

Yentzer v Addy
2018 NY Slip Op 30391(U)
March 9, 2018
Supreme Court, Tompkins County
Docket Number: 2017-0523
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State
of New York held in and for the Sixth Judicial
District at the Tompkins County Courthouse, Ithaca,
New York, on the 2nd day of February, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

BRAD YENTZER,

Plaintiff,

-vs-

DECISION AND ORDER

Index No. 2017-0523

RJI No.: 2017-0563-M

THOMAS ADDY and
MELISSA ADDY,

Defendants.

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon the motion of Brad Yentzer (“Plaintiff”) filed December 20, 2017 seeking an order compelling Thomas Addy and Melissa Addy (“Defendants”) to submit to an examination before trial pursuant to CPLR §3124. Defendants cross move seeking either dismissal pursuant to CPLR §3211 or summary judgment pursuant to CPLR §3212.

Defendants were the owners of a residence located at 57 Stark Road, Town of Newfield, Tompkins County. In July 2016, Defendants listed the residence with a real estate agent and completed a property condition disclosure statement pursuant to RPL §462. The disclosure provided, among other things, that there were no flooding, drainage or grading problems that result in standing water anywhere on the property and that the basement had no seepage that results in standing water. The disclosure also provided that no hazardous or toxic substance had been released, spilled or leaked on the property.

In November of 2016, Plaintiff received the disclosure statement and examined the property. Plaintiff then made a written offer to purchase the property for \$300,000 which was accepted by Defendants. The Plaintiff closed title on the property in February of 2017 and took possession of the property. When the ground thawed in the spring, Plaintiff alleges that there was water intrusion in the basement and standing water in multiple locations. In June of 2017, Plaintiff discovered a large pile of garbage covered by dirt on the property. The debris pile allegedly contained, among other things, alkaline batteries, asphalt, and light bulbs.

Plaintiff commenced this action by the filing of a verified summons and complaint on August 28, 2017. The issue was joined by the filing of a verified answer on September 27, 2017. Plaintiff moves seeking an order compelling the deposition of the Defendants as the Defendants have refused to appear for a duly demanded deposition. Defendants cross move to dismiss the complaint for failure to state a case of action or summary judgment. As the Court’s decision regarding Defendants’ motion could have the effect of rendering Plaintiff’s moot, the Court will

first address the cross motion.

Motion to Dismiss

On a motion to dismiss pursuant to CPLR §3211, the Court “must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference” *Krog Corp. v. Vanner Group, Inc.*, 2018 NY Slip Op 00876 (3rd Dept. 2018); *see Faison v. Lewis*, 25 NY3d 220, 224 (2015); *Zumpano v. Quinn*, 6 NY3d 666, 681 (2006). The Court must not just determine whether the party has *stated* a cause of action but rather “determine whether the facts as alleged fit within any cognizable legal theory” *Graven v. Children's Home R.T.F., Inc.*, 152 AD3d 1152, 1153 (2017).

In the present matter, the Plaintiff is making claims pursuant to RPL §462 which requires certain disclosures in the context of residential real estate transactions. The Plaintiff is also alleging common law fraud.

Real Property Law Article 14

“[E]very seller of residential real property pursuant to a real estate purchase contract shall complete and sign a property condition disclosure statement as prescribed by subdivision two of this section and cause it, or a copy thereof, to be delivered to a buyer or buyer’s agent prior to the signing by the buyer of a binding contract of sale” RPL §462(1). “Any seller who provides a property condition disclosure statement or provides or fails to provide a revised property condition disclosure statement shall be liable only for a willful failure to perform the requirements of this article”. RPL §465(2). Article 14 further provides for seller’s liability for actual damages for the willful failure to comply *see* RPL §465(2).

A “false representation in a disclosure statement may constitute active concealment in the context of fraudulent nondisclosure” *Klafehn v. Morrison*, 75 A.D.3d 808, 810 (3rd Dept. 2010), *see Anderson v. Meador*, 56 AD3d 1030, 1035 (3rd Dept. 2008); *Simone v. Homecheck Real Estate*

Servs., Inc., 42 AD3d 518, 520-521 (3rd Dept. 2007). However, the buyer must show that the seller had actual knowledge of the defect and thwarted the buyers efforts to discover the defect through active concealment. *Klafehn* at 810.

In the present matter, Plaintiff, in his complaint, alleges that Defendants knew of the seepage issues and the alleged toxic substances “dumped” on the property. He further alleges that they knowingly made false statements on the property disclosure statement. However, Plaintiff does not allege that Defendants took actions to thwart Plaintiff’s ability to discover the alleged defects. The Plaintiff does allege a violation of RPL §462 based upon Defendants’ allegedly wilfully false disclosure statement. The Plaintiff will be required to submit proof of active concealment when facing a summary judgment motion or at trial. This statutory claim under Article 14 is not a common law fraud and therefore the heightened pleading requirements to such a claim are not applicable CPLR §3016. At this early stage, the Court concludes that the Plaintiff has stated a cause of action under RPL Article 14. Although the Plaintiff will need to prove active concealment to prevail, there is no authority that active concealment must be pled. Therefore, the Defendant’s motion to dismiss is DENIED.

Common Law Fraud

To properly plead a cause of action to recover damages for common-law fraud, a plaintiff must allege “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). As with all claims of fraud or misrepresentation, “the circumstances constituting the wrong shall be stated in detail.” CPLR §3016.

The Plaintiff alleges material false statements on the property disclosure statement regarding seepage, standing water and toxic pollution on the property. The Plaintiff recounts immediate incidences of water seepage and standing water with the spring thaw. He also alleges that the Defendants misrepresented the presence of toxic debris on the property. Plaintiff alleges that Defendants had knowledge of the falsity and that the misrepresentations were made with the

intent of inducing him to purchase the property. He also alleges that he detrimentally relied on the Defendant's statements as the alleged defects did not become apparent until after the spring thaw.

The Court concludes that the Plaintiff has pled his claim for common law fraud with sufficient specificity to survive a motion to dismiss pursuant to CPLR §3211. Therefore, the Defendants' motion to dismiss the common law fraud claim is DENIED.

Summary Judgment

“[A] summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant.” *Metichecchia v. Palmeri*, 23 AD3d 894, 895 (2005). Where the issue has been joined for only seven months prior to motion for summary judgment and there are outstanding discovery demands, a denial of a summary judgment motion is appropriate. *See Gitman v. Martinez*, 139 AD3d 1175, 1176 (3rd Dept. 2016).

In the present matter, Plaintiff has sought Defendants' deposition. Defendants refused to appear for a deposition in light of their intent to submit the present motion. As Defendants have argued, in order for Plaintiff to establish his claim pursuant to RPL Article 14, he will need to prove that Defendants actively concealed the alleged defects. Whether Defendants actively concealed the alleged defects is, to at least some degree, solely within the knowledge of the Defendants and may be otherwise unavailable. *See Metichecchia* at 895. Additionally, Defendants filed their motion for summary judgment less than three months after the issue was joined. The Court concludes that in light of the outstanding deposition demand and the short time since the issue was joined, the Defendants' motion for summary judgment is premature.

Therefore, the Court finds that Defendants' motion for summary judgment is premature and it is DENIED without prejudice to renewal following discovery.

Motion to Compel Deposition

The Defendants refused to appear for depositions in anticipation of the filing of the dispositive motions herein. In view of the Court's determination above, the Plaintiff's motion to compel depositions is GRANTED and the Defendants are hereby directed to submit to depositions as demanded by Plaintiff within 60 days of the entry of this decision.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: March 9, 2018
Ithaca, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice