

Eickholt v Mitchell, Maxwell & Jackson

2009 NY Slip Op 32395(U)

October 13, 2009

Supreme Court, New York County

Docket Number: 601430/07

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT. Hon Joan A. Madden J.S.C.

PART 11

Justice

Index Number : 601430/2007

EICKHOLT, LISA

VS.

MITCHELL MAXWELL & JACKSON

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 601430-07

MOTION DATE 5-28-09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for Summary Judgment

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 the attached Memorandum Decision + Order

FILED
OCT 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

HON. JOAN A. MADDEN
J.S.C.

Dated: October 13, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

-----X
LISA EICKHOLT,

Plaintiff,

Index No. 601430/07

-against-

MITCHELL, MAXWELL & JACKSON, STEVEN
KNOBEL, KOSTAS E. HALKIAS, TYGER REALTY
HOLDING CORP. f/k/a TYGER REALTY LTD, RANDE
COLEMAN, SARAH JACKSON, KEVIN CLARK,
311-313 EAST 3RD STREET HOUSING DEVELOPMENT
CORPORATION, PRUDENTIAL DOUGLAS ELLIMAN
REAL ESTATE f/k/a DOUGLAS ELLIMAN, NADINE
SIEBURT, JOHN DOE and JANE DOE 2-20, other potential
parties presently unknown to plaintiff,

Defendants.
-----X

JOAN MADDEN, J.:

Defendants Mitchell, Maxwell & Jackson (“MM&J”), Steven Knobel (“Knobel”) and Kostas E. Halkias (“Halkias”)(together “the MM& J defendants”) move for summary judgment dismissing the complaint and all cross claims against them (motion seq. no. 001). Defendants 311 East 3rd Street Housing Development Fund Corporation (“311 East 3rd Street”) and Kevin Clark (“Clark”)(together “the Co-op defendants”) separately move for summary judgment dismissing the complaint and all cross claims against them (motion seq. no. 002).¹ Plaintiff, who is pro se, opposes the motions.

Background

This action arises out of plaintiff’s purchase of shares allocated to unit 28 (“the unit”) in a cooperative apartment complex located at 31 East 3rd Street, New York, NY (“the co-op”)

¹Motion seq. nos. 001 and 002 have been consolidated for disposition.

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which is owned by defendant 311 East 3rd Street. Plaintiff entered into a contract to purchase the unit November 9, 2003 for \$300,000. The unit had been listed at \$315,000. Defendant Tyger Realty Holding Corp. f/k/a Tyger Realty Ltd. through its agent, defendant Nadine Siebert, acted as the seller's agents and defendant Prudential Douglas Elliman Real Estate f/k/a Douglas Elliman, through defendant Sarah Jackson, acted as plaintiff's agent for the sale. Defendant Rande Coleman is also a broker with Douglas Elliman. MM&J conducted an appraisal of the unit for the bank which extended the mortgage to plaintiff, and was retained by the mortgage broker. Hakias is an employee of MM&J that was involved in the appraisal and Knudson is a principal of MM&J. The appraisal report is dated January 5, 2004, which is approximately two months after plaintiff entered into the contract to purchase the unit.

The complaint alleges that Ms. Siebert showed plaintiff two apartments in the co-op but failed to disclose that there were two comparable apartments available for less money and that had she been given this information prior to her purchase of the unit, she would not have entered into the contract. The complaint also alleges that Ms. Jackson told her she had no information about other comparable apartments in the co-op but that \$300,000 was "a fair price" for unit 28. The complaint also alleges that after plaintiff entered the contract she learned about other comparable and better apartments were on the market in the co-op at the same time, or at later dates and sold for much less. With respect to the Co-op defendants, the complaint alleges that 311 East 3rd Street and Clark, who was then President of the Board of Directors of 311 East 3rd Street, wrongfully withheld information regarding other sold apartments in the co-op on the ground that such information was private, including information regarding unit 33, which was comparable to unit 28, and was on the market in November 2003 and sold for \$257,000 in

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January 2004.

The complaint alleges that the appraisal contained numerous false statements, including that the information about comparable apartments in the co-op was not available, and that plaintiff's own research led her to believe that the information was obtainable. It is also alleged that Clark's name was listed as a source of information for the appraisal.

At her deposition, plaintiff testified that the first time she saw the appraisal report was in April 2004, a few months after the sale on the unit closed, although she alleges that she spoke to her mortgage broker about the appraisal prior to the closing. She further testified that the appraisal report contained false information including that there were no comparable apartments available in the co-op and that this false information was obtained from Mr. Clark. She also testified that if the unit had been appraised at its real value, she would have not purchased the apartment as she would not have been able to obtain financing.

A review of the appraisal report indicates that the report listed comparable apartments, including one in the co-op that sold for \$250,000 in February 2003 on a lower floor, and two others in the vicinity that sold for \$325,000 and \$345,000. It also states that "[c]omparable #1 represents the only similar sale in the subject building for the last one year. Therefore, the appraiser selected three [sic] other recent sales taken from nearby competing projects for this analysis." The report also states that "these cooperative corporations are privately held entities and as such, sales of stock in these corporations is not a matter of public record. Since sales information is not available through [Multiple Listing System] or public record, the appraiser is not able to review the cooperative apartment transactions."

The MM& J defendants move for summary judgment dismissing the claims and cross

claims against them. Specifically, the MM&J defendants argue that the complaint, which appears to assert claims against them for fraud and/or for negligent misrepresentation, must be dismissed as the record shows that plaintiff did not detrimentally rely on the appraisal report since it was not issued until January 5, 2004, which is approximately two months after plaintiff entered the contract to purchase the unit on November 9, 2003. In addition, they point out that plaintiff admits that she did not receive the appraisal report until in April 2004, which was after the closing.

The MM&J defendants further argue that they did not communicate with plaintiff prior to the closing so that they could not have made any misrepresentations to plaintiff, and that plaintiff did not suffer an injury since she testified that the unit was worth \$350,000. The MM&J defendants also argue that the negligent misrepresentation claim should be dismissed as they have no special relationship with plaintiff and that three-year statute of limitations expired before the action was commenced since the appraisal report was issued on January 5, 2004 and the action was not commenced until April 2007. Lastly, they argue that the claim for punitive damages must be dismissed as the complaint does not allege, and the record contains no evidence of, wanton and willful conduct on their part.

The Co-op defendants move for summary judgment dismissing the claims against them which appear to be for fraud and/or for negligent misrepresentation, asserting that there is no evidence that they made any misrepresentations, noting that plaintiff's Bill of Particulars alleges only that Mr. Clark failed to advise the appraiser of closing costs and dates of sale for other apartments in the building. In addition, the Co-op defendants argue that as these alleged failures to provide information did not occur until after plaintiff entered into the contract to purchase the

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unit, that she did not rely on such failures to her detriment. With respect to the appraisal report, like the MM&J defendants the Co-op defendants argue that plaintiff could not rely to her detriment on the report since she did not see it until after the sale closed. The Co-op defendants also argue that the negligent misrepresentation claim should be dismissed as they have no special relationship with plaintiff, that the three-year statute of limitations expired before the action was commenced, and punitive damages are not properly alleged.

Plaintiff opposes the motions, asserting that although the contract was signed before the appraisal was performed, the actual sale would not have gone through if the unit had been properly appraised. Plaintiff also asserts that while she did not see the appraisal report before the closing she was aware of it as she had discussed it with the mortgage broker. Notably, plaintiff does not argue that she learned of the alleged misrepresentation at that time. Instead, she asserts in opposition to the aspect of the motion regarding the three-year statute of limitations that she did not discover any asserted misrepresentations until April 2004. In addition, plaintiff submits correspondence with Mr. Clark indicating her efforts to obtain sales information about other apartments in the co-op. Notably, however, these exchanges all occurred after the sales contract was signed. As for damages, plaintiff asserts that she was harmed by the inaccurate appraisal since she would have paid less for the unit had she know its real value.

Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts

to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

To assert a viable fraud claim, a plaintiff must show that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996).

To assert a claim for negligent misrepresentation it must be shown that "there is a special relationship of trust or confidence which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given." Hudson River Club v. Consolidation Edison of New York, Inc., 275 AD2d 218, 220 (1st Dept 2000)(citations omitted).

Significantly, "[a]n essential element of any fraud or negligent misrepresentation claim is that there must be reasonable reliance, to the party's detriment, upon the representations made....Plaintiff must show both that the defendant's misrepresentations induced the plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiffs complains (loss causation)." Water Street Leasehold LLC v. Deloitte & Touche, 19 AD3d 183, 185 (1st Dept 2005), lv. denied, 6 NY3d 706 (2006)(internal citations and quotations omitted).

Here, the MM&J defendants and the Co-op defendants have made a prima facie showing entitling them to summary judgment based on evidence that plaintiff did not rely on the appraisal

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report to her detriment since it was issued after she entered into a contract to purchase the unit. See Howard v. Weaver, 244 AD2d 225 (1st Dept 1997)(noting that appraiser report commissioned after plaintiff's loss could not have caused plaintiffs' loss). Likewise, plaintiff cannot show that she relied to her detriment on Mr. Clark's failure to provide certain information to her about sales of comparable units in the co-op since the sale of the comparable unit plaintiff identifies occurred after she entered into the contract

Moreover, plaintiff has not established that the purported misrepresentation caused her any direct loss as her assertion that had the appraisal report properly assessed the value of the unit she would not have been provided financing for the unit is speculative. Water Street Leasehold LLC v. Deloitte & Touche, 19 AD3d at 185.

In addition, plaintiff fails to provide any evidence that the Co-op defendants' refusal to disclose information to plaintiff regarding other sales in the co-op was fraudulent or intended to induce her to purchase the unit, and the documentary evidence produced in opposition to the motion suggests only that the parties disagreed as to whether such information was subject to disclosure.

Accordingly, as plaintiff is unable to show that she relied to her detriment on the appraisal report in entering the contract of sale or the Co-op's defendants denial of her request for information as to sales by other shareholders, or that such reliance directly caused her purported loss, the MM&J defendants and the Co-op defendants are entitled to summary judgment dismissing the claims against them, and the court need not reach whether the additional grounds for dismissal asserted by these defendants have merit.

Finally, given the nature of this dispute, this matter is transferred to the Civil Court of the

City of New York.

In view of the above, it is

ORDERED that the motion for summary judgment by defendants Mitchell, Maxwell & Jackson, Steven Knobel, and Kostas E. Halkias dismissing the complaint and any cross claims against them is granted, and the complaint and the cross claims are dismissed as to defendants Mitchell, Maxwell & Jackson, Steven Knobel, and Kostas E. Halkias (motion seq 001); and it is further

ORDERED that the motion for summary judgment by defendants 311 East 3rd Street Housing Development Fund Corporation and Kevin Clark (motion seq 002) is granted and the claims and cross claims against these defendants are dismissed; and it is further

ORDERED the remainder of this action is transferred to the Civil Court of the City of New York in accordance with the annexed order.

DATED: October 13, 2009


J.S.C.
HON. JOAN A. MADDEN
J.S.C.

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