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

PRESENT: BERNARD J. FRIED J.S.C. PART 60

FBEM

Index Number : 603030/2005

PARIS, JOSEPH

VS

METROFLAG POLO

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

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

Dated: 6/21/07

BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 60

----------x

JOSEPH PARISI AND FRANK SCALISE,

Plaintiffs,

-against- Index No. 603030/05

METROFLAG POLO, LLC and PAUL KAVANOS,

Defendants.

----------x

APPEARANCES

Plaintiffs:

Goodman & Saperstein
600 Old Country Road -Suite 333
Garden City, NY 11530

Of Counsel: Martin Saperstein, Esq.

Defendants:

Rosenberg, Calica & Birney, LLP
100 Garden City Plaza
Garden City, NY 11530

Of Counsel: William J. Birney, Esq.

FRIED, J.

Under Motion sequence 002, defendants, Metroflag Polo, LLC (Metroflag) and Paul Kanavos, sued herein as Paul Kavanos, move to reargue my decision, entered December 4, 2006, which granted defendants' CPLR 3212 motion for summary judgment, in part, to the extent of dismissing all but plaintiffs' cause of action for negligent misrepresentation, and upon reargument, for judgment dismissing plaintiffs' complaint, in its entirety. Plaintiffs cross move to amend and reinstate their cause of action for fraudulent inducement, and to add factual allegations to their surviving negligent misrepresentation claim.

On the prior motion, defendants argued that they were entitled to summary judgment, as a matter of law, under the terms of lease and release agreements executed by defendant

Metroflag and its Nevada food court tenant, The Robinson Group (TRG) in Nevada. Both documents purported to exculpate Metroflag from liability as a result of its failure to construct the food court with a blocked sidewalk design. I found that those documents did not establish a prima facie right to judgment with respect to the causes of action asserted by plaintiffs in this action. Defendants also introduced a copy of a decision of the Nevada District Court, in a parallel action (*The Robinson Group, LLC, et al v Metroflag Polo LLC, et al,* Dist Ct, Clark County, Case No. A496793)(the Nevada action), which I found persuasive in dismissing plaintiffs' cause of action for fraud. I also dismissed plaintiffs' causes of action for breach of fiduciary duty and common law negligence, finding that plaintiffs failed to plead or prove the existence of either a fiduciary or contractual duty running from these defendants to plaintiffs.

On the current motion to reargue, defendants assert that, in determining the prior motion, I overlooked and misapprehended the facts and the law (*see* CPLR Rule 2221 [d] [2]; *see DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715 [1st Dept 2005]; *Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Andrea v E.I. Du Pont De Nemours & Co.*, 289 AD2d 1039 [4th Dept 2001]; *Frisenda v X Large Enterprises, Inc.*, 280 AD2d 514 [2d Dept 2001]), in allowing plaintiffs' cause of action for negligent misrepresentation to go forward under the "approaching privity" test, as interpreted subsequent to *Kimmell v Schaefer* (89 NY2d 257 [1996]) and *Prudential Ins. Co. of America v Dewey, Ballantine, Bushby, Palmer & Wood* (80 NY2d 377, 382 [1992]). I disagree, and deny the motion.

This is not a situations where, notwithstanding the fact that the recipient and the intended use of the information are known, the inaccurate or false information is provided in the ordinary course of filling out applications, or providing estimates, which result in the parties, or their principals, entering into a standard commercial contract (*see e.g. Wright v Selle*, 27 AD3d 1065 [4th Dept 2006] [construction cost estimate]; *Point o'Woods Assn. v Those Underwriters at Lloyd's*, 288 AD2d 78 [1st Dept 2001][application for insurance], *lv denied* 98 NY2d 611 [2002]; *Banque Nationale De Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359 [1st Dept 1995][mortgage application]). The cases cited by defendants in support of the motion, are consistent with these cases, and are inapposite. For instance, in *Murphy v Kuhn* (90 NY2d 266, *supra*), the Court of Appeals, finding that the insured never asked the agent to increase liability limits, never inquired about, and never discussed the issue, concluded that there was no justifiable reliance on the defendant insurance agent's expertise. In *JP Morgan Chase Bank v Winnick,* (350 F Supp 2d 393, 401 [SD NY 2004]), the U.S. District Court, citing the principle that plaintiffs cannot "transmogrify the contract claim into one for tort" *(see Hargrave v Oki Nursery, Inc.*, 636 F2d 897, 899 [2d Cir 1980]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987]), determined that the finding of a "special relationship" was foreclosed by the terms of the contract governing the relationship of the parties, which in that case, required the defendants to provide accurate information. The same rationale cannot be applied in this case, since there is no contractual relationship between the parties, and the purpose of the meeting was to obtain information and assurances about the exact matter alleged to have been misrepresented (*see e.g. Kimmell v Schaefer*, 89 NY2d at 264-65; *Ossining Union Free School Dist. v Anderson LaRocca*

Anderson, 73 NY2d 417, *supra*; *Ryan v Preferred Mutual Ins. Co.*, 38 AD3d 1148 [3rd Dept 2007]; *see also AUSA Life Ins. Co. v Ernst and Young*, 206 F3d 202 [2d Cir 2000]).

As I stated before, plaintiffs' inconsistent allegations regarding when the alleged representations were made, raise issues of credibility that cannot be determined within the context of a motion for summary judgment (*see S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Baseball Office of Commr. v Marsh & McLennan, Inc.*, 295 AD2d 73 [1st Dept 2002]). Defendants do not assert that the new evidence submitted in opposition to plaintiffs' cross motion, which appears to be a preliminary or committee level approval of, among other things, Metroflag's plan to interfere with the pedestrian right of way, was not available on the original motion. Such evidence, in any event, does not prove that plaintiffs could independently have verified whether or not the design plans were approved by the necessary authorities by searching the Nevada public records (*see e.g. JP Morgan Chase Bank v Winnick*, 350 F Supp 2d at 409-410). As stated in the prior decision, therefore, the question of plaintiffs' justifiable reliance, is an issue of fact (*see Murphy v Kuhn*, 90 NY2d at 271; *Kimmell v Schaefer*, 89 NY2d at 264).

On the prior motion, I dismissed plaintiffs' cause of action for fraud, on the ground that plaintiffs' allegation, that defendants failed to construct the mall as represented, related to anticipated future conduct and, thus, was not actionable as fraud. I also ruled that plaintiffs could not change their theory of pleading for the first time on reply, in the absence of a motion to replead (*see Lincoln Place LLC v RVP Consulting, Inc.*, 16 AD3d 123 [1st Dept 2005]; *Sidamonidze v Kay*, 304 AD2d 415, 416 [1st Dept 2003]; *Casa Redimix Concrete Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 277 AD2d 95 [1st Dept

2000]). On the cross motion, plaintiffs seek to reinstate and amend their fraud claim to allege that on the day of their meeting, defendant Kanavos falsely represented that both the City of Las Vegas and Clark County, Nevada, had approved the blocked sidewalk design plan, when in fact, defendants never submitted the plan for approval.

CPLR 3025[b] provides that leave to amend a pleading shall be freely granted. In determining whether to grant leave, however, the underlying merit of the proposed cause of action must be examined (*Morgan v Prospect Park Assoc. Holdings, LP*, 251 AD2d 306 [2d Dept 1998]; *Wieder v Skala*, 168 AD2d 355 [1st Dept 1990]). Thus, although the standard of proof is less exacting than on a motion for summary judgment, the movant must make an evidentiary showing of merit (*see Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404 [1st Dept 2006]; *Helene-Harrison Corp. v Moneyline Networks*, Inc., 6 AD3d 151 [1st Dept 2004]; *Mohan v Hollander*, 303 AD2d 473 [2d Dept 2003]).

In support of their motion to amend, plaintiffs annex excerpts from the deposition of defendant Kanavos, taken in the Nevada action on April 10, 2006. At page 80 of the transcript, Kanavos testifies that discussions regarding the blocking of the sidewalks to divert pedestrian traffic into the marketplace arose after TRG entered into the leases, and that the plan was to divert traffic into the market by blocking the pedestrian right of way with kiosks and push carts. Kanavos testified that at some time in October 2004, Metroflag had an agreement with the County to implement the blocked sidewalk design, that jurisdiction was transferred from the County to the State, and that the State District Attorney determined that Metroflag could not block the pedestrian right-of-way.

Fraud requires a "representation of a material existing fact, falsity, scienter, deception and injury."(*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). Although the testimony annexed is sufficient to demonstrate that Kanavos, as a principal of Metroflag, was in a position to have first hand knowledge about what was going on with the project, neither Kanavos' testimony, nor the statements of third parties, printed in a newspaper article, demonstrate that Kanavos uttered a knowingly false statement to plaintiffs, or that plans to implement a blocked sidewalk design were never filed with the appropriate authorities. Where, as in this case, the movants' submissions do not support the proposed cause of action, leave to amend should be denied (*see e.g. Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d at 405; *Friedman v Anderson*, 23 AD3d at 166; *Mohan v Hollander*, 303 AD2d at 474; *Heckler Elec. Co., Inc. v Matrix Exhibits-New York*, 278 AD2d 279 [2d Dept 2000]).

Accordingly, for the reasons stated, it is;

ORDERED, that defendants' motion for reargument, is denied; and it is further

ORDERED, that plaintiffs' cross motion to amend the complaint, is denied.

DATED: 6/21/07

ENTER:

BERNARD J. FRIED
J.S.C.

Fraud requires a "representation of a material existing fact, falsity, scienter, deception and injury."(*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005]). Although the testimony annexed is sufficient to demonstrate that Kanavos, as a principal of Metroflag, was in a position to have first hand knowledge about what was going on with the project, neither Kanavos' testimony, nor the statements of third parties, printed in a newspaper article, demonstrate that Kanavos uttered a knowingly false statement to plaintiffs, or that plans to implement a blocked sidewalk design were never filed with the appropriate authorities. Where, as in this case, the movants' submissions do not support the proposed cause of action, leave to amend should be denied (*see e.g. Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d at 405; *Friedman v Anderson*, 23 AD3d at 166; *Mohan v Hollander*, 303 AD2d at 474; *Heckler Elec. Co., Inc. v Matrix Exhibits-New York*, 278 AD2d 279 [2d Dept 2000]).

Accordingly, for the reasons stated, it is;

ORDERED, that defendants' motion for reargument, is denied; and it is further

ORDERED, that plaintiffs' cross motion to amend the complaint, is denied.

DATED: 6/21/07

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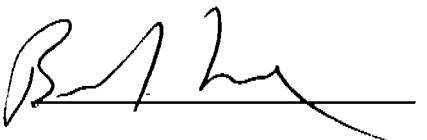

BERNARD J. FRIED
J.S.C.