

<b>Schembeck v Schefer</b>
2008 NY Slip Op 31838(U)
June 23, 2008
Supreme Court, Nassau County
Docket Number: 5660-04/
Judge: Antonio I. Brandveen
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: **ANTONIO I. BRANDVEEN**  
J. S. C.

BRIAN SCHEMBECK and NICHOLE SCHEMBECK,

TRIAL / IAS PART 32  
NASSAU COUNTY

Plaintiffs,

Index No. 5660/04

- against -

Motion Sequence No. 001

WILLIAM H. SCHEFER, BARBARA A. SCHEFER, HMA FRANCHISE SYSTEMS, INC., HMA FRANCHISE SYSTEMS, INC d/b/a HOUSMASTER and AMC PROPERTY EVALUATIONS, INC., AMC PROPERTY EVALUATIONS, INC. d/b/a HOUSEMASTER,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	_____
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendants William H. Schefer and Barbara A. Schefer, husband and wife, move for an order pursuant to CPLR 3211 (a) (1), (7) and CPLR 3212 (b) granting summary judgment in favor of these defendants, and dismissing the complaint on the ground the plaintiffs cannot establish a legally sufficient cause of action against these moving defendants. The plaintiffs oppose the motion. The plaintiffs sue these defendants, under the first, second and third causes of action, for breach of contract, negligence and fraud arising from the purchase of 2282 Sycamore Place, Merrick, New York by the plaintiffs

from these defendants.

The defendant Barbara A. Shefer states, in a supporting affidavit dated May 22, 2007, these defendants purchased the property and residential structure at 2282 Sycamore Place, Merrick, New York in 1972. The defendant Barbara A. Shefer states, in September 2000, these defendants found termite "swarmers" flying around their den area, and then hired a local exterminator, Innovative Pest Solutions, Inc., to inspect the entire house for termites, and to treat any active infestation at the premises. The defendant Barbara A. Shefer states, as a result of this inspection, they were advised active termites were found outside the den or family room of the house and crawl space on the south wall of the foundation, and the recommended treatment was to use a chemical known as "Prevail FT" along the exterior perimeter of our foundation, i.e. subterranean termite control treatment. The defendant Barbara A. Shefer reports the entire interior "Sill Plate" was also treated at all accessible areas, and details the rest of the process regarding the extermination process.

The defendant Barbara A. Shefer asserts, before going to contract with the plaintiffs to buy the home, the plaintiffs hired a house inspector, i.e. Housemaster to evaluate the physical condition of the more than 100 year old house. The defendant Barbara A. Shefer points out on May 1, 2002, a Housemaster inspector, to wit Noel Bannerton along with the plaintiff Brian Schembeck came to the premises to conduct the inspection. The defendant Barbara A. Shefer avers the inspector's primary concern was the condition of the oil burner in the basement which Bannerton said may have an unfixable small crack that could emit potentially harmful fumes. The defendant Barbara A. Shefer states having "Perillo Bros.

Oil” to inspect the furnace, and that company confirmed the crack, and found it could not be fixed, so these defendants spent \$2,225.00 to replace the oil burner. The defendant Barbara A. Shefer describes, when these defendants were requested by Bannerton to answer a questionnaire regarding the general physical condition of the house, the defendant Barbara A. Shefer told Bannerton about the prior subterranean termite treatment by Innovative Pest Solutions, Inc., and the warranty contract dated September 25, 2000 supplied by that company.

The defendant Barbara A. Shefer comments, during a subsequent visit to the premises by the plaintiffs, the defendant Barbara A. Shefer was asked by the plaintiff Nicole Schembeck, who was pregnant at the time, what was the pink container. The defendant Barbara A. Shefer alleges explaining there were termites about two years ago, and an exterminator placed that trap to capture the queen termite. The defendant Barbara A. Shefer also describes telling the plaintiff Nicole Schembeck the chemicals used to control any future infestation would not be harmful to the expectant mother nor the unborn child. The defendant Barbara A. Shefer opines the plaintiffs were aware of the prior termite infestation, and the termite treatment undertaken at the premises before they entered into a contract of sale to purchase on June 27, 2002. The defendant Barbara A. Shefer avers the plaintiffs also had the contractual right to have a licensed termite exterminator inspect the premises, specifically to evaluate the extent of any current termite infestation or structural damage at the premises, but they elected not to do it. The defendant Barbara A. Shefer points to paragraph 31 of the contract of sale which provides that if any “active termite infestation”

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and resulting "structural damage" is found at the premises, the sellers were then obliged to eliminate the active infestation and correct any structural damage at their cost, or cancel the contract. The defendant Barbara A. Shefer observes the plaintiffs waited until after they closed title, and took possession of the premises to contact Innovative Pest Solutions, Inc. to reinspect the house only to discover an active termite condition and potential danger. The defendant Barbara A. Shefer contends the plaintiffs were not damaged by anything the defendants may have said or done regarding the condition of the house. The defendant Barbara A. Shefer alleges the damage to the plaintiffs came by their own negligence, and the professionals they hired to protect their interests in the sale of this residential real estate.

The attorney for the defendants William H. Schefer and Barbara A. Schefer provides, in another supporting affirmation dated May 22, 2007, specific background information regarding the parties' circumstances with respect to the allegations in the complaint. The attorney for the defendants William H. Schefer and Barbara A. Schefer contends the plaintiffs have no viable cause of action, as a matter of law under CPLR 3211 (a) (1) and 3212 (b). The attorney for the defendants William H. Schefer and Barbara A. Schefer points out the defendants deny the plaintiffs' allegations, and allege five affirmative defenses, and notes the parties exchanged all relevant documentation in connection, and both plaintiffs were deposed on January 29, 2007. The attorney for the defendants William H. Schefer and Barbara A. Schefer points to the contract of sale for the property, and states the parties agreed to specific terms and conditions with representations and disclaimers, including specifically paragraphs 21, 28, 31, 39, and 53. The attorney for the defendants

William H. Schefer and Barbara A. Schefer asserts the plaintiffs failed to have the premises inspected by a licensed termite exterminator within the agreed 10 day period as provided in paragraph 31 of the contract of sale. The attorney for the defendants William H. Schefer and Barbara A. Schefer avers, if the plaintiffs learned the house was infested after the 10 day period, but before the closing, the sellers could have compelled them to accept the house in an "as is" condition. The attorney for the defendants William H. Schefer and Barbara A. Schefer contends, since the plaintiffs did not discover the termites until after the closing, well after the 10 days expired, they were not damaged by the seller's alleged fraud, the complaint alleging the defendants fraudulently concealed a latent termite condition in the house is insufficient as a matter of law.

The plaintiff Brian Schembeck states, in an opposing affirmation dated February 20, 2008, closing the purchase of the premises owned by this affiant and spouse on August 28, 2002. This plaintiff states, while pulling up some old linoleum, on August 29, 2002 they uncovered live termites in the family room floor, so the termite company previously hired by the defendants was contacted by this plaintiff. The plaintiff Brian Schembeck states the termite company representative advised them the house had been treated several times since 2000 for live termite infestation, and the neighbors informed them the family room floor collapsed with a couch falling through it. The plaintiff Brian Schembeck alleges a neighbor told them the floor was repaired with concrete by the neighbor. The plaintiff Brian Schembeck points to the January 29, 2007 deposition of the plaintiff wife, who testified about walking through the house before the closing, and asking the defendant wife if there

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were any termite problems, and the defendant spouse said no, but they had annual checkups for the condition.

The plaintiffs' attorney states, in an opposing affirmation dated February 20, 2008, there are genuine triable issues of fact, and challenges the assertions and legal contentions of the defense. The plaintiffs' attorney states the defendant claim they did no wrong, yet their answer admits they made misrepresentations to induce the plaintiffs to enter into the contract of sale. The plaintiffs' attorney asserts the fact that the inspector did not uncover any evidence of termite treatment nor any evidence of termite damage does not excuse the defendants' behavior nor untruthfulness.

This Court has carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. "In order to prevail on a motion to dismiss based on documentary evidence, the document relied upon must definitively dispose of the plaintiff's claim (*see*, CPLR 3211 [a] [1]; *Greenwood Packing Corp. v Associated Tel. Design*, 140 AD2d 303, 305; *Reilly v Town of Brookhaven*, 34 AD2d 1001)" (*Juliano v. McEntee*, 150 A.D.2d 524, 525, 541 N.Y.S.2d 23 [2<sup>nd</sup> Dept., 1989]). The Second Department observed in *Juliano*, in facts analogous to the present matter:

In the instant case, the plaintiffs failed to have the premises inspected within the agreed-upon 10-day period. It was only if the plaintiffs notified the seller within 10 days that the house was infested with termites that the seller would then have had to choose between removing the infestation at his expense or cancelling the sale. If the plaintiffs learned that the house was infested after the 10-day period but before the closing, McEntee could have compelled them to accept the house in "as is" condition. Therefore, since the plaintiffs did not discover the termites until after the closing, which was well after the 10-day period expired, they were not actually damaged by McEntee's alleged fraud, and their complaint against him was properly dismissed. The

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plaintiffs' reference to *Tahini Invs. v Bobrowsky*, (99 AD2d 489) and similar cases is unavailing, since in the instant case the parties' agreement gave the plaintiffs the means to discover the defect if they used due diligence.

*Juliano v. McEntee*, supra, at 525.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided

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(see, *Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

This Court finds the defendants have satisfied their *prima facie* burden, and demonstrated their entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. The plaintiffs' showing is insufficient to raise a triable issue.

Accordingly, the motion is granted.

So ordered.

Dated: **June 23, 2008**

ENTER:

  
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J. S. C.

FINAL DISPOSITION xxx

NON FINAL DISPOSITION

HON. ANTONIO I. BRANDVEIN

**ENTERED**

JUN 26 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE