Dazzo v Kilcullen
2007 NY Slip Op 33591(U)
October 26, 2007
Supreme Court, Suffolk County
Docket Number: 0015278/2006
Judge: Elizabeth H. Emerson
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

COPY

INDEX NO.: 15278-06

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 4-17-07
SUBMITTED: 5-16-07
MOTION NO: 001-MD
002-MOT D; CASE DISP

---x

ANTHONY DAZZO and JACQUELINE DAZZO,

Plaintiffs,

-against-

THOMAS KILCULLEN,

Defendant.

---x

JOHN G. POLI, III, P.C.
Attorney for Plaintiffs
200 Laurel Avenue
Northport, New York 11768

SIBEN & SIBEN, LLP
Attorneys for Defendant
90 East Main Street
Bay Shore, New York 11706

Upon the following papers numbered 1 to 39 read on this motion to strike and cross-motion for partial summary judgment ; Notice of Motion and supporting papers 1-7 ; Notice of Cross Motion and supporting papers 8-30 ; Answering Affidavits and supporting papers 31-38 ; Replying Affidavits and supporting papers 39 ; it is,

ORDERED that the motion by the defendant for an order striking the plaintiffs' complaint for failing to conduct depositions is denied as academic; and it is further

ORDERED that the branch of the cross motion by the plaintiffs which is for leave to serve a late reply to the defendant's counterclaims is denied as academic; and it is further

ORDERED that the branch of the cross motion by the plaintiffs which is for summary judgment in their favor on their second cause of action is denied; and it is further

ORDERED that the branch of the cross motion by the plaintiffs which is for summary judgment dismissing the defendant's counterclaims is denied as to the first counterclaim and granted solely to the extent that the second counterclaim is dismissed; and it is further

ORDERED that, upon searching the record, the complaint is dismissed, and the defendant is awarded summary judgment on his first counterclaim.

The plaintiffs and the defendant entered into a contract dated January 13, 2006, for the sale of a house in East Islip, New York. The purchase price was $580,000. The contract was conditioned on the plaintiffs, as the purchasers, obtaining a written mortgage commitment "on or

[* 2]

before forty five days from the date hereof (the "Commitment date")" in the amount of $500,000 "at the prevailing fixed rate of interest for a term of at least 25/30 years and on other customary commitment terms, whether or not conditional upon any factors other than an appraisal satisfactory to the Institutional Lender." The contract provided that, if a mortgage commitment was not obtained by the commitment date, the plaintiffs could cancel the contract by giving notice to the defendant, the seller, within five business days after the commitment date and the plaintiffs' down payment would be refunded. The contract further provided that, if the plaintiffs failed to give notice of cancellation to the defendant, the plaintiffs waived their right to cancel the contract and to receive a refund of the down payment. On February 7, 2006, the plaintiffs obtained a written mortgage commitment for the purchase of the premises subject to, inter alia, an acceptable appraisal report.

By a letter dated February 17, 2006, the plaintiffs advised the defendant that they were opting to cancel the contract on the ground of fraudulent concealment and demanding the return of their down payment. They alleged that the basement had a severe water problem, the extent of which was not disclosed prior to the signing of the contact, although it was discussed with the defendant at some length. By a letter dated February 21, 2006, the defendant rejected the plaintiffs' attempt to cancel the contract, claiming that there was no fraudulent concealment, and advised the plaintiffs that he would continue to hold their down payment in escrow.

An appraisal report dated February 20, 2006, was submitted to the lender. The appraiser noted the presence of a sump pump in the basement that was running at the time of the inspection, despite the fact that there was no evidence of a recent rain or snowfall, and recommended further analysis. By a letter dated March 8, 2006, the lender advised the plaintiffs that, before it made a decision regarding the acceptability of the property for financing, it required an inspection by a professional, licensed engineer to determine the extent of the problem and the cost to cure it, if curable. By a letter dated March 9, 2006, the plaintiffs advised the defendant that the lender was unable to make a decision on the mortgage loan due to water in the basement. The plaintiffs subsequently demanded that their down payment be refunded because they were unable to obtain a mortgage commitment. The defendant refused to refund the plaintiffs' down payment and sold the house in September 2006 for $485,000.

The plaintiffs commenced this action in May 2006. The complaint contains two causes of action to recover damages for fraud in the inducement and breach of contract, respectively. The defendant counterclaimed for a judgment declaring that he is entitled to retain the plaintiff's down payment and to recover damages for breach of contract. The defendant now moves for an order striking the plaintiffs' complaint for failing to proceed with depositions. The plaintiffs cross move for leave to serve a late reply to the defendant's counterclaims, for summary judgment in their favor on their second cause of action (breach of contract), and for summary judgment dismissing the defendant's counterclaims.

The plaintiffs contend that, because their attorney received the fully executed contract of sale on January 18, 2006, the commitment date was March 4, 2006, 45 days later. They further contend that they were unable to obtain a mortgage commitment from an institutional lender on or before March 4, 2006, and that they so advised the defendant four business days later on

March 9, 2006, thereby complying with the mortgage contingency clause in the contract of sale. Accordingly, the plaintiffs contend that they are entitled to the return of their down payment as a matter of law.

When, as here, the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms (*see*, **W.W.W. Assocs. v Gianconieri**, 77 NY2d 157, 162; **Automotive Mgmt. Group v SRB Mgmt. Co.**, 239 AD2d 450; **Matter of Ajar**, 237 AD2d 597). In the absence of any ambiguity, there are only documents to interpret, and the issue is one of law to be determined by the court (*see*, **Automotive Mgmt. Group v SRB Mgmt. Co.**, *supra*).

The court finds that the contract is not reasonably susceptible to more than one interpretation and is, therefore, unambiguous (*see*, **Chimart Assoc. v Paul**, 66 NY2d 570). It provides, in pertinent part, "The obligations of Purchaser hereunder are conditioned upon issuance **on or before forty five days from the date hereof** (the "Commitment date") of a written commitment from any Institutional Lender...." The contract was fully executed on January 13, 2006, which is the date of the contract. Thus, the court finds that the commitment date was 45 days later or February 27, 2006. The plaintiffs' notice of cancellation, which was sent on March 9, 2006, eight business days after the commitment date, was untimely. Thus, the plaintiffs waived their right to cancel the contract and to receive a refund of their down payment. Accordingly, the branch of the plaintiffs' motion which is for summary judgment in their favor on the second cause of action is denied.

Although the defendant does not cross move for summary judgment, the court has the authority to search the record and to award summary judgment to the nonmoving party with respect to a cause of action or issue that is the subject of the motion before the court (*see*, CPLR 3212[b]; **Dunham v Hilco Constr. Co.**, 89 NY2d 425, 429-430; **Micciche v Homes by Timbers**, 1 AD3d 326, 327). The court finds that the defendant is entitled to summary judgment in his favor on the plaintiffs' second cause of action, and the plaintiff's second cause of action is dismissed. The court also finds that the defendant is entitled to summary judgment in his favor on his first counterclaim, which is for a judgment declaring that he is entitled to retain the plaintiff's down payment. Accordingly, the branch of the plaintiffs' motion which is for summary judgment dismissing the defendant's counterclaims is denied as to the first counterclaim, and the defendant is awarded summary judgment thereon.

The defendant's second counterclaim, however, is barred by paragraph 23 of the contract, which limits the defendant's damages to retention of the down payment (*see*, **Andesco v Page**, 137 AD2d 349, 356). Accordingly, the branch of the plaintiffs' motion which is for summary judgment dismissing the defendant's counterclaims is granted solely to the extent that the second counterclaim is dismissed.

Finally, the defendant is entitled to summary judgment in his favor on the plaintiffs first cause of action to recover damages for fraud in the inducement. While a general merger clause is ineffective to exclude parol evidence of fraud in the inducement, a specific disclaimer destroys the allegations in the plaintiffs complaint that the agreement was executed in reliance upon contrary

oral misrepresentations (*see*, **Rudnick v Glendale Sys.**, 222 AD2d 572, 573; **Weiss v Shapolsky**, 161 AD2d 707; **Superior Realty Corp. v Cardiff Realty**, 126 AD2d 633). Here, the contract contains merger clauses which provide that the purchaser was not relying on any representations about the property's physical condition not specifically contained in the contract, that the purchaser had inspected the premises and was thoroughly acquainted with its condition, and that the purchaser agreed to take the premises "as is." Such clauses are sufficiently specific to bar the plaintiffs from claiming that they were fraudulently induced to enter into the contract because of oral misrepresentations about the property's physical condition (*see*, **Weiss v Shapolsky**, supra at 708). Moreover, it cannot be said that the facts allegedly misrepresented were peculiarly within the defendant's knowledge or could not have been discovered by the plaintiffs through the exercise of due diligence (*see*, **Superior Realty Corp. v Cardiff Realty**, *supra* at 634). Accordingly, the plaintiff's first cause of action is dismissed.

In view of the foregoing, defendant's motion for an order striking the plaintiffs' complaint for failing to proceed with depositions and the branch of the plaintiffs' cross motion which is for leave to serve a late reply to the defendant's counterclaims are denied as academic.

HON. ELIZABETH HAZLITT EMERSON

DATED: October 26, 2007

J. S.C.