

<b>Widlitz v Douglas Elliman, LLC</b>
2016 NY Slip Op 32721(U)
April 19, 2016
Supreme Court, New York County
Docket Number: 154689/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 32

-----X  
STACEY WIDLITZ,

Plaintiff,

-against-

DOUGLAS ELLIMAN, LLC, GODFREY LEE

Defendants.

-----X

**DECISION & ORDER**  
**Index No. 154689/2016**

Mot. Seq. 003 & 004

Motion Sequence Numbers 003 and 004 are consolidated for disposition. The motion by defendant Godfrey Lee (Lee) to dismiss the amended complaint (Mot Seq 003) is denied and the motion by defendant Douglas Elliman LLC (Elliman) to dismiss the amended complaint (Mot Seq 004) is denied.

**Background**

This case arises out of plaintiff's purchase of an apartment located at 5 Franklin Place (also known as 317 Broadway) in New York, New York. Plaintiff stresses that despite her express wishes to purchase an apartment with city views, and repeated assurances from Elliman and Lee that the apartment would contain these views once completed, the north-facing apartment only had views of the brick wall of a nearby building.

The subject apartment building, called the Franklin Place Condominium, was under construction when plaintiff sought to purchase an apartment in August 2014. Plaintiff claims that her primary requirement was that her apartment have expansive city views. Plaintiff alleges

that she retained defendant Elliman, a real estate brokerage firm, to assist her in finding a suitable apartment. Plaintiff insists that Elliman acted as both her, and the seller's, real estate agent.

Plaintiff argues that because the Franklin Place Condominium was under construction, she relied on Elliman's representations concerning a potential apartment. Plaintiff acknowledges that she went to the construction site on or about August 19, 2014, but was unable to identify the specific location of the apartment (12B) within the building or how tall each floor of the condo would be. Plaintiff insists that she had a conversation with an Elliman agent on August 20, 2014 where she noted that she was relying on representations about the subject apartment's city views and that Elliman's agent confirmed the apartment had city views. Plaintiff claims she was told to refer to a link on Elliman's website showing the listing, which contained views from the apartment captured by a drone.

Plaintiff contends that she submitted an offer to purchase the apartment on or about August 21, 2014 and was told by an agent for Elliman to retain defendant Lee (an attorney) to help her conduct due diligence. Plaintiff subsequently retained defendant Lee, and she insists she told him she wanted city views. On September 11, 2014 plaintiff entered into an assignment agreement in which she was assigned the rights, title and interest of Hashem LLC for \$1.39 million. Hashem had previously entered into a contract of sale with the sponsor (Broadway 371 LLC) to purchase Unit 12B for \$1.1 million in June 2013. Plaintiff contends that the scheduled closing in the original contract of sale (between Hashem and 371 Broadway) was July 2015. Plaintiff insists that she was informed the closing would be delayed until fall 2015. Plaintiff argues that she wanted the right to rescind the contract and claims that defendant Lee failed to

inform her that she may have had this right because the first residential unit closing did not occur until after July 1, 2015.

Plaintiff insists that she was told numerous times throughout 2015 and 2016 that her apartment would have full city views. The closing was eventually scheduled for March 23, 2016, the same day that plaintiff claims she was able to visit the newly-constructed apartment for the first time. Plaintiff insists that only brick walls could be seen when looking out from every room of the apartment.

Plaintiff contends that she did not complete the closing on March 23, 2016 but later, in an effort to mitigate damages arising from the sales contract, resolved her dispute with Hashem and 371 Broadway. Plaintiff alleges that she would have lost her downpayment (for \$208,500) had she not reached a resolution. Plaintiff claims she received a \$50,000 credit from Hashem towards the purchase price to settle her claims for defects in the apartment. Plaintiff insists that she fired defendant Lee a few days after the failed March 23, 2016 closing.

Plaintiff brings the following causes of action: fraudulent misrepresentation, breach of fiduciary duty and negligent misrepresentation against Elliman, and legal malpractice and breach of fiduciary duty against Lee.

### **Discussion**

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). A motion to dismiss based on documentary evidence “may be appropriately granted

only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]).

### **Lee's Motion (Motion Sequence 003)**

Lee moves to dismiss plaintiff's amended complaint on the ground that he never represented to her that her apartment would have unobstructed city views. Lee claims that plaintiff asked about air rights and he confirmed that there was a permanent easement for light and air rights for the north facade of the building (plaintiff's apartment faced north).

Lee disputes that he failed to tell plaintiff about her potential right to rescind. Lee insists that he told plaintiff they would have to speak directly with the seller because plaintiff purchased the apartment through an assignment. Lee points out that in this assignment agreement, Hashem was supposed to assign its rights, title and interest in Unit 12B at the time of closing – meaning plaintiff would have to speak directly with Hashem to acquire the right to rescind before the closing.

Lee claims that there are no facts showing that he was negligent in his representation of plaintiff. Lee claims that e-mail correspondence shows that he did not confuse plaintiff's purported request for a view with her request for information about air rights. Lee contends that the purchase agreement contained a no representation clause that warranted that plaintiff did not rely upon the representations of statements of anyone relating to the unit.

Lee maintains that plaintiff never had a right to rescind the contract because Hashem held that right until the closing. Lee also insists that his conduct did not proximately cause plaintiff any actual or ascertainable damages. Lee states that plaintiff ultimately closed on the apartment after allegedly discovering the unsatisfactory view. Lee argues that the breach of fiduciary duty claim must be dismissed because it is duplicative of the legal malpractice claim and it is contradicted by Lee's documentary evidence.

In opposition, plaintiff argues that Lee negligently advised plaintiff about the apartment's views and insists that although Lee contests the veracity of these verbal statements, that is not enough to prevail on a motion to dismiss. Plaintiff also argues that the legal malpractice claim is based on Lee's assurance that she had no termination right. Plaintiff argues that the fiduciary duty cause of action should remain because it derives from Lee's alleged self-interested actions in pressuring plaintiff to move forward with the deal.

"An action for legal malpractice requires proof of three elements: (1) that the attorney was negligent; (2) that such negligence was a proximate cause of plaintiff's losses; and (3) proof of actual damages. In order to establish proximate cause, a plaintiff must demonstrate that but for the attorney's negligence, she would have prevailed in the underlying matter or would not have sustained any ascertainable damages" (*Brooks v Lewin*, 21 AD3d 731, 734, 800 NYS2d 695 [1st Dept 2005] [citation omitted]).

Here, plaintiff's amended complaint states a cause of action for legal malpractice. Plaintiff alleges that she reiterated on numerous instances to Lee that she wanted an apartment with city views (*see* amended complaint ¶¶ 41, 42). Lee correctly observes that there are discrepancies between plaintiff's interpretation of email communications between her and Lee

that suggest that she was concerned with air rights. But plaintiff refers to verbal assurances from Lee that requires this case to proceed to the discovery stage on this cause of action (*see id.* ¶ 48). Although Lee disputes plaintiff's version of events, this Court is unable to dismiss the amended complaint at the motion to dismiss stage because the plaintiff is afforded every favorable inference.

With respect to the rescission issue, plaintiff has also stated a cause of action. Plaintiff points to an assignment and acceptance agreement (attached to a letter dated September 19, 2014), allegedly separate from the assignment agreement, which states that "Assignor hereby assigns, sets over and transfers to Assignee its interest of Assignor's rights, title and interest in, to and under the Agreement" (*id.* exh C). This agreement is signed by Hashem, plaintiff and the sponsor. It does not specify that these rights were to transfer at the time of the closing.

The assignment agreement, dated September 11, 2014 states that Hashem (Assignor) would assign to plaintiff its rights, title and interest at the time of closing (*see Lee affirmation* exh E ¶ 2). The assignment agreement also notes that at the time of closing, Hashem and plaintiff were to execute and deliver *an assignment and assumption agreement* (*id.* ¶ 4). The parties do not explain why an assignment and assumption agreement was executed eight days after the assignment agreement (instead of at the closing) or why the assignment and assumption agreement does not specify that the rights are to transfer at the closing. The letter accompanying the assignment and assumption agreement states that "This letter shall confirm the Sponsor hereby grants its consent to allow Purchaser to assign its rights and obligations under the Purchase Agreement for the captioned Unit. Sponsor shall execute and deliver an assignment of the contract at closing" (amended complaint, exh C).

It is not the Court's role, at the motion to dismiss stage, to sort through these apparently conflicting agreements. Discovery may clarify the timeline of events or substantiate Lee's claim that plaintiff did not have the right to rescind at closing. But Lee did not explain the significance of the assignment and assumption agreement in his papers.

Obviously, if plaintiff's allegations regarding the right to rescind and Lee's assurances concerning the presence of city views are true, then Lee was a proximate cause of plaintiff's damages. Plaintiff alleges that she did not obtain an apartment with city views and was unable to rescind the assignment agreement in which she purchased the apartment. Although Lee insists that plaintiff does not have ascertainable damages because she eventually closed on the apartment and received a \$50,000 credit off the purchase price, this argument fails. Plaintiff claims that she made a decision to close because she feared that she would lose her entire deposit (for \$208,500). Mitigating damages does not mean that plaintiff does not have ascertainable damages. Here, those damages are the value of not getting an apartment with city views and not being allowed to rescind the contract (assuming she has this right which is yet to be determined). Plaintiff purportedly did exactly what a reasonable purchaser would do— she followed through with the transaction despite her reservations rather than blowing up the deal and suing, and possibly being sued, for everything related to the transaction.

“In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct” (*Kurtzman v Bergstol*, 40 AD3d 588, 590, 835 NYS2d 644 [2d Dept 2007]). “It is axiomatic that the relationship of attorney and client is fiduciary” (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 8, 865 NYS2d 14 [1st Dept 2008]).

Although courts often find that legal malpractice and breach of fiduciary duty claims are duplicative, that is not the case here. Plaintiff insists that this cause of action relies on allegations that Lee acted in his own self-interest by pushing plaintiff to complete the transaction (amended complaint ¶¶ 45, 67). Plaintiff alleges that Lee did this to better his business relationship with Elliman (*id.* ¶¶ 154-55), a source of referrals. These allegations state a cause of action for breach of fiduciary duty and derive from separate alleged facts than the legal malpractice claim.

As stated above, Lee vigorously disputes plaintiff's version of events. While Lee's documentary evidence raises questions about *some* of plaintiff's contentions, this evidence does not utterly refute plaintiff's claims as is required on a motion to dismiss based on documentary evidence. Therefore, the motion to dismiss the causes of action against Lee is denied.

#### **Elliman's Motion Mot Seq 004**

Elliman moves to dismiss the three causes of action against it for fraudulent misrepresentation, breach of fiduciary duty and negligent misrepresentation. Rather than address each cause of action individually, Elliman's arguments specify reasons why it believes that all of plaintiff's causes of action should be dismissed.

Elliman insists that plaintiff's causes of action against it are barred because the facts were not peculiarly within Elliman's knowledge and were available to plaintiff. Specifically, Elliman argues that plaintiff knew her apartment would be on the 12<sup>th</sup> floor and north-facing and that it is clear from the naked eye and publicly-available documents that the building 'two doors down' (at 377 Broadway) is a 12-story building. Elliman insists that the presence of this building, which has been around since 1929, forecloses plaintiff's claims because a reasonable person exercising

ordinary intelligence would have known this building would factor into a 12<sup>th</sup> floor apartment's city views.

Elliman next argues that a no representation clause contained in the contract of sale, and incorporated into plaintiff's assignment agreement, bars any claims against Elliman.

Elliman also argues that plaintiff's causes of action are barred because plaintiff accepted the benefit of the assignment agreement. Elliman contends that the amended complaint demonstrates that plaintiff closed on the apartment two months after she saw that the view was obstructed. Elliman insists that plaintiff failed to plead the causes of action with the requisite specificity under CPLR 3016(b).

In opposition, plaintiff argues that just because the nearby building was 12 floors high does not mean that plaintiff was aware that the a yet-to-be-built apartment on the 12<sup>th</sup> floor of another building would have its views obscured. Plaintiff insists that Elliman had information about the building, especially because it served as both her and Hashem's broker. Plaintiff disputes that the contract of sale's no representation clause bars the causes of action because neither Elliman nor plaintiff was a party to the contract of sale between Hashem and the sponsor. Plaintiff contends that it did not ratify any agreement with Elliman, and their relationship was one of agency. Plaintiff argues that the \$50,000 credit it received was for claims unrelated to the view and instead was for construction defects.

In reply, Elliman reiterates that it was readily apparent to anyone who looked at the site surrounding the apartment building that 377 Broadway's height would impact the view on a 12<sup>th</sup> floor apartment. Elliman emphasizes that the amended complaint does not allege any statements made by Elliman between September 5, 2014 (when plaintiff alleges she was not prepared to

enter into the assignment agreement) and September 11, 2014 (when plaintiff signed the assignment agreement). Elliman insists that because plaintiff is an assignee of the contract, she took the property subject to the no representation clause, which bars plaintiff's causes of action against Elliman.

**The Nearby Building at 377 Broadway**

“[I]f 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” (*Danann Realty Corp v Harris*, 5 NY2d 317, 322, 184 NYS2d 599 [1959] [internal quotations and citations omitted]).

As an initial matter, Elliman’s claim that just looking at the building at 377 Broadway compels the Court to dismiss plaintiff’s causes of action fails. Of course, seeing a building of substantial height just two doors away when seeking an apartment with city views might raise a matter for further investigation. But, at the motion to dismiss stage, the Court is unable to dismiss the causes of action on this basis. The apartment plaintiff sought to buy was under construction, making a conclusion about city views more difficult. Plaintiff could not simply look up and compare the building’s heights.

Assuming that plaintiff’s allegations are true, as required on a motion to dismiss, the Court cannot ignore that Elliman presented the apartment as one with city views on numerous occasions (*see e.g.*, Amended Complaint ¶ 31, 33). Plaintiff even insists she was instructed by Elliman to look at a drone video allegedly shot from her apartment that pictured unobstructed

city views (*id.* ¶ 34). This conduct prevents the Court from dismissing this action at the motion to dismiss stage. Of course, in hindsight, plaintiff could have hired an expert to confirm that her apartment's views would not be affected by the structure at 377 Broadway instead of relying on Elliman's sales techniques.

Further, it is noteworthy that the building at 377 Broadway, according to Elliman, is 12 stories high and plaintiff's future apartment was on the 12<sup>th</sup> floor. This is not an instance where plaintiff was considering an apartment on the third floor and then furious that her views were obstructed by a 12-story building at the end of the block. Such a claim would clearly be barred. The height of a story in a building is not necessarily the same for every building. Some structures have high ceilings or may skip certain floor numbers. Reasonable people may not have been aware that there was an issue with the views, especially when this desire is expressed to their broker who repeatedly assures them that the apartment will have such views when fully constructed and are directed to a video purportedly confirming such views.

The Court finds that there is no evidence, at this stage, to suggest that plaintiff could have acquired the information about the city views. Elliman served as the seller's agent (as well as plaintiff's agent) and, as alleged in the amended complaint, represented that it had knowledge about the appearance of the final version of the apartment building (*id.* ¶ 33-35). Elliman purportedly used a 3D model of the building to entice prior buyers, although it had discontinued using this tool by the time plaintiff explored purchasing an apartment (*id.* ¶ 35).

The key fact distinguishing this case from prior cases in which courts dismissed misrepresentation allegations by real estate brokers is that this building was unfinished (*c.f.* *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706, 890 NYS2d 114 [2d Dept 2009])

[finding that the dimensions and boundary lines were not within the exclusive knowledge of defendants)]; *Sandler v Ramsay*, 49 Misc3d 1, 16 NYS3d 894 [App Term, 2d Dept, 9th & 10th Jud Dists 2015] [holding that it was unreasonable to rely on real estate agent's alleged misrepresentations about whether home was connected to public sewer system]). Viewing a building under construction did not provide plaintiff with the information necessary to deduce that Elliman's claims that her apartment would have city views were preposterous.

### No-Representation Clause

Elliman's argument that the 'no representation clause' compels dismissal of plaintiff's complaint also fails.

The no representation clause provides, in part, that:

**"No Representation.** Except as herein or in the Plan specifically set forth Purchaser acknowledges that he has not relied upon any architect's plans, sales plans, selling brochures, advertisements, representations, warranties or statement of any nature, whether made by Seller, Seller's Counsel or Selling Agent or otherwise, including, but not limited to, any relating to the description or physical condition of the Building or the Unit . . . or any other physical characteristics thereof . . . Purchaser agrees that Seller shall have no liability or responsibility to Purchaser if the layout or dimension of the Unit or any part thereof or of the Common Elements as shown on the floor plans and the architectural plans and specifications for the Building are not accurate or correct."

(affirmation of Angelillo, exh B ¶ 12).

A plain reading of the no representation clause suggests that its purpose is to insulate the *seller* from liability arising from representations about the subject apartment. It does not, on its face, suggest that the seller's real estate agent is immune from liability for its own misrepresentations. Further, as plaintiff observes, Elliman was not a party to the contract of sale (which contains the no representation clause) or the subsequent assignment between Hashem and

plaintiff. Elliman cannot enjoy the benefits of a contract to which it was not a party (*see Wittenberg v Robinov*, 9 NY2d 261, 263-64, 213 NYS2d 430 [1961]).<sup>1</sup>

Critically, Elliman served as broker for both Hashem and plaintiff. Plaintiff's amended complaint contends that Elliman made representations regarding plaintiff's desire to have an apartment with city views while acting as plaintiff's agent (amended complaint ¶¶ 20-26). Plaintiff insists that Elliman showed her multiple apartments throughout New York City, plaintiff communicated to Elliman that she required an apartment with city views and that Elliman promised that the subject apartment contained these views (*id.* ¶¶ 22-24, 26). Elliman argues that all of its representations are covered under the no representations clause, even those made in its capacity as plaintiff's agent. Even if Elliman's statements as the broker for the seller were covered under the no representations clause, that clause does not apply to statements made by Elliman while acting as plaintiff's broker. Accordingly, the Court declines to rewrite the contract of sale to include a provision that plaintiff could not rely on representations made by its own broker.

### **Acceptance of Benefit**

The Court also finds that the acceptance of the benefit argument does not compel the Court to dismiss plaintiff's complaint. As stated above, just because plaintiff eventually closed on the apartment pursuant to an assignment agreement with Hashem does not foreclose her ability to claim she suffered damages for not receiving an apartment with city views as promised by Elliman.

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<sup>1</sup>When exactly plaintiff obtained the rights from Hashem is disputed. That plays no role in this branch of the decision because Elliman was not a party to the contract.

Elliman's reliance on *Barrier Sys. v A.F.C. Enters.*, (264 AD2d 432, 694 NYS2d 440 [2d Dept 1999]) is unavailing because in that case defendant AFC allegedly entered into a modified lease agreement with plaintiff after experiencing technical difficulties with plaintiff's equipment. AFC was barred from asserting fraud in the inducement because it entered into a modification agreement with plaintiff and continued to use plaintiff's equipment after learning about problems with the equipment (*id.* at 433). Here, plaintiff never had an agreement or a modified agreement with Elliman. Plaintiff purchased an apartment from Hashem; if plaintiff had sued Hashem, then this argument might be applicable, but plaintiff has not sued Hashem. Elliman's role, as plaintiff's broker, was to help plaintiff secure an apartment consistent with her stated desires. Plaintiff's allegations that Elliman assured her on many occasions that the apartment contained city views and pressured her to close the deal are not washed away because plaintiff completed the transaction.

Elliman was also not a party to the agreement plaintiff insists she reached with Hashem and the sponsor regarding defects in her unit (*see* amended complaint ¶ 107). How can Elliman get the benefit of a settlement, which plaintiff alleges was done to mitigate her damages, in which Elliman offered nothing?

### **Pled with Particularity**

Plaintiff has also pled her allegations with the particularity requirements of CPLR 3016(b). "[T]o meet such requirement a plaintiff need only provide sufficient detail to inform defendants of the substance of the claims. Indeed, the pleading requirements of CPLR 3016(b) should not be interpreted so strictly as to require specificity where it may be impossible to state

in detail the circumstances constituting fraud” (*Kaufman v Cohen*, 307 AD2d 113, 120-21, 760 NYS2d 157 [1st Dept 2003] [internal quotations and citation omitted]).

Plaintiff provided detailed accounts of the alleged fraud sufficient to inform defendants of the substance of her claims (*see e.g.*, Amended Complaint, ¶¶ 24, 26, 29, 30, 31, 33, 34, 37). Plaintiff also attaches a copy of Unit 12B’s listing (*id.* exh A). This listing clearly states that the apartment has full city views. These allegations and the listing compel this Court to deny this branch of Elliman’s motion. Plaintiff need not, at the motion to dismiss stage, conclusively prove the alleged misrepresentations – she only has to identify the statements she claims support her claims. The amended complaint informs Elliman that its statements about the apartment’s city views are at issue and details specific dates when these alleged conversations occurred.

#### **Failure to State Cause of Action**

Elliman argues that plaintiff’s failure to cite a specific representation by Elliman between September 5, 2014 (the date plaintiff expressed doubts) and September 11, 2014 (the day plaintiff entered into the assignment agreement with Hashem) suggests that Elliman could not have induced plaintiff to enter into the assignment agreement because plaintiff overcame her concerns without any influence from Elliman.

This argument fails. Plaintiff alleges that Elliman pressured her into entering into the assignment agreement and informed her that she only had until September 8, 2014 to buy the apartment or Elliman would recommend that the apartment should be sold to another purchaser (*id.* ¶¶ 45-46). Plaintiff alleges that she was able to obtain an extension of time to purchase the apartment (*id.* ¶ 47). When giving plaintiff the benefit of every possible inference, these allegations suggest that plaintiff was ‘induced’ into purchasing the apartment because she feared

she would lose it to another buyer if she did not act in spite of her concerns. This does not constitute failure to state a cause of action.

### Summary

The Court observes that there are many cases holding that real estate brokers are not liable for representations made to prospective buyers concerning the condition of a property. The instant matter is distinguishable from those cases because the apartment building in question was under construction. Plaintiff's amended complaint suggests that Elliman knew what the finished product would look like (it commissioned a 3D model of the entire building for earlier prospective buyers and used a drone to represent to plaintiff what her views would be). Elliman cannot make repeated misrepresentations, assuming plaintiff's allegations are validated, regarding an apartment worth over a million dollars without any accountability. Discovery may reveal that plaintiff should have investigated how the building at 377 Broadway would impact her apartment's views or cast doubt on Elliman's and Lee's actions. But, at the motion to dismiss stage, the Court is unable to grant defendants' motions.

Accordingly, it is hereby

ORDERED that Elliman's and Lee's motions to dismiss are denied; and it is further

ORDERED that defendants must e-file answers pursuant to the CPLR.

The parties are directed to appear for a preliminary conference on July 18, 2017 at 2:15

p.m.

**Dated: April 19, 2016**  
New York, New York



**HON. ARLENE P. BLUTH, JSC**