

Victorian Homes of Jericho, Inc. v Zaman

2008 NY Slip Op 32566(U)

September 15, 2008

Supreme Court, Nassau County

Docket Number: 4783-08/

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
VICTORIAN HOMES OF JERICHO, INC.,

Plaintiff,

- against -

MOHAMMED ZAMAN and SHOMA A. ZAMAN,

Defendants.

-----X
MOHAMMED ZAMAN and SHOMA A. ZAMAN,

Third-Party Plaintiffs,

- against -

LAFFEY ASSOCIATES, LLC, CENTURY 21 LAFFEY
ASSOCIATES OF BROOKVILLE, ROSALIND MORGAN,
MARK LAFFEY and PHILIP LAFFEY,

Third-Party Defendants.

-----X

TRIAL PART: 21

NASSAU COUNTY

INDEX NO: 004783/08

MOTION SEQ. NO: 01

SUBMIT DATE: 8/20/08

The following papers having been read on this motion:

- Notice of Motion..... 1
- Memorandum of Law... .. 2
- Opposition 3
- Memorandum4
- Reply Memorandum.....5

This action arises from a contract for the sale of real estate between the Plaintiff and the Defendants. The Plaintiff moves for summary judgment granting the relief sought in their complaint, that is, liquidated damages in the amount of \$92,500, currently held in escrow by the attorneys for the Plaintiff. The Defendants oppose the motion on the grounds that there exist triable issues of fact with respect to alleged misrepresentations by Brokers acting on behalf of the Plaintiffs with respect

to the real estate taxes on the property. The Defendants commenced a Third-Party Action against the real estate brokers on May 9, 2008.¹ The Third-Party Defendants joined issue by service of a verified answer.²

BACKGROUND

On December 5, 2007, the Plaintiff and Defendants contracted to sell real property known as 104 Old Cedar Swamp Road, Jericho, New York.³ The contract price was \$925,000 and the down payment, held in escrow by the attorneys for the Plaintiff, was \$92,500. Closing, originally scheduled for 30 days after receipt of a fully executed copy of the contract by the attorney for the Defendants, was adjourned to February 26, 2008 to enable the Defendants to obtain a mortgage commitment.

The Defendants appeared at the scheduled closing, but refused to consummate the transaction, based on a claim of fraud by the Plaintiff or its Broker in connection with a representation as to the actual 2007/08 real estate taxes on the property. The claim is that the listings made by the Brokers reported the School and General taxes to be \$13,805.92 per year,⁴ when they, in fact, were \$37,684.11.⁵

Based upon the refusal of the Purchasers to close title on February 26, the Plaintiffs established a "law date" of March 3, 2008.⁶ The Defendants' counsel responded by letter dated February 29, 2008, in which the Defendants rejected the "time of essence" law date, and alleged that the Defendants did not willfully default, because they were the victims of material misrepresentations by the Plaintiff and their Broker. The letter called for the return of the down payment.⁷ The Plaintiff responded with a facsimile transmission of March 29, 2008, reiterating the

¹ Affirmation in Opposition at fn. 1 and Exh. "A".

² Exh. "B" to Affirmation in Opposition.

³ Exh. "B" to Motion.

⁴ Exhs. "D", "E", and "G" to Affirmation in Opposition.

⁵ Exh. "H" to Affirmation in Opposition.

⁶ Exh. "E" to Motion.

⁷ Exh. "F" to Motion.

intent to appear at the stated time and place prepared to tender a deed. ⁸

According to the affidavit of the title company representative dated March 3, 2008, the Defendants did not appear for the closing of title. The deed was found to be in form acceptable for filing and there were no objections to closing which were not remedied on that date. ⁹ The Plaintiffs rejected the demand of the Defendants to refund the escrow deposit of \$92,500. ¹⁰

DISCUSSION

The Plaintiff's motion for summary judgment declaring the rights of the parties and awarding the Plaintiff liquidated damages in the amount of \$92,500 is granted. The Defendants have willfully defaulted on the contract of sale, ostensibly on the grounds that the real estate taxes were approximately three times what they understood them to be. Real estate taxes are not a matter peculiarly within the knowledge of the Plaintiff, and were equally ascertainable by the Defendants with the exercise of due diligence. ¹¹ In fact, the title report obtained by the Defendants reports the 2007/08 School Tax to be \$27,487.64 and the 2008 General Tax as \$11,502.73, for a total annual real estate tax of \$38,990.37. ¹²

The contract of sale constitutes the entire agreement between the parties. ¶¶ 12 and 33 explicitly state that the Defendants were not relying on any representations as to the condition of the property including "... the cost of operation or any other matter related to the Premises or the other property included in the sale", and that "... no statements, representations or warranties relating to the Premises have been made to the Purchaser, its agents and/or representatives by Seller or anyone on behalf of the Seller except those that are specifically included in this Contract". ¹³

The Defendants' Answer contains five counterclaims, none of which are valid. The First alleges mutual mistake of fact. If there were such a mistake, it was not between the Plaintiff and

⁸ Exh. "G" to Motion.

⁹ Exh. "F" to Motion.

¹⁰ Exh. "J" to Motion.

¹¹ *Kay v. Pollak*, 305 A.D.2d 637 (2d Dept. 2003).

¹² Exh. "C" to Motion.

¹³ Exh. "B" to Motion.

Defendants. The Plaintiffs made no representations as to the actual real estate taxes in the contract of sale, and actual taxes were equally knowable to both parties. The Second alleges a unilateral mistake of fact, which, in the absence of allegations of misconduct, including active concealment of facts only within the knowledge of the Seller, does not constitute grounds for recovery.¹⁴ The Third Counterclaim alleges that the Plaintiff's counsel did not respond in a timely fashion in response to Defendants' February 26, 2008 demand for a refund of the down payment. It is not clear from the record whether the March 4, 2008 correspondence from the Plaintiff to their counsel¹⁵ was forwarded to counsel for the Defendants. But whether or not it was, Defendants were well aware that the Plaintiff had declared them in default and had no intention of refunding the deposit.¹⁶

The Fourth Counterclaim alleges a breach of an implied covenant of good faith and fair dealing. But the Seller is not required to make any representation as to information ascertainable from the public record. " 'New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment' ".¹⁷

The Fifth Counterclaim alleges violations of General Business Law §§ 349, 350 and 350-a. But these statutes are, in part, designed to enable an individual to act in the place of the Attorney General with respect to consumer-related deceptive conduct. The claim by the Plaintiff involves only alleged misrepresentation of the actual real estate taxes in this single instance, and does not involve a systematic scheme which the law is intended to rectify. The threshold question for reliance on these statutes is whether or not there is a broad impact on consumers at large.¹⁸ For the same

¹⁴ *Matos v. Crimmins*, 40 A.D.3d 1053 (2d Dept. 2007).

¹⁵ Exh. "J" to Motion.

¹⁶ Exh. "E" to Motion.

¹⁷ *Matos v. Crimmins*, 40 A.D.3d 1053, 1054 — 1055, citing *Jablonski v. Rapalje*, 14 A.D.3d 484, 485 (2d Dept. 2005). *Jablonski* involved the question of whether the Plaintiff adequately stated a claim of active concealment with respect to bat infestation. The majority held that they adequately stated a cause of action, while the dissenting opinion was to the contrary.

¹⁸ *Green Harbour Homeowner's Assn., Inc. v. G.H. Development and Cosnt., Inc.*, 307 A.D.2d 465, 468 (3d Dept. 2003), citing *Walsh v. Libert. Mut. Ins. Co.*, 289 A.D.2d 842, 844 (3d

reason that this information is not solely within the knowledge of the Plaintiff, and that there was no active concealment, this Counterclaim also fails.¹⁹

There are also five Affirmative Defenses, none of which constitutes a defense to this action at law for breach of contract. The First Cause of Action requests a declaration of the rights of the parties in accordance with Civil Practice Law and Rules § 3017 (b), and is a valid claim for relief. The Second is the same as the Third Counterclaim, and is rejected for the same reasons stated. The doctrine of unclean hands, raised in the Third Defense, is irrelevant in the action at law. The claim that the complaint fails to name a necessary party is inappropriate. The action is based upon the contract between the Plaintiff and Defendant, and names all the parties to the agreement.

While it is not determinative of the issue before the Court, the Defendants should recognize that the answer to the tax controversy is contained in their own opposition papers.²⁰ For the 2007 tax year, the fractional assessment for the subject property was \$1,949. At the .25% equalization rate adopted by the County, this converts to a full value assessment of \$779,600. But for the 2008 tax year, the assessed value is \$5,474. At the same equalization rate, this converts to a full value of \$2,189,600, almost triple the value for the preceding year. The reported tax burden for 2007 was \$14,940.34, while that for 2008 was \$37,717.66.

While the issue of the accuracy of the Nassau County Assessment is not before the Court, it would appear that the subject, which was substantially damaged by fire, and being sold as is, was valued as if fully restored as of January 2, 2007, the valuation date for the 2008/09 tax year.

The answer, counterclaims, and all affirmative defenses are stricken. The motion by the Plaintiff is granted to the extent that the Defendants have willfully breached the contract of sale, and that the Plaintiff is entitled to retain the down payment in the amount of \$92,500. The Third-Party action commenced by the Defendants and Third-Party Plaintiffs is severed.

The parties on the Third Party Action are directed to appear for a preliminary conference in DCM on October 6, 2008 at 9:30 a.m.

Dept. 2001).

¹⁹ *Marsh v. Hasbrouck*, 37 A.D.3d 1010 (3d Dept. 2007).

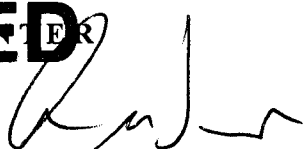
²⁰ Exh. "H" to Affirmation in Opposition.

This constitutes the decision and order of this Court.

DATED: September 15, 2008

ENTERED

SEP 18 2008



HON. ARTHUR M. DIAMOND
COUNTY CLERK'S OFFICE J.S.C.

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