

Uzzle v Nunzie Ct. Homeowners Assn., Inc.
2007 NY Slip Op 31421(U)
May 29, 2007
Supreme Court, Richmond County
Docket Number: 0103323/2006
Judge: Robert J. Gigante
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Supplemental Affidavit in Opposition to
Motion and Cross Motion

(dated March 15, 2007) 7

Upon the foregoing papers, the motion (No. 3852) to dismiss the complaint as against defendants United General Title Insurance Company (hereinafter “UGT”) and Newell & Talarico Title Insurance Agency (hereinafter “Newell”) is granted, as is the cross motion (No. 3938) for like relief by defendant John C. DiGiovanna.

Plaintiff brought this action to recover monetary damages suffered as a result of defendants’ alleged negligent and/or fraudulent representations regarding a certain easement of ingress and egress in plaintiff’s favor over Nunzie Court, a private roadway. It is uncontroverted that plaintiff acquired his property at 25 Nunzie Court, Staten Island, New York (hereinafter “the premises”), on or about May 30, 2006. The rear of these premises abuts Nunzie Court. Defendant John C. DiGiovanna, Esq. represented plaintiff in the transaction. UGT is the title insurance company that acted as the underwriter for the title policy covering plaintiff’s premises. Defendant Newell acted as UGT’s agent.

Plaintiff’s property is located on the north side of Nunzie Court. The homes located on the south side of the court, as well as, the court itself are privately owned by nonparty Albee Developers, Inc. (hereinafter “Albee”). On or about January 29, 2002, Albee recorded a Declaration of Covenants, Restrictions, Easements, Charges and Liens (hereinafter “the Declaration”) in the Richmond County Clerk’s Office under instrument No. 71339. The Declaration operated to create the defendant Nunzie Court Homeowners Association and vested with same the power to maintain and administer Nunzie Court. In addition, it provided the land subject to the Declaration with an easement over Nunzie Court for the purposes of ingress and

egress. Plaintiff contends that since the terms of the Declaration *do not* apply to his premises, it operates to deprive him of a right of ingress and egress over Nunzie Court, an eventuality against which the title insurance policy issued by UGT should have provided.

In his cause(s) of action against UGT and Newell, plaintiff claims that their fraudulent misrepresentations regarding ingress and egress induced him to purchase his premises. In support of their motion to dismiss (No. 3852), UGT and Newell contend that no fraudulent misrepresentations were made, as the title insurance policy specifically excepts coverage for “instrument no. 71339”, i.e., the Declaration, and any and all “defects, liens, encumbrances, adverse claims or other matters” arising therefrom. In his cause(s) of action against DiGiovanna, plaintiff contends that counsel’s malpractice and breach of contract induced him to purchase the premises. In his cross motion (No. 3938), defendant DiGiovanna maintains that the claims against him are without merit.

Motion No. 3852

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Court on such a motion must “accept the facts as alleged in the complaint as true and accord plaintiffs the benefit of every possible favorable inference” (*id.* at 88). The sole criterion on such a motion is whether “from [the] four corners [of the complaint] factual allegations are discerned which [when] taken together manifest any cause of action cognizable at law” (*Leibowitz v Bank Leumi Trust Co.*, 152 AD2d 169, 171 [2d Dept 1989] quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977][internal quotation marks omitted]). Nevertheless, “bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true” (*Meyer v*

Guinta, 262 AD2d 463, 464 [2d Dept 1999] *citing Doria v Masucci*, 230 AD2d 764 [2d Dept 1996]. Moreover, if “the moving party offers evidentiary material [on such a motion] the court is required to determine whether the proponent of the pleading *has* a cause of action, not whether she has merely stated one” (*id.* [emphasis added]).

On a motion to dismiss pursuant to CPLR 3211(a)(1) based “upon documentary evidence”, it is well settled that the evidence proffered must resolve “all factual issues as a matter of law, and conclusively dispose[] of the plaintiff’s claim” (*Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]). Otherwise, the motion will be denied (*id.*).

It is familiar law that a cause of action for fraud requires “(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” (*Ozelkan v Tyree Bros. Env'tl. Servs., Inc.*, 29 AD3d 877, 878 [2d Dept 2006] *citing Jablonski v Rapalje*, 14 AD3d 484, 487 [2d Dept 2005]). Here, the copy of the title insurance policy tendered by defendants UGT and Newell conclusively negates the existence of any misrepresentations or omissions that were made for the purpose of inducing plaintiff to close on the premises. To the contrary, the title insurance policy specifically refers to the recorded Declaration and exempts both the document and its legal effect from coverage. In addition, while CPLR 3016 (b) states that the circumstances constituting an alleged fraud must be pleaded “in detail,” plaintiff has failed to plead willfulness or unlawful intent on the part of either of these defendants (*see Williams v Upjohn Health Care Servs.*, 119 AD2d 817, 819 [2d Dept 1986]). Accordingly, the cause of action for fraud as against UGT and Newell is dismissed (*see Meyer v*

Guinta, 262 AD2d at 464).

Motion No. 3938

So much of counsel's cross motion as seeks dismissal of plaintiff's cause of action for breach of contract is granted, as any such cause of action is merely duplicative of the cause of action for legal malpractice (*see Shaya B. Pacific, LLC, v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34 [2d Dept 2006]).

Addressing so much of the cross motion as is to dismiss the cause of action for legal malpractice, it is well established that "[i]n a legal malpractice action, a plaintiff must show that [the defendant] failed to exercise the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession" and that such negligence "caused the plaintiff's actual damages" (*McCoy v Feinman*, 99 NY2d 295, 301-302; *see Cohen v Wallace & Minchenberg*, __ AD3d ___, 2007 NY Slip Op 3259, 2 [2d Dept]). Here, no such circumstance has been alleged. Among other things, plaintiff has failed to claim that the question of ingress and egress over Nunzie Court was ever an issue during the negotiations preceding his execution of the contract of sale or afterwards.

Accordingly it is,

ORDERED, that the motion and cross motion are granted, and the complaint as against defendants United General Title Insurance Company, Newell & Talarico Title Insurance Agency, Inc., and John C. DiGiovanna are severed and dismissed; and it is further,

ORDERED, that the Clerk enter Judgment accordingly.

Dated: May 29, 2007

E N T E R,

S/_____

Robert J. Gigante, J.S.C.