Alzhan v JJ Bryant Realty LLC
2016 NY Slip Op 32921(U)
May 12, 2016
Supreme Court, Bronx County
Docket Number: 23567/2015E
Judge: Ruben Franco

NEW YORK SUPREME COURT
COUNTY OF BRONX - IAS PART 26

NAGIMA ALZHAN ,

Plaintiff,

-against-

JJ BRYANT REALTY LLC, and TODD MIRANDA, LUKE J. BEGELOW, JEFF MATINALE, JEFFREY S. TANEN,

Defendants.

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MEMORANDUM DECISION/ORDER

HON. RUBEN FRANCO

Defendants JJ Bryant Realty LLC ("JJ Bryant") and Jeffrey S. Tanen ("Tanen") ["the moving defendants"], move pursuant to CPLR§§3211(a)(1) and (a)(7), for dismissal of the Complaint on the ground that a release executed by plaintiff, and the contract for the sale of the subject premises, bar the claims asserted by plaintiff. Defendant, Luke J. Bigelow ("Bigelow"), moves pursuant to CPLR§3211(a)(7), to dismiss the Complaint against him for failure to state a cause of action. Both motions are submitted on default and without opposition.

The Bigelow motion, made returnable on March 22, 2016, was served by mail on March 16, 2016, six days prior to the return date of the motion. The minimum time required for the service of a Notice of Motion is eight days (see CPLR§2214[b]), accordingly, Bigelow's motion is denied without prejudice, as untimely. The court notes that, notwithstanding Bigelow's denomination of its motion as a cross-motion, it does not seek relief against a moving party pursuant to CPLR§2215, and, thus, is not a cross-motion.

This is an action to recover monetary damages from defendants for alleged fraudulent concealment of real property defects, negligent concealment of real property defects, unjust

enrichment, promissory estoppel, and economic interference in connection with plaintiff's purchase of a residential property located at 225 East 164th Street, in Bronx County ("the subject property").

The gravamen of plaintiff's Complaint, with respect to the moving defendants, is that JJ Bryant, the owner of the subject property, and Tanen, an attorney and managing member affiliated with and/or working for JJ Bryant, made various representations to plaintiff in connection with the sale of the subject property, which were relied upon by plaintiff, and which allegedly, were untrue.

In order to state a legally cognizable cause of action for fraudulent misrepresentation, the plaintiff's Complaint must allege that: (1) defendant made a material misrepresentation of fact; (2) the misrepresentation was made intentionally in order to mislead the plaintiff; (3) the plaintiff reasonably relied on the misrepresentation; and, (4) the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation (see P.T. Bank Central Asia v. Abn Amro Bank, N.V., 301 A.D.3d 373 [1st Dept. 2003]), citing Swersky v. Dryer and Traub, 219 A.D.2d 321). In addition to the these four elements, in a cause of action for fraudulent concealment, the complaint must contain an allegation that the defendant had a duty to disclose material information, and failed to do so (P.T. Bank, supra, at 376, citing Wiscovitch Associates, Ltd. v. Phillip Morris Companies, Inc., 193 A.D.2d 542).

Paragraph "19" of the contract of sale executed by the parties provides as follows:

> 19. **CONDITION OF PROPERTY.** PURCHASER has inspected the building on the PREMISES and the personal property included in this sale and is thoroughly acquainted with their condition. PURCHASER agrees to purchase them "AS IS" and in their present condition subject to reasonable use, wear and tear and natural deterioration between now and Closing. PURCHASER shall have the right, after reasonable notice to SELLER, to

inspect the property before closing of title.

PURCHASER acknowledges that neither SELLER nor any representative or agent of SELLER have made any representation or warranty (express or implied) as to the physical condition, state of repair, expenses or operation of the Premises or any matter or thing affecting or relating to the Premises or this contract, except as specifically set forth herein. SELLER shall not be liable or bound in any manner by any oral or written statement, representation, warranty, agreement or information relating to the Premises or this contract furnished by any real estate broker, agent or other person, unless specifically set forth herein.

Paragraph "20" of the contract provides:

20. **ENTIRE AGREEMENT.** All prior understanding, agreements, representation and warranties, oral or written, between SELLER and PURCHASER are merged in this contract. It completely expresses their full agreement. It has been entered into after full investigation, neither party relying upon any statement made by anyone else.

Where a claim is made of fraud in the inducement, a general merger clause will not have operate to bar the introduction of parole evidence (see Rodas v. Manitaras, 159 A.D.2d 341 [1st Dept. 1990]). However, where the parties expressly disclaim reliance on the representations alleged to be fraudulent, parol evidence is inadmissible as to those representations (*Id.*, at 342). Nonetheless, where a seller has knowledge of a latent condition and the buyer has no way of discovering the existence of that condition in the exercise of reasonable diligence, then he may overcome a specific disclaimer clause and introduce parol evidence of fraudulent inducement (Rodas v. Maritaras, supra; Bando v. Achenbaum, 234 A.D.2d 242 [2nd Dept. 1996]). The Complaint fails to allege the existence of any latent conditions which the moving defendants were aware of, or that plaintiff had no means of discovering them with the exercise of due diligence. Accordingly, plaintiff's first cause of action against the moving defendants for fraudulent concealment is dismissed.

Plaintiff alleges a cause of action for "negligent concealment", which the court treats as

one for negligent misrepresentation. In order to state a legally cognizable cause of action for negligent misrepresentation, the Complaint must allege: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and, (3) reasonable reliance on the information (see Matlin Patterson ATA Holding LLC v. Federal Express Corp., 87 A.D.3d 836 [1st Dept. 2011], citing JAO Acquisition Corp. v. Stavitsky, 8 N.Y.3d 144 [2007]). The Complaint fails to allege these elements, accordingly, plaintiff's second cause of action against the moving defendants is dismissed.

Under New York law, a plaintiff asserting a claim for unjust enrichment must establish (1) that the defendant benefitted; (2) at the plaintiff's expense; and, (3) that equity and good conscience require restitution (Beth Israel Medical Center v. Horizon Blue Cross and blue Shield of New Jersey, Inc., 448 F.3d 573 [U.S. Ct. Of Appeals, 2nd Cir. 2011]). The theory underlying an unjust enrichment claim lies in quasi-contract claim, which the law creates in the absence of any agreement (Goldman v. Metropolitan Life Ins. Co., 5 N.Y.2d 561 [2005]). The existence of a valid contract governing a particular subject matter precludes recovery in quasi contract (Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382 [1987]). Since there was a valid contract between JJ Bryant and plaintiff, the third cause of action for unjust enrichment against the moving defendants is dismissed.

A necessary element of a claim for promissory estoppel is the reasonable reliance of a party on a promise which resulted in some prejudicial change of its position (see Tri-Land Props. v. 115 W. 28th St. Corp., 238 A.D.2d 206 [1st Dept. 1997]). Importantly, a valid and enforceable contract precludes recovery on a cause of action sounding in promissory estoppel (see Grossman

v. New York Life Ins. Co., 90 A.D.3d 990, 991 [2nd Dept. 201]). The elements of reasonable reliance and the existence of a valid and enforceable contract preclude recovery on the theory of promissory estoppel. Plaintiff's fourth cause of action for promissory estoppel against the moving defendants is dismissed.

Paragraph "23" of the Rider to the parties' contract provides, in relevant part, as follows:

> At closing, the plumbing, heating, electrical systems and appliances will be in working order and the roof will be free of leaks.

Paragraph "16" of plaintiff's Complaint alleges the following:

> When the Plaintiff moved into the house, she realized that there was 1) no properly connected electricity and gas in the house; 2) there was evidence of flooding in the basement, which compromises the house foundation; 3) the electricity was improperly connected preventing use of most appliances until middle of May 2015.

Closing of title occurred on February 4, 2015. Assuming for the purposes of this motion that paragraph "23" of the Rider, or any other clause of the contract was violated, on March 26, 2015, in exchange for the amount of $7,000.00, plaintiff executed, duly acknowledged, and delivered to the moving defendants a general release which released Bryant and its members, officers and directors jointly, and severally from all actions, causes of action, suits, etc.[1] Plaintiff cannot now be heard to say that the amount that she bargained for, was not enough or that at the time of signing the release, she did not know all the defects due to their hidden nature. As a general rule, absent fraud, duress, illegality or mistake, a general release bars an action on any cause of action arising prior to its execution (see Mergler v. Crystal Properties Assocs., Ltd., 179 A.D.2d 177 [1st

[1]The court notes that the general release signed by plaintiff cites as the consideration the sum of "(8,000.00) Seven Thousand dollars." Pursuant to UCC§3-118(c), words control figures, except that if the words are ambiguous, figures control.

Dept. 1992]). In any event, at the time of the execution of the release, plaintiff was in possession of the premises for over one month and was well aware of the existing infirmities and, as was stated, accepted a sum of money in full satisfaction. Moreover, the release is clear and unambiguous, thus, plaintiff may not endeavor to vary its terms by resorting to extrinsic evidence to explain the parties' intentions (see WDF, INC. v. City of New York, 104 A.D.3d 557 [1st Dept. 2013]). The execution by plaintiff of a general release requires dismissal of all causes of action against the moving defendants.

Accordingly, the moving defendants' motion is granted in its entirety, and all of plaintiff's causes of action against the moving defendants, only, are dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 12, 2016

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO