition or state of repair of the Unit, the Personalty, the Included Interests or the Premises. Purchaser has inspected or waived inspection of the Unit, the Personalty and the Included Interests and shall take the same "as is", as of the date of this Contract, except for reasonable wear and tear. However, at the time of Closing, the appliances shall be in working order and required smoke detector(s) shall be installed and operable.

Paragraph 34(b) of the Rider to the Contract reads as follows:

34. Unit Condition. Supplementing and modifying paragraph (7), it is agreed as follows.

(b) Purchaser acknowledges having entered into this Contract without relying upon any promises, statements, estimates, representations, warranties, conditions or other inducements, express or implied oral or written, not set forth in this Contract.

Paragraph 39 of the Rider to the Contract reads as follows:

39. Inspection. Purchaser shall have the right, on reasonable notice and at reasonable times between the date of contract and the date of closing, to inspect the premises. Additional access may be permitted as agreed by the parties orally or in writing.

On closing, all of defendant's obligations under the Contract were performed. Further, defendant is not obligated to provide a disclosure statement in a cooperative transaction. The merger clause in the Contract (¶ 14) bars plaintiffs from claiming that defendant made any representations other than the representations in the Contract. The "as is" condition of sale forecloses plaintiffs' claim for fraud or fraudulent concealment. Moreover, plaintiffs had the opportunity to inspect.

Plaintiffs' Opposition

In opposition, plaintiffs point to a February 9, 2005 comprehensive inspection report of the subject premises and the surrounding areas including the exterior courtyard. According to the

report, it is clear that the drainage defects were concealed in such a way that the inspection did not reveal any evidence of prior flooding.

Further, plaintiffs argue that discovery is necessary in that facts essential to justify opposition may exist but cannot now be stated, without discovery. The deposition of the defendant, defendant's subtenants and non parties will prove the long history of water leakage in the kitchen area which was known to the defendant at the time of closing.

Regardless of the theories of liability attributable to the defendant, the defendant is potentially liable for the damages caused to the plaintiffs. Despite a comprehensive inspection pre-closing and despite the inspection of two engineers at or around the time of the flooding, it was determined that there was no possible way to have discovered the long history of the flooding or the origin of the flood prior to the closing.

It was only after a rain fall which occurred in June 2005 that the flooding occurred in the kitchen area. It was only after the flooding that the plaintiffs discovered the long history of flooding. There was no way that the plaintiffs could have discovered this prior to the closing.

The doctrine of *Caveat Emptor* does not bar claims based on latent defects, not discoverable at the time of closing. In this case, the flooding and drainage defects discovered by the plaintiffs could not have been discoverable prior to the closing. Further, the evidence of active concealment by defendant is so severe and potentially dangerous that they impose a duty on the seller to inform the buyer.

Defendant's Reply

In reply, defendant reiterates the arguments made in the moving papers, and adds that in light of the inspection report submitted by plaintiffs in opposition to this motion, plaintiffs knew

or should have known about water drainage issues in the rear of the subject premises. Further, if as plaintiffs claim the wooden deck was illegally constructed, this should have been disclosed to them - by their comprehensive inspection.

And, plaintiffs' inspection report indicates a water drainage problem in the rear yard and or around the wooden decking, sufficiently to inform plaintiffs of a "condition."

In short, the fact that plaintiffs' inspector did not report defects or recommend further inspection is not a fact that can be interpreted against the defendant. A claim for fraud cannot be made if the party with due diligence could have discovered the defect.

Analysis

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a] [1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept

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1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare

legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

Defendant's motion to dismiss the first cause of action in the Complaint, breach of

contract, is granted. An action for breach of contract requires proof of (1) a contract, (2) performance of the contract by one party, (3) breach by the other party, and (4) damages (*WorldCom, Inc. v Francisco Sandoval*, 182 Misc 2d 1021 [Sup Ct New York County [1999] *citing Rexnord Holdings v Bidermann,* 21 F3d 522 [2d Cir. 1994]).

Courts must interpret a contract "to avoid inconsistencies and to give meaning to all of its terms" (*Barrow v Lawrence United Corp.*, 146 AD2d 15, 18), remaining "consistent[ ] with the over-all manifest purpose of the ... agreement." The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472

[1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, rearg denied 22 NY2d 827, 292 NYS2d 1031 [1968]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v. East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

In this case, the Contract is clear and unambiguous. The purchase/sale of the subject premises is "as is." There is no evidence nor is it argued that defendant made representations as to the physical condition of the subject premises. Plaintiffs can point to no section of the contract that has been breached.

Defendant's motion to dismiss the second cause of action in the Complaint, failure to disclose, is granted.

A viable fraud cause of action may be predicated upon an allegation of non-disclosure, which may be tantamount to an affirmative misrepresentation, when a party is duty-bound to disclose pertinent information. *See Melia v Riina,* 204 A.D.2d 955, 956 (3rd Dept.1994), lv. to app. dsmd. 85 N.Y.2d 857 (1995).

Typically, a Property Condition Disclosure form is required by Article 14 of the Real Property Law. This 2001 law provides for the mandatory use of a "Property Condition Disclosure Statement" in residential housing sales, and is to be given by the seller to the buyer before a contract of sale is signed. However, Real Property Law 461(5) excludes from the coverage of the statute "(a) unimproved real property upon which such dwellings are to be constructed, or (b) condominium units or cooperative apartments, or (c) property in a

homeowners' association that is not owned in fee simple by the seller." As such, defendant had no duty to provide plaintiffs with a Disclosure Form.

Further, plaintiffs cannot rely on the argument that the failure to disclose amounts to misrepresentation of a material fact or omission of a material fact which was false and known to be false. The elements of a cause of action for fraud are a misrepresentation, that is material, known to be false and made with the intent of inducing reliance, upon which the victim actually relies and, as a result of which, sustains damages (*see National Union Fire Ins. Co. v Christopher Assoc.,* 257 A.D.2d 1, 9 [1999]). Not only are plaintiffs unable to claim that the defendant made misrepresentations upon which they relied, paragraph 34(b) of the Contract expressly provides that there are no representations outside of the Contract upon which plaintiffs rely.

If, as plaintiffs argue, "[t]he leaks in the lower level were so severe that they extensively damaged the kitchen cabinetry, wall studs and supporting beams in the kitchen." (2nd cause of action in the Complaint), and that this leakage problem was historical, this damage should have been readily apparent through plaintiffs' comprehensive inspection - prepared for plaintiffs in advance of the execution of the Contract.

Defendant's motion to dismiss the third cause of action in the Complaint, fraudulent concealment, is granted. Absent a confidential or fiduciary relationship, failure to disclose cannot be the basis of a fraud claim (*see, Auchincloss v Allen,* 211 A.D.2d 417, 621 N.Y.S.2d 305; *Levine v Yokell,* 245 A.D.2d 138, 665 N.Y.S.2d 962).

If, as plaintiffs' argue, [T]he damage was covertly covered with a sheetrock patch in the

kitchen cabinetry to hide the extensive water and structural damage," again, this damage, especially a "patch," should have been readily apparent, and investigated, through plaintiffs' comprehensive inspection - again - prepared for plaintiffs in advance of the execution of the Contract.

Defendant's motion to dismiss the fourth cause of action of the Complaint, fraudulent inducement and unjust enrichment, is granted. In this case, plaintiffs do not allege any direct misrepresentations of fact by the defendant prior to their agreement to enter into the Contract (*see Linden v Moskowitz,* 294 A.D.2d 114 [1st Dept 2002]; *Abrahami v UPC Construction Co., Inc.,* 176 A.D.2d 180 [1st Dept 1991]).

Conclusion

Based upon the contractual provisions providing that all representations were merged into the Contract, that plaintiffs had purchased the subject premises "as is" and that acceptance of the deed by plaintiffs had extinguished all obligations defendant had under the Contract and Rider, plaintiffs' claim that defendant intentionally and willfully had made false statements and omitted material facts as to the condition of the property, upon which plaintiffs reasonably had relied in signing the Contract and thereafter closing on the subject premises are without both factual and legal merit.

The court finds plaintiffs' argument that there was no possible way to have discovered the long history of the flooding or the origin of the flood prior to the closing unpersuasive.

It is hereby

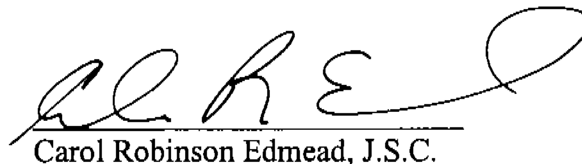
ORDERED that the motion of defendant Michael Wolohojian, for an order, pursuant to

CPLR 3211(a)(1) and (7), dismissing the first, second, third and fourth causes of action of the Complaint of plaintiffs Zechariah Rivietz and Joelle Reboh, is granted in its entirety. It is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

Dated: April 19, 2006



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