Comora v Franklin
2016 NY Slip Op 33002(U)
May 3, 2016
Supreme Court, Westchester County
Docket Number: 62604/2015
Judge: Mary H. Smith
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

ADAM COMORA and HILLARY COMORA,

Plaintiffs,

-against-

MARTIN FRANKLIN, CAROLINE FREIDFERTIG, Individually and As Agent for JPF 2, LLC d/b/a JULIA B. FEE SOTHEBY'S INTERNATIONAL REALTY, and JBF HOLINDGS LLC d/b/a JULIA B. FEE SOTHEBY'S INTERNATIONAL REALTY,

Defendants.

MOTION DATE: 03/11/16
INDEX NO.: 62604/2015

The following papers numbered 1 to 16 were read on defendants Franklin and Freidfertig's pre-answer motion to dismiss pursuant to CPLR 3211 and defendants Freidfertig, JBF 2, LLC and JPF Holdings LLC's motion pursuant to CPLR 3211 and 3212, etc.

Papers Numbered[1]

Notice of Motion – Affirmation (Solomon) – Memorandum of Law (Oved) – Exh. (A).....1-4
Notice of Motion – Affirmation (Ferrara) – Exhs. 1-4 – Memorandum of Law (Ferrara).....5-8
Memorandum of Law in Opposition (Siebert) – Answering Affidavit (Comora) – Affidavit (Rocha) – Affidavit (Tsakos) – Exhs. 1-11.....9-13
Replying Memorandum of Law in Support (Oved).....14
Replying Memorandum of Law in Support (Ferrara) – Replying Affirmation (Ferrara)...15-16

[1] Plaintiff's Sur-Reply Memorandum of Law, which was received by the Court on April 12, 2016, over a month after motion papers were returnable, on March 11, 2016, was not considered. The CPLR does not recognize the existence of Sur-Reply papers. Additionally, this Court will not consider any such papers absent a party's receiving express permission from the Court in advance which plaintiffs did not receive.

Upon the foregoing papers, it is Ordered and adjudged that defendants Franklin and Freidfertig's (collectively referred to as "defendants Franklin") motion to dismiss pursuant to CPLR 3211, subdivison (a), paragraph 1 and 7, and defendants Freidfertig, JBF 2, LLC and JPF Holdings LLC's (collectively referred to as "defendants JBF 2") motion pursuant to CPLR 3211 and 3212 are disposed of as follows:

By way of background, this action arises out of plaintiffs' purchase of a $6.2 million dollar home in Harrison, NY from defendant Franklin, on November 27, 2013. Defendant Franklin's sister, defendant Freidfertig, was his real estate agent in the transaction and the alleged caretaker of the home prior to said sale; no one had been living at the premises immediately prior to the sale. Defendant Freidfertig is employed by defendants JBF 2, LLC and JBF Holdings LLC. The home features an indoor pool wing which includes a large indoor swimming pool and hot tub and was described in the real estate listing prepared by defendants JBF 2 as being "humidity controlled."

In March 2013, before the property was listed for sale, non-party Belfor Property Restoration ("Belfor") had been hired to perform a mold remediation project in the indoor pool wing at a cost of more than one million dollars. The remediated work included replacing the ceiling and attic area as a result of it being compromised by significant mold growth. As part of this contract work, Belfor had agreed to monitor the humidity alarm located in the pool area which would trigger when then humidity was too high.

On April 18, 2013, after Belfor's completion of the mold remediation project, defendant Franklin hired non-party Bohlander Home Inspection, Inc. ("Bohlander") to inspect the remediation work and conduct mold clearance testing. Bohlander issued a letter/report, on April 18, 2013, and, in summary, confirmed that the remediation was

successful, however expressly warning that such mold growth could return if certain specified steps and conditions were not followed.

The house thereafter was then listed for sale, on May 20, 2013, which listing had been prepared by defendant Freidfertig. Notably, the recently completed mold remediation project was not indicated in this real estate listing.

Plaintiffs, as then potential property purchasers, had met with defendant Freidfertig, in September 2013, to view the subject property. Soon thereafter, the parties had reached an agreed sale price. Prior to their entering into a contract of sale, plaintiffs hired non-party ENCO Home Inspection, LLC d/b/a Housemaster ("Housemaster") to inspect the premises, including the indoor pool wing. Plaintiffs and defendant Freidfertig both were present for the October 7, 2013 inspection, which included the pool house wing, the HVAC system and "other related systems in the pool area." Housemaster reported "no visual evidence of or musty odors associated with fungi during the inspection, and there were no elevated moisture levels to indicate fungal proliferation." The parties signed the contract of sale, on October 11, 2013. Plaintiffs ordered a title report which revealed municipal records relating to a 2008 update to the property of which plaintiffs had been aware, but there was nothing in the records reflecting the 2013 mold remediation work. Plaintiffs purchased the property on November 23, 2013, and shortly after closing, plaintiffs turned on the swimming pool and the humidity alarm sounded. Plaintiffs state that they immediately called defendant Franklin about the alarm and that he "curtly" told them to "contact Belfor." Plaintiffs were then introduced to Belfor who visited the property several times attempting to resolve the humidity issue. It was during this time that plaintiffs

learned for the first time about the prior mold problem, and the undertaken remediation project.

In January 2014, mold began appearing on the surfaces of the pool wing. Plaintiffs hired Housemaster, on January 13, 2014, for a limited inspection of the pool area. A licensed inspector, along with Brian Abate, Housemaster's Director of Engineering found that the attic area above the pool area was completely "saturated with moisture" and that the humidistat and the air registers associated with the humidity system were incorrectly placed, causing skewed humidity percentages and excessive moisture. Plaintiffs sought a second opinion from engineer Caesar Rocha who did an inspection, on January 17, 2014, and reached the same conclusion as Housemaster, to wit, that there were significant moisture issues in the pool area and that the infrastructure and mechanical systems in place to control these issues were flawed.

Plaintiffs had their attorney reach out to defendant Franklin's attorney, who responded, on April 14, 2014, and for the first time told plaintiffs about the March 2013 mold remediation project. Plaintiffs were given, at that time, a copy of the April 2013 Bohlander Report and invoices from the remediation. Soon after, plaintiffs also received a copy of a report made by Belfor showing the calls and responses made between May 2013 and October 2013 due to the humidity alarm being triggered at the property.[2] The report states that, on August 27, 2013, Belfor received a call from "Mr. Franklin's sister," which plaintiffs assume, and defendants Franklin do not deny, referred to defendant Freidfertig, about the alarm sounding and Belfor reports that the "sister" was told that the

[2] The Court notes that it is not disputed that defendants did not disclose the 2013 mold remediation work, the Bohlander report or the Belfor humidity alarm responses to plaintiffs before or during the closing on the subject property.

pool cannot be left unattended and that the thermostat cannot be changed. The next day, August 28, 2013, Beflor received a call from the "sister" about high humidity again and it was recommended that the pool be drained. The following day, August 29, 2013, Belfor went to check on the home and saw that the alarm was triggered and the pool was not drained.

In Spring 2014, plaintiffs hired non-party Five Boro Mold Removal to remove the mold that spread throughout the pool house wing. In order for them to be able to use the indoor pool area and avoid future recurring humidity and mold issues, plaintiffs elected to redo the indoor pool area at a cost of approximately $1,114,000.00.

Plaintiffs commenced the current action, alleging nine causes of action based in fraud against all defendants with the exception of the first cause of action which is alleged only against defendant Franklin.[3] Plaintiffs allege that defendants are liable for fraud because defendants had particular knowledge of the humidity and mold problems in the indoor pool wing and never informed plaintiffs of same. Instead, plaintiffs' assert that defendants Franklin and Freidfertig actively concealed these issues from plaintiffs until months after plaintiffs had purchased the home. Plaintiffs further allege that defendants JBF 2, LLC and JPF Holdings LLC are liable on the basis of respondeat superior/vicarious liability given the agency/employment relationship with defendant Freidfertig. Plaintiffs make the following allegations of fraud against defendants: posting a misleading real estate listing which stated that the home was updated in 2008, but did not include information on the 2013 mold remediation work, and that the pool area was "humidity-controlled" (first and second causes of action); failing to disclose the mold remediation

[3] The Court appreciates plaintiffs' attempt to state various nuanced claims of fraud; however, it would have been advisable and most helpful had plaintiffs characterized/identified each fraud cause of action.

project and any other information associated with the project or the humidity and mold issues, including the Bohlander and Belfor reports (first, third, fourth, fifth, sixth, eighth and ninth causes of action) and failing to apply and secure the necessary permits from the Town of Harrison in order to do the mold remediation project which, had they done so, would have put plaintiffs on notice of the prior humidity and mold problems in the indoor pool wing (first and seventh causes of action). Plaintiffs also seek an award of punitive damages for defendants' conduct (tenth cause of action).

Addressing first defendants JBF 2's motion for summary judgment, same is denied. The movant for summary judgment has the burden of establishing a prima facie showing of entitlement to judgment as a matter of law and must do so by submitting evidentiary proof in admissible form. See CPLR 3212, subd. (b); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Additionally, CPLR 3212, subdivision (b), requires that any submitted supporting affidavit be from someone with personal knowledge of the facts in the action. See Zuckerman v. City of New York, supra; Carpenter v. Murphy, 4 A.D.3d 318 (2d Dep't 2004); Ambriano v. Town of Oyster Bay, 266 A.D.2d 415 (2d Dep't 1999). Defendants JBF 2 have failed to submit an affidavit from anyone with personal knowledge of the facts in support of their moving papers. Instead, they rely solely on affirmations from their attorney which are based on hearsay and thus have no probative weight. See Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2d Dep't 2006); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373 (2005); Zuckerman v. City of New York, supra.

Defendants JBF 2 alternatively are moving, along with defendants Franklin but on separately submitted motion papers, to dismiss plaintiffs' entire complaint pursuant to CPLR 3211 subdivision (a), paragraph 1 and 7. A motion to dismiss a complaint pursuant

to CPLR 3211 subdivision (a), paragraph 1 may be granted only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law. See Goshen v. Mut. Life Ins. Co. of New York, 98 N.Y.2d 314 (2002); Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). In order for evidence to qualify as documentary, it must be unambiguous, authentic and undeniable. See Fontanetta v. John Doe 1, 73 A.D.3d 78 (2d Dep't 2010). A contract of sale and rider may qualify as documentary evidence to support a motion to dismiss. See Attias v. Costiera, 120 A.D.3d 1281 (2d Dep't 2014).

Defendants Franklin and JBF 2 argue that plaintiffs' alleged nine causes of action, all sounding in fraud, are barred by the express terms of the executed Contract of Sale. The Contract has numerous disclaimers that defendants cite which, in summary, state that plaintiffs were purchasing the subject premises "as is" after completing their own inspections and that they were not relying on any representations made by defendants as to the property's condition. Additionally, defendants argue that plaintiffs necessarily acknowledged that defendant Franklin had made no representations as to the condition of the property by their having accepted the $500.00 property condition disclosure credit in lieu of a property condition disclosure statement pursuant to RPL §465.

Generally, the primary rule of contract construction where, as here, the terms of a written contract are clear and unambiguous, is that the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and the parties' reasonable expectations. See M & R Rockaway, LLC v. SK Rockaway Real Estate Co., LLC, 74 A.D.3d 759 (2d Dep't 2010); Slamow v. Delcol, 174 A.D.2d 725 (2d Dep't 1991); W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (1990). A

court may not rewrite the parties' contract by inserting or excising terms under the guise of construction, nor may the Court construe the language in such a way as would distort the contract's apparent meaning. See Stathakis v. Poon, 295 A.D.2d 496 (2d Dep't 2002); Slamow v. Delcol, supra. It is well settled that disclaimer clauses in a contract of sale do not preclude inquiry into specific claims of fraud, and therefore parties that engage in fraud will not be protected by reliance upon any contract disclaimers. See Blittner v. Filroben Associates, 183 A.D.2d 645, 645 (1st Dep't 1992); Chopp v. Welbourne & Purdy Agency, Inc., 135 A.D.2d 958 (3d Dep't 1987); Caramante v. Barton, 114 A.D.2d 680 (3d Dep't 1985).

Here, defendants are correct to the extent that they maintain the contract constitutes documentary evidence supporting the finding that defendants are not liable to plaintiffs. However, as discussed in more detail below, plaintiffs have set forth sufficient allegations to support their causes of action for fraud against defendants, and such allegations have not been negated by defendants beyond a substantial question. Therefore, defendants' arguments that the express contract language bars plaintiffs' fraud causes of action fails. Accordingly, defendants' motions for an Order pursuant to CPLR 3211, subdivision (a), paragraph 1 is denied.

Addressing next defendants Franklin's and defendants JBF 2's motions similarly seeking to dismiss the complaint pursuant to CPLR 3211, subdivision (a), paragraph 7 based upon plaintiffs' failure to state a cause of action. The pleading is to be plead with particularity to give the court and parties notice, but will be liberally construed, accepting all of the facts alleged in the complaint to be true, and according plaintiffs the benefit of every possible favorable inference. See CPLR 3013; Leon v. Martinez, supra at 88;

Margolin v. I M Kapco, Inc., 89 A.D.3d 690 (2d Dep't 2011); Jacobs v. Macy's E., 262 A.D.2d 607, 608 (2d Dep't 1999). Whether the complaint will later survive a motion for summary judgment, or whether plaintiffs will ultimately be able to prove their claims, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss. See Tooma v. Grossbarth, 121 A.D.3d 1093 (2d Dep't 2014); Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 A.D.3d 34, 38 (2d Dep't 2006). Additionally, where it has been shown that a material fact or facts as claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits and other evidentiary submissions, and/or where the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed. See CPLR 3211, subd. (a), par. 1; DePaulis Holding Corp. v. Vitale, 66 A.D.3d 816, 818 (2d Dep't 2009); Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dep't 1999), affd. 94 N.Y.2d 659 (2000); Robinson v. Robinson, 303 A.D.2d 234 (1st Dep't 2003).

To plead a prima facie case of fraud, plaintiffs must show that defendants made a material misrepresentation or omission of fact which was false, which defendants knew to be false, made for the purpose of inducing plaintiffs to rely upon same, justifiable reliance thereon by plaintiffs, resulting in injury. See Hecker v. Paschke, 133 A.D.3d 713, 716 (2d Dep't 2015) citing Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 421 (1996). As to representations by home sellers, New York is a caveat emptor state which means that the seller of real property is under no duty to speak when the parties deal at arm's length. See Jablonski v. Rapalje, 14 A.D.3d 484, 486 (2d Dep't 2005); Platzman v. Morris, 283 A.D.2d 561, 562 (2d Dep't 2001). Instead, caveat emptor imposes a duty on the buyer to satisfy himself as to the quality of his bargain. See London v. Courduff, 141 A.D.2d

803, 804 (2d Dep't 1988). The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud. See Matos v. Crimmins, 40 A.D.3d 1053, 1055 (2d Dep't 2007); Slavin v. Hamm, 210 A.D.2d 831, 832 (3d Dep't 1994).

Here, plaintiffs allege that defendants had engaged in active concealment of the extant humidity and mold issues in the pool area. In order to establish a claim that a seller has engaged in active concealment, a buyer must show that the seller or the seller's agents thwarted the buyer's efforts to fulfill his responsibilities fixed by the doctrine of caveat emptor. See Platzman v. Morris, supra at 562-63; Jablonski v. Rapalje, supra at 485; Schottland v. Brown Harris Stevens Brooklyn, LLC, 107 A.D.3d 684, 685 (2d Dep't 2013). Where the seller's conduct arises to the level of active concealment and it is established that a buyer otherwise had no way of knowing of the allegedly concealed defect, a seller may have a duty to disclose that information concerning the property. See Laxer v. Edelman, 75 A.D.3d 584 (2d Dep't 2010); Daly v. Kochanowicz, 67 A.D.3d 78, 91-92 (2d Dep't 2009); Bethka v. Jensen, 250 A.D.2d 887 (3d Dep't 1998). Where such a duty to disclose is found, the failure to do so is tantamount to an affirmative representation that the undisclosed facts known to the duty bound party do not exist. See Callahan v. Callahan, 127 A.D.2d 298, 300 (3d Dep't 1987); Century Pacific, Inc. v. Hilton Hotels Corp., 2004 WL 868211 (S.D.N.Y. 2004); 28 N.Y. Prac., Contract Law § 5:12.

Additionally, plaintiffs allege that defendants had a duty to disclose the indoor pool wing's earlier and unresolved issues of excessive humidity and mold pursuant to the special facts doctrine which requires disclosure if "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." Pramer S.C.A.

v. Abaplus Intl. Corp., 76 AD3d 89, 99 (1st Dep't 2010); Swersky v. Dreyer and Traub, 219 A.D.2d 321 (1st Dep't 1996); MBIA Ins. Corp. v. J.P.Morgan Sec. LLC, 43 Misc. 3d 1221(A) (Sup. Ct. 2014). This duty arises when material information is peculiarly within defendants' knowledge and where this same information could not have been discovered by plaintiffs through the "exercise of ordinary intelligence." See Centro Empresarial Cempresa S.A. v. Am. Móvil, S.A.B. de C.V., 17 N.Y.3d 269, 277–278 (2011); DDJ Mgt., LLC v. Rhone Group L.L.C., 15 N.Y.3d 147, 154 (2010); Danann Realty Corp. v. Harris, 5 N.Y.2d 317, 322 (1959).

Defendants Franklin argue that plaintiffs have not stated a fraud cause of action because defendants never made any misrepresentations nor were they under a duty based on caveat emptor to tell plaintiffs about the mold remediation project. Furthermore, defendants contend that they did not actively conceal the humidity and mold issues because the mold remediation project was a significant home improvement, they did not have to secure building permits for the mold remediation, plaintiffs had "unfettered access" to the property, and indeed had undertaken a professional inspection of the premises, and that the conditions causing any alleged humidity problems were open and obvious. Defendants Franklin submit that plaintiffs should have done a longer inspection or hired a specialist to inspect the indoor pool wing. Defendants however have not proffered any case law or expert testimony supporting their claim that plaintiffs, as reasonable buyers of a home with an indoor pool, had a duty to conduct any different or longer inspection other than that which had been conducted. Similarly, defendants Franklin also argue that the mold remediation work did not require permits from the Town of Harrison but fail to submit any proof supporting same.

The Court rejects defendants JBF 2's argument that they could not have made any misrepresentations to plaintiffs because they were never aware of the mold remediation project or the humidity issues. Sufficient allegations have been pleaded showing that defendant Freidfertig in fact knew of the actual facts of the indoor pool problems and undertaken remediation project, and such knowledge properly is imputed to defendants JBF 2, her employers. See Judith M. v. Sisters of Charity Hosp., 93 N.Y.2d 932, 933 (1999); Nerey v. Greenpoint Mortgage Funding, Inc., 116 A.D.3d 1015, 1016 (2d Dep't 2014).

Based upon the record at bar and after considering all the arguments and applying controlling law, the Court finds that plaintiffs' complaint set forth allegations sufficient to state causes of action for fraud in the "first", "second" and "fourth" through "ninth" causes of action, which allegations have not been negated beyond substantial question by defendants. However, plaintiffs' "third" cause of action is not pleaded with particularity, and essentially, is merely a general summary as to what plaintiffs are alleging in their remaining causes of action; therefore, plaintiff's "third" cause of action is hereby dismissed. See, CPLR 3013; Wildenstein v. 5H & Co, Inc., 97 A.D.3d 488, 491 (1st Dep't 2012).

As to plaintiffs' tenth cause of action, punitive damages may only be recovered in a fraud action where the "fraud is aimed at the public generally, is gross, and involves high moral culpability and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations." Kelly v. Defoe Corp., 223 A.D.2d 529 (2d Dep't 1996); see, Walker v. Sheldon, 10 N.Y.2d 401 (1961). Such allegations are found to be lacking

in the matter at bar. Accordingly, defendants' motion is granted to the extent that plaintiffs' tenth cause of action is dismissed.

Defendants Franklin shall have thirty (30) days from the date of entry to serve their answer.

The parties shall appear, as previously scheduled, for a Compliance Conference in the Compliance Part, room 800, on May 18, 2016 at 9:30 a.m.

Date: May 3, 2016
White Plains, New York

HON. MARY H. SMITH, J.S.C.

Attorneys for Defendants Franklin
Oved & Oved LLP
401 Greenwich Street
New York, NY 10013

Attorneys for Defendants JBF2
Costello, Cooney & Fearon, PLLC
5701 West Genesee Street
Camillus, NY 13031

Attorneys for Plaintiff
Keane & Beane, P.C.
445 Hamilton Avenue, 15th Floor
White Plains, NY 10601

Carolyn Carpenito, Compliance Conference Part