

Bharucha v Greenberg
2011 NY Slip Op 30171(U)
January 13, 2011
Supreme Court, Nassau County
Docket Number: 011008/08
Judge: Thomas P. Phelan
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

VISHAL BHARUCHA,

Plaintiff,

-against-

STEPHEN T. GREENBERG, ALAN ROSS,
SANJAY SEHGAL, SHAWN ELLIOT,
SHAWN ELLIOT LUXURY HOMES
and ESTATES, LUXURY TITLE AGENCY INC.
and COMMONWEALTH LAND TITLE
INSURANCE COMPANY,

Defendants.

TRIAL/IAS PART 2
NASSAU COUNTY
MOTION SEQUENCE ##1, 2, 3

ORIGINAL RETURN DATE: 09/07/10
SUBMISSION DATE: 11/12/10
Index No. 011008/08

The following papers read on this motion:

Notice of Motion	1
Notices of Cross Motion	2, 3
Affidavits in Opposition	4, 5
Reply Affidavit/Affirmation.....	6, 7
Memorandums of Law.....	8, 9
Stipulation of Discontinuance.....	10

Defendants, Sanjay Sehgal (“Sehgal”), Shawn Elliot (“Elliot”) and Shawn Elliot Luxury Homes & Estates (“Luxury”) (collectively “the Brokers”) move for summary judgment pursuant to CPLR 3212 dismissing plaintiff’s complaint as against them. Plaintiff opposes the motion and cross moves for summary judgment on the issue of liability against defendants, Stephen T. Greenberg (“Greenberg”) and Alan Ross (“Ross”). Defendant, Stephen T. Greenberg, cross moves for summary judgment dismissing plaintiff’s complaint against him.

The instant action was brought against defendant Ross for negligence, legal malpractice and

breach of fiduciary duty, against defendant Greenberg for breach of contract, against defendant Luxury for breach of contract, negligence and malpractice, against defendant Commonwealth Land Title Insurance Company for vicarious liability, against defendant Elliot for the breach of contract by defendant Greenberg and against the Brokers for conspiracy, fraud and punitive damages.

Plaintiff purchased premises known as 11 White Birch Road, Oyster Bay Cove, New York (the "Premises"), from defendant Greenberg pursuant to a contract of sale dated September 26, 2006 (the "Contract"). The record indicates that defendant Greenberg had purchased the Premises at a foreclosure sale in 2006, at which time there was an open permit for the tennis court on the Premises.

At the closing of the transaction between plaintiff and Greenberg on October 27, 2006, plaintiff and defendant Greenberg, as well as Morganstern & Quatela, as Escrowee, entered into an Escrow Agreement, which provided, inter alia, that the sum of \$5,000 was to be held in escrow pending delivery of Certificate of Occupancy, Certificate on Completion or Certificate of Compliance (collectively, the "C.O.") to plaintiff.

The Escrow Agreement provided that in the event the C.O. shall not have been delivered to plaintiff, plaintiff "shall be authorized to take whatever reasonable steps at a reasonable cost, which are necessary to obtain the C.O., at the Seller's [defendant Greenberg] expense" (Ex. E to Pl's Cross Motion, ¶4). The Escrow Agreement further provided that reimbursement was not limited to the escrow amount and that the Seller would remain personally liable (Id., ¶5).

It appears from the record that the tennis court on the Premises was built within an environmental easement which restricted buildings, structures or fences within the easement area (Ex. C to Pl's Cross Motion). Plaintiff avers that the Incorporated Village of Oyster Bay Cove refuses to issue a C.O. and is requiring the demolition of the tennis court and restoration of the plantings within the easement (¶11). Plaintiff submits a 106-count Information for Code Violations issued by the Building Inspector (Ex. G).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact; and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]). If material facts are in dispute or different inferences may reasonably be drawn from facts themselves undisputed, the motion for summary judgment must be denied (*Supan v. Michelfeld*, 97 AD2d 755 [2d Dept. 1983]).

The Brokers primary ground for summary judgment dismissing the complaint against them is the doctrine of *caveat emptor*. Here, the environmental easement on the Premises was not a matter

particularly within the knowledge of the Brokers and could have been ascertained by plaintiff by means available to him through the exercise of ordinary intelligence (*see, Esposito v Saxon Home Realty*, 254 A.D.2d 451 [2d Dept 1998]).

One of the allegations in the complaint is that defendant Elliot has an equitable ownership interest in the Premises and is, therefore, jointly and severally responsible for the breaches of defendant Greenberg. Elliot avers that he “did not have any ownership interest in the premises. The only connection I had to the premises was that my company, Shawn Elliot Luxury Homes & Estates, served as the listing agent with respect to the underlying transaction” (Elliot Aff. ¶4). Counsel for Elliot submits that it therefore follows that Elliot cannot be liable for Greenberg’s alleged breach of contract.

Plaintiff’s demand for punitive damages does not lie as the claims raised by plaintiff do not rise to the level of conduct required to support such an award. “Punitive damages are warranted where the conduct of the party being held liable evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness (citations omitted)” (*Buckholz v Maple Garden Apts., LLC*, 38 A.D.3d 584 [2d Dept. 2007]).

In light of Elliot’s and the Brokers’ showing of entitlement to judgment as a matter of law, the burden shifts to plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). This the plaintiff has failed to do. In opposition, plaintiff merely states that the Brokers recommended that he use Ross as his attorney in the transaction and, therefore, concludes that they were integrally involved in this matter. Accordingly, the eleventh, twelfth, thirteenth and fourteenth causes of action are dismissed as against Sehgal, Elliot and Luxury, only.

The court will now address plaintiff’s cross motion for summary judgment against defendants Greenberg and Ross on the issue of liability and Greenberg’s cross motion for summary judgment dismissing the complaint against him.

With regard to plaintiff’s breach of contract claims in connection with the contract of sale dated September 26, 2006, the court notes that paragraph 11(c) provides, as follows: “Except as otherwise expressly set forth in this contract, none of the Seller’s covenants representations warranties or other obligations contained in this contract shall survive Closing” (Ex. B to Pl’s Cross Motion)

Defendant Greenberg submits that discovery is necessary to explore, among other things, what information plaintiff had available to him at the time of the sale; the extent to which plaintiff’s failure to take any action and allowing the permit to expire affected the transaction; and the causal relationship between any purported breach of contract and whatever damages plaintiff claims.

Defendant Greenberg "established that it did not have an adequate opportunity to conduct discovery into these issues, some of which are exclusively in the knowledge of [plaintiff] (citations omitted)" (*Colon v. Manhattan & Bronx Surface Transit Operating Auth.*, 35 AD3d 515, 517 [2d Dept. 2006]). At the time this action was certified for trial, on November 15, 2010, counsel for the respective parties entered into a stipulation setting down deposition dates beginning on November 23, 2010. All of the papers on the motions are dated prior to that date.

Although plaintiff submits that defendant Ross failed to properly advise him, defendant Ross refutes these allegations. Neither plaintiff nor defendant Greenberg have demonstrated their prima facie entitlement to judgment as of matter of law. Material issues of fact exist, among other things, as to the actual advise given, or not given, by defendant Ross.

Based upon all of the foregoing, plaintiff's cross motion for summary judgment against defendants Greenberg and Ross on the issue of liability and defendant Greenberg's cross motion for summary judgment dismissing the complaint against him are denied.

Counsel for the respective parties have entered into a Stipulation of Discontinuance discontinuing plaintiff's claims and defendant Ross' cross-claims against defendant Commonwealth Land Title Insurance Company. Accordingly, the caption of the action is hereby amended to read as follows:

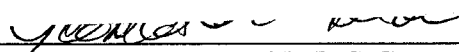
"VISHAL BHARUCHA,
Plaintiff,

-against-

STEPHEN T. GREENBERG, ALAN ROSS,
and LUXURY TITLE AGENCY INC.,
Defendants."

This decision constitutes the order of the court.

Dated: 1-13-11

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J..S.C.

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COUNTY CLERK'S OFFICE

RE: BHARUCHA v. GREENBERG, et al.

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