

Rosenblum v Corcoran Group Eastside Inc.
2013 NY Slip Op 31700(U)
July 23, 2013
Sup Ct, New York County
Docket Number: 111706/2011
Judge: Joan A. Madden
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SCANNED ON 7/29/2013

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

PRESENT: Hon Joan A. Miller
Justice

PART 11

Index Number : 111706/2011
ROSENBLUM, LEE
vs.
CORCORAN GROUP EASTSIDE, INC.
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the
attached Memorandum Decision Order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 29 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 23, 2013

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED

JUL 29 2013

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----- X
LEE ROSENBLUM and GAIL ROSENBLUM,

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff,

-against-

Index No. 111706/2011

CORCORAN GROUP EASTSIDE INC., JUDYTH GOLDBERG
and BROWN HARRIS STEVENS RESIDENTIAL SALES, LLC,
Defendants.

----- X
Joan A. Madden, J.:

Defendants Judyth Goldberg (“Goldberg”) and NRT New York, the Corcoran Group (“Corcoran”)(collectively the “Corcoran defendants”) move to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action. Defendant Brown Harris Stevens Residential Sales, LLC (“Brown Harris”) joins in the defendants’ motion to dismiss and cross-moves to dismiss the complaint. Plaintiffs Lee Rosenblum and Gail Rosenblum (collectively the “Rosenblums”) oppose the motion and cross-motion.

BACKGROUND

The Rosenblums bring this action to for damages in connection with their forfeiture of a down payment in the amount of \$90,000 arising out of a contract for the sale of real property. Corcoran, a real estate firm, and Goldberg, on behalf of Corcoran, acted as listing agents for Marc J. Glogoff and Andrea Glogoff (collectively the “Glogoffs”) for the sale of their cooperative apartment located at 320 East 57th Street Unit 4A, New York, NY 10022 (“the apartment”). Brown Harris acted as the Rosenblums’ agent.

In February 2012, Corcoran held an open house and invited prospective purchasers to view the property. The Rosenblums allege that at the open house they questioned Goldberg about the air conditioning in the living room and dining room and she assured them that there was “thru-wall” air conditioning in both rooms. Upon visiting the apartment on another

occasion, the Rosenblums were given an information sheet, which stated the apartment contained “air conditioning thru-wall.”

After viewing the apartment on several occasions, the Rosenblums entered into a contract of sale for the apartment on April 12, 2010, and made a down payment of \$90,000. Prior to the closing on June 25, 2010, the Rosenblums discovered that the apartment did not contain “thru-wall” air conditioning in the living and dining rooms, and that it would be impermissible to add air conditioning to the rooms facing 57th Street due to the rules of the cooperative corporation. The Rosenblums failed to appear at the closing, and the Glogoffs declared them in default. On July 20, 2010, the Rosenblums demanded a refund of their down payment, but the Glogoffs refused to comply.

In this action, the Rosenblums assert claims for fraud and negligent misrepresentation against the Corcoran defendants and Brown Harris. The fraud claim alleges Corcoran’s broker, Goldberg, knowingly made oral misrepresentations that the apartment had “thru-wall” air conditioning even though she knew that the apartment did not have air conditioning in the living room and dining rooms, and that Corcoran provided an information sheet containing the false statement that the apartment had “thru-wall air conditioning.” The Rosenblums allege that as a result of their reliance on defendants’ false representations, they sustained damages of \$90,000, plus interest, plus out-of-pocket expenses incurred in applying for financing for said property, plus future costs associated with the purchase of another property of similar value. The Rosenblums also allege that they are entitled to punitive damages.

As for the negligence claim, the Rosenblums allege that the defendants had a duty to know the apartment did not and could not contain air-conditioning in the living and dining rooms, and that if the defendants had advised them that the apartment did not contain air conditioning in the living and dining rooms, they would not have entered into the contract of sale

Before commencing this action, the Rosenblums brought an action in this court against the sellers for rescission of the contract of sale, fraud, breach of contract, and a declaratory judgment (Rosenblum v. Glogoff, Index no. 109723/2010)(hereinafter “the prior action”). By decision and order dated May 26, 2011, Justice Judith J. Gische granted summary judgment dismissing the Rosenblums’ claims against the Glogoffs (“hereinafter “the May 2011 decision”). The court based its decision upon a determination that the Rosenblums’ claims were barred by the doctrine of caveat emptor, that there was a merger clause in the contract of sale and a disclaimer as to the condition of personalty which was defined under the contract of sale to include air conditioning, and that there was no fraud or misrepresentation, as the apartment contained through-wall air conditioning, just not in every room. The court also found that defendants “had no duty to disclose that there was no [air condition] unit in the living room and dining room or that there was a pipe in one of the cabinets preventing the installation of the unit [and] that plaintiffs had the means to discover the truth by exercise of ordinary intelligence” (May 2011 decision, at 8).¹ Judge Gische’s dismissal was unanimously affirmed by the Appellate Division, First Department. See Rosenblum v. Glogoff, 96 A.D.3d 514 (1st Dept 2012).

The Corcoran defendants now move to dismiss the complaint, and Brown Stevens cross moves for the same relief and adopt the Corcoran defendants’ arguments. Defendants argue that under the doctrines of res judicata and collateral estoppel, the Rosenblums are precluded from relitigating the claims in this action based on the final judgment dismissing the claims in the prior action. Defendants alternatively argue that the Rosenblums’ claims are without merit as they are precluded under the doctrine of caveat emptor based on the merger clause in the

¹The Rosenblums subsequently moved to reargue Judge Gische’s May 26, 2011 decision. By decision and order dated August 10, 2011, Justice Gische granted reargument and, upon reargument, adhered to her original decision.

contract of sale which disclaims any reliance by the Rosenblums on any representations, warranties and statements, as well as a provisions defining “personalty” as including “central air conditioning and/or window or sleeve units,” and providing that personalty be taken “as is.”

In opposition, the Rosenblums argue that the doctrines of res judicata and collateral estoppel do not apply, since the Corcoran defendants and Brown Harris were not parties to the prior action, and as the prior action was based allegations of breach of contract, while the instant action asserts claims for fraud and negligence based on oral misrepresentations real estate brokers who were not parties to the contract of sale. They further argue the conduct of real estate brokers is dictated by Real Property Law § 443, and that in dealings with a buyer, brokers must exercise reasonable care, deal honestly and in good faith and to disclose all facts relevant to value and desirability of property. The Rosenblums also rely on the information sheet from Corcoran, which describes the apartment as containing “thru-wall air conditioning.”

In reply, defendants maintain the doctrine of collateral estoppel precludes the Rosenblums from re-litigating the issue of whether defendants may be liable for any material misrepresentation with respect to the air conditioning, since the issue was raised, argued and decided in the prior action. Furthermore, defendants argue that the First Department held that the doctrine of caveat emptor applies to agents and brokers, and that the Rosenblums failed to exercise ordinary intelligence in examining the apartment.

DISCUSSION

On a motion to dismiss a pleading for legal insufficiency pursuant to CPLR 3211(a)(7), the court “accept[s] the facts alleged as true and determine[s] simply whether the facts alleged fit within any cognizable legal theory.” Morone v. Morone, 50 N.Y.2d 481, 484 (1980) (citation omitted). The pleading is to be liberally construed, accepting all the facts alleged therein to be true, and according the allegations the benefit of every possible favorable inference. See

Goshen v. Mutual Life Ins. Co. of NY, 98 N.Y.2d 314 (2002). Where the allegations are ambiguous, the court resolves the ambiguities in plaintiff's favor. Snyder v. Bronfman, 13 N.Y.3d 504 (2009). "On the other hand, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." Roberts v. Pollack, 92 A.D.2d 440, 444 (1st Dept 1983).

To successfully state a cause of action for fraud, a plaintiff must allege a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. Eurycleia Partners, LLP v. Seward & Kissel, LLP, 12 N.Y.3d 553 (2009). In addition, when, as here, the subject matter is real estate, the seller will not be held liable for the alleged misrepresentation, "if the facts misrepresented were not matters peculiarly within their knowledge and plaintiffs had the means to discover the truth by the exercise of ordinary intelligence." Joseph v. NRT Inc. 43 A.D.3d 312, 312 (1st Dept 2007).

Here, as in the prior action, the Rosenblums' fraud claim is based on allegedly false oral statements by the Corcoran broker regarding the existence of "thru wall" air conditioning in the dining and living rooms, and the allegedly false statements regarding the air conditioning in the Corcoran information sheet. These statements are insufficient to state a cognizable claim for fraud since, as was the case in the prior action, the Rosenblums do not allege that they made any reasonable attempt to inspect the apartment or otherwise learn the truth as to whether there was air conditioning in the living and dining rooms. See Rosenblum v. Glogoff, 96 AD3d at 515 (noting that plaintiffs' fraud claim fails "for lack of justifiable reliance on the alleged misrepresentation). Furthermore, as in the prior action, "[p]laintiffs have not identified any conduct by the defendants (or their agents) which was deceptive and the acts described by plaintiffs do not amount to concealment that is actionable as fraud," citing, Moser v. Spizzirro, 31 A.D.2d 537 aff'd 25 N.Y.2d 941 (1968)(May 2011 decision, at 8).

In addition, contrary to the Rosenblums' position, the doctrine of caveat emptor is applicable to bar claims against not only sellers but their real estate agents. See e.g. Laxer v. Edelman, 75 A.D.3d 584, 585 (2d Dept 2010)(doctrine of caveat emptor applies to preclude liability against seller and seller's agent).

Next, to the extent that the Rosenblums base their claims on statements in the Corcoran information sheet, as found in the prior action, reliance on such statements is not a basis for a fraud claim as the sheet does not specifically state that each room has through wall air conditioning and contains a disclaimer which provides, *inter alia*, that "no warranty or representation is made as to the accuracy of [the information furnished regarding the property for sale] and same is submitted subject to errors, omissions...."

As for the claim for negligent misrepresentation, the First Department has held a "claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given." Hudson River Club v. Consolidated Edison Co., 275 A.D.2d 218, 220 (1st Dept 2000). No such relationship of trust and confidence existence between a seller's agent and potential buyers. See Harris v. Seward Park Hous. Corp., 2009 NY Slip Op 31396 (Sup Ct. NY Co. 2009), aff'd in part, dismissed in part on other grounds, 79 A.D.3d 425 (1st Dept 2010); Pappas v. New 19 West, LLC, 18 Misc.3d 1138[A](Sup Ct NY Co. 2008)(holding that a selling agent owed buyers no duty as real estate broker to refrain from representing that the roof setback was usable as their exclusive outdoor space). Likewise, it has been held that a seller's broker owes no fiduciary duty to the buyer under Real Property Law § 443. See Bowery Partners, LLC v. E.G. West 37th LLC, 32 Misc.3d 1210(A)(Sup Ct NY Co. 2011)(dismissing cause of action by buyer against seller' broker noting that under Real Property Law § 443(4)(a), which codifies the principle that

a seller's broker has a fiduciary duty of "undivided loyalty" to the seller, and that a "seller's agent does not represent the interests of the buyer").²

Furthermore, while Brown Harris, as the Rosenblums' broker, had a special relationship with the Rosenblums (Grammar v. Turits, 271 A.D.2d 644 [2d Dept 2000]), the complaint is devoid of allegations that Brown Harris made any misrepresentations as to existence of air conditioning in the apartment or that it knew that there was no air conditioning in the dining and living rooms and failed to disclose this information to the Rosenblums.

Finally, as the Rosenblums' claims are without merit, the court need not reach whether they are barred by the doctrines of res judicata and/or collateral estoppel.

Accordingly, it is

ORDERED that the motion by Corcoran defendants, and the cross motion by Brown Harris to dismiss the complaint are granted and the Clerk is directed to enter judgment dismissing the complaint in its entirety.

Dated: July 23 2013



J.S.C.

FILED
JUL 29 2013
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²To the extent the Rosenblums assert that the Corcoran defendants had a duty disclose the absence of air conditioning in the dining room and living room based on the Real Property Law § 443 and that such duty is broader than the duty provided under the common law, they cite no case law to that effect. Moreover, under Real Property Law § 443 the requirement that a seller's broker "disclose [to the buyer] all facts known to the agent materially affecting the value or desirability of the property" is limited by the phrase "except otherwise provided by the law."