

Moss v Mann

2012 NY Slip Op 33303(U)

January 6, 2012

Sup Ct, NY County

Docket Number: 104693/11

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

CHARLES B. MOSS, JR.,

Plaintiff,

-v-

ANNA MURDOCH MANN and GILMARTIN, POSTER
& SHAFTO, LLP,

Defendants.

INDEX NO. 104693/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1+2

Answering Affidavits- Exhibits _____ 3+4

Replying Affidavits _____ 5+6

CROSS-MOTION: _____ YES NO

FILED

Upon the foregoing papers, it is ordered that this motion is:

JAN 12 2012

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER. NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/6/12


DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
CHARLES B. MOSS, JR.,

Plaintiff,

Index No.

-against-

104693/11

ANNA MURDOCH MANN and GILMARTIN, POSTER &
SHAFTO, LLP,

FILED

Defendants.

JAN 12 2012

-----X
DONNA MILLS, J.,

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Anna Murdoch Mann (Mann) moves for dismissal of the first six causes of action in the complaint as against her, for the entry of a declaratory judgment in her favor in the seventh cause of action, and an order directing defendant Gilmartin, Poster and Shafto, LLP, (GPS) to deliver the contract deposit to her.

According to the complaint, plaintiff and Mann entered into a written contract of sale (Contract), dated March 5, 2010, in which Mann was willing to sell her co-operative apartment, Unit 770 and maid's room #4, in the premises located at 25 Sutton Place, New York, New York (premises). The premises are owned by 25 Tenants Corporation (Co-op). Plaintiff paid a contract deposit of \$620,000 when the Contract was signed. This deposit is currently in the possession of GPS, which is an Escrow Agent. Paragraph 6.1 of the Contract provides that "[t] his sale is subject to the unconditional consent of the Corporation." Paragraph 1.15 provides that "[t] he date scheduled for Closing is June 15, 2010."

The Contract was never carried out and Mann subsequently sold her apartment to another buyer. The parties are in dispute over the events occurring after the execution of the Contract. Plaintiff alleges that the Co-op never gave its unconditional consent to the sale and that there was

a condition precedent to the enforcement of the Contract which never took place. This condition was the Co-op's approval of plaintiff's proposal of renovations to the premises. Plaintiff claims that, after the closing date, he was cleared of any default and is entitled to a return of his deposit. Mann asserts that the Co-op approved of the sale, that there was no condition precedent, that plaintiff failed to pay the balance of the purchase price on the due date, and that he defaulted and is not entitled to a return of his deposit.

The complaint includes seven causes of action. The first cause of action alleges that Mann breached the Contract by failing to disclose certain alterations and/or an alteration agreement, and/or making misrepresentations as to the alterations. Plaintiff seeks money damages in the amount of the deposit, plus interest from March 5, 2010.

The second cause of action alleges that, due to a failure on Co-op's part to provide unconditional consent to the sale, plaintiff is released from his contractual obligations and is entitled to the return of his deposit. Plaintiff is suing Mann for the return of the deposit.

The third cause of action alleges that Mann breached a covenant of good faith and fair dealing by interfering with the Co-op's approval procedure, preventing the sale from occurring. Plaintiff seeks the return of the deposit.

The fourth cause of action alleges that Mann made material misrepresentations or failed to disclose material facts. Plaintiff seeks consequential damages of \$50,000 or more, plus interest from March 5, 2010.

The fifth cause of action seeks the recovery of attorney's fees, plus costs and expenses against Mann, incurred by plaintiff in connection with this litigation.

The sixth cause of action is brought against GPS, and seeks an order compelling GPS, as

Escrow Agent, to deliver the deposit to plaintiff.

The seventh cause of action is brought against both defendants, and seeks a declaratory judgment that a Closing Letter, dated June 29, 2010, which was issued by Mann's counsel to plaintiff's counsel, urging a "time is of the essence" closing on July 15, 2010, is null and void, and did not obligate plaintiff to close under the Contract.

Mann moves for an order dismissing the first six causes of action, for the entry of a declaratory judgment in her favor on the seventh cause of action, and for an order directing GPS, as Escrow Agent, to deliver the contract deposit to her. The motion to dismiss is based on a failure to state a cause of action, as well as on documentary evidence.

Mann moves for dismissal of the first cause of action on the ground that she had not performed any alterations or entered into any alteration agreement while an occupant of her apartment. She claims that all alterations in her apartment had been done before she had become an occupant. Thus, she asserts that she had no obligations to make any representations to plaintiff about alterations or being a party to an alteration agreement. She further asserts that plaintiff, in entering into the Contract, did not assume any obligations with respect to the alterations, nor would have been obligated to restore the apartment to its prior condition. Mann points out that the Contract included an "as is" clause, which meant that plaintiff would have taken possession of the apartment along with any prior alterations.

Mann moves for dismissal of the second cause of action on the ground that documentary evidence shows that there was no evidence of a condition precedent which, unfulfilled, excused plaintiff from any contractual obligations. A letter from a representative of the Co-op, dated June 11, 2010, indicates that the purchase of the apartment had been approved. This letter contains no

conditions. Mann disputes plaintiff's assertion that plaintiff had provided preliminary renovation plans to the Co-op and had been waiting for Co-op approval of the plans prior to the closing date.

She states that the Contract, which contains a merger clause, should be interpreted as the final embodiment of the agreed-to terms between the parties, and that any conditions considered by plaintiff and the Co-op, oral or otherwise, should be legally disregarded.

Mann moves for dismissal of the third cause of action on the ground that there is no proof that she had violated a covenant of good faith and fair dealing by interfering in the Co-op's approval process in connection with the Contract. She argues that the approval of preliminary renovations was not a condition precedent in the sale, and that the Co-op had unconditionally approved of the sale.

Mann moves for dismissal of the fourth cause of action on the ground that plaintiff has not shown that she had made misrepresentations or failed to disclose facts about alterations and/or an alteration agreement. She moves for dismissal of the fifth cause of action on the ground that the dismissal of the first and third causes of action necessarily mandates such a dismissal.

With respect to the sixth cause of action, Mann moves to compel GPS to deliver the contract deposit to her. She contends that plaintiff is not entitled to the deposit because he violated the Contract by failing to close pursuant to the Closing Letter.

With respect to the seventh cause of action, Mann seeks a declaratory judgment in favor of defendants which declares that plaintiff was required to close pursuant to the Closing Letter, and is in default for failing to do so.

In opposition to the motion, plaintiff argues that the documentary evidence fails to

* 6] provide conclusive proof and, in part, raises issues of fact, which requires discovery. He states that the motion should be denied because Mann has not conclusively shown that the Co-op gave its unconditional consent to the sale, that she did not make material misrepresentations regarding the alterations, and that she did not interfere in the Co-op's approval process.

Plaintiff provides evidence that the Co-op purportedly reserved its approval of the sale pending a evaluation of his proposed renovation plans for the apartment. He claims that this is proof that the Co-op had considered the proposed plan to be part of the Contract, and that approval of the plans was necessary before the sale could be consummated. Thus, plaintiff disputes the assertion that approval of the plans was not connected to the Contract. He further asserts that he would have not accepted ownership of the apartment if his plans were not accepted by the Co-op.

Plaintiff contends that Mann had failed to notify him of the alterations in the apartment and subjected him to terms included in the "Form of Alteration" agreement issued by the Co-op. According to plaintiff, these terms would have subjected him to obligations and liabilities, including the Co-op's option to request him to restore the apartment to its prior condition. He argues that the "as is" provision in the Contract has no relevance to his claim.

Plaintiff argues that Mann had violated the covenant of good faith and fair dealing by denying any knowledge of an alteration agreement and by conspiring with the Co-op to exclude the approval of plaintiff's plans in having the Co-op approve of the sale.

Plaintiff argues that the granting of a declaratory judgment would be premature at this time. He states that discovery would resolve disputes as to misrepresentations or conditions connected to the sale.

While analyzing the motion to dismiss, the court must determine whether plaintiff's pleadings state any cause of action. "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (citations omitted). The court will "liberally construe the complaint and accept as true the facts alleged in the complaint and any submission in opposition [citation omitted]" to the motion. As for the submission of documents in this motion, dismissal is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law [internal quotations marks and citations omitted]." *Id.*

The first cause of action alleges a breach of contract. The elements of a breach of contract claim "include the existence of a contract, plaintiff's performance thereunder, the defendants's breach thereof, and resulting damages." *Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 (1st Dept 2010). After examining this claim, the court finds that this cause of action is actually based upon a misrepresentation or fraud, not a breach of contract. No specific provision in the Contract that was allegedly breached by Mann is mentioned in the complaint, and the way the claim is drafted indicates tort rather than contractual liability.

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holdings Co. v Smith Barney*, 88 NY2d 413, 421 (1996). "Absent a confidential or fiduciary relationship, failure to disclose cannot be the basis of a fraud claim." *National Union Fire Ins. Co. of Pittsburgh, Pa. v Red*

Apple Group, 273 AD2d 140, 141 (1st Dept 2000). Absent a fiduciary relationship between the parties, there is nonetheless a duty to disclose when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair. *See Swersky v Dreyer & Traub*, 219 AD2d 321, 327 (1st Dept 1996).

Plaintiff is essentially alleging that Mann failed to disclose the existence of alterations in the apartment prior to the closing date. This is an allegation of fraudulent nondisclosure, which requires a fiduciary or confidential relationship, imposing a duty to disclose which would otherwise not exist. *See id.* Of course, the nondisclosure would have to be of a material nature. *See Apollo H.V.A.C. Corp. v Halpern Const. Inc.*, 55 AD3d 855, 857 (2d Dept 2008).

The court finds that there is no fiduciary or special relationship between plaintiff and Mann which would result in any duty to disclose any information, no matter how material. With respect to the "special facts" doctrine, the fact that Mann may have had information concerning the existence of alterations in the apartment at bar, the material nature of this information is, at best, speculative. The court shall dismiss the first cause of action.

The second cause of action involves the existence of an alleged condition precedent, the Co-op's approval of plaintiff's renovation plan, which was allegedly a necessary stage in the approval of the Contract. While the documents indicate the Co-op was aware of these plans, the subsequent letter of approval from the Co-op reveals no reference to the plan or approval or rejection of the plan. The documents submitted from both sides do not resolve the issue of a condition precedent and dismissal of this cause of action would not be appropriate.

The next cause of action alleges a breach of an implied covenant of good faith and fair dealing attached to the Contract. "Within every contract is an implied covenant of good faith and

fair dealing. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement (citations omitted).” *Aventine Investment Management, Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 513-514 (2d Dept 1999). A “cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained [where] it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to damages allegedly resulting from a breach of the contract.” *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419, 419-423 (1st Dept 2011) (citation omitted).

Here, the court finds that plaintiff has alleged conduct that is not redundant of a breach of any specific contractual obligation. Mann is alleged to have consulted with the Co-op in an effort to avoid an approval of plaintiff’s plan while otherwise consenting to the sale. Plaintiff has accordingly made out a claim for breach of the implied covenant of good faith and fair dealing.

The fourth and fifth causes of action refer to the earlier causes of action and request attorney’s fees as a part of damages. Whereas the issue of a possible condition precedent has not been resolved, the court shall not dismiss these causes of action.

The sixth cause of action concerns the right to possess the contract deposit currently in GPS’s custody. Since the primary issue of the condition precedent has not been resolved, the dispute as to the entitlement to the deposit remains in effect, and, so, this court shall not dismiss the cause of action and permit Mann to possess the deposit.

The last cause of action is subject to a motion to declare the invalidity of a Closing Letter, which is challenged by Mann, who seeks a declaration reaching a conclusion opposite to that

sought by plaintiff.

A declaratory judgment action requires an "actual controversy" between parties who have a stake in the outcome. *Mt. McKinley Ins. Co. v Corning Inc.*, 33 AD3d 51, 57 (1st Dept 2006). There is no disagreement as to the existence of an actual controversy; however, the actual judgment would be premature at this time. The court shall decline in entering judgment.

Accordingly, it is

ORDERED that the branch of defendant Mann's motion to dismiss the first six causes of action in the complaint is granted, in part, and the first cause of action is dismissed, and the motion is otherwise denied; and it is further

ORDERED that the branch of defendant Mann's motion to enter judgment of the seventh cause of action in favor of Mann is denied; and it is further

ORDERED that the branch of defendant Mann's motion directing defendant Gilmartin, Poster & Shafto LLP to deliver the contract deposit is denied, and it is further

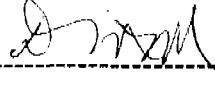
ORDERED that defendant Mann is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

DATED:

FILED

JAN 12 2012

ENTER:



NEW YORK
COUNTY CLERK'S OFFICE

J.S.C. - 100