

Levy v Bartfeld

2014 NY Slip Op 32142(U)

March 17, 2014

Supreme Court, New York County

Docket Number: 157901/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Justice
Index Number : 157901/2013
LEVY, HERBERT
vs
BARTFELD, DANIEL D.
Sequence Number : 001
DISMISS ACTION

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
ACCOMPANYING DECISION / ORDER

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

Dated: 3/17/14

HON. EILEEN A. RAKOWER, 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: PART 15

-----X
 HERBERT LEVY and BARBARA LEVY,

Plaintiffs,

Index No.
 157901/2013

Decision and
 Order

- against -

Mot. Seq. 01

DANIEL D. BARTFELD, BEVERLY BARTFELD,
 and 338 WEA LLC,

Defendants.

-----X
 HON. EILEEN A. RAKOWER, J.S.C.

This is an action for fraud, negligence, specific performance, and encroachment. Plaintiffs, Herbert Levy and Barbara Levy (the “Levys,” or “Plaintiffs”), are the owners of real property located at 340 West 84th Street, Block 1245, Lot 96, New York, New York (the “Levy Brownstone” or the “Levy Home”), and the former owners of real property located at 338 West 84th Street, Block 1245, Lot 95, New York, New York, (the “Adjoining Building”), which shares a party wall with the Levy Brownstone. Plaintiffs claim to have sold the Adjoining Building to defendants, Daniel D. Bartfeld (“Mr. Bartfeld”), Beverly Bartfeld (“Mrs. Bartfeld,” collectively, the “Bartfelds”), and 338 WEA LLC (and together with the Bartfelds, “Defendants”), in reliance on Mr. Bartfeld’s alleged oral promise not to perform construction on or renovations to the Adjoining Building. Plaintiffs claim that Defendants commenced a two-year renovation project on the Adjoining Brownstone notwithstanding this purported promise, and that Defendants’ construction activity interfered with the Levys’ enjoyment of their home. In addition, Plaintiffs claim that, in exchange for the Levys’ permission to do certain renovations affecting the common party wall, Defendants promised to open the ventilation flues for the common chimneys and clean the debris in the Levy Brownstone’s fireplace and that

Defendants failed to adequately perform under this agreement. Plaintiffs also claim that, in conjunction with the construction and renovation to the Adjoining Building, Defendants created an overhang that intrudes and trespasses into Plaintiffs property and air space.

Defendants move, pursuant to CPLR §§ 3211(a)(1) and (7), for an Order dismissing the first, third, and fourth causes of action of Plaintiff's complaint, on the grounds of documentary evidence and a failure to state a cause of action.

Plaintiffs oppose and submit the affirmation of Perry S. Friedman, Plaintiffs' attorney, in opposition to Defendants' motion to dismiss. Annexed to Friedman's affirmation is "a proposed amended complaint," which Plaintiffs state that they "intend to file after the instant motion is decided which adds two allegations ... concerning the liability of defendant Beverly Bartfeld." However, since Plaintiffs have not filed the proposed amended complaint, and do not now move to amend their original complaint, this court will only review the instant motion to dismiss as it relates to Plaintiffs' original complaint.

CPLR § 3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

In determining whether dismissal is warranted for failure to state a cause of action, the court must “accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dep’t 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

The elements of fraudulent inducement are: (1) a false representation of material fact; (2) known by the utterer to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages. (*MBIA Ins. Corp. V. Credit Suisse Securities (USA) LLC*, 32 Misc.3d 758, 927 NYS2d 517 [Sup Ct NY, 2011]). Additionally, CPLR § 3016 requires particularity in the pleading of a fraud cause of action.

A promise to confer a benefit in the future may be actionable when the promisor had no intention of fulfilling the promise at the time it was given. (*Braddock v. Braddock*, 60 A.D.3d 84, 89 [1st Dep’t 2009]). Although a general merger clause does not serve to exclude parol evidence of fraud in the inducement, “a specific disclaimer may destroy allegations in a plaintiff’s complaint that the agreement was executed in reliance upon these contrary representations.” (*Danann Realty Corp. v. Harris*, 5 N.Y.2d 317 [1959]).

Defendants submit documentary evidence establishing the terms of the contract of sale (the “Contract”) to sell the Adjoining Brownstone to the Bartfelds, and argue that the Contract constitutes documentary evidence warranting the dismissal of Plaintiff’s fraud cause of action. Defendant argues that the Contract contains a merger clause that provides:

All prior understandings, agreements, representations and warranties, oral or written, between Seller and Purchaser are merged into this contract; it completely expresses their full agreement and has been entered into after full investigation, neither party relying upon any statement made by anyone else that is not set forth in this contract.

Defendants also point to a second merger clause contained in the Rider to the

Contract, which states that the Contract is the “entire agreement.” As a result, Defendants contend, the merger clause bars Plaintiffs’ fraudulent inducement claim.

Defendants also submit evidence demonstrating that Mr. Levy is registered as an attorney in New York State, and establishing that the Adjoining Building is more than one hundred years old. Defendants argue that the alleged oral promise not to renovate is unenforceably vague, and that any claimed reliance thereon is not justifiable based on Mr. Levy’s experience and sophistication, as well as the Adjoining Building’s age. In addition, Defendants argue, Plaintiffs’ complaint fails to plead a cause of action for fraudulent inducement with sufficient particularity.

Plaintiffs’ complaint alleges that Plaintiffs entered into a contract of sale to sell the Adjoining Brownstone to the Bartfelds, “by reason of certain misrepresentations of fact made to the plaintiffs by D. Bartfeld . . . that were relied upon by the plaintiffs which led them to believe that the Bartfelds had no intention of gutting the Adjoining premises and completely renovating it.” Plaintiff’s complaint further alleges that “Plaintiffs did not want to sell the Adjoining building to anyone who intended to make extensive renovations to it,” and that Plaintiffs “had no need for an immediate sale and were therefore willing to wait to sell the building to an acceptable purchaser.”

The complaint also asserts, “the plaintiffs had [their broker] communicate to the Bartfelds (through their broker) that due to the fact that they were planning extensive renovations to the Adjoining building if they purchased it, Plaintiffs were no longer interested in selling the Adjoining building to them,” and, “About three weeks after the Bartfelds were informed that the Plaintiffs no longer wished to sell the Adjoining Building to them, D. Bartfeld requested a meeting with H. Levy.”

Plaintiffs’ complaint alleges,

At the meeting that took place at the Levy Home between D. Bartfeld and H. Levy, D. Bartfeld told H. Levy that the Bartfelds were occupying their apartment at 522 West End Avenue, New York, New York, 10024 as a sublet in a Co-op building and the Board of Directors of

the co-op informed them that they could no longer continue to occupy the apartment they were subletting. By reason of the foregoing, the Bartfelds had to move as soon as possible and as a result they could no longer renovate the Adjoining Building [if they bought it] [sic] because they would have to immediately move into the Adjoining Building.

Plaintiffs' complaint further alleges, "Plaintiffs had no reason to doubt the aforesaid representation being made by D. Bartfeld on behalf of the Bartfelds," and asserts that "in reliance on the aforesaid representations, the Plaintiffs consented to the Bartfelds purchasing the Adjoining Building at the agreed upon purchase price." Plaintiffs' complaint also asserts that "the Bartfelds knew at the time that D. Bartfeld made the aforesaid representation to H. Levy that it was untrue" and that, "After they purchased the Adjoining Building [the Bartfelds] continued to reside at 522 West End Avenue, New York, New York, 10024 for the next two years. During those two years the defendants caused a total gutting of the Adjoining Building."

Plaintiffs' complaint also asserts,

At the time that D. Bartfeld made the aforesaid false representations to Levy he knew that he did not have to move out of his apartment at any particular time and that he intended to make major renovations and changes to the Adjoining Building if the Bartfelds purchased it and that they would not be moving into the Adjoining Premises until after the renovations were completed.

Plaintiffs' complaint further alleges, "Had Plaintiffs known that the Bartfelds had no need to immediately move out of their co-op apartment [and that they intended to continue to reside there while extensive renovations were taking place at the Adjoining Building] [sic] they never would have agreed to sell the Adjoining Building to the Bartfelds."

Here, even accepting Plaintiffs' allegations as true, the merger clause contained

in the Contract is sufficiently specific to bar Plaintiffs from claiming that they were fraudulently induced into entering the Contract based on Defendants' prior representations. The merger clause contained in the Contract is not simply a general statement that the written instrument embodies the whole agreement, or that no representations were made. Rather, the clause in question specifically acknowledges that Plaintiffs did not enter into the Contract in reliance on any extracontractual representations. Plaintiffs do not claim that they never read or understood the Contract, or that the merger clause itself was procured by fraud. Thus, "[P]laintiff[s] ha[ve] in the plainest language announced and stipulated that [they are] not relying on any representations as to the very matter as to which [Plaintiffs] now claim [they were] defrauded." (*Danann Realty Corp. v. Harris*, 5 N.Y.2d 320 [1959]). Accordingly, even accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, Defendants' documentary evidence flatly contradicts Plaintiffs' fraudulent inducement claim.

As for Plaintiffs' third cause of action, "the elements of a cause of action for specific performance of a contract are that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to [perform the contract], and that there was no adequate remedy at law." (*EMF Gen. Contr. Corp. v. Bisbee*, 6 A.D.3d 45, 51 [1st Dep't 2004]).

"The decision whether or not to award specific performance is one that rests in the sound discretion of the trial court. In determining whether money damages would be an adequate remedy, a trial court must consider, among other factors, the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award (see, Restatement [Second] of Contracts § 360)." (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409 [2001]). In general, specific performance will not be ordered where money damages would be adequate to protect the expectation interest of the injured party. (*Id.*).

Plaintiffs' complaint alleges, "That in consideration for permitting the defendants to do gut renovations that affected the common party wall and chimneys and the Levy Home the defendants promised to:

- a) Open the ventilation flues for the common chimneys;
- b) Install proper insulation for the flues that had been removed by defendants as part of its renovations and;
- c) Clean the debris in the Levy Home's fireplace that was caused by dust and debris entering the fireplace as a result of the aforesaid renovations."

The complaint further alleges, "The plaintiffs performed their contractual obligations by permitting the construction and renovations to continue." Plaintiffs' complaint asserts that Plaintiffs were at all times ready, willing, and able to perform under the contract, that "the aforesaid promises were either not performed or not properly performed," and that, "It was and still is within the power of the defendants to perform what had been promised," and that "plaintiffs have no adequate remedy at law in that the defendants, their agents, servants and/or employees having performed the aforesaid construction and renovations are in the best position to perform what had been promised as set forth above."

Defendants argue that Plaintiffs' claim for specific performance fails to state a cause of action because specific performance is a remedy for breach of contract, rather than an independent claim. Defendants further argue that the purported contract, for which Plaintiffs seek specific performance, is unenforceably vague, and fails for lack of consideration because the "permission" to perform renovations affecting the party wall was not the Levys' to give.

Plaintiffs, in turn, argue that the Levys' permission to perform renovations affecting the party wall constitutes valid consideration because one adjoining landowner cannot, without the consent of the other, close flues on the property and construct others in their place. Plaintiffs argue that they are entitled to use the party wall as it was constructed, and that, as a result, Defendants needed Plaintiffs' permission to perform work affecting the party wall, the chimneys, and the Levys' use thereof.

Here, accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint adequately plead a contract, including consideration, i.e. Plaintiffs' permission to perform

renovations affecting the party wall. Accordingly, these allegations are sufficient to withstand a motion to dismiss for failure to state a cause of action at the pleadings stage. “Whether money damages would adequately . . . [protect Plaintiffs’ interest] is a matter to be resolved at a later stage, not on a motion to dismiss the complaint.” (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 415 [2001]).

As for Plaintiffs’ fourth cause of action, “A property owner’s permanent structure upon an adjacent owner’s property is characterized in New York as an unlawful encroachment and as a continuous trespass giving rise to successive causes of action, unless barred by the acquisition of title or an easement by operation of law. Although the nature of the structure may be permanent, the nature of the trespass is continuous.” (*Stone Realty LLC v. Soho 54 LLC*, 2008 N.Y. Misc. LEXIS 9440, *13-14 [N.Y. Sup. Ct. Sept. 18, 2008] *citing 509 Sixth Ave. Corp. v New York City Transit Auth.*, 15 N.Y.2d 48, [1964]). A defendant may cause an object to encroach on a plaintiff’s property, which constitutes a trespass. (*Shaw v. Bronfman*, 284 A.D.2d 267 [1st Dep’t 2001]) (finding cause of action for trespass where steel beam emanated from defendant’s premises without plaintiffs’ consent or permission).

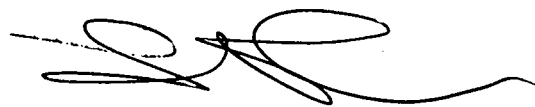
Here, Plaintiff’s complaint alleges, “That as part of their construction and renovation of the adjacent premises, defendants caused coping stones on the top of the parapet on the two story rear extension to the original building to create an overhang that intruded and trespassed into Plaintiffs’ property and air space . . . by approximately one (1) foot.” Accordingly, accepting these allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs’ complaint adequately plead an encroachment, for purposes of surviving a motion to dismiss at this early stage of litigation.

Wherefore it is hereby,

ORDERED that Defendants, Daniel D. Bartfeld, Beverly Bartfeld, and 338 WEA LLC’s, motion to dismiss is granted only to the extent that the first cause of action of Plaintiffs’ complaint is dismissed.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: March 17, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Eileen A. Rakower, J.S.C.