

**Bibbo v 31-30, LLC**

2011 NY Slip Op 32506(U)

September 12, 2011

Sup Ct, Nassau County

Docket Number: 23745/2010

Judge: Lawrence K. Marks

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
PAUL BIBBO, :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 31-30, LLC and GEORGE ELLIOT, :  
 :  
 Defendants. :  
-----X

Index No. 23745/2010

LAWRENCE K. MARKS, J.

Defendants 31-30, LLC and George Elliot move to dismiss the causes of action of Plaintiff Paul Bibbo.

BACKGROUND

Plaintiff bought from Defendant 31-30, LLC (“the LLC”) a parcel of developed property, located at 56-25 215th Street in Bayside, New York. Gionis Aff, ¶ 5.

Defendant George Elliot, who is listed as the sole member of the LLC, signed the contract of sale on behalf of the LLC. Gionis Aff, Exh B (“the Contract”), at 9.

Plaintiff asserts that he entered into the Contract to purchase the property on or about February 2007. Compl, ¶ 4. He alleges that on or about April 4, 2007, subsequent to the execution of the Contract, and without his knowledge, the LLC conveyed rights from that property via a zoning lot declaration to the adjacent parcel owned and retained by the LLC. Compl, ¶ 8; Gionis Aff, ¶ 8. The closing on the property sale occurred on or

about June 17, 2008. Compl, ¶ 9; Gionis Aff, ¶ 5. Plaintiff argues that the recorded zoning lot declaration prevents him from pursuing his plan to add additional stories to the building he purchased, a plan that he alleges defendants knew about when the contract of sale was executed and that defendant Elliot, in fact, had offered to assist him in constructing.

Plaintiff has brought claims against: the LLC for breach of contract (the first cause of action); all defendants for conversion (the second cause of action); the LLC for breach of covenants in deed (the third cause of action); all defendants for slander of title (the fourth cause of action); the LLC under Article 15 of New York's Real Property Actions and Proceedings Law (the fifth cause of action); and all defendants for fraud (the sixth cause of action). Compl at 1-9. Plaintiff alleges to be damaged in an amount not yet determined, but at least \$2,500,000.

Defendants seek dismissal of these claims.<sup>1</sup> There is no dispute that the developed parcel sold to plaintiff by the LLC was part of a larger tract of land. Defendants assert that, when the LLC subdivided the tract into two parcels, and sold the smaller developed section, they made certain representations clear in the Contract. Defendants aver, *inter alia*, that the Contract specified that the premises were sold subject to: zoning and subdivision laws; a zoning lot declaration; and a certificate of occupancy that includes that occupancy of the dwelling cannot exceed two families. Gionis Aff, ¶ 6. They argue

---

<sup>1</sup> Originally, defendants also sought to have a Notice of Pendency vacated. Gionis Aff, ¶ 4. This issue was resolved by the parties prior to the argument on the motion.

that the zoning lot declaration limits the size of the structure on plaintiff's lot. They contend that, contrary to plaintiff's assertions regarding air rights, these limitations address the overall size of the building in relation to the lot size. *Id.*, ¶ 9.

Defendants argue that the documentary evidence establishes that they have neither breached any agreement with plaintiff, nor committed any tort. *Id.*, ¶ 4. They assert that plaintiff's, or his counsel's, neglect in reviewing the recorded zoning lot declaration and the filed site plan does not create any liability against them, particularly where plaintiff was on constructive notice regarding the size limitations on the dwelling he was purchasing. *Gionis Id.*, ¶ 11.

