SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

---X

438 WEST 20 STREET, LLC,

Plaintiff,

– against –

ANDREW BARES, ALLA KORMILITSYNA a/k/a ALLA BARES, DAF CONTRACTING LTD., THOMAS VAIL d/b/a VAIL ASSOCIATES ARCHITECTS and PROFESSIONAL HOME INSPECTIONS, INC.,

Defendants.

---X

ANDREW BARES and ALLA KORMILITSYNA,

Third-Party Plaintiffs,

-against-

THOMAS VAIL d/b/a VAIL ASSOCIATES ARCHITECTS,

Third-Party Defendant,

---X

DECISION AND ORDER
Index No.: 654331/2015

Motion Sequence No.: 006

O. PETER SHERWOOD, J.:

In motion sequence 006, defendants Andrew Bares and Alla Kormilitsyna a/k/a Alla Bares (together, "the Bares defendants") move for summary judgment dismissing the verified complaint in its entirety and all cross-claims brought in response to the third-party complaint against architects Thomas Vail Associates. The only claim asserted against the Bares defendants in the complaint is for fraud. For the reasons discussed below the motion shall be GRANTED.

I. BACKGROUND

Plaintiff entity is a Delaware LLC and its sole principal member is attorney Douglas Davis ("Davis") (rule 19-a Stmt ¶¶ 2-3, Doc. No. 241[1]). The Barres defendants, formerly owned a townhouse located at 438 West 20th Street (the "Townhouse") and conveyed it to plaintiff on January 15, 2015 pursuant to the terms of the contract (*id.* ¶¶ 4, 6). The contract is composed of a

[1] "Doc. No. ___" refers to the docket number assigned individual documents in the New York State Courts Electronic Filing System.

Residential Contract of Sale, a Rider, and a Supplemental Rider (*id.* ¶¶ 6-8; *see* exhibits B-D to Bares and Kormilitsyna affs, Docs. No. 216-218). The Bares defendants converted the 150 year old Townhouse from an apartment building into a single family home prior to listing it for sale (rule 19-a stmt ¶ 9). DAF Contracting Ltd. served as general contractor and Thomas Vail as the architect (*id.* ¶10). The parties do not dispute that Alla Kormilitsyna never spoke with Davis or any representative of plaintiff regarding the prior renovation or present condition of the premises. The only statement that Andrew Bares made to Davis about the condition of the premises concerned the need for new batteries in the alarm panel (*id.* ¶¶ 11-12).

The contract contains multiple provisions indicating that plaintiff purchased the Townhouse in "as is" condition and after full investigation (*id.* ¶ 13). Aside from specific "Seller's Representations" made in paragraph 10 of the Contract of Sale, it states that "none of Seller's covenants, representations and warranties... shall survive closing" (*id.* ¶ 15). The contract further states that plaintiff has conducted an inspection and investigation, and is entering into the contract based only on that inspection (*id.* ¶ 16). The contract also contains a merger clause with respect to defendants' representations and warranties (*id.* ¶ 18). The Rider also contains a provision stating that the purchaser has conducted a full inspection and that sellers made no representations (*id.* ¶ 21).

Nevertheless, Davis complains that the Townhouse contained a "host of latent, egregious and often dangerous defects that were actively concealed behind the drywall by Sellers," including asbestos, poor construction, structural issues and a hole going directly to the outside and rotting in the area (opp at 8). The parties dispute whether defendants provided full access to plaintiff to conduct its inspection. Defendants state that they provided whatever access plaintiff requested (Bares aff ¶ 26, Doc. No. 239). Following the inspection where multiple defects were identified, Davis negotiated a $150,000 price reduction (rule 19-a stmt ¶ 27). The Supplemental Rider specifically states that "Purchaser has been provided access to conduct whatever inspections (both engineering and environmental) and other due diligence that the Purchaser deems necessary" (plaintiff's response to rule 19-a stmt, ¶¶ 24-25, Doc. No. 300). Plaintiff disputes this, stating that the "[s]ellers would not allow disruptive testing or inspections because the Townhouse was being staged for photoshoots and would be rented if Sellers did not sell the Townhouse" (*id.* ¶ 24).

