SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
Justice

TRIAL/IAS PART 20

X

NOORALI KERMALI and RUBAB KERMALI,

Plaintiffs,

-against-

MARIA BELLI, Executrix of the estate of ROSE BUCOLO a/k/a ROSE BUCOLO, STEPHANIE CATANZARO and REALTY EXECUTIVES WEST,

Defendants.

X

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Motion Sequence...02, 03
Motion Date...02/09/10
XXX

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Notice of Cross-motion.....x
Affidavit in Opposition.....x
Reply Memorandum of Law.....x
Reply Affirmation.....x

The Defendants, Stephanie Catanzaro (hereafter "Catanzaro") and Realty Executives West (hereafter "Realty Executives") move this Court for an Order, pursuant to CPLR § 3212, granting Summary Judgment and dismissing the Plaintiffs, Noorali and Rubab Kermali's (hereafter Kermali) Complaint and Cross-claims against them. The Defendant,

Maria Belli, Executrix of the Estate of Rose Bucolo a/k/a Rose Bucolo (hereafter "Belli") Cross-moves for an Order, pursuant to CPLR § 3212, granting her summary judgment dismissing the Plaintiffs' complaint against her. The Plaintiffs oppose both the motion and Cross-motion.

The underlying action involves the purchase of real property located at 700 South Park Lane, Franklin Square, New York. The property, which consisted of a one-family house and its lot, was being sold by Belli, as the executrix of her mother's estate. Catanzaro, was employed as a licensed real estate associate by Realty Executives, the listing agent, and engaged by Belli, her mother, to sell the property at issue. A contract of sale was executed by Belli and the Plaintiffs on April 11, 2008, whereby the Plaintiffs agreed to buy the property for $450,000.00. A down-payment in the amount of $45,000, to be held in escrow, was tendered by the Plaintiffs. Subsequently, the Defendants asserted that the property was too small to build the home they required.

The Plaintiffs commenced this action by service and filing of their summons and complaint on or about June 18, 2008. Catanzaro and Realty Executives served their answer on or about August 18, 2008. Belli served her answer on or about July 16, 2008. The Plaintiff, Rubab Kermali and Belli were deposed on May 7, 2009, and Catanzaro was deposed on August 6, 2009.

The Plaintiffs contend that Catanzaro prepared a listing for the property in question which indicated that the lot size was 13,200 square feet. Further, they allege that

all parties involved knew that the square footage was important because the Plaintiffs intended to demolish the house and construct a much larger one to accommodate their multi-generational family. They claim that they did not learn the true size of the lot and that it would not meet their needs, until after the contract of sale was signed, when plans were prepared by their architect/engineer, Robert F. Alweis (hereafter "Alweis"). It is their contention that they relied on the erroneous listing to their detriment.

Catanzaro and Realty Executives along with Belli allege that although the initial listing may have contained the incorrect square footage, the correct lot acreage size, was supplied by them in the form of a survey map that was provided to the Plaintiffs prior to the signing of the contract. Further, they claim that Alweis drew up plans for the Plaintiff's house prior to the contract being signed. Belli also alleges that she never had any written or oral contact with the Plaintiffs prior to the deposition date of May 7, 2009. It is the position of all the Defendants that the signed contract speaks for itself and contains no representation as to square footage. Further, they allege that the Plaintiffs knew or should have known the true size of the property prior to their signing of the contract.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 [1988]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986], *Rebecchi v. Whitmore*, 172 A.D.2d 600 [2nd Dept. 1991]). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form

sufficient to require a trial of material issues of fact" (*Frank Corp. v. Federal Ins. Co., supra,* at 967; *GTF Mktg. v. Colonial Aluminum Sales,* 66 N.Y.2d 965 [1985]; *Rebecchi v. Whitmore, supra* at 601). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see, Frank Corp. v. Federal Ins. Co., supra*).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Barr v. County of Albany*, 50 N.Y.2d 247 [1980]; *Daliendo v. Johnson*, 147 A.D.2d 312, 317 [2nd Dept. 1987]). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. (*Barrett v. Jacobs,* 255 N.Y. 520 [1931]; *Cross v. Cross*, 112 A.D.2d 62 [1st Dept. 1985]). The evidence should be construed in a light most favorable to the party moved against. (*Weiss v. Garfield*, 21 A.D.2d 156 [3rd Dept. 1964]).

The Defendants have, in the first instance, established a prima facie case that there exist no material and triable issues of fact. This they have accomplished by way of submission of the contract of sale and the depositions of the parties. It is then incumbent upon the Plaintiffs to present evidence sufficient to require a trial of any material factual issues. Normally, this is accomplished by producing proof in admissible form. In this instance, the Plaintiffs have failed to raise a triable issue of fact as to whether the Defendants actively concealed the actual square footage of the property and thwarted the Plaintiffs'

efforts to discover that information. (*See Matos v. Crimmins*, 40 A.D.3d 1053 [2nd Dept. 2007]).

Initially, it should be noted that the contract of sale makes no reference whatsoever to the square footage of the property in question nor to the Plaintiffs' requirement that the property be of a certain minimal size. Additionally, the contract contains the following relevant provisions:

> 12. Condition of Property. Purchaser acknowledges and represents that Purchaser is fully aware of the physical condition and state of repair of the Premises and of all other property included in this sale, based on Purchaser's own inspection and investigation thereof, and that Purchaser is entering into this contract based solely upon such inspection and investigation and not upon any information, data, statements or representations, written or oral as to the physical condition, state of repair, use, cost of operation or any other matter related to the Premises or the other property included in the sale, given or made by Seller or its representatives, and shall accept the same "as is" in their present condition. . .
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> 28. Miscellaneous. (a) All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged in this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract.

and in an attached rider:

> Said premises are sold an shall be conveyed and taken subject to the following additional provisions:
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> Any state of facts an accurate survey may show, provided the same does not render title unmarketable.

The parties to the contract were each represented by counsel. There was no undue influence exerted by either party. The contract speaks for itself. The Plaintiffs can

not now complain that they were misled or deceived by the Defendants and that the contract is not controlling.

It is well settled that in a real property contract, unless the facts represented are matters particularly within one party's knowledge, the other party must make use of means available to learn, by the exercise of ordinary intelligence, the truth of such matters. Otherwise he can not complain that he was induced to enter into the transaction by misrepresentation. (*Esposito v. Saxon Home Realty, Inc.*, 254 A.D.2d 451 [2nd Dept. 1998]).

Furthermore, the doctrine of caveat emptor applies to real estate transactions and imposes no duty on the seller or its agent the disclose any information about the property when the parties deal at arm's length unless there is conduct on the seller's part which constitutes active concealment. *(Rozen v. 7 Calf Creek, LLC*, 52 A.D.2d 590 [2nd Dept. 2008]). To establish a cause of action for fraudulent concealment, a plaintiff in a real estate transaction must demonstrate that the seller or its agent 1) concealed a material fact which they were duty-bound to disclose due to a confidential or fiduciary relationship between the parties, 2) there was the intention to defraud the plaintiff, 3) the plaintiff reasonably relied on the misrepresentation, and 4) resulting injury. (*Spencer, et al. v. Green, et al.*, 42 A.D.3d 521 [2nd Dept. 2007]). Additionally, the plaintiff must show that the defendants thwarted the plaintiffs' efforts to discover the information. *See Rozen, supra.*

The information about which the Plaintiffs claimed to have been deceived, the size of the lot they were purchasing, was public information, as easily accessible to the

Plaintiffs or their agents, as to the Defendants. Clearly, the information was discovered by Alweis when drawing up his plans for the Plaintiffs' home. The information was not within the peculiar knowledge of the Defendants. The Defendants made no attempts to conceal, nor could they in fact have concealed, the true size of the property. The Plaintiffs have failed to demonstrate that the information allegedly withheld was within the exclusive knowledge of the seller or her agents or that it was "unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction." (*Glazer v. LoPreste*, 278 A.D.2d 198 [2nd Dept. 2000]).

Accordingly, based upon the foregoing, the Defendants, Catanzaro and Realty Executives' motion granting summary judgment and dismissing the Plaintiffs' Complaint and Cross-claims against them is **GRANTED**. The Defendant Belli's Cross-claim for an Order granting Summary Judgment, dismissing the Plaintiffs' Complaint is also **GRANTED**.

This constitutes the Decision and Order of the Court.

Any applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
April 19, 2010

Hon. Randy Sue Marber, J.S.C.
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