Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

SAIDUL HUQ,
Plaintiff,

-against-

ROCKAWAY STORAGE, INC., et al.,
Defendants.

Index
No. 28756 2010

Motion
Date February 11, 2013

Motion
Cal. No. 45

Motion
Seq. No. 2

The following papers numbered 1 to 30 read on this motion by defendant Stewart Title Insurance Company (Stewart) for summary judgment dismissing the complaint; and on the cross motion by defendant Rockaway Storage, Inc., (Rockaway) for summary judgment dismissing the complaint.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affidavits - Exhibits | 1-5 |
| Notice of Cross Motion - Affidavits - Exhibits | 6-9 |
| Answering Affidavits - Exhibits | 10-24 |
| Reply Affidavits | 25-30 |

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages for a real estate transaction involving property located at 113-33 207 Street, in the County of Queens, City and State of New York. According to the complaint, plaintiff purchased the subject property from Rockaway, who

– along with the other defendants – is alleged to have represented the subject premises as a legal two-family dwelling when, in fact, it was not. Further, plaintiff alleges that defendant John Messer, Esq. (Messer), who represented plaintiff during the purchase of the property, "steered" plaintiff to obtain financing from defendant Griffin Mortgage Bankers – failing to inform plaintiff of an apparent conflict of interest – and inflated the value of the house by misrepresenting it as a two-family dwelling. Plaintiff also states that Messer "steered" plaintiff to Messer's business partner, defendant Roger Hui, who owned defendant Juris Abstract Corporation (Juris). Stewart, through its agent Juris, pursuant to the parties' underwriting agreement dated March 5, 2005 (which permitted Juris to issue title insurance policies in Stewart's name), issued the title insurance policy to plaintiff, dated December 5, 2005.

Plaintiff commenced the instant action sounding in breach of contract, fraud and misrepresentation and has alleged that, at the time of the sale, the property was not a legal two-family dwelling as agreed to in the contract of sale, and that defendants, acting in concert, knowingly misrepresented that fact.[1] Although it is noted that the instant motion and cross motion have been made beyond the 120 days since the filing of the note of issue, the motions have been timely made pursuant to two so-ordered stipulations dated August 8, 2012, and October 25, 2012.

Stewart has moved for summary judgment dismissing the complaint. As a preliminary matter, it is noted that there is no allegation specifically against this defendant; rather, plaintiff asserts that all defendants acted in concert in their misrepresentation that the subject premises was a two-family dwelling and that, in reliance upon same, plaintiff was damaged by virtue of his entering into a contract of sale for a two-family house.

As to plaintiff's claim against Stewart sounding in breach of contract, as noted before, plaintiff does not reference any particular contract that existed between himself and Stewart, nor does plaintiff reference Stewart's role in the subject transaction. Notwithstanding, to the extent that the complaint can be read to assume that the breached contract referred to is the title insurance policy, Stewart has met its prima facie burden of establishing dismissal of this claim. The terms of the policy issued by Juris in Stewart's name expressly excluded coverage which arise by reason of:

> "(a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating,

---

1. It is noted that plaintiff's "Wherefore" clause seeks damages occurring as a result of several breaches of contract only, though his second and third causes of action (of the three alleged) appear to sound in fraud and misrepresentation.

> prohibiting or relating to (i) the occupancy, use, or enjoyment of the land; [and] (ii) the character, dimensions or location of any improvement now or hereafter erected on the land."

As such, Stewart has demonstrated that it did not breach its contract with plaintiff regarding either the legal occupancy or the character of the premises (*see Voorheesville Rod & Gun Club v Tompkins Co.*, 82 NY2d 564, 571-572 [1993] ["marketability of title is concerned with impairments on title to a property, i.e., the right to unencumbered ownership and possession, not with legal public regulation of the use of the property"]; *Property Hackers, LLC v Stewart Title Ins. Co.*, 96 AD3d 818 [2012]; *Nisari v Ramjohn*, 85 AD3d 987 [2011] [dismissing plaintiff's claim against title insurance company despite its issuance of a policy of insurance without the proper certificates of occupancy]). Stewart has demonstrated, thus, that plaintiff has no claim under the terms of the insurance policy. In opposition, despite plaintiff's contention that the purpose of procuring title insurance is to protect against defects in title, he has failed to point to sufficient evidence to raise a triable issue of fact in light of the policy's express exclusions (*see Voorheesville*, 82 NY2d at 571). Thus, Stewart is entitled to dismissal of plaintiff's breach of contract claim against it.

With respect to plaintiff's claims against Stewart sounding in fraud and misrepresentation, "[t]he elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages" (*Introna v Huntington Learning Ctrs., Inc.*, 78 AD3d 896, 898 [2010]).

Stewart submits the affidavit of its Vice President and Regional Claims Counsel, Richard J. King, Esq., who specifically states that Stewart did not attend the closing, did not communicate with plaintiff or his attorney, and made no representations regarding the "use or occupancy of the Property or otherwise." To the extent that the complaint can be read to assert that the terms of the insurance policy constituted a representation, "[n]o cause of action to recover damages for fraud will arise when the only fraud alleged relates to a breach of contract" (*Bella Maple Group, Inc. v Attias*, 78 AD3d 1092, 1093 [2010]; *see Rocchio v Biondi*, 40 AD3d 615, 617 [2007]).

In opposition to the motion, plaintiff admits that he had no contact with anyone from Stewart, never communicated with Stewart and that no one from Stewart was present at the closing (*see Tapia v Prudential Richard Albert Realtors*, 79 AD3d 735, 736 [2010]).

Furthermore, even assuming there was a representation made as to the legal occupancy of the premises, "[w]here a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he

cannot claim justifiable reliance on [his opponent's] misrepresentations" (*Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1997]; *see Rosenblum v Glogoff*, 96 AD3d 514, 515 [2012]). Nor can a claim for fraud be maintained where the facts were "a matter of public record that [] could have been discovered by the exercise of ordinary diligence" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group*, 273 AD2d 140, 141 [2000]). Stewart has also sufficiently demonstrated, through the inclusion of records from the New York City Department of Buildings, that plaintiff and his counsel had, at least, constructive notice, prior to the closing date, that the legal occupancy of the subject property was as a one-family dwelling (*see Esposito v Saxon Home Realty*, 254 AD2d 451 [1998]). In opposition, not only has plaintiff failed to point to evidence to raise a triable issue of fact as to these claims, but in his affidavit, he admitted that the title search of the property reflected that the property was a one-family dwelling. Therefore, Stewart is entitled to the relief sought on this branch of its motion.

To the extent that plaintiff seeks to implicate Stewart as a principal of Juris, Stewart has argued that it cannot be held vicariously liable for the alleged fraudulent or negligent acts committed by Juris, and that plaintiff has no claim under the policy of title insurance issued for the subject property. Stewart has relied upon a copy of the underwriting agreement between itself and Juris and upon the policy issued for the property. The terms of the underwriting agreement expressly limited Juris to issuing title insurance policies in Stewart's name. The policy issued to plaintiff expressly excluded from coverage the use and occupancy of the property. Based upon plaintiff's testimony regarding his lack of contact with Stewart, Stewart has demonstrated that Juris did not have either actual or apparent authority to make representations to plaintiff regarding the legal occupancy of the subject property (*see IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 27 Misc3d 1230[A], *5 [2010], *affd* 84 AD3d 637 [2011]). In opposition, plaintiff has failed to raise a triable issue of fact as to whether Stewart made any representations as to whether Juris had any authority to act beyond the issuance of a policy on behalf of Stewart and whether Stewart made any representations to indicate that Juris had such authority (*see Beizer v Bunsis*, 38 AD3d 813, 814 [2007]; *Tapia v Prudential Richard Albert Realtors*, 79 AD3d at 736).

Rockaway has cross-moved for summary judgment dismissing the complaint. The allegations against Rockaway are identical to those alleged against Stewart. As to the claims sounding in fraud and misrepresentation, Rockaway has argued that it never communicated with plaintiff and, notably, plaintiff admits to never having communicated with Rockaway prior to, during, or after the closing. Therefore, Rockaway has demonstrated that, outside of the contract of sale, it did not make any representations to plaintiff. As such, and as noted *supra*, since "[n]o cause of action to recover damages for fraud will arise when the only fraud alleged relates to a breach of contract" (*Bella Maple Group, Inc. v Attias*, 78 AD3d 1092, 1093 [2010]; *see Rocchio v Biondi*, 40 AD3d 615, 617 [2007]). In any event, the fact that

plaintiff admitted that the title report reveled that the premises was in fact a one-family dwelling is fatal to any allegation of justifiable reliance (*see Vasquez v Soto*, 61 AD3d 968 [2009]). Plaintiff has failed to raise an issue of fact in opposition with respect to these issues.

With respect to the breach of contract claim, "[a] written agreement that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Alvarez v Amicucci*, 82 AD3d at 688; *see Dysal, Inc. v Hub Props. Trust*, 92 AD3d 826, 827 [2012]). "It is well settled that in a real property contract, unless the facts represented are matters particularly within one party's knowledge, the other party must make use of means available to learn, by the exercise of ordinary intelligence, the truth of such matters 'or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation' " (*Esposito v Saxon Home Realty*, 254 AD2d at 451, quoting *Danann Realty Corp. v Harris*, 5 NY2d 317, 322 [1959]).

Presumably, plaintiff relies upon the fact that the first Rider to the contract indicates that the seller represents that the premises "may be legally occupied as a **two family** dwelling (emphasis in original)." However, that same paragraph goes on to state the following: "And if not contracts may be canceled by Purchasers. In this regard seller will have no obligation to spend any money to legalize the premises and if Purchasers elect to cancel sellers' sole obligation will be to refund the down payment made hereunder." Admittedly, plaintiff did not exercise his right to cancel the contract of sale but, rather, went forward with the closing. Notably, plaintiff went forward with the closing with the express knowledge that the premises did not have the proper certificate of occupancy. As such, plaintiff has not raised any issues of fact with respect to the survivability of his breach of contract claim against Rockaway.

To the extent that Rockaway has moved for dismissal of a cause of action sounding in negligence in an amended complaint, the court has searched the record and determined that no negligence cause of action has been alleged, that no amended complaint was filed with the clerk's office, nor have the parties attached it to the papers before the court.

Accordingly, Stewart's motion for summary judgment dismissing the complaint is granted in its entirety. Rockaway's motion for summary judgment dismissing the complaint is granted in its entirety.

Dated: May 14, 2013

J.S.C.