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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Justice

Index Number : 603789/2006
SHILLINGTON, ANGUS
VS
RILEY, JACQUELINE
Sequence Number : 002
AMEND PLEADING

INDEX NO. 603789/06

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

Motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... | 1, 2 |
| Answering Affidavits — Exhibits | 3 |
| Replying Affidavits | 4 |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
JUL 07 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: June 30, 2008

MARTIN SHULMAN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 1

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ANGUS SHILLINGTON and LISA TORNELL,

Plaintiffs,

-against- Index No. 603789/06

JACQUELINE RILEY, COLDWELL BANKER HUNT KENNEDY and SINVIN REALTY,

Defendants.

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**Martin Shulman, J.:**

Plaintiffs move for leave to amend their complaint, and for an order dismissing defendant Jacqueline Riley's ("Riley") second and third counterclaims.

In this action, plaintiffs are seeking the return of the down payment they tendered in anticipation of purchasing a cooperative apartment from defendant Riley. They allege that prior to entering into the contract to purchase the apartment they were told by Riley's broker, co-defendant Coldwell Banker Hunt Kennedy ("Coldwell Banker"), that a wall separating the living area of the apartment from a storage space could be removed, adding 200 square feet of living space. They also allege that the broker told them that Riley had represented to them that the work could be done, and that Riley had consulted with an architect to ensure the legality of removing the wall. Plaintiffs now seek to add a claim for negligent misrepresentation against Riley and Coldwell Banker, as well as an unjust enrichment claim against Riley. Defendants oppose asserting that the proposed amendments lack merit.



Defendant Riley owned 58 shares in a cooperative corporation known as Tribeca Towers, Inc. (the "Co-op"). She was the proprietary lessee of Unit 3W in the building

located at 427 Washington Street, New York, New York (the "Premises"), pursuant to a proprietary lease between her and the Co-op (Amended Complaint, ¶ 5). Defendants Coldwell Banker and Sinvin Realty ("Sinvin") were Riley's real estate brokers (id., ¶¶ 2-4). The Premises included a storage area that is approximately 200-300 square feet, which is separated from the apartment by a wall (id., ¶ 6).

In July and August 2006, the Premises was put up for sale, and plaintiffs were shown the Premises (id., ¶ 7). Plaintiffs claim that upon their first viewing of the Premises, Coldwell Banker volunteered the information that the wall separating the storage space could be removed (Exhibit A to Notice of Motion, Affidavit of Angus Shillington, dated September 1, 2007, ¶ 3). In anticipation of making an offer for the apartment, plaintiffs asked defendants about the rights of shareholders to make certain alterations (Amended Complaint, ¶ 8). Plaintiffs allege that they specifically told defendants that they would only want to purchase the Premises if the wall separating the storage space could be removed legally, and with the permission of the Co-op's board (the "Board") (id., ¶ 9). Plaintiffs state that they told defendants that without the permission to do this, the apartment would be too small for them (id.). Plaintiffs assert that Coldwell Banker told them that the wall was removable, and that Riley had spoken to the Board members, and that such alteration would be approved (id., ¶ 10). Plaintiffs further allege that they later learned that Riley was a member of the Board, and that she and defendants Coldwell Banker and Sinvin knew that plaintiffs' desired alteration would violate the City of New York Building Codes (id.). Plaintiffs claim that they relied upon these misrepresentations in entering into the sales contract.

On August 21, 2006, the plaintiffs and Riley signed the Contract of Sale for the Premises for a purchase price of $2,050,000.00, with a 10% down payment of $205,000.00 (id., ¶ 11). In section 7.1, the Contract of Sale provides that "[s]eller makes no representation as to the physical condition or state of repair of the Unit, the Personalty, the Included Interests or the Premises. Purchaser has inspected or waived inspection of the Unit, . . . and shall take the same 'as is,' as of the date of this Contract" (Exhibit D to Notice of Motion, at § 7.1). Section 13.1, regarding defaults, provides that, in the event of the purchaser's default, the seller's exclusive remedies "shall be to cancel this Contract, retain the Contract Deposit as liquidated damages and, if applicable, Seller may enforce the indemnity in ¶ 13.3 as to brokerage commission[s]" (id., § 13.1; see also § 13.3). The Contract of Sale also contained a merger clause in section 14.1, providing that "[a]ll prior oral and written representations, understandings and agreements had between the Parties with respect to the subject matter of this Contract" were merged into the Contract of Sale, and that any changes or waivers must be in writing signed by the party to be charged (id., § 14.1).

