

**Reiter v Columbus Real Estate, Inc.**

2010 NY Slip Op 32968(U)

October 20, 2010

Supreme Court, New York County

Docket Number: 108196/10

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.

PART 10

Index Number : 108196/2010  
REITER, IRA  
vs.  
COLUMBUS NY REAL ESTATE INC.  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, It is ordered that this motion

OCT 21 2010

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 10/20/10

JSG  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

Supreme Court of the State of New York  
County of New York: IAS 10

-----x  
Ira Reiter and Susan Reiter.

Plaintiffs,

Decision/Order

-against-

Index108196/10  
Mot. Seq. # 01

Columbus Real Estate, Inc. and  
Elissa Abreau,

Defendants.

**FILED**

-----x  
Hon. Judith J. Gische:

OCT 21 2010

Pursuant to CPLR 2219(a) the following papers were considered by the Court on this motion:

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NUMBERED

**PAPERS**

Notice of Motion, RJB affirm, exhibits.....	1
MYK affirm, exhibits.....	2
RJB Reply affirm.....	3

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

Defendants have moved, pre answer, to dismiss the complaint for failure to state a cause of action and based on documentary evidence. CPLR §3211(a)(1), (7).

Plaintiffs opposes the motion. The complaint asserts three causes of action respectively for: negligence (1<sup>st</sup> cause of action); breach of warranty of habitability (2<sup>nd</sup> cause of action); and return of brokerage fees (3<sup>rd</sup> cause of action).

When deciding a motion to dismiss the complaint for failure to state a cause of action, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference (Goshen v. Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon v. Martinez, 84 NY2d 83 [1994]; Morone v. Morone, 50 NY2d 481 [1980]; Beattie v. Brown

& Wood, 243 AD2d 395 [1<sup>st</sup> Dept. 1997]). Where the basis for dismissal is also based upon documentary evidence (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1<sup>st</sup> Dept 2006]), such evidence must definitively dispose of 3<sup>rd</sup> party plaintiff's claims (Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 [1<sup>st</sup> dept. 1995]).

The complaint alleges in substance that the plaintiff's negotiated a lease for a residential apartment located at 116 Central Park South, New York NY apartment 16N ("apartment") with a lease term that was set to begin on February 15, 2010 through February 14, 2011. They claim that defendant Abreu, acting as an employee of co-defendant Columbus NY Real Estate, Inc., represented to plaintiffs that they could move into the apartment on February 15, 2010, which the defendant knew to be a crucial date for plaintiff's move in. Plaintiffs allege that defendants "negligently delayed in submitting the condominium package to the managing agent." As a result, on the commencement date of the lease, plaintiffs did not have the required approvals and were denied access to move in.

Plaintiffs seek damages they incurred in connection with having to find alternative accommodations until they could move in. They also seek damages because they claim that when they were allowed to move in, there were conditions in the apartment that violated the warranty of habitability. Finally, they seek a return of brokerage fees that they paid "in reliance on representations made by defendants they would be able to rent the unit in move-in condition on February 15, 2010."

In connection with the claim for negligence, the documentary evidence shows that the lease for the apartment was not signed by plaintiffs until January 22, 2010. The lease expressly provides that the apartment is located within a condominium and that

the condominium has a right of first refusal. The lease expressly provides:

"You shall furnish to the condominium or its managing agent, within 5 business days after the date of this lease, such personal and financial references and additional information concerning You and the Permitted Occupants of the Apartment as may be requested in order to obtain the waiver of the Condominium's right of first refusal with respect to this Lease, including the submission of any application requested by the condominium.

You acknowledge that the Lease will not commence and that You and the Permitted Occupants shall have no right to occupy the apartment until the waiver of the Condominium Right of First Refusal with respect to the Lease is obtained. If such waiver has not been obtained by the specified date in Article 2 as of the beginning date of this Lease, You shall have no obligation to pay rent until such waiver has been obtained..."

While there seems to be some dispute about when a completed application was delivered by plaintiffs, it is undisputed that the condominium had a thirty days within which it could decide whether to exercise its right of first refusal.

The first cause of action for negligence is dismissed. The plaintiffs signed a lease knowing full well that the lease commencement date was contingent upon the condominium waiving its right of first refusal. They knew or should have known before February 15, 2010 that they did not have such approval.

The allegations of negligent delay in submitting the application do not otherwise state a valid cause of action. Negligence connotes a duty. Here defendants were the agents of the owner and not the tenants. Plaintiffs do not identify the legal duty that defendants owe them. The relationship they have here is with the defendants' disclosed principal and it is pursuant to contract. They cannot sue in negligence for a relationship that is governed by contract. JE Morgan Knitting Mills, Inc. v. Reeves

Bros., Inc. 243 AD 2d 422 (1<sup>st</sup> dept. 1997).

Even assuming there was a legal duty owed by defendants to plaintiffs, the cause of action would otherwise fail. The documentary evidence shows that there was no delay in submitting the application package to the Condominium which caused a delay in the commencement of the lease. Although the parties factually contest when the materials were actually completed and provided to defendants for submission to the Condominium, they could not have been provided earlier than January 25, 2010, the date of one of the reference letters provided by plaintiffs. The Condominium had 30 days to act, and indeed it did act within 30 days of the date of the last letter. Thus, based on plaintiff's own facts, there was no breach of any duty that caused a late start date to the lease.

The second cause of action for breach of warranty of habitability must also be dismissed. The facts alleged are that the defendants were agents for the owner of the condominium. Breach of warranty of habitability requires a landlord tenant relationship to exist between the parties. (McCarthy v. Board of Managers of the Bromley Condominium, 271 AD2d 247[1st dept. 2000]). It is an owner or landlord that has the obligations to provide a habitable residential premises and the fact that an agent may be designated by a disclosed principle for notification purposes is not sufficient to create liability on the part of the agent.

Finally, the third cause of action seeks to collect the brokerage fees. It is unclear who those fees were paid to. The third cause of action appears, however, to only be allegations related to damages rather than a separate cognizable legal claim. Since the

complaint does not otherwise state any cognizable legal claim , the third cause of action must likewise be dismissed.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion to dismiss the complaint is granted in all respects; and it is further

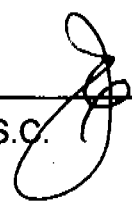
ORDERED that the Clerk shall enter a judgment in favor of defendants Columbus Real Estate, Inc. and Elissa Abreu, against plaintiffs Ira Reiter and Susan Reiter dismissing the complaint, with prejudice and with the costs and disbursements of this action, as taxed by the court.

Any requested relief not otherwise granted herein is denied.

This constitutes the decision and order of the Court.

Dated: New York, NY  
October 20, 2010

**FILED**  
OCT 21 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

SO ORDERED:  
  
\_\_\_\_\_  
J.G. J.S.C.