Plaintiff retained Richard Perri ("Perri") of Professional Home Inspections ("PHI") to inspect the Townhouse (rule 19-a stmt ¶¶ 26, 27). Although Davis complains that it has been taken out of context, Davis later wrote an email to his real estate broker prior to closing stating that

> "The fact has become clear to me that what I thought I was getting when I first walked through was nearly a $500,000 difference from what I am presented with today (again, including a broiler, fireplaces, chimney code issue, total roof job, etc etc etc). $150,000 is just where I draw the line, I will eat everything above it. You know I would've bought the house for 8.1, so it isn't the $100,000 as much as it is the totality of what we are faced with."

(*id.* ¶ 29; exhibit Q to Bares and Kormilitsaya affs, Doc. No. 231). The PHI Report contains comments on many issues including, mold on sheetrock in the basement, problems with the fireplaces and chimneys, the existence of internal framing changes, moisture penetration and more (*id.* ¶¶ 30; exhibit L to Bares and Kormilitsyna affs, Doc. No. 226).

Plaintiff also highlights that the Bares defendants sued their insurance company in 2013 for not covering certain structural damage to the Townhouse that defendants valued at $1,875,000 (plaintiffs rule 19-a stmt in opp ¶ 1, Doc. No. 300). Node Engineering and Consulting prepared a Property Condition Assessment in connection with that litigation, noting severe wall cracking and separation issues (*id.* ¶ 5, 7).

After plaintiff took possession, the basement flooded, prompting Davis to make a deeper investigation into the floors, walls, and structure of the Townhouse, during which he discovered many structural defects that he now alleges were actively concealed by defendants (Davis aff ¶¶ 17-22; complaint, Docs No. 242 and 215). Davis also points to two spreadsheets written by Kormilitsyna, one of them containing the following: "The building has to look like new construction and not show any structural issues." (rule 19-a stmt ¶ 14; exhibit 49 to Salzler aff, Docs. No. 300 and 198).

II. ARGUMENTS

The Bares defendants argue that there is no triable issue of fact as to the fraud claim because the contract of purchase contains multiple provisions disclaiming any representations or reliance thereon of the elements of fraud (mem at 15-17, Doc. No. 240, citing exhibit B at 4, 27; exhibit C at 1). Defendants analogize this case to *Danann Realty Corp. v Harris* (5 NY2d 317, 320-21 [1959]), in which the Court of Appeals found that the existence of an agreement with similarly

specific provisions was sufficient to defeat a fraud claim ("[p]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations."). The Bares defendants also argue that there could be no fraud because plaintiff had a "full and fair opportunity to inspect the premises" (mem at 19, Doc. No. 240, citing Bares aff ¶¶ 24, 26, 27; Kormilitsyna aff ¶¶ 22-25; *McPherson v Husbands*, 54 AD3d 735 [2d Dept 2008] [granting summary judgment to seller defendant where it was demonstrated on the motion that the premises were fully available for inspection]). Finally, the Bares defendants argue that the doctrine of caveat emptor should not be disturbed because a sophisticated plaintiff "cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification available to it" (mem at 21, Doc. No. 240, citing *Valassis Communications, Inc. v Weimer*, 304 AD2d 448 [1st Dept 2003]).

In opposition, plaintiff contends that the disclaimers at issue are general and not specific to any conditions (opp at 6, Doc. No. 299).[2] Even if the disclaimers were specific, the inquiry does not end with *Danan*. The Bares defendants ignore that in New York "[t]here is a... doctrine which holds that even a specific disclaimer of reliance is insufficient to bar a fraud claim where the facts misrepresented are 'peculiarly within the representor's knowledge'" (opp at 5, citing *Superior Technical Resources Inc. v Lawson Software Inc.*, 851 NYS2d 74 [Sup Ct, NY County 2007]). Here, most of the facts supporting the fraud claim indicate information that would have been "particularly within" the seller's knowledge (opp at 6, Doc. No. 299, citing *Hi Tor Industrial Park, Inc. v Chemical Bank*, 114 AD2d 838 [2d Dept 1985] [finding disclaimed representations and warranties regarding the "physical nature of the premises" and "environmental matters" to be insufficient to bar parol evidence of fraud where plaintiff allegedly discovered underground tanks containing toxic chemical after closing]).

Plaintiff also contends that it was not, in fact, provided with "virtual[ly] unlimited" access to perform an inspection of the Townhouse (*id.* at 7). Rather, plaintiff was only allowed to inspect to the extent it did not "disrupt the aesthetic" of the Townhouse, which the sellers were preparing

[2] Plaintiff submits a brief that purports to meet the page limitation of Commercial Division Rule 17 but substitutes three affidavits which he states constitutes a "full statement of the pertinent facts", thereby making a submission that is almost twice the length authorized by Rule 17.

to be photographed at the time (*id.* citing Davis aff ¶¶ 8-13). Plaintiff did not learn of the Townhouse's non-visible defects until removing flooring in the basement following a flood in 2015, which led to the discovery of growing mold in the floors and prompted the more extensive investigation of the walls and ceilings that uncovered the list of defects described in the complaint (*id.* at 8, citing Davis aff ¶¶ 17-22). Plaintiff argues that it has provided "clear and convincing evidence" that the Bares defendants knew about the non-visible defects at issue, including court filings from a suit that the Bares defendants themselves brought against their insurance company for not covering "severe structural damage" to the Townhouse that occurred during construction of a neighboring structure (*id.* at 9, citing Salzer aff ¶¶ 27-35). The allegations in that case were based on a Property Condition Assessment conducted by Node Engineering & Consulting, P.C., which provided a detailed report on all of the Townhouse's structural issues as of the summer of 2011 and recommended repairs (*id.* at 9, citing Salzler aff ¶¶ 31-33, exhibit 33 [Property Condition Assessment Doc. No. 278]).

Finally, plaintiff argues that the exception to *caveat emptor*, where "there is some conduct on the part of the seller or the seller's agent which constitutes active concealment" that thwarts the buyer's efforts to fulfill his responsibility to use ordinary intelligence to discover a falsehood, applies here (*id.* at 10, citing *Jablonski v Rapalje*, 14 AD3d 484, 485 [2d Dept 2005]; *Pettis v Haag*, 84 AD3d 1553, 1555 [3d Dept 2011]). Plaintiff exercised ordinary intelligence by hiring a home inspector. Plaintiff could not have inspected for non-visible defects without destroying the property (*id.* at 11).

In reply, defendants reiterate that the fraud claim is precluded by the contract and argue that it is not their fault if the construction was poorly performed. Nor does the quality of the construction indicate fraud (reply affirmation ¶¶ 8-9, Doc. No. 301). Some of the defects that plaintiff alleges defendants concealed were in full view – for example, the alleged gas hot water issue (*id.* ¶ 9, citing Salzler aff ¶ 68). Some of the statements that defendants allegedly made were in fact made by the real estate brokers, not defendants, or constituted mere puffery (*id.* ¶¶ 14-15, citing Salzler aff, Davis aff). Plaintiff further fails to support its arguments with any caselaw indicating that plaintiff has met the clear and convincing evidence standard and cannot prove that defendants made any material misrepresentations or that plaintiff reasonably relied on those misrepresentations (*id.* ¶¶ 10-12).

The language of the contract obviates any claim of material misrepresentations (*id.* ¶ 16). Furthermore, defendants' affidavits state that they did not interfere with plaintiff's opportunity to inspect the premises (*id.* ¶ 17, citing Bares aff ¶¶ 24-28; Kormilitsyna aff ¶¶ 22-26, Doc. No.238). Defendants add that they would have consented to additional, more invasive inspection if asked (*id.* ¶ 19, citing Bares aff ¶ 26). It was defendants' representatives, not defendants themselves who made the statements about disruptive inspection that would disturb the house's aesthetic. Those statements are hearsay (*id.* ¶ 21). All of the construction undertaken by defendants was approved by both the New York City Department of Buildings and Landmarks Preservation Commission, and so the Node Report (prepared years before renovations commenced in 2013) has no bearing on the construction undertaken by the Bares defendants (*id.* ¶ 22). Defendants have produced evidence sufficient to show that the Townhouse was fully available for inspection, and as such, they are entitled to summary judgment (*id.* ¶ 19, citing *McPherson v Husbands*, 54 AD3d 735 [2d Dept 2008]).

Nor can plaintiff show reasonable reliance by clear and convincing evidence. Plaintiff ignored the contents of the PHI Report and failed to review any architectural drawings, NYC Department of Buildings filings, or other documents concerning construction of the Townhouse prior to closing (*id.* ¶¶ 25-26). The PHI Report contained seventeen areas where Perri advised plaintiff of possible issues, yet plaintiff ignored that report (*id.* ¶ 28, citing Rondello affirmation, exhibit L, Doc. No. 226). The purchaser also made certain admissions via email that obviate the possibility that he relied on defendants' representations (Rondello affirmation ¶¶ 37-40, Doc. No. 214). For example, the purchaser acknowledged an awareness that the price of the Townhouse indicated that the construction was probably not complete, that he was "getting ripped off", and a willingness to "eat everything above [a $150,000 price concession]" (exhibits N, O, P, Q, Docs. No. 228-31).

III. STANDARD

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as

a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra*; *Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

IV. DISCUSSION

A fraud claim requires "proof by clear and convincing evidence" as to each element of the claim (*Gaidon v. Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 350 [1999]). "The convincing clarity requirement is relevant . . . in a ruling on a motion for summary judgment [and as such] the judge must view the evidence presented through the prism of the substantive burden" (*Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 250 [1986]). A cause of action for fraud is comprised of "[1] a representation of material fact, [2] the falsity of the representation, [3] knowledge by the party making the representation that it was false when made, [4] justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). To succeed on a summary judgment motion,

defendants must do more than show that there are gaps in plaintiff's proof – the defendant movant must make an affirmative showing that there is no triable issue of fact as to the merits (*River Ridge Living Ctr., LLC v. ADL Data Sys., Inc.*, 98 AD3d 724 [2012]).

As to the first and second elements of a fraud claim, defendants demonstrated that the contract bars the claim. The contract contains a purchaser representation, warranty and agreement that it has "examined the Premises . . .and is familiar with the physical condition thereof . . . and that "neither Seller nor the . . . agents . . . of Seller have made any verbal or written representations . . .to Purchaser (Contract Rider ¶ 2B, Doc. No. 217). Thus, plaintiff can neither show a misrepresentation nor refute defendants' denial of any representation of a material facts or falsely of any representation. In fact, plaintiff admits defendants made no representations about any condition of the Premises (rule 19-a stmt ¶¶ 12 and 14, Doc. No. 241). After plaintiff's inspection, Davis negotiated a reduction of the price and, in return, reaffirmed in a Supplemental Rider that "Purchaser shall take title to the Premises in its "as is" condition" (*id.* ¶ 27). There can be no misrepresentation here because plaintiff entered into a contract with defendants that specifically disclaims liability for any representations made prior to closing ("[T]he acceptance of the Deed by Purchaser shall be deemed to be an acknowledgment by Purchaser that Seller has fully performed, discharged and complied with all of Seller's obligations, representations, warranties, covenants and agreements hereunder, that Seller is discharged therefrom and that Seller shall have no further liability with respect thereto [. . .]" [*see Rider* ¶ 2A, reproduced at rule 19-a stmt ¶ 20, Doc. No. 241).

Defendants further argue, correctly, that the contract language in this case is specific enough to obviate any claim that misrepresentations were made (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320-21 [1959]). The contract states that: "[e]xcept as otherwise set forth in this contract, none of Seller's covenants, representations, warranties or other obligations contained in this Contract shall survive Closing". It also contains a similarly worded merger clause (rule 19-a stmt, ¶ 15; Bares aff, Kormilitsyna aff, exhibit B [Contract of Sale] at 4 and 27, Doc. No. 216; *see also* exhibit B [Rider at 1 ¶ 2.A], Doc. No. 217).

Plaintiff, however, argues that the allegedly misrepresented facts were "peculiarly within the representor's knowledge". Plaintiff's claim arises out of representations of defendants and their agents that the Townhouse had been "gut renovated" with "top of the line renovations" (opp at 1).

None of these appear in the contract. As discussed above, representations of any kind are expressly disclaimed. Evidence of the misrepresentations alleged include disturbed asbestos in the walls, holes in the walls that were covered up with drywall and siding (exhibit 4 to Salzler aff), carbon monoxide risks (Salzler aff exhibit 7), air duct work that was cheaply done (exhibit 10 to Salzler aff), joist defects in the roof, etc. Plaintiff argues that issues that are "not easily verified without destructive testing" may be found to be "peculiarly within the representor's knowledge", and as such, even a specific disclaimer in the contract would be insufficient to bar a fraud claim. Plaintiff cites *Schooley v. Mannion* (241 AD2d 677, 678 [3d Dept 1997]), where the court's inquiry was "limited to whether any viable cause of action can be gleaned from the complaint" and *Superior Technical Resources Inc. v Lawson Software Inc.*, (17 Misc3d 1137[A], 851 NYS2d 74, 2007 NY Misc LEXIS 8053 [Sup Ct NY County 2007]). This is a motion for summary judgment and purchaser had the means available to him of knowing the truth or real quality of the representations. The CPLR 3211 (a)(7) standard applicable in *Schooley* and the exception discussed in *Superior Technical Resources, Inc.* do not apply (*see* 2007 NY Misc LEXIS 8053 *28).

The contract does not limit plaintiff's ability to inspect. Plaintiff does not put forth any evidence indicating that defendants refused more invasive inspection or made any affirmative representations about the structural health of the building. Plaintiff's allegations do not reflect the "convincing clarity" required to avoid a grant of summary judgment (*see Anderson*, 477 U.S. at 250). Moreover, the asserted misrepresentations are belied by the Contract, Rider and Supplemental Rider: The Rider states "neither Seller nor the . . . agents . . . of Seller have made any . . . representations to Purchaser" (rule 19-a stmt ¶ 21, Doc. No. 241); the Contract provides "Purchaser . . . represents. . . [it] is fully aware of the physical condition and state of repair of the Premises . . . and is entering into the contract based solely upon [its] inspection . . . and not upon any . . . representations . . . given or made by Seller" (*id.* ¶ 16); and the Supplemental Rider recites "Purchaser shall take title of the Premises in its 'as is' condition" (*id.* ¶ 27).[3]

Bares states, and Davis does not deny, that neither he nor anyone on his behalf interfered with the work of Davis' inspector (*see* Bares aff ¶ 24). The inspector did not report any restrictions on or interference with his work at the Premises. Additionally, Bares confirmed that he would

[3] Notably, the Supplemental Rider was negotiated after inspection of the Premises which inspection resulted in a report that revealed or cautioned about many of the items now complained of.

have given his consent to have plaintiff perform whatever inspection Davis' representatives might have chosen to perform at the Premises. Bares was never asked to give his consent to any further inspections (*see id.* ¶ 24).

As to the fourth element, defendants have shown that even if representations had been made, plaintiff could not have reasonably relied on them because the Supplemental Rider, as part of the contract, provides that the "Purchaser has been provided access to conduct whatever inspections (both engineering and environmental) and other due diligence that the Purchaser deems necessary" (Bares aff, Kormilitsyna aff, exhibit D [Supplemental Rider] at 3, Doc. No. 218). Plaintiff's home inspector reported seventeen defects, including evidence of mold, moisture penetration, a need for exterior waterproofing, waterproofing, settlement that "will cause deflections and floor sags, flame distortions and wall and ceiling cracks" and concluded that "it is not unusual for new purchasers to assume the risk of unknown, hidden defects in old buildings like this one . . . ". The Report also notes that the roof was "poorly installed" and will "need to be re-sloped", that the rear extension is poorly heated, that the fireplaces with old brick flues "are considered unsafe", that the steel I-beam supporting the sidewalk is "deteriorating" and that "walls have been, and walls were removed" (Doc. No. 226).

Armed with the Report, Davis was able to negotiate a $150,000 concession on the price of the Townhouse, (rule 19-a stmt ¶¶ 27-28 Doc. No. 214). Plaintiff was aware of all of the defects discovered by the home inspector and the risks it would be assuming when it determined to go through with the purchase. Further, plaintiff suspected that there may be underlying structural issues with the Townhouse, yet declined to investigate further as to those issues prior to closing (Rondello ¶¶ 37-40, exhibits N-Q, Docs. No. 228-31). Under the doctrine of *caveat emptor*, "the seller should not be responsible for the buyer's failure to make use of the means of verification available to it" (mem at 21, citing *Valassis Communications, Inc. v Weimer*, 304 AD2d 448 [1st Dept 2003]).

Plaintiff attempts to avoid the risks he assumed by asserting that defendants actively concealed non-visible defects. As evidence, he submits two spreadsheets where defendant

Kormilitsyna wrote, "[t]he building has to look like new construction and not show any structural issues" (Salzler aff, exhibit 49, Doc. No. 198).[4] This statement is taken out of context.

The spreadsheets, labeled "Action Plan," were prepared during a $1.3 million renovation project of the Premises in 2013. According to Ms. Kormilitsyna, the spreadsheets concerned priorities for performing certain work within the next week.[5] The quoted statement "not show any structural issues" was intended to communicate to the contractor that she "wasn't going to take any shortcut." In her deposition Ms. Kormilitsyna stated that the Townhouse was to be "completely fixed" given that she and Bares were "spending more than a year of our lives and a small fortune to do it" (Deposition of A. Kormilitsyna at 150, Doc. No. 302). Thomas Vail, the architect, confirmed that the Bares "wanted the final product to be a new renovation" and that he and the Bares "wanted the house not to have structural issues" (Deposition of T. Vail at 151, Doc. No. 224).

Perri, plaintiff's inspector, when asked whether he saw "any evidence of any concealed defects or other indiction that would suggest that the sellers, or any other entity, fraudulently tried to hide defects in the townhouse," replied simply, "No" (Deposition of R. Perri at pp. 51-52, Doc. No. 225). The "convincing clarity" required to show active concealment simply is absent here.

Accordingly, plaintiff's cause of action alleging fraud must be dismissed as there are no material issues of fact sufficient to require a trial on the merits. Even if some such facts were shown, they do not rise to the "clear and convincing evidence" standard required. It is hereby,

ORDERED that the motion for summary judgment of defendants Bares and Kormilitsyna (Bares defendants) to dismiss the complaint is GRANTED and the complaint is dismissed in its entirety; and it is further

[4] The spreadsheet submitted by plaintiff are illegible (Transcript of oral argument at 5, Doc. No. 305). Plaintiff's counsel provided legible copies subsequently (Doc. No. 304).
[5] The spreadsheets appear to cover less than three weeks. One shows a "Completion Date" of March 14, 2013; the other April 1, 2013 to April 15, 2013 (Doc. No. 304). The renovation project took more than a year (*see* Doc. No. 302 at 130). The spreadsheets show that "structural work" was a priority in the March-April 2013 period (*see* Doc. No. 302).

ORDERED that the complaint having been dismissed, the cross-claims for indemnification and contribution against the Bares defendants shall likewise be DISMISSED; and it is further

ORDERED that the Clerk is hereby directed to enter judgment against plaintiff 438 West 20 Street, LLC and in favor of defendants Andrew Bares, Alla Kormilitsyna a/k/a Alla Bares, DAF Contracting, LTD., Thomas Vail d/b/a Vail Associates Architects and Professional Home Inspections Inc., together with costs and disbursements to defendants upon submission of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: March 21, 2019

ENTER,

O. PETER SHERWOOD J.S.C.