

**Ahmed v Stewart**

2011 NY Slip Op 33742(U)

September 14, 2011

Sup Ct, Suffolk County

Docket Number: 9192/2009

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

**PRESENT:****HON. PAUL J. BAISLEY, JR., J.S.C.**-----X  
ASHRAF AHMED and MARTYNA AHMED,

Plaintiffs,

-against-

MICHAEL STEWART and KELLI STEWART,

Defendants.

-----X  
ASHRAF AHMED and MARTYNA AHMED,

Plaintiffs and Third-Party Plaintiffs,

-against-

TOWN OF BROOKHAVEN and WHITFORD  
DEVELOPMENT INC.,Third-Party Defendants.  
-----X

INDEX NO.: 9192/2009

MOTION DATE: 4/28/2011

MOTION NO.: 001 MG; 002 MD  
005 MG**PLAINTIFFS' ATTORNEY:**

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Upon the following papers numbered 1 to 119 read on this motion to dismiss third-party plaintiffs' complaint; motion to dismiss; cross-motion to amend third-party complaint; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-38; Notice of Cross Motion and supporting papers 57-79; Answering Affidavits and supporting papers 39-56; 87-89; 90-92; 109-119; Replying Affidavits and supporting papers 80-86; 93-108; Other   ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (motion sequence no. 001) of defendant Town of Brookhaven for an order pursuant to CPLR §3211(a)(5) and (7) dismissing the third-party plaintiffs' complaint for failure to comply with the applicable statute of limitations and failure to state a cause of action is granted; and it is further

**ORDERED** that the motion (motion sequence no. 002) of defendant Whitford Development, Inc. for an order pursuant to CPLR §3211(a)(7) dismissing the third-party plaintiffs' fraud cause of action as it fails to state a cause of action, and dismissing the third-party plaintiffs' complaint based on documentary evidence, to wit, the contract of sale, which terminates any claims by plaintiffs against movant upon conveyance of the deed, is denied; and it is further

**ORDERED** that the cross-motion (motion sequence no. 005) of third-party plaintiffs for an order permitting third-party plaintiffs to serve an amended third-party complaint to add a third cause of action for reformation of the contract as against third-party defendant Whitford Development, Inc. is granted.

On December 23, 2003, plaintiffs/third-party plaintiffs Ashraf Ahmed and Martyna Ahmed (the “Ahmeds”) as purchasers and third-party defendant Whitford Development, Inc. (“Whitford”) as seller entered into a contract of sale with respect to Lot No. 1 of a four-lot subdivision owned by Whitford, on which Whitford proposed to construct three single-family homes (Lot No. 4 already having been improved with a single-family residence). As shown on the subdivision map, Lot Nos. 2 and 3 are flag lots that share a common driveway that is the sole source of access to and from the public highway for all lots in the subdivision. As a condition of subdivision approval, the Town of Brookhaven (the “Town”) directed Whitford to provide a 16-foot-wide common driveway with cross-access and maintenance agreements for all lots within the subdivision.

Pursuant to the contract of sale, Whitford was also required to grant plaintiffs “a good and sufficient easement of ingress and egress to the nearest public highway....” It is undisputed that prior to closing title with plaintiffs, Whitford deeded out Lot No. 2 to defendants Michael Stewart and Kelli Stewart (the “Stewarts”) and Lot No. 3 to non-parties Frank Gagliano and Lori Gagliano without providing for a driveway easement benefitting Lot No. 1; and it is further undisputed that Whitford did not require the purchasers of any of the lots to enter into cross-access and maintenance agreements with respect to the common driveway as required by the Town. On July 29, 2004, the Town issued a certificate of occupancy with respect to Lot No. 1, notwithstanding that the condition requiring cross-access and maintenance agreements with respect to the common driveway had not been complied with; and on August 12, 2004, the Ahmeds closed title to the property.

Nearly five years later, on March 11, 2009, the Ahmeds commenced the instant action against the Stewarts, alleging causes of action for assault, private nuisance, and intentional infliction of emotional distress arising, in part, out of the parties’ use of the common driveway. In their answer, the Stewarts interposed various counterclaims including abuse of process and trespass. In addition, the Stewarts counterclaimed for a declaratory judgment declaring that the Ahmeds are not entitled to use the common driveway, and for injunctive relief to prevent the Ahmeds from using the driveway. The Ahmeds then commenced a third-party action against Whitford and the Town. The Ahmeds allege that Whitford breached the contract of sale by failing to file or record a cross-access and maintenance agreement or an easement for the driveway, and that Whitford intentionally sought to defraud the Ahmeds into purchasing the property. The Ahmeds further allege that the Town was negligent and breached a special duty to the Ahmeds in issuing a certificate of occupancy for Lot No. 1 without requiring Whitford to file a cross-access and maintenance agreement as assertedly required by the Town’s conditional approval of the subdivision. The Ahmeds seek an award of compensatory damages in the sum of \$500,000.00 against both third-party defendants.

By pre-answer notices of motion, the Town and Whitford both moved pursuant to CPLR §3211(a) to dismiss the third-party complaint.

The Town alleges, among other things, that the Ahmeds’ third-party negligence claim against the Town is time-barred (CPLR §214). It is well established that a claim that a municipality was negligent in issuing a building permit or certificate of occupancy accrues on the date the permit or certificate is issued (*Klein v City of Yonkers*, 73 AD2d 931 [2d Dept 1980],

*aff'd*, 53 NY2d 1011 [1981]). The submissions thus establish that the Ahmeds' commencement of this third-party action against the Town, more than six years after the allegedly wrongful issuance of the certificate of occupancy, is untimely. Moreover, plaintiff was required to, and did not, file a notice of claim pursuant to General Municipal Law §50-e and §50-i prior to interposing its claim against the Town.

The Ahmeds' arguments in opposition to the Town's motion are without merit. Although the Ahmeds urge that their claim against the Town should be construed as one for indemnification, such that the statute of limitations has not yet commenced to run, the allegations of the third-party complaint do not reasonably permit such a construction. The Ahmeds' claim against the Town is clearly grounded in negligence and the breach of an alleged duty to the Ahmeds, for which they seek compensatory damages. Nothing therein suggests that they seek such relief only if, as and when the Stewarts prevail on their counterclaims against the Ahmeds.

The Ahmeds' further argument that the statute of limitations is not applicable to third-party actions is misapplied to the facts of this case (*cf.*, *Vestry Service Corp v Bd. of Election, Nassau County*, 2 NY2d 413 [1957]). The Ahmeds' negligence cause of action against the Town, if it exists, existed at the time the certificate of occupancy was issued, and the Ahmeds could have pursued their claim immediately upon closing title to the property. The Ahmeds may not extend the statute of limitation for a first-party claim by the artifice of a third-party action. Moreover, the Ahmeds' submissions fail to establish that the Town owed them a special duty. In light of the foregoing, the motion of the Town of Brookhaven is granted, and the third-party complaint is dismissed as against the Town.

Whitford's motion to dismiss the Ahmeds' fraud claim is denied. Whitford relies on the well-established principle of law that where the only fraud claim relates to a breach of contract, a cause of action for fraud will not lie (*W.I.T. Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]), and that a cause of action for breach of contract will not give rise to a cause of action for fraud merely by the additional allegation that the contracting party did not intend to meet its contractual obligation at the time of contracting (*Gould v Community Health Plan of Suffolk, Inc.*, 99 AD2d 479 [2d Dept 1984]). To maintain a fraud claim that is separate and distinct from a breach of contract claim, a plaintiff must establish "that a legal duty independent of the contract itself has been violated [citations omitted]. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Island Rail Road Company*, 70 NY2d 382 [1987]). Those circumstances are present here.

The Ahmeds allege that notwithstanding Whitford's knowledge that the deeds it had previously granted to the owners of Lot Nos. 2 and 3 did not reserve a driveway easement in favor of Lot No. 1, and that the owners of Lot Nos. 2 and 3 had not executed cross-access and maintenance agreements with respect to the common driveway, Whitford failed to disclose these facts to the Ahmeds, and intentionally sought to defraud them into closing title to the property by representing that the certificate of occupancy and survey were correct and could be relied upon by the Ahmeds as to their unfettered use of the premises and common driveway. Plaintiffs further allege that had they known that there was not an easement and a cross-access and maintenance agreement in effect, they would not have closed title to the property. The foregoing is sufficient to state an independent cause of action for fraud that is not merely duplicative of the breach of contract claim. Accordingly, the motion to dismiss the fraud cause of action is denied.

Whitford also moves to dismiss the third-party complaint in its entirety on the ground that the provisions in the contract merged in the deed. The contract provides, at paragraph 11(b), that “The Seller shall not be bound by representations, warranties, guarantees, agreements or promises, oral or otherwise, not printed or inserted in this contract, the attached riders or “ARTICLES OF SPECIFICATION.” The contract further provides, at paragraph 22, that: “Acceptance of the deed at the closing of title constitutes full compliance with and discharge of the Seller in the performance of all the terms and conditions of this contract and a waiver of any and all claims for defective performance and/or non-performance on Seller’s part *except as to those provisions specifically made to survive closing of title* [emphasis added].” Whitford argues that the contract provision concerning ingress and egress was not “specifically made to,” and accordingly did not, survive closing of title.

Contrary to Whitford’s argument, however, the circumstances of this case do not reflect an intention that the easement requirement would merge with the deed. “Intention of the parties may be derived from the instruments alone or from the instruments and the surrounding circumstances” (*Goldsmith v Knapp*, 223 AD2d 671 [2d Dept 1996]). Here, where Town approval of the subdivision sought by Whitford was expressly conditioned on Whitford’s provision of a common driveway with cross-access and maintenance agreements for all lots, and the subdivision map showed access to all of the lots in the subdivision via the common driveway and easement, and the survey annexed to the contract showed a “proposed common utility and driveway easement” over the common driveway, and where the absence of a driveway easement would make Lot No. 1 inaccessible from the road, and where compliance with both the contractual provision and the subdivision condition was solely within the control of Whitford, the merger provision in the contract alone is insufficient to establish the parties’ intention to merge the easement provision into the deed. In light of the foregoing, Whitford’s motion to dismiss the third-party complaint on the basis of documentary evidence is denied.

The Ahmeds’ cross-motion to amend the third-party complaint to add a cause of action for reformation of the contract is granted. The Ahmeds’ allegations that either by mutual mistake, or by a fraudulently induced unilateral mistake, the contract of sale between the Ahmeds and Whitford does not express the actual agreement of the parties, which was that the contract would be subject to an easement and cross-access and maintenance agreement that would give the Ahmeds the right to access their property via the common driveway, adequately states a cause of action for reformation of the contract (*EGW Temporaries, Inc. v RLI Ins. Co.*, 83 AD3d 1481 [4th Dept 2011]). The proposed amended third-party complaint shall be deemed served with the motion papers, except that the cause of action with respect to the Town of Brookhaven shall be stricken therefrom.

Third-party defendant Whitford shall serve an answer to the amended third-party complaint in accordance with CPLR §3211(f).

Dated: September 14, 2011

**PAUL J. BAISLEY, JR.**

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J.S.C.