

Attwood v Sokol

2011 NY Slip Op 30929(U)

March 21, 2011

Supreme Court, New York County

Docket Number: 112043/2010

Judge: Saliann Scarpulla

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SCANNED ON 3/24/2011
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **SALIANN SCARPULLA**

PART 19

Index Number : 112043/2010

ATTWOOD, MARIE HELENE

vs

SOKOL, ANDREW L., ESQ.

Sequence Number : 001

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

decided per the memorandum decision dated _____
which disposes of motion sequence(s) no. 001 and 002.

FILED

MAR 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/21/11

Saliann Scarpulla
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: CIVIL TERM: PART 19

-----X
MARIE HELENE ATTWOOD,

Plaintiff,

Index No.: 112043/2010
Submission Date: 1/26/11

- against-

DECISION AND ORDER

ANDREW SOKOL, ESQ., NORMAN
HOROWITZ, and HALSTEAD PROPERTY, LLC,

Defendants.
-----X

For Plaintiff:
Susan Warnock, Esq.
880 Third Avenue, 13th Floor
New York, New York 10022

For Defendant Norman Horowitz:
Law Office of Allison M. Furman, Esq.
120 East 37th Street
New York, NY 10016

For Defendant Halstead Property, LLC:
Penn Proefriedt Schwarzfeld & Schwartz
114 West 47th Street, 19th Floor
New York, NY 10036

FILED

MAR 24 2011

Papers considered in review of these motions to dismiss:

NEW YORK
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Notice of Motion	1
Aff in Support	2
Mem of Law	3
Aff in Opp	4
Mem of Law	5
Reply Aff	6
Notice of Motion	7
Aff in Support	8
Aff in Opp	9
Mem of Law	10

HON. SALIANN SCARPULLA, J.:

In this action stemming from plaintiff's purchase of a condominium, defendant Norman Horowitz ("Horowitz") and defendant Halstead Property, LLC ("Halstead")

* 3] .
(collectively “defendants”) separately move to dismiss plaintiff Marie Helene Attwood’s (“Attwood”) verified complaint. Defendant Andrew L. Sokol, Esq. (“Sokol”) interposed an answer, but has not submitted papers on these motions.

In motion sequence 001, Horowitz moves pursuant to CPLR 3211(a)(5) to dismiss the verified complaint because the causes of action are barred by the statute of limitations, and in the alternative pursuant to CPLR 3211(a)(1) and (7), to dismiss the verified complaint based upon documentary evidence and/or because it fails to state a cause of action. In motion sequence 002, Halstead moves pursuant to CPLR 3211(a)(5) to dismiss the verified complaint because the causes of action are barred by the statute of limitations. Motions with the sequence numbers 001 and 002 are consolidated for disposition.

As alleged in the verified complaint, in or around September 2002, Attwood saw an advertisement in the New York Times Real Estate Section for an “open house” at 249 Elizabeth Street, Unit No. Prof. B, New York, NY 10012 (the “premises”). In addition to details about the apartment, the advertisement listed contact information for “HALSTEAD N. Horowitz.”¹

Attwood alleges that she contacted Horowitz, and then attended the open house for the premises. At the open house Attwood learned that Horowitz was a real estate broker, and was also the owner seeking selling the premises. Attwood subsequently made an offer

¹ The descriptive portion of the advertisement stated, “Condo 1BR + pvt grdn, grnhse + wbf, custom’zd deck, live-work, pied-a-terre, pets OK. No Board Approv! Only \$41,K.”

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to purchase the premises, which Horowitz accepted. Attwood retained Sokol to represent her in connection with the purchase of the premises. On or about October 21, 2002, Attwood purchased the premises from Horowitz for \$400,000.

In the contract of sale, Attwood represented that she “has examined or waived consideration of all other matters pertaining to this contract and to the purchase hereunder, and does not rely on any representations made by any broker or by Seller or anyone acting or purporting to act on behalf of seller as to any matters which might influence or affect the decision to execute this Contract or to by the Unit.” The condominium deed indicates that Attwood became owner of the premises “known as Condominium Unit Professional B . . . located at 259 Elizabeth Street, New York, New York The use of said Unit is for residential purposes.”

In or around Spring 2010, Attwood listed the premises for sale using a real estate broker. Attwood received an offer to purchase the premises for \$750,000. Attwood again retained Sokol to represent her and prepare a contract of sale. Attwood alleges that, prior to executing the contract of sale, the prospective purchaser’s attorney conducted a “preliminary search” and learned that the certificate of occupancy designated that the premises were to be used as a doctor’s office, and did not permit the premises to be used for residential purposes.

Attwood then retained new counsel to handle the sale of her premises. Through her new counsel and an architect/expediter, Attwood was advised that the certificate of

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occupancy could not be changed from professional to residential use. As a result, the prospective buyers backed out of the purchase of the premises.

Attwood further alleges that she inquired about selling her premises as a commercial unit, and was advised that the value would be significantly less than if it was marketed as a residential unit. Attwood asserts that if she "had known of the issue with the Certificate of Occupancy at the time she purchased the [] Premises, she never would have purchased the [] Premises in the first instance."

In her first cause of action, Attwood alleges deceptive business practices, pursuant to General Business Law ("GBL") §349, against Halstead and Horowitz. In support of this cause of action, Attwood asserts that when Horowitz listed the premises for sale, he was employed by Halstead, and Halstead placed the advertisement listing the sale of the premises as a one bedroom residential unit, and that at that time "Halstead and/or Horowitz knew or should have known" that such a representation about the premises was false. Attwood further alleges that she relied on the truthfulness of the advertisement when she entered into the contract to purchase the premises, that she would not have entered into such a contract had she known that the representation was false, and as a result Attwood cannot use, occupy or convey the premises as a residence.

In her second cause of action, Attwood asserts "Fraudulent/negligent misrepresentation" against both Halstead and Horowitz. In support, Attwood alleges that Halstead employed Horowitz as a broker, and placed an advertisement containing false information. Attwood further alleges that she relied on the truthfulness of defendants'

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representations that the premises was a residential condominium unit, and entered into the contract of sale, which she would not have done had she known the representation was false. Attwood also alleges that Halstead, through Horowitz, "fraudulently, knowingly and/or negligently" advertised and represented that the premises was a residential unit, and misled Attwood into believing that it was a residential unit, and as a result Attwood cannot use, occupy or convey the premises as a residence.

The third cause of action is styled "Breach of Contract/Fraudulent Misrepresentation" against Horowitz. In support of this cause of action, Attwood alleged that Horowitz was aware that the Certificate of Occupancy was for the premises as a doctor's office and not for residential use, and that he never disclosed the "true status" of the premises to Attwood. Attwood further alleges that Horowitz committed fraud by "knowingly and/or negligently misrepresenting" that the premises could be used as a residential unit. Attwood also alleges that Horowitz "specified that the premises were to be used for residential purposes in the deed given by Horowitz to [Attwood]."

Horowitz and Halstead move to dismiss the verified complaint as barred by the statute of limitations. In support, Horowitz and Halstead argue that the statute of limitations for the deceptive trade practices cause of action is three years, pursuant to CPLR 214(2), and as such the cause of action is not timely, as the action was commenced almost eight years after the advertisement and purchase of the premises. Horowitz and Halstead also argue that the second cause of action, for fraudulent/negligent inducement, is also barred by a six year statute of limitations.

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In opposition, Attwood argues that the GBL §349 cause of action was timely commenced within the three year statute of limitations, as she was not injured until she found herself unable to sell her apartment for \$750,000 in the Spring of 2010. Attwood further argues that her fraudulent claim is timely, as she did not discover the fraud until the potential buyer withdrew its offer in the Spring of 2010.

Discussion

There is no dispute between Attwood and the defendants that the statute of limitations for a GBL §349 cause of action is three (3) years, pursuant to CPLR 214(a). *See also Gaidon v. Guardian Life Ins. Co. of America*, 96 N.Y.2d 201, 210 (2001). The dispute between the parties centers on when such a cause of action may have accrued.

“In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief. . . . [A]ccrual of a [GBL] section 349(h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice violating section 349.” *Gaidon*, 96 N.Y.2d at 201 (citations omitted).

Attwood asserts that she was not injured, and therefore the deceptive practices cause of action did not accrue, until she attempted to sell the premises, and was unable to do so, upon her potential purchaser’s discovery of the certificate of occupancy designating the premises as a doctor’s office.

However, throughout the verified complaint, Attwood pleads that had she been aware of the status of the premises, she never would have purchased it in 2002. And at the

time of her closing, Attwood, through her attorney, should have been in possession of all the information necessary – including the certificate of occupancy – to determine the status of the unit she was about to purchase. The certificate of occupancy is dated March 10, 1998, and was certainly discoverable by Attwood at the time she purchased the premises, as it was to her potential purchasers years later.

Additionally, the documents submitted by Horowitz in support of his motion show that Attwood's previous attorney, Sokol, had been provided a copy of the certificate of occupancy by First American Title Insurance Company of New York prior to her closing in 2002. That her agent knew or should have known of the certificate of occupancy and that it designated the premises a professional and not residential unit, is imputed to Attwood. *See Seward Park Hous. Corp. v. Cohen*, 287 A.D.2d 157, 167 (1st Dep't 2001) ("notice to an agent while acting within the scope of his duties constitutes notice to a principal").

Accordingly, the alleged deceptive practices cause of action accrued at the time Attwood closed on the purchase of the premises in October, 2002. "Plaintiff's claims under General Business Law §349, however, are time-barred as the three-year limitation period set forth in CPLR 214(2) applies to causes of action predicated thereon and the date of discovery rule is not applicable and cannot serve to extend that limitations period." *Wender v. Gilberg Agency*, 276 A.D.2d 311, 312 (1st Dep't 2000) (citation omitted). *See also Board of Managers of Marke Garden Condominium v. 240/242 Franklin Avenue LLC*, 20 Misc. 3d 1138A, at 6 (Sup. Ct. Kings co. 2009), *aff'd*, 71 A.D.3d 935 (2d Dep't

2010) (finding cause of action for GBL §349 accrued on date of closing of sale). As the three year statute of limitations for a GBL §349 claim has long since run, Attwood's first cause of action is dismissed against Horowitz and Halstead as time barred.

Next, Atwood asserts a cause of action styled "fraudulent/negligent misrepresentation" against both Halstead and Horowitz. "Fraud (CPLR 213(8)) and misrepresentation (CPLR 213(1)) have six-year limitations periods; negligence has a three-year limitations period (CPLR 214(4))." *Santiago v. 1370 Broadway Assocs., L.P.*, 96 N.Y.2d 756, 766 (2001). Halstead argues that the designation of "Prof B" in the deed and other documents put Attwood on notice that the premises could have been designated for professional instead of residential use. Moreover, as explained above, the certificate of occupancy was certainly discoverable by Attwood at the time she purchased the premises, and was likely in her attorney's possession at the time of the closing.

Therefore, a cause of action for fraudulent or negligent misrepresentation also accrued, at the latest, at her closing in October, 2002. As the closing took place almost eight (8) years before the commencement of this action, the cause of action must be dismissed as time barred.

Lastly, Attwood asserts what amount to a cause of action for fraudulent inducement against Horowitz (although it is styled "Breach of Contract/Fraudulent Misrepresentation"), as she asserts that Horowitz failed to disclose his knowledge of the professional designation of the unit, so as to induce her to enter into the contract to purchase the unit. "A cause of action for fraud in the inducement of a contract (and

therefore the commencement of the running of the Statute of-Limitations) accrues at the time of the execution of the contract.” *Ply*Gem of Laurel, Inc. v. Lee*, 91 A.D.2d 513 (1st Dep’t 1982) (citing CPLR 203(a)). “A cause of action alleging fraud is timely if it is commenced either within six years from the time of the fraud, or within two years after the plaintiff discovers, *or with reasonable diligence could have discovered*, the fraud.” *Prand Corp. v. County of Suffolk*, 62 A.D.3d 681, 682 (2d Dep’t 2009) (emphasis added).

Horowitz argues that a cause of action for fraud in the inducement would have accrued in October 2002, when the contract for sale of the premises was executed, which was more than six years ago, making the cause of action time barred. In opposition, Attwood argues that she did not discover the fraud until Spring 2010 when the potential purchaser rescinded the offer to purchase the premises for \$750,000.

Even applying the discovery rule, as Atwood suggests, she should have discovered with reasonable diligence the designation in the certificate of occupancy at the time she entered into the contract (just as her potential purchasers conducted their due diligence to discover the certificate of occupancy). Accordingly, the discovery rule does not aid Attwood, and the third cause of action asserted against Horowitz is dismissed as time barred.

In accordance with the foregoing, it is

ORDERED that the motion to dismiss the verified complaint by defendant Norman Horowitz (motion sequence 001) is granted, the plaintiff Marie Helene Attwood’s verified

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complaint is dismissed as against Norman Horowitz, and the Clerk of the Court is directed to enter a judgment accordingly; and it is further

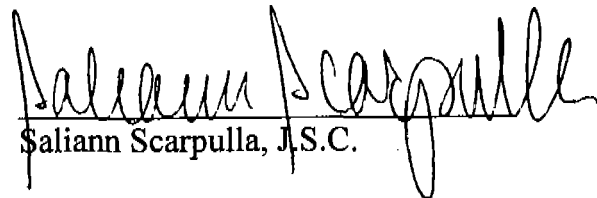
ORDERED that the motion to dismiss the verified complaint by defendant Halstead Property, LLC (motion sequence 002) is granted, the plaintiff Marie Helene Attwood's verified complaint is dismissed as against Halstead Property, LLC, and the Clerk of the Court is directed to enter a judgment accordingly; and it is further

ORDERED that the action is severed and shall continued with respect to defendant Andrew L. Sokol, Esq.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
March 21, 2011

ENTER:


Saliann Scarpulla, J.S.C.

FILED

MAR 24 2011

NEW YORK
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