## DISCUSSION

On a CPLR 3211(a)(1) motion to dismiss, based on documentary evidence, "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002). *See also Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

Plaintiff argues that the majority of the evidence submitted by defendants on this motion is not documentary evidence, within the meaning of CPLR 3211(a)(1). Opp Br at 3. Plaintiff exempts from this the Contract and "possibly" the certificate of occupancy. *Id.*

Defendants counter, *inter alia*, that the deed, referenced in and annexed to the Complaint, also constitutes documentary evidence within the meaning of CPLR 3211(a)(1). In this, defendants are certainly correct. *M. Fund, Inc. v. Carter*, 31 A.D.3d 620, 621 (2d Dep't 2006).<sup>2</sup>

First Cause of Action, for Breach of Contract:

Plaintiff claims that the LLC's conveyance of rights constituted a breach of contract. Compl, ¶ 11. Defendants seek dismissal, asserting that the Contract's terms specified that the plaintiff's acceptance of the deed would be deemed to be full performance by the LLC and a discharge of all agreements and obligations of the LLC. Gionis Aff, ¶ 13. Defendants contend that, if plaintiff had an objection, he should have raised it before the closing, not years after his acceptance of the deed. *Id.*, ¶ 15. Plaintiff addresses defendants' arguments regarding dismissal of the breach of contract claims only in the most general terms. Opp Br at 3-6. Plaintiff makes assertions regarding defendants' failure to establish that rights were "proportionately" or "fairly" divided between the two lots. *Id.* at 5. He further argues, without citation to law, that any designation in a zoning declaration or certificate of occupancy "is irrelevant since a

---

<sup>2</sup> Generally, in order for evidence to qualify as documentary, for purposes of section 3211(a)(1), it must be unambiguous, authentic and undeniable. *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84-86 (2d Dep't 2010). It is traditionally "clear that judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case." *Id.* at 84-85.

zoning or contractual limitation restricting occupancy can have no bearing on a property owner's right to add one or more stories to his home." *Id.* at 6. Plaintiff does not, however, address defendants' arguments regarding the Contract's terms, acceptance of the deed and the merger doctrine.

The first rider to the Contract clearly states that:

acceptance of the deed by the Purchaser shall be deemed to be a full performance and discharge of every agreement and obligations on the party [sic] of the Seller to be performed pursuant to the provisions of this contract, except those, if any, which are herein specifically stated to survive the delivery of the deed.

Contract; Jan. 2007 Rider, ¶ 7

As to the merger doctrine, the "purpose of a merger clause is to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary, or contradict the terms of a written agreement." *Matthius v. Platinum Estates, Inc.*, 74 A.D.3d 908, 909 (2d Dep't 2010). In the case at hand, the Contract specifically provides, in pertinent part, that:

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.

Contract, ¶ 28.

Having closed on the title, and received the deed, claims arising from the contract of sale are extinguished by the merger doctrine. *Rothstein v. Equity Ventures, LLC*, 299 A.D.2d 472, 475 (2d Dep't 2002). Plaintiff has simply

failed to state a cause of action to recover damages for breach of contract. Because title to the property had closed and the deed was delivered, any claims the plaintiff might have had arising from the contract of sale were extinguished by the doctrine of merger unless there was a clear intent evidenced by the parties that a particular provision of the contract of sale [would] survive the delivery of the deed.

*Ka Foon Lo v. Curis*, 29 A.D.3d 525, 526 (2d Dep't 2006) (internal quotations omitted).

As such, Plaintiff's breach of contract claim against the LLC is dismissed.

Second Cause of Action, for Conversion:

Defendants seek dismissal of this claim, contending that this claim is derivative of the breach of contract claim, and precluded by the merger doctrine. *Gionis Aff*, ¶ 16.

They also assert that they are not in possession of any property which rightly belongs to the plaintiff, because they withheld nothing from plaintiff that he was entitled to receive. *Id.* They further argue that plaintiff neither made a prior demand, nor even alleged he made a prior demand, for the return of any property belonging to him. Therefore, defendants claim, plaintiff's conversion claim should be dismissed as premature. *Id.*, ¶ 17.

Plaintiff argues that this claim, along with another claim jointly and quickly addressed in his opposition, are founded on violation of duties existing independent of the Contract and, thus, may be maintained regardless of the Contract. Opp Br at 7-8.

In opting to oppose dismissal of this claim in this manner, plaintiff failed to address the more important of defendants' arguments, regarding the very nature of a claim for conversion.

To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights.

*Cusack v. American Defense Sys., Inc.*, 927 N.Y.S.2d 381, 383 (2d Dep't 2011). Plaintiff has not alleged facts sufficient, if true, to set out a claim for conversion.

Most importantly, although not noted by either counsel, an "action sounding in conversion does not lie where the property involved is real property." *Scott v. Fields*, 85 A.D.3d 756, 757 (2d Dep't 2011). See also *Garelick v. Carmel*, 141 A.D.2d 501, 502 (2d Dep't 1988).

Therefore, plaintiff's conversion claim against all defendants is dismissed.

Third Cause of Action, for Breach of Covenants in Deed:

Defendants contend that this claim against the LLC is derivative of the breach of contract claim, and precluded by the merger doctrine. *Gionis Aff*, ¶ 18. They also argue

that the deed was accurate, and consistent with the representations the LLC made in the Contract, and that there were no encumbrances on the property purchased by plaintiff. *Id.*

Plaintiff argues that he was not merely buying a two-family house, but also the land upon which it sat. He avers that, absent a provision in the contract of sale to the contrary, a purchaser of real property also buys the land and all development rights accompanying the land. Plaintiff asserts that the law presumes such development rights, absent contrary provisions in a contract of sale and, thus, he was entitled to rely on receiving a deed that included all air and development rights. Opp Br at 8. Plaintiff also claims he was entitled to rely upon the covenant against grantor's acts contained in the bargain and sale deed required by the Contract as further protection against defendants' unauthorized restrictive filings. *Id.*

Plaintiff appears to be arguing that the LLC "covenanted" in the deed that it had not encumbered the premises in any way, that the deed contains no statement of encumbrances, but that at the time the deed was delivered, it was restricted by the LLC's reservation of rights. Compl, ¶¶ 23-25.

Plaintiff has not, however, addressed why this is not duplicative of the breach of contract claim. Nor has plaintiff addressed why restrictions, presumably those specified in the zoning lot declaration, create a breach in the covenants of the deed.

Accordingly, plaintiff's claim against the LLC for breach of covenants in the deed is dismissed.

Fourth Cause of Action, for Slander of Title:

Slander of title requires a showing of a communication falsely casting doubt on the validity of plaintiff's title, which is reasonably calculated to cause harm and which results in special damages. *Hanbidge v. Hunt*, 183 A.D.2d 700, 701 (2d Dep't 1992).

Plaintiff alleges that defendants' conveyance and recording of the air rights to the property was the false communication that casts doubt on the validity of plaintiff's title. Compl, ¶ 29. Defendants assert that this claim merged with plaintiff's acceptance of the deed. They further argue that the recording is accurate and not false, and that at the time of the recording the sale was not yet closed and, as such, plaintiff had no title at that time to be slandered. *Gionis Aff*, ¶¶ 25-27.

Plaintiff counters that he acquired equitable title upon entering into the contract of sale and, in any event, the communication became untrue at least upon closing. Opp Br at 7.

Plaintiff has not adequately alleged a claim for slander of title. Certainly "the act of wrongfully filing of record an unfounded claim to the property of another is actionable as slander of title." *Hanbidge*, 183 A.D.2d at 701. However, plaintiff has not alleged in his Complaint that he was specifically harmed by false communication by defendants about plaintiff's title; plaintiff has asserted, at bottom, that he was harmed because the title he obtained genuinely provides him with less rights than he anticipated. The documents at issue establish that plaintiff does not have the rights he claims defendants

are slandering.

Additionally, defendants also seek dismissal of this claim on the grounds that it is barred by the statute of limitations. They assert that plaintiff had one year to bring this claim, and that this action was commenced almost three years after the closing and almost four years after the zoning declaration and site plan were recorded. *Gionis Aff*, ¶ 28. Plaintiff responds that the statute of limitations begins to run, not from the date of the recording, but from the time the loss was incurred. *Citing, generally, Rosenbaum v. City of New York*, 8 N.Y.3d 1 (2006). He argues that, since the Complaint does not allege when his damages were incurred, there is no evidence in the record upon which to dismiss this claim on statute of limitations grounds. *Opp Br* at 7.

This is wholly inadequate. Plaintiff is attempting to circumvent the statute of limitations by referencing, and attempting to rely upon rather than correct, his failure to meet his pleading requirements. Plaintiff is required to plead his claims clearly, and give defendants notice of the allegations against them. As the case plaintiff himself cites held, “special damages are an element of a cause of action for slander of title based upon the recording of an unfounded claim, and the cause of action does not arise until special damages actually result.” *Rosenbaum*, 8 N.Y.3d at 12. Inasmuch as plaintiff has not pled his special damages, or the date upon which they were incurred, it is unclear if the claim has arisen and/or if the time to seek relief on it has lapsed.

For these reasons, plaintiff’s slander of title claim against defendants is dismissed.

Fifth Cause of Action, to Quiet Title:

Plaintiff brought this claim against the LLC, under Article 15 of New York's Real Property Actions and Proceedings Law.

Defendants assert that this claim is derivative of Plaintiff's other claims. They contend that, as the LLC disclosed the restrictions, as a matter of public record before the closing, plaintiff has no viable title claim in law or equity. *Gionis Aff*, ¶ 30.

Plaintiff argues that his claims are founded on violation of duties existing independent of the Contract and, thus, may be maintained regardless of the Contract. *Opp Br* at 7-8.

However, plaintiff's basis for this cause of action appears to be based on a claim to "an absolute fee simple interest in the entire Property conveyed by, and immediately accrued from, the Deed from the LLC" and an assertion that he "is in actual possession of the Property." *Compl*, ¶ 36. Plaintiff avers that the LLC's claims regarding rights to his property are invalid and are without legal justification. *Id.* at ¶ 38. Yet such assertions are inconsistent with plaintiff's general position that the title he obtained genuinely provides him with less rights than he anticipated.

It is unclear if this could have been remedied, but certainly plaintiff did not do so. He cites no law in defense of this claim and, in fact, conflates his defense of it into a joint paragraph regarding his conversion claim. Moreover, while generally asserting that his claims can be maintained alongside his breach of contract claims, he does not provide a

specific basis for this cause of action. He seeks a “judgment awarding possession of the entire Property to him” but does not ground that request in any particular legal claim, legal theory, or case law. *Id.* at ¶ 43. The documents support dismissal of this claim and, to the extent plaintiff seeks to differentiate this cause of action, he has failed to do so. Dismissal is also warranted where the pleadings are “so vague and lack such specificity as to provide inadequate notice of the . . . material elements of [the] alleged claim.” *Morris v. Morris*, 306 A.D.2d 449, 452 (2d Dep’t 2003).

As such, plaintiff’s claim for quiet title against the LLC is dismissed.

Sixth Cause of Action, Fraud:

Defendants argue that plaintiff has not pled this claim with the requisite particularity. *Gionis Aff*, ¶ 31. They assert that plaintiff merely alleges that the LLC represented that the property would be conveyed without the reservation of air rights. They aver that this “is altogether unlikely” as this action is not about air rights. *Id.*

Defendants also argue that, especially with respect to a real property contract, a party may not complain of having been induced to enter into the transaction by misrepresentation, unless the facts represented are particularly within the other party’s knowledge. Relatedly, defendants also aver that plaintiff cannot establish justifiable reliance, where plaintiff did not inspect the public records.

In both arguments, defendants are correct.

It is well settled that with respect to a real property contract, unless the facts represented are matters particularly within one party's knowledge, the other party must make use of the means available to learn, by the exercise of ordinary intelligence, the truth of such matters or he [or she] will not be heard to complain that he [or she] was induced to enter into the transaction by misrepresentation.

*Culver & Theisen v Starr Realty Co.*, 307 A.D.2d 910, 910 (2d Dep't 2003) (internal quotes omitted) (brackets in original). Additionally, fraud has not been stated where the plaintiff failed to check public records "either before or after the contract signing." *Shao v. 39 College Point Corp.*, 309 A.D.2d 850, 851 (2d Dep't 2003). Indeed, failure to search public records to learn facts renders reliance upon the alleged misrepresentation unjustified. *Parkway Woods, Inc. v. Petco Enterprises, Inc.*, 201 A.D.2d 713, 713 (2d Dep't 1994). Defendants further argue that plaintiff had actual knowledge that the premises he was purchasing would be subject to a zoning lot declaration, as that was delineated in the first rider to the Contract. Reply Br at 14. Additionally, they aver, because the zoning lot declaration was recorded, plaintiff was charged with knowing of it. *Id.* Again, in this, defendants are correct. *Ryzuk v. Timber Ridge Homes at the Woods, Inc.*, 179 A.D.2d 751, 751 (2d Dep't 1992).

Plaintiff contends he has stated a viable claim for fraud in the inducement. Opp Br at 8. He asserts that, knowing plaintiff would only purchase the real estate if he could expand the top floors, defendants entered into a contract falsely representing it would perform the construction to add the additional floors. He argues that it was after he

signed the Contract and gave his deposit that defendants, consistent with their fraudulent plan, then filed a zoning lot declaration and took from plaintiff's parcel all or virtually all development rights. Opp Br at 9. He asserts that defendants did so without any disclosure in the Contract, or otherwise, and that only an architect or land use expert could have been expected to comprehend defendants' zoning lot declaration. He claims that this, at minimum, raises an issue not properly determined on a motion to dismiss of whether a reasonably prudent purchaser would discover defendant's "elaborate and premeditated fraud under such circumstances." *Id.* Plaintiff asserts that he had no reason to scrutinize the zoning lot declaration, in view of defendants' representations to him that he could add floors to the house, or to suspect that defendants would file a document that would strip from him virtually all development rights without a provision in the Contract authorizing such a filing. *Id.* He argues that he was under no legal duty to presume defendants' alleged dishonesty and was entitled to rely, without continually investigating public records, on the seller's compliance with its contractual and other legal obligations. *Id.* at 10. Plaintiff also avers that he was entitled to rely on defendants' duty not to unlawfully misappropriate plaintiff's property through unauthorized filings. *Id.* He argues such misconduct constitutes fraud.

Although plaintiff claims to have raised questions of fact, he has not cited any law that supports that position. Plaintiff cites only one case in his opposition to dismissal of this claim, *Deerfield Communications Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954

(1986). Although that case does provide that fraud may sound where the misrepresentation regards “a representation of present fact, not of future intent” (*id.* at 956), it surely does not address the primary issues raised with regard to this claim. Plaintiff has not provided any basis for differentiating his fraud claim from those dismissed in cases where filed public records were available to provide the plaintiffs with the information at issue.

It is settled law in New York State that the seller of real property is under no duty to speak when the parties deal at arm’s length. The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud. The buyer has the duty to satisfy himself as to the quality of his bargain pursuant to the doctrine caveat emptor, which in New York State still applies to real estate transactions.

*London v. Courduff*, 141 A.D.2d 803, 804 (2d Dep’t 1988).

Therefore, plaintiff’s claim for fraud against the defendants is dismissed.

The Court has considered the parties’ other arguments, and finds them unavailing.<sup>3</sup>

---

<sup>3</sup> For example, defendants argue that plaintiff’s fraud claim is a converted version of his breach of contract claim, and that this is impermissible unless there are representations which are collateral or extraneous to the underlying agreements. *Gionis Aff*, ¶ 33. Given the Court’s determinations above, there is no need to address this and other such arguments.

Defendants also argue that there is no basis for piercing the corporate veil of the LLC. They argue that plaintiff failed to allege inadequate capitalization, commingling of funds or using the LLC as Mr. Elliot’s alter ego. *Gionis Aff*, ¶ 38. As such, they seek to have all the claims against Mr. Elliot, individually, dismissed. Plaintiff did not oppose dismissal of the claims against George Elliot, individually. *See generally* Opp Br; Reply Br at 2. However, inasmuch as all the claims against defendants have been dismissed, the Court need not address this argument.

Accordingly, it is ordered that the claims of Paul Bibbo against 31-30, LLC and George Elliot are dismissed.

This opinion constitutes the decision and order of the Court.

Dated: September 12, 2011

ENTER:



A handwritten signature in cursive script, appearing to read "J.S.C.", is written over a horizontal line.

**ENTERED**  
SEP 21 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE