

85-87 Pitt St., LLC v 85-87 Pitt St. Realty Corp.

2010 NY Slip Op 30776(U)

March 31, 2010

Supreme Court, New York County

Docket Number: 601341/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

85-87 Pitt Street LLC

INDEX NO. 001341/09

MOTION DATE _____

- v -

85-87 Pitt Street Realty Corp.

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED
APR 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: MAR 31 2010

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: PART 10

-----X

85-87 Pitt Street, LLC,

Plaintiff,

-against-

85-87 Pitt Street Realty Corporation,
Solomon Hallivus and Henry Hallivus,

Defendants.

-----X

Decision/Order

Index No.: 601341/09
Seq. No. : 001

Present:

Hon. Judith J. Gische
J.S.C.

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

Papers

Def's n/m [3211(a)(1),(7)] w/ SL affirm, HH affid, exhs	1
Pltf's opp w/ SK, DR, JF, NH, SB, SE affids, exhs	2
Def's reply w/ SL, HH, SE affids, exhs	3

FILED
 APR 06 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

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

This action arises from a dispute involving a contract of sale ("Contract of Sale").

Plaintiff, 85-87 Pitt Street, LLC (the "Buyer"), entered into the Contract of Sale with defendants, 85-87 Pitt Street Realty Corporation (the "Seller"), to purchase the apartment building located at 85-87 Pitt Street, New York, New York (the "Building"). Defendants Solomon Hallivus ("Solomon") and Henry Hallivus ("Henry") are President and Vice President of the Seller, respectively. Buyer raises various claims in tort and contract, seeking rescission of the Contract of Sale and full restitution together with consequential damages and costs. Alternatively, Buyer seeks compensatory, punitive,

and loss of reputation damages due to the presence of bedbugs in the Building.

Defendants now move, pre-answer, to dismiss each of the causes of action asserted in the Complaint based upon documentary evidence and failure to state a cause of action [CPLR § 3211 (a)(1), (7)]. Plaintiff opposes the motion to dismiss in its entirety. The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference [EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005); Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 (2001); P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 (1st Dept 2003)].

The following facts are accepted as true:

Facts Presented and Arguments Considered

Seller and non-party Steven Kauff ("Kauff"), individually, entered into a Contract of Sale on December 13, 2007 for the sale of the Building. Kauff is a member of Buyer, a limited liability company. The Contract of Sale included a rider, additional rider, and addendum. On April 14, 2008, Kauff executed an assignment of contract, in which he assigned the Contract of Sale to Buyer. Buyer and Seller amended the Contract of Sale on April 14, 2008, in two separate writings. The closing between Buyer and Seller took place on April 18, 2008.

Buyer argues, *inter alia*, that after the Contract of Sale was entered into, but before the closing took place, defendants made fraudulent misrepresentations to Buyer. Specifically, Buyer contends that defendants stated there were no bedbugs in the Building, aside from Apartment #16, where the problem had been corrected. Buyer claims that at least three other apartments in the Building were infested with bedbugs

and that defendants knew of the presence of bedbugs, had a duty to disclose that condition, but intentionally failed to notify Buyer in order to induce Buyer to proceed with the closing. Buyer contends that defendants fraudulently concealed the extent of the infestation by falsely stating that the infestation had been confined to one apartment and that it had been cured. Buyer claims that the infestation is a latent defect not reasonably discoverable with due diligence and had it known of the bedbug infestation, it would not have proceeded with the closing.

Buyer has three additional causes of action against defendants for failure to properly repair holes in apartment # 8; failure to repair the sewer pipe in the basement; and failure to pay an outstanding violation issued by the Fire Department of New York City.

Buyer urges the court to rescind the Contract of Sale and have defendants pay Buyer full restitution together with consequential damages and costs. Alternatively, Buyer seeks compensatory, punitive, and loss of reputation damages.

Defendants seek to dismiss Buyer's action based on the documentary evidence, pursuant to CPLR § 3211 (a) (1) and, alternatively, pursuant to CPLR § 3211 (a) (7) on the ground that the individually named defendants (Solomon and Henry) are not subject to personal liability because they were acting in an official capacity.

Defendants provide the sworn affidavit of Henry Hallivus, who states that prior to the closing date, defendants never made any representations with regard to the existence, or non existence, of bedbugs in the Building. Defendants also contend they did not have any discussions with Buyer regarding bedbugs until several months after the closing date. Defendants deny there was any discussion of bedbugs until

September 2008, approximately five months after the closing, when Buyer asked him whether there were bedbugs in the Building. According to Henry, he explained there had been a problem in Apartment #16, but the problem "had been resolved long ago." Defendants argue that Buyer has no cause of action because the Contract of Sale expressly provides that all obligations merge into the Deed and therefore defendants sold the property "as is."

In opposition, Buyer provides the affidavits of Dean Ross, member of Buyer; James Famularo, a real estate broker; Nazmul Haque, the current Building exterminator; and Steve Ewbanks, the current Building super. Through these affidavits, Buyer contends that the infestation will most likely never be completely eradicated due to improper and ineffective remediation efforts by defendants. Buyer argues that the damage to the Building's reputation cannot be reversed, mainly as a result of web-based bedbug registries, and that this effects its ability to lease apartments to new tenants and maintain the existing tenants. Buyer argues that tenants of Apartment # 3, 5, 9, 11, and 12 have made complaints to defendants about bedbugs. Buyer also claims that defendants withheld certain building files, which would have revealed the existence of bedbugs in the Building.

In reply, defendants provide the affidavits of Henry Hallivis and Steve Ebanks. Defendants claim that Buyer's affidavit of "Steve Ewbanks" was falsified and their affidavit by "Steve Ebanks" is the correct affidavit. Steve Ebanks, states that he is currently the Building's superintendent. He states that the affidavits provided by Buyer contain "incorrect language" and that "additional information was added or after [he] read them different affidavits were substituted before [he] signed them." Defendants allege

that Robert Williams, the notary who notarized the signatures of "Steven Ewbank," James Fumularo, and Nazmul Haque, is not a valid notary, and therefore, the affidavits of these affiants should be disregarded by the court.

Discussion

In deciding whether the complaint must be dismissed, the court is not required to decide whether plaintiff has pled claims that it will eventually succeed on. Rather, the court has to broadly examine the complaint to see whether, from its four corners, "factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1st Dept. 1977). Consequently, unless disproved through, for example, documentary evidence [CPLR § 3211 (a)(1)], or the complaint fails to set forth a cognizable cause of action [CPLR § 3211 (a)(7)], the complaint should be preserved until issue has been joined and the claims are ready for a dispositive motion or trial.

Applying this standard, Buyer asserts facts, which even when accepted as true, do not support the causes of action it has asserted against defendants in light of the documentary evidence (the Contract of Sale), which conclusively disproves those claims. Furthermore, the tort claims are redundant of the contract claims and must be dismissed for that reason as well.

Breach of Contract Claim

In order to state a cause of action for breach of contract, the pleading must allege the existence of a valid and enforceable agreement, due performance by plaintiff, and a

failure of performance by defendant, resulting in damages (see Furia v Furia, 116 A.D.2d 694, 695 [2d Dept 1986]). Here, the documentary evidence establishes that defendants did not breach the Contract of Sale.

The relevant provisions of the Contract of Sale state as follows:

21. PURCHASER has inspected the building on the PREMISES and the personal property included in this sale and is thoroughly acquainted with their condition. PURCHASER agrees to purchase [sic] them "as is" and in their present condition subject to reasonable use, wear, tear, and natural deterioration between now and CLOSING. PURCHASER shall have the right, after reasonable notice to SELLER, to inspect them before closing.

22. All prior understandings and agreements between SELLER and PURCHASER are merged into 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.

28. The purchaser represents that the purchaser has inspected said premises, and is purchasing said premises "as is" as of the date hereof, ordinary wear and tear from the time of contract to closing excepted. This provision shall not survive the delivery of the deed or possession, whichever is later. . . .

41. None of the provisions of this Contract shall survive delivery of the deed, except as provided herein or shall otherwise be specifically provided in writing to survive the closing and, except where otherwise expressly provided herein, this Contract shall merge in the deed with the closing of title.

The Contract of Sale unequivocally establishes that the Building would be sold to the Buyer "as is" and that all prior agreements and understandings merged into the contract and would be extinguished at the time of closing. The fact that Buyer is unsatisfied with the presence of bedbugs in the Building, that Buyer is losing tenants, and that Buyer is spending unanticipated amounts of money to remediate the problem, is not sufficient to demonstrate a breach of contract because defendants failed to disclose the presence of bedbugs to Buyer.

While Buyer provides testimony through affidavits and exhibits, to establish that prior to the Contract of Sale, defendants knew of and failed to disclose that there were bedbugs in the Building, such parol evidence is inadmissible. "Parol evidence is inadmissible to contradict, vary, add to, or subtract from the terms of the written agreement between the parties." Bedowitz v. Farrell Development Co., Inc., 180 A.D.2d 177, 180 (2d Dept. 2001).

Buyer's three additional causes of action against defendants for failure to make repairs and pay an outstanding violation issued by the Fire Department of New York City, must also be dismissed based upon the documentary evidence (the Contract of Sale). The Contract of Sale does not contain any provision that would obligate defendants to make such repairs or payments after title was transferred to the Buyer. Once the closing took place, defendants were relieved of all prior obligations. The contract clearly states that "all prior understandings and agreements between SELLER and PURCHASER are merged into this contract. It completely expresses their full agreement." There is no separate agreement requiring defendants to make the repairs or pay the fine. Where the words used in a contract with respect to survivability are

susceptible to no other interpretation, then claims in tort and contract are barred. See Novelty Crystal Corp. v. PSA Institutional Partners, L.P., 49 A.D.3d 113 (2d Dept. 2008).

