

Marques v Wine Servs., Inc.
2009 NY Slip Op 30602(U)
March 10, 2009
Supreme Court, Suffolk County
Docket Number: 15385-2006
Judge: Emily Pines
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**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 12-18-2008
Motion Submit Date: 01-14-2009
Motion Sequence No's.: 001 MG
CASEDISP

_____ X
RUI MARQUES and JOEL PORTELA,

Plaintiff,

-against-

**WINE SERVICES, INC., ZORN & SONS, LLC,
AIRECO REAL ESTATE CORP.,
ANTHONY F. PAPIERO, SCOTT MALIN, ESQ.**

Defendants.

Attorney for Plaintiffs
William Porter, Esq.
1820 Middle Country Road
Centereach, New York 11720

Attorney for Defendants Papeiro and
Aireco RE
Kevin Foreman, Esq.
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Islandia, New York 11749

Attorney for Defendants Wine Services
ans Zorn & Sons
Glynn Mercep and Purcell, LLP
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Stoney Brook, New York 11790

Scott Malin, Esq.
150 Broad Hollow Road
Melville, New York 11747

ORDERED, that the motion (motion sequence number 001) by defendants, WINE SERVICES, INC. and ZORN & SONS, LLC¹, for summary judgment on the first and second causes of action is granted; and it is further

ORDERED, that the escrow agent, SCOTT MALIN, ESQ. is hereby directed to release the down payment in the amount of \$62,800.00 to counsel for defendants WINE SERVICES, INC., and ZORN & SONS, LLC., within thirty (30) days from the date herein.

This is an action arising out of two real estate contracts, both dated October 20, 2005, between plaintiffs, as buyers, and defendants, WINE SERVICES, INC. ("Wine") and ZORN & SONS, LLC. ("Zorn")(collectively referred to as "defendants"), as sellers. Defendant Aireco Real Estate Corp.

¹By Stipulation filed April 4, 2007, the action was discontinued with prejudice against defendants Aireco Real Estate Corp., and Anthony F. Papiero. Additionally, a third-party action brought by Aireco Real Estate Corp., and Anthony F. Papiero against William J. Porter, Esq., was also discontinued.

("Aireco") was the real estate broker and defendant Anthony Papiro ("Papiro") was the real estate sales person on the purchase. Specifically, plaintiffs entered into one contract (contract #1) for the purchase of vacant land, lots 10 and 11 Zorn Boulevard, Yaphank for the price of \$500,000.00 and a second contract (contract #2) for the purchase of the "vacant land between lot 11 and recharge basin" for the purchase price of \$127,997.00. Pursuant to the contracts, plaintiffs paid a down payment of \$50,000.00 on contract #1 and \$12,800.00 on contract #2, respectively. Defendant Scott Malin, Esq. was defendants' attorney on the contract and is named herein as the holder of the escrow funds. Contract #1 provided that the closing was to take place on or about November 5, 2005 and contract #2 provided that the closing was to take place on or about October 15, 2007.

Plaintiffs allege in their Complaint that they were interested in purchasing property for the operation of their business and that defendants Aireco and Papiro on behalf of Wine and Zorn represented to plaintiffs that the subject properties were zoned L1, Light Industrial, under the Code of the Town of Brookhaven and as such, plaintiffs could construct a building and operate their business. Plaintiffs admit that the contracts were subject to covenants and restrictions placed on the property by Wine and Zorn. These covenants and restrictions, filed in the office of the Suffolk County Clerk on June 16, 2001, provided that the property could only be used for offices or light industrial purposes or "any other use and occupancy first approved in writing" by Wine and Zorn and also required the approval of Wine and Zorn of all building plans. Significantly, the covenants and restrictions also prohibited the use of the property for outdoor storage of materials. Notwithstanding these recorded covenants and restrictions, plaintiffs allege that Wine and Zorn represented to them that they would permit them to use the property in accordance with the rules and regulations of the Town of Brookhaven such that they could operate their business. Plaintiffs allege that based upon these representations, they entered into the contracts for the purchase of the parcels. Subsequent to the execution of the contracts and the payment of the required down payments, plaintiffs allege that defendants informed them they could only build a specific type of building and that they were prohibited from any outdoor storage, which they needed to operate their business. Plaintiffs thus claim they were fraudulently induced to enter into the contracts based upon the false representations regarding the permitted uses of the property. Based on the foregoing, plaintiffs seek rescission of the contracts, a return of their down payments and counsel fees.

Defendants Wine and Zorn move for summary judgment dismissing the Complaint against them. Defendants argue that under the theory of *caveat emptor*, which applies to real estate contracts, the Complaint must be dismissed. Specifically, defendants assert that the contracts between the parties represented their entire agreement, that the subject covenants and restrictions were filed in the Suffolk County Clerk's office more than five (5) years prior to the execution of the contracts, and the plain language of the agreements bars plaintiffs' recovery.

Defendants rely on the following provisions of the contracts and the riders annexed to each contract:

11. **Condition of Property.** Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral, as to the physical condition, state of repair, use, cost or operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representatives, and shall accept the same "as is" in their present condition and state of repair, subject to reasonable use, wear, tear and natural deterioration between the date hereof and the date of closing (except as otherwise set forth in paragraph 16(e)), without any reduction in the purchase price or claim of any kind for any change in such condition by reason thereof subsequent to the date of this contract. Purchaser and its authorized representative shall have the right, at reasonable times and upon reasonable notice (by telephone or otherwise) to Seller, to inspect the Premises before Closing.

Riders to both contracts contained the following clauses:

1. It is expressly understood that the Seller has not made and does not make any representations as to the physical condition, operation or any other matter relating to the aforesaid premises, and it is not bound by any statements, representations or information that may have been made to the Purchaser by anyone, pertaining to the premises herein unless specifically set forth herein. The Purchaser hereby acknowledges that no such representations have been made and they have personally made a thorough inspection of the premises and are familiar with the condition of same and agree to accept same in their present condition "AS IS".
5. The premises are sold and conveyed subject to the following:
 - (1) Such state of facts as an accurate survey may show, provided same does not render title unmarketable; (2) Covenants, restrictions, utility easements and agreements of record as of the date of contract, if any, provided same are not violated by existing structures or the use thereof; (3) The violations of any covenant or restriction shall not be deemed an objection to title provided that title company insuring title shall agree to insure that such improvements may remain in their present location as long as same shall stand; (4) Encroachments and variations from the record line of hedges, retaining walls, sidewalks and fences shall not be deemed to render title unmarketable, provided that no "out of possession" issue is raised by the title company.
12. If the Purchasers default hereunder, Sellers' sole remedy (except as hereinafter set forth) shall be to retain the down payment as liquidated damages, it being agreed that Sellers' damages in

case of Purchasers' default might be impossible to ascertain and that the down payment constitutes a fair and reasonable amount of damages under the circumstances and is not a penalty. If Sellers default hereunder, Purchasers shall have such remedies as Purchasers shall be entitled to at law or in equity, including, but not limited to, specific performance.

Based on these clear and unambiguous provisions, defendants claim that plaintiffs cannot complain that they relied on misrepresentations not contained within the agreements, plaintiffs should be bound to the terms of the contracts they executed and that they are entitled to summary judgment dismissing the complaint and an Order directing the escrow agent to release the down payments to them.

Plaintiffs oppose the motion by affirmation of counsel and an affidavit by plaintiff Joel Portela. Portela states in his affidavit that plaintiffs were looking for a new place to relocate their construction business and went to Aireco and Papiro and told them what they were looking for in a parcel of property, and that they needed a place for outdoor storage of materials and equipment. Portela states that Papiro told him about the subject parcels and that the lots could be used as they needed it. Based on these representations, they hired an attorney who advised them to check with the Town of Brookhaven Building Department to determine whether the property could be used for a one story commercial building and outdoor storage. He states that he was advised that the zoning regulations allowed such use and therefore, entered into the contracts. Portel states that it was not until plaintiffs received the title report did they discover there were covenants and restrictions affection the type of building and prohibiting outdoor storage.² At that point, he claims he attempted to work out the type of building to be constructed, but to no avail. Therefore, plaintiffs did not close on the subject properties. Plaintiffs argue there is a question of fact as to whether the actions of the defendant sellers and the defendant agents were fraudulent with regard to their representations regarding the permitted uses of the subject properties and argue that summary judgment must be denied.

In reply, defendants reiterate that the plain language of the contracts bars plaintiffs from arguing reliance on any representations not contained within the agreements. Moreover, defendants argue that in the exercise of due diligence, plaintiffs should have researched the County Clerk's records and they would have discovered the subject covenants and restrictions. Defendants argue that they neither made any misrepresentations to plaintiffs, nor did they prevent plaintiffs from researching the records

²The Court notes that this claim appears somewhat contradictory to the allegation of the Complaint that plaintiffs were aware of the covenants and restrictions but were told that defendants would allow them to use the property as they needed and intended. **See, Complaint at ¶ SIXTEENTH.**

themselves prior to the execution of the contracts. Thus, they argue that summary judgment should be granted in their favor and the escrow agent be directed to release the funds to Wine and Zorn.

It is well established that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberger v. Brick & Ballerstein, Inc.**, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. **Zayas v. Half Hollow Hills Cent. School Dist.**, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). It is axiomatic that contract language that is clear and unambiguous on its face shall be enforced according to its terms. **Manzi Homes, Inc., v. Mooney**, 29 A.D.3d 748, 816 N.Y.S.2d 130 (2d Dept. 2006). Moreover, it is well settled that:

New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the sellers' 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. The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud. To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor.

Matos v. Crimmins, 40 A.D.3d 1053, 837 N.Y.S.2d 234 (2d Dept. 2007)(internal citations omitted). **See also, Mancuso v. Rubin**, 52 A.D.3d 580, 861 N.Y.S.2d 79 (2d Dept. 2008); Additionally, a specific merger clause contained within a contract may preclude a buyer from claiming he relied on any of the seller's alleged misrepresentations. **Simone v. Homecheck Real Estate Services, Inc.**, 42 A.D.3d 518, 840 N.Y.S.2d 398 (2d Dept. 2007).

In the case at bar, defendants have met their initial burden by the submission of the contracts and the riders annexed thereto. These agreements, entered into by parties, represented by counsel, specifically state that plaintiffs did not rely on any representations by defendants, or their agents, that the agreements were subject to covenants and restrictions and that plaintiffs were entering into the agreements based upon their own investigations of the properties. These were the clear and unambiguous terms of the contracts entered into by the parties. The covenants and restrictions, filed several years prior to the execution of the contracts, were easily discoverable as a filed public record and the contents thereof readily ascertainable by a reading thereof. **See, e.g., Rozen v. 7 Calf Creek,**

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LLC., 52 A.D.3d 590, 860 N.Y.S.2d 155 (2d Dept. 2008).

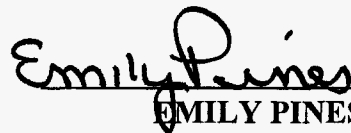
In opposition, plaintiffs failed to raise a triable issue of fact warranting a trial. Plaintiffs have failed to demonstrate that defendants thwarted their efforts to fulfill their obligations under the doctrine of caveat emptor. There is no evidence that defendants interfered with their ability to find the covenants and restrictions which were filed in the office of the County Clerk more than five (5) years prior to the execution of the subject contracts.

Based on the foregoing, the motion by defendants, WINE SERVICES, INC. and ZORN & SONS, LLC, for summary judgment is granted, the complaint is dismissed against the remaining defendants and the escrow agent, SCOTT MALIN, ESQ. is hereby directed to release the down payment in the amount of \$62,800.00 to counsel for said defendants, within thirty (30) days from the date herein. In rendering this determination, the Court notes that while defendants' notice of motion only sought dismissal of the first and second causes of action, all four causes of action are inextricably linked. In its wherefore clause, plaintiff seeks an award of the down payment and attorneys fees. The fourth Cause of Action is against Scott Malin as escrow agent only. In view of this Court's determination that Wine Services, Inc., and Zorn & Sons, LLC are entitled to return of the monies sought, the entire complaint is hereby dismissed.

This constitutes the *DECISION* and *ORDER* of the Court.

Submit Judgment on ten (10) days notice of settlement.

Dated: March 10, 2009
Riverhead, New York



EMILY PINES
J. S. C.