

Milleris v Sullivan

2011 NY Slip Op 33272(U)

September 30, 2011

Supreme Court, Queens County

Docket Number: 15808/09

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

EDUARDO MILIERIS and PATRICIA
MILIERIS,
Plaintiffs,

-against-

PATRICK J. SULLIVAN, ESQ., et al.,
Defendants.

Index No. 15808/09

Motion
Date August 2, 2011

Motion
Cal. No. 18 and 19

Motion
Sequence No. 3 and 4

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Upon the foregoing papers it is ordered that the motion by defendant, Anchors Away Realty, Inc. ("Anchors Away") for an order granting it summary judgment pursuant to CPLR 3212 on the grounds that there is no triable issues of fact and/or the plaintiff does not have a cause of action for which relief can be granted as against it and the motion by defendant, Elaine Hajian, as Executrix under the Last Will and Testament of Lillian Margosian, deceased ("Hajian") for an order granting summary judgment pursuant to CPLR 3212 dismissing the Verified Complaint of the plaintiffs, Eduardo Milieris and Patricia Milieris, in its entirety with prejudice are hereby consolidated solely for purposes of disposition of the instant motions.

In their Verified Complaint, plaintiffs allege, inter alia, that: on September 18, 2008, they signed a contract for the purchase of the premises at 86-29 Palo Alto Street, Holliswood, New York 11423 for a price of \$950,000.00, that prior to September 2008, defendant Hajian was the owner of said premises

in a representative capacity as executrix under the Last Will and Testament of Lillian Margosian, deceased, that defendant Hajian made false and misleading misrepresentations for the purpose of deceiving the plaintiffs into believing that the premises was a legal two (2) family house, that defendant Anchors Away intentionally made a false misrepresentation by furnishing plaintiff Eduardo Milieris with a flyer that recited "C of O-legal 2-family" and by advising plaintiff Mr. Milieris that the purchase of the premises was a great investment because it was a legal two (2) family house. Plaintiff asserts causes of action against moving defendants sounding in fraud and negligence. It is undisputed that Elaine Hajian sold the subject premises in her capacity as executrix of Lillian Margosian's estate. It is also undisputed that Anchors Away served as real estate broker for Hajian regarding the sale of the subject premises.

That branch of the motion by defendant Anchors Away which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999][internal citations omitted]; *Leon v. Martinez*, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (*1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc., supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see, Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (*see, Rovello v. Orofino Realty Co., Inc., supra; Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

The Court finds that defendant, Anchors Away, has failed to establish a prima facie case that the Verified Complaint fails to

state a cause of action. Defendant, Anchors Away has failed to establish that it may not be held liable if the facts as alleged in the Complaint are true (*Prado v. Theatrical Services, LLC*, 2009 NY Slip Op 30358U [Sup Ct, NY County 2009]). On a CPLR 3211 motion, "[a]ny evidentiary material submitted by the defendant must show that a fact as claimed by the plaintiff is not a fact at all; otherwise dismissal will not be granted" (*Kelly v. PM Lounge*, 2010 NY Slip Op 32931U [Sup Ct, NY County 2010]). Accordingly, that branch of the motion by defendant, Anchors Away to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action is hereby denied.

That branch of the motion by defendant Anchors Away which is for an order pursuant to CPLR 3212 dismissing the complaint against on the grounds that there are no triable issues of fact is granted.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

To state a cause of action for fraud, plaintiff must demonstrate that defendant knowingly misrepresented a material

fact, upon which plaintiff justifiably relied, resulting in an injury (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). CPLR 3016(b) states that in an action for fraud, "the circumstances constituting the wrong shall be stated in detail". It is well settled that a claim for fraud must satisfy the specificity and particularity requirements of 3016 (b) and allege the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception (see, *Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 NY2d 644, 647 [1989]; *Channel Master Corp. v Aluminum Ltd. Sales, Inc.*, 4 NY2d 403 [1958]).

"In order to make out a claim for negligent misrepresentation, plaintiffs must demonstrate 'that defendant[s] had a duty, based upon some special relationship with them, to impart correct information, that the information given was false or incorrect and that plaintiffs reasonably relied upon the information provided'" (*Joseph v. NRT, Inc.*, 853 NYS2d 481 [Civ Ct, NY County 2007], citing *Berger-Vespa v. Rondack Building Inspectors Inc.*, 293 AD2d 838 [3d Dept 2002]).

Defendant, Anchors Away establishes a prima facie case that there are no triable issues of fact. Plaintiff asserts causes of action against defendant Anchors Away sounding in fraud and in negligent misrepresentation. In support of the motion, defendant Anchors Away presents, inter alia, the examination before trial transcript testimony of plaintiff, Eduardo Milieris, who testified that: he retained an attorney to represent him and his wife in connection with the purchase which is the subject of this action, which attorney was named Patrick Sullivan; the examination before trial transcript testimony of defendant, Patrick Sullivan, who testified that: after the contract was signed, he ordered, received, and reviewed a title search, including a copy of the certificate of occupancy, that he received a copy of the title report that had the certificate of occupancy included or attached to it "a few weeks or a month. Maybe slightly more" before the closing.

Defendants established a prima facie case that a misrepresentation will not result in liability if the real facts could have been ascertained by the plaintiffs through the exercise of ordinary intelligence (*Vasquez v. Soto*, 61 AD3d 968 [2d Dept 2009][internal citations omitted]). Additionally, where "the true information is provided in the title report provided to the plaintiffs' attorney prior to the closing, any reliance by

the plaintiffs is not reasonable or justifiable" (Id. at 969)[internal citations omitted]). In the instant case, a prima facie case has been established that there are no material issues of fact in that the title report with the certificate of occupancy was provided to the plaintiffs' attorney prior to the closing.

In opposition, plaintiffs fail to raise a triable issue of fact. Plaintiffs present, inter alia, an affidavit of plaintiff Eduardo Milieris, wherein he does not deny that his attorney was given a copy of the title report prior to the closing. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel, Inc. v. Baider*, 36 NY2d 539 [NY 1975]; see also, *Tortorello v. Carlin*, 260 AD2d 201 [1st Dept 1999]).

Accordingly, that branch of the motion by defendant Anchors Away for summary judgment pursuant to CPLR 3212 is granted.

The motion by defendant Elaine Hajian, as Executrix under the Last Will and Testament of Lillian Margosian, deceased, which is for an order pursuant to CPLR 3212 dismissing the complaint against her on the grounds that there are no triable issues of fact is granted.

Defendant Hajian establishes a prima facie case that there are no triable issues of fact. In support of the motion, defendant Hajian presents, inter alia, the examination before trial transcript testimony of defendant Hajian, herself; the examination before trial transcript testimony of plaintiff, Eduardo Milieris; the examination before trial transcript testimony of plaintiffs' attorney, Patrick Sullivan, who testified that: he provided the contract to the plaintiffs for their review and plaintiffs read the contract, he received a title report a few weeks to a month prior to the closing, and upon receiving the title report, he reviewed the report.

In opposition, plaintiffs fail to raise a triable issue of fact. Plaintiffs present, inter alia, an affidavit of plaintiff Eduardo Milieris, wherein he does not deny that his attorney was given a copy of the title report prior to the closing. "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel, Inc. v. Baider*, 36 NY2d 539 [NY 1975]; see also, *Tortorello v.*

Carlin, 260 AD2d 201 [1st Dept 1999]).

Plaintiffs assert causes of action against defendant Hajian sounding in fraud and in negligent misrepresentation. Both causes of action involve reasonable reliance by the plaintiffs. In the instant case, reasonable reliance cannot be proved by plaintiffs. It is well-established law that where "the true information is provided in the title report provided to the plaintiffs' attorney prior to the closing, any reliance by the plaintiffs is not reasonable or justifiable" (*Vasquez v. Soto, supra*). In the instant case, it is undisputed that the title report with the certificate of occupancy was provided to the plaintiffs' attorney prior to the closing.

Accordingly, the motion by defendant Hajian is granted.

This constitutes the decision and order of the Court.

Dated: September 30, 2011

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Howard G. Lane, J.S.C.