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SCANNED ON 5/5/2009

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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 603789/2006
SHILLINGTON, ANGUS
VS.
RILEY, JACQUELINE
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 603789/06
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-E	1, 2
Answering Affidavits — Exhibits A+B	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

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

FILED
MAY 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 30, 2009

MARTIN SHULMAN J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 1

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ANGUS SHILLINGTON and LISA TORNELL,

Plaintiffs,

-against-

Index No. 103789/06

JACQUELINE RILEY, COLDWELL BANKER HUNT KENNEDY and SINVIN REALTY,

Defendants.

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Martin Shulman, J.:

Defendant Coldwell Banker Hunt Kennedy ("Coldwell Banker" or "defendant") moves for summary judgment dismissing the complaint as against it.

Plaintiffs, prospective buyers of a cooperative apartment, are seeking the remainder of the down payment they tendered in anticipation of purchasing a cooperative apartment in Tribeca, owned by defendant Jacqueline Riley. Plaintiffs settled with defendant Riley, who returned a portion of the down payment ($150,000.00), and are seeking the balance ($55,000.00) from the remaining defendants.

Plaintiffs allege that prior to entering into the contract to purchase the apartment, they were told by Riley's broker, defendant Coldwell Banker, that a wall separating the living area of the apartment from a storage space could be removed, adding 200 square feet of living space. They also assert that Coldwell Banker not only represented that the storage space could be so incorporated, but also represented that Riley was a member of the Board of Managers of the cooperative corporation and was certain that removing the wall was a permissible change for the apartment, and that she had

consulted with an architect to ensure the legality of removing the wall between the spaces.

Plaintiffs learned, after the contract of sale was signed, but before the closing, that the wall could not legally be removed, and brought this action to rescind the contract of sale, and for fraudulent inducement and negligent misrepresentation. Coldwell Banker seeks summary judgment, arguing that the doctrine of caveat emptor bars plaintiffs' claims, that it has no duty to plaintiffs, and that plaintiffs could not have reasonably relied on any representations as a matter of law. Plaintiffs oppose the motion contending that there are numerous factual issues regarding whether defendant's representations created a special relationship and a duty, whether defendant acted with reckless disregard, and whether plaintiffs exercised due diligence and reasonably relied on the representations. They further argue that summary judgment is premature because there has been no discovery in this action.

The underlying circumstances in this action are fully set forth in this court's decision on the plaintiffs' prior motion to amend dated June 30, 2008, and shall not be repeated here, except as necessary for clarification.

In its motion, defendant Coldwell Banker submits the affidavit of Toehl Harding, who was associated with Coldwell Banker when the apartment was offered for sale, and was involved in the underlying real estate transaction (Affidavit of Toehl Harding, dated November 12, 2008, ¶ 1). Ms. Harding states that Coldwell Banker was the listing agent for the premises in 2006. She attests that she told plaintiffs, when they asked about removing the wall in the apartment, that based on her conversations with Riley, it "appeared as if the co-op board would likely consent to plaintiffs' removing a specific

wall in the apartment" (*id.*, ¶ 3). Ms. Harding further states that she never represented to plaintiffs that she had any independent or peculiar knowledge as to whether removal of the wall would comply with local law, or that she had performed any type of investigation into that issue (*id.*).

Coldwell Banker also submits plaintiffs' bill of particulars, in which plaintiffs set forth the following additional facts regarding their dealings with defendants. Initially, plaintiffs saw the apartment on June 29, 2006, based upon an advertisement through defendant Sinvin Realty, but that subsequently, Riley fired Sinvin and Coldwell Banker became Riley's broker (Plaintiffs' Verified Bill of Particulars, ¶ 9). Plaintiffs further state that they were not given access to Riley, and that Coldwell Banker spoke on her behalf at all times (*id.*, ¶ 4). On July 25, 2006, while plaintiffs were on the premises, Ms. Harding told everyone present that the storage space could be incorporated into the living area and plaintiffs asked that Ms. Harding confirm that with Riley and the Board because plaintiffs needed the space or the apartment would be too small to accommodate their children (*id.*, ¶ 3). According to plaintiffs, later that day or the next, Ms. Harding confirmed that the Board and Riley had already consulted an architect, and that the work was permissible (*id.*). On July 31, 2006, plaintiffs' broker again requested that Ms. Harding confirm that the wall could be removed since the apartment would be too small without the extra space (*id.*). Again, plaintiffs assert that she confirmed that the Board and seller had already checked into this with an architect (*id.*). On August 4, 2006, plaintiffs met Ms. Harding at the premises, and she again confirmed that the wall could be removed (*id.*). On August 8, 2006, Ms. Harding told plaintiffs' interior designer

that the wall could be removed, and that the designer could draw up plans accordingly (*id.*).

Coldwell Banker argues that plaintiffs' action must be dismissed in its entirety pursuant to the doctrine of caveat emptor. Under this doctrine, defendant argues, there is no duty imposed on a seller, or a seller's agent, to disclose any information concerning the premises when the parties deal at arm's length, as they did here. Coldwell Banker asserts that plaintiffs did not act prudently in assessing the value and fitness of the premises. It also urges that the legality or illegality of plaintiffs' proposed alterations were not facts peculiarly within Coldwell Banker's knowledge. It contends that the exception to the caveat emptor doctrine for active concealment does not apply here, because there is no evidence that it thwarted plaintiffs' efforts to fulfill their responsibilities fixed by the doctrine of caveat emptor. Coldwell Banker further argues that the complaint against it must be dismissed because it did not owe any fiduciary duty to plaintiffs since it was the broker for the seller Riley. Defendant also challenges plaintiffs' fraudulent and negligent misrepresentation claims on the grounds that plaintiffs' reliance was unreasonable as a matter of law, it did not intentionally make any misrepresentations, it did not misrepresent any facts to plaintiffs, and plaintiffs did not have a special relationship with it.

In opposition, plaintiffs argue that there are many triable issues of fact, and that they have not conducted any discovery, making summary judgment premature. They submit the affidavits of plaintiff Angus Shillington and Riley in support of their position. In his affidavit, Mr. Shillington recounts the events set forth above that are stated in the bill of particulars (Affidavit of Angus Shillington, dated January 7, 2009, ¶¶ 3-7). He

adds that it was not until he and his wife met with the Board, over a month after signing the contract, and less than a week before closing, that they suspected they had been misled (*id.*, ¶ 9). At that meeting, the co-tenants of the third floor suggested that they check with the City of New York whether it was legal to remove the wall (*id.*). Then, plaintiffs sent the plans to the City and met with a New York City expeditor just four days later, who told them that the change to the apartment would not be legal (*id.*, ¶ 13).

Plaintiffs also submit an affidavit from defendant Riley. In her affidavit, Ms. Riley states that, during the time that she owned the apartment, she had never considered making renovations which involved taking down the wall separating storage space from the living area (Affidavit of Jacqueline Riley, dated August 14, 2008, ¶ 2). She also attests that she did not consult with an architect to discuss removing the wall, nor did she tell anyone, including the broker working on her behalf, that she had discussed removing it with an architect (*id.*, ¶ 3). She further states that she did not contact anyone at the City of New York Department of Buildings or tell anyone that she had (*id.*, ¶ 4). Ms. Riley asserts that she did not make any representations, nor authorize any real estate brokers working on her behalf, to make any representations regarding the wall, or the buyers' right to remove the wall (*id.*, ¶ 5).

Based on this proof, plaintiffs contend that there are numerous triable issues of fact, including whether they had exercised due diligence prior to entering into the contract of sale, and whether they reasonably relied on Coldwell Banker's assurances; whether a duty arose based on Coldwell Banker's conduct (more than mere silence);

whether Coldwell Banker acted with intent or reckless disregard; whether plaintiffs had a special relationship with Coldwell Banker; and whether Coldwell Banker misrepresented the facts.

DISCUSSION

For the following reasons, Coldwell Banker's motion for summary judgment is granted and the complaint is dismissed. "New York adheres to the doctrine of caveat emptor and imposes no duty on the seller 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 which constitutes active concealment" (*Platzman v Morris*, 283 AD2d 561, 562 [2d Dept 2001], citing *Stambovsky v Ackley*, 169 AD2d 254, 257 [1st Dept 1991]; *London v Courduff*, 141 AD2d 803, 804 [2d Dept], *appeal dismissed* 73 NY2d 809 [1988]). If there is conduct by the seller (i.e. more than mere silence) that rises to the level of active concealment, the seller may have a duty to disclose information concerning the property (*Jablonski v Rapalje*, 14 AD3d 484, 485 [2d Dept 2005]). To maintain a claim to recover damages for active concealment in the context of fraudulent nondisclosure or partial disclosure, the plaintiffs must show, in effect that the seller thwarted the plaintiffs' efforts to fulfill their responsibilities fixed by the doctrine of caveat emptor (*Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 520 [2d Dept 2007]; *Jablonski v Rapalje*, 14 AD3d at 485; *Jee Foo Realty Corp. v Lemle*, 259 AD2d 401, 402 [1st Dept 1999]).

Active concealment has been found, for example, where the sellers and their real estate broker cleaned up bat droppings, set up lights to temporarily cause the bat

colony to leave the roost, and hid the smells (*Jablonski v Rapalje*, 14 AD3d at 485-488); where the seller constructed a dummy ventilation system (*17 E. 80th Realty Corp. v 68th Assocs.*, 173 AD2d 245 [1st Dept 1991]); where the seller constructed false walls to conceal a water problem (*Stephens v Sponholz*, 251 AD2d 1061 [4th Dept 1998]; or where the seller concealed the cracks in dining room and living room walls by paneling over them (*George v Lumbrazo*, 184 AD2d 1050 [4th Dept], *lv dismissed* 81 NY2d 759 [1992]). The buyer must "act prudently to assess the fitness and value of his purchase," and the doctrine of caveat emptor operates to bar a buyer who fails to exercise due care from seeking the equitable remedy of rescission (*Stambovsky v Ackley*, 169 AD2d at 258).

Plaintiffs argue that the caveat emptor doctrine does not bar their fraudulent inducement claim, because whether they could have ascertained the legality of the proposed renovation with reasonable diligence prior to entering into the contract is an issue for the trier of fact. They point to Mr. Shillington's numerous inquiries to Ms. Harding as proof that they diligently investigated whether the renovation was legal. Even accepting all of plaintiffs' allegations as true, as we must on summary judgment, plaintiffs fail to present any proof that they made any effort to independently investigate the legality of the proposed renovation. This is despite the fact that they were aware of the need to confirm and questioned the legality of knocking down the exterior wall. Plaintiffs first saw the apartment in the end of June 2006, and did not execute the contract of sale until August 11, 2006. Thus, they had 43 days in which to investigate whether they could make such a renovation, a significant change to the property, a

change which they assert was essential for the apartment to be able to accommodate them. In that time, while they asked Coldwell Banker, who was the seller's broker, about it several times, they never made any effort to independently investigate it. They had the power to separately determine the legality of the renovation, as they ultimately did just before the closing date, but they failed to use that power before signing the contract and depositing their $205,000.00 down payment. In addition, if they were concerned about the legality of adding this essential space, they could have added a contingency clause to the contract of sale, but they did not. Therefore, Coldwell Baker has demonstrated, and plaintiffs failed to even raise a triable issue, that they did not prudently assess the value and fitness of their purchase.

Platzman v Morris (283 AD2d at 562) is instructive. In that case, the buyers claimed that they were fraudulently induced with respect to the purchase of a house which contained three kitchens. The sellers told the buyers that the kitchen in the basement was not legal, but that the kitchens on the second and third floors were legal. After the closing, the buyers were notified that the basement and second floor kitchens were in violation of zoning laws. They brought a claim against the sellers contending that the sellers actively concealed the fact that the kitchen on the second floor was illegal. The buyers never contacted the local building department before the completion of the sale to investigate the possibility that the kitchens violated the local zoning ordinances. The court dismissed the claim for failure to state a cause of action based on the lack of evidence in the record that the buyers made any effort to investigate the legality of the kitchens (*id.*; *see also Rozen v 7 Calf Creek, LLC*, 52 AD3d 590, 593 [2d Dept 2008] [no active concealment where release was readily ascertainable from public

records]; *Bennett v Citicorp Mortgage, Inc.*, 8 AD3d 1050 [4th Dept 2004] [summary judgment to listing broker, misrepresentation about number of acres included in sale was matter of public record, readily ascertainable, and buyer failed to make use of means available to discover truth]; *DiFilippo v Hidden Ponds Assocs.*, 146 AD2d 737 [2d Dept 1989] [summary judgment dismissing fraudulent inducement claim, where plaintiff buyer failed to ascertain for himself the restrictions of a zoning ordinance, merely asking the defendant sellers if he could rent out the unit]).

The *Platzman* court also held that the illegality of the second floor kitchen was not a fact which was peculiarly within the seller's knowledge (283 AD2d at 562; *Goldman v Strough Real Estate, Inc.*, 2 AD3d 677, 678 [2d Dept 2003] [summary judgment to seller, buyer not reasonable in relying on seller's predictions about how the adjoining parcel was going to be developed, buyer had access to public records to ascertain the limitations and status of neighboring parcels]; *Glazer v LoPreste*, 278 AD2d 198 [2d Dept 2000] [summary judgment to real estate brokers, because fact that sex offender lived in neighborhood was not peculiarly within broker's knowledge or unlikely to be discovered by prudent purchaser exercising due diligence]; *Esposito v Saxon Home Realty, Inc.*, 254 AD2d 451 [2d Dept 1998] [property boundaries were not peculiarly within the knowledge of the defendant]). Here, plaintiffs present no evidence that this was a matter peculiarly within Coldwell Banker's knowledge or that Coldwell Banker thwarted their efforts to fulfill their responsibilities fixed by the doctrine of caveat emptor. Therefore, their claim for fraudulent inducement is dismissed.

With respect to plaintiffs' fraudulent misrepresentation claim, plaintiffs must prove a misrepresentation or material omission of fact, which was false and known to be false by defendant, for purpose of inducing plaintiffs' reliance, justifiable reliance by plaintiffs and injury (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). A party is not justified in relying on an alleged misrepresentation if the facts represented are not matters peculiarly within the defendant's knowledge, and plaintiffs had the means to discover the truth by exercising ordinary intelligence (*Joseph v NRT Inc.*, 43 AD3d 312, 313 [1st Dept 2007]). In *1537 Assocs. v Kaprielian Enters., Inc.* (259 AD2d 447 [1st Dept 1999]), the court dismissed the defendants' counterclaim for fraud, holding that the defendants could not have reasonably relied on plaintiff's misrepresentation regarding the size of the rental premises, because the dimensions were not within the plaintiff's peculiar knowledge. In *Bennett v Citicorp Mortgage, Inc.* (8 AD3d 1050, *supra*), the buyer's reliance on the listing agent's representation as to the number of acres that were included in the sale was not reasonable as a matter of law, because the seller's ownership was a matter of public record, readily ascertainable in the exercise of ordinary intelligence. Also, in *DiFilippo v Hidden Pond Assocs.* (146 AD2d at 738), the buyer claimed that the sellers fraudulently induced him to purchase the property by misrepresenting that he could rent out the unit, which rental violated the zoning laws. The court granted summary judgment dismissing the complaint, because the buyer failed to ascertain for himself the restrictions of the zoning ordinance, which was not a matter peculiarly within the defendants' knowledge (*id.*).

In the present case, Coldwell Banker is entitled to summary judgment dismissing the fraudulent misrepresentation claim because it has established that plaintiffs were not reasonable in relying on its representations regarding the legality of making future renovations to the apartment. This was not a matter peculiarly within Coldwell Banker's knowledge. In addition, plaintiffs had the means to discover the truth by the exercise of ordinary intelligence (*see Joseph v NRT Inc.*, 18 Misc 3d 296, 853 NYS2d 481, 484 [Civ Ct, NY County 2007]). Prior to the execution of the contract of sale, plaintiffs could have hired an architect or a New York City expeditor to advise them regarding whether the renovations they contemplated were legal, but they did not. Plaintiffs actually discovered that the renovation would have been illegal within three days after undertaking to investigate it themselves. This fact could have been discovered with due diligence prior to the execution of the contract (*see East 15360 Corp. v Provident Loan Soc'y of New York*, 177 AD2d 280, 281 [1st Dept 1991]). Thus, Coldwell Banker has shown that the information was not something peculiarly within its knowledge, and that the plaintiffs were not justified in relying on the broker's representation on this point as a matter of law. Accordingly, the plaintiffs' claim for fraudulent misrepresentation against Coldwell Banker is dismissed.

Plaintiffs' claim for negligent misrepresentation against Coldwell Banker also is dismissed. To establish a claim for negligent misrepresentation, plaintiffs must show that defendant had a duty, based on some special relationship with them, to impart correct information, the information given was false, and the plaintiffs reasonably relied on it (*Berger-Vespa v Rondack Building Inspectors Inc.*, 293 AD2d 838, 841 [3d Dept

2002]). As discussed above, plaintiffs cannot demonstrate that they reasonably relied on Coldwell Banker's misrepresentations (*see Joseph v NRT Inc.*, 43 AD3d at 313; *Bennett v Citicorp Mortgage, Inc.*, 8 AD3d at 1050).

Plaintiffs' request for discovery, and denial of the motion as premature, is rejected. Whether plaintiffs exercised due diligence and investigated the legality of their contemplated renovation to the apartment involves proof that clearly would be in their own possession. Thus, plaintiffs fail to provide a basis for denial of the motion.

Accordingly, it is

ORDERED that the motion of defendant Coldwell Banker Hunt Kennedy for summary judgment dismissing the complaint as against it is granted and the complaint is hereby severed and dismissed as against defendant Coldwell Banker Hunt Kennedy, and the Clerk is directed to enter judgment in favor of that defendant, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the action is severed and continued as against defendant Sinvin Realty.

Counsel for plaintiffs and defendant Sinvin Realty Inc. are directed to appear for a compliance conference on June 2, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York. Plaintiff is directed to notify said defendant of the conference date forthwith.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: April 30, 2009

Martin Shulman, J.S.C.