

**Pikus v Ramirez**

2009 NY Slip Op 30946(U)

April 22, 2009

Supreme Court, New York County

Docket Number: 602262/06

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 602262/2006

PIKUS, JEFFREY

vs.

RAMIREZ, CARMEN

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

**FILED**

APR 24 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: April 22 2009

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Jeffrey Pikus d/b/a  
Bluestar Properties, Inc.

Plaintiff (s),

**-against-**

Carmen Ramirez and Ricardo Ramirez,

Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 602262/06  
Seq. No.: 002

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
APR 24 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Defs' n/m (3212) w/RDeV affirm, CR affid, exhs .....	1
Pltfs' opp w/TWB affirm, JP affid, exhs .....	2
Defs' reply w/RDeV affirm .....	3

*Upon the foregoing papers, the decision and order of the court is as follows:*

Plaintiff Jeffrey Pikus d/b/a Bluestar Properties, Inc. ("plaintiff" or "Pikus") seeks to recover monetary damages from defendants Carmen Ramirez and Ricardo Ramirez ("defendants" or "the Ramirezes") arising from an alleged breach of contract. Issue has been joined and the defendants asserted counterclaims against Pikus, also based upon claims of breach of contract.

The court now has before it defendants' motion for partial summary judgment to dismiss eight of the nine causes of action set forth in the complaint. The note of issue has been filed and this motion is timely; it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision is as follows:

**Arguments presented**

Plaintiff entered into a contract of sale to purchase the building located at 15 Wadsworth Avenue, New York, New York ("premises") from the Ramirezes, the owners and sellers. The building is a multi-family residence and the Ramirezes lived in one of the apartments (5D). The building's superintendent, Washington Ramirez (and Ricardo Ramirez's brother), lived in apartment 3E. Plaintiff contends that he was denied access to either of these apartments so he could see what condition they were in before he signed the contract and before the closing. He contends he asked to see the apartments many times, but the Ramirezes always found a reason why he could not.

Pikus alleges that neither the Ramirezes nor Washington vacated their apartments timely, but remained in occupancy after the closing. Pikus contends that both apartments were delivered to him in an uninhabitable condition and that their deterioration was beyond the normal wear and tear he would have expected the apartments to have. Although Pikus admits he did not examine either apartment prior to signing the contract or the closing, he had the right to do under the contract of sale and the contract states that he had, in fact, inspected both apartments and taken other steps. Pikus claims he was fraudulently induced into signing the contract because the defendants showed other apartments in the building that they told him were in a condition comparable to the apartments he had not seen.

As per the contract of sale dated May 3, 2005 ("contract of sale"), the purchase price for the building was \$2,500,000. Paragraph 25 of the rider to the contract of sale ("rider"), provides that shall be delivered "as is where is" at closing. It also provides that "The Purchaser understands that there are numerous violations and other problems related to

the Premises and consents to taking title subject to all violations and problems related to the Premises at the time of closing. Purchaser may not cancel this agreement because of such violations and problems." The contract of sale has a rider ("rider"). The rider provides at paragraph 4 that the purchaser (Pikus) had "the right to inspect the Premises on reasonable notice to Sellers. Purchaser will not inspect the Premises more than five (5) times between the execution hereof and closing. In addition to said five times, Purchaser's lender may also inspect the Premises, which shall not be included in said inspections."

The closing was originally scheduled for July 5, 2005, but actually occurred on July 25th. By written agreement dated July 12, 2005 ("occupancy agreement"), plaintiff and defendants agreed that not only could the sellers (the Ramirezes) remain in occupancy of their apartment (5D) until after the closing, Washington could stay in occupancy of his apartment (3E) as well. As per the occupancy agreement, the Ramirezes could stay in apartment 5D (without creating any tenancy) until September 12, 2005, provided they paid use and occupancy ("U&O") of \$1,348 per month and vacated apartment 5D by September 12, 2005. Washington could also remain in occupancy of apartment 3E until September 12, 2005, but without paying any U&O, provided the Ramirezes used their "best efforts" to deliver 3E vacant to Pikus no later than September 12, 2005. Thereafter, however, Pikus could charge, collect and the defendants would be responsible for the payment of U&O in the amount of \$1,348 per month for apartment 3E as well. The Ramirezes placed the sum of \$25,000 in escrow with their attorney to insure compliance with the occupancy agreement and for the following purposes:

"1) [to] Pay to purchaser any outstanding use and occupancy for the two apartments (5D & 3E), and

"2) [to] Pay to purchaser all costs associated (including legal fees) with the vacating of said apartments should either or both of the foregoing remain in possession after September 12, 2005."

Section 5 of the contract of sale provides that the premises are being sold and purchaser takes "as is where is." Sections 5.01 and 5.02 provide as follows:

"§5.01 Purchaser has inspected the premises, is fully familiar with the physical condition and state of repair thereof, and subject to [certain other provisions] shall accept the Premises "as is" and in their present condition, subject to reasonable use, wear, tear and natural deterioration between now and the Closing Date, without any reduction in the Purchase Price for any change in such condition by reason thereof subsequent to the date of this contract. Purchaser takes "as is where is."

"§ 5.02 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 upon any representations, warranties or statements, whether express or implied, made by Seller or any agent, employee or other representative of Seller ... which are not expressly set forth in this contract ..."

Paragraph 9.04 of the contract of sale "[n]o fixtures, equipment or personal property included in this sale shall be removed from the Premises, the same are replaced with similar items of at least equal quality prior to closing."

Pikus has brought this action for breach of contract based upon allegations that the defendants failed to pay use and occupancy for either apartment, even though they did not surrender them until September 2005, defendants did not allow plaintiff to physically inspect either apartment before plaintiff signed the contract or the closing, he incurred legal fees

obtaining possession of apartment 3E, and both apartments were destroyed by the time he obtained possession of them.

Plaintiff's 2<sup>nd</sup> and 3<sup>rd</sup> causes of action are for post-closing damages to apartments 5D and 3E, respectively. His 4<sup>th</sup> cause of action is for fraud in the inducement as to each apartment. His 5<sup>th</sup> and 6<sup>th</sup> causes of action are to recover monetary damages equal to the cost of restoring apartment 3E and 5D to a rentable condition, comparable to what they were prior the closing. The 7<sup>th</sup> and 8<sup>th</sup> causes of actions are based on claims the sellers removed fixtures, etc., from the apartments and building and continued to collect rent from some of the tenants although they had no right to. Plaintiff's 9<sup>th</sup> cause of action is for lost profits because the apartments were unrentable for some time. The Ramirezes contend they are entitled to summary judgment dismissing all but the 1<sup>st</sup> cause of action, based upon plaintiff's own deposition testimony which is that he never physically examined the subject apartments either before he signed the contract or before the closing.

The defendants deposed Pikus ("EBT"). Pikus testified at his EBT that he was in the building many times before he executed the contract and he saw different parts of it and different apartments. He did not, however, ever inspect either of the subject apartments. He did not see (or apparently ask for) photographs of either apartment nor did anyone inspect them on his behalf.

Pikus, however, in opposition to defendants' motion relies on his testimony that he asked the defendants many times if he could inspect the apartment, but they refused, urging him instead to believe the two apartments were in comparable condition to other apartments he was being shown. At his deposition and in his sworn affidavit in opposition to the motion, Pikus states that the Ramirezes moved out of apartment 5D after the closing

but did not surrender possession to him. Instead, they allowed their adult son and his girlfriend to move in temporarily. According to Pikus, he did not obtain possession of either apartment 3E or 5D until September 20, 2005 when one of his employees (the temporary superintendent) found the doors to apartment 3E and 5D unlocked and the apartments vacant.

Plaintiff has also testified that the conditions he observed when he gained possession of the apartments were deplorable. He contends these conditions are depicted in photographs he took in September 2005, after he gained possession of the apartments. The black and white photographs show some wires, plastered areas, missing light fixtures, missing tiles and holes in the walls. Pikus testified that he "[couldn't] imagine someone living in this apartment with loose wires hanging from light fixtures. It's a fire hazard. It's very dangerous." Thus, Pikus contends that the condition of the apartment must have changed (it was "destroyed" by the Ramirezes), based upon the seller's statements that they were in the same (habitable) condition of the other apartments he was shown. Pikus testified at his EBT and reiterates in his affidavit, however, that he does not actually know when the changes occurred.

Defendants argue that plaintiff has absolutely no evidence that the apartments were in any different condition in September 2005 than they were at the time he signed the contract in May 2005. The Ramirezes further contend that plaintiff has no evidence in admissible form or fact witnesses with first hand knowledge of the condition either apartment was in at the time of the contract or closing, despite discovery having been completed and the note of issue filed. Defendants have testified and reiterate in Mrs. Ramirez's sworn affidavit in support of this motion that they did not do nor suffer anything to

be done to either apartment that would have changed its condition, let alone remove any fixtures from them, or the building nor did they destroy any of the apartments' contents.

According to Mrs. Ramirez, Pikus did, in fact, inspect both subject apartments many times, although she could not remember the exact dates. As she examined the photographs taken by Pikus at her EBT, Mrs. Ramirez was able to identify some of the belongings she left behind. However, she also observed and testified that some things did look different than she had left them. She also testified that it looked like someone had done work in the apartment after she had moved out because she could see paint and plaster in the photographs which she had not left behind they moved out. The Ramirezes denied they removed any fixtures from their apartment or the building and Mrs. Ramirez testified she even left behind "two beautiful lamps" she had bought not long ago and was apparently fond of.

### **Discussion**

The movant on a motion for summary judgment has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). It is only when the proponent of the motion makes a prima facie showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman v. City of New York, supra at 562.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or

debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 AD2d 161, 162 (1st Dept 1996). However, general allegations of a conclusory nature that are unsupported by competent evidence are insufficient to defeat a motion for summary judgment. Alvarez v Prospect Hospital, 68 NY2d 320, 324-25 (1986). Furthermore, the court cannot resolve issues of credibility on a motion for summary judgment because it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 (1974).

Fraudulent Inducement - 4<sup>th</sup> cause of action

In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract. Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320, 323 (1st Dept 2004); Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114 (1st Dept 1998).

Here, plaintiff claims he relied upon defendants' assurance that the apartments he had not seen were in the same or comparable condition to apartments he had inspected at the premises before signing the contract to buy the premises. Leaving aside the factual dispute about whether he did or did not inspect either subject apartment, plaintiff argues that he expected the apartments would be in a certain condition, allowing for wear and tear, but he found them to be in a much worse condition than he had anticipated when he was finally able to inspect them.

The misrepresentations that defendants allegedly made to plaintiff (assuming they could be proved by plaintiff at trial) are neither collateral nor extraneous to the parties' contract of sale, but an integral part of it. The contract of sale provides that the premises

were being sold - and accepted by the buyer - in an "as is where is" condition. It also states that Pikus had inspected the premises before signing the contract. Thus, any claim by Pikus that he was fraudulently induced into signing the contract fails. Not only was he able to (indeed, obligated to) inspect the premises to ascertain the condition they were in before he signed the contract, even if there were misrepresentations they were not collateral to the contract. Moreover, the contract includes a merger clause which states that the buyer has inspected the premises before signing the contract and agrees to accept it in its "as is where is" condition, without making any representation as to what that condition is. It was Pikus' duty to determine the apartment's condition before he signed the contract by physically inspecting it; the oral representations - even if puffery or untrue- do not survive the execution of the written contract. Therefore, Pikus' claim of fraud against the Ramirezes was extinguished upon closing. McPherson v. Husbands, 54 A.D.3d 735, 737 (2<sup>nd</sup> dept 2008) (internal citations omitted). When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2<sup>nd</sup> Dept 2003). Since plaintiff failed to state a cause of action for fraudulent inducement, and even if he did, defendants have proved their defense which is that the purchaser bought the premises in an "as is where is" condition and no representations survived the closing, defendants' motion for summary judgment dismissing the 4<sup>th</sup> cause of action must be, and hereby is, dismissed. *2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and and 6<sup>th</sup> causes of action*

These claims are all based upon allegations that neither apartment was delivered to him in the same condition they were at the time he signed the contract. Plaintiff contends the apartments were changed, if not destroyed by the defendants or their agents.

Specifically, Pikus contends fixtures were removed, holes punched into the wall, and wires were left dangling. Plaintiff provides photographs which show some of the conditions he described. Defendants deny these photographs are an accurate representation of what their apartment (5D) looked like when they moved out or apartment 3E when they last saw it. There is, however, testimony by plaintiff that the Ramirez's son and his girlfriend moved into apartment 5D temporarily, after the defendants moved out and before the keys were surrendered to Pikus. There is also testimony by Mr. Ramirez that he gave the keys to apartment 5D to Pikus' new superintendent (also surname Ramirez, but no relation). Neither defendant saw the condition that apartment 3E was left in.

Since there are factual disputes about whether either or both apartments were damaged after the closing, and the court cannot resolve issues of credibility on a flat record, but they must be decided by the jury who can weigh the evidence and draw legitimate inferences therefrom, defendants' motion for summary judgment dismissing the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> causes of action must be, and hereby is, denied. S.J. Capelin Assocs. v. Globe Mfg. Corp., 34 NY2d 338 (1974).

*7<sup>th</sup> and 8<sup>th</sup> causes of action*

These causes of action deal with changes allegedly made by the Ramirez's or their agents to the building and the subject apartments, including the removal of fixtures, like security cameras, and defendants' acceptance of rental payments made to them by some of the tenants. Although paragraph 9.04 of the contract provides that no fixtures shall be removed from the building, unless they are replaced with fixtures of similar quality prior to closing, Pikus testified at his deposition that he noticed after he signed the contract that the security cameras at the building and its canopy were removed. Thus, the fixtures were

removed after the contract was signed , but before the closing took place on July 25<sup>th</sup>.

Pikus, nonetheless, proceeded with the closing without any objections. The obligations of the seller did not survive the closing (paragraph 16.01) and at closing Pikus took the premises "as is where is."

Under these circumstances, Pikus has no recourse against the sellers, and therefore, defendants' motion to dismiss the 7<sup>th</sup> and 8<sup>th</sup> causes of action based upon allegations that the security cameras and awnings were removed, but not replaced as required under the contract, must be granted and those claims dismissed.

To the extent, however, that the 7<sup>th</sup> and 8<sup>th</sup> causes of action are based upon plaintiff's allegations, that the Ramirezes or their agents (or Washington) removed fixtures, etc., from either of the apartments after the closing, or the Ramirezes continued to collect rent from the tenants, although they had no right to do so, those claims are viable and present factual issues for the jury to decide. Both Ramirezes deny they removed anything from their apartment and claim Washington did not do so either. Plaintiff has, however, raised issues of fact that have to be tried. Therefore, defendants' motion as to these claims is denied.

*Lost profits - 9<sup>th</sup> cause of action*

Pikus contends he spent money to restore the apartments so as to make them habitable. To the extent that his claims are based upon changes made by the defendants (or that they are responsible for) post-closing, before Pikus obtained possession of either one of them, Pikus has raised issues of fact to defeat defendants' motion, as more thoroughly addressed in other parts of this decision. However, for reasons already addressed, Pikus cannot litigate his claims based upon changes to the apartments during the period prior to the contract of sale or prior to closing. Consequently, to the extent the 9<sup>th</sup>

cause of action alleges damages at or prior to the date of closing, defendants' motion for summary judgment is granted. To the extent, however, that damages are alleged after closing and before the apartments were surrendered to Pikus, the motion is denied as there are issues of fact to be decided at trial.

### Conclusion

Defendants' have prevailed on their motion and summary judgment is granted dismissing plaintiff's 4<sup>th</sup> cause of action for fraudulent inducement. That cause of action is severed and dismissed. The 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> causes of action are limited to damages allegedly sustained by plaintiff after closing and before possession of the apartments were delivered to him. Defendants' motion for dismissal of the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> causes of action is denied in its entirety as there are triable issues of fact.

Since this case is ready for trial and plaintiff filed the note of issue, plaintiff shall within Thirty (30) Days hereof serve a copy of this decision and order on the office of trial support so the case can be scheduled for trial.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York  
April 22, 2009

So Ordered:

Hon. Judith J. Siche, J.S.C.