Several weeks after signing the Contract of Sale, plaintiffs assert that they learned, during a meeting with the Board, that while the Board would be inclined to approve the alteration, it was unlikely that the City of New York would allow the wall to be removed to incorporate the storage space into the living space (id., ¶ 12). Shortly thereafter, plaintiffs met with a City expeditor who told them that the alteration would not be allowed (id., ¶ 13). Plaintiffs then sought to rescind the Contract of Sale, and the return of their down payment, which Riley refused (id., ¶¶ 14-16). Plaintiffs then

brought this action seeking rescission of the Contract of Sale, and damages for fraudulent inducement (Exhibit B to Notice of Motion, Amended Complaint).

In her answer, Riley interposed three counterclaims. The first asserts that plaintiffs have breached the Contract of Sale for the Premises, thereby forfeiting their down payment (Exhibit C to Notice of Motion, ¶¶ 24-40). The second counterclaim asserts that as a result of plaintiffs' breach, Riley is entitled to retain the down payment, and to enforce the indemnity provision in paragraph 13.3 of the Contract of Sale as to any brokerage commissions, plus reasonable legal fees (id., ¶¶ 41-43). The third counterclaim seeks additional damages suffered by Riley due to the breach (id., ¶¶ 44-46).

In this motion, plaintiffs seek to amend their complaint to add a third claim for negligent misrepresentation against all defendants, and a fourth claim for unjust enrichment against Riley. They allege that defendants made negligent statements regarding the legality and permissibility of removing the wall, that they made the statements knowing that plaintiffs would act upon such statements, that defendants were bound to plaintiffs by a duty to act with care as a result of the special relationship of trust that existed between the parties, and that as a result, plaintiffs suffered damages in the amount of their down payment, plus losses incurred because they were unable to purchase another apartment because their capital is being held in escrow (Exhibit E to Notice of Motion, Proposed Second Amended Complaint, ¶¶ 22-26). The proposed fourth claim is against Riley for unjust enrichment, alleging that Riley subsequently sold the apartment for $50,000.00 more than plaintiffs had agreed to pay,

and that to allow her to keep plaintiffs' down payment plus the extra $50,000.00 would unjustly enrich her at plaintiffs' expense (id., ¶¶ 27-30).

In support of their motion, plaintiffs urge that their proposed claims are legally sufficient. Angus Shillington submits his affidavit in support in which he states that before entering into the Contract of Sale, he and his wife, plaintiff Lisa Tornell, were explicitly told by Coldwell Banker that a wall separating the main living space of the apartment from a storage area outside the apartment could be removed, adding living space to the Premises (Shillington Aff., ¶ 3). He further attests that Coldwell Banker told plaintiffs that Riley had told them that the work could be done, and that Riley had consulted with an architect to ensure the legality of removing the wall (id., ¶ 4). Mr. Shillington asserts that they were repeatedly assured by Riley and the Board through Coldwell Banker that removal of the wall was permissible, and that they relied on these assurances in signing the Contract of Sale (id., ¶ 8). He states that at a meeting with the Board one week before the scheduled closing one Board member suggested that they make sure doing so was permissible by the City of New York, because the last time that member checked, it was not legal (id., ¶ 9). He further states that they then made an appointment with a City expeditor, who told them that the only way the wall could be removed was if they owned the entire 3rd floor, which they would not (there was another cooperative apartment on that floor) (id., ¶ 13). Plaintiffs urge that they have sufficiently stated claims for negligent misrepresentation and unjust enrichment. They also urge that the second and third counterclaims should be dismissed, because they seek amounts in addition to the liquidated damages (the down payment), to which defendant Riley is not entitled.

Riley has withdrawn the third counterclaim, but opposes the remainder of the motion on the ground that the claims lack merit as a matter of law. Coldwell Banker similarly opposes the motion, asserting that it was the listing agent, and had no fiduciary or even a special relationship resulting in any duty to plaintiffs. It further argues that based on the provisions of the Contract of Sale, disclaiming reliance by plaintiffs upon oral representations and including a merger clause, plaintiffs could not have reasonably relied upon any purported misrepresentations.

