

Verma v Vanegas
2015 NY Slip Op 31878(U)
September 18, 2015
Supreme Court, Queens County
Docket Number: 701616/2015
Judge: Leonard Livote
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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LEONARD LIVOTE
Justice

IA Part 33

Pawan Verma and Betty P.P. Hsu,
Plaintiffs

Number 701616/2015

- against -

Motion

Date June 26, 2015

Jose Luis Vanegas, Nora Avalos,
d/b/a NY Superior Realty and
Bleier, Bleier & Buggy,
as Escrow Agents,

Motion Seq. Nos. 1-2

Defendants.

x

FILED
SEP 25 2015
COUNTY CLERK
QUEENS COUNTY

The following papers read on this motion by defendant Nora Avalos (Avalos) d/b/a NY Superior Realty (Superior Realty) to dismiss the complaint of plaintiffs' Pawan Verma and Betty P.P. Hsu pursuant to CPLR 3211(a)(1) and (7) and 3016(b), and a motion by defendants Jose Luis Vanegas (Vanegas) and Bleier, Bleier & Buggy (BBB) for summary judgment dismissing the complaint and for sanctions against plaintiffs for filing a frivolous action.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits.....	EF 4-20
Answering Affidavits - Exhibits.....	EF 22-26
Reply Affidavits.....	EF 27-28

Upon the foregoing papers it is ordered that these motions are consolidated for purposes of disposition and are determined as follows:

Plaintiffs were the potential purchasers in a contemplated transaction for the sale of certain real estate by seller Vanegas, who was represented therein by his attorneys, BBB, and in which Avalos on behalf of Superior Realty was the listing agent/broker. Plaintiffs were allegedly specifically told by seller that they would be able to evict the current tenants of the premises upon

expiration of their existing leases without restriction. Plaintiffs and Vanegas entered a Contract of Sale (the Contract) dated November 7, 2014 and deposited \$105,000.00 to be held in escrow by BBB pursuant to the Contract's terms. On December 15, 2014, plaintiffs learned that the premises were subject to New York City Rent Stabilization Laws (RSL), which was never indicated by defendants. Plaintiffs' complaint alleges that Superior Realty willfully and fraudulently misrepresented and/or failed to disclose the fact that the subject property was subject to the RSL in order to induce plaintiffs into entering the Contract and to facilitate the sale of the property. They further claim that they never would have entered the Contract if they had known the premises were covered under the RSL. When plaintiffs attempted to void the Contract, defendants refused to do so or return their deposit, and instead demanded to set a date for closing on the title of the property. Plaintiffs subsequently commenced this action to recover their escrow monies plus interest as well as attorney's fees.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must afford the complaint a liberal construction, accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Goldfarb v Schwartz*, 26 AD3d 462, 463 [2006]; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). A motion to dismiss will fail if, from the four corners of the complaint, factual allegations are discerned which manifest any cause of action cognizable at law (see *id.*; *Cooper v 620 Prop. Assoc.*, 242 AD2d 359, 360 [1997]). Additionally, the dismissal of an action on documentary evidence grounds pursuant to CPLR 3211(a)(1) "is warranted only if the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1999]; see *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

"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" (*Schottland v Brown Harris Stevens Brooklyn, LLC*, 107 AD3d 684, 685 [2013], quoting *Jablonski v Rapalje*, 14 AD3d 484, 485 [2005]). The seller's mere silence, without an affirmative act or deception, is not actionable as fraud (see *Rojas v Paine*, 101 AD3d 843, 845 [2012]; *Matos v Crimmins*, 40 AD3d 1053, 1054 [2007]). "To maintain a cause of action to recover damages for active concealment, the plaintiff must show, in effect, that the seller or the seller's

agents thwarted the plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor" (*Matos*, 40 AD3d at 1055, quoting *Jablonski*, 14 AD3d at 485). "Where the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Perez-Faringer v Heilman*, 95 AD3d 853, 854 [2012] [internal quotation marks omitted]).

Here, Avalos/Superior Realty did not have a duty to disclose the rent stabilized status of the property under the doctrine of caveat emptor (see *Schottland*, 107 AD3d at 686; *Rojas*, 101 AD3d at 845). Moreover, although defendants allegedly did not respond truthfully when questioned by plaintiffs about the rent stabilization status of the current tenants or leases, such status was a matter of public record, as established by the Registration Rent Rolls and copies of the existing leases annexed to the Additional Rider to the Contract submitted as documentary evidence in support of their motion, and was not information exclusively within the knowledge of defendants (see *Schottland*, 107 AD3d at 686; *Rojas*, 101 AD3d at 846; *Perez-Faringer*, 95 AD3d at 854; *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706 [2009]). Defendants thus established that they did not actively conceal such status from plaintiffs or otherwise thwart them from fulfilling their responsibilities in due diligence (see *Schottland*, 107 AD3d at 686; *Rojas*, 101 AD3d at 846).

With respect to CPLR 3016(b), to state a cause of action for fraud, the following elements must be alleged, with sufficient particularity: representation of a material existing fact, falsity, scienter, deception and injury (see *Daly v Kochanowicz*, 67 AD3d 78, 89-91 [2009]). Plaintiffs fail to detail not only the specific misrepresentations that were allegedly made by Avalos/Superior Realty, but when and by whom as well (see *id.* at 90). Moreover, such conclusory allegations of fraud against defendants based "upon information and belief" are insufficient to permit a reasonable inference of the alleged conduct (see *Mancuso v Rubin*, 52 AD3d 580, 584 [2008]; *Shim v Exim Capital Group*, 272 AD2d 315 [2000]). Any reliance on alleged misrepresentations by defendants would be unreasonable, as due diligence would have revealed the truth of the matter (see *F.A.S.A. Constr. Corp. v Degenshein*, 47 AD3d 877, 879 [2008]; *KNK Enters., Inc. v Harriman Enters., Inc.*, 33 AD3d 872 [2006]). Plaintiffs' complaint thus fails to allege the elements of fraud with sufficient specificity. Even when accepting the facts alleged in the complaint as true and

according to plaintiffs the benefit of every favorable inference, as required on a motion pursuant to CPLR 3211 (see *Goldfarb*, 26 AD3d at 463), the court finds that plaintiffs have also failed to state a cause of action against Avalos and Superior Realty.

Turning to Vanegas and BBB's motion under CPLR 3212, the court similarly finds that dismissal is appropriate. Vanegas and BBB rely on the same Registration Rent Rolls and copies of the existing leases annexed to the Additional Rider to the Contract, which were forwarded to plaintiffs' counsel, as well as the terms of the Contract, which contains a merger clause (Paragraph 17.02) stipulating that all understandings between the parties were merged into the Contract and an additional provision in Paragraph 8 of the Rider reciting that the buyer had inspected the premises and agreed to accept same "as is," without any further representations by the seller beyond what was specifically set forth in the Contract. Such evidence shows that the alleged misrepresentation was fully detailed in the document itself, was not collateral or extraneous to the Contract, and moreover, could have been discovered through reasonable due diligence, as discussed above (see *Stangel v Chen*, 74 AD3d 1050, 1052-1053 [2010]; *Fabozzi v Coppa*, 5 AD3d 722, 723-724 [2004]). Insofar as the provisions of the contract were sufficiently specific to bar plaintiffs' claim that they were fraudulently induced into entering the Contract because of defendants' representations to the contrary outside the Contract, and plaintiffs' claims of fraud were based on matters not within the peculiar knowledge of defendants, Vanegas and BBB successfully establish prima facie entitlement to judgment as a matter of law (*Stangel*, 74 AD3d 1050). In opposition, plaintiffs continue to argue only that they would not have executed the Contract had defendants not fraudulently misrepresented the rent stabilization status of the subject property, and fail to submit any evidence which raises a triable issue (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The court denies the part of Vanegas and BBB's motion seeking to impose sanctions, as plaintiffs' conduct constitutes litigious conduct not rising to the level of frivolous conduct (see *Winski v Kane*, 33 AD3d 697, 699 [2006]; *Lazich v Vittoria & Parker*, 189 AD2d 753, 754 [1993], appeal dismissed 81 NY2d 1006 [1993]).

Finally, plaintiffs' request to amend the complaint is denied insofar as it was made in the opposition papers, rather than by motion on notice (CPLR 2211, 2214; see *New York State Div. of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608 [2007]).

Accordingly, Avalos and Superior Realty's motion seeking to dismiss the complaint is granted. The branch of Vanegas and BBB's

.....
motion seeking summary judgment dismissing the complaint is granted, but the branch of the motion seeking to impose sanctions against plaintiffs is denied.

Dated: September 18, 2015



A.J.S.C.

FILED
SEP 25 2015
COUNTY CLERK
QUEENS COUNTY