

Rosenblum v Corcoran Group Eastside Inc.
2014 NY Slip Op 31102(U)
April 18, 2014
Supreme Court, New York County
Docket Number: 111706/2011
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: How Joan A. V. d. d. w
Justice

PART 11

Index Number : 111706/2011.
ROSENBLUM, LEE
vs.
CORCORAN GROUP EASTSIDE, INC.
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

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

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

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):

RECEIVED
APR 29
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

FILED

APR 30 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 18, 2014

[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

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

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

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.:

Plaintiffs Lee Rosenblum and Gail Rosenblum (collectively the "Rosenblums") move for reargument of this court's decision and order dated July 23, 2013 ("the original decision"), which granted the motion by defendants Judyth Goldberg ("Goldberg") and NRT New York, the Corcoran Group ("Corcoran")(collectively the "Corcoran defendants") and the cross motion of defendant Brown Harris Stevens Residential Sales, LLC ("Brown Harris") dismissing the complaint. The Corcoran defendants and Brown Harris oppose the motion, which is denied for the reasons below.

FILED

APR 30 2014

BACKGROUND

COUNTY CLERK'S OFFICE
NEW YORK

The Rosenblums bring this action to recover 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 Glogoffs 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).

In the original decision, the court granted the motion and cross motion to dismiss the complaint. With respect to the fraud claim, the court wrote that:

To successful[ly] 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

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.

plaintiff and damages. Eurcyleia 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).

original decision, at 5.

The court noted that, 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. The court then found that “[t]hese 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.” The court further found that “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)(original decision, at 5). In addition, the court rejected the Rosenblums’ position, that the doctrine of caveat emptor is applicable to bar claims against only sellers and not against 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).

The court further found that to the extent that the Rosenblums based their claims on statements in the Corcoran information sheet, their reliance on such statements was 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....”

The court also dismissed the negligence claims, finding that there was no relationship of trust and confidence existence between Corcoran defendants, as the seller’s agent, and that the Rosenblums failed to allege any negligent misrepresentations made to them by their own agent at Brown Harris.

The Rosenblums now move for reargument of that part of the original decision dismissing the fraud claim, arguing that the court erred in deciding as a matter of law that the Rosenblums could have reasonably discovered that there was no air condition in the living room. Instead, the Rosenblums assert that there are factual questions here as to whether there was active concealment as to the lack of air conditioning in the dining room and living room. They further assert that contrary to the finding in the original decision, the principles of *caveat emptor* do not apply to the statements made by brokers, and that Laxer v. Edelman is not controlling here as the purchasers in that case were aware of the mold condition at issue when they signed the relevant contract.

The defendants separately oppose the motion, asserting that the court did not misapprehend any law or facts, and that the Rosenblums have failed to cite any case law to support their position.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 A.D.2d 558,

567 (1st Dept 1979). However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, appeal denied in part dismissed in part 80 N.Y.2d 1005 (1992).

Here, the motion to reargue is denied as the Rosenblums have failed to demonstrate that the court overlooked or misapprehended any relevant facts or misapplied the law. First, contrary to the Rosenblums’ position, the court did not err in finding that the Rosenblums could have discovered in the absence of air conditioning, as a matter of law, and that there was no active concealment. It is well establish that “[t]o prevail upon ... a claim (of fraud based on active concealment), plaintiffs must demonstrate that the false representation prevented fulfillment of their own obligations imposed by the doctrine of caveat emptor and that they justifiably relied upon the false representation ‘Justifiable reliance does not exist [w]here a party has the means to discover [a falsehood] by the exercise of ordinary intelligence, and fails to make use of those means’ Pettis v. Haag, 84 A.D.3d 1553, 1554-1555 (3d Dept 2011), quoting Kurtz v Foy, 65 A.D.3d 741, 743 (3d Dept 2009)(other internal and quotations citations omitted);² see also, Rosenblum v. Glogoff, 96 A.D.3d at 515 (“[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 defendant's misrepresentations.”)(internal citation and quotation omitted).

²Simone v. Homecheck Real Estate Services, Inc., 42 A.D.3d 518, 520 (2d Dept 2007) is not to the contrary as it also holds that “to maintain a cause of action to recover damages for active concealment in the context of a fraudulent nondisclosure, the buyer must show, in effect, that the seller thwarted the buyer's efforts to fulfill the buyer's responsibilities fixed by the doctrine of caveat emptor.” While the court in Simone held that false representations in the disclosure statement provided to the buyers was proof of active concealment, there are no allegations here of false statements in a disclosure statement. In any event, there are no allegations that the Rosenblums lacked the means to discover the false representations regarding the air.

Here, as the court found in its original decision, the Rosenblums cannot claim justifiable reliance as there are no allegations 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. In fact, as the First Department noted in Rosenblum v. Glogoff, “when told that the air conditioning unit was behind a particular cabinet door, [the Rosenblums] failed to even open the door or inquire what was “thru-wall” air conditioning, or how it worked. It is not speculation to conclude that [the Rosenblums] could have discovered the truth by use of ordinary intelligence...”]. 96 A.D.3d at 515.

Moreover, the court correctly found that the doctrine of caveat emptor is applicable to bar claims against both sellers and their real estate agents. See e.g. Beach 104 St. Realty, Inc. V. Kisslev-Mazel Realty, 76 A.D.3d 661 (2d Dept 2010)(“New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment”); Laxer v. Edelman, 75 A.D.3d at 585 (doctrine of caveat emptor applies to preclude liability against seller and seller’s agent); 1 N.Y. Law & Practice of Real Property § 22:64 (2d ed. 2013). While the facts in Laxer v. Edelman are not identical to the circumstances here, the legal principles stated in that case are nonetheless applicable. In fact, the Rosenblums fail to cite any precedent to the contrary.

Accordingly, it is

ORDERED that the Rosenblum’s motion to reargue is denied.

Dated: April 18, 2014

J.S.C.

FILED

APR 30 2014