Fraudulent Misrepresentation Claim

To state a cause of action for fraud, plaintiff must show: (1) that defendants intentionally made a misrepresentation or material omission of fact; (2) that the misrepresentation or material omission of fact was false or known to be false to defendants; (3) plaintiff's reliance; and (4) that the misrepresentation resulted in some injury to plaintiff. Held v. Kaufman, 91 N.Y.2d 425 (2d Dept. 1998).

While Buyer raises claims in both tort and contract, it is a well-established legal principle that a breach of contract is not to be considered a tort unless a legal duty, independent of the contract itself, has been violated. Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co., 70 N.Y.2d 382 (2d Dept. 1987). This legal duty must arise from circumstances extraneous to, and not constituting, elements of the contract. Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co., 70 N.Y.2d 382, *supra*.

The misrepresentations that defendants allegedly made to Buyer (assuming they could be proved by Buyer 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" condition. It also states that the Buyer had the right to inspect the Building before closing. Thus, any claim by Buyer that it was fraudulently

induced into signing the Contract of Sale fails. Not only did it have the right and opportunity to inspect the Building to ascertain its condition before the date of closing, even if there were any misrepresentations, they were not collateral to the contract.

Moreover, the Contract of Sale includes a merger clause which states that all prior understandings and agreements are merged into the contract and it is a complete expression of their full agreement. It was Buyer's duty to determine the Building's condition before it 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, Buyer's claim of fraud against defendants was extinguished upon closing. McPherson v. Husbands, 54 A.D.3d 735, 737 (2d Dept. 2008) (internal citations omitted).

Furthermore, the Contract of Sale contained several handwritten changes and addendums, and Buyer and defendants entered into several written agreements prior to closing. None of these agreements mention or refer to bedbugs or contain representation that there are or are no bedbugs in the Building. Had defendants made any representations about the presence or absence of bedbugs, such language should have been set forth in the writings so as to be enforceable.

Buyer has not alleged any fraud that is collateral or extraneous to the contract, or that damages are not recoverable under a contract measure of damages, or that defendants owed the Buyer a separate duty. Coppola v. Applied Electric Corp., 288 A.D.2d 41, 42 (1st Dept. 2001). Buyer cannot plead fraudulent misrepresentation to avoid defeat of its contract claim. The tort claim and breach of contract claim are

redundant because the only tort plaintiff alleges is that the defendants made misrepresentations regarding the condition of the Building (see First Bank of Americas v. Motor Car Funding, Inc., 257 A.D.2d 287, 291 [1st Dept. 1999]).

Notarization

Defendants contention that Robert Williams is not a valid notary, and that the affidavits of his affiants should be disregarded by the court, must also fail. The expiration of a notary's term will not invalidate the defectively notarized documents, even if the person who notarized them "knowingly" notarized them with a lapsed notary commission (Executive Law § 142-a [2] [b], [c], [d], [f]; Parks v. Leahey & Johnson, P.C., 81 N.Y.2d 161 [1st Dept. 1998]). Furthermore, Buyer's pleadings and affidavits, even when accepted as true, do not support the conclusion that Buyer would have been successful on the contract or tort claims absent the alleged fraud. See Parks v. Leahey & Johnson, P.C., 81 N.Y.2d 161, *supra*.

Personal Liability

It is a generally accepted rule that an agent acting within the scope of his authority is not liable in damages to the other party of the contract unless there is evidence of independent tortious conduct. Buckley v. 112 Central Park South, Inc., 285 A.D. 331 (1st Dept. 1954); Greyhound Corp. v. Commercial Casualty Insurance Co., 259 A.D. 317 (1st Dept. 1940). Where there is no evidence of independent tortious conduct

on the part of individual defendants, then such agents will be immune from personal liability.

The mere assertion that the corporate entity was dissolved weeks after this case was commenced is not reason to assert individual liability against Henry and Solomon. Buyer argues that the corporation was dissolved to "thwart the Plaintiff and to leave it without a remedy." However, the Buyer has not pled any facts, let alone set forth particularized statements, detailing fraud or other independent tortious misconduct on behalf of Henry and Solomon that support imposing personal liability in order for Buyer to achieve equity. See Bowles v Errico, 163 A.D.2d 771 (3d Dept. 1990).

Therefore, defendants' motion to dismiss for failure to state a cognizable cause of action (CPLR § 3211 [a] [7]) against Henry and Solomon is dismissed.

Conclusion

In accordance with the foregoing, defendant's motion for the pre-answer dismissal of the complaint, based on the documentary evidence and for failure to state a cognizable cause of action, is granted and the complaint is dismissed in its entirety.

IT IS HEREBY

ORDERED that the Clerk shall enter judgment in favor of defendants, 85-87 Pitt Street Realty Corporation, Solomon Hallivus, and Henry Hallivus, against plaintiff, 85-87 Pitt Street, LLC., dismissing the complaint; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 31, 2010

So Ordered:



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

FILED
APR 06 2010
NEW YORK
COUNTY CLERK'S OFFICE