**DISCUSSION**

The branch of the motion for leave to amend is granted to the extent that the complaint is amended to add a claim for negligent misrepresentation, as pleaded in the Proposed Second Amended Complaint, and is otherwise denied. The branch of the motion seeking dismissal of the second and third counterclaims is granted only to the extent of dismissing the third counterclaim, and is otherwise denied.

Leave to amend shall be freely granted absent surprise or prejudice (see CPLR 3025 [b]; Sheets v Liberty Alliances, LLC, 37 AD3d 170, 830 NYS2d 56 [1st Dept 2007]). To conserve judicial resources, consideration of the merits of the proposed pleading is required (see Watts v Wing, 308 AD2d 391, 765 NYS2d 18 [1st Dept 2003]). Leave shall be denied where the proposed pleading fails to state a claim, or is palpably insufficient as a matter of law (Ancrum v St. Barnabas Hosp., 301 AD2d 474, 475, 755 NYS2d 28, 30 [1st Dept 2003]).

To state a claim for negligent misrepresentation, the plaintiff must allege that: (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have

known was false; (3) the information was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment (see Eiseman v State of New York, 70 NY2d 175, 187, 518 NYS2d 608, 614 [1987]). Before a party can recover on such a tort claim, there must be a showing that there was either actual privity of contract between the parties, or a relationship so close as to approach that of privity (Parrott v Coopers & Lybrand, L.L.P., 95 NY2d 479, 483, 718 NYS2d 709, 711 [2000]). "In the commercial context, a duty to speak with care exists when 'the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information'" (Kimmell v Schaefer, 89 NY2d 257, 263, 652 NYS2d 715, 719 [1996], quoting International Prods. Co. v Erie R.R. Co., 244 NY 331, 338 [1927]). "Whether the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact (id. at 264).

Houlihan/Lawrence, Inc. v Duval (228 AD2d 560, 664 NYS2d 553 [2d Dept 1996]) ("Houlihan") is analogous to the instant action. In that case, the plaintiff, a real estate broker, represented to the buyer that the residence the buyer was purchasing was designed by the well-known architect, Stanford White. The buyer refused to pay the broker's commission because, when he resold the house, he realized a lower sale price because of the real estate broker's inability to prove the representations regarding the design of the house. The lower court dismissed the defendant purchaser's negligent misrepresentation counterclaim on the ground that the buyer had failed to establish privity, or any kind of special relationship, required for a negligent

misrepresentation claim (id. at 561). The Appellate Division, however, found that the evidence submitted demonstrated that the plaintiff broker purportedly misrepresented the authenticity of the design of the house to a "known party with whom it had personal, direct dealings and whose reliance thereupon could be reasonably anticipated" (id. at 562). The court set forth the standard for negligent misrepresentation claims, stating that there may be liability:

> where there is a relationship between the parties such that there is an awareness that the information provided is to be relied upon for a particular purpose by a known party in furtherance of that purpose, and some conduct by the declarant linking it to the relying party and evincing the declarant's understanding of their reliance.

Id. at 561 (citations omitted). Thus, the relying person must have been the person for whose use the statement was intended, or at the least was a member of a small group of persons for whose guidance the statement was made (id., citing Prosser and Keeton, Torts § 107, at 747 [5th ed]). The Appellate Division found that the purchaser in Houlihan was not a faceless or unresolved class of persons, but instead, was a known purchaser (id. at 562; see also Grammer v Turits, 271 AD2d 644, 706 NYS2d 453 [2d Dept 2000] [allegations that prospective subtenant, who lived far away, stressed to brokers the need for quiet and private home, and brokers failed to disclose construction taking place on adjoining property, established special relationship for negligent misrepresentation claim against brokers]).

Similarly, in Joseph v NRT Inc. (43 AD3d 312, 841 N.Y.S.2d 38 [1st Dept 2007]), the buyers brought an action against the seller and the brokers alleging negligent misrepresentation in the sale of a condominium apartment. The Appellate Division,

First Department held that summary judgment was premature, since no discovery had been conducted, and issues of material fact existed as to whether the brokers, individually and as agents for the seller, materially misrepresented the number of legal bedrooms in the apartment and, if so, whether the buyers reasonably relied on such misrepresentations (id. at 313). The court found that there was a duty based on the relationship of the parties. The plaintiffs had alleged that they purchased the apartment which had been advertised as having three bedrooms, but later learned that the seller had added two bedrooms with windows unlawfully placed to what was legally only a one-bedroom apartment (id.). The court held that the general disclaimer clause in the contract of sale would not bar parole evidence, because there was no specific disclaimer regarding reliance on representations as to the legality of bedrooms (id.). The court also found that, while the defendants were correct that if the facts misrepresented were not facts peculiarly within their knowledge, and if plaintiffs had the means to discover the truth by the exercise of ordinary intelligence, there would be no liability, the record did not establish that the principle barred the plaintiff's claim (id.).

In Osuchowski v Gallinger Real Estate (273 AD2d 892, 711 NYS2d 369 [4th Dept 2000]), the Appellate Division, Fourth Department, also found that there may be liability for negligent misrepresentation, denying defendant's motion for summary judgment dismissing the complaint. The court rejected defendant's argument that there was no negligent misrepresentation as a matter of law, because there was no privity and no special relationship (id. at 892-893). It found that a triable issue of fact arguably existed about whether the defendant was negligent in conducting a real estate auction, and whether the defendant's agent made negligent misrepresentations to plaintiff during the

auction, quoting the standard set forth in Houlihan set forth above (id. at 893; see also Atlantic Bank of New York v Carnegie Hall Corp., 25 AD2d 301, 268 NYS2d 941 [1st Dept 1966] [where party assumed responsibility to respond to defendant's inquiry, it had a duty to speak fully and truthfully]).

Applying these cases to the instant action, this court finds that the plaintiffs' claims for negligent misrepresentation against both defendants Riley and Coldwell Banker are not palpably insufficient as a matter of law. Plaintiff Shillington, in his affidavit in support, attests that he and his wife had engaged in detailed discussions about the Premises with the defendants prior to entering into the contract, that they were explicitly told by Coldwell Banker that the wall could be removed, and that the information was also volunteered immediately upon their entering the apartment for their first viewing (Shillington Aff., ¶ 3). He asserts that prior to entering into the Contract of Sale, they made several requests to Coldwell Banker to confirm with Riley and the Board that the wall could be legally removed (id., ¶ 4). He affirms that Coldwell Banker assured them that Riley was a member of the Board and was certain that removing the wall was a permissible change for the apartment; that Riley told the broker that the work could be done; and that Riley herself had consulted with an architect to ensure the legality of removing the wall (id.). Mr. Shillington asserts that Coldwell Banker reassured them again in the presence of plaintiffs' broker and designer (id., ¶5). He further attests that on August 1, 2006, plaintiff Tornell had e-mailed plaintiffs' broker one last time about the wall, and their broker said that Coldwell Banker had checked with the Board, and that there were no worries with regard to removing the wall (id., ¶6). These reassurances were again confirmed on a visit to the apartment on August 8,

2006 (id., ¶ 7). Mr. Shillington affirms that it was not until their meeting with the Board, on September 27, 2006, a month after the Contract of Sale was signed, that they began to suspect that they had been misled, and that it might not be legal to remove the wall (id., ¶ 9). He states that their broker told him on September 28, 2006 that she spoke to Coldwell Banker again, who reassured her that Riley, as well as the sponsor of the building, had checked with architects before they told plaintiffs that they could use the storage space as living area (id., ¶ 11).

As plaintiffs correctly argue, these allegations meet the standard set forth in Houlihan. The allegations set forth a series of dealings between plaintiffs and both defendants Riley and Coldwell Banker in which the defendants allegedly misrepresented the legality of planned renovations directly to plaintiffs, a known party with whom they had direct and personal dealings, and whose reliance thereupon could reasonably be anticipated. As in Houlihan, this is not a case where the representations were made to a faceless or unresolved class of persons, but rather to a known buyer (Houlihan, 228 AD2d at 562, citing White v Guarente, 43 NY2d 356, 361, 401 NYS2d 474, 477 [1977]). Plaintiffs have sufficiently pleaded the existence of a special relationship with both Riley and Coldwell Banker (id.; see also Joseph v NRT Inc., 43 AD3d at 313; Grammer v Turits, 271 AD2d at 645; Osuchowski v Gallinger Real Estate, 273 AD2d at 893). The general disclaimer in section 7.1 and the merger clause in section 14.1 of the Contract of Sale in which Riley states that she makes no representation as to the physical condition of the Premises, would not bar parole evidence, because there was no specific disclaimer in that contract regarding reliance on representations as to the legality of removing the wall (see Joseph v NRT Inc., 43

AD3d at 313, citing Cleangen Corp. v Filmax Corp., 3 AD3d 468, 772 NYS2d 692 [2d Dept 2004]; Stephens v. Sponholz, 251 AD2d 1061, 674 NYS2d 244, 244-245 [4th Dept 1998]). With regard to the defendants' arguments that plaintiffs could not have reasonably relied upon the alleged misrepresentations, whether the nature and caliber of the relationship is such that the plaintiffs' reliance is justified will not be determined on this motion for leave to amend, prior to an answer or any discovery (see Kimmell v Schaefer, 89 NY2d at 264). Similarly, whether plaintiffs should have discovered the truth of the representations through their own due diligence, is also a factual inquiry not appropriate on a motion for leave to amend (see Joseph v NRT Inc., 43 AD3d at 313).

The branch of plaintiffs' motion seeking leave to add a fourth claim for unjust enrichment is denied. In the Contract of Sale, the plaintiffs agreed to a liquidated damages provision in which they would forfeit their down payment for a breach thereof. Plaintiffs fail to present a basis for challenging that provision, or for allowing them to bring an unjust enrichment claim based on Riley's retention of the down payment, or any additional amounts obtained upon a resale of the Premises (see Maxton Builders, Inc. v Lo Galbo, 68 NY2d 373, 379-383, 509 NYS2d 507, 510-512 [1986] [buyer who defaults without lawful excuse cannot recover down payment]; Rivera v Konkol, 48 AD3d 347, 851 NYS2d 537 [1st Dept 2008]; see also Uzan v 845 UN Ltd. Partnership, 10 AD3d 230, 236-240, 778 NYS2d 171, 175-178 [1st Dept 2004] [liquidated damages provisions with regard to retaining down payment for breach may only be challenged by showing disparity of bargaining power, duress, fraud, illegality or mutual mistake]). The fact that Riley was able to resell the Premises, due to the increased market value at the time of the breach, without sustaining actual damages, does not support a claim for

unjust enrichment (see Micciche v Homes by Timbers, Inc., 18 AD3d 833, 796 NYS2d 628 [2d Dept 2005]). Accordingly, leave to amend is denied with regard to this proposed claim.

The branch of plaintiffs' motion with regard to Riley's second and third counterclaims is granted only to the extent that the third counterclaim is dismissed. As previously stated, Riley withdrew the third counterclaim in response to plaintiffs' motion (Defendant Riley's Memorandum of Law in Opposition, at 10). Therefore, that counterclaim is dismissed. The plaintiffs, however, fail to present a basis for dismissing the second counterclaim. In that counterclaim, Riley appropriately seeks recovery for breach of the Contract of Sale. Section 13.1 of the Contract of Sale provides that Riley could retain the down payment as liquidated damages. That section also provides that, if applicable, Riley could enforce the indemnity provision in section 13.3 as to brokerage commissions. The second counterclaim appropriately seeks recovery for these damages for breach of the Contract of Sale.

Accordingly, it is

ORDERED that the branch of the motion for leave to amend is granted only to the extent that leave shall be granted to add the third claim for negligent misrepresentation in the form proposed as annexed to the moving papers, and leave to amend to add the proposed fourth claim for unjust enrichment is denied and that claim is stricken; and it is further

ORDERED that plaintiffs will serve a Second Amended Complaint, revised as set forth herein, within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the defendants shall answer the Second Amended Complaint within 10 days from the date of that service; and it is further

ORDERED that the branch of the motion seeking dismissal of the second and third counterclaims is granted only to the extent that the third counterclaim is dismissed, and is otherwise denied.

Counsel for the parties are directed to appear for a compliance conference on July 22, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiffs, Riley and Coldwell Banker.

DATED: New York, New York
June 30, 2008

HON. MARTIN SHULMAN, J.S.C.