Miller v Icon Group, LLC

2009 NY Slip Op 30892(U)

April 9, 2009

Supreme Court, New York County

Docket Number: 603055/07

Judge: Milton A. Tingling

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SCANNED ON 4/20/2009
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MILTON A. TINGLING J.S.C. Justice

PART 44

Index Number : 603855/2007

MILLER, HARVEY S. SHIPLEY

VS.

ICON GROUP, LLC

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 603055-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

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

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

FILED
APR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/9/09

MAT 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
NEW YORK COUNTY - - PART 44

HARVEY S. SHIPLEY MILLER, As Trustee of the Trust known as Judith Rothschild Foundation,

Index No.: 603855/07

Plaintiffs,

- *against* -

DECISION/OR[DER]

THE ICON GROUP LLC,

Defendant.

FILED
APR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

TINGLING, MILTON, J.:

In this action, plaintiff Harvey S. Shipley Miller, as Trustee of the Trust known as Judith Rothschild Foundation (Miller), seeks damages, including a $1.7 million down payment, from defendant The Icon Group LLC (Icon) for Icon's alleged breach of a contract for the sale of real property located at 1110 Park Avenue, New York, New York. Icon has asserted as an affirmative defense that it was fraudulently induced to enter the contract. Plaintiff now moves for summary judgment in its favor.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v City of New York,* 49 NY2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has

been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." *Zuckerman*, 49 NY2d at 562.

Plaintiff was, at times relevant to the complaint, the owner of a brownstone building located at 1110 Park Avenue in Manhattan (subject property). Defendant Icon, of which Terrence Lowenberg (Lowenberg) and Todd Cohen (Cohen) are the principals, is in the business of managing various Manhattan real estate properties that are owned by entities in which Lowenberg, Cohen, and their family members have an ownership interest (Lowenberg Dep. at 9-10, 18). In or around May 2007, Icon became interested in acquiring the subject property. Lowenberg testified at his deposition that he was informed by a real estate broker that the subject property was for sale, and after discussing the matter with Cohen, he made an offer to purchase the subject property (*id.* at 25-26, 28-29). After negotiations between the parties, both represented by attorneys, Icon agreed to purchase the subject property for $17 million (*id.* at 34-36). Lowenberg's father and Cohen's father were also involved in the decision to purchase the subject property, agreed with the purchase price of $17 million, and agreed to provide the source of money for the purchase of the property (*id.* at 31-33).

On June 6, 2007, the parties executed a contract of sale for the subject property (*id.* at 37). At the signing, Miller,

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Lowenberg and Cohen were present with their respective counsel. Lowenberg signed the agreement on behalf of Icon, and Cohen wrote a check for a down payment of $1.7 million (*id.*). As noted on the contract, it was agreed that the check would not be deposited until June 11th (*see* Contract, Ex. 4 to Kurtz Aff. in Support, at 20), although there is some dispute about the reason for delaying the deposit. According to Lowenberg, at the June 6 signing, Miller was told that Icon's investor, Marty Cohen, the father of Todd Cohen, was away for the weekend, and funds for the purchase would not be available until after he returned on Sunday, June 10th (*id.* at 36, 38), but Miller insisted that the contract be signed on June 6 (*id.* at 39). Other than the issue of the delay in payment, Lowenberg acknowledged that there were no other unresolved issues at the contract signing (*id.* at 38-39).

According to Lowenberg, at the time that he was approached by a real estate broker about the subject property, the broker represented that the property located at 1108 Park Avenue (adjacent property), not owned by plaintiff, might also be available, and the two buildings could be developed together (*id.* at 26-27; *see* Lowenberg Aff., ¶ 3). Lowenberg claims that he later spoke with Miller about the adjacent property and was told by Miller that Joseph Bogen (Bogen), the owner of the adjacent property, was willing to sell 1108 Park Avenue to the purchaser of 1110 Park Avenue for a price in the range of $10 million, but

he would not sell it until after the closing on the subject property, and that only Miller could deal with Bogen (Lowenberg Aff., ¶¶ 4-5). After the contract to purchase the subject property was signed, on or about June 7, Lowenberg contacted Bogen, and was informed that he was unwilling to sell his property (*id.*, ¶ 15).

On June 12th, after the down payment check was deposited, and after learning that it would not be able to acquire the adjacent property, Icon stopped payment on the check, and "repudiated" the contract for the purchase of the subject property (*see* Lowenberg Dep at 53; Lowenberg Aff., ¶ 17). Plaintiff subsequently sold the subject property to another buyer for $15 million (Complaint, ¶ 13).

In support of the motion for summary judgment, plaintiff has presented evidence establishing the existence of a fully executed contract of sale between the parties, and defendant's failure to make the down payment by stopping payment on the check given to plaintiff at the contract signing. Plaintiff has thereby demonstrated his prima facie entitlement to judgment as a matter of law as to liability for breach of contract. *See Daimon v Fridman*, 5 AD3d 426, 427 (2d Dept 2004) (dishonor of down payment check is a material breach of contract of sale).

In opposition, Icon does not dispute that it signed a contract of sale, and that, by stopping the check, it did not

make the down payment (*see* Amended Answer, ¶¶ 28-29, 31). Rather, defendant contends that it executed the contract of sale with the understanding, based on representations of plaintiff, that Icon would be able to purchase the property located at 1108 Park Avenue at a reasonable price and that Miller would facilitate the purchase. Defendant asserts that its purchase of the subject property was contingent upon its ability to purchase the adjacent property. Icon thus alleges that it was fraudulently induced into entering the contract of sale for the subject property by Miller's misrepresentations that Icon would be able to purchase the adjacent property from Bogen at a price of approximately $10 million, that Miller would facilitate such purchase, and that only Miller could discuss the transaction with Bogen (*see id.*, ¶ 17; Lowenberg Aff., ¶¶ 4-6).

"The parol evidence rule forbids proof of an oral agreement that might add to or vary the terms of a written contract that was intended to embody the entire agreement." *Stage Club Corp. v West Realty Co.*, 212 AD2d 458, 459 (1st Dept 1995); *see Marine Midland Bank-Southern v Thurlow*, 53 NY2d 381, 387 (1981); *Sabo v Delman*, 3 NY2d 155, 161 (1957); *Stone v Schulz*, 231 AD2d 707, 707 (2d Dept 1996). It is not a bar, however, to introducing extrinsic evidence to establish that there was fraud in inducing the agreement. *See Danann Realty Corp. v Harris*, 5 NY2d 317, 320 (1959); *Sabo*, 3 NY2d at 162. Further, a general merger clause is

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ineffective to exclude parole evidence of fraud in the inducement. *See Danann Realty Corp.*, 5 NY2d at 320; *Sabo*, 3 NY2d at 162. "However, where the person alleging fraud specifically disclaims reliance upon oral representations, parole evidence is inadmissible." *Mahn Real Estate Corp. v Shapolsky*, 178 AD2d 383, 385 (1st Dept 1991); *see Danann*, 5 NY2d at 320-321; *Citibank, N.A. v Plapinger*, 66 NY2d 90 (1985); *Taormina v Hibsher*, 215 AD2d 549 (2d Dept 1995). Moreover, when a person claiming to have been defrauded has specifically disclaimed reliance on oral representations, he may himself be guilty of deliberately misrepresenting his true intentions, and the parole evidence rule applies. *See Citibank, 66 NY2d* at 94; *Danann*, 5 NY2d at 323.

To sustain its defense of fraudulent inducement, defendant must prove a representation of a material fact which was false and known by plaintiff to be false, made for the purpose of inducing defendant to rely upon it, justifiable reliance by defendant on the misrepresentation, and resulting injury. *See Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996); *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 (1958); *Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 98 (1st Dept 2006). Although mere opinions or predictions of future events will not sustain an action for fraud, a statement concerning a future event which is made with the knowledge that the event will not occur, is deemed a statement of a material

existing fact sufficient to support a fraud action. *See Channel Master Corp.*, 4 NY2d at 407; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005); *Cristallina S.A. v Christie, Manson & Woods Intl., Inc.*, 117 AD2d 284, 294-295 (1st Dept 1986).

To demonstrate reliance, defendant must show that it was induced to act or refrain from acting to its detriment by virtue of the alleged misrepresentation. *Shea v Hambros PLC*, 244 AD2d 39, 46 (1st Dept 1998). The asserted reliance must be justifiable. *Danaan*, 5 NY2d at 322. The reliance must also be reasonable. *Stuart Silver Assocs., Inc. v. Baco Dev. Corp.*, 245 AD2d 96, 98 (1st Dept 1997); *see Global Minerals & Metals Corp.*, 35 AD3d at 99.

Further, "'if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations'." *Danaan*, 5 NY2d at 322 (citations omitted); *see Stuart Silver Assocs., Inc.*, 245 AD2d at 98-99; *Goldman v Strough Real Estate, Inc.*, 2 AD3d 677, 678 (2d Dept 2003); *LaBarbera v Marino*, 192 AD2d 697, 698 (2d Dept 1993); *Century 21, Inc. v F.W. Woolworth Co.*, 181 AD2d 620,

625 (1st Dept 1992). Similarly, when a party has been put on notice of the existence of material facts and nevertheless proceeds with a transaction without further investigation or without "'inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented'." *Schwartz v Ross*, 233 AD2d 229, 230 (1st Dept 1996), quoting *Rodas v Manitaras*, 159 AD2d 341, 343 (1st Dept 1990); *see Mirandi v 210 W. 19th St. Condominium*, 248 AD2d 198, 199-200 (1st Dept 1998); *Global Minerals & Metals Corp.*, 35 AD3d at 100.

In this case, the contract contained merger and disclaimer clauses (*see* Contract of Sale, §§ 5.02, 18.02). Section 18.02 provided:

> This contract embodies and constitutes the entire understanding between the parties with respect to the transaction contemplated herein, and all prior agreements, understandings, representations and statements, oral or written, are merged into this contract. Neither this contract nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument signed by the party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

Section 5.02 further provided:

> Before entering into this contract, Purchaser has made such examination of the Premises, the operation, income and expenses thereof and all other matters

> affecting or relating to this transaction as Purchaser deemed necessary. In entering into this contract, Purchaser has not been induced by and has not relied on any representations, warranties or statements, whether express or implied, made by Seller or any agent, employee or other representative of Seller or by any broker or any other person representing or purporting to represent Seller, which are not expressly set forth in this contract, whether or not any such representations, warranties or statements were made in writing or orally.

Even if the above contractual provisions are not sufficiently specific to bar parole evidence of alleged misrepresentations about the status of the adjacent property (*but see Taormina v Hibsher*, 215 AD2d 549, *supra* [similar provisions sufficient to bar allegations of misrepresentations about status of adjacent property]; *Sorenson v Bridge Capital Corp.*, 30 AD3d 1144 [1st Dept 2006][acknowledgment that no reliance on representations with regard to purchase of condominium units was sufficiently specific]), defendant's asserted reliance on any alleged misrepresentations of plaintiff concerning the availability and purchase price of the adjacent property was not justified or reasonable.

At his deposition, Lowenberg testified that he knew that, notwithstanding a contract provision that Miller would get an additional $500,000 if Icon purchased the adjacent property, he did not have the right to cancel the contract if Icon could not

purchase the 1108 Park Avenue property (Lowenberg Dep. at 48-49). It was also his understanding that there was nothing in the contract that conditioned the purchase of the subject property on Icon's purchase of the adjacent property (*id.* at 56-57). Icon also agreed, as stated in Rider A to the contract, that it would make "reasonable commercial efforts" to purchase the adjacent property located at 1108 Park Avenue (*see* Rider A to Contract of Sale, Ex. 4 to Kurtz Aff. in Support).

Defendant's claim that the purchase of the subject property was contingent on its purchase of the adjacent property is contradicted by Lowenberg's own deposition testimony. To the extent that defendant contends that it was relying on Miller's representations that he would effectuate the purchase of the adjacent property, the language in Rider A that defendant was obligated to make reasonable commercial efforts to acquire the adjacent property, evidences that plaintiff did not guarantee that defendant would be able to acquire the property. Defendant was also put on notice by the language of Rider A of the existence of material facts and nevertheless proceeded to sign the contract of sale without inserting any language for its protection.

Additionally, facts concerning the availability and selling price of the adjacent property cannot be said to be facts peculiarly within the knowledge of plaintiff or that could not

have been discovered by the exercise of ordinary intelligence. *Compare Century 21, Inc. v F.W. Woolworth Co.*, 181 AD2d 620, *supra* (extent of asbestos on premises was not detectable to untrained eye and so questions of fact existed as to whether fact was peculiarly within seller's knowledge). Although Lowenberg asserts that he relied on Miller's representations that only he could deal with Bogen until after Icon closed on the subject property (Lowenberg Dep. at 50, 55), as experienced business persons, Lowenberg and Cohen had an affirmative duty "to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transaction ... ." *Global Minerals & Metals Corp.*, 35 AD3d at 100. Defendant could have easily discovered that the adjacent property was not for sale. Moreover, where, as here, a contract is negotiated at arm's length by counsel for both parties, the exercise of due care would have warranted inclusion in the contract of the alleged condition of sale. *See Mirandi v 210 W. 19th St. Condominium*, 248 AD2d 198, *supra*.

While the issue of reasonable reliance is not often subject to summary disposition (*see Brunetti v. Musallam*, 11 AD3d 280, 281 [1st Dept 2004]), it has been repeatedly held, in cases involving circumstances comparable to those in this case, that the reasonableness of the plaintiff's reliance can be determined on a summary judgment motion. *See Global Minerals & Metals*

Corp., 35 AD3d at 98; *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389, 391 (1st Dept 2005); *Shea v Hambros PLC*, 244 AD2d 39, 47 (1st Dept 1998). *Compare Segal v Cooper*, 49 AD3d 467 (1st Dept 2008)(fraud is a factual issue not to be resolved on motion to dismiss addressed to the pleadings). Here, the court finds that the evidence is sufficient to establish that defendant's reliance on any alleged misrepresentations was unreasonable.

In view of the above, the court declines to grant defendant's request to conduct further discovery. Defendant fails to identify any facts available to it that would justify opposition to the instant motion. *See Global Minerals & Metals Corp.*, 35 AD3d at 103.

Accordingly, for the reasons set forth above, it is

ORDERED that plaintiff's motion is granted and plaintiff is awarded summary judgment as to liability; and it is further

ORDERED that an assessment of damages is directed; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

Dated: 4/9/09

MILTON TINGLING, J.S.C.

Judge Milton A. Tingling

FILED
APR 20 2009
COUNTY CLERK'S OFFICE
NEW YORK