

Muller v Lugo

2010 NY Slip Op 30219(U)

January 28, 2010

Supreme Court, Suffolk County

Docket Number: 32240/2007

Judge: Paul J. Baisley

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

ROBERT J. MULLER and
 REBECCA J. MULLER

Plaintiff(s),

-against-

RICHARD LUGO, LISA LUGO, TURN THE
 KEY REALTY CORP., and ALL COUNTY
 FINANCE INC.

Defendant(s).

ORIG. RETURN DATE: February 28, 2008
FINAL RETURN DATE: March 13, 2008
MTN. SEQ. #: 001-CASEDISP

PLTF'S ATTORNEY:

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 MELVILLE, NY 11747

Upon the following papers numbered 1 to 32 read on this motion for dismissal: Notice of Motion and supporting papers 1 - 13; Affirmation in Opposition and supporting papers 14 - 23; Reply Affirmation 24 - 32; it is

ORDERED that that part of the motion (001) by the defendants Richard Lugo and Lisa Lugo for dismissal of the complaint pursuant to CPLR 3212 and CPLR 3211 is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as to all defendants; and it is further

ORDERED that that part of the motion seeking an order of preclusion is denied as moot in view of the decision herein as well as having been resolved in a preliminary conference order; and it is further

ORDERED that the moving defendants herein are directed to serve a copy of this decision and order upon the other parties pursuant to CPLR 2103 within 45 days of the date of entry of this decision and order and to file the proof of service the Clerk of the Court.

This is an action brought by the plaintiffs Robert J. Muller and Rebecca J. Muller (hereinafter, collectively, the Mullers) against the defendants Richard Lugo and Lisa Lugo (hereinafter, collectively, the Lugos), Turn The Key Realty Corp. (hereinafter TKR) and All County Finance Inc. (hereinafter All County). This action stems from the basic contention of the Mullers that Richard Lugo was supposed to convey to them commercial property with rental capabilities but did not.

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The complaint contains six causes of action: The first cause of action alleges that the defendants failed to provide a certificate of occupancy as required by the contract of sale; the second cause of action alleges certain fraudulent representations by the Lugos with regard to the premises being “properly legalized” for commercial and rental purposes; the third cause of action alleges a prima facie tort claim against the Lugos based upon, inter alia, fraud; the fourth cause of action alleges that the Lugos committed fraud; the fifth cause of action contains fraud allegations against TKR; and, the sixth cause of action is also related to a claim of fraud against TKR. There are no causes of action or any allegations specifically with regard to the defendant All County.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied regardless of the sufficiency of the opposition papers (*see Smalls v AJI Industries, Inc.*, 10 NY3d 733, 853 NYS2d 526 [2008]). If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion, the Lugos submit, inter alia, copies of the contract of sale, the mortgage application, the certificate of occupancy, the title report, the loan application, various letters, the affirmation of the attorney representing the Lugos in the sale of the premises and a personal affidavit from Richard Lugo.

The Lugos’ submissions support their contention that the property at issue was a one family residence in which Richard Lugo legally conducted his realty (TKR) and mortgage (All County) businesses as well as having a tenant living in a downstairs apartment. The documents contain absolutely no representations that the property is other than a one family residence and, indeed, the documents contain specific references to the one-family residential status.

Richard Lugo states in his affidavit that TKR was not a party to the sale, did not list the property and, in any event, has since been dissolved (although he submits no independent proof as to this latter contention). He also says that his inquiry to the Town of Babylon (in which the property is located) revealed that the Town of Babylon does not allow for the transfer of a tenant permit to a new owner. Richard Lugo also told the Mullers that a change of use permit (for commercial use) was on file with the town but that one had not been issued and that the Mullers would have to reapply on their own for a change of use permit.

Richard Lugo also states that no real estate broker was used in the underlying transaction and, indeed, this is specifically supported by language in the contract of sale signed by the Mullers who, notably, were represented by counsel in the transaction.

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Richard Lugo also says he personally assisted the Mullers with the mortgage application but charged no fee for lending this assistance.

The mortgage application indicates that it is for a "residential home mortgage" and the title report also reflects that the property is a one family dwelling, has an existing certificate of occupancy reflecting that and also indicates that there is no change of use permit in effect.

The Lugos also refer to a provision in the contract of sale which, they contend, precludes the Mullers from relying on any discussion, agreements, etc., not otherwise contained in the contract of sale and the deed, to wit; paragraph 21 which provides as follows:

"All prior understandings and agreements between the SELLER [the Lugos] and the PURCHASER [the Mullers] are merged in this contract. It completely expresses their full agreement. It has been entered into after full investigation, neither party relying upon any statements made by anyone else that are not set forth in this contract."

These submissions - affidavit, affirmation and documents - support a prima facie showing that the Lugos as well as TKR and All County were not guilty of any fraudulent conduct and were in compliance with the terms of the contract of sale.

With regard to the application for summary judgment, the burden now shifts to the plaintiffs to come forward with evidence of material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980])2d at 401, 565 NYS2d at 427). Here, as to these specific issues, the defendants have failed to satisfy their burden.

In opposition, the Mullers submit, inter alia, copies of the Settlement Statement, Loan Closing Instructions, the contract of sale, an additional rider to the contract of sale and the personal affidavit of Rebecca Muller.

In Rebecca Muller's affidavit, she states that she was in the market for office space and inquired as to the property in question. She says that Richard Lugo told her in a phone conversation that the property in question was commercial with a legal apartment. She visited the property and saw that Richard Lugo had an office area in addition to, inter alia, four desks in the living room area. She was also told that the downstairs apartment was legal.

Richard Lugo also told Rebecca Muller that he was in the process of applying for a change of use permit to professional use but that he put that request on hold to maintain the residential tax rate and garbage pickup privileges.

Rebecca Muller further states that she was permitted to rent office space there starting on June 15, 2006 until the closing. The rental agreement was formalized in a commercial lease three months later agreement on September 15, 2006 and the closing occurred ten days later on September 25, 2006.

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Rebecca Muller goes on to say that Richard Lugo “handled all of the paper work” for the mortgage application and the appraisal. In conclusion, Rebecca Muller claims, inter alia, that she and Robert Muller would “never have purchased this property had we known that it could not be legalized for offices and an apartment”

In reply, the Lugos contend that the Mullers were provided with all the pertinent documents which clearly indicated the single family residence status and, indeed, the Mullers signed many of those documents all of which were supplied to their attorney for the transaction from whom, the Lugos point out, there was no affirmation or affidavit submitted in opposition to this motion. The Lugos also argue that Rebecca Muller admitted in her affidavit that she knew the Mullers had not obtained a change of use permit and, in any event, that the terms of the contract of sale precluded consideration of any prior conversations and understandings. Furthermore, the status of the property as to commercial use and an apartment rental were easily ascertainable from the town and not information exclusively within the possession of the Lugos.

In scrutinizing the complaint in accordance with the applicable standards for summary judgment (CPLR 3212) and dismissal (CPLR 3211), the court finds as follows:

As to the first cause of action, the contract of sale is devoid of any language requiring the Lugos to provide a certificate of occupancy showing the property was approved for commercial use with an apartment. The certificate of occupancy required to be provided was expressly for “all existing structures located at the premises at closing” (Additional Rider, ¶ 7) and that the sale was subject to “zoning ordinances, building regulations, covenants, reservations, agreements, restrictions, easements and declarations of record....” (Rider, ¶ 1[c]).

In view of the contract of sale clearly not supporting this cause of action, it is dismissed pursuant to CPLR 3212 and CPLR 3211(a)(1) (documentary evidence).

The second, third and fourth causes of action, each against the Lugos only, are each based in fraud. The fifth and sixth causes of action are also fraud-based but are only against TKR. These causes of action are all dismissed pursuant to CPLR 3212 and CPLR 3211(a)(7) (failure to state a cause of action).

In order to support a claim sounding in fraud, the plaintiffs must allege and prove that the defendants misrepresented a material fact which they knew to be false, that there was justifiable reliance upon the false representation and that the plaintiffs suffered injuries or damages due to the misrepresentations (*see In re Garvin*, 210 AD2d 332, 333, 620 NYS2d 400 [2d Dept 1994]; *Gouldsbury v Dan’s Supreme Supermarket, Inc.*, 154 AD2d 509, 510-511, 546 NYS2d 379 [2d Dept 1989]; *Masella v Leemilt’s Flatbush Ave., Inc.*, 112 AD2d 1027, 493 NYS2d 24 [2d Dept 1985]).

As to proof of conversations and understandings outside of the contract, the merger clause in the underlying contract of sale is of a general nature and clearly does not address the actual matters at issue with regard to the commercial use of the property and the use of an apartment. A general merger clause of this nature is “ineffective to preclude parol evidence” as to such specific fraudulent accusations (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 321, 184 NYS2d 599 [1959]). Accordingly, the court may

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consider such evidence submitted in opposition to this motion. Nevertheless, in considering such evidence, the plaintiffs fail to overcome a major defect in their pleadings and proof, namely; the plaintiffs cannot show a justifiable reliance on the alleged misrepresentations made by or on behalf of the defendants (*see In re Garvin*, 210 AD2d 332, 333, 620 NYS2d 400 [2d Dept 1994]; *Gouldsbury v Dan's Supreme Supermarket, Inc.*, 154 AD2d 509, 510-511, 546 NYS2d 379 [2d Dept 1989]; *Masella v Leemilt's Flatbush Ave., Inc.*, 112 AD2d 1027, 493 NYS2d 24 [2d Dept 1985]).

Here, the plaintiffs allege that the defendants falsely represented that they were to be conveyed property "approved for commercial use with an apartment." While it could ultimately be found that the defendant Richard Lugo was truthful when he said that his use of the property for personal commercial uses as well as the apartment - for which he had permission from the town - was truthful and he merely told the plaintiffs what his legal uses were in order to indicate what was potentially available to the plaintiffs, the crucial element lacking in this complaint and in the submissions on the issue of summary judgment is that the plaintiffs cannot show a "justifiable reliance" on the allegedly false representations made by the defendants.

Any representation as to the commercial use of the property as well as to the apartment was with regard to information which was "not particularly within the knowledge of the defendant" and, thus, since the plaintiffs could have, "with due diligence" (*East 15360 Corp. v Provident Loan Soc.*, 177 AD2d 280, 575 NYS2d 856 [1st Dept 1991]) and "by the exercise of ordinary intelligence," ascertained this information themselves from the Town of Babylon, they could not have justifiably relied on any such alleged misrepresentations (*see Danann Realty Corp. v Harris*, 5 NY2d 317, 320, 322, 184 NYS2d 599 [1959]; *East 15360 Corp. v Provident Loan Soc.*, 177 AD2d 280, 575 NYS2d 856 [1st Dept 1991]).

Accordingly, dismissal of the complaint in its entirety as to all defendants pursuant to CPLR 3212 and CPLR 32311(a)(1) and (7) is granted as provided herein.

This constitutes the decision and order of the court.

Dated:

Jan 28, 2010

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.