

Lieberman v The Greens at Half Hollow LLC

2007 NY Slip Op 32951(U)

September 12, 2007

Supreme Court, Suffolk County

Docket Number: 0015050/2004

Judge: Peter Fox Cohalan

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 MOT. SEQ. #001

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x	CALENDAR DATE: March 28, 2007
EDWARD LIEBERMAN and CAROL LIEBERMAN,	MNEMONIC: Mot D.
Plaintiffs,	<u>PLTF'S/PET'S ATTORNEY:</u>
-against-	Law Offices of Peter B. Gierer
THE GREENS AT HALF HOLLOW LLC,	400 Town Line Road
Defendant.	Hauppauge, NY 11788
-----x	<u>DEFT'S/RESP ATTORNEY:</u>
	Daniel F. DeVita, Esq.
	377 Oak St.
	Garden City, NY 11530

Upon the following papers numbered 1 to 18 read on this motion for summary judgment _____;
 Notice of Motion/Order to Show Cause and supporting papers 1-10 _____; Notice of Cross-Motion and
 supporting papers _____; Answering Affidavits and supporting papers 11-15 _____; Replying
 Affidavits and supporting papers 16-18 _____; Other _____; and after hearing counsel in support of and
 opposed to the motion it is,

ORDERED that this motion by the defendant, The Greens at Half Hollow LLC.,
 for summary judgment and dismissal of the plaintiff's breach of contract claims pursuant to
 CPLR §3211 and §3212 is hereby denied as to causes of action #1, #2 and #3 as there are
 clear and readily identifiable factual issues which warrant denial of summary disposition to the
 defendant. The causes of action listed as #4 and #5 with reference to the claims involving the
 satellite dish do not involve this defendant but the homeowner's association (hereinafter HOA)
 which was not named as a defendant in this action, and therefore, those causes of action are
 dismissed.

Plaintiffs instituted this breach of contract action against the defendant, The
 Greens at Half Hollow LLC., (hereinafter The Greens), as to the plaintiffs' purchase of a
 condominium. The Greens is a condominium development for seniors over 55 years of age
 consisting of 1200 units located at Half Hollow Hill Road and Old South Path in Dix Hills,
 Suffolk County on Long Island, New York. According to the plaintiffs, they signed a purchase
 agreement with The Greens on December 4, 2002 to buy a condominium designated as No.
 #132, Model Valencia Type on a plot plan under "Golf Villas" for the agreed purchase price of
 \$575,000.00 and an additional \$75,000.00 premium lot charge for a unit overlooking the golf
 course. The plaintiffs claim the representatives of The Greens and a diorama provided by the
 defendant placed the location of their "Golf Villa" as overlooking the golf course. The plaintiffs
 claim they were prohibited from visiting the construction site until the walk through on
 December 22, 2003 when they noticed that their condominium did not overlook the golf
 course as promised but instead overlooked what the plaintiffs characterized as a "working

sandpit" or sump. The plaintiffs objected to the location and initially refused to close but claim they were threatened with the loss of their \$65,000 down payment and \$175,000 in upgrades purchased by them if they did not close title. The plaintiffs closed title on December 23, 2003 with counsel present. This lawsuit was instituted seeking the return of the \$75,000 lot premium paid on the grounds of fraud or mistake. The plaintiffs, in their complaint, allege fraud in the inducement, mutual mistake and mistake with fraud. The plaintiffs also allege a fourth and fifth cause of action involving the installation of a satellite dish for television reception and The Greens rightly argue that the homeowner's association and not the Greens are the proper defendant and the claim brought under Federal Communications Commission (FCC) regulations is not a private right or actionable.

The Greens now move for summary judgment and dismissal of the plaintiffs' action pursuant to CPLR §3211 and §3212 arguing that the closing of title forecloses this lawsuit since the buyers acknowledged full compliance by the seller "The Greens" with the terms of the agreement and thereby contractually waived any such issue. The plaintiffs, in opposition, argue that The Greens engaged in either an outright fraud or a mistake by charging them a \$75,000 lot premium for what was characterized as a golf villa and presented them an offering plan and diorama showing their purchase was a unit overlooking the golf course rather than a sand pit or sump.

For the following reasons, The Greens's motion for summary judgment and/or dismissal of the plaintiffs' action pursuant to CPLR §3211 and §3212 is hereby denied as to causes of action #1, #2 and #3 and granted as to causes of action #4 and #5 with reference to the satellite dish.

The function of the court on a motion for summary judgment is issue finding not issue determination. It is a most drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable. Elzer v. Nassau County, 111 AD2d 212, 489 NYS2d 246 (2nd Dept. 1985); Steven v. Parker, 99 AD2d 649, 472 NYS2d 225 (2nd Dept. 1984); Gaeta v. New York News, Inc., 95 AD2d 325, 466 NYS2d 321 (1st Dept. 1983). As the New York Court of Appeals noted in Sillman v. Twentieth Century Fox, 3 NY2d 395, 404 (1957):

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (DiMenna & Sons v. City of New York, 301 NY 118.). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App. Div. 1019), or where the issue is 'arguable' (Barnett v. Jacobs, 255 NY 520, 522); 'issue finding, rather than issue determination is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)."

It is the function of the court on a motion for summary judgment to consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and to determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

Here, in the case at bar, after reviewing all the evidentiary material presented in the light most favorable to the party opposing the motion for summary judgment as required, [***Robinson v. Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact on the question of the lot premium requirement and payment of \$75,000 sufficient to withstand The Greens request for summary disposition. Initially, it should be noted that the plaintiffs seek neither to disavow the purchase of the condominium nor for damages but merely the return of the \$75,000 lot premium paid by them for what they consider an inferior unit which does not overlook the golf course as called for by the plans.

The Greens, in support of its motion, points to paragraph 19 of the purchase agreement that "acceptance of the ...deed at the time of closing shall constitute full compliance by the seller" but ignores the language in the last sentence of the same paragraph that states "All representations contained in the Offering Plan shall survive delivery of the deed." In the purchase agreement entered into by the plaintiffs and The Greens in paragraph 1 it states

"The Purchaser hereby agrees to purchase and the Seller agrees to sell and build the Condominium Home designated as No. 132, Model Type **Valencia**, as shown on the plot plan which forms a part of the Offering Plan attached hereto..." (Emphasis added).

Also, The Greens never do explain or provide a basis for what it was that the plaintiffs bought for their \$75,000 lot premium charge except to suggest that they have a "southern exposure" as the basis for it. The plaintiffs dispute this alleged explanation by James Kaplan, a representative of The Greens. The plaintiffs argue that the \$75,000 lot premium was specifically charged according to the offering plan and the diorama of the development showing the lot premium was for those condominiums overlooking the golf course.

Clearly, the Court is confronted with issues of credibility between the plaintiffs, who, in reliance upon representations of the seller, the offering plan, the diorama of the development and the use of the term "golf villa", were allegedly misled or mistakenly led to believe that the condominium the plaintiffs bought would overlook the golf course. The Greens argues no representation was made and the plan merely stated that:

"in the opinion of sponsor, certain homes are located in preferable areas of the development or may have a better view or a more private location. Such homes have been assigned a 'location premium..."

This then brings us back to the defendant's representations and its diorama of what the "preferable areas" were to justify the lot premium charged. The credibility of the parties is not an appropriate consideration for the Court on a motion for summary judgment and statements made in opposition to the motion for summary disposition must be accepted as true. *Torres v. Jeremias*, 283 AD2d 484, 724 NYS2d 461 (2nd Dept. 2001). See also, *M.M. Advertising, Inc. v. Panasonic Industrial Co.*, 2 AD3d 252, 770 NYS2d 10 (1st Dept. 2003). Clearly, extrinsic evidence of a fraudulent representation or fraud in the inducement is not barred by the general merger clauses at closing of title. *Automate v. Balnir Inc.*, 309 AD2d 683, 765 NYS2d 870 (1st Dept 2003); *K & S of New York Corp. v. Sushi of Nao Intern. Inc.*, 8 Misc 3d 41, 798 NYS2d 294 (App. Term 2005). See also, *Black v. Chittenden*, 69 NY2d 665, 511 NYS2d 833 (1986). Here, the plaintiffs set forth allegations and claims of representations by The Greens that for a lot premium of \$75,000 the plaintiffs would have a golf villa overlooking the golf course and, instead, they were required to settle for a unit overlooking a drainage basin or sump. The plaintiffs' claims that threats by the defendant that their failure to close title would result in over \$250,000 in losses to them with the down payment and extras do not foreclose their rights to bring this action for the return of the \$75,000 lot premium payment. However, the plaintiffs' argument, in their memorandum of law (Point II, p.7), that the contract is void is without merit since the causes of action in the complaint seek the return of the \$75,000 lot premium paid for the fraudulent representations and not a voiding of the contract.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. *VanNoy v. Corinth Central School District*, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). The plaintiffs have set forth sufficient factual issues and disputes involving representations made to them, both orally and in the plans and diorama presented by the defendant as to the location of their condominium, to defeat The Greens' motion for summary disposition.

Accordingly, The Greens' motion for summary judgment and dismissal of the plaintiffs complaint pursuant to CPLR §3211 and 3212 is denied as to causes of action #1, #2 and #3 as there are numerous factual issues requiring a trial of this action and granted as to causes of action #4 and #5.

The foregoing constitutes the decision of the Court.

Dated: September 12, 2007



J.S.C.