

<b>Marquina v Pellegrini</b>
2008 NY Slip Op 32514(U)
September 8, 2008
Supreme Court, Queens County
Docket Number: 0015362/2007
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 22

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JOSE MARQUINA and TOMAS MARQUINA,  
  
Plaintiffs,

Index No. 15362/07  
  
Motion  
Date July 8, 2008

-against-

NICHOLAS PELLEGRINI, CENTURY 21  
BEST REALTY,  
  
Defendants.  
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Motion  
Cal. No. 14, 15  
  
Motion  
Sequence No. 1, 2

PAPERS  
NUMBERED

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Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Plaintiffs, Jose Marquina and Tomas Marquina commenced this action against defendants, Nicholas Pellegrini ("Pellegrini") and Century 21 Best Realty ("Century 21") to recover damages arising out of the purchase of a three-family dwelling located at 32-52 106<sup>th</sup> Street, East Elmhurst, New York. Plaintiffs allege that defendant Pellegrini represented them as their real estate attorney regarding the purchase and that defendant Century 21 was the real estate broker in the transaction. Plaintiffs seek to recover, *inter alia*, the diminution of fair market value of the dwelling based on specific tax abatements that were allegedly not granted to them.

Defendant Pellegrini seeks summary judgment pursuant to CPLR 3212 dismissing plaintiffs' Complaint as against him and defendant Century 21 seeks summary judgment pursuant to CPLR 3212 and pursuant to CPLR 3211, dismissing plaintiffs' Complaint and any claims and cross claims interposed against defendant Century 21. By way of cross motion plaintiffs seek leave to amend the

Complaint to assert additional causes of action as against defendants and to add Froylan Arguero, alleged real estate agent of defendant Century 21 as a party defendant.

Plaintiffs assert in the original Verified Complaint a first cause of action as against defendant Pellegrini that: "Pellegrini by failing to insist that the contract contain a provision requiring the seller to submit the necessary application for said tax abatement breached his duty to represent plaintiffs in a competent manner;" a second cause of action as against both defendants in "[t]hat the defendants therefore either intentionally or negligently made a material misrepresentation concerning the status of the tax abatement for which they are liable to the plaintiffs . . .;" a third cause of action against Century 21 alleging that "the defendant Century 21 Best by assuring plaintiffs prior to the signing of the contract that the premises had a tax abatement and by not telling the that it would be necessary for the seller to apply for said abatement fraudulently misled the plaintiffs into believing that the premises already had a tax abatement which was false . . .;" a third cause of action<sup>1</sup> against both defendants that: "the defendants are liable to the difference between the tax abatement and the additional real estate taxes that plaintiffs will be required to pay as a result of the premises not being approved for the 421(a) tax abatement;" a fourth cause of action as against both defendants in that plaintiffs seek "diminution in market value as a result of the defendants conduct herein;" and a fifth cause of action as against Pellegrini claiming that Pellegrini owes plaintiffs additional monies.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce

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<sup>1</sup> The Court notes that the Complaint erroneously denominated two separate cause of actions with the same title of "third cause of action".

competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

To establish a claim for legal malpractice, the plaintiff must demonstrate that, but for the attorney's negligence, he would have prevailed on the underlying action or not sustained any damages (see, *Siciliano v. Forchelli & Forchelli*, 17 AD3d 343 [2d Dept 2005]; *Adamopoulos v. Liotti*, 273 AD2d 260 [2d Dept 2000]). For the defendant to obtain summary judgment on a legal malpractice claim, he must establish, through the submission of evidentiary proof in admissible form, that the attorney did not fail to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community (see, *Tortura v. Sullivan Papain Block McGrath & Cannavo*, 21 AD3d 1082 [2d Dept 2005]; *Greene v. Payne, Wood & Littlejohn*, 197 AD2d 664 [2d Dept 1993]).

Defendant Pellegrini presented a *prima facie* entitlement to summary judgment as a matter of law pursuant to CPLR 3212. Defendant Pellegrini met his burden of disproving the elements of negligence and proximate cause (see, *Caires v. Siben & Siben, LLP*, 2 AD3d 383 [2d Dept 2003]). In support of the motion, defendant Pellegrini submits, *inter alia*, an affidavit of defendant himself wherein he states that: it was never represented that the property would have a tax abatement, that "[n]either the binder, listing, contract of sale, nor any closing document state that the property would have a tax abatement or even qualify for a tax abatement," and that the plaintiff did not pay any fee for a tax abatement. In his affidavit, defendant Pellegrini adopts the arguments set forth in the affirmation of his attorney, including the contention that the Contract of Sale did not contain any representations regarding a tax abatement and the assertion that the plaintiff failed to set forth any evidence that the property qualified for a tax abatement. Accordingly, defendant Pellegrini presented a *prima facie* entitlement to summary judgment as a matter of law pursuant to CPLR 3212.

As it is undisputed that the parties have not completed discovery, and that significant discovery remains outstanding, including, a deposition of defendant Pellegrini and a deposition of defendant Century 21, defendant, Pellegrini's motion for summary judgment is denied without prejudice as it is premature (see, CPLR 3212(f); *Groves v. Lands End Housing Co., Inc.*, 80 NY2d 978 [NY 1992]; *Ramos v. DEGU Deutsche Gesellschaft Fuer*

*Immobilienfonds MBH*, 2007 NY Slip Op 1714 [2d Dept 2007]; *Yadgarov v. Dekel*, 2 AD3d 631 [2d Dept 2003]; *George v. New York City Transit Authority*, 306 AD2d 160 [1st Dept 2003]). Accordingly, defendant Pellegrini's motion for summary judgment pursuant to CPLR 3212 is hereby denied "with leave to renew when discovery, including examinations before trial of all parties, is complete." (See, *Ramos, supra*).

Defendant, Century 21 presented a *prima facie* entitlement to summary judgment as a matter of law. In support of the motion, defendant submits, *inter alia*, an affidavit of Jeffrey Silverbush, the President and CEO of defendant, Century 21. Mr. Silverbush affirms "[t]hat no agent or representative of defendant Century 21 Best, at anytime prior to, through the point of signing the aforementioned contract or during closing, make any representations to the plaintiffs, Jose and Tomas Marquina, pertaining to tax abatements regarding the subject property;" "that at no time prior to, through the point of signing said contract of sale or during closing did Plaintiffs Jose and Tomas Marquina ever make mention to Defendant Century 21 Best Realty or any inquiry into or regarding any tax abatements associated with the subject property;" that at all times relevant to these matters, . . . Defendant Century 21 Best and its agents acted reasonably, dutifully, and properly in meeting the standard of care that was owed to the Plaintiff buyers. . ." Accordingly, defendant Century 21 Best presented a *prima facie* entitlement to summary judgment as a matter of law pursuant to CPLR 3212.

As it is undisputed that the parties have not completed discovery, and that significant discovery remains outstanding, including, a deposition of defendant Pellegrini and a deposition of defendant Century 21, defendant, Century 21's motion for summary judgment is denied without prejudice as it is premature (see, CPLR 3212[f]; *Groves v. Lands End Housing Co., Inc.*, 80 NY2d 978 [NY 1992]; *Ramos v. DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH*, 2007 NY Slip Op 1714 [2d Dept 2007]; *Yadgarov v. Dekel*, 2 AD3d 631 [2d Dept 2003]; *George v. New York City Transit Authority*, 306 AD2d 160 [1st Dept 2003]). Accordingly, defendant Century 21's motion for summary judgment pursuant to CPLR 3212 is hereby denied "with leave to renew when discovery, including examinations before trial of all parties, is complete." (See, *Ramos, supra*).

That branch of defendant Century 21's motion for summary judgment pursuant to CPLR 3211(a) (7) for failure to state a cause of action is decided as follows:

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a) (7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according

the plaintiff the benefit of every possible favorable inference \*\*\*." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (1455 *Washington Ave. Assocs. v. Rose & Kiernan*, *supra*, 770-771).

The Court notes that the first and fifth causes of action are against defendant Pellegrini, and as such, are not relevant to this branch of the motion. The portions of the remaining causes of action that relate to defendant Century 21 Best Realty attempt to make out causes of action for fraud and for negligent misrepresentation. The Court finds that plaintiffs have sufficiently pled causes of action for both fraud and for negligent misrepresentation as against defendant Century 21.

"In order to make out a claim for fraud, plaintiffs must prove 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" (*Joseph v. NRT, Inc.*, 853 NYS2d 481 [Civ Ct, NY Cty 2007][internal citations omitted]). "Although 'mere allegations of fraudulent intent are insufficient' the particularity requirement 'is not construed so strictly as to prevent an otherwise valid cause of action where it would be impossible for the plaintiff to state in detail the circumstances of the fraud because the knowledge of those details is in the exclusive possession of defendants.'" (*A. Morrison Trucking, Inc. v. Bonfiglio*, 824 NYS2d 752 [Sup Ct, Kings Cty 2006] [internal citations omitted]). It is well-established law that the cause of action for fraud must be pled with particularity (see *Id.*; CPLR 3016[b]).

In the instant case, the Court finds that through the Verified Complaint and through the affidavit of the plaintiffs themselves in opposition to the defendants' motions, plaintiffs have sufficiently pled a cause of action for fraud. Plaintiffs have alleged that Century 21 and its agents assured plaintiffs prior to the signing of the contract that the premises had a tax abatement and failed to tell them that it would be necessary for the seller to apply for said abatement which fraudulently misled the plaintiffs into believing that the premises already had an abatement which was false, which representation plaintiffs relied on and resulted in damages. Additionally, plaintiffs have not yet had the opportunity to depose Century 21 or its agent. Therefore, defendant, Century 21's motion to dismiss pursuant to CPLR 3211(a)(7) is hereby denied as to the cause of action for fraud as against defendant Century 21.

"In order to make out a claim for negligent misrepresentation, plaintiffs must demonstrate 'that defendant[s] had a duty, based upon some special relationship with them, to impart correct information, that the information given was false or incorrect and that plaintiffs reasonably relied upon the information provided.'" (See, *Joseph, supra*).

In the instant case, the Court finds that through the Verified Complaint and through the affidavit of the plaintiffs themselves in opposition to the defendants' motions, plaintiffs have sufficiently pled a cause of action for negligent misrepresentation. Plaintiffs assert that they contacted the defendant Century 21 and their agent showed them the premises. Plaintiffs allege that the agent from Century 21 told them that there was a 25 year tax abatement on the property because it was a new construction, when in fact there was no abatement and that if plaintiffs had known there was no abatement, they would not have purchased the premises. Additionally, plaintiffs have not yet had the opportunity to depose Century 21 or its agent. Therefore, defendant, Century 21's motion to dismiss pursuant to CPLR 3211(a)(7) is hereby denied as to the cause of action for negligent misrepresentation as against defendant Century 21.

Plaintiffs' cross motion which seeks leave pursuant to CPLR 3025(b) to plaintiffs to serve and file the Proposed Supplemental Summons and Amended Complaint is hereby granted solely to the following extent:

That branch of plaintiffs' cross motion which seeks to amend the complaint to add additional causes of action against defendant Nicholas Pellegrini and against defendant Century 21 Best Realty is hereby granted. It is well-settled law that

motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025(b); *Wirhouski v. Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]). "Leave to amend a complaint to add additional theories of law based upon facts formerly alleged should be freely given." (*Stuart v. Board of Directors of the Police Benevolent Association of the New York State Police, Inc.*, 86 AD2d 721 [3d Dept 1982][internal citations omitted]). "It is necessary that the defendant have had notice of the facts out of which the original and new cause of action arose." (*Allied Bank v. Fireman's Fund Ins. Co.*, 522 NYS2d 421 [Sup Ct, NY Cty 1987][internal citations omitted]).

As the new causes of action and the additional relief are based upon facts formerly alleged, and as the defendants had notice of such facts, that branch of plaintiffs' cross motion seeking to amend the complaint to add additional causes of action against defendant Nicholas Pellegrini and against defendant Century 21 Best Realty is granted.

That branch of plaintiffs' cross motion which seeks to amend the complaint to add Froylan Arguero as a party defendant is hereby granted. It is well settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025(b); *Wirhouski v. Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]). The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom." (*Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 [2d Dept. 1995]). The Court has discretion to add Froylan Arguero as a defendant to the action. CPLR Section 1003: Nonjoinder and misjoinder of parties states in relevant part, that "[p]arties may be added at any stage of the action by leave of court. . ." While a motion to add a party must be made on notice to everyone who is already a party, notice need not be given to the party sought to be added (David D. Siegel, *New York Civil Practice*, [4th ed. 2005] § 138, at 236-238; see, CPLR 1003). Plaintiffs demonstrated that Froylan Arguero should be joined as a defendant in this action, as plaintiffs submit a sworn affidavit asserting that Froylan Arguero made incorrect representations regarding the tax abatements.

Accordingly, that branch of plaintiffs' cross motion which seeks to join a party defendant (Froylan Arguero) is granted.

Plaintiffs are granted permission to serve and file the Supplemental Summons and Proposed Amended Complaint together with a copy of this order and notice of entry within thirty (30) days from the date of service of a copy of this Order with Notice of Entry.

The foregoing constitutes the decision and order of this Court.

Dated: September 8, 2008

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**Howard G. Lane, J.S.C.**