

Dennehy v Laruffa & Durcan

2007 NY Slip Op 30771(U)

March 27, 2007

Supreme Court, Suffolk County

Docket Number: 0008249/2001

Judge: Robert W. Doyle

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Upon the following papers numbered 1 to 142 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-30; 31-60; 61-85; 86-98; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 99-105; 106-110; 111-115; 116-122; Replying Affidavits and supporting papers 123-126; 127-131; 132-137; 138-142; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is.

ORDERED that defendants Anthony Scotto and Catherine Scotto's motion (#004) for summary judgment dismissing the fifth and sixth causes of action of plaintiffs' complaint is denied; and it is further

ORDERED that defendants Richard Lenard and Prudential Long Island Realty's motion (#005) for summary judgment dismissing plaintiffs' fifth, sixth and seventh causes of actions is denied; and it is further

ORDERED that defendant Albie Exterminating Co., Inc.'s motion (#006) for summary judgment dismissing the first, second, third, fourth and eight causes of action in plaintiffs' complaint is determined herein; and it is further

ORDERED that defendant Suburban Exterminating Service Inc.'s motion (#007) for summary judgment dismissing the first, second, third and eight causes of action in plaintiffs' complaint is determined herein.

The instant action arises from the sale of residential real estate located at 14 Mark Drive, Smithtown, Suffolk County, New York. Plaintiffs, Patrick Dennehy and Susan Dennehy ("plaintiffs"), purchased the one-family residence from defendants Anthony and Catherine Scotto ("the Scottos") on August 21, 2000. Despite hiring Laruffa & Duncan Consulting Engineers ("L&D") and Albie Exterminating Co., Inc. ("Albie") to conduct a home and a termite inspection, shortly after closing on the property plaintiffs discovered that the premises were infested with dry wood termites. Plaintiffs claim that defendant Scotto and his agent, Richard Lenard, both knew of the termite infestation, that they failed to disclose the condition and that they intentionally concealed the infestation by continuously assuring plaintiffs that the house was clean and free of defects. In addition to alleging fraudulent and negligent concealment against the Scottos, Richard Lenard ("Lenard") and his employer, Prudential Long Island Realty ("Prudential"), plaintiffs also allege that Lenard and Prudential are liable for fraudulent misrepresentation and aiding and abetting the seller in concealing the defective condition. Plaintiffs' complaint also contains causes of action against L&D, Albie and Suburban Exterminating Service Inc. ("Suburban")¹ for breach of contract, breach of express warranty, breach of implied warranty of fitness and violation of General Business Law §§ 349 and 350. Plaintiffs also assert a cause of action for negligent misrepresentation against L&D and Albie.

Although defendants Anthony Scotto and Catherine Scotto moved for summary judgment dismissing plaintiffs' claims, subsequent correspondence from plaintiffs' counsel dated October 17,

¹Prior to the sale of the home Suburban had a service contract with the previous homeowner wherein they agreed to continue insect extermination services even after the premises was sold.

2006, indicates that the defendants have settled and the action against them has been discontinued with prejudice. Therefore, defendants Anthony Scotto and Catherine Scotto's motion for summary judgment dismissing plaintiffs' causes of action against them is denied as moot. However, plaintiffs' action is continued against the remaining defendants who now each move for summary judgment dismissing plaintiffs' claims.

Defendants Prudential and Lenard contend that plaintiffs' fifth, sixth and seventh causes of actions alleging negligent and fraudulent concealment and fraudulent misrepresentation are without merit and should be dismissed because (1) there was no contractual privity between the parties, (2) the plaintiffs's claims are barred by the disclaimer and merger provisions in their residential sales contract, (3) there is no evidence that Lenard knew about the infestation or made any representations to the plaintiffs concerning termites, and (4) plaintiffs' claim should be estopped because plaintiffs did not rely on Lenard for information concerning termites but were made aware of the premises prior termite problems by their own inspection experts. In support of their motion defendants submit *inter alia* copies of the pleadings; Prudential's listing agreement with the sellers; the binder and sales contract agreement; L&D's building inspection report; Albie's termite inspection report and deposition testimony from the plaintiffs, defendant Anthony Scotto, and defendant Richard Lenard. Defendant Richard Lenard also submitted an affidavit wherein he asserts that he never made any representations concerning termites to the plaintiffs other than indicating that there was an existing termite contract on the home that could be transferred at the time of purchase.

Plaintiffs oppose Prudential and Lenard's motion on the grounds that defendant Lenard was aware that the property had termite problems and failed to disclose these problems to the plaintiffs despite warranting that he had a duty to disclose such defects to the plaintiffs before they purchased the property. Plaintiffs submit in opposition, *inter alia*, an affidavit from plaintiff Susan Dennehy; affidavits from Elissa and Richard Dennelly—previous prospective purchasers of the subject property—as well as a copy of the termite inspection conducted on the premises by Kane Exterminating Corp on April 3, 2000.

Although Lenard contends that as the seller's agent he had no confidential or fiduciary duty to prospective buyers, such a duty arises where as in this case the sellers engaged in active concealment of a known termite infestation (*see, Boyle v McGlynn*, 28 AD3d 994, 814 NYS2d 312 [2006]; *Jablonski v Rapalje*, 14 AD3d 484, 788 NYS2d 158 [2004]; *Gizzi v Hall*, 300 AD2d 879, 754 NYS2d 373 [2002]). NY CLS Real P § 443 also requires a seller's agents to disclose to the purchaser "all facts known to the agent materially affecting the value or desirability of property". Plaintiffs have established the existence of a triable issue of fact as to whether Lenard knew of the termite problems by submitting sworn affidavits from prior prospective buyers—the Dennellys—wherein they state that they informed Lenard of the results of the inspection conducted by Kane Exterminating Corp on April 3, 2000 which concluded that there was active visible infestation in the finished slab area and in the second floor bedrooms and hallways. Although Lenard contends that he made no affirmative representations that the property was termite free, non disclosure of a material fact is tantamount to an affirmative misrepresentation when a party is duty bound to disclose such pertinent information (*Striker v Graham Pest Control Co.*, 179 AD2d 984, 578 NYS2d 719 [1992]; *First American Bank v Fink*, 183 AD2d 437, 585 NYS2d 1012 [1992]; *Tahini Invest., Ltd. v Bobromsky*, 99 AD2d 489, 470 NYS2d 431 [1984]; *see also, Greenberg v Glickman*, 50 NYS2d 489, 1944 NY Misc LEXIS 2358; *Noved Realty Corp. v A.A.P. Co.*, 250 AD 1, 293 NYS2d 336 [1937]). Furthermore, whether the purchaser had the means available of knowing the

truth is a question of fact for jury determination (*see, Boyle v McGlynn, supra; Bethka v Jensen*, 250 AD2d 887, 672 NYS2d 494 [1998]; *Tahini Invest., Ltd. v Bobromsky, supra*). Thus, defendants' motion for summary judgment dismissing plaintiffs fifth and sixth causes of action is denied.

Defendant Albie contends that plaintiffs' first, second, third and eight causes of action alleging (1) negligence and breach of contract, (2) breach of express warranty, (3) breach of implied warranty of fitness, and (4) violation of GBL §§ 349 and 350 should be dismissed because its contract with plaintiffs neither contained an express or implied warranty, and exculpatory clauses within the contract limited Albie's representations to the presence or absence of termites to only those areas to which it had access on the day of the inspection. Albie also argues that there is no evidence that Albie or its employees were aware that the property was infested with termites at the time of the inspection and so they could not have materially misled plaintiffs about the condition of the property.

In opposition plaintiffs argue that there are issues of fact concerning whether Albie's exterminator failed to see, discover and disclose what was there to be seen on the day of the inspection. In support they submit *inter alia* affidavits from plaintiff Susan Dennehy and plaintiffs' expert, Steven Jacob, an Urban Entomologist employed by Pennsylvania State University. Plaintiffs also submitted copies of Kane Exterminating Corp's inspection report and a letter from The National Pest Management Association.

With regard to plaintiffs' claims for violation of NY GBL § 350, to the extent that they have failed to submit any advertisements containing alleged "material misstatements," plaintiffs have failed to state a cause of action and the portion of their complaint alleging violation of the act must be dismissed (*see*, NY GBL § 350; *see also, Geisman v Abraham & Straus*, 109 Misc2d 495, 439 NYS2d 1005 [1981]). Plaintiffs have also failed to submit proof of a deceptive practice that threatens the *rights of a broad section of the public* and therefore cannot maintain an action based on NY GBL § 349 (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 623 NYS2d 529 [1995]; *Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330, 704 NYS2d 177 [1999]). Likewise, plaintiffs' cause of action for negligent misrepresentation is without merit since there is no evidence that defendants possessed knowledge of the infestation and failed to pass this information along to the plaintiffs (*see, Hausler v Spectra Realty Inc.*, 118 AD2d 722, 590 NYS2d 587 [1992]; *Houlihan/Lawrence, Inc. v Duval*, 228 AD2d 560, 644 NYS2d 553 [1996]).

In addition to their breach of contract claim, the gravamen of plaintiffs' first cause of action is that the signs of the termite infestation in the property were so widespread and so obvious that, as professional termite inspectors, Albie and its employees were grossly negligent in failing to detect the vermin. Thus, while the court notes the presence of an exculpatory clause in Albie's contract shielding it from ordinary negligence, such language will not insulate it from acts of gross negligence which evinces a reckless disregard to the rights of others (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957 [1992]; *Drullinsky v Tauscher Croanacher Engrs.*, 14 Misc3d 1207A, 2006 NY Misc LEXIS 3838). In her affidavit Susan Dennehy indicates that although Albie's report suggested that there were no visible signs of termite infestation in the house, within days after moving in, she and her husband found heavy damage and infestation evidenced by among other things; large piles of frass in the basement, the middle bedroom and main levels of the house; doors so damaged that they could be penetrated by finger tips, insect wings in and outside the house, and disfigured walls and flooring. Ms.

Dennehy's testimony echos the testimony of defendant Anthony Scotto who indicated that his wife had similar experiences in the home prior to its sale to the plaintiffs. Plaintiffs' expert, Steven Jacobs, also indicated that his personal inspection of the house in 2001 and review of the inspection reports and deposition testimony leads him to conclude that had Albie performed a diligent inspection of the property in May 2000, the infestation would have been discovered. Mr. Jacob noted that there was visible damage to all four levels of the house and that Drywall or other coverings in the house would not have concealed it. Consistent with statements contained in a report solicited by Albie from the National Pest Management Association, Mr. Jacobs asserts that Dry Wood termites are found with increasing frequency within the United States and would have been found by a conscientious inspector. Mr. Jacobs also opines that because of the considerable length of time Dry Wood Termites would require to achieve the level of damage he observed, it is likely that the infestation continued for over ten years and that the evidence of damage would not have been significantly different one year earlier when Albie conducted its inspection. Kane's report also indicated that there were visible signs of infestation in the finished slab area and in the second floor bedrooms and hallways. The sworn statements and expert testimony offered by plaintiff reveals numerous readily observable signs of infestation that demonstrate the existence of an issue of fact as to whether Albie's conduct during the inspection evinced a reckless disregard of plaintiffs' right to obtain a professional termite inspection report appraising them of the crucial level of infestation in the property before they made a potentially life long investment (*see, Drullinsky v Tauscher Croanacher Engrs., supra; see also, Sommer v Federal Signal Corp., supra*).

Accordingly, the portion of defendant Albie's motion for summary judgment dismissing plaintiffs' eighth cause of action premised on violation of NY GBL §§ 349 and 350 is granted. The portion of Albie's motion for summary judgment dismissing plaintiffs second and third causes of action alleging breach of express and implied warranties is also granted. However, with respect to the portion of defendant Albie's motion seeking to dismiss plaintiffs' first cause of action alleging negligence is denied.

Suburban also moved for summary judgment dismissing plaintiffs claims and any all cross claims against it. Suburban adopts those portions of defendant Albie's motion seeking to establish the insufficiency of plaintiffs' first, second, third and eighth causes of action alleging negligence, breach of contract, and breach of express and implied warranties, and violation of GBL §§ 349 and 350. Additionally, Suburban argues that plaintiffs' causes of action should be dismissed because its contract limited its warranties against infestations to Eastern Subterranean Termites only and plaintiffs did not rely upon its representations before purchasing the property.

In opposition plaintiffs argue that Suburban's motion should be denied because its actions were deceptive and misleading and its failure to warn plaintiffs of the dry wood termites was a breach of contract.

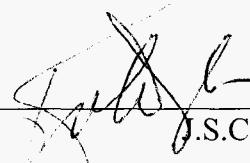
As stated above, while the exculpatory language in an inspector's contract shields it from acts of ordinary negligence, such language will not insulate it from acts of gross negligence which evinces a reckless disregard to the rights of others (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957 [1992]; *Drullinsky v Tauscher Croanacher Engrs.*, 14 Misc3d 1207A, 2006 NY Misc LEXIS 3838). Thus, while Suburban's contract warranted to protect its customers from Eastern Subterranean Termites only, the adduced evidence indicates that there are triable issues of fact precluding summary

judgment concerning whether Suburban's conduct of continuing to provide treatment for subterranean termites despite visible signs of continued infestation within the subject property evinced a reckless disregard to the rights of the plaintiffs to be appraised of the obvious presence of termites in the subject property. Plaintiffs submitted both testimonial and documentary evidence from party and nonparty witnesses ranging from the Scottos, Kane Exterminating Corp., plaintiffs' expert Steven Jacobs, as well as prior prospective purchasers, the Dennellys, which all indicated the existence of visible signs of a serious termite problem.

With regard to the portion of plaintiffs' claims alleging that Suburban violated GBL § 350, although plaintiffs have submitted a copy of an advertisement in the yellow pages, plaintiffs have failed to specify any materially misleading statements within the advertisement since it did not contain any representations about warranties or the lack thereof (*see*, NY GBL § 350). Also, with respect to plaintiffs claim alleging that Suburban violated GBL § 349, plaintiffs have also failed to submit proof of a deceptive practice that threatens the *rights of a broad section of the public* and therefore cannot maintain an action based on NY GBL § 349 (*see, Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 623 NYS2d 529 [1995]; *Gaidon v Guardian Life Ins. Co. of America*, 94 NY2d 330, 704 NYS2d 177 [1999]). Although the spread of dry wood termites are a public concern, plaintiffs' allegations at best show a private contract dispute and not conduct affecting the consuming public at large (*see, New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 [1995]; *Continental Cas. Co. v Nationwide Indem. Co.*, ___ NYS2d ___, 2005 WL 729187, 2005 NY Slip Op 02546 [NYAD 1 Dept Mar 31, 2005]).

Accordingly, Suburban's motion for summary judgment dismissing plaintiffs' eighth cause of action alleging violation of Business Law § 349 and § 350 is granted. The portion of Suburban's motion for summary seeking to dismiss plaintiffs' second and third causes of action alleging breach of express and implied warranties is also granted. However, the portion of defendant Suburban's motion seeking to dismiss plaintiffs' first cause of action alleging negligence and breach of contract is denied.

Dated: MAR 27 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION