

**Kafiluddi v John Paul Bldr., LLC**

2013 NY Slip Op 32853(U)

November 8, 2013

Sup Ct, Albany County

Docket Number: 1001-13

Judge: Joseph C. Teresi

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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RONNY KAFILUDDI and KAMLAWATIE  
KAFILUDDI,

Plaintiffs,

-against-

**DECISION and ORDER**  
**INDEX NO. 1001-13**  
**RJI NO. 01-13-110310**

JOHN PAUL BUILDERS, LLC and  
KENNETH RAYMOND,

Defendants.

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Supreme Court Albany County All Purpose Term, October 23, 2013  
Assigned to Justice Joseph C. Teresi

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**TERESI, J.:**

Plaintiffs commenced this action, in relevant part, by asserting a fraud cause of action against John Paul Builders, LLC (hereinafter “JPB”), premised on their purchase of 35 East

Cobble Hill Road, Loudonville, New York. This Court, by Decision and Order dated August 6, 2013 (hereinafter “Decision and Order”), dismissed Plaintiffs’ fraud claim pursuant to CPLR §§3016(b) and 3211(a)(7).<sup>1</sup> Plaintiffs now move to amend, to correct their prior fraud cause of action’s flaws. JPB opposes the motion. Because Plaintiffs failed to establish their entitlement to amend the complaint, their motion is denied.

Preliminarily, contrary to JPB’s contention, Plaintiffs’ motion to amend the complaint is neither procedurally defective nor barred by this court’s prior CPLR §§ 3016(b) and 3211(a)(7) dismissal. (Janssen v Inc. Vil. of Rockville Ctr., 59 AD3d 15 [2d Dept 2008]; Morpheus Capital Advisors LLC v UBS AG, 105 AD3d 145 [1st Dept 2013]; Clark v Pfizer, Inc., 64 AD3d 536 [2d Dept 2009]; Shelton v New York State Liq. Auth., 61 AD3d 1145 [3d Dept 2009])

Substantively however, Plaintiffs failed to sufficiently establish their entitlement to amend the complaint.

It is well established that a CPLR §3025(b) motion to amend “should be freely granted absent prejudice or surprise to the other party.” (Webber v Scarano-Osika, 94 AD3d 1304, 1305 [3d Dept 2012]). The statute requires, however, some “evidentiary showing of the prima facie basis for [the amended] claim.” (Paolucci v Mauro, 74 AD3d 1517, 1521 [3d Dept 2010]; Cowsert v Macy's E., Inc., 74 AD3d 1444 [3d Dept 2010]).

Here, although the proposed amendment would cause no surprise or prejudice, Plaintiffs offered no evidentiary showing to support their amended claim. First, Plaintiffs’ attorney’s affirmation “lacked any evidentiary value,” because it was not based upon firsthand knowledge.

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<sup>1</sup> The Decision and Order also dismissed Plaintiffs’ breach of contract and Deceptive Business Acts and Practices causes of action, which are not currently at issue. In addition, the background facts of this case are fully set forth in the Decision and Order.

(Groboski v Godfroy, 74 AD3d 1524, 1526 [3d Dept 2010]; Chiarini ex rel. Chiarini v County of Ulster, 9 AD3d 769 [3d Dept 2004]). Similarly, because Plaintiffs’ “First Amended Verified Complaint” was not verified, sworn or signed, it does not constitute evidentiary proof. (Ulster County v CSI, Inc., 95 AD3d 1634 [3d Dept 2012]; 92 Ct. St. Holding Corp., LLC v Monnet, 106 AD3d 1404 [3d Dept 2013]; Bright ex rel. Bright v McGowan, 63 AD3d 1239 [3d Dept 2009][rev’d on other grounds]; Slavenburg Corp. v Opus Apparel, Inc., 53 NY2d 799 [1981]). The final documents Plaintiffs submitted in support of their motion, the original complaint and the Decision and Order, again provide no evidentiary support for their proposed amendments. Although Plaintiffs’ reply papers sought to insert the requisite proof, by submitting Kamlawatie Kafiluddi’s (hereinafter “Kafiluddi”) affidavit, this belated submission does not meet Plaintiffs’ prima facie evidentiary burden. (Kevin Kerveng Tung, P.C. v JP Morgan Chase & Co., 105 AD3d 709 [2d Dept 2013]; Barrera v MTA Long Is. Bus., 52 AD3d 446 [2d Dept 2008]; Albany County Dept. of Social Services v Rossi, 62 AD3d 1049 [3d Dept 2009]). As such, Plaintiffs failed to make a sufficient prima facie evidentiary showing to amend their complaint.

Moreover, even if Kafiluddi’s affidavit were considered, Plaintiffs still failed to sufficiently establish the merit of their claim. Plaintiffs’ amended fraud cause of action must be based upon allegations that JPB’s “false representation prevented [Plaintiffs] fulfillment of their own obligations imposed by the doctrine of caveat emptor and that they justifiably relied upon the false representation.” (Pettis v Haag, 84 AD3d 1553, 1554 [3d Dept 2011]). In his affidavit Kafiluddi made no material factual assertions, but rather “attested to the truth” of the Plaintiffs’ unsigned “First Amended Verified Complaint[s]” allegations. The “First Amended Verified Complaint,” however, failed to adequately plead justifiable reliance. Instead, it acknowledged

that Plaintiffs' "discovered a host of material defects with the [subject] property" prior to their purchase of it. The "First Amended Verified Complaint" specifically admits that, prior to purchase, Plaintiffs were aware of the property's "leaky rooftop chimney and water in the basement," malfunctioning "electrical switches," "blistering" paint, "buckling" sheetrock, and inadequate drainage "among other things." In view of Plaintiffs' extensive knowledge of the property's defects before they purchased the property they cannot prove justifiable reliance on JPB's structural integrity and habitability representations. (Pettis v Haag, supra at 1555). Nor, in light of Plaintiffs' admitted knowledge, did the "First Amended Verified Complaint" sufficiently allege that JPB "interfered with or thwarted plaintiff[s'] efforts to fulfill [their] responsibilities fixed by the doctrine of caveat emptor." (Klafehn v Morrison, 75 AD3d 808, 811 [3d Dept 2010]; Schottland v Brown Harris Stevens Brooklyn, LLC, 107 AD3d 684 [2d Dept 2013]; Stoian v Reed, 66 AD3d 1278, 1280 [3d Dept 2009]).

Accordingly, Plaintiffs' motion to amend is denied.

This Decision and Order is being returned to the attorney for the JPB. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 8, 2013  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated September 24, 2013; Affirmation of Douglas J. Rose, dated September 24, 2013, with attached Exhibits "A" - "C(A-B)".
2. Affidavit of Thomas O'Gara, dated October 15, 2013, with attached Exhibits "A" - "B."
3. Affirmation of Mary Elizabeth Slevin, dated October 15, 2013.
4. Affirmation of Douglas J. Rose, dated October 22, 2013; Affidavit of Kamlawatie Kafiluddi, dated October 22, 2013.