Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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JOSE CORREA AND JUAN CORREA,

Plaintiff,

Index No: 14152/06
Motion Date: 7/23/07
Motion Cal. No: 01, 02, 03
Motion Seq. No: 5,6,7

-against-

MATTHEW J. DITRAPANI, McCABE, WEISBERG & CONWAY, P.C., JOSE POLANCO d/b/a CRUSE REALTY, LUIS LIMA, BASIK FUNDING INC. and AMERICA'S WHOLESALE LENDER,

Defendants.

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The following papers numbered 1 to 13 read on this motion for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's complaint as against Basik Funding, Inc., on the grounds that (a) the complaint fails to state a valid cause of action for negligence and misrepresentation; and (b) that a complete defense is founded upon the documentary evidence; and in the alternative, (2) pursuant to CPLR 3025(b) allowing the defendant, Basik Funding, Inc., to file an Amended Answer (Motion No. 1); the following papers numbered 1 to 9 read on this motion for summary judgment pursuant to CPLR 3212, in favor of defendant Jose Polanco d/b/a Cruse Realty (Motion No. 2); and the following papers numbered 1 to 9 read on this motion for summary judgment pursuant to CPLR 3212, in favor of defendant Luis Lema, s/h/a Luis Lima (Motion No. 3) together with costs and disbursements.

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Motion No. 3

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Upon the foregoing papers, it is ordered that the motions are disposed of as follows:

This is a negligence and legal malpractice action for damages allegedly sustained by plaintiffs Jose Correa and Juan Correa ("plaintiffs") arising from a real estate transaction involving their purchase of property located at 104-41 Ditmars Blvd., East Elmhurst, New York. Plaintiffs commenced this action against their attorneys, defendants Matthew J. Ditrapani, and McCabe, Weisberg & Conway, P.C., who represented plaintiffs at the closing of the property; Jose Polanco d/b/a Cruse Realty and Luis Lima, real estate brokers; Basik Funding Inc., a mortgage broker; and America's Wholesale Lender, the funding source for the purchase. By order dated January 4, 2007, this Court dismissed the action against defendant America's Wholesale Lender, and denied plaintiffs' motion to add as a defendant Shane D. Scott, Esq., of the Law Office of Shane D. Scott, P.C., who negotiated the contract of sale in which plaintiffs entered on October 5, 2005, for the purchase of the subject property. By order dated January 8, 2007, the legal malpractice action against defendants Matthew J. Ditrapani, and Mccabe, Weisberg & Conway, P.C., was dismissed. The remaining defendants each now move for dismissal of the complaint.

Relevant Facts

In September 2005, plaintiffs, who are brothers, sought to purchase property located at 104-41 Ditmars Boulevard, East Elmhurst, New York, which they believed to consist of a house and an adjoining vacant lot, which was shown to them by defendant Louis Lema, s/h/a Luis Lima ("Lema"), a purported employee or associate of defendant Juan Polanco ("Polanco") d/b/a Cruse Realty ("Cruse"), a real estate brokerage. Lema allegedly provided plaintiffs with print-outs from the New York City Web Site entitle "OASIS," an apparent acronym for Open Accessible Space Information System for New York City, which in two separate documents referenced Lots 46 and 48, and represented that the property for purchase consisted of both lots. On September 22, 2005, plaintiffs entered into a Sales Agreement, prepared by Cruse, to purchase the property, identified solely by address, from Jose and Felicia Reyes for $675,000.00. Lema allegedly recommended that plaintiffs utilize the services of R&R Mortgage ("R&R"), a mortgage brokerage firm, to assist in securing financing for the purchase; Mikhail Musheyev provided to R&R a September 27, 2005 appraisal of the property, that valued a residence situated on 7,280 square feet on a lot with the dimensions "70 X 104 (SUBJECT TO SURVEY)." On October 5, 2005, plaintiffs executed a Contract for Sale that set forth their intent to purchase "104-41 Ditmars Blvd., East Elmhurst, NY;" the areas in that contract for block and lot numbers were left blank. A November 5, 2005 survey conducted by Gerald T. Buckley of Citi Abstract, Inc., and certified to plaintiffs, however, referenced "101-41 Ditmars Blvd., East Elmhurst NY," Block 1641, Lot 46.

Several months later, on January 6, 2006, plaintiffs went to the offices of defendant Basik Funding ("Basik"), a mortgage broker, where they met with Byron Alarcon, Basik's Account Executive, and Lema, the real estate broker, to discuss engaging Basik to secure financing for the purchase of the property because of R&R's inability to obtain the necessary funds. In response to a telephone call from Basik on that same day, CP Appraisal gave an informal appraised value of $625,000.00 for the property, a figure $50,000.00 lower than the contracted for purchase price. On January 7, 2006, plaintiffs and Lema advised Basik that the sellers agree to reduce the sale price to $625,000.00, plaintiff Jose Correa executed an Uniform Residential Loan Application, and, upon his indication that he was seeking a new attorney, Alarcon referred him to attorney DiTrapani. Several days thereafter, plaintiff, his new attorney, DiTrapani, and Alarcon met to review the contract of sale; the attorney ordered a title report and survey, and directed plaintiffs to have the property inspected for pests. The official appraisal by CP Appraisals, which appraised the property at $620,000.00, referenced Block 16421, Lot 46, as did the title report prepared by Vanguard Title Agency. Basik secured funding for the purchase from America's Wholesale Lender, the closing on the property was held March 16, 2006, the deed to the property passed to plaintiffs, and the closing papers thereafter were forwarded to plaintiffs on May 3, 2006. The property conveyed was identified as 101-41 Ditmars Blvd., East Elmhurst NY, Block 16421, Lot 46. Plaintiffs, apparently under the opinion that the property that they purchased was a large, single parcel of property consisting of a dwelling and vacant land located at 104-41 Ditmars Blvd, described as Lots 46 and 48, commenced this action for negligence and fraudulent misrepresentation thereafter, alleging that they first learned in May 2006 that the property purchased by them did not include the vacant lot, which allegedly was not owned by the sellers but owned by a relative of Lema.

The complaint set forth four causes of action. The first, asserted against defendant DiTrapani and his law firm, and the fourth, asserted against defendant America's Wholesale Lenders, were previously dismissed. At issue on these motions are the second cause of action against Polanco and Lema, alleging false and fraudulent representations; and the third cause of action asserted against Basik, alleging that Basik had a duty to plaintiffs as their mortgage broker, and that it negligently failed to apprise plaintiffs that their purchase did not include Lot 48.

Motions

In Motion No. 1, Basik, a mortgage broker, moves, pursuant to CPLR §3211(a)(1) and (a)(7), to dismiss the complaint on the grounds that it fails to state a valid cause of action for negligence and misrepresentation, and that a complete defense is founded upon documentary evidence; or, in the alternative, an order granting it leave to file an amended answer. Basik, as mortgage broker, procured, on behalf of plaintiffs, financing for the purchase of the property from America's Wholesale Lender.[1] Plaintiffs allege that Basik "knew or should have known that the

[1]Although denominated as a pre-answer motion to dismiss pursuant to CPLR §3211(a)(1) and (a)(7), this Court will treat the motion as one for summary judgment, pursuant to CPLR 3211(e), as the parties have "laid bare" there proof by submitting affidavits and other documentary evidence. See Kavoukian v. Kaletta, 294 A.D.2d 646, 742 N.Y.S.2d 157 [2002]

property which was being conveyed to plaintiffs was not as depicted in the appraisal, was not the property which plaintiffs believed they were purchasing, only included the property known as Lot 46 and did not include the property known as Lot 48."

In Motion No. 2, Polanco moves for summary judgment, pursuant to CPLR §3212, dismissing the complaint upon the grounds that it fails to state a cause of action against him and Polanco has a complete defense founded upon documentary evidence. Polanco, alleging that he is a licensed real estate broker and office manager employed by Renilda Pichardo d/b/a Cruse Realty, contends that plaintiffs' failed to attribute any alleged misrepresentation directly to him or to establish any act or omission by him that purportedly induced plaintiffs to purchase the property at issue. Alleging that he has never done business as Cruse Realty, Polanco argues that plaintiffs are seeking to impute to him alleged acts of Lema, described by plaintiffs as "a broker/salesman associated with POLANCO." Polanco disputes plaintiffs' claim that he falsely and fraudulently represented that the property for purchase consisted of both Lots 46 and Lot 48, and argues that because plaintiffs' only alleged prior communication with him was his having provided them with two OASIS WEBSITE computer print-outs that clearly depicted two separate and distinct tax lots, Lot 46 and Lot 48, the action must be dismissed against him as a matter of law.

In Motion No. 3, Lema, a licensed real estate salesperson in the employ of Cruse Realty, also moves for summary judgment, pursuant to CPLR §3212, dismissing the complaint upon the grounds that the complaint fails to state a cause of action against him and that Lema has a complete defense based upon documentary evidence. Lema alleges that on September 18, 2005, he was enlisted by the Reyes, the sellers, to act as their agent in showing the property located at 104-41 Ditmars Blvd., East Elmhurst, New York, and, soon thereafter introduced plaintiffs to the property owners who showed the property to plaintiffs. He further alleges that at the time he showed the property for sale, Lot 46, to plaintiffs, Lot 48, the "alleged" vacant lot, had a house on it that had been built in 2004 which had not been shown of the OASIS print-out. He also alleges that the "only 'vacant' land to the west of Lot 46, the purported location of the "adjoining property," is the large Lot 1, owned by LaSalle Hotel, which operates the Marriott Hotel on the premises." Plaintiffs allege that Lema, knowing that the property consisted solely of only Lot 46, falsely and fraudulently represented the subject property to consist of two lots, Lot 46 and Lot 48, that they justifiably relied upon such representations and sustained damages because of that reliance.

Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Lui v. Park Ridge at Terryville Ass'n, Inc, 196 A.D.2d 579 (2d Dept.1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957); Conde v. City of New York, 24 A.D.3d 595 (2d Dept. 2005); .D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1st Dept. 1985). Generally, the proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York

Univ. Med. Center, 64 N.Y.2d 851, 853 (1983); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." Rotuba Extruders v. Ceppos, supra, 46 N.Y.2d at 231; Coughlin v. Bartnick, 293 A.D.2d 509 (2d Dept. 2002). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

1. Motions to Dismiss for Failure to State a Cause of Action

a. Negligence Cause of Action asserted against Basik

To recover damages for negligent misrepresentation or fraud, the plaintiffs must demonstrate, inter alia, that they were justified in relying on the information supplied, and as a consequence, suffered damages. Goldman v. Strough Real Estate, Inc., 2 A.D.3d 677 (2nd Dept. 2003). Moreover, a "claim for negligent misrepresentation can only stand in the presence of a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another." WIT Holding Corp. v. Klein, 282 A.D.2d 527 (2nd Dept. 2001)[claim alleging negligent misrepresentation must also be based on some special relationship which implies a close degree of trust between the plaintiff and the defendant]; Atkins Nutritionals, Inc. v. Ernst & Young, 301 A.D.2d 547, 549(2nd Dept. 2003)["The lack of a special relationship. . .precludes the second cause of action . . .to recover damages for negligent misrepresentation"]. See, also, LLP.United Safety of America, Inc v. Consolidated Edison Co of New York, Inc, .D.2d 283, 286 (1st Dept 1995), citing, Delcor Labs v. Cosmair, Inc, 169 A.D.2d 639 (1st Dept 1991). Such a special relationship, also referred to as a fiduciary relationship, "'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation [(EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 19, quoting Restatement [Second] of Torts § 874, Comment a).'" Spencer v. Green, __ A.D.3d__, __ N.Y.S.2d__, 2007 WL 2127242 (2nd Dept. 2007)]. In the absence of any duty owed by the defendants to the plaintiffs, a cause of action for negligence and/or negligent misrepresentation properly may be dismissed. Chambers v. Executive Mortg. Corp., 229 A.D.2d 416 (2nd Dept. 1996); Gardianos v. Calpine Corp., 16 A.D.3d 456 (2nd Dept. 2005)["The Supreme Court properly granted that branch of the defendants' motion which was to dismiss the cause of action to recover damages for negligent misrepresentation where there was no evidence of a special relationship between the parties."].

Here, plaintiffs claim that Basik breached its duty to disclose precisely what property they were purchasing. No such duty, however, was established that would obligate Basik to disclose the disputed information; Basik's only duty to plaintiffs was to seek to find a funding source for the property. In the absence of a special duty of care on which justifiable reliance could have been placed, no cause of action is stated when negligent misrepresentation claim, as asserted here, is based upon an inaccurate property appraisal. See, Cendant Mortg. Corp. v. Packes. 37 A.D.3d 515 (2nd Dept. 2007). Significantly, plaintiffs entered into the contract to purchase the property at issue after an appraisal had been conducted on behalf of the first broker, R&R, and several months prior to their first interaction with Basik. Clearly, plaintiffs did not rely on any acts of Basik, negligent or

otherwise, as a basis for their decision to purchase the property. Plaintiffs have wholly failed to meet their burden of demonstrating the existence of material issues of fact on the question of the alleged negligent misrepresentation by Basik, who neither had a duty nor special relationship with plaintiffs, by producing evidentiary proof in admissible form in support of their position. See, Zuckerman v. City of New York, supra. Instead, they assert in conclusory fashion, that Basik failed to "perform its duties properly so as to ensure that plaintiffs received that which they had thought they had agreed to purchase and which they were told, both orally and by written information provided to them by the real estate brokers, Lima [sic] and Polanco, that the property they were purchasing consisted of a lot improved by a house and an adjoining vacant lot." This clearly is insufficient to raise an issue of material fact with respect to Basik, as "[a] buyer has the duty to satisfy himself as to the quality of his bargain (citation omitted)." Glazer v. LoPreste, 278 A.D.2d 198, 198-199 (2nd Dept. 2000); London v. Courduff, 141 A.D.2d 803 (2nd Dept. 1988), appeal dismissed, 73 N.Y.2d 809 (1988). Accordingly, Basik's motion to dismiss is granted, and the complaint hereby is dismissed on the ground that it fails to state a cause of action sounding in negligent misrepresentation against Basik.

b. Fraud and Misrepresentation cause of action asserted against Polanco and Lema

Plaintiffs' causes of action against defendants Polanco and Lema also must be dismissed for failure to state a cause of action. It is well-recognized that a "claim of fraud will not lie if, inter alia, the misrepresentation allegedly relied upon was not a matter within the peculiar knowledge of the party against whom the fraud is asserted, and could have been discovered by the party allegedly defrauded through the exercise of due diligence (see, Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 184 N.Y.S.2d 599, 157 N.E.2d 597; Superior Realty Corp. v. Cardiff Realty, 126 A.D.2d 633, 511 N.Y.S.2d 70; Most v. Monti, 91 A.D.2d 606, 456 N.Y.S.2d 427)." Cohen v. Cerier, 243 A.D.2d 670 (2nd Dept. 1997). See, Lama Holding Company v. Smith Barney, Inc., 88 N.Y.2d 413 (1996); New York University v. Continental Ins. Co., 87 N.Y.2d 308, 318 (1995). And, "[w]here the claim is based upon allegedly material omissions, the general rule is that no duty to disclose exists in the absence of a confidential, fiduciary relationship or statutory duty between two parties to a contract See, Chiarella v. United States, 445 U.S. 222, 228 (1980); George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc., 114 A.D.2d 930, 931 (2nd Dept. 1985), app den, 68 N.Y.2d 603 (1986]).

Here, no such duty to disclose is presented. "With respect to a contract for the sale of real property, unless the facts allegedly misrepresented involved matters peculiarly within one party's knowledge, the other party must make use of the means available to learn, by the exercise of ordinary intelligence, the truth of such matters or he or she will not be heard to complain that he or she was induced to enter into a transaction by such misrepresentations (see Schumaker v. Mather, 133 N.Y. 590, 596, 30 N.E. 755; Fabozzi v. Coppa, 5 A.D.3d 722, 724, 774 N.Y.S.2d 555; Fiorilla v. County of Putnam, 1 A.D.3d 475, 476, 767 N.Y.S.2d 281)." Boothe v. Alpha Development Corp., 14 A.D.3d 702 (2nd Dept. 2005). As was stated by the Court of Appeals in Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 323 (1959):

> The general rule was enunciated by this court over a half a century ago in Schumaker v. Mather, 133 N.Y. 590, 596, 30 N.E. 755, 757, that 'if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations. (Baily v. Merrell, Bulstrode's Rep.Part III, p. 94; Slaughter's Adm'r v. Gerson, 13 Wall. (379) 383, 20 L.Ed. 627; Chrysler v. Canaday, 90 N.Y. 272.)'.Very recently this rule was approved as settled law by this court in the case of Sylvester v. Bernstein, 283 App.Div. 333, 127 N.Y.S.2d 746, affirmed 307 N.Y. 778, 121 N.E.2d 616."

See, also, M & T Mortg. Corp. v. Alleyne, 7 A.D.3d 761 (2nd Dept. 2004)["Alleyne cannot complain that she was defrauded by M & T, since the matters allegedly represented, namely, the value and the condition of the property, were not within the peculiar knowledge of M & T, and Alleyne could have discovered the true nature of the representations through the exercise of her ordinary intelligence or reasonable diligence"].

Indeed, the Second Department, in Eisenthal v. Wittlock, 198 A.D.2d 395(2nd Dept.1993), leave to appeal dismissed, 84 N.Y.2d 849 (1994), addressed the precise issue raised in the instant case, stating:

> Moreover, the facts allegedly misrepresented by the defendants, that is, the boundaries of the premises, are not within the peculiar knowledge of the defendants and could have been ascertained by the plaintiffs by the means available to them through the exercise of ordinary intelligence. In light of these facts, the plaintiffs cannot, as a matter of law, establish that they rightfully relied upon any alleged misrepresentations by the defendants as to the size of the property to be conveyed

See, Fiorilla v. County of Putnam, 1 A.D.3d 475 (2nd Dept. 2003)["the size of the subject parcel of property was not a matter peculiarly within the knowledge of the defendant, and could have been ascertained by the plaintiff by means available to him through the exercise of ordinary intelligence, including the examination of certain public records, or by physically inspecting the property before the closing."]; Huron Street Realty Corp. v. Lorenzo, 19 A.D.3d 450 (2nd Dept. 2005)["the fact misrepresented by the defendant was not peculiarly within the knowledge of the defendant and could have been ascertained by the plaintiff by the means available to it through the exercise of ordinary intelligence"]; Parkway Woods, Inc. v. Petco Enterprises, Inc., 201 A.D.2d 713 (2d Dept. 1994)["since the plaintiff could have promptly searched the public records to learn that the defendant did not in fact own the subject property, his delay in doing so renders his reliance on the defendants' alleged misrepresentation unjustified"]. See, also, Orlando v. Kukielka, 40 A.D.3d 829 (2d Dept.2007). Moreover, a "party cannot claim reliance on a misrepresentation when he or she could

have discovered the truth with due diligence (see East 15360 Corp. v. Provident Loan Socy. of N.Y., 177 A.D.2d 280, 575 N.Y.S.2d 856)." KNK Enterprises, Inc. v. Harriman Enterprises, Inc., 33 A.D.3d 872 (2nd Dept. 2006); Pais-Built Homes, Inc. v. Beckett, 297 A.D.2d 726 (2nd Dept. 2002) ["defendants failed to show that they could not ascertain the truth of the representation through the exercise of due diligence"]; Bando v. Achenbaum, 234 A.D.2d 242 (2nd Dept. 1996), leave to appeal denied, 90 N.Y.2d 920 (1997)["'[A] party will not be heard to complain that he has been defrauded when it is his own evident lack of due care which is responsible for his predicament' (Rodas v. Manitaras, 159 A.D.2d 341, 343, 552 N.Y.S.2d 618)"].

Here, plaintiffs clearly could have ascertained the boundaries and size of the parcel they were purchasing. Their failure to exercise the due diligence necessary for them to ascertain the true nature of their purchase cannot be the predicate for the assertion that defendants Polanco and Lema made false and fraudulent statements upon which they reasonably relied to their detriment. The same steps that they took to ascertain that they had purchased only Lot 46 could have been taken prior to their execution of the contract of sale in which they acknowledged that they were "entering into this contract solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition. . . or any other matter related to the Premises or the other property included in the sale." Accordingly, as plaintiffs have not met their burden of showing the existence of material issues of fact by producing evidentiary proof in admissible form, in support of their position (see, Zuckerman v. City of New York, supra.), the motions to dismiss the complaint based upon a failure to state a cause of action also is granted with respect to defendants Polanco and Lema.

2. Motions to Dismiss Based upon Documentary Evidence

All defendants move to dismiss based upon documentary evidence, alleging that all documents exchanged, including appraisals, survey, title report, OASIS computer print-outs, establish that the parcel to be purchased consisted of a single parcel, Block 1641, Lot 46 . It is well established that to support dismissal of a complaint founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (citations omitted)." Fleming v. Kamden Properties, LLC, 41 A.D.3d 781 (2nd Dept. 2007); Martin v. New York Hosp. Medical Center of Queens, 34 A.D.3d 650(2nd Dept. 2006); Del Pozo v. Impressive Homes, Inc., 29 A.D.3d 621 (2nd Dept. 2006). Such a motion "may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (citations omitted)." Ruby Falls, Inc. v. Ruby Falls Partners, LLC, 39 A.D.3d 619 (2nd Dept. 2007). See, Kupersmith v. Winged Foot Golf Club, Inc., 38 A.D.3d 847 (2nd Dept. 2007); Shaya B. Pacific, LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34 (2d Dept. 2006). Here, the documentary evidence flatly contradicts plaintiffs' claim that they were deceived into believing that they were purchasing a single parcel comprised of Lot 46 and Lot 48. Again, plaintiffs have not met their burden of showing the existence of material issues of fact by producing evidentiary proof in admissible form sufficient to defeat defendants' motion. See, Zuckerman v. City of New York, supra. Accordingly, those branches of the motion for summary judgment dismissing the complaint based upon a defense of documentary evidence is granted.

Conclusion

Based upon the foregoing, it is hereby

ORDERED, that the motion by defendant Basik Funding, Inc. [Motion No. 1] for an order dismissing the complaint as against it on the grounds that (a) the complaint fails to state a valid cause of action for negligence and misrepresentation; and (b) that a complete defense is founded upon the documentary evidence is granted; and it is further

ORDERED, that the motion by defendant Jose Polanco d/b/a Cruse Realty (Motion No. 2) for summary judgment in his favor, and dismissing the complaint as against it on the grounds that (a) the complaint fails to state a valid cause of action for negligence and misrepresentation; and (b) that a complete defense is founded upon the documentary evidence is granted; and it is further

ORDERED, that the motion by defendant Luis Lima (Motion No. 3) for summary judgment in his favor, and dismissing the complaint as against it on the grounds that (a) the complaint fails to state a valid cause of action for negligence and misrepresentation; and (b) that a complete defense is founded upon the documentary evidence is granted; and it is further

ORDERED, that the complaint hereby is dismissed in its entirety.

Dated: August 21, 2007

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J.S.C.